EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Miss E Sanham (nee Hodges)	**South London and Maudsley NHS Foundation Trust**

Heard at: London South (in public; by video)

On: 2, 3 & 4 January 2024

Before: Employment Judge **P Klimov**
Tribunal Member **H Bharadia**
Tribunal Member **C Edwards**

Appearances:

For the claimant: **in person**

For the respondent: **Mr L Harris**, of counsel

JUDGMENT having been announced to the parties at the hearing on 4 January 2024 and written reasons having been requested by the claimant on 10 January 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim and evidence

1. On 3 January 2022, the claimant brought a claim containing complaints of automatically unfair dismissal contrary to s.99 of the Employment Rights Act 1996 ("**ERA**"), pregnancy and maternity discrimination contrary to s.18 of the Equality Act 2010 ("**EqA**"), and for notice pay. On 18 May 2023, the notice pay complaint, having been withdrawn by the claimant, was dismissed under Rule 52 of the of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. On 19 April 2022, the respondent presented a response denying all the claims.

3. There were two case management preliminary hearings, on 1 September 2023, before EJ Andrews, and on 22 December 2023, before EJ Self. At the second

preliminary hearing, the final list of issues had been settled and recorded by EJ Self in the Case Summary (p.1076 – 1078 of the hearing bundle[1]). The List is reproduced as an Annex to this Judgment for ease of reference.

4. At the hearing, the claimant represented herself. The respondent was represented by Mr Harris of counsel. The claimant submitted witness statements of herself, Mr Harry Sanham (her father) and Mr Stephen Hodges (her husband). The respondent called Ms Michelle Mehta, the Deputy Director of Pharmacy (Operations) of the respondent and the claimant's direct line manager at the material time.

5. The hearing had been listed for four days. However, due to lack of judicial resources the Tribunal could only sit on the first three days. I discussed this issue with the parties at the start of the hearing. It was agreed that the hearing would be to decide the liability (including Polkey) issues (issues 2 and 3 of the List of Issues), and the remedy issues, if arise, will be decided at a separate hearing. A timetable for the hearing was discussed and agreed with the parties. The claimant agreed that, because Mr Hodges' evidence went to the remedy issues, there was no need for the Tribunal to hear from him at this hearing. All other witnesses gave sworn evidence and were cross-examined.

6. The Tribunal was referred to various documents in a 1078-page bundle of documents that parties submitted for the hearing. We only read the documents referred to in the witness statements, in the parties' respective reading lists, and those, to which we were referred to during the hearing. The respondent submitted a neutral chronology and a cast list. No issues were taken by the claimant in relation to those two documents.

7. At the start of the hearing, I confirmed with the parties that the List of Issues was complete and correct. I also clarified with the claimant that for the purposes of her s.18 EqA complaint, she alleges that the treatment after the end of the protected period (i.e. the claimant's dismissal on 30 November 2021) was in implementation of a decision taken during the protected period. In the course of the hearing, the claimant further clarified that the alleged unfavourable treatment – issue 2.1c (*On the 25 August 2021 Ms Mehta contacted the Claimant to inform the Claimant she would be extended until the 30 November 2021. Ms Mehta said to the Claimant she didn't think she needed to ask as she knew the Claimant wanted to remain with the Trust*) was the failure to extend the contract beyond 30 November 2021, and not the fact that Ms Mehta had informed the claimant of the extension until 30 November 2021, or that Ms Mehta had extended the contract without first asking the claimant if she wanted it to be extended.

8. There was also an outstanding claimant's application for a costs order, which EJ Self had directed to be considered at the conclusion of the final hearing. After the Tribunal announced its unanimous decision, in the afternoon of day 3

[1] In this Judgment references in the format p.x-x are to a page(s) in the 1078-page hearing bundle.

of the hearing, the claimant said that she was withdrawing her costs application. The Tribunal dismissed the application upon withdrawal.

The Facts

9. Having considered the evidence presented to the Tribunal by the parties, the Tribunal made the following key findings of fact.

The claimant's role and the Team structure

10. The claimant was recruited by the respondent on a 12-month Fixed Term Contract ("**the FTC**"), commencing on 6 January 2020 and ending on 5 January 2021, in the role of Band 6 Principal Pharmacy Technician in Clinical Trials team. The claimant was recruited principally to cover the role held by an employee ("**the Band 6 Employee 1**") who went on maternity leave on 15 September 2019.

11. In the Clinical Trials team, in addition to the claimant, there was a Band 7 Chief Technician ("**the Band 7 Employee**") and a Band 5 employee, who had been "upgraded" for a fixed term period to a Band 6 role ("**the Band 6 Employee 2**").

12. The Band 6 Employee 2 had been employed by the respondent on a permanent basis as a substantive Band 5 Senior Pharmacy Technician since April 2014. In February 2019, the Band 6 Employee 2 was "upgraded" on a fixed term basis to Band 6 Principal Technician role for six months, working in that role three days a week with the remaining two days in their substantive Band 5 role. This was to cover paternity leave of the Band 7 Employee.

13. The Band 6 Employee 2 was again "upgraded" into Band 6 role on a fixed term basis from 1 August 2019 until 31 January 2020. That was to cover the Band 6 Employee 1's maternity leave.

14. The Band 6 Employee 1's maternity leave ended on 12 September 2020. She, however, decided to take accrued annual leave and returned to work on 4 November 2020 on a part-time (three days a week) basis.

15. The Band 7 Employee, having returned from paternity leave was considering working on a part-time basis – three days a week. This was one of the considerations why the respondent decided to recruit the claimant as a Band 6 employee on the FTC, but on a full-hours basis, in addition to keeping Band 6 Employee 2 working in the upgraded Band 6 role three days a week initially until June 2021. The Band 7 Employee went on long-term sick leave in November 2019 and never returned to work. The Band 6 Employee 2 "upgrade" was further extended (on a 4-days a week basis) initially for a further period of three months to cover the claimant's maternity leave, and then again (on a full time hours basis) to cover the claimant's extended maternity leave and the Band 7 Employee's ongoing sick absence.

16. There was also a locum/agency worker ("**the Locum**"), who started working in the pharmacy department on 19 July 2021, working three days a week in the Clinical Trials team and two days a week in the Dispensary department. The Locum was working at a Band 5 level, a junior role to that of the claimant, however, due to the agency terms the Locum was paid at a Band 6 employee level.

