EMPLOYMENT TRIBUNALS

Claimant: **Ms Zowie Young**

Respondent: **Shift Group Limited**

Heard at: **Southampton (by CVP)** **On:** **18, 19 and 20 July 2023**

Before: **Employment Judge Halliday**
Mrs J Killick
Mr D Stewart

Representation
Claimant: In person
Respondent: Mr T Fuller (Chartered Legal Executive)

JUDGMENT having been sent to the parties on 7 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The respondent provides logistics services to consumers, businesses and retail partners. Services include same day and next day courier, freight, removal and store to home delivery services. It has 6 offices and approximately 110 employees, of which 20/25 employees are based in the Plymouth office. The claimant was employed as a Customer Services Executive in the Plymouth office by the respondent from 9 April 2021 and remained in employment with the respondent until her maternity leave started.

2. The respondent knew that the claimant was pregnant from on or around the end of May 2021. The claimant alleges that the respondent treated her unfavourably because of her pregnancy.

Claims and Proceedings to date

3. The claimant issued proceedings on 12 November 2021 claiming discrimination on grounds of pregnancy or maternity.

4. The ET3 was submitted out of time on 16 February 2022 and an extension of time for submission was granted for by Employment Judge Smail on 1 March 2022.

5. An abortive Preliminary Hearing (due to IT issues) was held on 18 October 2021 following which directions were given by Employment Judge Fowell in an order dated 18 October 2022 sent to the parties on 27 October 2022 and the matter was listed for a two day hearing on 8 and 9 May 2023. This hearing was postponed and the matter was re-listed for a substantive final hearing on 18, 19 and 20 July 2021 for both liability and remedy to be determined.

6. As the issues had been set out by Employment Judge Fowell in the parties' absence, there was short discussion about the identified issues and the claimant's case at the start of the hearing and further incidents of unfavourable treatment were identified (as set out in par 8.1 and 8.2 below) which had been referred to in the pleadings and other documents but not highlighted by Employment Judge Fowell in his list of issues. The parties agreed that these issues could properly be addressed in the course of the hearing and that it would be appropriate for the respondent's representative to lead further evidence (if required) and cross-examine the claimant on the additional issues.

7. It was also agreed following a request from the claimant that the Tribunal timetable would be adjusted to accommodate a break between 2.30pm and 2.45pm.

The Issues

8. The incidents of unfavourable treatment relied on by the claimant agreed at the start of the hearing are as follows:

    8.1. The claimant says she was pressurised to attend the office (instead of being allowed to work from home) when there were cases of Covid and she was at increased risk due to pregnancy and also suffering from pregnancy related sickness;

    8.2. A pregnancy risk assessment was completed by Reuben Hodge-Brooks whilst the claimant was absent and without consultation. She alleges that it was a box-ticking exercise and not a genuine risk assessment;

    8.3. On or about 24 July 2021 the claimant's shifts for 27 July 2021 and 28 July 2021 were deleted from the roster without explanation and her line manager told her (incorrectly) on 26 July that she was not needed for those shifts as she was on a zero hours contract;

    8.4. At the beginning of August, she was rostered for the same shifts as her partner, in breach of the terms of her job offer;

    8.5. Her line manager then told her that it was for her to work out her childcare issues and to complete those shifts;

    8.6. On 4 August 2021 she was told by her line manager that her pregnancy-related sickness was now affecting the department;

8.7. On 11 August she was given a new contract of employment providing that she could be required to work the same shifts as her partner;

8.8. On 2 September she was signed off sick, resulting in a loss of pay;

8.9. On 9 September her grievance about these issues was rejected;

8.10. On 11 October her appeal against this decision was rejected.

Evidence

9. We heard evidence from the claimant. The claimant also submitted a statement from Ms Kasha Clifton, formerly Operations Manager, which we read and noted but to which we attached only attach limited weight because she was not in the hearing to be questioned on this evidence. For the respondent we heard from: Steve James now the respondent's People Director primarily in relation to the grievance; Mr Carroll at the relevant time Operations Director primarily in relation to the re-organisation and the grievance appeal; and Tamara Gregory, Finance Manager in relation to the SSP payment.

10. We were also provided with an agreed bundle of 143 pages. An additional document, (a screenshot of the respondent's Atlas HR platform), was added to the bundle with the agreement of the parties at the beginning of day 2 of the hearing as page number 144 of the bundle.

11. There was limited a degree of conflict on the evidence. We found the claimant to be a credible witness giving consistent evidence which was in the main corroborated by the documents before us. We do not accept the respondent's submission that the claimant's evidence was prone to exaggeration and at worst entirely misleading. We did not hear evidence or see a statement from either Reuben Hodge-Brooks or Jessica Davis who both had significant involvement in the matters complained of and the evidence provided by Steve James and Neil Carroll on points on which they had no direct involvement could only be given limited weight.

12. We have heard the witnesses give their evidence and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Findings of Facts

13. On 2 April 2021 the claimant was offered the role of Customer Service Executive commencing 9 April 2021 based in the respondent's offices in Plymouth. The offer letter confirmed the claimant would be employed for 16 hours per week on a permanent contract at an hourly rate of £9.25. As a Customer Service Executive, the claimant responded to customer queries by telephone, chat, or social media messages as required.

14. The claimant was not provided with a contract at that time, The respondent at some point prepared a zero hour contract dated 20 April 2021 which contradicted the offer letter but this was not signed by the claimant and the Tribunal accepts the claimant's evidence that this was never sent to the claimant and she did not see it until these proceedings.

