EMPLOYMENT TRIBUNALS

Claimant: Ms R Smith-Kennedy

Respondent: Maximus UK Services Ltd

Heard at: London South (by video)

On: 15, 16, 17, 18 and 19 January 2024

Before: Employment Judge Evans
Mr S Corkerton
Mr A Peart

Representation
Claimant: in person
Respondent: Ms M Polimac of Counsel

WRITTEN REASONS PROVIDED FOLLOWING A REQUEST MADE PURSUANT TO RULE 62(3)

The Tribunal gave oral judgment with reasons in this claim on 19 January 2024. A written judgment was subsequently sent to the parties. On 4 February 2024 the claimant made a request for written reasons pursuant to Rule 62(3) of the Employment Tribunal's Rules of procedure. Those written reasons are set out below. The Tribunal's unanimous judgment was that:

1) The claimant's complaint that she was treated unfavourably because of pregnancy is well-founded in respect of issues 1.4 (the MATB1 allegation) and 1.6 (the risk assessment allegation). It is not well-founded and is dismissed in respect of all the other allegations.

2) The claimant's complaint under the Working Time Regulations 1998 is not well-founded and is dismissed.

3) If the parties are unable to reach an agreement in relation to the question of remedy by 16 February 2024, they should apply to the Tribunal for a one day remedy hearing to be conducted by video.

Preamble

1. These are the Tribunal's reasons for its decision given orally at the end of the Hearing on 19 January 2024.

2. The claimant's employment with the respondent began on 10 January 2022 and continues. She is employed as an Employment Adviser.

3. Early conciliation began on 30 August 2022 and ended on 27 September 2022. The claimant presented two claims on 27 September 2022. They included a complaint of pregnancy or maternity discrimination, a complaint under the Working Time Regulations 1998 and various other complaints which the Tribunal has no jurisdiction to hear. The claimant subsequently withdrew such other complaints and they are not therefore considered further in these reasons. On 17 July 2023 Employment Judge Dyal ordered that the two claims should be heard together.

4. The claims came before Tribunal between 15 and 19 January 2024. The parties had agreed a bundle of 610 pages prior to the Hearing to which additional pages 611 and 612 were added during the Hearing. All references to page numbers are to the pagination of the bundle.

5. The claimant gave oral evidence by reference to a witness statement. So too did Ms C Barrios, Ms S Obamwonyi and Ms C McCalman.

Applications and orders during the hearing

6. **Applications to amend:** the claimant had made an application to amend on 28 July 2023 which had not been dealt with before the first day of the Hearing. She also made a further application to amend on the first day of the Hearing. The first application was refused except that the claimant was permitted to add two further dates to the allegation set out at issue 1.1.1 below. The second application was refused in its entirety. The reasons for our decisions in relation to the applications were given orally on the first day of the Hearing.

7. **Application for a witness order:** the claimant had made an application for a witness order on 4 December 2023. This had also not been dealt with before the Hearing began. It was also refused for reasons given orally on the first day of the Hearing.

8. **Application in respect of certain recordings:** the claimant made an application on 16 January 2024 for certain audio recordings to be admitted. That application was refused on 17 January 2024 for reasons given orally on that date.

The issues

9. The issues arising in this case were set out as follows in EJ Dyal's case management orders (page 76). It should be noted that we checked the question of whether any limitation issue arose in relation to any aspect of the claim with the respondent's representative at the beginning of the hearing and we were told that it did not.

1. Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

1.1 Did the respondent treat the claimant unfavourably by doing the following things:

1.1.1 Refusing to allow the Claimant to work from home when she was unwell and telling the Claimant to take a sick day or annual leave (the Claimant says

she was suffering Pelvic Girdle Pain that made mobilising difficult, she was able to work from home but not the office) on:

1.1.1.1 **29 April 2022** [*The respondent's position as clarified at the beginning of the Hearing was that it accepted that the claimant was unwell but not that she was unwell for a pregnancy related reason or that she suffered from PGP on that date. The respondent accepted the claimant was not permitted to work from home on that date and said that this was because she was unwell.*]

1.1.1.2 **17 May 2022 [added by amendment on 15 Jan]**

1.1.1.3 **19 May 2022** [*The respondent's position as clarified at the beginning of the Hearing was that there was no evidence to show that the claimant was unwell for a pregnancy related reason or that she asked to work from home on that date. She simply came into work late. There was therefore no refusal to allow her to work from home because there was no request*]

1.1.1.4 **24 May 2022** [*The respondent's position as clarified at the beginning of the Hearing was that there was no evidence to show that the claimant was unwell for a pregnancy related reason or that she asked to work from home on that date. She simply came into work late. There was therefore no refusal to allow her to work from home because there was no request*]

1.1.1.5 **28 June 2022** [*The respondent's position as clarified at the beginning of the Hearing was that there was no evidence to show that the claimant was unwell for a pregnancy related reason or that she asked to work from home on that date. She simply came into work late. There was therefore no refusal to allow her to work from home because there was no request*]

1.1.1.6 **12 July 2022 [permitted by amendment on 15 Jan]**

1.1.1.7 **15 September 2022** [*The respondent's position as clarified at the beginning of the Hearing was that it agreed to the claimant working at home in morning but stated that she would be deemed as working for half a day with sickness absence in afternoon.*]

1.2 **On 3 August 2022 telling the Claimant to take a sick day to attend an antenatal appointment;** [*The respondent's position as clarified at the beginning of the Hearing is that this was a misunderstanding rectified on the day, that the claimant was not required to have a sick day on the day and that no absence was recorded*]

1.3 **Refusing to allow the Claimant to work from home during her pregnancy until 26 September 2022, and then only allowing her to work from home one day per week (the Claimant says she ought to have been allowed to work from home as required basis when she had Pelvic Girdle Pain or other pregnancy related illness).** [*The respondent's position as clarified at the beginning of the Hearing was that it denied that she was not allowed to work from home until 26 September - it accommodated working from home when it could. The respondent accepted that from 26 September she was allowed to work from home for 1 day per week.*]

1.4 **The Claimant provide form MATB1– to her manager Chantelle McCalman in July 2022. Ms McCalman failed to process it until the Claimant chased the matter with HR in September 2022. In the meantime and as a result the Claimant says she did not know when she could take maternity leave and this**

contributed to stress and ill-health. [*The respondent's position as clarified at the beginning of the Hearing was that it accepted that the form was provided and was not processed because it was not correctly filled out and the form was processed when a further copy was provided in September. The respondent denies that a MATB1 form was provided in July.*]

1.5 Ms McCalman criticised the Claimant for wearing sandals in a conversation in around August 2022 and told her to wear her shoes around the office. The Claimant says she needed to wear sandals because she had swollen feet on account of pregnancy. [*The respondent's position as clarified at the beginning of the Hearing is that it accepts that there was a conversation about wearing sandals around August 2022 but says that when the claimant said her feet swelled it allowed her to wear crocs.*]

1.6 Failing to carry out a pregnancy risk assessment until 26 September 2022 (the Claimant says she told her manager, at that time that she was pregnant in March 2022). [*The respondent's position as clarified at the beginning of the Hearing was that it accepts no pregnancy risk assessment was done until 26 September but contends that an OH assessment was done in July which it says was of similar effect.*]

1.7 Did the unfavourable treatment take place in a protected period? [*The respondent's position as clarified at the beginning of the Hearing was that to the extent that the factual allegations are made out they took place in a protected period.*]

1.8 If not did it implement a decision taken in the protected period?

1.9 Was the unfavourable treatment because of the pregnancy/maternity? [*The respondent's position as clarified at the beginning of the Hearing was that if there were unfavourable treatment it was not because of the pregnancy/maternity*]

1.10 Was the unfavourable treatment because of illness suffered as a result of the pregnancy? [*The respondent's position as clarified at the beginning of the Hearing was that if there were unfavourable treatment it was not because of illness suffered as a result of the pregnancy.*]

2. Annual leave (Working Time Regulations 1998)

2.1 Did the Respondent unlawfully prevent the Claimant from exercising her right to annual leave?

2.1.1 The Claimant requested to take annual leave on 10 – 17 July 2022. The complaint was not authorised and she lost flights.

