EMPLOYMENT TRIBUNALS

Claimant: Ms L Singleton

Respondent: Lancashire County Council

Heard at: Manchester **On:** 20, 21, 23 and 24 May 2024
6 June 2024
(In Chambers)

Before: Employment Judge Slater
Mr A Egerton
Ms V Worthington

REPRESENTATION:

Claimant: In person
Respondent: Mr T Wood, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Tribunal does not have jurisdiction to consider any of the complaints of pregnancy and maternity discrimination and does not have jurisdiction to consider the complaint of harassment relating to calling the claimant "passive aggressive" at a meeting on 14 July 2020, because these complaints were presented out of time and it is not just and equitable to extend time.

2. The other complaints of harassment related to sex are not well founded.

3. The complaint of direct sex discrimination is not well founded.

4. The claimant was engaged on like work to Mr Norris, but there was no breach of the equality clause because the respondent has shown that the difference in pay was due to a material factor which does not involve direct or indirect sex discrimination.

5. The remedy hearing provisionally arranged for 18 November 2024 is cancelled.

REASONS

Claims and Issues

1. The claimant claimed unfavourable treatment because of pregnancy (Section 18 Equality Act 2010), direct sex discrimination (Section 13 Equality Act 2010), harassment related to sex (Section 26 Equality Act 2010), and equal pay on the basis of like work with a comparator, Mr Thomas Norris. The complaints had been discussed and the issues identified to a large extent at a Case Management Preliminary Hearing held on 23 February 2023. We had a further discussion at the start of this final hearing. The claimant confirmed that her equal pay complaint was brought on the basis of like work.

2. The claimant made an application to amend her claim to plead the complaint about being called passive aggressive at a meeting on 14 July 2020 as a complaint of harassment related to sex, in the alternative to the complaint already pleaded of unfavourable treatment because of pregnancy. The respondent opposed the application. We granted the application for the following reasons. There was no material prejudice to the respondent in allowing the amendment. The respondent's primary argument was that the comment was not said. They had to address the same facts in relation to a harassment complaint as in relation to unfavourable treatment because of pregnancy. The Tribunal considered that negligible additional time would be needed in submissions or the Tribunal deliberations to deal with the alternative argument. If the amendment was not allowed, there was possible prejudice to the claimant if she could not argue harassment related to sex as well as pregnancy if the facts found supported the harassment allegation but not that of pregnancy unfavourable treatment.

3. No amended response had been required by the Tribunal and no application made to amend the response to deal with the complaint of equal pay more specifically once this had been identified at the private preliminary hearing. Mr Wood, Counsel for the respondent, had set out the respondent's defence of the equal pay claim in some detail in his skeleton argument provided at the start of the hearing. In response to the Judge raising an issue as to whether the response to the equal pay claim needed an amendment to the response, Mr Wood made an application to amend the response to incorporate the details set out in paragraphs 45 to 49 of his skeleton argument. The claimant opposed the application. The Tribunal allowed the application for the reasons that the Tribunal considered it in the interests of justice that the details of the response to the equal pay claim be set out clearly before the Tribunal heard evidence rather than relying only on the limited way in which it was dealt with in the response form. We did not consider the claimant would suffer any real prejudice if the amendment was allowed and, in fact, we considered it could be to the claimant's advantage to know clearly the respondent's case on equal pay before evidence was heard and arguments made. There was possible hardship to the respondent if the amendment was not allowed in that they could face arguments about what their pleaded defence to the equal pay case was. We

considered that the balance of hardship and injustice lay in favour of allowing the amendment.

4. The claimant applied, prior to the final hearing, to amend her claim by adding a complaint of unfair dismissal. This application was refused at a Preliminary Hearing on 29 June 2023.

5. After reading the claimant's witness statement in which, in paragraph 55 she wrote: "I can only conclude that the prolonged harassment and discrimination I received, was a result of my Equal pay requests back in early 2019", the judge raised the issue of whether the claimant was seeking to bring a victimisation complaint, although this was not pleaded and had not been identified at the case management preliminary hearing. The claimant said she did not intend to pursue a victimisation complaint.

6. Following the discussions with the parties and the amendment applications the Judge drew up a list of complaints and issues which were also agreed by the parties. This is set out as follows.

List of complaints and issues

1. **Time limits**

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 21 February 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

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

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

2.1.1 In the week of 13 July 2020, refuse a request made by the claimant for the meeting to be held on 20 July 2020 to be conducted remotely.

2.1.2 In the week of 13 July 2020, threaten the claimant that, if she did not attend the meeting of 20 July 2020, she would be denied requested annual leave.

2.1.3 At a meeting on 14 July 2020, calling the claimant "passive aggressive"?

2.1.4 At the meeting on 20 July 2020, accuse the claimant of continually representing herself as a victim?

2.1.5 At the meeting on 20 July 2020, raise concerns in a derogatory manner about the claimant's mental health?

2.1.6 At the meeting on 20 July 2020, cruelly inform the claimant that her colleagues did not like to work with her.

2.2 It is agreed that the alleged unfavourable treatment took place in a protected period, being during the claimant's pregnancy?

2.3 Was the unfavourable treatment because of the pregnancy?

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

3. **Direct sex discrimination (Equality Act 2010 section 13)**

3.1 What are the facts in relation to the following allegations:

3.1.1 In the period December 2021 to March 2022 Sue Ryan and Steve Green collecting information about the claimant, including about breaks taken to breast feed her baby.

3.2 Did the claimant reasonably see the treatment as a detriment?

3.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than a man in the same material circumstances

was or would have been treated? The claimant relies on a hypothetical comparison.

3.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of sex?

3.5 If so, has the respondent shown that there was no less favourable treatment because of sex?

4. **Harassment related to sex (Equality Act 2010 section 26)**

4.1 Did the respondent do the following alleged things:

4.1.1 At a meeting on 14 July 2020, calling the claimant "passive aggressive"?

4.1.2 At a meeting with Sue Ryan and Sue Scotland on 9 March 2022, Sue Ryan interrogating the claimant about the case they had been involved in over the weekend.

4.1.3 At the meeting on 9 March 2022, Sue Ryan raising concerns about the claimant's availability on shift.

4.1.4 At the meeting on 9 March 2022, Sue Ryan asking the claimant questions about the age of the claimant's baby.

4.1.5 Sue Ryan's facial expressions and body language demonstrating disgust when asking the claimant about the age and breast feeding of her baby.

4.1.6 Around March 2022, instigating a disciplinary investigation into the claimant.

4.2 If so, was that unwanted conduct?

4.3 Was it related to sex?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. **Equal pay**

5.1 Was the claimant's work like Mr Norris's work?

5.1.1 The respondent accepts their work was broadly similar.

5.1.2 Were the differences between their work of practical importance in relation to the terms of their work? If so, it is not like work. The respondent relies on the matters set out in paragraph 46 of their skeleton argument (added to the grounds of resistance by amendment). Paragraph 46 of the skeleton argument in set out in the Annex to this judgment.

5.2 If the work was like work, can the respondent show that the difference in terms is because of a material factor which does not involve direct or indirect sex discrimination? The respondent relies on the fact that Mr Norris commenced on a higher grade than the claimant. (The material factor was identified by an amendment to the grounds of resistance).

Evidence and the progress of the hearing

7. The Tribunal heard evidence from the claimant and Thomas Norris for the claimant and from the following witnesses for the respondent: Sue Ryan, Team Manager for the Emergency Duty Team; Stephen Green, Practice Manager within the EDT Team and the claimant's line manager; Sue Scotland, Practice Manager in the EDT Team; Paul McIntyre, Senior Manager for the Safeguarding Inspection and Audit Service; and Andy Smith, Head of Service for Safeguarding Inspection and Audit for the respondent.

8. We also had a witness statement, on behalf of the respondent, for Georgine Lee, who had chaired a disciplinary hearing for the claimant which led to the claimant's dismissal. The respondent decided not to call Ms Lee to give evidence and we have not relied on the evidence in her witness statement for our decision. Ms Lee's involvement in the case was subsequent to the matters with which we are concerned.

9. We had an agreed bundle of documents consisting of 889 pages.

10. The case had been listed for 5 days. However, on the morning of 22 May 2024, the claimant informed us that she would not be able to attend the hearing that day, because her sister, who had been accompanying her to the hearing, had been taken ill. We resumed the hearing on 23 May and were able to conclude evidence and submissions in the remainder of the listed hearing. The Tribunal did not, however, have time to make and give judgment so we reserved our decision and met in chambers on 6 June 2024.

Facts

11. The respondent is a local authority. At relevant times the claimant worked as a Social Worker in the respondent's Emergency Duty Team (EDT). The EDT is a team that works out of hours; their role and remit is to respond to social care

emergency situations that arise after the social workers who work during the day Mondays to Fridays finish work. They deal with child protection and adult safeguarding issues. Their work involves dealing with crisis moments where risk of harm is imminent. Their team works from 4.45 pm through to 9 am each weekday and on weekends until 9am Monday morning. At relevant times, the EDT consisted of Sue Ryan, the Team Manager, four Practice Managers, who included Steve Green and Sue Scotland, twelve Social Workers and eight Customer Service Advisors who act as call takers and support staff.

