Case Number 1303265/2023
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs L Sahota		**Secure Healthcare Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 2, 3 & 4 April 2024

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mrs M D Rance**
Mr M Pitt

Representation
For the Claimant: **Mr K Aggrey-Orleans (Counsel)**
For the Respondent: **Mr R Ennis (Solicitor)**

JUDGMENT

The unanimous judgment of the tribunal is:

1 The claimant's application for permission to amend her claim to include a claim for harassment on the grounds of sex is allowed.
2 The claimant was not dismissed by the respondent for a reason prescribed in Section 99(3) of the Employment Rights Act 1996 or Regulation 20 of the Maternity & Parental Leave Regulations 1999. The claimant's claim for unfair dismissal is not well-founded and is dismissed.
3 The claimant was not subject to unfavourable treatment or detriment contrary to Section 47C of the Employment Rights Act 1996 or Regulation 19 of the Maternity & Parental Leave Regulations 1999. Her claims for unfavourable treatment and/or detriment are dismissed.
4 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of discrimination on the grounds of pregnancy, pursuant to Section 120 of that Act, are dismissed.
5 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 40 of the Equality Act 2010. The claimant's complaints of harassment on the grounds of sex, pursuant to Section 120 of that Act, are dismissed.

REASONS

Introduction

1 The claimant in this case is Mrs Lillita Sahota who was employed by the respondent, Secure Healthcare Limited, as a Complex Care Co-ordinator, from 11 October 2021 until 6 January 2023 when she was dismissed. The reason given by the respondent at the time of the claimant's dismissal was poor performance.

2 By a claim form presented to the tribunal on 5 April 2023, the claimant brings claims for unfair dismissal and various types of discrimination on the grounds of pregnancy. The claimant also seeks to pursue a claim for harassment on the grounds of her sex. It is the respondent's case that no case of sexual harassment can be discerned from the claim form, and that if the claimant is to be permitted to pursue that claim she will require permission from the tribunal to amend her claim. We will deal with the amendment application later if we consider it is required.

3 The claimant's claims are set out in a List of Issues to be found at Paragraph 41 of a Case Management Order made by Employment Judge Hussain at a preliminary hearing on 10 July 2023. They can be summarised as follows:

(a) Automatic unfair dismissal (Section 99(1) Employment Rights Act 1996 (ERA) and Regulation 20 of the Maternity and Parental Leave Regulations 1999 (MPLR)
(b) Unfavourable treatment by reason of pregnancy (Section 18 of the Equality Act 2010 (EqA) and Section 47C ERA
(c) Detriment contrary to Regulation 19 MPLR and Section 47C ERA.
(d) Harassment related to sex (Section 26(1) EqA.

4 The respondent admits that the claimant was dismissed. It is the respondent's case that she was dismissed for reasons relating to her performance and expressly not because she was pregnant. Pursuant to Section 108(1) ERA the claimant is not sufficiently time-served to bring a claim for "ordinary" unfair dismissal.

The Evidence

5 The claimant gave evidence on her own account and she called her husband Mr Sundeep Sahota to give evidence on her behalf. During the course of the hearing, the claimant along with her husband were sharing responsibility

for looking after their young child. Accommodations were made during the claimant's evidence to facilitate breastfeeding.

6 The respondent relied on the evidence of three witnesses:

(a) Mr Robbie Steeles - Managing Director
(b) Miss Samantha Morden - Clinical Lead Nurse
(c) Miss Prab Patel - Complex Care Co-ordinator

The respondent had also submitted a witness statement from Mr Jeevan Cheema – Marketing Assistant. Mr Cheema was not called to give evidence; there was no acceptable explanation for his absence. The respondent asked us to take account of his witness statement giving it such weight as we thought appropriate. The claimant objected to us having any regard to the witness statement as there was no acceptable explanation for the witness's absence. We confirm that we have disregarded the statement in its entirety.

7 We were provided with an agreed bundle of documents running to approximately 200 pages. We have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing.

8 Mr Sahota was a truthful witness but his evidence as to an event which occurred some 10 months after the claimant's dismissal was of no relevance to the issues in the case.