2.2 Was the Respondent entitled to refuse to allow the Claimant to take this leave?

[*The respondent's position as clarified at the beginning of the Hearing was annual leave for 11-15 July approved. The respondent says 10, 16 and 17 July 2022 were weekend days.*]

The Law

Pregnancy and maternity discrimination

10. Section 18 of the Equality Act 2010 ("the EA 2010") provides as follows:

(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 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.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on 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.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(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;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

11. The meaning of "unfavourable treatment" in the context of a disability discrimination claim was considered in Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65, [2019]. This case is authority for the proposition that "unfavourable" treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. As was held in the EAT by Langstaff P in Williams, "treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous … Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be."

12. In a claim of pregnancy or maternity discrimination the Tribunal must consider whether there is a causal connection between the treatment and the pregnancy. It must consider why the claimant was treated unfavourably. It is not sufficient for pregnancy or maternity to simply be part of the background context.

13. Underhill LJ set out the correct approach to the reason why question as follows at [58] of City of London Police v Geldart [2021] ICR 1329:

The correct approach to the reason why issue is also well established. The most authoritative statement is in para 64 of the judgment of Baroness Hale of Richmond JSC in R (E) v Governing Body of JFS (United Synagogue intervening) [2010] 2 AC 728 (the Jewish Free School case). The ultimate question is what caused the treatment in question? But, as Lord Nicholls observed at para 29 of his speech in Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065, causation is a slippery word. Answering the causation question in this context may involve two different kinds of inquiry. In a straightforward case the putative discriminator will have overtly applied a criterion based on the protected characteristic. But in other cases, although the ostensible criterion is something else, the putative discriminator may still have been influenced in his or her decision by the proscribed factor, consciously or unconsciously: in such a case it is necessary to examine their mental processes to establish what caused them to act as they did. In the jargon of discrimination lawyers the former are sometimes described as criterion cases and the latter as motivation cases. The distinction is not black-and-white, but it is a useful working tool.

14. Applying this test, Underhill LJ concluded that there was no direct sex discrimination when a claimant who was absent on maternity leave was not paid an allowance that was not paid to any employee who was absent. The reason for the non-payment was absence, not maternity leave.

15. In Geldart Underhill LJ expressly considered whether this approach could be reconciled with the authorities culminating in Webb v Emo Air Cargo (UK) Ltd (no 2) [1995] ICR 1021. He summarised these at [44] as follows:

> *The authorities culminating in Webb establish that the dismissal of a worker, or the refusal of employment, because of current or anticipated pregnancy/maternity absence is to be treated as discrimination on the ground of her sex, without the need for the identification of a male comparator in materially the same circumstances. It is no answer to say that she would have been dismissed for the equivalent absence occasioned by something other than pregnancy/maternity, such as ill-health: the two situations are not comparable. I should note that there are several other decisions of the CJEU to the same effect the only one to which we were specifically referred was Brown v Rentokil Ltd (Case C-394/96) [1998] ICR 790; [1998] ECR I-4185 but they simply reflect the working out of the principle in different situations.*

16. He concluded that it could for the reasons he gave at [62]:

> *That approach, identifying absence rather than maternity absence as the relevant reason, echoes Lord Keith's initial analysis in Webb v Emo, which of course he had to abandon as a result of the decision of the CJEU: see para 43 above. But Webb v Emo, together with Dekker and Hertz, which it followed, are cases of a different kind. They were not concerned with pay but with dismissal. That is a fundamental distinction. It is one thing to proscribe the dismissal, or other adverse treatment, of a woman for being absent as a result of pregnancy/maternity; but it is quite another to require that she be paid during a period of pregnancy/maternity absence. The scheme of both the domestic and the EU legislation is that a woman should receive maternity pay on a prescribed basis for a prescribed period; but the whole premise of the scheme is that that is required because she would not otherwise be entitled to be paid since she is not available for work. That is stated explicitly by the CJEU in Gillespie: see para 45 above. It is plainly not sex discrimination not to*

pay a female employee who is absent on maternity leave more than the amount of maternity pay to which she is entitled during the prescribed period, nor, if she remains absent beyond that period, not to pay her at all.

17. Geldart was a direct sex discrimination claim. However, the EAT reached a very similar decision in relation to claims under section 18 of the EA 2010 in Interserve FM Limited v Ms A Tuelikyte [2017] IRLR 615. At [17] Simler J noted as follows in relation to the applicability of the approach in Richmond JSC in R (E) v Governing Body of JFS (United Synagogue intervening) (referred to above) to section 18 claims:

17. It was not in dispute before me that this approach is appropriate in a direct discrimination claim under section 18 just as it is under section 13, nor was it suggested that the absence of any ability to pursue an indirect discrimination claim on the basis of pregnancy or maternity leave under section 19 alters the position in any way. I consider that to be correct. There is no reason why the approach in a direct discrimination claim under section 18 should not follow the approach identified and explained in the cases I have just referred to. Indeed, there is authority in the Appeal Tribunal that supports this approach (see in particular Johal v Commission for Equality & Human Rights UKEAT/0541/09, a decision of HHJ Peter Clark; and see also the decision in Martinez).

18. She went on to observe at [20]:

In domestic law, the point is well established that the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination.

19. Finally, she observed at [22]:

22. In cases that do not involve the application of any inherently discriminatory criterion and where the discriminatory reason or grounds exist because of a protected characteristic that has operated on the discriminator's mind or thought processes to some extent (whether consciously or subconsciously) the discriminatory reason for the conduct need not be the sole or even the principal reason for the impugned treatment. It is enough that it is a contributing cause in the sense of a significant influence.

20. If the respondent does not know that the claimant was pregnant then pregnancy cannot be the reason (Hair Division Ltd v Macmillan [2013] EqLR 18).

21. Section 136 of the EA 2010 provides for a shifting burden of proof in cases such as these:

(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.

22. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263.

23. In a complaint of pregnancy and maternity discrimination, to shift the burden of proof the claimant will need to establish on the balance of probabilities that they have suffered unfavourable treatment and that there are facts from which it can be inferred that the reason for such treatment was one of the four reasons prohibited by section 18.

Risk assessments and pregnancy

24. Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 ("the MHSW Regulations") set out a duty on an employer to make a "suitable and sufficient" assessment of risks to health and safety.