12. There are normally up to 4 Social Workers on shift at any time. In the period from 1 a.m. until 9 a.m., there will be two Social Workers on shift, unless, due to illness or leave, there is only one available. In addition, there will be a call handler, who is not a Social Worker, on shift. Managers work until 1 a.m. but, after that, there is always a manager on call.

13. All Social Workers working for the respondent are grade 8 or 9. Grade 10 is a management position. Some Social Worker positions are grade 8 only. Roles within EDT are grade 8 or 9. If appointed to EDT as a grade 8, there is the potential to progress to a grade 9 position, but this is not automatic. There is a process, which has changed over time, by which the respondent decides whether the Social Worker has demonstrated that they are working at grade 9 level and can be moved onto that grade.

14. The majority of Social Workers in the team at relevant times were women.

15. The claimant qualified as a Social Worker in 2014. After qualifying, she worked as an agency worker, not in a social worker position, for a period before joining the respondent as a Social Worker in January 2015. Before joining EDT, the claimant was a Grade 8 Social Worker with the respondent. She worked in an adult services team. She was appointed to that post in January 2015 on spinal column point 31. Prior to joining the EDT, the claimant sometimes worked bank hours as a Social Worker with the EDT team, as did her comparator Thomas Norris. When working bank hours with EDT, the claimant got some experience with child social care.

16. In 2017, the claimant applied for, and was appointed to, a post of Social Worker with the EDT with effect from 10 March 2017. The post was described in the employment particulars as Grade 8/9. The claimant was informed that her starting salary would be £31,601 and that this was spinal column point 36. Spinal column point 36 at the time was the top of grade 8 and the bottom of grade 9. This involved an increased salary to her previous post, moving to a higher spinal column point. The employment particulars do not make it clear that the claimant was still a grade 8. The claimant did not ask, after receiving this letter, whether she was grade 8 or grade 9. The claimant did not query her letter of appointment.

17. The claimant says she was told by Sue Ryan and others, before she was offered the job, that this was a grade 9 post. Sue Ryan denies this. We prefer the evidence of Sue Ryan in finding that the claimant was not told she would be appointed as a grade 9. The claimant did not, at this stage, have the minimum post qualification experience (PQE) required to be a grade 9. We do not find it plausible that the claimant would be told she would be appointed as

a grade 9 when she did not have the minimum PQE. It may be that the claimant was encouraged to apply for the post in EDT on the basis that it was possible to achieve grade 9 status in that role, in contrast to her previous role which was grade 8 only.

18. Mr Norris joined EDT in August 2017. He had applied for a job with EDT around the same time as the claimant. The reasons for Mr Norris not joining the team earlier are in dispute. Mr Norris was given an identical letter of appointment to the claimant. It is common ground that Mr Norris queried his appointment, which he understood to be on grade 8 rather than grade 9. He suggested he should be on grade 9. Mr Norris had more than the minimum 3 years PQE to be eligible for a grade 9 appointment and was unusual in having post qualification experience in both front line children's and adult social care teams. Sue Ryan considered that his experience would be extremely useful to the team. Sue Ryan approached the head of the service, Andy Smith, who agreed that Mr Norris should be appointed on grade 9.

19. Mr Norris and the claimant had the same starting salary when they joined EDT. However, over time, Mr Norris began to earn more than the claimant because he received grade 9 increments whereas the claimant was at the top of grade 8.

20. Mr Norris had longer post qualification experience than the claimant when joining EDT. The claimant had just over two years' post qualification experience as at March 2017. Mr Norris had around four years post qualification experience with the respondent when he moved into EDT. He had worked in various roles and had experience in both adult and child social care.

21. The claimant's previous role with the respondent, which was her only PQE experience as a Social Worker, was in adult social care. Her experience of child social care as a Social Worker was limited to when she did bank duties for EDT before her appointment to EDT.

22. In April 2019, the claimant discovered, during a conversation with Mr Norris, that he was earning more than her. She raised the issue with her managers. At Sue Ryan's suggestion, the claimant submitted a portfolio to try to evidence that she was working at grade 9. Sue Ryan did not consider that this supported working at grade 9.

23. The claimant brought an equal pay grievance in September 2019. The grievance was rejected by a letter sent to the claimant on 12 December 2019 (p.378). The claimant appealed against this decision in January 2020. The grievance appeal hearing was 30 July 2020. The delay in arranging the grievance appeal was due, at least in part, to the impact of the Covid-19 pandemic. The appeal was heard by Andy Smith who rejected the appeal.

The work done by the claimant and her comparator

24. EDT had a mixture of grade 8 and grade 9 Social Workers at relevant times. When drawing up the rotas, no account was taken of whether the Social Worker was a grade 8 or grade 9. A Social Worker in EDT would have to take on work that came in, regardless of their grade. We accept the evidence of Sue Ryan in finding that, in general, a grade 8 Social Worker would need more management support and oversight than a grade 9 Social Worker. They would expect a grade 9 Social Worker to be able to run a case and go to their manager with a plan, whereas a manager would be directing a grade 8 Social Worker as to how to run a case. More would be expected of grade 9 Social Workers in relation to how they practised as professionals, supported the team and the team manager and dealt with their own continuing professional development.

25. We heard no specific evidence from the respondent's witnesses as to the level of support required by Mr Norris as compared to the claimant and how, if at all, what they did on a day to day basis differed.

Background to the disciplinary hearing on 14 July 2020

26. The disciplinary hearing arose as a result of concerns raised by Sue Scotland in October 2019 about the claimant's practice whilst on a weekend shift. The claimant had been asked to arrange a strategy discussion with the police on a childcare case to agree a safeguarding plan. The meeting did not happen. Although the claimant had made a record on the social work system that she had attempted to call the police, Sue Scotland could find no evidence that this had been done. A fact finding meeting was held by Sue Scotland and Steve Green with the claimant. Following this, Sue Ryan escalated the concern to Andy Smith, who decided that the concern should be looked at under the disciplinary procedures.

27. The claimant was informed by letter dated 12 November 2019 from Paul McIntyre (p.369) that there would be a disciplinary investigation into allegations set out in that letter. The investigation was conducted by Danielle Winkley, Quality and Review Manager, and Carla O'Brien, HR business support officer. Their investigation report (p.437) upheld most of the allegations, including making a finding that the claimant had been persistently dishonest in her explanations as to why her call to the police could not be evidenced. The investigating officers recommended that management consider their findings and conclusions and take any action deemed appropriate.

28. A disciplinary hearing was arranged for 14 July 2020.

29. The claimant was not pregnant when the disciplinary investigation began but was pregnant by the time of the disciplinary hearing.

The impact of the Covid-19 pandemic

30. In March 2020, the Covid-19 pandemic led to the first national lockdown. Members of EDT, including the claimant, who had previously worked from the office, began to work from home. They would still need, on occasions, to make visits to service users.

31. Members of EDT used the chat function on Teams to keep in touch with each other. They used this, amongst other things, to let each other know if they were taking a break. As previously noted, when working at night, there would be one or two social workers working, as well as a call handler, who was not a social worker. Managers worked until 1 a.m., but remained on call throughout the night. It was important that the members of the team on shift knew when, and for how long, any other member of the team was likely to be unavailable.

32. The claimant worked from her home base from March 2020 until she went on maternity leave in January 2021, a period of about 9 months. Prior to the claimant's return to work after maternity leave, it is agreed that there were no issues about the claimant's availability for work.

33. In a meeting on 6 May 2020 between the claimant, Sue Ryan and Steve Green, the managers discussed with the claimant concerns that a number of staff had expressed that they felt uncomfortable with her behaviours to the extent that they did not want to work on the same shift or team with her. A letter sent on 6 May 2020 enclosed a summary of the concerns discussed and confirmed advice that the claimant's behaviours were not acceptable and were not to continue.

The claimant's pregnancy

34. By the time of the events in July 2020 about which the claimant complains, it is common ground that the claimant was pregnant and the relevant managers knew of her pregnancy. The claimant informed the respondent of her pregnancy on 25 June 2020.

35. The claimant suggests that no pregnancy risk assessment was done. The first time the claimant raised this appears to be in her skeleton argument provided to the respondent and the Tribunal on the first day of the hearing. This allegation does not appear in her claim form or in her witness statement. Steve Green, when asked about this, said an assessment had been done and there would be a document recording this but it was not in the bundle. He said not everything was in the bundle but relevant documents had been included. Given the lateness of the claimant raising this issue, we draw no inference about whether or not an assessment was done from the absence of a document in the bundle. Since the claimant had not made this allegation before the skeleton argument, the respondent could not reasonably be expected to have considered the pregnancy risk assessment to be a relevant document, needing to be disclosed and included in the bundle. The claimant gave no evidence about the absence of a risk assessment. We accept the evidence of Steve Green that a risk assessment was done. We consider it more likely than not that he would have carried out such an assessment, given that Sue Ryan, in an email to him of 26

June 2020 (p.427) asked him to undertake an expectant mother risk assessment, sending him a link to the relevant document.