15. The Tribunal accepts the claimant's evidence which was also confirmed in the written statement provided by Kasha Ley/Clifton, that it was verbally agreed during the recruitment process that the claimant's shifts would be scheduled when her partner was not working. The claimant's partner was working three days on three days off at that time. It also appears that the respondent accepted that this verbal agreement had been reached as evidenced by the reference to this "prior agreement" in the re-issued contract dated 1 August 2021.

16. At the time of the claimant's appointment the customer services department operated 7 days a week between 08:00 and 23:00 with varying shift patterns. The majority of staff were on zero hour contracts.

17. The Tribunal further accepts the claimant's evidence that other than at the start of her employment on the 9 April 2021 and 11 April 2021, (when the ikea account was ramping up) on the 11 May 2021 and on 3 and 4 July 2021, when she did work whilst her partner Joseph Young was also working, her shifts were in practice scheduled when her partner was not working. The Tribunal also accepts the claimant's evidence that on the specific occasions that they both worked at the same time, they did not both work in the office.

18. The Tribunal finds that whilst staff may not have known that this had been expressly set out in an offer letter, or was contractual agreement, the senior employees responsible for building the rota, firstly Tim Shepherd and subsequently Jessica Davis, were aware of this practice.

19. On 25th May 2021 a group meeting was held regarding a restructure of the respondent's operations, of which the Customer Service Team was a part. The Claimant attended the meeting remotely.

20. Our findings in relation to the re-structure are as follows. In order to support the growth of the business and focus investment and management time, it had been decided by senior management to outsource certain business processes to South Africa. Over time, this involved the outsourcing of the first line operations work to South Africa and the recruitment of 40 people in South Africa. The intention was that the UK business was to evolve over time into a multi-disciplinary operations team dealing with second line queries. Mr Carroll who gave evidence on the restructure was unable to confirm the time line of how this restructure impacted on the UK business in June/July/August/September 2021 and we are therefore unable to draw any conclusions on the time line for these changes. Mr Caroll did state, and we accept, that the South African recruits required a period of training and then there was a further period during which the support was run in parallel to ensure continuity. We also note that Mr Jospeh Young, the claimant's partner whose role changed as part of these changes, started a new shift pattern of five Days on two days off from 15 September 2021 and it therefore appears that the some changes may have been implemented gradually over the summer period. Mr Carroll confirmed, and we accept, that the intention was to move certain other employees to fixed shifts, but no details of employees affected, whether this happened, or if so, dates when these changes were made, were provided to us.

21. By on or around the 25 May 2021 the respondent was aware that the claimant was pregnant as evidenced by the exchange of messages between the claimant and Mr Carroll in which the claimant refers to the "checks on baby tomorrow" and "scan"

being clear. The respondent does not dispute that it was aware of the claimant's pregnancy at all material times.

22. Following the meeting on 25 May 2021, there was an exchange of messages between the claimant and Mr Carroll in which it was highlighted to the claimant that the existing arrangements (being scheduled on opposite shifts) might not continue to be possible with live operations moving to a 5 day week shift. Reference was made to the need to chat to both of them individually and see what could work.

23. No further discussions were held with the claimant about the proposed changes.

24. On 28 and 29 May the claimant worked two 8 hour shifts.

25. On 29 May 2021 Kasha Clifton emailed the claimant and confirmed the arrangements agreed at the time of her appointment that the claimant could work opposite shifts to her partner. The respondent did not see this email at that time.

26. The claimant worked further 8 hour shifts on 1 June 2021, 5 June 2021, a 7 hour shift on 15 June 2021, and 8 hour shifts on 26 and 27 June 2021, all at times that her partner was not working.

27. On 22 June 2021 an unsigned zero hour contract dated 20 April was uploaded to the Atlas HR system. No evidence or an explanation has been provided by the respondent as to why or by whom.

28. On or around the beginning of July 2021, there were cases of Covid in the office.

29. The claimant then worked 8 hours shifts on 3 July 2021 and 4 July 2021 at the same time as her husband (who worked shorter shifts on those days). She worked 7.33 hours on 10 July 2021 and 3.17 hours on 11 July 2021. She then worked an 8 hour shift on 15 July 2021 from home.

30. On the 15 July 2021 Mr Reuben Hodge-Brooks sent a letter to the claimant requiring her to work from the office and enclosing a pregnancy risk assessment. We find that this had not been discussed in advance with the claimant notwithstanding that guidance on the form recommends that the assessment should be completed in conjunction with the [expectant] mother. The risk assessment was a standard pregnancy risk assessment with one generic paragraph dealing with the management of Covid risk in general terms. There is no assessment of the specific risks to pregnant women and unborn babies who at that time had both been identified as at increased risk of severe symptoms of Covid by the Royal College of Obstetricians and Gynaecologists (RCOG) and the Royal College of Midwives (RCM).

31. Mr James suggested that this may have been done as Mr Hodge-Brooks was in the office and the claimant was not. We do not accept this as a reasonable explanation. Mr James was merely putting forward a supposition about Mr Hodge-Brook's motives, of which he had no direct knowledge. Further and in any event, there appears to be no reason why Mr Hodge-Brooks could not have spoken to the claimant remotely as she suggested he should have in her evidence, given she was working on that day.

32. The letter of 15 July 2021 opens by referring to concerns raised by the claimant. These concerns are not set out or responded to in the letter, but we understand from the claimant's witness statement that this reference is to a request to work from home due to the number of Covid cases in the office. The letter proceeds to set out the requirement for her to resume working from the office. It refers to Government guidance allowing the respondent to operate safely providing social distance is maintained and refers to the cleaning arrangements put in place to protect staff from infection but does not refer to the Government Guidelines which advised working from home if possible or to any specific guidance in relation to pregnant women. It states that the instruction to come back into the office with effect from 16 July 2021 is a reasonable management instruction and that any failure to return to work will be treated as unauthorised absence and will not be paid.