25. Regulation 16(1) of the MHSW Regulations provides the employer must specifically include an assessment of particular risks to new or expectant mothers and their babies where:

    25.1. the persons working in an undertaking include women of childbearing age; and

    25.2. the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II to the EU Pregnant Workers Directive (No.92/85) ('the Pregnant Workers Directive').

26. This is an obligation on employers to carry out a general risk assessment in terms that are not specific to individual workers. Equally, however, the need to carry out this general type of risk assessment does not arise by reason of any particular pregnancy being notified to it.

27. The need for an individual risk assessment arises when an employee gives written notice of her pregnancy under regulation 18(1) of the MHSW Regulations. The employer must then consider whether the measures to avoid risks identified by the general risk assessment will sufficiently avoid risks to the individual employee. It not, the respondent must take additional action under regulations 16(2) and (3). These provide:

    (2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.

    (3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.

28. An employer is not required to take any action under regulation 16(2) or (3) until the employee has "notified the employer in writing that she is pregnant, has given birth within the previous six months, or is breastfeeding" (regulation 18(1)).

Further, the employer is not required to take action if the employee has notified the employer that she is pregnant but has failed, within a reasonable time of being asked to do so in writing by the employer, to produce a certificate from a registered medical practitioner or registered midwife stating that she is pregnant (regulation 18(2)(a)).

29. The failure to carry out a risk assessment under the MHSW Regulations may entitle a claimant to bring a claim under section 18 of the EA 2010. However, in Indigo Design Build & Management Ltd & anor v Mrs M Martinez [2014] UKEAT/0020/14, the EAT held at [31] that the same approach as should be taken under section 13 should be taken in a direct discrimination claim under section 18 and that a failure to carry out a risk assessment was not necessarily an act of discrimination:

> *Failure to provide a notification or a risk assessment relating to pregnancy or maternity leave may be, but is not necessarily, "because of" pregnancy or maternity leave. It may, for example, be a simple administrative error. The same process of reasoning is required in such a case as is required in any other discrimination case.*

30. Further, if the unfavourable treatment relied on is the failure to carry out a pregnancy-specific risk assessment under regulation 16, the claimant must prove: (a) that she notified her employer in writing that was pregnant; (b) the work was of a kind that could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby, and (c) the risk arose from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of the Pregnant Workers Directive (O'Neill v Buckinghamshire County Council [2010] IRLR 384).

Annual leave and the Working Time Regulations 1998

31. Regulations 13 and 13A of the Working Time Regulations 1998 give workers the right to 5.6 weeks' annual leave.

32. Regulation 15 deals with dates on when leave may be taken.

> *(1) A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*
>
> *(2) A worker's employer may require the worker—*
>
> *(a) to take leave to which the worker is entitled under regulation 13 or regulation 13A; or*
> *(b) not to take such leave (subject, where it applies, to the requirement in regulation 13(12)),*
> *on particular days, by giving notice to the worker in accordance with paragraph (3).*
>
> *(3) A notice under paragraph (1) or (2)—*
>
> *(a) may relate to all or part of the leave to which a worker is entitled in a leave year;*

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

33. A "relevant agreement" includes a contract of employment. The contract of the claimant at page 166 states:

8.3. You must follow the relevant Annual Leave Policy when requesting and taking any holiday. Failure to do so may result in us refusing to allow you to take holiday for the time you have requested.

34. Unfortunately, the respondent's Annual Leave Policy was not included in the bundle but, for reasons which will become apparent, this was not a material omission.

Findings of fact

35. These findings of fact do not of necessity refer to all of the evidence that was before the Tribunal. As in many cases, the bundle was of excessive length and the Tribunal made plain at the outset that it would not necessarily read pages contained in it that were not referred to in the witness statements or during the course of the Hearing.

General background findings

36. The claimant was employed as an Employment Advisor with effect from 10 January 2022. The respondent delivers programmes and services which provide employment skills and support for disabled people and people with long-term health conditions. Such people are referred to by the respondent as "participants". It does this pursuant to a contract which it has with the Department for Work and Pensions ("the DWP").

37. The claimant's first line manager was a "Business Manager" ("the First Line Manager"). He remained her line manager until the end of July 2022 although, as a result of the claimant raising a grievance and complaints against him, another Business Manager, Ms McCalman, had some responsibility for the claimant from early July 2022. Ms McCalman became the claimant's line manager at the end of July 2022. There were approximately 25 employees in the office where the claimant was employed.

Terms of employment

38. The claimant's contract of employment (page 163) ("the contract") contains a probationary period. Clause 7.1 provides:

Your employment will be subject to an initial probationary period of 6 months, however this could be terminated or extended in the event of underperformance, poor sickness or conduct.

39. The contract provides that the probationary period may be extended by up to 3 months (clause 7.3).

Credibility of the witnesses

40. The two principal witnesses were the claimant and Ms McCalman. We found the claimant to be a more credible witness than Ms McCalman for the following reasons:

40.1. Although – as identified below – we found the claimant's recollections to be on occasion imprecise, in broad terms we found her oral and written witness evidence to be internally consistent and, in addition, we found her witness evidence to be generally consistent with the documentation.

40.2. By contrast, we found the witness evidence of Ms McCalman often to be inconsistent, contradictory or confused. To give but two examples:

40.2.1. In her witness statement (paragraph 10) she states "in our meeting Richelle did not tell me that she was pregnant or that her lateness and/or absence was in any way connected to her being pregnant". However, it is perfectly clear from the respondent's own notes of that meeting that the claimant did exactly that (middle of page 248).

40.2.2. In her witness statement (paragraph 16) she states in respect of the ante-natal appointment that the claimant attended on 3 August 2022 "It hadn't occurred to me that the appointment was an antenatal appointment as I was not made aware that the appointment was an antenatal appointment which I knew would have been different". Her witness evidence in this respect was:

40.2.2.1. Inconsistent with the documentary evidence as there is an email at page 359 showing the claimant emailed Ms McCalman about the appointment on 1 August 2022 and, also, another email at page 369 sent on the day of the appointment telling Ms McCalman that the appointment was lasting longer than anticipated;

40.2.2.2. Contradictory because her witness statement suggests that the reason Ms McCalman said what she said was that she did now know the claimant was attending an antenatal appointment ("which I knew would have been different") whereas in her oral evidence she said that it was because she did not know that antenatal appointments were treated differently to others ("I just assumed that it was like any other appointment").

40.2.3. Ms McCalman accepted in answer to questions asked during her oral evidence that her witness statement was in some respects inaccurate. However, we find that this did not undo the damage done to her credibility.

The claimant's pregnancy and pregnancy related illness

41. The claimant discovered she was pregnant in February 2022 and, we find, told the First Line Manager about this at some point in March but initially asked him to keep this information confidential. We find that she suffered from illnesses arising because of her pregnancy throughout her pregnancy. She suffered from both morning sickness and Pelvic Girdle Pain ("PGP"). We find that she told the First Line Manager about these fairly early in her pregnancy. We also find that Ms McCalman knew about them no later than the meeting of 6 July 2022 to which we turn below. We so find because, as Ms McCalman explained, the First Line Manager carried out a handover and, also, because the claimant mentioned them to her.