36. Sue Ryan also asked, in the same email, that Steve Green direct the claimant to the "coronavirus" section on the intranet and the guidance for pregnant women. She wrote that the guidance was that public facing work/home visits could continue up to 28 weeks trimester if there were no significant health conditions such as heart or lung disease. She wrote that they would be mindful when sending the claimant out on visits that she was not being exposed to high risk situations i.e. residential care homes where there was a confirmed covid outbreak amongst numerous residents.

37. We heard no evidence to suggest that the claimant had any particular health conditions making her more vulnerable than most pregnant women. Other than attendance at the face to face meeting on 20 July 2020, which we deal with later, the claimant has made no allegations about being put at particular risk during her pregnancy.

The disciplinary hearing – 14 July 2020

38. A disciplinary hearing with the claimant was held on 14 July 2020 by video conference. It was conducted by Andy Smith. The allegations related to a particular case the claimant worked on and were: falsification of work undertaken on a child's record; and persistent dishonesty regarding the claimant's actions.

39. The claimant makes one allegation in relation to the disciplinary hearing conducted by Andy Smith on 14 July 2020. She alleges that Mr Smith called her passive aggressive in this meeting. The claimant alleges that this was harassment related to sex or, alternatively, unfavourable treatment because of pregnancy.

40. We accept the evidence of Andy Smith and Sue Scotland as to the claimant's conduct in the meeting in that she turned sidewards to the camera and purposely looked away when Sue Scotland came online to give evidence. Every now and then the claimant would turn around towards the camera and challenge what Sue Scotland was saying. Mr Smith perceived this as aggressive behaviour. Sue Scotland found it disrespectful. At one point, whilst Sue Scotland was giving evidence and the claimant was turned away sideways, the claimant started eating a bag of crisps. Mr Smith told the claimant that she should turn around and listen to what was being said. The written reflection of the claimant (p.460) supports that Mr Smith raised an issue with her about not looking at people on the screen when they were talking.

41. We find that Mr Smith said at the start of the meeting, as was normal practice, that anyone could ask for a break at any time. They had one break when Mr Green was to join the video conference. The claimant, who was represented by a trade union representative, did not request any other breaks. We find that the claimant did not say anything about being nauseous or feeling unwell. In the claimant's email to her trade union representative on 15 July 2020 (p.859), the claimant wrote that she tried her best to keep focused for such a long time on screen but her eyes were starting to hurt. In her reflection on the meeting

written some time after the meeting (page 460), the claimant refers to being extremely tired and that the 3 hour long video call was hurting her eyes. In neither the email nor the reflection, does the claimant refer to feeling nauseous. The claimant has not satisfied us that she was feeling nauseous in the meeting and that this was why she was eating crisps. She has not satisfied us that the reason she was looking away from the screen was because of pregnancy or any illness suffered as a result of pregnancy.

42. The claimant wrote in her email to her trade union representative on 15 July 2020: "I don't think I deserved to be called passive aggressive". Mr Smith could not recall using these words. We find, based on the near contemporaneous evidence of the claimant's email dated 15 July 2020 that Mr Smith did use this term in relation to the claimant's behaviour. He used this term because of the behaviour he observed at the meeting, referred to in paragraph 40 above.

43. The outcome of the disciplinary hearing was that both allegations were upheld and the claimant was issued with a final written warning, to remain on the claimant's personnel file for 18 months. The claimant was told of the decision at the hearing and this was confirmed by a detailed 12 page letter dated 27 July 2020 (beginning at p.492). The claimant was advised that she had a right of appeal but she did not appeal the warning.

The lead up to the meeting on 20 July 2020

44. On 16 July 2020, Sue Ryan wrote to the claimant (p.470), writing that she considered it important that they look at drawing a line under the disciplinary outcome and move forward. She wrote that she and Paul McIntyre would like to meet the claimant the following Monday (20 July) so they could sit down together and discuss how they would move forward. She asked the claimant to meet them at County Hall on 20 July. She wrote that they would ensure they had a room big enough that would allow them to socially distance during the meeting.

45. The claimant replied on 17 July 2020 (p.470) to say that she could not make next Monday, writing that she was hoping to get away for a few days.

46. Sue Ryan replied, asking her to confirm that she was on shift on Monday 20 July. The claimant replied, writing on 17 July at 17.26 (p.469), that she had asked Steve to take this as annual leave. Sue Ryan queried this, writing that the rota showed the claimant had cancelled this leave.

47. The claimant did not give any evidence in her witness statement about having made a further request for leave for 20 July, prior to being asked to attend the meeting on 20 July. In oral evidence, she asserted that she had made a verbal request of Steve Green. Steve Green, in evidence, disputed that the claimant had made such a request. From the contemporaneous emails, it appears that the claimant made a request by email at 17.30 on 17 July 2020 (p.462) to take leave on Monday 20 July. This email does not say that it is putting in writing an oral request previously made to Steve Green. We prefer the evidence of Steve Green, which is more consistent with the contemporaneous emails, that the claimant had not, after cancelling leave

booked for 20 July, made a request to rebook this, until after she was asked to attend a meeting on 20 July. Sue Ryan refused the request for leave, writing that the meeting needed to take priority (p.464). However, she wrote that she was happy to consider a request for leave for Monday evening after they had had a meeting. They agreed a time of 9 a.m. for the meeting, to allow the claimant to get away on leave after that meeting.

48. The claimant's complaints relating to the period leading up to the meeting on 20 July 2020 include a complaint that the claimant was threatened that, if she did not attend the meeting of 20 July 2020, she would be denied requested annual leave. We find no evidence that Sue Ryan, or anyone else, told the claimant that she could not take leave unless she attended the meeting. We find that Sue Ryan went ahead with arrangements for a meeting on 20 July 2020 because the claimant had not, at the time she was arranging the meeting, booked leave for that day and she considered the meeting important to move forward following the disciplinary hearing.

49. In an email sent on 17 July 2020 (p.467), the claimant wrote: "Is there any chance we can have a skype meeting? I am just trying to avoid any communal areas given that I am vulnerable." Sue Ryan replied the same day (p.467), refusing the request, writing:

"It was clear from the Skype meeting on Tuesday [i.e. the disciplinary hearing on 14 July] that that didn't work so well so we would like this meeting to be face to face rather than skype.

"County Hall is fairly deserted at the moment and we will ensure that we have a room that is large enough to allow us all to socially distance and ensure that we are following the government guidance. You can wear PPE if that makes you feel more comfortable."

50. The respondent's grounds of resistance incorrectly stated, at paragraph 17, that the claimant did not request that the meeting proceed on a virtual basis. Sue Ryan was unable to explain why this had been stated in the grounds of resistance. The grounds of resistance, in the same sentence, correctly stated that the claimant had not notified her managers that she was required to self isolate at that time. We find that pregnant women were regarded, at the relevant time, as being at greater risk from Covid than the general population, being identified as "clinically vulnerable". They were advised to stay at home as much as possible, so to work from home if they could. Advice from the Royal College of Obstetricians and Gynaecologists, current as at 25 June 2020, and referenced by Sue Ryan in an email when the claimant notified her of her pregnancy (p.428) was that women who were less than 28 weeks' pregnant with no underlying health condition, should practise social distancing but could continue to work in public-facing roles, provided the necessary precautions were taken, including the use of PPE and risk assessment. We had no evidence that the claimant had any underlying health conditions that put her at any greater risk from Covid than other healthy women experiencing a normal pregnancy.

51. We accept the evidence of Sue Ryan that the reason she wanted the meeting to be face to face rather than by video conference was that she did not

consider the claimant had engaged with the virtual disciplinary hearing and she thought there was a better chance that the claimant would engage with a face to face meeting. The claimant's engagement in the meeting was important so they could move forward following the disciplinary warning.

The meeting on 20 July 2020

52. The meeting went ahead as planned on 20 July 2020 except that Sue Ryan attended the meeting virtually rather than in person. We accept Sue Ryan's evidence that this was because her car broke down that morning and there was no alternative way to get to the meeting on time. We reject the claimant's assertion, unsupported by evidence, in her closing submissions, that alternative arrangements could have been sought if desired and that Sue Ryan's non-attendance in person was because she put her safety above that of the claimant. The claimant and Paul McIntyre attended the meeting in person.

53. The claimant's complaints about this meeting are that she was accused of continually representing herself as a victim; that concerns were raised in a derogatory manner about her mental health and that she was cruelly informed that her colleagues did not like to work with her.