33. We have not had the benefit of hearing evidence from Mr Hodge-Brooks but on the face of the documents we find that the risk assessment did not seek to address the increased risk to pregnant women and unborn children and we are not satisfied that it was a genuine attempt to consider and address risk, but was rather prepared with the purpose of supporting the requirement that the claimant should return to the office. We accept the claimant's evidence that other staff who were unwell or had been contacted by the track and trace app, were already working from home. We have also considered Mr James' evidence that the respondent felt it needed staff in the office to work together collaboratively and that the same rules applied to all staff. However, we do not find that the requirement for the claimant to attend the office when there was covid outbreak amongst her colleagues was a reasonable management request and we find that the threat to withhold pay was also unreasonable in the context of covid cases in the office and an identifiable risk to her as a pregnant woman and her unborn baby.

34. The letter and the risk assessment were not reviewed by the claimant immediately. She saw them much later that day. No further discussions about the risk assessment took place and the claimant confirmed that she would return to work in the office the following week once the current outbreak of covid had died down.

35. The claimant was absent due to pregnancy related illness on 16 July 2021, 21 July 2021 and 22 July 2021.

36. On Wednesday 21 July 2021 whilst she was still off sick the claimant's next two shifts scheduled for 27 and 28 July 2021 were notified as cancelled on rotacloud which we understand to be the respondent's scheduling software.

37. The claimant contacted Jessica Davis Head of Operations (who was responsible for building the rotas) twice over the weekend to ask why her shifts had been cancelled but received no response.

38. The claimant also contacted her line manager Reuben Hodge-Brooks on 24 July 2021 and 26 July 2021 to ask why her shifts had been cancelled. On 26 July 2021 Mr Hodge-Brooks responded that he would check with Jess Davis and asked if the claimant was able to do any additional shifts. The claimant responded that her partner, Joe was to be working 7 days straight so she only wanted to work those two days but that she could perhaps "*dip in and out from home now and then depending on how the kids act*". Mr Hodge-Brooks reiterated that he would catch up with Jessica Davis. Later the same day (3.06) Mr Hodge-Brooks confirmed that the

claimant had been removed from the rota because she was on top of "intercom" and so was not required.

39. The claimant responded by asking if she would be paid as she was contracted to work 16 hours and that she was not on a zero hour contract.

40. At this point Mr Hodge-Brooks confirmed that he had looked into it, and she was on a zero hour contract and although he was aware that they had been giving the claimant 16 bours a week there was no requirement for those hours. The claimant responded by saying she had never signed a contract and that her job offer letter stated 16 hours a week and sent him a copy of her job offer letter dated 2 April 2021. We find that Mr Hodge-Brooks then checked the claimant's HR file and confirmed at 7.01 pm that having checked with Ms Davis they weren't aware of the discrepancy in the contracts and reinstated the two shifts. We conclude that this was the first time that Mr Hodge-Brooks had looked at the offer letter or the claimant's contract. We also find that it was not Mr Hodge-Brooks who had previously made the decision to cancel the claimant's shifts.

41. The claimant accepted in her evidence that Mr Hodge-Brooks may have believed she was on a zero hour contract before it was brought to his attention that she was not and we agree with this assessment. The claimant submits that the respondent felt they could use this fact to remove shifts which they wished to do, because she had been sick and unreliable. We find this to be the case. The shifts were removed whilst she was off sick on 21 July 2021, not because she was on a zero hour contract as the respondent seeks to argue, (others on her shift were also on zero hours contracts and their shifts were not cancelled) but because of her pregnancy related absence and her perceived unreliability.

42. The respondent has presented no evidence as to why it was the claimant who had her shift cancelled on that day (and not another employee on the same shift). Mr Carroll referred to the fact that he was aware that other zero hours employees did on occasion have shifts cancelled and suggested that other workers had different skills. However, he was unable to recall any specific examples of other employees affected, or give any specific examples, or clarify timeframe of the business process changes, so we do not draw any conclusions from these suggestions.

43. We further accept that the claimant suffered some anxiety and stress when she was waiting to find out what was happening the following day as evidenced by the number of chasing messages she sent. Mr Carroll confirmed in his evidence that he accepted that there was a period of hours when she did not know what was happening and that this caused some anxiety to the claimant. The Tribunal has concluded that this time period was not a matter of hours but over a period of two days from her first emails to Ms Davis and Mr Hodge-Brooks until Mr Hodge-Brooks confirmed that the shifts were reinstated at 7,01pm on 26 July 2021, the evening before her next shift. The Tribunal also accepts the claimant's evidence that the claimant had never had a rostered shift cancelled previously.

44. The claimant worked her two 8 hour shifts in the respondent's offices on 27 July 2021 and 28 July 2021.We accept the claimant's evidence that when she worked the shifts on 27 and 28 July 2021 there were four people working on that shift as was usual and that she was busy.

45. The claimant was then absent for pregnancy related sickness on her next scheduled shift on 3 August 2021 and on that day notified Mr Hodge-Brooks that she would not be able to work on the 4 August 2021 as she had been scheduled to work on the same shift as her partner.

46. By message timed at 09:59 on 3 August 2021 Mr Hodge-Brooks said to the claimant that the respondent could not be responsible for her childcare arrangements and that going forward she needed to make sure that if they were both on the rota, she had to make the necessary arrangements to come in.