The claimant's relationship with the First Line Manager and subsequent performance management

42. The claimant's relationship with the First Line Manager soured in late April/early May 2022. This was we find unrelated to her pregnancy. The First Line Manager had raised certain concerns about her performance with her on 3 May 2022 (page 158). She responded saying amongst other things that she felt her workload was excessive and she believed the First Line Manager gave her duties falling outside her role. She did not like the way in which he wrote and spoke to her. She was also dissatisfied with the fact that, if she could not attend work because of illness, he did not wish her to contact him before 8.45am (see question 4 of the email at page 145). We find that the source of the conflict between the First Line Manager and the claimant was a mixture of his dissatisfaction with her work and his heavy handed and on occasions inappropriate management style. An example of this is at page 142 where in a text message he wrote:

> *OK, firstly, I have stated to you that you need to inform me 15 mins before 9am if you are sick. You failed to do so today, you have participant coming in asking for you, which I have to sort out. Watch your mouth when talking to me about having home issues. I have a responsibility to ensure that you communicate with me about your whereabouts.*
>
> *Me, stating to you that have a final warning, is me letting you know that moving forward if you continue to not go through the correct procedure with me, I will start to formally document.*

43. The claimant then raised her concerns on 13 May 2022 with Sarah Clamp, a Service Delivery Director and, in the course of doing so, informed her (and so the respondent) in writing that she was pregnant (email at page 149). She asked for a change of line manager but again did not suggest that her dissatisfaction with the First Line Manager related to his treatment of her in relation to her pregnancy. The concerns she raised with Ms Clamp are summarised in an email at page 154.

44. The claimant ultimately raised a grievance against the First Line Manager (page 181) on 4 July 2022. Again, she did not allege that the First Line Manager had treated her unfavourably because of pregnancy or pregnancy related illness and did not raise the question of working from home. She did however raise the following issues in a subsequent email of 7 July 2022 (page 257) stating:

> *5. when I've requested to work from home/leave work due to being in pain/sich he's refused*
>
> *6 been marked as late when its been pregnancy related issues – understandably im late however I have sent in an email*

45. The First Line Manager denied that this had happened when interviewed (page 276). The grievance of 4 July was partially upheld (page 355). It was not upheld in relation to the issue of working from home or being marked late for pregnancy related reasons (page 356). The claimant did not appeal this part of the grievance outcome (the appeal meeting notes were at page 409). Following the grievance outcome, the claimant's line manager was changed to be Ms McCalman.

46. The claimant's probationary review meeting (categorised as a "conduct meeting") took place with Ms McCalman on 6 July 2022 (page 242). It dealt with complaints from participants and other performance issues; the claimant's conduct towards her manager; lateness; and the claimant's alleged non-compliance with the respondent's dress code.

47. It is clear that during the meeting on 6 July 2022 the claimant raised the issue of her pregnancy and pregnancy related illness when asked about the 5 occasions on which she had arrived late (page 248). Ms McCalman is recorded as saying "we have to look into those lates I can understand your symptoms, but we need to try and see what we can do better". When asked about this in her oral evidence Ms McCalman did not know what if any action had been taken in relation to this, saying that it was up to the First Line Manager.

48. We find that in fact no significant action was taken in relation to this by the respondent in the period immediately following the meeting and we find it surprising that Ms McCalman, having conducted the meeting, thought that it was up to the First Line Manager to follow up, particularly given that she took over line management responsibilities for the claimant just a few weeks later. In this respect we also note that when Ms McCalman subsequently agreed a Probation Action Plan (page 442, dated 1 August 2022) the sections related to Attendance and Punctuality did not acknowledge in any way that the claimant's pregnancy might (because of morning sickness and/or PGP) affect her attendance and punctuality. Rather they simply state "Richelle needs to make sure to attend in office on all her working days" and "Richelle will need to make sure that she is in the office by 9am everyday" (page 445). We found Ms McCalman's explanation for this in her oral evidence unconvincing. She said it was because "[the claimant] didn't say it was an issue in discussions about her attendance, asked if she wanted to move times but she said didn't want to do that". We found it unconvincing because the claimant quite clearly had raised it as an issue on 6 July.

49. Following the meeting on 6 July 2022 the respondent decided to extend the claimant's probationary period and did so. It was reviewed weekly until early October 2022 when the claimant went off sick and after when she did not return to work prior to her maternity leave beginning.

50. We have made specific findings of fact below in relation to the risk assessment and MATB1. However, we find that Ms McCalman was generally slow to deal with issues relating to the claimant's pregnancy, including these. For example, she was given advice on 9 August 2022 by Julie McGovern (page 378) which included an instruction to ensure a "maternity risk assessment" had been completed and that her "Mat B1 has been sent to HRSC" but these matters were not dealt with until September. We find that she dealt more swiftly with matters which she regarded as being relevant to the claimant's performance.

51. Ms McCalman conducted a final probation review with the claimant on 21 September 2022 (page 532). The question of lateness is amongst the issues addressed. The probation outcome was sent to the claimant on 7 October 2022

(page 553). It indicated ongoing concerns with lateness, behaviour and conduct. It concluded:

> *Given that we had already extended your Probationary period for a further 3 months period, from June to September, we cannot extend for another further period as this is outside of our Probationary Policy. You are now due to start your Maternity leave, we have no other alternative but to confirm your Probationary.*
>
> *However, there are ongoing significant concerns as outlined above which we not seen any improvement on - lateness, conduct. Behaviour, Performance - Quality and compliance).*
>
> *We will be addressing these issues with an improvement plan, which we will work with you on your return to work from your Maternity leave.*
>
> *We wish you well for your Leave and on the arrival of your new baby.*

Working from home and findings re dates when claimant said she was not allowed to work from home

The position generally

52. Under the respondent's contract with the DWP the respondent was required to conduct most of the more significant interviews with participants face-to-face. This is unsurprising, given the nature of the work. During covid, this requirement was relaxed to some extent with the result that employees of the respondent did work from home. Once covid had ended, the contract with the DWP again required meetings with participants to be conducted face-to-face. This resulted in the respondent changing its own practices and, essentially, requiring employees to be in the office for the whole of their working time. This change took place in June or July 2022.

53. The position as summarised above is reflected in the First Line Manager's email of 3 May 2022 (page 146). It explains working from home days were only introduced because of covid and that the intention is to return to five days in the office.

54. The claimant contends that even after the change in June or July 2022 employees such as those named in the second paragraph of page 6 of her witness statement were allowed to work from home. We do not accept that this is the case because (1) one of the employees named, Ms Barrios, gave evidence (having been called by the claimant) that she had asked if she could work from home for childcare reasons outside the arrangements in place prior to the change and this had not been allowed; (2) the evidence of Ms McCalman was clear on this point. We do accept, however, that following the period to which the claim relates employees have been able to "earn" the right to work from home for the odd day by first meeting all their targets.

55. We find that prior to the change being implemented there were a few occasions when the claimant was allowed to work from home. We find that following the change being implemented, she was generally not allowed to work from home apart from for part of 15 September 2022 (findings below) and from the date of completion of the risk assessment (26 September 2022). This notes (page 530) under Recommended Actions "For Richelle to work from home 1 day a week to help support her. I have also said that if she is wanting to change her start time I

will be happy to support with this." The factual allegation is therefore partially made out.