54. We have no contemporaneous notes of the meeting. We have the claimant's "reflection" on the meeting written some time after the event (p.473). The claimant was unable to tell us exactly when this was written. We consider that it records more the claimant's feelings and perceptions than being what we can rely on as an accurate description of what was said. We also have a letter dated 29 September 2020 from Paul McIntyre, which does not present itself as a record of what was said, although, as with the claimant's "reflection", it gives us some assistance in making findings of fact about what was said at the meeting. We accept Mr McIntyre's evidence that this letter was based on an earlier draft, written much closer to the meeting, but, through error, it was not sent to the claimant, as intended, at an earlier date. Indeed, it appears from an email exchange in early October 2020 between the claimant and Sue Ryan (pp 512-513), that the letter did not reach the claimant until some time after early October 2020. We treat both the written notes and the witness evidence, given so long after the meeting, with caution as to their reliability.

55. The claimant alleges that, at the meeting, she was accused of continually representing herself as a victim. It is common ground in both written sources, that the claimant said that she thought she was being bullied by Sue Scotland and that Sue Ryan and Paul McIntyre asked the claimant to give examples. We find, based on the claimant's note and the evidence of Paul McIntyre, which accepted that he may have referred to this, that there was some reference by Paul McIntyre to the "Karpman drama triangle." Mr McIntyre explained this in his witness statement as being a psychological explanation of human relationships wherein there are roles of "victim", "abuser" and "rescuer". We find that Mr McIntyre referred to this in seeking to demonstrate that what he understood to be the claimant's perception that no one in the team liked her could be as a result of her hostility and lack of trust in the team. Mr McIntyre explained that the theory is that a person can reflect and bring themselves out of the dynamic of being the victim in this model. We find that

this discussion arose because of the claimant's allegation of bullying and how Mr McIntyre understood, from what the claimant said, that she perceived herself in relation to others. We accept that the claimant may have perceived that Mr McIntyre was saying, in effect, that she always saw herself as the victim (as she records in her "reflection" on p.473). However, the claimant has not satisfied us that Mr McIntyre referred to her as continually representing herself as a victim; rather, the discussion was about the claimant assuming this role in this psychological explanation of human relationships.

56. The claimant alleges that she was cruelly informed that her colleagues did not like to work with her. Both written sources support that there was a discussion about the claimant's relationship with colleagues. Mr McIntyre's letter refers to the claimant undermining trust with colleagues by seeking to elicit examples of perceived poor management decision making from them. This is consistent with concerns which had been raised by Sue Ryan and Steve Green in a meeting with the claimant on 6 May 2020 and recorded in a letter of that date (p.412). At that meeting, the claimant was advised that certain behaviours were not acceptable and were not to continue. The attached summary of concerns included that team members were uncomfortable with the claimant's behaviour to the extent that some staff did not want to work in the same team or on the same shift as the claimant. The summary noted that team members had reported that the claimant had been recording information about them and asking for information on cases in order to criticise EDT practice and manager oversight. Staff were said to be concerned that the claimant was deliberately misconstruing information to place a negative slant on team practice and management oversight of cases. Managers were recorded as reporting that the claimant had presented as challenging and confrontational when they were offering management oversight. We find that the discussion on 20 July 2020 referred back to such concerns. We note that these concerns had been raised in May 2020, before the claimant informed the respondent that she was pregnant.

57. The claimant alleges that Ms Ryan and Mr McIntyre raised concerns in a derogatory manner about her mental health. There is common ground that there was some discussion about what Mr McIntyre describes as the claimant's emotional well being, which could be understood by the claimant to be about her mental health. We find that this was raised by the managers out of concern for the claimant and a desire that the claimant be assisted to create better relationships with colleagues, given the difficulties which had been discussed on 6 May and again at this meeting. The letter of 29 September 2020 supports that the claimant was to be pointed to external sources of support to help her with her relationships with colleagues. The claimant has not satisfied us that the managers raised these concerns in a derogatory manner. The claimant's own "reflection" (p.473) notes that Sue Ryan said she had concerns and both managers said they felt she needed help. The note does not support that concerns were raised in a derogatory manner, although the claimant records that she felt intimidated and did not feel this was supportive.

The claimant's maternity leave and return to work

58. The claimant was on maternity leave between 5 January 2021 and 5 October 2021.

59. When the claimant returned to work, she, as with other members of EDT, was still based working from home.

60. The claimant's managers were aware that the claimant was breastfeeding when she returned to work. It is common ground that it was agreed that the claimant could take breaks during her working periods to breast feed. No breast feeding risk assessment was done because Steve Green was unaware of the need to do one and the claimant did not ask for one. The claimant has not pointed to anything that would have been done as a result of a risk assessment, had one been done. Since the claimant was working from home, she was in control of her environment, for example in relation to a suitable place to breast feed and refrigeration, if she was expressing and storing milk.

Allegation of gathering information about the claimant in the period December 2021 to March 2022

61. The claimant alleges that, in this period, Sue Ryan and Steve Green collected information about her, including about breaks taken to breast feed her baby.

62. We find that Sue Ryan and Steve Green did not solicit complaints about or information about the claimant from other staff. Rather, concerns were raised by some staff with managers, particularly about the claimant being unavailable when she was on shift, without the claimant having told them when and how long she would be unavailable.

63. In or around January or February 2022, a member of staff reported to Steve Green that they had struggled to get hold of the claimant whilst on a night shift for a significant period of time. Steve Green chose not to raise this issue with the claimant at the time, preferring to wait and see if it was a one off or a continuing problem. He asked the member of staff to let him know if it was a continuing problem.

64. Separately, a call taker, JM, raised issues with Sue Scotland in a supervision in September 2022 about the claimant's availability during night shifts. She gave a couple of examples. A relatively new social worker had put a message on Teams asking for advice. The claimant did not respond for over half an hour. On another occasion, JM could not get hold of the claimant for over four hours.

The meeting on 9 March 2022

65. On 9 March 2022, Sue Ryan and Sue Scotland held a fact finding meeting with the claimant. The claimant was asked by Sue Ryan if she could attend a meeting but not told in advance that Sue Scotland would be attending or what was to be discussed.

66. We find that the main reason for holding this meeting was because of serious concerns about a case which the claimant had dealt with over the weekend. Sue Scotland and Sue Ryan were concerned that the claimant had given

managers incorrect information about the police requesting a joint visit to a vulnerable family the following day. Through a routine audit of the case, listening to telephone calls, Sue Scotland found that the police had not asked for a joint visit the day after but the claimant had told the police she would not be undertaking a visit until 6 March and asked if they wanted to attend with her. Sue Scotland was concerned that the claimant had lied to managers about her actions regarding the case and had recorded false information on the social work record. Sue Scotland raised her concerns with Sue Ryan. Sue Ryan raised the matter with Andy Smith, who spoke to HR. It was agreed that Sue Ryan and Sue Scotland should hold a fact finding meeting with the claimant. Sue Ryan also raised with Andy Smith the concerns which had been raised by colleagues about the claimant not being contactable on night shifts. HR advised that Sue Ryan should also discuss these concerns with the claimant in the fact finding meeting.

67. In advance of the meeting, Sue Ryan planned the questions she was going to ask, writing these out, with spaces to fill in the answers. We did not see the original handwritten notes, but accept that the typed version, later used in the disciplinary proceedings (p.850), is likely to be an accurate, although not verbatim, account of what was said.

68. The claimant alleges that she was interrogated about the case they had been involved in over the weekend. We find that the claimant was asked probing questions about the case, as would be expected in such a meeting. If the use of the word “interrogating” in the allegation is intended to suggest that there was something improper in the way questions were asked, the claimant has not satisfied us that this was the case.

69. The claimant alleges that Sue Ryan raised concerns about the claimant’s availability on shift. This is not in dispute. The claimant was told that concerns had been raised by colleagues about her not being available during shifts, particularly overnight shifts, not answering phones, not picking up work, and not responding to messages on teams. Sue Ryan asked the claimant whether there was any reason why people would be saying this. Sue Ryan put this to the claimant because of the concerns which had been raised by colleagues. The claimant replied that she had no idea, saying she fed her baby. Sue Ryan then asked what time the claimant fed her baby and the claimant replied “I don’t know, it could be any time, 3 times a night.”

70. The claimant alleges that Sue Ryan asked questions about the age of the baby. This is not in dispute. This followed on from the claimant’s answer that she could feed her baby three times a night. Sue Ryan asked how old the baby was. The claimant replied that she was 13 months old. Sue Ryan responded: “So your daughter is 13 months old and she has 3 feeds a night.” The claimant replied: “Yes”. Sue Ryan then asked whether the claimant let other workers know when she was feeding her baby. The claimant said she didn’t, but perhaps she should. Sue Ryan replied that she should, saying that, if her colleagues didn’t know where she was or that she was unavailable, if an important call came in for the claimant, there could be a delay in the call being responded to, which could potentially leave someone at risk. We find that Sue Ryan asked about the age of the baby so she could understand the likely need for breaks for breastfeeding.