47. At 10:25 the claimant forwarded the email of 29 May 2021 from Kasha Clifton to Mr Hodge-Brooks in support of her contention that it had been agreed that she would work opposite shifts to her partner. We accept that the respondent had not previously seen the email or other written evidence of the agreement that she would work opposite shifts to her partner. The claimant said in evidence that the respondent's managers generally and Mr Hodge-Brooks and Ms Davis in particular knew at that time that she worked opposite shifts to her partner; Ms Davis because she arranged the shifts and Mr Hodge-Brooks although he may not have known initially would have been aware of this by the time of this exchange. Mr Carroll clearly knew as he had referred to it expressly as a potential issue on 25 May 2021. We did not hear any evidence from Mr Hodge-Brooks or Ms Davis and in the absence of any credible evidence from the respondent to the contrary and noting that the summary of shifts worked prepared by the respondent show a consistent (if not invariable) pattern of scheduling the claimant and her partner on opposite shifts, we accept the claimant's evidence on this point.

48. On the basis of the messages sent to Mr Hodge Brooks about "dipping in and out" from home we further conclude that Mr Hodge-Brooks was aware that this arrangement was required for childcare reasons.

49. In the same message of 10.25 the claimant also raises the fact that she believes that this has been done due to her pregnancy related absences and that it feels to her that they are trying to "push her out" because she is suffering from pregnancy related illness.

50. Mr Hodge-Brooks responded in a message the same day timed at 17:52 referring to the undocumented arrangements and the need to align the information known to the respondent with their operational requirements. He also stated that the claimant's level of absence had impacted the department and until a message sent on Monday, the claimant had not referred to seeking medical advice to relieve her symptoms which he said had made it difficult to support her. He also asked questions about her previous pregnancies and sought information about how long her symptoms were likely to persist.

51. The respondent has sought to explain this comment as a general comment about the impact of absence on the team, but we find that this comment was made to the claimant in a private message following a period of pregnancy related absence and was directed specifically at her in relation to her pregnancy related absences. Both the questions asked, and the tone of the email were inappropriate and understandably distressing to the claimant. It is unrealistic to suggest that pregnancy related sickness follows a pattern or can be predicted. The sentiments expressed also lend credence to the claimant's wider submissions and expressed concerns that her unavoidable and unpredictable pregnancy related absences made her

continued employment unattractive to the respondent in a fast-paced environment where they were looking for and expecting flexibility on the part of their employees in a changing operational environment.

52. The claimant sent a message timed at 8.11 pm to Mr Hodge-Brooks stating that one of the ways in which he could support her was not to refer to the impact her absence had had on the department. She also referred to him ignoring her references to pregnancy related sickness and that she could not predict when her sickness would end as one pregnancy was not like another. Mr Hodge-Brooks responded the next day saying he would honour previous arrangements and expressing his hope that they could "move past this".

53. The claimant did not work on 4 August 2021 as she was unwell with pregnancy related illness.

54. The claimant was then absent on pre-arranged leave from 8 August 2021 to on or around 28 August 2021.

55. On 11 August the claimant was emailed an employment contract by Alison Prosser, Accounts Assistant dated 1 August 2021 which in relation to working hours provided:

> "*You are contracted to a 16-hour week. You must agree to make every effort to be available for work, should Shift Group require you work as per any issued rotas. If at any time the business requires you to work hours that coincide with Mr Joseph Young's hours you will be expected to work the shift given. We will try to honour a previous agreement where we will try to give you hours that do not coincide with Mr Joseph Young, however, the needs of the business and its requirement to fully function will take precedence over any such prior agreement."*

56. There had been no discussion with the claimant about this contract which whilst it recorded the agreed 16 hours working week, purported to vary the "previous agreement" that hours would not coincide with Mr Joseph Young (the claimant's partner). We find that this was the first contract that the claimant had received during her employment. The claimant noted the confirmation of her entitlement to work 16 hours a week but objected to the new clause in relation to the allocation of shifts. The respondent still had not met with the claimant to explain the business reasons for the proposed change to rostering, to seek to agree an arrangement that would work for the claimant and her partner, or to explain and seek to agree the revised contract.

57. On 17 August 2021 the claimant raised a grievance to Alison Prosser. She agreed to work in accordance with the contract "under protest".

58. On 24 August 2021 Ms Davis (who was originally allocated to hear the grievance) sought to summarise the grievance as follows:

> "*For ease of reference, I have categorised your concerns as follows:*
>
> *1. Complaint that you were issued a new contract of employment.*
> *2. Complaint that you have had hours withdrawn from your rota.*
> *3. Complaint that you have had rota hours scheduled at the same time as your partner.*

59. The claimant responded the same day and said that this was not an accurate summary because:

"[they] fundamentally ignore the main point of concern, which is that I feel you are actively attempting to force me to resign from my position because I am pregnant.

I would like the summary of the grievance amended to:
1. I feel as though you are discriminating against me because I am pregnant
2. I feel as though you are discriminating against me due to illness related to my pregnancy, including related time off which has been noted above
3. You have actively changed the previously agreed terms of my contract; attempted to remove me completely from the working rota / working environment and lied to me in a bid to force me to resign during my pregnancy because my pregnancy is impacting on the business."

60. Atter the claimant raised concerns about Ms Davis hearing her grievance and Nic Burridge taking notes, the claimant was told Steve James would chair her grievance on 25 August 2021.