The specific dates when the claimant said she was not allowed to work from home

56. A number of factual issues arise in relation to the days when the claimant says she was unwell because of Pelvic Girdle Pain ("PGP") but was not allowed to work from home and was told to take a sick day or annual leave:

    56.1. Whether she was unwell;

    56.2. If she was unwell, whether it was because of PGP;

    56.3. Whether she not allowed to work from home;

    56.4. Whether she was told to take a sick day or annual leave.

57. We make the following findings in relation to each of the days in question.

58. The parties approached the question of whether the claimant was not allowed to work from home on a particular day as involving a two stage investigation: (1) whether the claimant had asked if she could work from home; (2) if she had, what the response had been. We find that this was the correct approach in light of our general findings in relation to this issue above.

59. We should note that at the end of her evidence in relation to the specific dates to which we now turn the claimant accepted that she had not on each of the specific dates asked for permission to work from home.

29 April 2022:

    59.1. *Whether unwell:* There is an email from a clinician at page 315 stating "Dear Richelle, as discussed, your diarrhea could be due to a tummy bug – "gastroenteritis" this can be easily passed on, so we would recommend you working from home until up to 48 hours after the symptoms have resolved". We therefore find that the claimant was unwell on the date in question.

    59.2. *Whether because of PGP*: the claimant's oral evidence in relation to the exact reasons for her absence on particular days was (unsurprisingly) at times vague. In light of the email at page 315, we find that the reason for the unwellness on this occasion was not PGP.

    59.3. *Whether she was not allowed to work from home:* we find that she did not expressly ask to work from home because the final probation review notes suggest (page 546) that on the day in question she was called about her whereabouts because she was absent, and only made contact with her manager after noting that the cascade HR system had her marked down as sick, and in that message said "why am I working then if I am marked down as sick?". However, her manager did not then tell her that she could work at home so she was not allowed to work from home.

    59.4. *Whether told to take a sick day or annual leave:* we find that she was told to take a sick day or annual leave.

    59.5. The factual allegation is therefore not made out because we have not found that the reason for the absence was PGP.

17 May 2022

60. We make the following findings in relation to the 17 May 2022

60.1. *Whether unwell:* the claimant's sickness absence record does not show her as unwell on that date (page 557) and her attendance record does not show her as having arrived late (page 555). The only email in the bundle which refers to 17 May is at page 302 and is dated 18 May. It says "I left work early yesterday as a incident took place at my sons school and no one else was able to collect him. (I notified yourself and fareed before I left)". This contains no reference to illness. The claimant said in her oral evidence that she called the First Line Manager to say she was ill. However, in light of our findings above about the precision of her recollections we find that she was not unwell on this day and the other issues do not arise.

61. The factual allegation is therefore not made out.

19 May 2022

62. We make the following findings in relation to the 19 May 2022.

62.1. *Whether unwell:* the claimant's sickness record does not show her as unwell on that date (page 557). Her attendance records show her as having arrived at work 10 minutes late (page 555). She gave no oral evidence in cross-examination on this point and her witness statement does not expressly address it. In these circumstances, we do not accept that she was unwell on this day and the other issues do not arise.

63. The factual allegation is therefore not made out.

24 May 2022

64. We make the following findings in relation to the 24 May 2022

64.1. *Whether unwell:* the claimant's sickness record shows that she emailed "stating that she will be late due to throwing up on herself" (page 557) and her attendance record shows her as having arrived 21 minutes late (page 555). The claimant was therefore unwell on this date.

64.2. *Whether because of PGP*: the claimant has not provided any significant evidence that she was unwell because of PGP. Rather her email suggested that it was because of morning sickness. We do not find that the morning sickness was a consequence of the PGP because no significant evidence that it was has been provided. Consequently, we do not find that her absence was because of PGP.

64.3. *Whether she was not allowed to work from home:* the claimant emailed the respondent at 09.06 (page 307). She explained she was late because she had thrown up and explained that she was "currently stuck in traffic". She did not ask in the email to work from home. In her oral evidence the claimant said that she had thrown up at home, spoken to the First Line Manager to ask him if she could work from home, which he had refused, and then thrown up again on her way to work. There is nothing in the email which corroborates this account, and if she had thrown up previously one would have expected the word "again" to appear in the email. We do not therefore accept that she

asked if she could work from home and this was refused. It cannot therefore be said that she was "not allowed" to work from home.

64.4. *Whether told to take a sick day or annual leave:* we do not find that this occurred in light of our other findings above.

65. The factual allegation is therefore not made out.

28 June 2022

66. We make the following findings in relation to the 28 June 2022

66.1. *Whether unwell:* the claimant's sickness record does not show her as absent from work (page 558) but her attendance record shows that she arrived 26 minutes late. The claimant referred to this lateness in an email on 6 July 2022 (page 303) following a meeting with Ms McCalman (page 242). She explained in the email with reference to 28 June that "I was not well" and also mentioned an issue relating to her daughter. We therefore find that the claimant was unwell on this date.

66.2. *Whether because of PGP*: we find that the reason for the unwellness was PGP.

66.3. *Whether she was not allowed to work from home:* the claimant has produced call logs (page 304) showing that she called the First Line Manager on 28 June at 09.15. We find that this was a call to tell the First Line Manager that she would be late and the claimant accepted in her oral evidence that given she was nearly at work by the time she called it was unlikely that she had asked to work from home. We therefore find that she did not ask to work from home on this date. It cannot therefore be said that she was "not allowed" to work from home.

66.4. *Whether told to take a sick day or annual leave:* this issue does not arise.

67. The factual allegation is therefore not made out.

12 July 2022

68. We make the following findings in relation to 12 July 2022:

68.1. *Whether unwell:* the claimant's sickness record does not show her as absent (page 557) and her attendance record does not show her as having arrived at work late. However, two emails that she sent to the First Line Manager (pages 611 and 612) show that she emailed him at 08.22 saying "Good morning, I've woken up this morning and not long finished throwing up I'm almost ready to go out" and then at 14.02 she emailed saying "I arrived at 10am this morning and now leaving 14.00pm". We find that the claimant was unwell on the day in question.

68.2. *Whether because of PGP*: the claimant has not provided any significant evidence that she was unwell because of PGP. Rather her email suggested that it was because of morning sickness. We do not find that the morning sickness was a consequence of the PGP. Consequently, we do not find that her absence was because of PGP.

68.3. *Whether she was not allowed to work from home:* the emails do not suggest that she asked to work from home and we do not find that she did. It cannot therefore be said that she was "not allowed" to work from home.

68.4. Whether told to take a sick day or annual leave: this issue does not therefore arise.

69. The factual allegation is therefore not made out.

15 September 2022

70. We make the following findings in relation to 15 September 2022:

70.1. *Whether unwell:* the claimant emailed Ms McCalman at 08.14 on 15 September saying "Is it OK to cover my meetings from home today I'm in genuine paint [sic] but I'm able to work… I do not want to be marked as sick as I can do the job from home" (page 484). The claimant emailed again at 09.53 referring to "being in pain and throwing up". We therefore find that the claimant was unwell on the day.