9 Miss Morden and Miss Patel were truthful and honest witnesses will have no hesitation in accepting their evidence.

10 Mr Steeles is clearly a forthright businessman who has something of a disregard for what he regards as unnecessary paperwork and procedure. But we found him to be an honest witness; we accept what he told us particularly with regard to the reasons for any actions which he took in relation to the claimant.

11 The claimant was an honest witness. She gave evidence as to things as she believed them to be. But her evidence was highly selective and was constructed through the lens of her extreme grievance that she had been unfairly treated and unfairly dismissed. It has been necessary for us to keep in the forefront of our minds that this was not an unfair dismissal case (Section 98 ERA). The central issue for us were the reasons for any unfair treatment - not the unfairness itself.

12 The claimant's credibility was potentially undermined by the readiness with which she made serious allegations against the respondent which were irrelevant

to the issues in the case and for which there was no evidential base. Principally she alleged that Mr Steeles and Miss Patel were engaged in a romantic/sexual relationship. She agreed that this had no relevance to the issues in the case; she adduced no evidence to support the assertion; and it was not even put to Mr Steeles or Miss Patel when they were cross-examined. Similarly, the claimant alleged that the respondent had adopted the practice of encouraging/requiring employees to attend work even when they had tested positive for Covid. There was not the slightest evidence from anybody to support such an allegation which again she agreed no relevance to the issues in the case.

The Facts

13 On 11 October 2021, the claimant commenced her employment with the respondent. The claimant was employed as a Complex Care Co-ordinator role in which she continued until her employment was terminated. Mr Steeles was the managing director of the respondent (he was effectively the owner of the business) and he was the claimant's Line Manager.

14 Having had some difficulty in conceiving, and having suffered miscarriages in the past, in May 2022 the claimant embarked on a programme of fertility treatment. Her first appointment was fixed for 12 May 2022. Mr Steeles was aware of this; he wished the claimant well; and he facilitated her attendance at the appointment. It is clear however from communications passing between the claimant and Mr Steeles that as early as May 2022 there were concerns as to the claimant's performance at work (by this time she had been in post for seven months).

15 Notwithstanding these concerns, in June 2022, the claimant was given a pay rise. We reject the claimant's assertion that at the time of the pay rise she was promoted to the role of Senior Complex Care Co-ordinator. There was no evidence to support this assertion and it was totally undocumented.

16 In September 2022, the claimant became pregnant, it's her account that she told some colleagues informally. The claimant's knowledge of her pregnancy arose by reason of a positive pregnancy test. It was not until 2 November 2022 that she received medical confirmation that she was pregnant. On 4 November 2022, the claimant notified Mr Steeles of her pregnancy by email. The claimant agrees that she has no basis to suggest that Mr Steeles was aware of her pregnancy any earlier.

17 On 26 September 2022 the claimant was given a verbal warning for poor performance following a series of mistakes.

18 On 1 November 2022, following further mistakes the claimant was given a final written warning. It is the claimant's case that she was unaware of this warning having been given as she was absent from the workplace on that day. However Mr Steeles' unchallenged evidence was that it was sent to her correct email address; an email address only accessible and used by her. No explanation has ever been provided as to why the claimant would not see the email upon her return to work. Certainly we find that Mr Steeles believed that the claimant had received the warning.

19 On 1 and 2 November 2022, the claimant was absent from work. She was suffering from sickness and dizziness. It was on 2 November 2022, that she received medical confirmation that she was in fact pregnant. The claimant believes that her sickness on these two days was pregnancy related - but she did not know this at the time and neither did Mr Steeles.

20 Once the claimant had confirmed her pregnancy to Mr Steeles on 4 November 2022, it is common ground that no specific risk assessment was undertaken. Mr Steeles contends that at that stage in the claimant's pregnancy a risk assessment was unnecessary. She was engaged in a sedentary desk-based role with no obvious risks associated. Further, when the claimant notified Mr Steeles of her pregnancy, she specifically requested confidentiality until the end of the first trimester which would not have been until mid-December – Mr Steeles could not have commissioned a meaningful risk assessment without others becoming aware of the claimant's pregnancy. The claimant's evidence on this is a little contradictory: she states that she asked Miss Morden for a risk assessment - but this would not be consistent with her desire for confidentiality. Further it was not Miss Morden's role to undertake a risk assessment and Miss Morden is quite certain no such request was made.