17. The Locum was brought in to cover for the claimant's work during her maternity leave and also as extra capacity to cover the on-going staff shortage in the department due to part-time work of Band 6 Employee 1 and the Band 7 Employee's absence. The respondent could terminate the Locum's contract at any time on one week notice. The claimant's contract also had a break clause, however required the respondent to give the claimant at least 8-week notice.

Relationship with Ms Mehta

18. Ms Mehta was the claimant's line manager from the start. Although normally the claimant's reporting line was into the Band 7 Employee, as they were absent from work, Ms Mehta became the claimant's direct line manager.

19. The claimant had good working relationships with Ms Mehta. Ms Mehta thought highly of the claimant. Ms Mehta considered the claimant as having strong technical skills. They communicated regularly in supportive and professional manner. Until raising her grievance in November 2021, the claimant made no complaints against Ms Mehta.

20. At the time of joining the respondent, the claimant was studying for a law degree and intended to pursue a legal career. She told that to Ms Mehta at the job interview. Ms Mehta was supportive and allowed the claimant time off for her legal exams and preparation. On 6 November 2020, the claimant informed Ms Mehta that she had been selected for a job interview for the clinical trial legal assistant role, she had applied for. She asked if she could take annual leave to attend the interview. Ms Mehta replied: "*Yes of course - I'm not surprised!*"

First extension

21. In or around September 2020, Ms Mahta verbally offered to the claimant to extend her FTC until 31 March 2021, the end of the respondent's financial year. This was to cover the ongoing shortage of staff due to the part-time return to work by Band 6 Employee 1 and the Band 7 Employee's sick leave absence. The extension was formally approved by a change form, submitted by Ms Mehta 26 October 2020.

The claimant's pregnancy and maternity leave

22. On 1 December 2020, the claimant informed Ms Mehta in a telephone conversation that she was pregnant. The claimant also explained that she had some pregnancy related complications. Ms Mehta was expecting that the claimant was going to tell her that she had secured the legal job she had applied

for and would be leaving the respondent. There was a pause in the conversation, then Ms Mehta told the claimant that she was delighted for the claimant, that the claimant must not go on hospital wards, should look after herself, and ensure that she attends her ante-natal appointments.

23. On 14 December 2020, the claimant wrote to Ms Mehta and Mr David Taylor (the Director of Pharmacy) querying if her FTC had been extended until the end of March 2021 and expressing her interest in extending her FTC to November 2021. Ms Mehta replied confirming the extension until 31 March 2021 and saying that "*[the respondent] can't offer a further extension at present unfortunately due to uncertainty regarding the budgets. We hope to clarify the position by the end of January*."

24. On 14 January 2021, Glynis Ivin, a Senior Pharmacist, wrote to Ms Mehta asking her whether certain funds that had been awarded to the respondent could be used to fund a further extension of the claimant's FTC. Ms Mehta replied that she had been told by the finance that the money needed to be spent by the end of March and could not be carried over into the next financial year. Ms Mehta also said that she wanted to extend the claimant's FTC and was trying to sort it out.

25. On 19 January 2021, the claimant and Ms Mehta had two telephone conversations. In the first conversation, the claimant asked about extending her FTC. The claimant said that she wanted to take a short period of maternity leave and then return to work. The claimant indicated that she was planning to take shared leave with his husband and return from maternity leave at the end of September 2021.

26. Following the first conversation, Ms Mehta contacted the respondent's HR department. She was informed by HR that under the respondent's policy the claimant's FTC would be extended automatically to the end of her maternity leave. Ms Mehta then called the claimant straight away and informed her that her FTC would be extended until 30 September 2021.

27. On 8 March 2021, Jan Vince, the respondent's Children & Families Manager, wrote to the claimant giving detailed information about maternity leave and associated entitlements.

28. There were further email exchanges in April 2021 between the claimant and Ms Vince, concerning the claimant's maternity leave entitlement. In particular, on 8 April 2021, the claimant confirmed her shared leave plans, giving her projected dates of maternity leave, as follows:

Me and Harry were talking earlier and we want to adjust the time we are each taking just slightly. I felt put at a slight disadvantage as my plan was relying heavily on our child's birth being on the 18th July. If they were late then that would substantially affect my time with them and the means of breastfeeding/ bonding

This is what we want to do:

Liz
A/L 21/06/2021 – 03/07/2021
Maternity leave 8 weeks full pay (04/07/2021- 29/08/2021)
Then 6 weeks half pay + SMP (29/08/2021 - 10/10/2021)

Harry
2 weeks parental leave from date of birth of baby.
10 weeks shared parental leave half pay +SMP (10/10/2021 – 19/12/2021)
A/L after that

I'm unsure if me being on a fixed term contract over this leave will mean that I would have to pay back any leave if for any reason I was not returning to work (I intend to but that is out of my hands slightly at present). I think we discussed this before but today has made me second guess myself!

29. On 9 April 2021, Ms Vince replied stating "*… if baby came up to 2 weeks late this would lessen your time with baby, which is a consideration for you both*". She explained to the claimant that she could change her plans at any time by giving 8-week notice. She also said that she "*…. wanted to ensure that you understood you Elizabeth could take the whole year and not have to pay back the OMP or SMP you have received…*". Ms Vince concluded her email stating: "*I think Michelle [Ms Mehta] is worried that you are making your plans based on the needs of the service rather that your new family needs so she has sent up a teams meeting to ensure that you both hear from us that whatever you both choose to do, it is all fine with us*".

30. The claimant started her maternity leave on 7 July 2021, having first taken her annual leave from 18 June 2021. The claimant's baby was born on 28 July 2021. On 9 August 2021, the claimant informed Ms Mehta of the birth of her child.

31. On 27 August 2021, the claimant wrote to Ms Vince, with a copy to Ms Mehta, informing them that she intended to extend her maternity leave and, instead of the originally planned return date of 11 October 2021, return to work on 31 October 2021, and for her husband to start his parental leave on 1 November 2021. Ms Mehta called the claimant to inform her that in the light of that change, her FTC would be extended until the end of November 2021. Ms Mehta then extended the claimant's FTC until 30 November 2021.