61. On 31 August 2021 the claimant attended the grievance hearing with her partner Joseph Young. Sophie Parr attended to take notes. During the hearing the timeline and detail of the events complained of was discussed at some length.

62. On 1 September 2021 the claimant was signed off sick as unfit for work, initially for four weeks and subsequently until her maternity leave started on or around 6 November 2021.

63. On 9th September 2021 the Claimant's grievance was rejected. Mr James stated that he had thoroughly investigated the grievances and set out his detailed findings on each point.

64. The first point was discrimination due to pregnancy. The findings are set out in some detail. Mr James concluded that the reason the shifts were cancelled was because of a mistaken belief that the claimant was on a zero hour contract but could not confirm in his evidence before this Tribunal that he had identified who had made that decision during the investigation although in the outcome letter he did repeat the explanations given in the messages to the claimant by Mr Hodge-Brooks.

65. In relation to the pregnancy risk assessment and the instruction to return to work he re-iterated that it was company policy but did not address the specific concern raised about the increased risks to pregnant women and any unborn children.

66. On the first grievance point, Mr James concluded that there had been no discrimination due to pregnancy.

67. The second point was discrimination due to pregnancy related illness. The outcome letter sets out a summary of the communications between the parties in relation to events occurring between 2 and 5 August 2021 and concluded that: there was no malice in the shift allocation; that they were allocated based on the information available; that the exchange about the opposite shift working was made without knowing that an agreement had been reached; and the manager then agreed to adhere to the arrangements.

68. On that basis the second grievance point was not upheld.

69. The third grievance point related to the issue of the new contract which the claimant felt was an attempt to force her to resign her position during her pregnancy. Mr James concluded that the contract was issued in line with department changes and a genuine attempt to adhere to written and verbal agreements made when the claimant was employed by Kasha Clifton whilst adding the caveat that business needs would need to be upheld. On that basis the third point of the claimant's grievance was not upheld.

70. Mr James acknowledged that mistakes had been made in communication about the terms and agreements made in relation to the claimant's employment and that there had been a lack of communication between previous and new management but did not find that the issues related to discrimination.

71. No details of the investigations undertaken or notes of interviews were provided to the claimant or included in the bundle for this hearing but a detailed outcome letter was provided, and we find no evidence that the way the grievance was dealt with relates directly to the fact that the claimant was pregnant or had taken pregnancy related sick leave. We find that it was open to Mr James to reach the conclusions he did on the basis of the information before him having undertaken his investigation. We further find that Mr James acted in good faith and independently in reaching the conclusions set out in the outcome letter.

72. On 13 September 2021 the Claimant appealed against the grievance outcome on the basis: firstly, that she did not believe a full and fair investigation was concluded and secondly, that she disagreed entirely with the outcome on each point. Specifically, she highlighted that she first suffered pregnancy related absence; then the decision to remove her shifts was made; she was then told that her absence was impacting the business; she was then scheduled on to the same shift as her partner; and finally when she was able to show that this was in breach of her agreed working arrangements, she was issued with a new contract. She further suggested that it was clear she was removed from the rota because her pregnancy absence was impacting the business and not because new management were not updated about the initial agreement which was known to Neil Carroll as Operations Director and Jess Davis who set the rotas.

73. On 27 September 2021 the claimant attended the grievance appeal hearing which was chaired by Neil Carroll. Sophie Parr attended to take notes and Joseph Yong accompanied the claimant. There was a discussion about the grievance outcome and the points of appeal and Mr Carroll agreed to investigate three points further: firstly whether or not the element of grievance around the claimant's line manager around pregnancy related illness comments has been investigated and responded to; secondly discrepancies between documentation (contracts) and if this was available why hours were removed; and lastly why the claimant was not given a satisfactory outcome to working around her partner's hours.

74. The same day, on 27 September 2021 the claimant was advised by Tamara Gregory that she did not qualify for statutory sick pay as her [qualifying] earnings were below the required threshold for the purposes of the statutory sick pay scheme.

75. The parties agree that to qualify for SSP the claimant would need to earn a minimum of £120 per week in the qualifying period. Based on her contracted hours, the earnings would have been c £150 per week. However, as at 1 September 2021 when the claimant went off on long term sick, she had not worked her full hours due, amongst other reasons, to her previous sick absences during the qualifying period between 3 July 2021 and 28 August 2021. When calculated either by using the respondent's payroll calculation (a total of £920.37) or by applying the HMRC guidance (an average of £106.19 per week), the claimant did not meet the £120 per week threshold and she therefore did not qualify for SSP.

76. The claimant chased for an appeal outcome on 8 October 2021.

77. On 11 October 2021 the claimant's grievance appeal was rejected on the basis that Mr Carroll considered that a reasonable level of investigation had been carried out, the removal of shifts was genuinely due to the belief she was on a zero hours' contract, and there was a reasonable explanation offered relating to her shift pattern.

78. We find no evidence in the way that the grievance appeal was dealt with that relates directly to the fact that the claimant was pregnant or had taken pregnancy related sick leave. We find that it was open to Mr Carroll to reach the conclusions he did on the basis of the information before him. We further find that Mr Carroll acted in good faith and independently in reaching the conclusions set out in the outcome letter.

The Law

79. This is a Claim brought by the claimant pursuant to the provisions of Section 18 Equality Act 2010. Section 18 (insofar as it relates to discrimination during pregnancy) states:

> "(1) This section has the effect for the purposes of the application of part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (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.
>
> …
>
> (5) The protected period begins when the pregnancy begins and ends at the end of a period of ordinary or additional maternity leave.