21 The claimant alleges that on 8 November 2022, Mr Steeles shouted at her when she asked a question during the team meeting. When cross-examined about this claimant confirmed that there had been numerous occasions when Mr Steeles had shouted at her and other members of staff both before and after 4 November 2022. Mr Steeles has no specific recollection of shouting on that day. But he did not deny that there were occasions when he shouted at staff during meetings. He was certain that this had nothing to do with the fact that the claimant had recently revealed her pregnancy to him.

22 The claimant alleges that on 15 November 2022 she overheard Mr Steeles making a comment to the effect that "*pregnancy is not an illness*". In the claimant's witness statement, she indicates that this comment arose in the context of her feeling nauseous and telling those around her (this was at a time when so far as Mr Steeles was aware, the claimant's colleagues were still unaware of her pregnancy and it was within the period that he had been asked to

maintain confidentiality). Mr Steeles has no specific recollection of making such a comment but does not deny that he may have made it. However, it was not directed at the claimant; it was not directed at *her* pregnancy; it was a general observation which Mr Steeles maintains was intended to be supportive of pregnant women who should not be treated as though they were ill. The claimant made no complaint about this comment at the time: not to Mr Steeles and not to any of her colleagues albeit that on the claimant's account this comment was offensive to her as a woman and it was said in an office with several other women present.

23 The claimant alleges that on 15 November 2022, Mr Steeles unfairly blamed her for a mistake in staff rosters and that he shouted at her. Again, Mr Steeles has no specific recollection: he does not believe that he ever unjustifiably blamed any member of staff for any error; he does admit that on some occasions he shouted in frustration. He is adamant that none of this was related to the claimant pregnancy.

24 On 16 and 17 November 2022, the claimant was absent from work with pregnancy related sickness and dizziness. On 16 November 2022, she attended her first antenatal appointment. She was booked to be absent from work on that day even if she had not been unwell.

25 On 21 November 2022, the claimant says that she was excluded from a team meeting to which she would normally have been invited. She alleges that this behaviour was repeated at a meeting on 14 December 2022. The claimant provided no specific detail as to the nature of these meetings or why she would normally have expected to have been invited. Mr Steeles gave evidence that the entire team worked in an open office with constant dialogue. But sometimes he needed specific members of different teams to attend closed meetings with him. Some of these meetings necessarily involved the claimant and some did not. He strongly denies ever excluding her from a meeting to which she would normally have been present. It is striking that the claimant has not adduced any supporting evidence from other colleagues as to this happening. The claimant made no adverse comment at the time - she could easily have questioned in an email the reason for her apparent exclusion from a particular meeting but she did not do so. We reject her evidence on this.

26 From 5 December 2022 until 12 December 2022, the claimant was absent from work with symptoms of Covid. This was not a pregnancy related absence. With Covid she would have been absent whether pregnant or not. There is considerable confusion in the manner in which her claim has been presented: the claimant was more vulnerable one she contracted Covid because she was pregnant - but this was not the reason for her absence.

27 It is the claimant's case that on 20 December 2022 Mr Steeles made a comment in the office that he was pleased that another worker had had an abortion. The claimant alleges that this was an act of harassment on grounds of sex. Again, Mr Steeles has no particular recollection of that incident. But he does recall a situation where a member of staff who was only 18 years of age had found herself pregnant unexpectedly. It was clear that the member of staff concerned had agonised about the pregnancy and ultimately have made a decision for termination. Mr Steeles recalls being supportive of the member of staff concerned and it is in that context that any comment he made should be viewed. The comment was not directed at the claimant; it was not about the claimant; it was said in the presence of other women including Miss Patel but no one appears to have been offended by it. And the claimant made no complaint either to Mr Steeles or to any of her colleagues at the time.