70.2. *Whether because of PGP*: in her email of 11.16 the claimant says "I am in pain, as you are fully aware I have PGP I cannot sit for long periods at all times and I have issues completing daily tasks…". We therefore find that the illness was because of PGP.

70.3. *Whether she was not allowed to work from home:* Ms McCalman initially refused the request (page 484). She subsequently relented in her email of 11.04 and allowed the claimant to work from home for half a day (page 486).

70.4. Whether told to take a sick day or annual leave: the claimant was initially told in effect to take the whole day as a sick day and this was subsequently reduced to half a day.

71. The factual allegation is therefore made out in respect of half the day.

The MATB1 form

72. We find that the claimant provided a MATB1 form to the respondent by giving it to Ms Obamwonyi in July 2022. We find that it was passed on to Ms McCalman by the end of July 2022 and that she misplaced or lost it. In finding that Ms Obamwonyi passed the form to Ms McCalman we have preferred the evidence of Ms Obamwonyi to that of Ms McCalman. We have done so because, although we recognise that the matters raised with Ms Obamwonyi at the beginning of her cross-examination tend to damage her credibility, we nevertheless found her evidence in this respect more convincing than that of Ms McCalman, bearing in mind also our findings about her credibility.

73. The witness evidence in relation to the date the form was provided was contradictory. Ms Obamwonyi thought it was later than July but was not sure. Ms McCalman denied having received it at all. The claimant said she had provided the form to Ms Obamwonyi in July. The reason that we have found that the form was provided and passed on in July 2022 is because this is what the contemporaneous documentary evidence suggests. In particular, the email at page 479 of 13 September refers to the MATB1 form having been provided

"almost two months ago" and the SAR Case Report 65050 of 9 August 2022 at p379 includes guidance stating that:

> *You will also need to ensure a maternity risk assessment has been completed and her Mat B1 has been sent to the HRSC as they will work out what if any maternity pay she would be entitled to.*

74. We consider the most natural understanding of this is that the risk assessment had not been completed but that a MATB1 had been received.

75. We find that a second MATB1 form was then provided to Ms McCalman in early September. We find that she processed this promptly but it was rejected because it did not contain an expected due date. A third MATB1 dated 15 September 2022 (page 499) was then provided by the claimant around 21 September 2022.

76. Overall, we find that Ms McCalman failed to process the claimant's MATB1 form from a date at the end of July 2022 (when the first form was passed to her) to a date in early September 2022 (when the second form was provided). The delay between the second and third form cannot be said to be a failure of processing by the respondent given that the second form had not been correctly completed.

77. We note that the claimant complains that a consequence of the delay in processing her MATB1 form was that "she did not know when she could take maternity leave". We find that this was not the case. The claimant knew her expected week of confinement because this is given in the assessment of 7 July 2022, to which we turn below. Further, the claimant had access to the respondent's pregnancy and maternity policy. She could have consulted this at any point. Its sections 4 and 9 when read together make it perfectly clear that when her maternity leave began was a matter for her, not the respondent. We refer in this respect in particular to its sections 9.1 to 9.4.

The ante-natal appointment on 3 August 2022

78. We find that what Ms McCalman told the claimant when she returned from her antenatal appointment on 3 August 2022 was what the claimant wrote in her email of that date to HR (page 370): "Chantelle has told me I'm only allowed 2 hours or I need to take annual leave for my appointment, my appointment took this period of time due to transfer of antenatal & midwifery care which I explained to Bm Chantelle on the 1/8/22".

79. We find that this contemporaneous document is more likely to be accurate about the detail of what occurred than the recollections of the witnesses. The factual allegation is therefore not made out because this refers to a more absolute position (having to take a sick day *whatever* the length of the appointment) and, also, because it refers to taking a *sick* day, not *annual leave*.

80. We find that Ms McCalman knew that the claimant had attended an antenatal appointment on that day before she returned to the office because of the emails we have referred to above. We find that Ms McCalman did not bother to check the position in relation to antenatal appointments in the respondent's pregnancy and maternity policy before saying what she said and that what she said did not accurately reflect its provisions at section 5. We therefore find that, although the factual allegation is not made out, Ms McCalman acted carelessly on the day in relation to the claimant's pregnancy and maternity rights. Further, we find that she was only made to understand the position correctly after she had been informed of this by the respondent's HR department.

81. Finally, we find that the claimant was paid normally for 3 August 2022. She was not required to take a sick day or annual leave. This is clear from her absence and holiday records contained in the bundle.

The sandals incident

82. We find that the claimant wore the footwear pictured at page 160 after her feet became swollen due to her pregnancy. We find that the wearing of this footwear was approved by a manager at the time (see the text messages at page 160). It was further approved by the assessment considered below by Ability First which took place on 7 July 2022.

83. We find that when Ms McCalman was moved to the Bromley office there were concerns about the performance of that office, which included concerns about how the staff in that office dressed for work. We find that Ms McCalman was moved to the Bromley office because she was regarded as an effective Business Manager with high standards. We find that she raised the issue of appropriate footwear with the staff in the Bromley office generally.

84. We find that Ms McCalman did not regard the footwear pictured at page 160 to be appropriate office wear for the claimant. Ms McCalman commented on this at the meeting on 6 July 2022 (page 249):

> *CM Ok moving on to dress code*
> *R.K What's wrong with my dress code*
> *CM Wearing inappropriate shoes to work*
> *R.K Tyreke said this was fine, how is this now an issue 3 different managers have approved this I was told as long as its closed toe then its fine.*
> *R.K A discussion between myself , Stephanie and also Tyreke. I, happy to put my shoes on when im at my desk but due to my pregnancy my feet swell up and that's why I have to wear this.*

85. We find that Ms McCalman did not pursue the issue further in the meeting. We also find that she only raised the issue on one further occasion with the claimant when she saw someone tread on the claimant's foot in the kitchen. We find that on that occasion she suggested that the claimant should wear crocs not the shoes at page 160. We do not accept that an instruction was given in light of the way that Ms McCalman had not pursued the issue at the meeting on 6 July 2022.

86. In light of these findings we do not accept that the claimant was "criticised" for wearing sandals and "told to wear her shoes around the office" in a conversation around August 2022.

87. We have made these findings doing the best we can with the evidence before us and taking into account the fact that both Ms McCalman and the claimant were inconsistent in their evidence in relation to this issue. For example, so far as the claimant is concerned, she asserted both that Ms McCalman had said that she had worn crocs when pregnant and, also, that she said that she had worn high heels when pregnant.

Risk assessment

88. A work support referral was made by Ms Obamwonyi, a Business Manager, in respect of the claimant on 23 June 2022 (page 162). The reason for it was said to be "Physio requested extra support due to pregnancy". An assessment was

carried out remotely by Teams on 7 July 2022 (page 251). It recorded that the claimant's "expected due date" was 22 October 2022. It recorded that the claimant "reports some discomfort when sitting in her office chair" and that the chair did not adjust. It recommended that she be provided with a different chair and footrest, and also states:

> *Richelle advises she is having to wear mule type shoes, as her feet are swelling as the day progresses. This is seen as an acceptable adjustment by Ability First, as placing feet in shoes that become too tight as the day progresses could prove to be harmful to Richelle.*

89. The assessment of 7 July 2022 was self-evidently not an assessment of the risks that the claimant might face in the workplace because she was pregnant. Rather it was an assessment of what might be done to deal with discomfort she was experiencing at her work-station because of pregnancy.