71. The claimant alleges that Sue Ryan's facial expressions and body language demonstrated disgust when asking the claimant about the age and breastfeeding of her baby. The claimant has not satisfied us that Sue Ryan demonstrated disgust in this way. Sue Ryan breast fed her own child and as a family social worker is an advocate for a "breast is best" policy. We consider it unlikely, given this, that Sue Ryan expressed disgust. We find that, in general, using our judicial knowledge, unless there are particular health issues, babies and young children need fewer feeds at night as they get older. A thirteen month old child needing three feeds a night is unusual. We consider that Sue Ryan's words, repeating back to the claimant that the baby was 13 months old and she had 3 feeds a night perhaps conveyed surprise, but we do not infer disgust.

72. Sue Ryan concluded the fact finding meeting saying: "To summarise, I do have some concerns, particularly around you not being honest about the request for a joint visit; your disparaging comments to other professionals around the manager direction given to you and you not being available during shifts, which I will need to look into further. I will need to share my concerns with Andy Smith and HR."

The instigation of a disciplinary investigation into the claimant

73. As Sue Ryan had said she would do, she shared the outcome of the fact finding meeting with Andy Smith and HR. It was the decision of Andy Smith, with advice from HR, that the matter should proceed to a disciplinary investigation. The reason for deciding to hold a disciplinary investigation was that the respondent had serious concerns, as described at the end of the fact finding meeting, based on the information available to the respondent, including the claimant's answers to questions in the fact finding meeting. The respondent's managers had particular concerns about the claimant's honesty in relation to what she said about the police having requested a joint visit the following day on a case the claimant was dealing with and the accuracy of the record she had made about the case.

74. A disciplinary investigation was undertaken, which led to a disciplinary hearing and the claimant's dismissal.

Subsequent events

75. The claimant went on sick leave in March 2022 and did not return to work before her dismissal with immediate effect on 6 September 2022.

76. It is not necessary for us to make many findings of fact relating to the dismissal since we have no complaint about dismissal to decide on in this case. We note that the allegation about being unavailable/non contactable when on shift was not upheld. The disciplinary officer found the evidence in relation to this allegation to be inconclusive, but commented that they remained very concerned about the data suggesting the claimant was unavailable on certain shifts for significant amounts of time which could not be explained by legitimate lunch and breastfeeding breaks. The other allegations were all upheld. These were: failure to follow management instructions in supporting service users in crisis; making disparaging remarks about

management/LCC to outside agencies; dishonesty regarding the claimant's actions; and that the claimant's actions had the potential to place service users at risk of harm.

77. Social Work England were informed of the outcome of the disciplinary hearing but decided in April 2024 that the claimant's fitness to practise was not impaired. Social Work England's report does express some concerns about the claimant's conduct and notes that the case examiners provided the claimant with an unpublished warning.

78. The period of ACAS early conciliation was 20 May 2022 to 16 June 2022. The claimant presented her claim to the Tribunal on 16 July 2022.

Evidence relevant to the time limit issue

79. The claimant brought no Tribunal claim after the meetings in July 2020. She gave evidence that she was concentrating on her pregnancy. However, she did not go on maternity leave until January 2021, more than 5 months later. She did not experience difficulties in pregnancy which prevented her working.

80. The claimant was getting advice from her trade union representative at this time, which included some advice about possible Tribunal proceedings. The trade union representative referred in an email dated 15 July 2020 to preparing a Tribunal claim which, from the reference to needing Mr Norris on board, appears to relate to an equal pay claim. However, the trade union representative also made a reference to a possible victimisation claim (p.857).

Submissions

81. Mr Wood provided a written skeleton argument at the start of the hearing. He made some oral closing submissions. The claimant also provided a written skeleton argument at the start of the hearing. She started to make some closing oral submissions, reading from an updated version of her skeleton argument on her laptop, but the battery on her laptop failed part way through her submissions. The claimant accepted, and Mr Wood agreed with, a suggestion from the judge that she should send her written submissions to the Tribunal and the respondent that evening. Mr Wood would then have a chance to respond in writing, if he felt any response was needed.

82. The claimant sent her written submissions to the Tribunal on the evening on 24 May 2024. Mr Wood provided a brief response in writing.

83. We do not set out the written submissions of the parties which can be read if required.

84. A summary of the respondent's oral submissions is that Mr Wood encouraged the Tribunal to be circumspect about the claimant's version of events. He submitted that the claimant's evidence was far less reliable than that of the respondent.

85. Mr Wood submitted that the difference in pay between the claimant and her comparator was due to the difference in grade; the respondent did not need to

justify the grading provided this was not tainted by discrimination. The claimant needed to have 3 years PQE or be at the top of grade 8 or for there to be exceptional circumstances in accordance with the respondent's progression document, to be appointed at grade 9. The claimant was not at the top of grade 8 and did not have 3 years' PQE. The respondent's policy made it impossible for the claimant to be appointed as a grade 9 on appointment. The team was mixed sex and predominantly female. There was nothing to suggestion the progression policy or qualification criteria to be a grade 9 was indirect discrimination against women.

86. In relation to events 14-20 July 2020, Mr Wood submitted that the respondent's evidence was clear on the rationale for everything which happened. It had no relationship to pregnancy or pregnancy related illness.

87. In relation to post maternity leave matters, there was no suggestion that the respondent was collecting information; employees approached Steve Green and Sue Scotland. A man in the same position, subject to the same concerns, for example about disappearing for 4 hours, would have had the same unavailability questioned. The claimant never provided any explanation for the amount of time missing; we do not know today that it was for breastfeeding.

88. The way the claimant was questioned at the meeting on 9 March 2022 was nothing to do with her sex; it was undoubtedly because of her suspect dishonesty on a second occasion. The discussion about the claimant's availability did not relate to sex. The unavailability was clearly ostensibly more extensive than one would expect to breast feed a child of 13 months. Any employer would ask how often the claimant needed to feed her baby; they needed to reconcile her unavailability with expected unavailability. It is unlikely Sue Ryan expressed any negativity towards breast feeding. She promotes this through work.

89. Pre-maternity leave complaints are out of time. The remainder are not. The pre maternity leave complaints do not form part of an act extending over time which ends in time. It would not be just and equitable to extend time. There was no explanation why the claim was not presented within 3 months. Mr Wood accepted pregnancy was a factor but the claimant had the support of a trade union representative. The time lapse makes it difficult for the respondent to put its case.

90. The claimant's submissions were all set out in writing so we do not seek to summarise these. We have, however, dealt with her principal arguments, as we understand them, when setting out our conclusions.

The Law

Equal pay for like work

91. The Equality Act 2020 (EqA) provides for a person doing equal work to a person of the opposite sex to have no less favourable contractual terms, including pay, unless the employer succeeds in a material factor defence.

92. The relevant part of sub section 65(1) EqA for this case provides that A's work is equal to that of B if it is like B's work. Subsection 65(2) provides that A's work is like B's work if their work is the same or broadly similar and "such differences as there are between their work are not of practical importance in relation to the terms of their work." Subsection (3) provides that "On a comparison of one person's work with another's for the purposes of subsection (2) it is necessary to have regard to (a) the frequency with which differences between their work occur in practice, and (b) the nature and extent of the differences."

93. Section 69 sets out the material factor defence. To rely on this defence, the employer must show that the difference in pay (or other contractual term) is

> "because of a material factor reliance on which –
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2) , is a proportionate means of achieving a legitimate aim."

94. Subsection (2) provides:

> "A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's."

95. Subsection (6) provides:

> "For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."

Pregnancy discrimination

96. Section 18 of the Equality Act 2010 (EqA) provides:

> "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."

The protected period, as defined in subsection (6) includes the period where the claimant is pregnant.

Direct sex discrimination

97. Section 13(1) of the Equality Act 2010 (EqA) provides:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

98. Section 4 lists protected characteristics which include sex.

99. Section 23(1) EqA provides that:

"on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case.

Harassment related to sex

100. The relevant parts of section 26 EqA provide:

"A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

101. Subsection (4) provides that:

"In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

102. Subsection (5) lists relevant protected characteristics which include sex.

Burden of proof

103. Section 136 EqA provides:

"(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."

Time limits

104. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period. Section 123(3)(b) provides that failure to do something is to be treated as occurring when the person in question decided on it.

Conclusions

Equal pay claim

105. The respondent accepted that the work of the claimant and Mr Norris was broadly similar. Although the respondent's pleaded amended grounds of resistance (incorporating paragraph 46 of Mr Wood's skeleton argument) are that there were differences between their work of practical importance in relation to the terms of their work, the evidence in relation to differences was generalised in nature. Work was not allocated according to grade. The rota was not drawn up having grades of social workers in mind. The evidence of the respondent was that differences would be expected between the work of a grade 8 and a grade 9. However, the respondent gave no specific evidence that these differences were borne out in the work done by Mr Norris and by the claimant. The burden of proof is on the respondent, as the party asserting the differences. We conclude that the respondent has failed to satisfy us that there were differences between the work of the claimant and Mr Norris of practical importance in relation to the terms of their work. We, therefore, conclude that the claimant's work was like that of Mr Norris.

106. The claimant would, therefore, be entitled to equality of contractual terms with Mr Norris unless the respondent can satisfy the Tribunal that the difference in pay (being the relevant contractual term in this claim) is because of a material factor which does not involve treating the claimant less favourably because of her sex and which the claimant does not show to involve indirect sex discrimination.