The Budget cuts

32. The respondent's Pharmacy department operates on the basis of three annual budgets (financial year runs from 1 April to 31 March): a staffing budget, a medicines budget and an 'other items' budget. The latter two are referred to as non-pay budgets. It is not possible for budgets to be carried over into subsequent financial years and the non-pay budgets cannot be crossed over to the pay/staffing budget and vice versa. The Clinical Trials team, in which the claimant worked, has its own separate budget within the overall department's budget.

33. During the Covid-19 pandemic temporary additional funding arrangements were put in place, which meant that extra funding was provided under a

separate Covid-19 budget to allow the respondent to fund their staffing and other needs to meet extra demands and pressures arising from the pandemic. Such extra funding was used by Ms Mehta to cover (in part) the staffing costs in the department, including costs of the claimant's salary.

34. On 8 October 2021, Ms Mehta was informed by Mr Daniel Norwick, the Head of Central Management Accounting, that effective 1 October 2021 the Covid-19 budget was no longer available to fund the staffing costs, meaning that all staff costs must be met out of the department's staffing budget. He also told Ms Mehta that previously 30% of her staffing costs had been diverted to the Covid-19 budget, which he estimated to be £240,000 for the first six months of the then current financial year, and now need to be reversed to Ms Mehta's staffing budget. Before that conversation, Ms Mehta was unaware that her budget would be cut in that way. Later, Mr Norwick sent to Mr Taylor and Ms Mehta a summary of the accounts, which showed £350,000 overspent to the end of October 2021 and a run rate of £40,000 overspent per month thereon.

35. That meant that Ms Mehta had to urgently review her staffing levels and decide what cuts to make to try to balance the budgets by the end of the 2021/22 financial year.

36. Around the same time, Ms Mehta was notified by the respondent's Employee Relations team that the Band 7 Employee would be returning from sick leave to resume their role imminently.

37. On 28 October 2021, Ms Mehta consulted Ms Onai Muchemwa, Senior HR Business Partner. She explained the situation and that in the circumstance she would not be able to extend the claimant's contract beyond 30 November 2021 due to the budget constraints. Ms Muchemwa confirmed that from HR perspective Ms Mehta could proceed and not extend the claimant's contract further.

The claimant's return and dismissal

38. On 29 October 2021, Ms Mehta informed the claimant on the telephone that she would not be able to extend the claimant's FTC beyond 30 November 2021 due to the significant financial pressure. Ms Mehta was upset to give this news to the claimant. She was crying when she spoke with the claimant. The claimant tried to console Ms Mehta by telling her not to worry, that it was not Ms Mehta's fault, and that the claimant knew it was a possibility that her FTC would not be extended.

39. After that call with the claimant, Ms Mehta spoke with the respondent's HR department to find out whether the claimant could be paid in lieu of working the remainder of her FTC, essentially to be placed on "gardening leave". The HR told Ms Mehta that it was fine, and Ms Mehta then called the claimant and offered her that option. The claimant said that she wanted to come back to work on 1 November 2021 and work to the end of her FTC.

40. On 3 November 2021, Ms Mehta sent to the claimant a follow up letter to confirm the end date of the FTC.

41. The claimant came back to work on 1 November 2021. She worked until 24 November 2021 and then went on annual leave until the end of her FTC.

42. On 5 November 2021, the claimant submitted a grievance to Ms Mehta about the decision not to extend her FTC. On the same day, Ms Mehta forwarded the claimant's grievance to Mr Taylor and the respondent's HR asking for advice.

43. On 11 November 2021, Ms Mehta acknowledged to the claimant receipt of the grievance and said that she would respond as soon as she could.

44. Ms Mehta chased the respondent's HR for help with the grievance, but all in vain. The matter was being passed from one HR manager to another, but no real HR assistance was ever provided to Ms Mehta. Consequently, the grievance had not been dealt with, and the claimant had never received a substantive response to her grievance before issuing her claim.

45. On 23 November 2021, the claimant emailed Ms Mehta to inform that she had contacted ACAS to seek their assistance in resolving the dispute. The claimant obtained the ACAS early conciliation certificate on 3 January 2021 and presented her claim form on the same day.

The Law

Unfair dismissal

46. S. 95(1)(b) of the ERA states:

> **95.— Circumstances in which an employee is dismissed.**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) , only if)—
> […]
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or […]
> […]

47. S.99 of the ERA states:

> **99.— Leave for family reasons.**
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.
> (2) In this section *"prescribed"* means prescribed by regulations made by the Secretary of State.
> (3) A reason or set of circumstances prescribed under this section must relate to—
> (a) pregnancy, childbirth or maternity,
> […]

48. Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999/3312 ("**MAT**") states:

20.— Unfair dismissal
(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if–
(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

[…]

(3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with–
(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(c) the application of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave [or additional maternity leave] ;

[…]

49. There is no qualifying period to claim automatically unfair dismissal under S.99 ERA. However, an employee who has less than two years' continuous service bears the burden of proof in showing that the reason for dismissal was a prescribed reason within the meaning of S.99 ERA and the applicable regulations (see, *Smith v Hayle Town Council* 1978 ICR 996, CA).

50. A reason for dismissal "*is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.*" (*Abernethy v Mott, Hay & Anderson* [1974] ICR 323*)***.**

51. This requires the tribunal to identify the person who made the decision to dismiss and consider his or her mental process. The tribunal must consider "*only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss"* (*Orr v Milton Keynes Council* 2011 ICR 704, CA).

52. If the decision is made for more than one reason the tribunal must identify the principal reason. The Tribunal is not obliged to accept the employer's stated reason where supporting evidence is poor or where the Tribunal suspects that there was a different motive. Based on the established facts the Tribunal is entitled to draw permissible inferences in finding the real reason which caused the employer to dismiss the employee. "*As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. […]*" (*Kuzel v Roche Products Ltd* 2008 ICR 799, CA).

53. In *Atkins v Coyle Personnel plc* 2008 IRLR 420, EAT, considering the meaning of the word "connected with" in the MAT said at [40]:

40. The fact that the words 'connected with' might on the dictionary definition be taken to mean 'associated with' does not mean that a causal connection is not necessary between the dismissal and the paternity leave. 'Associated with', without more, is a very vague concept, so wide and vague that it could on its face include a simple time connection, in other words it would be enough merely because the employee was on paternity leave at the time he was dismissed. Such an interpretation cannot have been intended and for the same reasons nor can a 'but for' test or a causa sine qua non test.

