EMPLOYMENT TRIBUNALS

Claimant: Miss Poppy Duggan

Respondent: Kelly Traffic Management Ltd

JUDGMENT WITH FULL WRITTEN REASONS

Heard at: Midlands West Employment Tribunal

In person Hearing

Before: Employment Judge Gidney
Tribunal Member Libird
Tribunal Member Hicks

On: 8th, 9th, 10th, 11th & 12th April 2024

Appearances

For the Claimant: Miss Poppy Duggan (In person)

For the Respondent: Miss Adele Akers (Counsel)

JUDGMENT

1. It is the unanimous Judgment of the Tribunal that:

   1.1 The Claimant's claim of pregnancy and maternity discrimination is upheld and succeeds, in part.

   1.2 The Claimant's claim of constructive unfair dismissal fails and is dismissed.

   1.3 Compensation is awarded in the sum of £16,298.30.

REASONS

Introduction

2. On 8th December 2022 the Claimant notified ACAS of a dispute with Kelly Traffic Management Ltd, the Respondent. She received her Early Conciliation Certificate on 9th January 2023. By a Claim Form of the same date, 9th January 2023 **[e3]** the Claimant presented claims of pregnancy and maternity discrimination, contrary to s18 **Equality Act 2010** (**EqA**) and constructive unfair dismissal, contrary to s95(c) **Employment Rights Act 1996** (**ERA**).

3. The Respondent's Grounds of Resistance dated 1st February 2023 denied the Claimant's claims **[e23]**. It took the fair point that the Claimant remained its employee and as such, she could have no constructive unfair dismissal claim as she had not been dismissed. The Claimant was on maternity leave at the time. On the date her maternity leave ended, 3rd April 2023, she did resign.

4. The case was case managed by Employment Judge Meichen in his Case Management Order dated 9th June 2023 **[e33]**. During the course of that hearing the Judge allowed an amendment by the Claimant to argue that her dismissal on 3rd April 2023 amounted to a constructive unfair dismissal.

The Issues

5. The issues to be determined in this case were set out by Judge Meichen. At the outset of the Final Hearing both parties accepted that the pregnancy/maternity discrimination and unfair dismissal issues as recorded were correct. They raised 5 factual allegations, that were relied on as both incidents of pregnancy/maternity discrimination and incidents destroying mutual trust and

confidence justifying a constructive unfair dismissal. Accordingly the 5 factual liability issues were as follows **[e38-40]**:

5.1 After the claimant informed the respondent of her pregnancy in or around January 2022 the claimant's manager, Daniel Abbott, said to her that she should get a TV for her bedroom instead of having sex and getting pregnant. The '*TV in the Bedroom incident*'.

5.2 After the claimant informed the respondent of her pregnancy in or around January 2022 another manager, Sarah Abbott, asked the claimant if she would be returning to work and if so how would that work with her having children. The '*what three kids*' incident.

5.3 In or around February 2002 the claimant was called into Daniel Abbott's office. Mr. Abbott screamed at her using foul and abusive language and the claimant was told that her work would be given to someone else. The '*16 February shouting*' incident.

5.4 In or around June 2022 whilst she was working from home the Claimant received an email inviting her to a poor performance meeting. This was regarding a job that other employees were working on as well, but the Claimant was singled out. The Claimant asked if the other employees were also being called in to a poor performance meeting but she did not receive a response to that question. The people involved were Daniel Abbott and Sarah Abbott. This resulted in the Claimant taking her maternity leave early as she did not feel comfortable continuing to work. The Claimant believes this is what the respondent wanted to achieve. The '*disciplinary invitation*' incident.

5.5 Just after she went on maternity leave (on or around 20 June 2022) the Claimant was left out of a promotion opportunity that was given to everyone else on the same level as her. The opportunity was the role of Office Manager. This role was given to another Team Leader without giving the Claimant the opportunity to apply. The Claimant found out

about this in or around November 2022. She complained and was offered an interview but the role had already been filled and she had lost trust with the respondent. The *'Expression of Interest (EOI)*' incident.

6. There were also issues on time. The Claimant notified ACAS of a dispute on 8th December 2022. She obtained her Early Conciliation certificate on 9th January 2023 and presented her Claim Form on the same day. On 3rd April 2023 she resigned. Accordingly all incidents occurring prior to 9th September 2022 were out of time unless they could be considered as one single act of discrimination that extended over a period that ended on or after 9th September 2022. In the event that all of any allegations had been presented out of time, the Tribunal could only entertain them if it considered that it should extend time on just and equitable grounds.