107. We conclude that the difference in pay between Mr Norris and the claimant is due to them starting in EDT on different grades; the claimant started as a grade 8 and Mr Norris started as a grade 9. Although their starting salaries were the same (being the top of grade 8 and the bottom of grade 9), because Mr Norris benefited from pay increments for a grade 9, and the claimant did not, being already at the top of the grade 8 pay scale, a difference in pay arose. We found that Mr Norris was given the post at grade 9 because he queried his offer letter, he met the minimum requirements to be eligible for a grade 9 appointment (which the claimant did not, having fewer than the minimum number of years PQE required) and the respondent wanted him in the post because of his unusual experience in both adult and child social care. We conclude that the difference in grade on appointment was a material factor

which is not tainted by sex discrimination, direct or indirect. There is no evidence to suggest that the decision to appoint Mr Norris at grade 9 and to appoint the claimant at grade 8 was less favourable treatment because of the claimant's sex. The claimant has not proved any facts from which we could conclude that the factor of appointment at a particular grade put the claimant and other women doing work equal to the claimant's at a particular disadvantage when compared with men doing work equal to the claimant's. Since the material factor has not been shown to be indirectly discriminatory, disadvantaging women, the respondent is not required to show justification for use of the factor i.e. that using it was a proportionate means of achieving a legitimate aim. We conclude that the respondent has established a material factor defence to the equal pay claim.

108. For these reasons, we conclude that the equal pay complaint is not well founded.

Pregnancy and maternity discrimination complaints

Time limit issues in relation to the complaints of unfavourable treatment because of pregnancy

109. The last complaint is about conduct on 20 July 2020. The claim was presented on 16 July 2022. Because ACAS early conciliation was not begun within the primary time limit (early conciliation beginning on 20 May 2022), it does not extend time for presenting these complaints. All the complaints were presented very considerably out of time. The claimant gave evidence that she was concentrating on her pregnancy. However, she remained at work, not going on maternity leave until 5 January 2021. The claimant also had access to advice from her trade union representative.

110. We do not consider that, in these circumstances, it would be just and equitable to extend time.

111. We conclude, therefore, that we do not have jurisdiction to consider the complaints of unfavourable treatment because of pregnancy. The complaints are dismissed on this basis.

112. We have, however, gone on to consider what we would have decided on the merits of the complaints, had we had jurisdiction to consider them. For the reasons we give, we would have concluded that all the complaints are not well founded.

The merits of the complaints of unfavourable treatment because of pregnancy

113. We will take the alleged acts of discrimination in their chronological order, rather than the order in which they appear in the list of issues.

Allegation 2.1.3 – at a meeting on 14 July 2020 calling the claimant "passive aggressive"

114. The allegation is that Andy Smith made this comment at a disciplinary hearing on 14 July 2020. The concern and the investigation which led to the disciplinary hearing pre-dated the claimant's pregnancy.

115. We found that Mr Smith did use this term about the claimant at the disciplinary hearing (see paragraph 42). However, it was used in the context of the claimant's behaviour; the claimant looked away from the camera when Sue Scotland came online to give evidence, every now and then turning towards the camera to challenge what Sue Scotland said, and, at one point, when Sue Scotland was giving evidence, the claimant ate a bag of crisps. Mr Smith raised an issue with the claimant during the meeting about her not looking at people on screen when they were talking.

116. The initial burden of proof is on the claimant to prove facts from which we could conclude that there was unfavourable treatment because of the claimant's pregnancy. The claimant argues, in her closing submissions, that her behaviours at the meeting were a direct result of her pregnancy and that calling her "passive aggressive" in response to this conduct was, therefore, unfavourable treatment because of pregnancy.

117. As a matter of fact, the claimant has not satisfied us that her conduct in looking away from the camera and eating crisps was because of pregnancy or any illness suffered as a result of pregnancy (see paragraph 41). The claimant has not proved facts from which we could conclude that calling the claimant "passive aggressive" was unfavourable treatment because of pregnancy and this complaint must fail.

118. Even if we had been satisfied that there was, in fact, a link between the claimant's behaviour and her pregnancy, and that the burden passed to the respondent to prove that the unfavourable treatment was not because of pregnancy, we would have concluded that the complaint was not well founded. The claimant's argument appears to be one of saying that "but for" her pregnancy, the claimant would not have behaved as she did and Mr Smith would not have made the remark. This is not the causation test we have to apply. In discharging the burden of proving that Mr Smith's comment was not because of pregnancy, the respondent would need to satisfy us that his reasons for making the remark (whether conscious or unconscious) were not, to a material extent, influenced by knowledge that the claimant was pregnant. We were satisfied, as a matter of fact, that calling the claimant "passive aggressive" was in response to the claimant's conduct. There was nothing to alert the respondent that the turning away from the camera and eating crisps during the meeting was related to the claimant's pregnancy. She did not inform the respondent she was tired and nauseous and needed a break. We would have concluded that the respondent had satisfied us that Mr Smith's reasons for making the comment were not, to a material extent, because of the claimant's pregnancy.

Allegation 2.1.1 – In the week of 13 July 2020, refusing a request made by the claimant for the meeting to be held on 20 July 2020 to be conducted remotely

119. The meeting to be held on 20 July 2020 was to be a meeting between Sue Ryan, Paul McIntyre and the claimant to discuss how they would move forward, following the issuing to the claimant of a final written warning at the disciplinary hearing on 14 July 2020.

120. By a letter dated 16 July 2020, Sue Ryan asked the claimant to attend a meeting at County Hall on 20 July. She wrote that they would ensure they had a room big enough that would allow them to socially distance during the meeting.

121. Contrary to what had been asserted in paragraph 17 of the respondent's grounds of resistance, the claimant did request that the meeting be conducted remotely. She did so by an email dated 17 July 2020 in which she wrote: "Is there any chance we can have a skype meeting? I am just trying to avoid any communal areas given that I am vulnerable." As we noted in our findings of fact (see paragraph 50), we had no evidence that the claimant was more vulnerable than any other pregnant woman, with no underlying health conditions.

122. We found that the respondent did refuse the request for the meeting to be held remotely (see paragraph 49). Sue Ryan wrote to the claimant, refusing the request and explaining her reasons why:

> "It was clear from the Skype meeting on Tuesday [i.e. the disciplinary hearing on 14 July] that that didn't work so well so we would like this meeting to be face to face rather than skype.
>
> "County Hall is fairly deserted at the moment and we will ensure that we have a room that is large enough to allow us all to socially distance and ensure that we are following the government guidance. You can wear PPE if that makes you feel more comfortable."

123. We found that Sue Ryan wanted the meeting to be face to face rather than by video conference because she did not consider the claimant had engaged with the virtual disciplinary hearing and she thought there was a better chance that the claimant would engage with a face to face meeting. The claimant's engagement in the meeting was important so they could move forward following the disciplinary warning (see paragraph 51).

124. The claimant's argument as to why we should conclude that the refusal to hold the meeting virtually was unfavourable treatment because of her pregnancy appears to be an extension of her argument as to why making the "passive aggressive" comment was because of her pregnancy i.e. that the claimant's behaviour at the meeting on 14 July was because of her pregnancy and that the refusal to hold the meeting virtually was also because of this behaviour and, therefore, because of her pregnancy.

125. We reject this argument for similar reasons to those given in relation to allegation 2.1.3. As a matter of fact, the claimant has not satisfied us that her conduct in looking away from the camera and eating crisps was because of pregnancy or any illness suffered as a result of pregnancy (see paragraph 41).

126. The only additional matter the claimant relies on, from which she may be inviting us to draw an inference that the respondent's refusal was because of pregnancy, was the respondent's incorrect statement in the grounds of resistance that the claimant had not requested the meeting to be virtual. The claimant describes this statement as "dishonest". The statement is not correct, but we do not have evidence which would lead us to conclude that there was dishonesty involved in the making of the incorrect statement.

127. We do not consider that the incorrect statement in the grounds of resistance is sufficient material for the claimant to satisfy the initial burden of proof. We conclude that the claimant has not proved facts from which we could conclude that the refusal to hold the meeting on 20 July by remote means was unfavourable treatment because of pregnancy. The complaint, therefore, fails.

128. If we had concluded that the claimant had satisfied the initial burden of proof, we would have concluded that the respondent had proved that the refusal was not because of the claimant's pregnancy. Sue Ryan wanted the meeting to be face to face, rather than by video conference, because she did not consider the claimant had engaged with the virtual disciplinary hearing and she thought there was a better chance that the claimant would engage with a face to face meeting. The claimant's engagement in the meeting was important so they could move forward following the disciplinary warning (see paragraph 51).