Pregnancy and Maternity discrimination

54. S.18 of the EqA states:

18 Pregnancy and maternity discrimination: work cases

(1) This section has 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 [or after][2] 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 [in that protected period as a result of the pregnancy] .

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave [or on equivalent compulsory maternity leave] .

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

[...]

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

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(aa) if she does not have that right, but has a right to equivalent maternity leave, at the end of that leave period, or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have [a right as described in paragraph (a) or (aa)], at the end of the period of 2 weeks beginning with the end of the pregnancy.

[…]

55. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("**the EHRC Employment Code**") states at [5.7] that "unfavourably" means that a person "*must have been put at a disadvantage*"[3]. The case law suggests (*Williams v Trustees of Swansea University Pension and Assurance Scheme and anor* 2019 ICR 230, SC), that the term "unfavourably" is analogous to the statutory concepts of "disadvantage" or "detriment" and generally has a relatively low thresholds to be engaged.

56. The EHRC Employment Code provides at [9.8] and [9.9] the following summary of types of treatment, which may amount to a "detriment":

"Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment."

57. There is a substantial case law on the issue of how the question of causation should be approached by employment tribunals. In the majority of cases, the

[2] Words in the square brackets were inserted by Equality Act 2010 (Amendment) Regulations 2023/1425 with effect from January 1, 2024. However, the legal position was the same before the Regulations because, in *Brown v Rentokil Ltd* 1998 ICR 790, ECJ, the European Court established that pregnancy and maternity protection extends to unfavourable treatment that occurs after the end of the protected period where that treatment is because of the pregnancy or pregnancy-related illness during the protected period.

[3] Although the EHRC Employment Code gives guidance with respect to s.15 EqA, s.18 EqA uses the same terminology and therefore the guidance can be applied by analogy.

best approach in deciding whether allegedly discriminatory treatment was 'because of' a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

58. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL).

59. In *Onu v Akwiwu and anor; Taiwo v Olaigbe and anor* 2014 ICR 571, CA, Lord Justice Underhill dealing with the question of what constitutes "the grounds" (the language used in earlier discrimination legislation) said:

> 42. What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in Nagarajan called his "mental processes" (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in Nagarajan : see pp. 885–6.

60. In *Indigo Design Build and Management Ltd and anor v Martinez* EAT 0020/14, HHJ Richardson held:

> 29. The Tribunal was required by section 13(1) and sections 18(2) and thereafter to consider whether the alleged treatment of Mrs Martinez was "because of" the protected characteristic in question or "because of" pregnancy or maternity leave. The use of the term "because of" is a change from terms used in earlier discrimination legislation, but it is now well-established that no change of legal approach is required: see Onu v Akwiwu [2014] ICR 571 at paragraph 40, Underhill LJ. The law requires consideration of the "grounds" for the treatment.

EqA Burden of Proof

61. Section 136 EqA states:

> *(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*.

62. The guidance set out in *Igen v Wong* [2005] ICR 9311 (approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054) sets out the correct approach to interpreting the burden of proof provisions. In particular:
    a. it is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also *Ayodele v Citylink Ltd and anor* [2018] ICR 748 at paras 87 - 106);
    b. it is unusual to find direct evidence of discrimination and '*[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (para 79(3));
    c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on '*what inferences it is proper to draw from the primary facts found by the tribunal*' (para 79(4));

d. '*in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts*' (para 79(6));
e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was "in no sense whatsoever" on the grounds of the protected characteristic and for the tribunal to '*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*' (para 79(11)-(12));
f. '*[s]ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*' (para 79(13)).

63. In *Igen v Wong* the Court of Appeal cautioned tribunals '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*' (para 51).

64. In *Martin v Devonshires Solicitors* 2011 ICR 352, EAT, the then President of the EAT, Underhill J said about the burden of proof statutory provisions:

> 39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head – "the devil himself knoweth not the mind of man" (*per* Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law. In the present case, once the Tribunal had found that the reasons given by Mr. Hudson and Mr. Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf. our observations in *Hartlepool Borough Council v. Llewellyn* [2009] ICR 1426 , at para. 55 (p. 1448C).)

Analysis and Conclusions

65. The claimant complains of pregnancy and maternity discrimination contrary to s.18 EqA and automatically unfair dismissal contrary to s.99 ERA. For the purposes of the latter the reasons of "a prescribed kind" are said to be pregnancy, childbirth, or maternity; or her ordinary, compulsory or additional maternity leave (s.99(3)(a) and 99(3)(b) ERA). For brevity, I shall refer to these throughout the Judgment as "pregnancy or maternity". Also, for brevity, I shall refer to the grounds listed in s.18(2)-(4) of the EqA as "pregnancy or maternity". For the sake of completeness, the claimant did not take or sought to take additional maternity leave, therefore that could not have been the reason for dismissal or unfavourable treatment.

66. The agreed List of Issues shows that there are overlapping allegations - both between the two complaints (s.99 ERA and s.18 EqA), and with respect to the alleged unfavourable treatment within s.18 complaint. However, as the test of causation is different for unfair dismissal complaints and discrimination complaints, I shall deal with them separately.

67. I shall first deal with the Tribunal's factual findings on the three matters the claimant relies upon in support of her contention that it was her pregnancy or maternity that was the real reason for her dismissal. These are paragraphs 3.1a, 3.1b and 3.1c on the agreed list of issues.

68. I shall also give our factual findings on the issue 2.1e (the allegation that the claimant was replaced by the Locum and the Band 6 Employee 2). Although this matter is being relied upon as unfavourable treatment during her maternity leave, in her evidence the claimant also relied upon this allegation as the evidence showing that the reason for her dismissal was pregnancy or maternity. Therefore, this allegation is relevant to both complaints before the Tribunal.

Issue 3.1a: In December 2020, when the Claimant informed her manager, Michelle Mehta, that she was pregnant, Ms Mehta "bristled".

69. The Oxford English dictionary gives the following definition of "bristle".

    "[…]

    Of a person: to display temper or indignation, to 'show fight.'

    […]"

70. In her evidence the claimant accepted that what she called "bristled" was no more than a long pause. She accepted that there was nothing in that conversation said by Ms Mehta that the claimant took as offensive or unacceptable.