80. The issue to be determined in this case is therefore whether or not the respondent treated the claimant unfavourably because of her pregnancy and her maternity leave in relation to any or all of the issues set out at Par 8.1 to 8.10 above:

81. Unlike other claims for direct discrimination, it is not necessary for the claimant to compare the way she was treated with the way a comparator had been or would have been treated. Section 18 Equality Act 2010 requires only that the claimant shows she has been treated "unfavourably".

82. In considering whether the treatment was because of the proscribed factor Mr Fuller draws the Tribunal's attention to the case of *Interserve FM Ltd v Tuleikyte [2017]*

IRLR 615, in which the EAT said that the correct approach to the question of whether the treatment complained of was 'because of' the proscribed factor was the same in the context of s.18 EqA 2010 as in that of s.13 EqA 2010 (endorsed in *Commissioner of the City of London Police v Geldart [2021] IRLR*.

83. There is no dispute in this case that the unfavourable treatment alleged by the claimant occurred during the protected period, i.e., whilst the claimant was pregnant.

84. The burden of proof provisions are set out within s.136(1)-(3) EqA 2010, which state:

> "(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.

85. The leading cases on the burden of proof are *Igen Limited v Wong 2005 EWCA CIV 142, Madarassy v Nomura International Plc 2007 EWCA CIV 33 and Hewage v Grampian Health Board*, a decision of the Supreme Court in 2012 approved by *Efobi v Royal Mail Group Ltd 2021 ICR 1263 SC*. It is for the claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant is able to show this, the burden of proof shifts to the respondent to show that it did not discriminate as alleged by the claimant.

86. Mr Fuller has also referred the Tribunal to the case of *Bahl v The Law Society* [2004] IRLR 799 in support of the principle that it is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain the unreasonable behaviour.

87. In relation to what constitutes unfavourable treatment, Mr Fuller has also referred the Tribunal to the cases of *T-Systems Ltd v Lewis [2015] UKEAT/0042/15 (par 24*) and *Williams v Trustees of Swansea University Pension and Assurance Scheme [2015] IRLR 885 pars 27-29*). We note that both these cases look at what constitutes unfavourable treatment in the context of a disability discrimination claim and on the facts in this case and given the very different circumstances find them to be of limited relevance.

88. The Tribunal is also mindful of the provisions set out in The Equality and Human Rights Commission Code of Practice on Employment 2011 (last updated 2015) at chapter 8 and in particular the guidance that:

    88.1. a woman's pregnancy or maternity leave does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause (par 8.20).

    88.2. An employer must not demote or dismiss a woman, or deny her training or promotion opportunities, because she is pregnant or on maternity leave. *Nor*

must an employer take into account any period of pregnancy-related sickness absence when making a decision about her employment (par 8.21).

89. There is no commentary on the meaning of unfavourable in the chapter on pregnancy and maternity discrimination but the guidance on unfavourable treatment in relation to disability discrimination states:

> "*For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably"*

90. We bear these cases and the Code in mind in reaching our conclusions, although not in substitution for the law.

Discussion and Conclusions

91. We agree with the respondent's submission on the general premise that the facts and chronology of what happened and as to when is largely agreed, and the evidence will come down to the interpretation of those facts by each party to explain why they acted in the way they did. We do not however accept Mr Fuller's contention that the respondent's misapprehension about the claimant's contractual terms is sufficient in itself to provide a valid non-discriminatory explanation for the respondent's behaviour in relation to each of the identified issues.

92. We conclude that the claimant's pregnancy related absence was an inconvenience to the respondent which was exacerbated by finding out: firstly, that she was not on a zero hour contract but had been offered permanent employment on a 16 hour a week contract; and secondly, that assurances had been given by her former manager that she would only be required to work on opposite shifts to her partner. We note that had a properly prepared contract been issued by the respondent at the start of the claimant's employment, setting out the contractual terms which would apply (as is required by statute), then the confusion on these two points would not have occurred, and that this situation was not of the claimant's making. We further conclude that the claimant's agreed employment terms did not align with the respondent's plans to move to a multi-skilled and flexible workforce.

93. We have also noted that the sentiments expressed by Mr Hodge-Brooks potentially lend credence to the claimant's wider submissions and expressed concerns that her unavoidable and unpredictable pregnancy related absences made her continued employment unattractive to the respondent in a fast paced environment where they were looking for and expecting flexibility on the part of their employees in a changing operational environment. However we do not conclude that the various incidents that arose were part of a wider or co-ordinated plot to force the claimant to resign as she alleges. Although we have found that she was subjected to some discriminatory acts, we agree with Mr Carroll's findings on the appeal to the extent that we do not conclude that there was any malice on the part of any of the individuals involved.

94. We now consider each of the issues in turn.

95. ***Issue 1***: *The claimant says she was pressurised to attend the office (instead of being allowed to work from home) when there were cases of Covid and she was at increased risk due to pregnancy and also suffering from pregnancy related sickness.*

96. ***Issue 2****: A pregnancy risk assessment was completed by Reuben Hodge-Brooks whilst the claimant was absent and without consultation. She alleges that it was a box-ticking exercise and not a genuine risk assessment.*

97. We consider these two issues together as they are interlinked. Mr Fuller has accepted on behalf of the Respondent that the COVID-19 Government guidance at that time was that, where possible, workers should work from home.