The Evidence

7. We were provided with an agreed trial bundle which ran to 89 pages. The bundle had been provided in both electronic and hard copy formats. Unfortunately the electronic page numbering did not match the hard copy page numbering. To avoid confusion in this Judgment we have referred to every document by its e-page number. We were provided with the following witness statements:

   7.1 The Claimant's witness statement running to 4 pages;
   7.2 Jessica Brindley's witness statement running to 1 page;
   7.3 Daniel Abbott, the Respondent's Senior Street Works Manager, running to 4 pages; and,
   7.4 Mark Lowton, the Respondent's HR & HSQE Director, running to 5 pages.

8. On the first morning of the hearing the Respondent told the Tribunal that it did not intend to challenge the evidence of Ms Brindley. She had asserted that in July 2022 she was told that Storm Strugnell was now the temporary office

manager following the departure of Sarah Abbott (nee Smith) on 10th June 2022. The following week she (Ms Brindley) was advised that Ms Strugnell appointment to the Office Manager role was now permanent. Accordingly we advised the Claimant that whilst we would like Ms Brindley to attend Tribunal to confirm under oath that her statement was true, she would not be questioned or challenged on that evidence.

9. On the second morning the Respondent reversed its position on this and stated it did intend to cross examine Ms Brindley. The Tribunal expressed some dissatisfaction with the about turn and the disadvantage that it caused to both the Claimant and her witness, who had been assured that the Respondent would not challenge her evidence. On inquiry as why the Respondent wished to change its position regarding Ms Brindley, we were told it was to challenge her evidence that Ms Strugnell's role was made permanent the following week.

10. The documents already before us revealed that Ms Strugnell accepted the role on 20th June **[e79]** and that it was made permanent by way of a new signed contract from 1st July 2022 **[e82]**, pretty much one week later, as Ms Brindley asserted in her statement. After taking instructions the Respondent confirmed that it would no longer challenge Ms Brindley's statement. As it turned out Ms Brindley was unable to attend Tribunal, even for the purposes of confirming under oath that her statement was true, due to childcare difficulties. Ultimately we read and considered her statement as another document in the case, on the basis that it's contents were not opposed by the Respondent, but it had not been given under oath.

11. Each of the remaining witnesses gave evidence from their witness statements and were subject to cross examination.

12. We were struck by just how ill prepared the Respondent was in defending this claim. Despite the central issues in the case being pregnancy discrimination the Respondent had not provided, by way of example:

    12.1 the Claimant's pregnancy risk assessment;

12.2 any of its equality policies including any section dealing with pregnancy discrimination;

12.3 the various emails from HR;

12.4 the text messages passing between the Claimant and Ms Smith regarding the reasons for her absence on 14th and 15th February; and,

12.5 template disciplinary investigation invite letters and template capability investigation invitation letters.

13. Of even greater surprise, given that 2 of the 5 factual allegations were made against Mrs Abbott and her motivation for doing them was central to our analysis if the burden switched to the Respondent to explain its reasons for acting as it did, the Respondent failed to call her to give evidence. Whilst she was no longer its employee, she faced allegations of discriminating against an employee because of her pregnancy and at all material times she was and remains the wife of Mr Daniel Abbott.

14. On the second morning of the hearing, Ms Akers made an application to add a further 60 pages of documents to the bundle. This additional disclosure would have nearly doubled the size of the hearing bundle. I asked if a paged and indexed supplementary bundle had been prepared and a copy provided to Ms Duggan, acting as a litigant in person, with sufficient time for her to read and digest the additional pages and thus be in an informed position to say whether she consented to or opposed the Respondent's late disclosure. To our surprise Ms Akers told us that not only had the Claimant not been given a copy of the additional documents, she had not even forewarned Ms Duggan of her intention to make the disclosure application. We consider this to be poor practise. We informed that the Respondent that we would not entertain any application for late disclosure until the Claimant had been provided with a paged and indexed supplementary bundle with sufficient time to give us an informed decision on whether she consented or opposed the application.

15. The Respondent did not renew its late disclosure application and confirmed at the start of its final submissions that it no longer intended to make it.

Findings of Fact

16. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

17. The Claimant commenced employment with the Respondent for the 2nd time on 8th January 2019. She had had two prior years' service from August 2016, before leaving the Respondent in August 2018. She recommenced employment in the Noticing Department (dealing with the various notices and approvals that are necessary to undertake groundworks on the public highways) and was promoted to a Team Leader position. She had two children at this point. She told us, and we accept, that she had not faced any disciplinary or capability issues with the Respondent.