71. There was a disagreement between the parties about how long the pause actually was. We were not presented with the evidence by either party as to their estimated duration of the pause in seconds. We, however, observe that in a telephone conversation even a very short pause in real terms (e.g. 2-3 seconds) might appear as "long". In any event, the exact duration of the pause in our view is irrelevant. Even if it was, what an impartial observer might reasonably consider as a long pause, this, in our judgment, could not be sensibly said to equate to displaying temper or indignation or "showing fight".

72. We accept Ms Mehta's evidence that she was surprised by the claimant's news of pregnancy, as she was expecting the claimant to tell her that she was leaving for another job. Understandably, Ms Mehta needed a moment to process that new information. Having done so, she gave the claimant what can only be described as a thoughtful and caring advice, telling the claimant to take care of herself, not to attend the hospital wards, and to make sure to attend her ante-natal appointments. The claimant confirms Ms Mehta's advice to attend ante-natal appointments in her own witness statement.

73. We also accept Ms Mehta's evidence, which is corroborated by the claimant's own evidence, that she then sought advice from the respondent's HR on other related matters concerning the claimant's pregnancy and forthcoming maternity leave.

74. Looking at this situation in the round, we cannot find anything in Ms Mehta's reaction to the claimant's news, which can be objectively viewed as inappropriate, and even less so, as showing Ms Mehta's intention to dismiss

the claimant for pregnancy or maternity. Ms Mehta showed no hostility, irritation, bed temper or indignation. She did not "bristle".

75. Accordingly, this allegation fails on the facts.

Issue 3.1b: On the 19 January 2021, Ms Mehta said that the Claimant's contract would end in March 2021. Ms Mehta did not mention the budget in this conversation. Shortly thereafter, having heard the Claimant's objections, she said that September 2021 was as far as she could extend the contract because "it was all that was within David Taylor's [Director of Pharmacy's] comfort zone.

76. The claimant in her evidence developed that allegation into Ms Mehta trying to end the claimant's contract at the end of March, and the claimant pushing back on that during their telephone conversation on 19 January 2021. We find that this allegation is both misconceived and not supported by evidence.

77. Why is it misconceived? That is because there was no need for Ms Mehta to try to end the claimant's FTC at the end of March. The claimant's FTC, as things stood then, was ending at the end of March 2021 by reason of the expiry of its term. That was known to both of them. Therefore, there was no need for Ms Mehta to try to end it, nor to tell the claimant that it was ending at the end of March. That would be telling the claimant what she already knew very well herself, and why she wanted to speak with Ms Mehta about extending her FTC in the first place.

78. Furthermore, the claimant's evidence in chief (at para 9 of her witness statement) is that she was anticipating news about Ms Mehta extending her contract. That is further supported by her WhatsApp exchange with her father where the claimant writes: "*I expect [her] to tell me I'm okay to stay for a bit*" (p.225). The claimant knew that her FTC was due to expire at the end of March 2021, if not extended.

79. As it happened, Ms Mehta was working to find a way to extend the claimant's contract. We accept her evidence on this point, which evidence is supported by the contemporaneous documentary evidence (p.218). We reject the claimant's suggestion that Ms Mehta's email to Ms Ivin of 14 January 2021 was written by her to plant disinformation in Ms Ivin's head, so that Ms Mehta's real intention would not become known to Ms Ivin and would not be transmitted to the claimant by Ms Ivin. This is allegation came out of the blue during the claimant's cross-examination. It was not mentioned in the claimant's pleaded case, it is not in the agreed List of Issues, nor in her witness statement. It is not supported by any credible evidence.

80. Turning to the second part in the allegation, we find that the sole reason Ms Mehta did not mention the budget in that conversation with the claimant, was simply because that was not an issue at the time. That became an issue, and indeed - the issue, much later, in October 2021. Therefore, Ms Mehta not mentioning the budget in no way indicates her intention to dismiss the claimant for pregnancy or maternity.

81. Finally, we accept Ms Mehta's evidence that she did not tell the claimant that September 2021 was as far as she could extend the contract because "it was all that was within David Taylor's [Director of Pharmacy's] comfort zone".

82. We prefer Ms Mehta's evidence on this point. Ms Mehta was informed by HR that the Trust policy was to extend fixed term contracts automatically to cover the period of maternity leave. There were no budget constraints at that time that needed to be discussed with David Taylor. Therefore, there were no apparent reasons why he would have had to be consulted about such an extension.

83. We accept Ms Mehta's evidence that 30 September 2021 date was, in all probability, suggested by the claimant. This accords with the claimant 's own evidence in chief (at para 9 of her witness statement) where she says: "*In the call I was asked by Ms Mehta what outcome I wanted. I said that I wanted to take a short period of maternity leave then return to work*".

84. It is also consistent with the claimant's adjusted plan, which she communicated to Jan Vince on 8 April 2021 (p.252), where she writes:

"*Me and Harry were talking earlier and we want to adjust the time we are each taking just slightly. I felt put at a slight disadvantage as my plan was relying heavily on our child's birth being on the 18th July. If they were late then that would substantially affect my time with them and the means of breastfeeding/ bonding*

This is what we want to do:

Liz

A/L 21/06/2021 – 03/07/2021

Maternity leave 8 weeks full pay (04/07/2021- 29/08/2021)

Then 6 weeks half pay + SMP (29/08/2021 - 10/10/2021)

[...]"

85. The claimant's husband, Mr Harry Sahnam, writes to Jan Vince on the same day (p.253) stating that their original plan was 3 months' leave each.

86. Considering the claimant's plan to start her maternity leave at the beginning of July, the extension to the end of September was the 3 months' period to coincide with the anticipated end date of her maternity leave.

87. In short, the extension to the end of September 2021 was not Ms Mehta trying to end the claimant's contract prematurely, but on the contrary, extending it in accordance with the respondent's policy to extend FTCs automatically to the end of maternity leave.

88. To the extent the claimant's case is that not extending the contract for longer than to coincide with the anticipated end date of maternity leave should be taken as showing that Ms Mehta wanted to dismiss the claimant of the reason of pregnancy or maternity, we reject this.

89. We accept Ms Mehta's evidence that she was simply acting on the HR advice and in accordance with the respondent's maternity leave policy. It is also because, as Ms Mehta said in her evidence, often women change their original plans after they give birth. Some may decide to come back sooner, others may decide to stay longer, thirds may decide not to return to work at all. As Ms Mehta said in her evidence, the usual advice from the respondent's Children & Families Manager to women going on maternity leave is: "*once the baby arrives that is when you make your decisions*".