98. We have found that the risk assessment did not genuinely seek to address the increased risk to pregnant women and unborn children from Covid and we are not satisfied that the assessment was a genuine attempt to consider and address risk, rather that it was prepared with the purpose of supporting the requirement that the claimant should return to the office. We have found that the requirement for the claimant to attend the office as a pregnant woman when there was a covid outbreak amongst her colleagues was not a reasonable management request and we have also found that the threat to withhold pay was unreasonable in the context of covid cases in the office whilst there was an identifiable risk to her as a pregnant woman and to her unborn baby. We are mindful of the fact that there does not need to be a comparator in pregnancy discrimination cases and conclude that the claimant was in a unique position which deserved special consideration due to her pregnancy. It is in our view not material that the threat was not carried out; it was made.

99. We therefore do not accept Mr Fuller's submission that the unfavourable treatment was merely the completion of the risk assessment without consultation with the claimant having concluded that there was in reality no genuine assessment at all of the very real risks a return to the office posed to the claimant and her unborn child whilst there were covid cases amongst her colleagues.

100. The risk assessment is intrinsically linked to the claimant's pregnancy and can only have been undertaken because of her pregnancy and we are satisfied that undertaking such a risk assessment with the intent of forcing the claimant to return to the office (as evidenced by the accompanying letter) is unfavourable treatment. We also do not accept Mr Fuller's submission that the fact that she was not being asked to return to the office *because* she was pregnant means this head of claim must fail. There was a clear disadvantage to the claimant in being subjected to an inadequate risk assessment and being threatened with the sanction of withholding pay if she did not return to the office. This only applied to her due to the increased risk she faced by reason of her pregnancy.

101. These heads of claim therefore succeed,

102. **Issue 3**: *On or about 24 July 2021(now identified as 21 July 2021) the claimant's shifts for 27 July 2021 and 28 July 2021 were deleted from the roster without explanation and her line manager told her (incorrectly) on 26 July that she was not needed for those shifts as she was on a zero hour contract.*

103. Essentially the respondent says that the cancellation was due to the change in shift pattern and a reduction in the need for additional shifts from zero hour workers. The claimant refers to the fact that she had never been on a zero hour contract and claims that the cancellation was due to her pregnancy related absence. We have found that the shifts were removed whilst she was off sick on 21 July 2021, not because she was on a zero hour contract as the respondent seeks to argue, (others on her shift were also on zero hours contracts and their shifts were not cancelled) but rather because of her pregnancy related absence and her perceived unreliability. We also note the inconsistency highlighted by the claimant that at the same time as her shifts were cancelled Mr Hodge-Brooks asked if she was able to do any additional shifts. We note that he does not ask if she *wanted* additional shifts but whether she was "able to" work them. Without Mr Hodge-Brooks evidence we can only deduce from the words used what was in his mind, but in our view, they suggest a need from the business which undermines the argument put forward by Mr Carroll in evidence that need had decreased due to the operational restructure. No specific evidence was submitted to support Mr Carroll's general contentions on this point, and we note his acknowledgement that he could not recall the time-frame of these changes or any specific examples. We have also found that the claimant was in fact busy the next day and that there were four colleagues on her shift, which was in line with usual practices.

104. The respondent's arguments are based on the fact that the relevant managers were not aware of the fact that the claimant was not on a zero hour contract, so they had the right to cancel the claimant's shifts. This seems to the Tribunal to miss the point. Whatever the contractual position, the claimant had not had rostered shifts cancelled before, and the first time this happened was when she was absent on pregnancy related illness and on the context of a comment made by her line manager about the impact her absence was having on the department. The unfavourable treatment was the cancellation of her shifts (whether allowed contractually or otherwise) and we are satisfied that this was because of her perceived unreliability due to her pregnancy related absence.

105. Mr Fuller submits that once the contractual position had been clarified and the respondent accepted that the claimant had a 16 hour a week contract, the shifts were reinstated and there was therefore no unfavourable treatment for the claimant in that she suffered no disadvantage, as ultimately she worked those shifts and was paid for them. We do not agree. The claimant had never had a shift cancelled before and was provided with no advance notification or explanation on this occasion. After trying to contact both Ms Davis and her line manager Mr Hodge-Brooks over the weekend she messaged her line manager on the Monday morning, and he was not able to provide an explanation to her. She had to wait until 7.00 pm the evening before her shift was due to start before it was confirmed that she would be working and we have accepted that that caused her anxiety as she claims and as was acknowledged by Mr Carroll. We therefore conclude that the cancellation of the shifts was unfavourable treatment, as it was because of her pregnancy related sick absence and it caused her distress and worry.

106. This head of claim is therefore upheld

107. ***Issue 4:*** *At the beginning of August, she was rostered for the same shifts as her partner, in breach of the terms of her job offer.*

108. The main issue we have with this head of claim is that taken in isolation it does not appear to be *because o*f the claimant's pregnancy or pregnancy related absence. Unless we were to conclude that this was one step in a concerted effort to force the claimant to resign because of her pregnancy related illness (as she suggests is the case), then there is no obvious causal link between her pregnancy and the change in approach to the roster and we have not found that there was any such concerted plan to force her to resign. We have however, found that the following the meeting on 25 May 2021, the Claimant was warned by Mr Carroll that the current arrangement of scheduling her and her partner on opposite shifts may become difficult due to the operational changes which had just been announced and we accept that these operational changes were genuine and were being introduced over time. We conclude that the decision to schedule the claimant onto the same shift as her partner (and not to guarantee that the claimant would always be scheduled on the opposite shift to her partner), however, poorly implemented, arose from these operational changes and were not because of the claimant's pregnancy or pregnancy related absence. This head of claim therefore fails.