28 On 15 December 2022, Mr Steeles sent an email to Ms Stephanie Melia in the respondent's accounts department. The email appears to suggest that Mr Steeles had by then decided that in January the claimant was to be dismissed. This followed further mistakes which had arisen since the final written warning given on 1 November 2022. Mr Steeles does not deny that by then he had decided that the claimant was not performing adequately and indeed his evidence was that his decision that she should be dismissed and been taken as early as 26 September 2022. He produced evidence of advertising for a replacement.

29 On 26 December 2022, Mr Steeles accused the claimant of "*Bullshit*" in relation to an explanation which the claimant was providing for any failure to cover certain shifts. Mr Steeles does not deny using the expression but is adamant that it was unrelated to the claimant's pregnancy.

30 Over the Christmas period 2022, issues arose with regard to staffing and staff rostering which Mr Steeles believes amounted to serious safeguarding issues. These were further errors for which Mr Steeles holds the claimant responsible occurring after 15 December 2022.

31 On 3 January 2023, at shortly before 8pm, Mr Steeles wrote to the claimant inviting her to an urgent meeting the following day at 1pm; also advising her that she was suspended from work pending an investigation into her performance; the claimant was told that she may bring a trade union or other representative to the meeting.

32 The claimant responded to the effect that she could not get a representative at such short notice. She asked for the meeting to be rescheduled; she also asked for information with regard to the investigation. On this, the claimant again was contradictory: on the one hand, she was asking for

written evidence before attending an investigatory meeting - on the other, she was suggesting that he should have been spoken to informally. We accept Mr Steeles' evidence that informality at this stage was what he was seeking. Certainly, applying the ACAS Code and ordinary standards of fairness there is no obligation to provide documentation; advance notice; or an opportunity for representation at initial investigatory meeting.

33 Ultimately, the claimant indicated that her representative would be available on Friday, 13 January 2023 after 1pm. She also requested that the meeting should take place away from the workplace.

34 Mr Steeles responded saying that the time of the meeting could be between 9am and 12noon or between 2pm and 4pm. 1pm was not available. He was adamant that the meeting should take place at the respondent's premises and set a time for the meeting at 2pm on 6 January 2023. The claimant responded saying that she was unable to attend the meeting on that day but did not say why. (We accept by implication however that she had previously indicated that her representative who had not been identified was unavailable. She gave no evidence of making attempts to find an alternative representative who was available.)

35 In the event no meeting ever took place. On 6 January 2023, Mr Steeles emailed the claimant's colleagues requesting details of errors and mistakes which the claimant had made. He received affirmative responses from all of her colleagues these included Miss Morden and Miss Patel. Later on 6 January 2023, Mr Steeles wrote to the claimant terminating her employment with immediate effect but with the payment of one week's pay in lieu of notice. In his letter Mr Steeles referred to their having been over 20 issues since 4 August 2022 which he viewed as a lot of mistakes in a short timeframe especially having regard to time away from the workplace due to annual leave and sickness.

36 On 4 January 2023, at approximately 9:30pm the claimant raised a grievance. She referred to verbal aggression and psychological abuse. She referred to harassment and insults and claims to have witnesses to this behaviour (no witnesses gave evidence before the tribunal). Significantly, the grievance makes no mention of any suggestion of pregnancy discrimination. By a letter dated 26 January 2023, the claimant expanded on her grievance but again does not suggest pregnancy discrimination.

37 Notwithstanding the claimant's dismissal, Mr Steeles offered for the grievance to be dealt with by Ms Melia. However the claimant declined to attend a meeting.

38 It was Mr Steeles' unchallenged evidence that he had provided help to the claimant and her husband in securing a mortgage; that he had been flexible with the claimant with regard to holiday arrangements for her 40th birthday; and that his workforce predominantly comprised women of childbearing age. His business had encountered many pregnancies with employees taking maternity leave and returning to work without any difficulty. He also provided evidence of one specific employee who was actually recruited when she was several months pregnant in the full knowledge that after a very short period she would be absent on maternity leave.