90. This allegation fails on the facts too.

<u>Issue 3.1 c:</u> Ms Mehta "coerced" the Claimant into cutting her maternity leave short by "dangling the trial manager role" in front of her and asked her to complete tasks which would have been the Trial Managers role, such as creating a business plan for funding, obtaining backdated income owed to Research and attending a management course. Shortly before the Claimant's maternity leave commenced in July 2021, during a Teams meeting, Ms Mehta asked the Claimant "hypothetically", if the Trial Manager job came up later in the year (2021), whether she would be interested (to which she said yes).

91. First, we do not accept that Ms Mehta "coerced" the claimant into cutting her maternity leave. As can clearly be seen from our factual findings, it was the claimant's intention all along to take a short maternity leave – originally planned to be 3 months only.
92. To the extent the claimant alleges that her plan was formulated by her operating under the impression that taking a short period of maternity leave would mean her getting the trial manager role - even if that was the case, we do not accept that such impression was formed by reason of the claimant being misled by Ms Mehta in that regard, i.e., by what the claimant describes as "dangling the trial manager role".
93. We accept Ms Mehta's evidence that the role was simply not vacant, and that position remained for as long as the Band 7 Employee remained on long term sick leave. Furthermore, even if the role had become vacant, it would not have been automatically given to the claimant. It would have been advertised internally and externally, and the claimant would have been one of potentially many candidates. Ms Mehta acknowledged in her evidence that the claimant would have been a strong candidate, but that is not the same as being guaranteed to get the job.
94. The fact that the claimant was doing part of the Band 7 Employee's role was a simple matter of the Band 7 Employee's work needed to be re-distributed within the Clinical Trials team. That also formed part of the claimant's performance development. It appears the claimant enjoyed taking on additional responsibilities and made no complaints at that time about being given such responsibilities or being sent to management training courses.
95. Of course, acting up in that role (or doing part of it) meant that the claimant's chances of being appointed were probably higher than of other potential candidates, but that would have still required for the vacancy to come up, and this never happened during the claimant's entire period of employment with the respondent.
96. Long-term sickness cases are often complex and take long time to resolve. It is understandable that for so long as there was a real prospect of the Band 7 Employee returning to their job, it would have been inappropriate and possibly unlawful for the respondent to even advertise, let alone to offer their job to someone else on a permanent basis.

97. Certainly, the fact that the Band 7 Employee was on long-term sick leave for a considerable period of time might have created an impression on the claimant's part that they would never come back, and in that sense their role was "dangling" itself before the claimant.

98. Ms Mehta accepted in her evidence that she might have asked the claimant "hypothetically" whether the claimant would be interested in the trial manager role if it came up later in the year. That, however, was in July 2021 according to Ms Mehta (or in June 2021, on the claimant's case). In either case, that was a few months after the claimant had decided on the duration of her maternity leave, which was in early April. Therefore, that conversation could not have been something that "coerced" the claimant into cutting her maternity leave short.

99. Finally, even if the trial manager role had become available while the claimant was on maternity leave, the respondent would have had to notify the claimant about the vacancy, and the claimant would have been able to apply for the role. If the claimant proved to be the best candidate, it would have been unlawful for the respondent to refuse to appoint her into the Band 7 Employee's role because the claimant was still on maternity leave. Therefore, cutting maternity leave would not have made any difference to the claimant's chances of getting that job.

100. Therefore, this allegation fails both on the facts and as a matter of chronology.

101. I shall pose here to explain that the claimant's whole theory that Ms Mehta was deliberately trying to make the claimant to come back from maternity leave earlier, so that her protected period will have ended before she was dismissed, but made a mistake by telling the claimant in October 2021 that her FTC would not be renewed past November 2021 (that is when the claimant was still on maternity leave and therefore within the protected period) is flawed as a matter of law.

102. Whether the claimant was within or outside the protected period when the dismissal took place, or when the decision to dismiss was taken, makes no difference. This is because under the law as it stood then by virtue of the EU case law (see above - ***Brown v Rentokil Ltd*** 1998 ICR 790, ECJ) and as it stands now by virtue of the changes introduced by the Retained EU Law (Revocation and Reform) Act 2023 and Equality Act 2010 (Amendment) Regulations 2023, means that the protection against discrimination on grounds of pregnancy and maternity covers unfavourable treatment after the protected period as well as during it, where the treatment is because of the pregnancy or pregnancy-related illness during the protected period. In that sense, it does not matter when the employer decides to dismiss a female employee, during or after her maternity leave. What matters is why it decides to dismiss her. If it is because of pregnancy or pregnancy-related illness during the protected period, such dismissal will be discriminatory under s.18 EqA.

103. Accordingly, even if Ms Mehta had such a "cunning plan" (which we find that she did not), from a legal point of view she would have had nothing to gain from enticing the claimant to come back from her maternity leave earlier.

104. There is, of course, a separate consideration with respect to the right to return to work under Regulation 18 of the MAT. This, however, is a different matter altogether, which is not part of the claimant's case and does not arise on the facts.

105. Finally, we also accept Ms Mehta's evidence that she did not know what the protected period meant and was simply relying on HR advice whether it was permissible for her not to extend the claimant's contract in those circumstances. Therefore, enticing the claimant to come back earlier, so to end her protected period, could not have been something operating on Ms Mehta's mind consciously or unconsciously when she decided to dismiss the claimant.

106. Before moving to our conclusion on the central issue in the case, namely the reason for the claimant's dismissal, I shall first deal with the allegation 3.1e as a matter of factual findings.

<u>Issue 2.1e:</u> The Claimant was replaced while away on maternity leave by a locum on or around 17th July 2020 and another colleague [date to be provided] whose hours were increased at an increased rate to ensure there was cover in the department.

107. Although this allegation was advanced by the claimant as unfavourable treatment for the purposes of the s.18 EqA complaint, in her evidence and when cross-examining Ms Mehta, the claimant relied on it as the evidence showing that the real reason of her dismissal was her pregnancy or maternity.

108. Firstly, it is not disputed that "while away on maternity leave" the claimant's work had to be re-distributed among other team members, including the Locum and the Band 6 Employee 2. That had been planned out before the claimant went on maternity leave, as can be seen from the email exchange between Ms Mehta and the claimant on 1 June 2021 (p. 280, 281).