90. A pregnancy risk assessment was carried out by Ms McCalman on 26 September 2022 (page 528). Ms McCalman had been told to carry out such a risk assessment on 9 August 2022 (page 378). Her evidence about why there had then been a delay of over 6 weeks was confused: she referred both to how busy she was having just taken over a new team and, also, believing that she should wait until she had the MATB1 form filled in correctly before carrying out a risk assessment. She did not consult the respondent's pregnancy and maternity policy to see what was required. She had not received any training in relation to such risk assessments and in her evidence said that she had filled in the form at page 528 on a "common sense" basis.

91. We find that the risk assessment conducted by Ms McCalman did not identify all the risks that it should have identified to the claimant as a pregnant employee in the respondent's workplace. We find that Ms McCalman answered the question "Are there any risks of violence at work?" in a self-evidently incorrect way when she said "no". Many of the "participants" that the respondent deals with are out of work and at risk of being "sanctioned" (i.e. their benefits being reduced or removed) if they do not cooperate with the respondent in its attempts to find them work. Most meetings are held face-to-face. Some participants have mental health problems. There is clearly a risk of violence in these circumstances. Indeed, a risk of violence can be seen in the situation relating to one participant who attended meetings whilst intoxicated and uncooperative (account at page 245) and there was no dispute that the police were called and employees were escorted to their cars after an incident in which another participant had subjected the claimant to unwanted attention and then turned up at the office to speak to her.

The holiday claim

92. The factual allegation is that the claimant was prevented from exercising her right to annual leave under the Working Time Regulations 1998 because she requested to take annual leave for the period 10 to 17 July 2022 but the request was not authorised (with the result that she lost her flights).

93. The claimant's oral evidence about when she had requested leave and when it had been refused was vague. However, in the end she conceded that she had been able to take leave on the dates that she wanted.

94. We find that she was right to do so in light of the emails at page 240 and the record of annual leave at page 571. In particular, the email at 19.18 of 6 July:

I put in for my holiday request initially round mid june from what i can remember and removed it twice to change the dates I had asked tyreke to approve them multiple time to which he ignored .

I spoke to bijal Shah and she said to use some of my holiday as part of my maternity leave as I stated I'll like to work up until I genuine cannot work any longer so I put in another request with new dates

The new request was put in after the conversation with Bijal on 4/7/22
It was then surprisingly approved on the 5/7/22

95. It is clear from the record of annual leave at page 571 that she then took leave as she wished. We therefore find that the claimant was not as she contends refused annual leave between 10 and 17 July 2022.

Submissions

96. The parties both provided written submissions for which we are grateful. We do not set them out in any detail here. However, the respondent's submissions explained why the respondent disputed the factual allegations and focused on its arguments that none of the treatment complained of was "because of" pregnancy when the correct legal test was applied. In her oral submissions, Ms Polimac submitted that Indigo was the correct line of authority in relation to the question of reason for the treatment complained of and that was where the claim "stumbled": causation had not been established. Turning to the claimant's submissions, Ms Polimac maintained that, contrary to what the claimant had said in her submissions, Ms McCalman had been a credible witness.

97. The claimant's submissions focused to a very considerable extent on why the claimant did not consider Ms McCalman to be a credible witness. She made detailed submissions in relation to the contents of Ms McCalman's witness statement. She then summarised how she felt she had been mistreated and ignored, and how in her view the respondent had acted negligently. In her oral submissions, she made a limited number of specific points in relation to the written submissions of Ms Polimac.

98. In her submissions the claimant made an allegation that Ms McCalman had been coached during her evidence. The allegation had not been made during Ms McCalman's evidence. Ms Polimac took instructions on this issue and informed us that she was instructed that no coaching had taken place. The Tribunal had not during Ms McCalman's evidence felt that there was any evidence of coaching – for example, delayed replies. If we had then we would have raised it at the time. The Tribunal took the view that in these circumstances it was not appropriate or necessary to recall Ms McCalman so that the allegation might be put to her and did not do so.

Conclusions

1 Did the respondent treat the claimant unfavourably by doing the following things:

1.1 Refusing to allow the Claimant to work from home when she was unwell and telling the Claimant to take a sick day or annual leave (the Claimant says she was suffering Pelvic Girdle Pain that made mobilising difficult, she was able to work from home but not the office) on:

1.1.1 29 April 2022
1.1.2 17 May 2022
1.1.3 19 May 2022
1.1.4 24 May 2022
1.1.5 28 June 2022
1.1.6 12 July 2022
1.1.7 15 September 2022

In light of the findings of fact above, the factual allegation is not made out except in respect of half a day on 15 September 2022. We conclude that was unfavourable treatment because being told one cannot work from home when ill is "unfavourable" in the sense identified in Williams.

1.2 On 3 August 2022 telling the Claimant to take a sick day to attend an antenatal appointment;

1.2.1 In light of the findings of fact above, the factual allegation is not made out and so the claimant has not proved unfavourable treatment of the kind alleged in the list of issues.

1.3 Refusing to allow the Claimant to work from home during her pregnancy until 26 September 2022, and then only allowing her to work from home one day per week (the Claimant says she ought to have been allowed to work from home as required basis when she had Pelvic Girdle Pain or other pregnancy related illness).

1.3.1 In light of the findings of fact above, the factual allegation is partially made out. Again, not being allowed to work from home when suffering a pregnancy related illness is "unfavourable" treatment in the sense identified in Williams.

1.4 The Claimant provide form MATB1– to her manager Chantelle McCalman in July 2022. Ms McCalman failed to process it until the Claimant chased the matter with HR in September 2022. In the meantime and as a result the Claimant says she did not know when she could take maternity leave and this contributed to stress and ill-health.

1.4.1 In light of the findings of fact above, the factual allegation is made out in respect of the period between the provision of the first MATB1 to Ms McCalman in late July 2022 and the second in September 2022, but not in respect of the period between the provision of the second MATB1 and the third, that period being short, and the further delay being caused by the claimant providing an incorrectly completed form. We conclude that this delay between July and September was unfavourable treatment in the sense identified by Williams. However, for the reasons given above in our findings of fact, we conclude that the result of this was not that the claimant did not know when she could take maternity leave.

1.4.2 In reaching this conclusion we have taken account of our findings above that the form was initially given to Ms Obamwonyi who gave it to Ms McCalman, but we have concluded that that does not affect the substance of the allegation: that Ms McCalman failed to process the form.

1.5 **Ms McCalman criticised the Claimant for wearing sandals in a conversation in around August 2022 and told her to wear her shoes around the office. The Claimant says she needed to wear sandals because she had swollen feet on account of pregnancy.**

1.5.1 In light of findings of fact above we find that this allegation is not made out and so the claimant has not proved unfavourable treatment of the kind alleged in the list of issues.