The Law

39 We have considered the statutory provisions upon which the claims are based:

(a) Sections 99(1) and 47C of the Employment Rights Act 1996.
(b) Regulations 19 and 20 of the Maternity and Parental Leave Regulations 1999.
(c) Sections 18 and 26(1) of the Equality Act 2010.

The Burden of Proof

40 For the purposes of the unfair dismissal claim (Section 99(1) ERA and Regulation 20 MPLR), the burden is upon the claimant to establish that on the balance of probabilities she was dismissed for one of the prohibited reasons prescribed in Section 99(3) ERA. In a case such as this it is unnecessary for the respondent to establish any reason for the dismissal.

41 For the purposes of the detriment claim under Section 47C ERA and Regulation 19 MPLR, the claimant must establish that she suffered detriment but thereafter it is for the respondent to prove on the balance of probabilities that the reason for the detrimental treatment was other than a reason proscribed in Section 47C or Regulation 19.

42 Pursuant to Section 136 EqA, in the claims under Section 18 and Section 26(1) EqA, we must consider the evidence and decide whether facts have been established from which we *could* conclude that discrimination has taken place. If such facts have been established, then we *must* find that there has been discrimination unless the respondent proves otherwise on the balance of probability.

Time Limits

43 It is the respondent's case that complaints relating to acts occurring before 22 December 2022 may be out of time we have considered the provisions of Section 123 EqA. The question of jurisdiction depends on firstly whether such acts for part of a continuing series of acts with later incidents of discrimination or alternatively whether we find that it is just and equitable for time to be extended. There is no specific duty on the claimant to provide evidence to the effect that it would be just and equitable to extend, but in this case no evidence or explanation has been provided other than that Mr Aggrey-Orleans maintains that there is no prejudice to the respondent and allowing the out of time claim to proceed.

Amendment Applications

44 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a Case Management Order: Rule 29 Employment Tribunals Rules of Procedure 2013. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

45 ***Harvey v Port of Tilbury (London) Limited*** **[1999] ICR 1030 (EAT)**

Where an amendment is sought, it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks.

46 ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836 (EAT)**

The EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

47 The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

48 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail. However, this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion, but they are not decisive.

49 ***Vaughan v Modality Partnership*** **UKEAT/0147/20/BA (EAT)**
The practical consequences of allowing an amendment which should underpin the balancing exercise a tribunal needs to conduct in weighing the prejudice to each party.

50 In considering whether or not to permit an amendment, the tribunal may take into account the merits of a claim. There is no point in allowing an amendment to add an utterly hopeless case. (***Woodhouse v Hampshire Hospitals NHS Trust*** **UKEAT/0132.12/DM (EAT)** Similarly: "nothing is lost in not being able to pursue a claim which cannot succeed on the merits". (***Herry -v- Dudley MBC and anor*** **EAT 0170/17**)

51 **Decided Cases – Discrimination**

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Richmond Pharmacology Limited v Dhaliwa **[2009] IRLR 336 (EAT)**

The necessary elements of liability for harassment are threefold: (1) Did the respondent engage in unwanted conduct? (2) Did the conduct in question either (a) have the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him. (3) Was the conduct on a prohibited ground? There is substantial overlap between these questions. Whether conduct was "unwanted" will overlap with whether it creates an adverse environment.
Where harassment is said to result from the effect of the conduct - that effect must actually be achieved. However, the question of whether or not conduct had that adverse effect is an objective one - it must reasonably be considered to have that effect, although the alleged victim's perception of the effect is a relevant factor.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had

committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

The Parties' Cases

52 it is the claimant's case this that she was dismissed because of pregnancy or pregnancy related matters. It is the respondent's case that the claimant was dismissed because of performance issues an unacceptably large number of mistakes accumulating since as early as May 2022 which were showing no signs of improvement indeed, to the contrary, things were deteriorating.

53 It is the claimant's case that the following conduct by Mr Steeles' was unfavourable treatment because of pregnancy or pregnancy related matters:

(a) On 8 November 2022, shouting at her for asking a question in a team meeting.
(b) On 15 November 2022 blaming her for uncovered shifts and shouting at her.
(c) On 21 November 2022 excluding her from an update meeting.
(d) On 14 December 2022 excluding her from an update meeting.
(e) On 26 December 2022 unfairly rebuke her in a text message.
(f) On 3 January 2023 suspending her and continuing with a disciplinary process.