109. Therefore, it is not correct to described the situation as the claimant being "replaced" (meaning "permanently replaced") by "*a locum […] and another colleague*" while away on maternity leave. Both were doing some of the claimant's work simply because she was not there to do that work due to being on maternity leave, but the work was still there and needed to be done.

110. Furthermore, this cannot sensibly be said to amount to unfavourable treatment of the claimant. There was no detriment or disadvantage to the claimant "while away on maternity leave".

111. However, what the claimant appears to be complaining about is not that the Locum and the Band 6 Employee 2 were "replacing" her while she was away on maternity leave, but that after she came back things were not reversed to the pre-maternity leave position, namely letting the Locum go and making the Band 6 Employee 2 to go back to whatever work pattern their had had before the claimant's maternity leave, thus "re-creating" the claimant's pre-maternity role to be performed by her.

112. The claimant says that this shows that Ms Mehta wanted to dismiss her for pregnancy and maternity reason, because, the claimant says, if that was not the case, the obvious solution was to give the Locum one week notice and to "downgrade" the Band 6 Employee 2 back to what they had been doing before the claimant started her maternity leave.

113. However, this is a bare allegation on the part of the claimant, which is not based on anything more than the claimant's suspicion, as to what motivated Ms Mehta when she decided to dismiss the claimant and keep the Locum and the Band 6 Employee 2 in the upgraded role. In our view, this suspicion was comprehensively and convincingly defeated by Ms Mehta's clear and persuasive evidence as to the rational for keeping the Locum and allowing the Band 6 Employee 2 to continue in the upgraded role.

114. The outcome the claimant understandably wanted in those circumstances was simply not a viable solution from the operational and budgetary perspectives. We accept Ms Mehta's evidence that she was told that the Band 7 Employee could come back to work imminently, which meant that if she had extended the claimant's FTC, she would have had to pay two salaries (to the Band 7 Employee and to the claimant) when she had the budget only for one. Ms Mehta could not simply ignore that fact and proceed regardless. As she said in her evidence, which we accept, that would have been very serious mismanagement on her part.

115. "Downgrading" the Band 6 Employee 2 would not have yielded enough money to cover two salaries, either. The top of Band 5 salary (where the Band 6 Employee, as a long-serving employee, was) was £31,534 per annum, where the bottom of Band 6 salary was £32,306 per annum.

116. Letting the Locum go and extending the claimant would have meant taking the risk of the Band 7 Employee returning to work, and then not being able to let the claimant go until the expiry of her extended FTC, or at any rate not before giving her 8-weeks' notice, which the claimant's FTC provided for.

117. It was a very difficult decision that Ms Mehta had to make, but in the circumstances, we accept that it was a rational, and possibly the optimal, decision she took to try to balance the books and minimise the risk of going further overbudget, and at the same time keeping the operations going.

118. It was, of course, very unfortunate that Ms Mehta was only told about the budget cuts on 8 October 2021, and with retrospective effect from 1 October 2021, and was not forewarned of this. We accept her evidence that had she known about the forthcoming end of the Covid-19 budget funding, she would have tried to act differently by extending the claimant's FTC before the cuts were announced or advising the claimant to take a longer period of maternity leave. That demonstrates that, contrary to the claimant's contention, Ms Mehta's intention was to try and find a way of keeping the claimant in the job, if possible. The sudden budget reversal decision with retrospective effect meant that both the claimant and Ms Mehta were caught by surprise.

119. Turning to our overall conclusion on the reason for the claimant's dismissal.

120. As I stated earlier, the causation test and the burden of proof provisions for the purposes of s. 99 ERA complaint and s.18 EqA complaint are different. The former requires that the reason, or if more than one, the principal reason for dismissal be pregnancy or maternity and the burden of proof in showing that this was the true reason for dismissal is firmly on the claimant. That is because at the date of her dismissal the claimant did not have two years of continuous service.

121. The exercise requires the Tribunal to consider the mental processes of the person who made the decision, Ms Mehta in this case. To discover the real reason behind the dismissal the Tribunal must examine all the facts and beliefs that caused the dismissal.

122. In contrast, the causation test with respect to s.18 EqA complaint requires the Tribunal only to be satisfied that the protected characteristic (in this case pregnancy or maternity) had "a significant influence" on the decision to dismiss the claimant. It does not have to be the only factor. The Tribunal needs to examine based on all the circumstances of the case what consciously or subconsciously motivated Ms Mehta when she decided not to extend the claimant's FTC beyond 30 November 2021.

123. As explained above (see paragraphs 61-64) the burden of proof provisions is different for discrimination complaints. The initial burden is on the claimant to prove facts from which the Tribunal could, in the absence of any other explanation, decide that the discrimination took place, and if she established such facts, the burden shifts to the respondent to prove that the protected characteristic in no sense whatsoever was the reason for the treatment complained of.

124. To put it simply, with respect to the dismissal it is easier both as a matter of causation and burden of proof for the claimant to make out her case under s.18 EqA than under s.99 ERA. Conversely, if we were to conclude that the claimant's pregnancy or maternity was in no sense whatsoever the reason for the respondent's decision to dismiss the claimant, it will follow that both her s.18 EqA (in so far as it relates to the dismissal) and s.99 ERA claim must fail.

125. Finally, we find that based on the evidence before us we can make a positive finding as to the real and the only reason for the dismissal and therefore there is no need for us to go through the two-step burden of proof statutory provisions under s.136 EqA.

Overall conclusion on dismissal

126. Our firm and unanimous conclusion is that the sole reason for the claimant's dismissal was the budgetary constraints Ms Mehta was unexpectedly had to deal with. I have already explained in some detail why we found her evidence on this critical issue compelling. Ms Mehta's evidence is also supported by the contemporaneous documents (email of 8 November informing Ms Mehta of the budget cuts at p.300, spreadsheets showing her being significantly overbudget at p. 338 -350).

127. Furthermore, the claimant's theory of Ms Mehta plotting to dismiss her because of pregnancy or maternity largely fails on the facts as we found them.

128. It also makes little sense when one looks at the entire picture. We see no plausible reason why Ms Mehta, who thought of the claimant very highly, wanted the claimant to stay in her team and succeed in her professional development, had good professional relationship with the claimant, was positive about the claimant's attempts to get a job in the legal sector, and was no stranger to female staff in her team falling pregnant and taking maternity leave, would suddenly take exception to the claimant's pregnancy or her taking maternity leave and in retaliation dismiss the claimant. When I posed that question to the claimant when she was giving her evidence, she could not come

up with any clear answer as to possible motives for Ms Mehta to behave in such a vindictive way.