1.6 **Failing to carry out a pregnancy risk assessment until 26 September 2022 (the Claimant says she told her manager, at that time that she was pregnant in March 2022).**

1.6.1 The claimant informed the respondent in writing that she was pregnant by no later than 13 May 2022. Applying O'Neill, an obligation arose on that date to carry out a pregnancy specific risk assessment under regulation 16 of the MHSW because the work was of a kind that could involve a harm or danger to the health and safety of a new or expectant mother or her baby and the risks arose from working conditions. This is in fact recognised by the respondent's own risk assessment and is also clear in light of our findings of fact above about the risk of violence.

1.6.2 The respondent did not dispute that an obligation to carry out a risk assessment under regulation 16 of the MHSW arose in its submissions and we understand that this conclusion is probably wholly uncontroversial, but we reach it to avoid any doubt.

1.6.3 We find that the respondent failed to comply with its obligation to carry out a pregnancy risk assessment for around four months. In light of our findings of fact above, we wholly reject the assertion that the assessment carried out on 7 July was in some way an adequate alternative. Realistically, that assessment addressed only the question of changes that needed to be made to the claimant's workstation.

1.6.4 We conclude that a failure to carry out the necessary risk assessment for a four month period was clearly unfavourable treatment in the Williams sense.

1.7 **Did the unfavourable treatment take place in a protected period?**

1.7.1 The respondent accepts that it did.

1.8 If not did it implement a decision taken in the protected period?

1.8.1 The issue does not arise.

1.9 **Was the unfavourable treatment because of the pregnancy/maternity?**

1.9.1 The factual allegations of unfavourable treatment which are wholly or partially made out are that the claimant was not allowed to work from home during her pregnancy when she had PGP or some other pregnancy related illness, the allegation relating to the MATB1, and the allegation relating to the risk assessment.

1.9.2 We have concluded that although in each case the unfavourable treatment is clearly connected to the fact that the claimant is pregnant, this is not a "criterion" case. That is to say it cannot be said that the respondent overtly applied a criterion based on the protected characteristic. This is, therefore, a "motivation" case.

1.9.3 We have therefore considered whether the claimant has proved facts from which we could conclude, in the absence of any other explanation, that the relevant employees of the respondent were influenced in their decisions consciously or unconsciously by the claimant's pregnancy or by an illness suffered as a result of her pregnancy. The relevant employees are the First Line Manager and Ms McCalman (in respect of the working from home allegations) and Ms McCalman alone (in respect of the allegations relating to the MATB1 and the risk assessment).

1.9.4 We conclude that the claimant has not proved such facts in respect of the First Line Manager. It is clear that there were difficulties in their working relationship and this may have affected how he managed the claimant. However, in light of our findings of fact above, we conclude that those difficulties were not in any material way related to the claimant's pregnancy.

1.9.5 However, we conclude that the claimant has proved such facts in respect of Ms McCalman in light of our findings of fact in relation to the following matters:

1.9.5.1 The fact that, after the claimant had identified pregnancy and pregnancy related illness as being a factor in her lateness at the meeting on 6 July 2022, Ms McCalman did not take any significant action in relation to this in the period immediately following the meeting;

1.9.5.2 Further and separately, the fact that the Probation Action Plan makes no reference to the claimant's pregnancy in the sections dealing with attendance and punctuality and Ms McCalman's unsatisfactory explanation of this;

1.9.5.3 Further and separately, Ms McCalman losing or misplacing the first MATB1 form provided by the claimant and so the delay in relation to it;

1.9.5.4 Further and separately, what she said to the claimant in respect of her attendance at antenatal appointments on 3 August 2022. Whilst the factual allegation is not made out for the reasons set out above, nevertheless Ms McCalman did not bother to check the position before speaking;

1.9.5.5 Further and separately, the delay in conducting the risk assessment, even after she had been instructed to do one on 9 August 2022, and the way that she carried it out when she did: filling in the form without seeking any guidance in relation to what was required and consequently failing to identify all relevant risks.

1.9.6 We conclude that all these matters individually and collectively show a carelessness and disregard in relation to both the fact and the consequences of the claimant's pregnancy. We find that this carelessness and disregard suggest that the claimant's pregnancy was inconvenient to Ms McCalman and so she paid as little attention to it as possible. It was inconvenient to her because it made her task of improving the performance of the staff in the Bromley office more difficult. Specifically, in relation to the claimant who was regarded as being an underperforming employee by the First Line Manager, it made the task of improving/managing her performance more difficult because special considerations arise when one is managing pregnant employees: it is always necessary to consider whether matters such as lateness, absence and poor performance are explained in whole or in part by their pregnancy when deciding how to deal with them.

1.9.7 We have taken into account all of the evidence when reaching these conclusions, and recognise that there were of course occasions when Ms McCalman addressed the question of the claimant's pregnancy, for example at the meeting on 21 September 2022.

1.9.8 The burden of proof therefore shifts to the respondent. So far as the unfavourable treatment arising from the failure of the respondent to permit the claimant to work from home is concerned (issues 1.1.1 and 1.3), we find that the respondent has proved that the claimant's pregnancy (or either of the illnesses she had as a result of the pregnancy) was not a contributing cause in the sense of a significant influence. We so conclude because we believe that the extent to which the claimant was or was not permitted to work from home as found above quite simply reflected the respondent's policy (which changed over time) in this regard and, also, the fact that the claimant was an employee in her probationary period in respect of whose performance there were concerns. It was not in any sense because of her pregnancy (or an illness she had as a result of pregnancy).

1.9.9 We would have reached this conclusion in relation to all of the individual factual allegations concerning a refusal to allow the claimant to work from home if they had been made out (but, for the reasons set out above, they were not).

1.9.10 However, so far as the unfavourable treatment consisting of the delays in dealing with the MATB1 (issue 1.4) and conducting the risk assessment (issue 1.6) are concerned, we find that the respondent has not proved that the claimant's pregnancy was not a contributing cause in the sense of a significant influence. The respondent did not accept that the first occurred and so provided no real explanation for it. The explanation in relation to the second was confused, as we have set out above. The respondent has not therefore proved that the treatment was not because of pregnancy.

1.9.11 In fact, if it had been necessary for us to reach a positive conclusion about the reason for the treatment, we would have concluded that pregnancy was a contributing cause in the sense of a significant influence because Ms McCalman was influenced consciously or sub-consciously by the fact that the claimant's pregnancy was inconvenient to her management task.

1.9.12 The claimant's complaint that she was unfavourably treated because of pregnancy therefore succeeds in respect of the allegations concerning the MATB1 (issue 1.4) and the risk assessment (issue 1.6) but not otherwise.

1.10 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

To the extent that it is necessary to consider the unfavourable treatment relating to working from home separately under this heading, we reach the same conclusions that we have set out above. The unfavourable treatment was not because of illness suffered as a result of the pregnancy.

2. Annual leave (Working Time Regulations 1998)

2.1 Did the Respondent unlawfully prevent the Claimant from exercising her right to annual leave?

2.1.1 The Claimant requested to take annual leave on 10 – 17 July 2022. The complaint was not authorised and she lost flights.

2.2 Was the Respondent entitled to refuse to allow the Claimant to take this leave?

In light of our findings of fact above this claim fails and is dismissed because the respondent did not fail to authorise leave that the claimant sought to take between 10 and 17 July 2022.

Employment Judge Evans

Date: 7 February 2024

REASONS SENT TO THE PARTIES ON
12th March 2024

FOR THE TRIBUNAL OFFICE

Notes

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