54 On the claimant's evidence the conduct alleged at (a) and (b) above was conduct of any nature which had occurred regularly both before and after she informed Mr Steeles' of her pregnancy the respondent's cases that Mr Steeles' has been known to shout at employees but this is unrelated to pregnancy.

55 The respondent's case is that there were no meetings from which the claimant was excluded to which she would ordinarily have been invited. There where meetings at which her attendance was unnecessary.

56 The respondent's case is that the rebuke of 26 December 2022 was entirely justified and was unrelated to pregnancy. And that the suspension and investigation from 3 January 2023 was a response to genuine concerns about the claimant's performance and was unrelated to pregnancy.

57 It is the claimant's case that the following incidents were acts of harassment on grounds of sex:

(a) On 15 November 2022 telling her "pregnancy is not an illness".
(b) On 20 December 2022 saying in front of the claimant "I like her; good that she has had it [an abortion]"

It is the respondent's case that there is no harassment claim properly before the tribunal and that an amendment should not be permitted. In the event that such a claim is permitted, the respondents cases that taken in context neither of these comments amounted to harassment.

58 So far as time limits are concerned, the respondent's primary case is that If the tribunal finds that the dismissal was on grounds other than pregnancy then The allegations occurring before 22 December 2022 cannot form part of a continuing act and are therefore out of time. No case has been advanced as to why it would be just and equitable for time to be extended.

Discussion & Conclusions

Amendment Application

59 Mr Aggrey-Orleans is quite correct when he argues that a harassment claim pursuant to Section 26(1) EqA is clearly advanced in the claim form. The claimant's difficulty however is that the only protected characteristic referred to in the claim form is that of pregnancy or maternity there is no reference to any unlawful discrimination on the grounds of sex. The respondent quite rightly therefore pointed out that there could be no valid harassment claim as the protected characteristic of pregnancy or maternity is not one of the protected characteristics to which Section 26(1) applies. Accordingly we are satisfied that if such a claim is to be pursued the claimant will require permission from the tribunal to amend her claim.

60 In our judgement the amendment which is sought here is a classic relabelling exercise. The facts about which she complains are clearly stated as is the fact that she claims that the conduct amounted to harassment. Bearing in mind that everything else contained in the claim form relates to pregnancy, of course the acts of harassment alleged could only be addressed to women. The fact that the claimant wished to pursue a claim of sex discrimination was properly heralded at the preliminary hearing before Judge Hussain on 10 July 2023. Applying the ***Selkent*** principles to which we have referred, we find that there is no prejudice whatsoever to the respondent in allowing the amendment. Accordingly the amendment is allowed.

Unfair Dismissal

61 We should clearly record that in our judgement the claimant's dismissal did not meet the objective requirements of fairness which we would have expected to see. She had been subject to both verbal warning and a final written warning but both of these had been issued without any formal process. It is tolerably clear from the documentary evidence before us that by 15 December 2022 Mr Steeles had decided that the claimant was to be dismissed in January (Mr Steeles' own evidence was that the decision had been taken much earlier than 15 December 2022). This was without any dismissal process at all. However, as previously observed, we have to be mindful of the fact that we are not in this case considering an unfair dismissal claim applying the requirements of Section 98 ERA. The claimant will only establish that she was unfairly dismissed if she establishes that the reason or the principal reason for her dismissal was pregnancy related.

62 It is also clear however that there were mounting concerns from at least May 2022 with regard to the claimant's performance. Unless we considered that these performance issues were entirely manufactured, we are not concerned with whether or not they were justified - only with whether they genuinely existed. We are satisfied that they did exist. We are satisfied that the claimant was given a verbal warning on 26 September 2022 and a final written warning on 1 November 2022, both of which were before Mr Steeles was aware of the claimant's pregnancy.