109. ***Issue 5:*** *Her line manager then told her that it was for her to work out her childcare issues and to complete those shifts.*

110. As with issue 4, it does not appear to us that this issue relates in any way to her pregnancy and does not therefore pass the test of being "because" of her pregnancy. This head of claim therefore fails.

111. ***Issue 6****: On 4 August 2021 she was told by her line manager that her pregnancy-related sickness was now affecting the department.*

112. This was an inappropriate comment and as suggested by Mr Fuller was both insensitive and misconceived. The respondent has sought to explain this comment as a general comment about the impact of absence on the team, but we have found that this comment was made to the claimant in a private message following a period of pregnancy related absence and was directed specifically at her in relation to her pregnancy related absences. We further conclude that both the questions asked, and the tone of the email were inappropriate and understandably distressing to the claimant.

113. Further, we are not persuaded by Mr Fuller's submission that the comment does not meet the threshold of unfavourable treatment as it did not place any hurdle in front of the Claimant or create a particular difficulty for the Claimant to overcome. Being subjected to such a comment is in itself unfavourable treatment, in the same way that any other harassing comment made on protected grounds would in itself be discriminatory and constitute a disadvantage. This head of claim succeeds.

114. ***Issue 7****: On 11 August she was given a new contract of employment providing that she could be required to work the same shifts as her partner.*

115. We have found that the claimant had not previously received or signed an employment contract with the respondent. We have also accepted Mr Carroll's evidence that operational changes were being made which would impact on the claimant's role and conclude that these proposed changes were entirely unrelated to the claimant's personal position and specifically her pregnancy. We have accepted Mr Carroll's' evidence that some employees were being issued with contracts when they stepped into new roles, however we conclude that this did not

apply to the claimant as her role was not changing. We do not agree that the sole reason for the issue of the claimant's contract was the operational changes as submitted by the respondent, rather we conclude that it was at least in part, issued in an attempt to address the claimant's lack of a contract of employment, and to record the claimant's terms and conditions accurately as well as move away from the agreement to schedule the claimant and her partner on opposite shifts. However, none of these factors relate to her pregnancy.

116. We do not accept the claimant's representation that the reason the contract was issued was to make it impossible for her to work for the respondent. We have concluded there was no plan to force her to resign because of her pregnancy, and in the absence of her agreement to a contractual change to her employment terms, either expressly or by deemed acceptance, insofar as the contract purported to change her agreed terms, it was ineffective. As she registered her protest to the changes, they would not apply. Further and in any event, we conclude that the unrecorded agreements that the claimant was entitled to work 16 hours and on opposite shifts to her partner, and the respondent's efforts to deal with these in the context of their need for a flexible work-force, were unrelated to her pregnancy.

117. As with issues 4 and 5 we do not therefore conclude that there is a causal link between the issue of this contract and the claimant's pregnancy or pregnancy related absence and this head of claim fails.

118. ***Issue 8****: On 2 September she was signed off sick, resulting in a loss of pay.*

119. We have found that the claimant did not receive the required level of earnings of £120 per week (however calculated) during the qualifying period and was therefore ineligible for sick pay. We heard from the claimant that she has not been able to find any basis to challenge the respondent's position and we do not find that the respondent has in anyway discriminated against the claimant because of her pregnancy by applying the provisions of the statutory sick pay scheme. This head of claim fails.

120. ***Issue 9:*** *On 9 September her grievance about these issues was rejected.*

121. ***Issue 10****: On 11 October her appeal against this decision was rejected.*

122. We consider these two issues together as they rely on the same points of principle.

123. We have found no evidence in the way that either the grievance or grievance appeal was dealt with that relates directly to the fact that the claimant was pregnant or had taken pregnancy related sick leave. We have also concluded that it was open to both Mr James and Mr Carroll to reach the conclusions they did on the basis of the information before them.

124. We have further found that Mr James and Mr Carroll acted in good faith and independently in reaching the conclusions set out in their respective outcome letters.

125. However, in this hearing we have concluded that the claimant was discriminated against in relation to her pregnancy risk assessment and accompanying letter, the comment made by Mr Hodge-Brooks on the impact her pregnancy related absence was having on her department and the cancellation of her shifts.

126. These were all matters considered by Mr James at the grievance hearing and Mr Carroll at the appeal hearing. To the extent that her grievances were not upheld by them and have now been found to have substance by this tribunal, we conclude that it could be argued that the failure to uphold her grievance was unfavourable treatment because of her pregnancy or pregnancy related absence.

127. We conclude that the decision not to uphold those parts of her grievance (which have now been found to be discriminatory) is unfavourable treatment. However, we accept Mr Fuller's submission that these decisions were not reached *because* of the claimant's pregnancy but were decisions which were reached following discussions with the claimant, their investigations and were decisions based on the information available to them. That the Tribunal has reached a different conclusion today, does not create a direct causal link between the failure to uphold the claimant's grievance (or appeal) and the claimant's pregnancy; it is not because of her pregnancy or pregnancy related absence that the grievance was not upheld but because each of Mr Carroll and Mr James concluded in good faith on the basis of the evidence before them that the grievance had not been made out. These heads of claim are therefore not upheld.

128. The decision of the tribunal is therefore that the claimant succeeds in her claim for pregnancy related discrimination in relation to Issues 1 and 2 (the allegation that she was being forced back into the office and the pregnancy risk assessment), issue 3 (the cancellation of her shifts) and issue 6, (the comment made by Mr Hodge-Brooks) and the matter will now be listed for a remedy hearing.

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Employment Judge Halliday
Date 25 August 2023

Reasons sent to the Parties on 15 September 2023

For the Tribunal Office