129. Based on the evidence we heard and our primary findings of fact, we see no legitimate grounds to make any adverse inferences to the effect that the claimant's pregnancy or maternity was something that had any influence (consciously or subconsciously) on the Ms Mehta's decision to dismiss her.

130. As I have already said, the fact that the claimant's second extension was only until the end of September to coincide with her anticipated end of maternity leave was no more than Ms Mehta following HR advice to automatically extend the contact to the end of maternity leave. We do not accept that this in any way demonstrates Ms Mehta's intention to dismiss the claimant because of her pregnancy or maternity.

131. Therefore, we find that the claimant's pregnancy or maternity played no part in, and in no way whatsoever influenced, Ms Mehta's decision to dismiss the claimant.

132. This conclusion means that the claimant's claim for automatically unfair dismissal (s.99 ERA) and part of her discrimination complaint (s.18 EqA) as it relates to the allegations of unfavourable treatment on the List of Issues at paragraphs 2.1a, 2.1c (as clarified by the claimant during the hearing – i.e. not extending her contract beyond 30 November 2021), 2.1d and 2.1e are not well founded and stand to be dismissed.

133. For completeness, I shall briefly deal with the claimant's allegation (she advanced at the hearing, but which forms no part of her pleaded legal claim) that not extending her contract beyond 30 November 2021 was to deprive her from gaining 2-year continuous service (which she would have acquired in January 2022) and thus from having more employment rights and protection, including the right not to be unfairly dismissed under s.94 ERA. We accept Ms Mehta's evidence that it was simply an unfortunate consequence of the decision to dismiss, but not the reason for that decision.

134. In any event, ending someone's employment to avoid them gaining 2-year continuous service and stronger employment protection and dismissing someone because of their pregnancy, childbirth or maternity are two completely different matters. The latter is unlawful, the former is not against the law.

Offer to serve out "notice" at home

135. This leaves us to deal with one further allegation of unfavourable treatment, namely:

<u>Issue 2.1b:</u> On the 1 November 2021, Ms Mehta tried to get the Claimant to leave on her first day back from maternity leave by saying the Trust would give her a month's (notice) pay.

136. We find that it was not unfavourable treatment. The claimant was simply offered not to come back to work and instead spend the remainder of her FTC at home – essentially on paid "gardening leave". If anything, that offer was beneficial to the claimant, as it would have given her more time to spend with her newborn baby and more free time to organise herself and look for another job.

137. We also accept Ms Mehta's evidence that the claimant staying at home would not have meant that her access to the respondent's HR or computer systems would have been disabled, or that she would have had to return her laptop.

138. In any event, this was simply an offer, and the claimant was free to take it or, as she did, to decline it. There were no adverse consequences on the claimant for declining the offer.

139. For completeness, we also say that we are satisfied that making that offer was not in any way related to the claimant's pregnancy or maternity. The only reason for that was Ms Mehta trying to help the claimant in her difficult situation by offering her more time to organise herself and focus on securing an alternative employment as soon as possible. The claimant's pregnancy or maternity in no way whatsoever influenced Ms Mehta in making the offer.

140. This means that this remaining part of the claimant's complaint under s.18EqA fails too.

141. It follows that for all these reasons the claimant's entire claim fails and is dismissed.

Employment Judge Klimov
29 January 2024

Sent to the parties on:
1 March 2024

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For the Tribunals Office

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Annex

AGREED LIST OF ISSUES

1. **Introduction**

1.1 The Claimant pursues complaints of pregnancy and maternity discrimination and automatic unfair dismissal.

1.2 The Respondent denies the claims.

2. Pregnancy and Maternity discrimination

2.1 Did those for whom the Respondent is liable under Section 109 EqA act in the following ways as alleged by the Claimant?:

a. On the 29 October 2021, Mrs Mehta called the Claimant while on maternity leave to tell her HR had decided to end the Claimant's employment due to budget cuts.

b. On the 1 November 2021, Ms Mehta tried to get the Claimant to leave on her first day back from maternity leave by saying the Trust would give her a month's (notice) pay.

c. On the 25 August 2021 Ms Mehta contacted the Claimant to inform the Claimant she would be extended until the 30 November 2021. Ms Mehta said to the Claimant she didn't think she needed to ask as she knew the Claimant wanted to remain with the Trust.

d. The Respondent terminated the Claimant's contract on 30th November 2021.

e. The Claimant was replaced while away on maternity leave by a locum on or around 17th July 2020 and another colleague [date to be provided] whose hours were increased at an increased rate to ensure there was cover in the department.

2.2 If so, do those acts amount to unfavourable treatment?

2.3 If so, was the unfavourable treatment done for any of the reasons in Section 18 (2)- (5) EqA 2010?

3. **Automatic Unfair Dismissal**

3.1 Was the reason or the principal reason for the termination of the Claimant's

employment because of her pregnancy, childbirth, or maternity; or her ordinary, compulsory or additional maternity leave? The Claimant relies on the following matters:

a. In December 2020, when the Claimant informed her manager, Michelle Mehta, that she was pregnant, Ms Mehta "bristled".

b. On the 19 January 2021, Ms Mehta said that the Claimant's contract would end in March 2021. Ms Mehta did not mention the budget in this conversation. Shortly thereafter, having heard the Claimant's objections, she said that September 2021 was as far as she could extend the contract because "it was all that was within David Taylor's [Director of Pharmacy's] comfort zone".

c. Ms Mehta "coerced" the Claimant into cutting her maternity leave short by "dangling the trial manager role" in front of her and asked her to complete tasks which would have been the Trial Managers role, such as creating a business plan for funding, obtaining backdated income owed to Research and attending a management course. Shortly before the Claimant's maternity leave commenced in July 2021, during a Teams meeting, Ms Mehta asked the Claimant "hypothetically", if the Trial Manager job came up later in the year (2021), whether she would be interested (to which she said yes).

3.2 If so, would the Claimant have been dismissed fairly in any event? When?

The Respondent asserts the Claimant was dismissed for a potentially fair reason, namely the ending of her fixed term contract.

4. **Remedy**

If the Claims are successful consideration will be given to the appropriate remedies including an ACAS uplift, if appropriate.