63 The mistakes and the problems continued: it was mistakes occurring between 1 November 2022 and 15 December 2022 which prompted Mr Steeles' conclusion that the claimant should be dismissed in January. And there were further serious mistakes over the Christmas period between 15 December 2022 and 3 January 2023 when the claimant was suspended.

64 Having expressed concerns regarding the lack of due process, we should also observe that in our judgement the claimant's characterisation of the respondents post 3 January 2023 investigation as a "*sham*" is an overstatement. We accept that Mr Steeles had already decided that the claimant was to be dismissed, however we accept his evidence that if the claimant had attended a meeting he was open to persuasion from her that dismissal was not necessary. The claimant did not cooperate as she should in ensuring attendance at the meeting which was required of her during paid suspension - it was not a matter of choice. So long as the meeting was during her normal working hours it was not for her to dictate the time, date, or location of the meeting. She had been offered the opportunity to bring a representative - it was incumbent upon her to find a representative who was available.

65 The enquiries which Mr Steeles made of the claimant's work colleagues on 6 January 2023 were intended to compile evidence to support the conclusion which he had already reached. No employee was put under any pressure to respond, and yet they all did respond with highly negative comment regarding the claimant's performance. As stated, this was a case of Mr Steeles shoring up the decision he had made. It was not a case of compiling false evidence as to the claimant's performance in order to mask a dismissal by reason of pregnancy. We accept Mr Steeles' evidence that over a period of months he had received generalised complaints from the claimant's colleagues but he had not documented them as he should have done. His enquiries on 6 January 2023 were designed to document the complaints of which he was already aware.

66 We are satisfied that the sole reason for the claimant's dismissal was Mr Steeles' genuine concern as to the claimant's poor performance. She was not dismissed for any pregnancy related reason. We accept Mr Steeles' evidence that he deals routinely with pregnant employees and has never experienced any problem.

67 Accordingly, the claimant has not discharged the burden which is upon her to prove that the reason for her dismissal was pregnancy related. Her claim for unfair dismissal is therefore not well-founded and it is dismissed.

Unfavourable Treatment and Detriment

68 We find that the incidents of shouting to which the claimant refers may well have occurred. They are not acceptable: but we are satisfied that they were unrelated to pregnancy. Similar incidents occurred involving the claimant before her pregnancy had been announced, and involving other employees. To the extent that the burden of proof is upon the respondent, this has been discharged satisfactorily.

69 We are not satisfied on the evidence before us that the claimant was excluded from any meetings to which she would ordinarily have been invited. The claimant has provided insufficient detail for us to reach the conclusion she seeks. We are satisfied with the respondent's explanation that not all employees are required at every meeting.

70 We are satisfied that the rebuke which Mr Steeles gave in a text message on 26 December 2022 was given because of his genuine concerns as to the honesty of an explanation the claimant was offering. Again, it may be that the language he used was unacceptable, but we are quite satisfied that it was unrelated to pregnancy. To the extent that the burden of proof is upon the respondent, this has been discharged satisfactorily.

71 Consistent with our findings as to the unfair dismissal claim, we are satisfied that the claimant's suspension and the process which followed was purely on the grounds of concerns as to the claimant's performance - wholly unrelated to pregnancy.

72 Accordingly the claimant's claims for unfavourable treatment and detriment are dismissed.

Harassment

73 Firstly, we are satisfied that the comments attributed to Mr Steeles were not made with the proscribed intent. We fully accept Mr Steeles' evidence as to the context in which they were made.

74 As to whether the comments had the proscribed effect: the claimant has not satisfied us on the balance of probabilities that they did. Her case is that these comments were offensive to her as a woman - and yet, she made no complaint at the time not even to any of her female colleagues. And none of the other women present appear to have found the comments offensive in any way.

75 Even if it were the case that because of her heightened vulnerability during her pregnancy, the claimant found otherwise innocuous comments to be offensive. Our judgement is that this would only be because she was hypersensitive. In our judgement, it is not reasonable for these comments made in the context as explained by Mr Steeles to have had any of the proscribed effect.

76 Accordingly, the claim is for harassment on the grounds of sex are Dismissed.

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Employment Judge Gaskell
4 April 2024
Judgment sent to Parties on