129. We conclude that this complaint is not well founded.

Allegation 2.1.2 – in the week of 13 July 2020, threatening the claimant that, if she did not attend the meeting of 20 July 2020, she would be denied requested annual leave

130. The facts we found did not support this allegation. We set out in our findings of fact (see paragraphs 45 to 48), the sequence of events about requests for leave and the arranging of the meeting. At the time of trying to arrange the meeting, the claimant had not requested leave for 20 July. She had previously booked, then cancelled, leave on that day. A subsequent request for leave was made, and refused, after the request to attend a meeting on 20 July. Sue Ryan did, however, arrange the meeting on 20 July at 9 a.m. so that the claimant could get away on leave after the meeting.

131. The facts do not support the allegation and we conclude that the complaint is not well founded.

Allegation 2.1.4 – at the meeting on 20 July 2020, accusing the claimant of continually representing herself as a victim

Allegation 2.1.5 – at the meeting on 20 July 2020, raising concerns in a derogatory manner about the claimant's mental health

Allegation 2.1.6 – at the meeting on 20 July 2020, cruelly informing the claimant that her colleagues did not like to work with her

132. These allegations relate to the meeting between Sue Ryan, Paul McIntyre and the claimant on 20 July 2020, seeking a way to move forward, following the

claimant having been given a final written warning at the disciplinary hearing on 14 July 2020.

133. We found that the claimant had not satisfied us that Mr McIntyre referred to her as continually representing herself as a victim; rather, the discussion was about the claimant assuming this role in a psychological explanation of human relationships (see paragraph 55). Allegation 2.1.4 is not made out on the facts found and this complaint is not well founded.

134. The claimant did not satisfy us that the managers raised concerns about her mental health in a derogatory manner (see paragraph 57). There was some discussion about the claimant's emotional well being, or mental health, raised by the managers out of concern for the claimant and a desire that the claimant be assisted to create better relationships with colleagues. Allegation 2.1.5 is not made out on the facts found and this complaint is not well founded.

135. We found that there was a discussion about the claimant's relationship with colleagues. Concerns raised with the claimant included that team members were uncomfortable with the claimant's behaviour to the extent that some staff did not want to work in the same team or on the same shift as the claimant. (See paragraph 56).

136. We do not understand, from the claimant's submissions, the basis on which the claimant asserts that she has proved facts from which we could conclude that informing the claimant that some colleagues did not want to work with her was because of her pregnancy. We are unable to identify, on the basis of the facts we have found, any material which could lead us to conclude that the reasons the managers raised these concerns with the claimant was because of pregnancy. We conclude that the claimant has not satisfied the initial burden of proof and allegation 2.1.6 is not well founded.

137. If we were wrong, and the initial burden of proof was satisfied, in relation to allegation 2.1.6, we would have concluded that the respondent had shown that they had acted for reasons which were not because of pregnancy. We found that concerns raised at the meeting on 20 July 2020 were consistent with concerns which had been raised with the claimant on 6 May 2020, before the respondent's managers knew the claimant was pregnant. The claimant had been advised, on 6 May 2020, that certain behaviours were not acceptable and were not to continue. On 20 July 2020, referring back to the concerns raised by colleagues about working with her was in the context of a meeting where Sue Ryan and Paul McIntyre were discussing a way forward, following the final written warning. This included trying to assist the claimant to create better relationships with colleagues (see paragraph 57). The respondent's reasons for discussing these matters with the claimant had nothing to do with the claimant's pregnancy, being a continuation of concerns which had arisen before the respondent's managers were aware of the claimant's pregnancy.

138. We conclude that the complaints of unfavourable treatment because of pregnancy in allegations 2.1.4, 2.1.5 and 2.1.6 are not well founded.

Complaint of direct sex discrimination

139. This is a complaint that, in the period December 2021 to March 2022, Sue Ryan and Steve Green collected information about the claimant, including about breaks taken to breast feed her baby.

140. The period the complaint relates to ends in March 2022. Given this end date, the complaint was presented in time and we have jurisdiction to consider it.

141. We dealt with the facts relating to this complaint at paragraphs 61 to 64 of our findings of fact. We found that Sue Ryan and Steve Green did not solicit complaints about or information about the claimant from other staff. Rather, concerns were raised by some staff with managers, particularly about the claimant being unavailable when she was on shift. If the allegation is intended to be that the managers set out to collect information about the claimant in this period, we conclude that it is not established on the facts.

142. If the complaint is about the receipt of concerns from other staff members and retention of this information, we consider first whether the claimant has satisfied the initial burden of proof. She must prove facts (from any source) from which we could conclude that what the managers did was less favourable treatment than would be given to a man in similar circumstances and that the treatment was because of her sex.

143. The matters the claimant appears to be relying on to satisfy this initial burden of proof are as follows. The claimant relies on the respondent's failure to do a breast feeding risk assessment. We found that no breast feeding risk assessment was done because Steve Green was unaware of the need to do one and the claimant did not ask for one (see paragraph 60). However, as we noted in that paragraph, since the claimant was working from home, she was in control of her working environment, for example in relation to a suitable place to breast feed and refrigeration, if she was expressing and storing milk. It was common ground that the respondent agreed that the claimant could take breaks to breast feed, during working hours, once she returned to work from maternity leave.

144. The claimant refers to there not having been any formal complaints about her availability on shift prior to her maternity leave. It was agreed between the parties that, prior to the claimant's return to work after maternity leave, there were no issues about her availability for work (see paragraph 32). The claimant is not correct if her submissions are to be read as including an assertion that there were no formal complaints about her performance prior to her maternity leave; the claimant received a final written warning on 14 July 2020 for misconduct, including dishonesty, which inevitably relates to performance.

145. The claimant says the only thing which had changed was that she was now a mother, breast feeding her child.

146. The concerns raised were not about the claimant taking breaks to breast feed per se. The concerns raised were about not being able to contact the claimant, once for as long as 4 hours, when she was meant to be working, without the claimant having alerted them to being unavailable for those periods. The claimant has not satisfied us that all the periods when she was

not contactable were because she was breast feeding. In particular, the period of 4 hours where a staff member was unable to contact the claimant has remained unexplained and cannot reasonably relate to a break for breastfeeding.

147. We have had no evidence to suggest that, had other staff been unable to contact a male social worker on shift for similar periods of time (including, on one occasion, for 4 hours), that those staff would not have raised their concerns with managers and the managers would not have retained that information.

148. We are doubtful that these factors are sufficient to prove facts from which we could conclude that the collection and retention of information about the claimant being not contactable at various times when she was on shift was less favourable treatment because of sex, than would have been given to a man in the same, or not materially different, relevant circumstances. The construction of a hypothetical comparator in a case where the claimant says the reason she was not contactable was due to breastfeeding, which can only be done by a woman, is problematic.

149. We assume, therefore, (without deciding), that the claimant has satisfied the initial burden of proof and move to the reason why the managers received and retained information about the claimant in this period. They received the information because other staff were concerned about not being able to contact the claimant at times when she was meant to be working on shift, and the implications for the safety of the service EDT was providing, and raised these concerns with managers. The managers retained the information because it was a real concern which they might need to act on. The managers could, properly, have raised this with the claimant at an earlier stage. Steve Green chose not to, preferring to wait and see if it was a one off or a continuing problem (see paragraph 63). We conclude that the reasons for the respondent acting as they did was not because of the claimant's sex. They were not acting as they did because the claimant was breast feeding; they acted as they did because the claimant was not contactable at various times, when she was meant to be working, without the claimant having told them she would be unavailable for particular periods.

150. We conclude that the complaint of direct sex discrimination is not well founded.

Complaints of harassment related to sex

Allegation 4.1.1 – at a meeting on 14 July 2020, calling the claimant "passive aggressive"

151. This same allegation was also argued under the head of unfavourable treatment because of pregnancy. Even if the other complaints of harassment were well founded, this is of a different nature, involving different people, to the other complaints of harassment. We conclude that it could not form part of a continuing course of harassment, ending with complaints presented in time. For the reasons given when considering the complaint of unfavourable treatment because of pregnancy, we conclude that the complaint was

presented out of time and it would not be just and equitable to consider it out of time. We conclude that we have no jurisdiction to consider the complaint.

152. If we had had jurisdiction to consider the complaint, we would have concluded that the claimant had not satisfied the initial burden of proof; she has not proved facts from which we could conclude that making this comment was related to sex. There is no evidence on the basis of which we could reach such a conclusion. The complaint would have failed on its merits.

Allegation 4.1.2 – at a meeting with Sue Ryan and Sue Scotland on 9 March 2022, Sue Ryan interrogating the claimant about the case they had been involved in over the weekend

Allegation 4.1.3 – at the meeting on 9 March 2022, Sue Ryan raising concerns about the claimant's availability on shift

Allegation 4.1.4 – at the meeting on 9 March 2022, Sue Ryan asking the claimant questions about the age of the claimant's baby

Allegation 4.1.5 Sue Ryan's facial expressions and body language demonstrating disgust when asking the claimant about the age and breast feeding of her baby

153. We deal with these four allegations together since they all relate to alleged conduct at the meeting on 9 March 2022. We made findings of fact about this meeting at paragraphs 65 to 72.

154. We found that the claimant was asked probing questions about the case they had been involved in during the weekend. The meeting was held because of serious concerns that the claimant had given managers incorrect information about the police requesting a joint visit to a vulnerable family the following day. If the use of the word "interrogating" in the allegation was intended to suggest there was something improper in the way the questions were asked, the claimant did not satisfy us that this was the case.

155. We do not understand what, if anything, the claimant says we can rely on to infer that questioning the claimant about the case was related to sex. We conclude the claimant has not satisfied the initial burden of proof in relation to allegation 4.1.1 so the complaint is not well founded. Had the burden passed, the respondent would have satisfied us that the reason the claimant was asked questions about the case was because of serious concerns about the case, and nothing to do with the sex of the claimant or anyone else.

156. In relation to allegation 4.1.3, we understand the claimant to argue that her unavailability was due to breast feeding so questioning her about this was related to sex. We are not persuaded by this argument. The claimant was questioned about her availability because colleagues had raised these concerns with managers and HR had advised Sue Ryan to discuss these concerns with the claimant in this meeting as well as the case which was the main reason for the meeting. We are doubtful that asserting that the unavailability was due to breast feeding is sufficient to prove facts from which we could conclude that questioning the claimant about her availability on shift was related to sex. The claimant has not satisfied us that all her unavailability

(which included a period of 4 hours) was due to breast feeding. However, assuming (without deciding) that the burden shifted to the respondent, the respondent has satisfied us that raising these concerns with the claimant was not related to sex. Their concern was that the claimant was unavailable, for whatever reason, when she was meant to be working, with the implications this could have for the service EDT provided. Sue Ryan wanted to explore with the claimant the reasons for her unavailability. The respondent has also satisfied us that, if raising this concern with the claimant was perceived by the claimant as creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, it was not reasonable, in the circumstances, for the conduct to have that effect. The respondent had a legitimate and reasonable concern that the claimant was not available to work when she was meant to be working, and it was reasonable for them to explore the reasons for this with the claimant. We conclude that this complaint of harassment related to sex is not well founded.

157. The claimant complains that Sue Ryan asking the claimant questions about the age of the claimant's baby was harassment related to sex. The questions were in response to the claimant asserting that any unavailability was because she was feeding her baby. Sue Ryan asked what time the claimant fed her baby and the claimant replied that it could be any time, 3 times a night. This led to Sue Ryan asking the age of her baby, who was 13 months old at the time. We conclude that the question was related to sex, because it was related to the claimant's assertion that her unavailability was due to breast feeding. We accept that the questioning of the claimant was unwanted by her. We find no evidence that the purpose of the questions was to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. If it was perceived by the claimant as creating such an environment, we conclude that it was not reasonable, in the circumstances, for the conduct to have that effect. The respondent had a legitimate and reasonable concern that the claimant was not available to work when she was meant to be working. It was reasonable for them to explore the reasons for this with the claimant and, when she asserted that her unavailability was due to breast feeding, to ask questions to explore the likely need for breaks for breast feeding. The age of the claimant's baby was a relevant factor in the likely need for breast feeding breaks. As we noted in paragraph 71, babies and young children need fewer feeds at night as they get older. A thirteen month old child needing three feeds a night would be unusual. We conclude that this complaint of harassment related to sex is not well founded.

158. The claimant did not satisfy us, as a matter of fact, that Sue Ryan's facial expressions and body language demonstrated disgust when asking the claimant about the age and breast feeding of her baby. We conclude that allegation 4.1.6 is not made out on the facts and this complaint of harassment related to sex is not well founded.

<u>Allegation 4.1.6 – around March 2022, instigating a disciplinary investigation into the claimant</u>

159. It was the decision of Andy Smith, with advice from HR, that the matter should proceed to a disciplinary investigation. The reason for deciding to hold a disciplinary investigation was that the respondent had serious concerns, as

described at the end of the fact finding meeting, based on the information available to the respondent, including the claimant's answers to questions in the fact finding meeting. The concerns about the claimant's honesty in relation to what she said about the police having requested a joint visit the following day on a case the claimant was dealing with and the accuracy of the record she had made about the case was of particular concern. (See paragraph 73).

160. The claimant, in her closing submissions, suggests that the outcome of the referral to Social Work England, following the claimant's dismissal, which was that they did not find the claimant's fitness to practise was impaired, must lead to the conclusion that the purpose of subjecting her to a disciplinary investigation, as a new mother breast feeding her child, was to cause intimidation and offence due to her sex. We do not agree with this suggested conclusion. There can be legitimate grounds for a disciplinary investigation, even if it does not result in a disciplinary penalty. In this case, the claimant's conduct in relation to the case did result in a disciplinary penalty from the respondent, the claimant being dismissal for gross misconduct. The allegation about being unavailable/non contactable when on shift was not upheld, the disciplinary officer finding the evidence to be inconclusive, although commenting that they remained very concerned about the data suggesting the claimant was unavailable on certain shifts for significant amounts of time which could not be explained by legitimate lunch and breastfeeding breaks. Social Work England approach issues brought before them from a different perspective to that of an employer. A finding that someone's fitness to practise is not impaired is not the same as concluding that an employer's reasons for investigating and taking disciplinary action are not well founded. Although Social Work England concluded the claimant's fitness to practice was not impaired, the report does express concerns about the claimant's conduct and notes that the case examiners provided the claimant with an unpublished warning.

161. Concerns about the claimant's unavailability for work at times when on shift formed part of the matters to be investigated. Arguably, investigating this was related to sex, since the claimant was asserting that any unavailability was due to breast feeding. The greater concern, however, was the claimant's conduct in relation to the case over the weekend, which raised concerns about the claimant's honesty. We can find no basis on which an investigation of the claimant's conduct in relation to that case can be said to be related to sex. We accept that a disciplinary investigation was unwanted by the claimant. To the extent that part of the investigation could be said to relate to sex, there is no evidence that the purpose of instigating an investigation was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. If it was perceived as having such an effect by the claimant, we conclude that it was not reasonable, in all the circumstances, for it to have this effect. There were serious concerns about the claimant's conduct and it was reasonable for the respondent to instigate a disciplinary investigation into the claimant's conduct.

Summary

162. For the reasons we have given, we have concluded that, where we have jurisdiction to consider the complaints, those complaints are not well founded.

We do not have jurisdiction in relation to the complaints of unfavourable treatment because of pregnancy and one complaint of harassment related to sex because the complaints were presented out of time and it is not just and equitable to consider them out of time. If we had had jurisdiction in relation to those complaints, for the reasons given, we would have concluded that these complaints also are not well founded.

Employment Judge Slater
19 June 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 July 2024

FOR THE TRIBUNAL OFFICE

ANNEX

Paragraph 46 of the respondent's skeleton argument

There are, however, differences of practical importance between the two such that different grading was appropriate:

(1) At the time of the claimant's appointment, she could have been considered for Grade 9 if she had either (a) reached what was then SCP36 (more recently SCP30 [261]), or (b) if not, had gained three years' experience, and even then appointment to Grade 9 would be exceptional (see operating criteria at the time of

appointment at [333]):

(a) The claimant met neither of the criteria, which would be required before the respondent could consider whether exceptional circumstances applied:

(i) At the time of appointment, she was not SCP36, but was increased on appointment to that level (PM21) [379] (see also [181] for SCP31 on commencement of employment with the respondent in 2015 i.e. she would not have worked up to SCP36 by 2017);

(ii) At the time of appointment to the EDT, the claimant had two years' experience as a social worker (PM86) [379];

(b) Conversely, it was decided that TN's circumstances were exceptional in that her had "an unusual career profile in having significant experience in both statutory child care and adult safeguarding work [which] is highly suited to EDT work" [380]. That experience was eight years in Children's Services [507]. That difference in qualification makes the work different in that the claimant and TN were recruited on the basis of different qualifications, which relate to the different roles they perform (per *Wiener Gebietskrankenkasse*);

(2) Accordingly (and there is no evidence to the contrary), it is highly unlikely that the claimant was told at interview that she would be appointed to Grade 9;

(3) The Grade 9 competencies are set out at [336-341]:

(a) The claimant did not display those competencies as follows:

(i) [337] range of complex reports and [338] high standard of decision-making or constantly seek reassurance:

(aa) The portfolio provided by the claimant related to work prior to EDT [323] [382] and were routine cases [367];

(ab) There was also insufficient focus on complex childcare work [323] [365], with the claimant having below average involvement in complex childcare work [508];

(ac) The claimant required a lot of management oversight, guidance, and support (SR16);

(ii) [336] additional tasks and [339] active role in delivery of training: the claimant only undertook mandatory CPD training (of herself) [382] [366], did not make a significant contribution to team or service development [381];

(iii) [339-340] ability in role of workplace supervisor, Practice Educator or mentor: the claimant's appointment to Practice Educator had not completed at the time of her Grade 9 assessment, although it had been round the time of the grievance outcome (12.12.2019) [381];

(b) Conversely, the respondent will say that TN did display those competencies.