18. On 10th January the Claimant told her line manager Sarah Smith[1] and Ms Smith's line manager, Daniel Abbott that she was pregnant. Mr Abbott told her that she should get a television for her bedroom **[e54]**. He accepted in evidence that intended he intended this comment to convey to the Claimant that if she had a television in her bedroom she would have less sex and thus be less likely to be pregnant. Ms Duggan's evidence is that he actually explained that it would mean less sex and less chance of pregnancy. The first part of the comment is admitted by Mr Abbott. We will return in our conclusion to the issue of whether the second part was also said.

[1] Ms Smith was and is married to Mr Abbott, but used her maiden name at work.

19. On 17th January 2022 Kezia Reid undertook a maternity risk assessment **[e67]** which was shared with the Claimant's management team. One of its recommendations was that expectant mothers should not be exposed to specific risks including work-related stress.

20. On 31st January 2022 Ms Smith asked the Claimant whether she intended to return to work. Miss Duggan said that she did, to which Ms Smith said 'What with 3 kids, how is that going to work' **[e54]**.

21. On 14th and 15th February 2022 the Claimant took two days sickness absence. She had suffered a panic attack on 13th February and was told by her midwife to take some rest. She informed Ms Smith of her sickness absence and the advice from her midwife that she rest. The Claimant returned to work on 16th February 2022 for an early morning regular team meeting. After its conclusion she was asked to stay behind. Mr Abbott, with Ms Smith present then berated the Claimant about errors in a defects report. The Claimant had had a period of sickness absence and did not understand what he was referring to. Mr Abbott accepted in evidence that he got angrier and angrier with the Claimant and began screaming foul and abusive language at her. As the Claimant got up to leave he shouted '*go home then, I don't want you here*'.

22. After this incident Mr Abbott removed the Claimant from the defects report and wage reports. The Claimant asserts that she was deskilled over the next few months, with different aspects of her role being given to other employees. We accept her evidence on this.

23. Immediately after the February 16th meeting at which Mr Abbott had shouted foul and abusive language at her, the Claimant raised a complaint by email sent as early as 10.24am on 16th February **[e52]**. The email was sent to HR and raised a grievance against Mr Abbott regarding his treatment of her at that meeting. Ms Duggan stated in her grievance '*This kind of behaviour toward staff is completely inappropriate. Daniel and Sarah are both aware that I'm pregnant and as per my risk assessment, my stress should be minimised. To deal with this situation in the manner that he did was totally wrong*.' We considered this to be a complaint

that a pregnant employee, for whom a risk assessment had identified stress should be minimised, should not be treated in that way, rather than a complaint that the reason or motivation for Mr Abbott's conduct had been the fact that she was pregnant.

24. On 18th February Mark Lowton interviewed both Mr Abbott and Ms Smith. Mr Abbott confirmed that he knew Ms Duggan had suffered a panic attack causing a period of sickness absence **[e58]**. He knew she was pregnant. He explained that the Claimant had been managing the defects report and that it recorded 376 outstanding defects, but only 131 remained live. This had the consequence that engineers would be tasked to repair defects that no longer required attention, thus wasting the Respondent resources and money. He considered Ms Duggan to be responsible and he admitted shouting at her and telling her to get her stuff and go home. Under evidence he admitted using foul and abusive language. Ms Smith confirmed that Mr Abbott had raised his voice and shouted that she should pack her stuff and go **[e56]**. On 19th February 2022 she emailed HR again (copying in Mark Lowton, who had been appointed to deal with her complaint) **[e53]**. She confirmed that she had taken advice from ACAS. In evidence she told us this was limited to how to write a grievance, however it is an early example of the Claimant having the where with all to obtain legal advice when she needed it. On advice from ACAS she attached a timeline of incidents. This expanded the scope of the original grievance by formally adding the 'TV in the bedroom' comment and the 'what 3 kids' comment as well as raising the Claimant's concern that her work was being taken from her.

25. In light of the additional allegations, Mr Lowton reinterviewed Mr Abbott and Ms Smith. Mr Abbott told Mr Lowton that he had not made the TV in the bedroom comment **[e64]**. Given that he now admits the remark, the unavoidable conclusion is that his denial to Mr Lowton, a manager investigating a grievance of pregnancy discrimination, was a lie and known by him to be untrue. Not only was he lying to the grievance investigator, but he got angry and pushed back, saying '*I am pissed about this but carry on*'. Mr Lowton was required to tell him to calm down. Now angry Mr Abbott refused to take part, said he would not

comment on the allegations and rose to leave the interview. He then said he would listen, but would not say anything.

26. Mr Lowton put the 'what three kids' comment to Ms Smith and told her that Ms Duggan had found the comment to be inappropriate **[e62]**. Ms Smith admitted making the 'what three kids' comment to the Claimant, but denied that it has been said maliciously. She also accepted that the Claimant had sent her text messages explaining her panic attack and sickness absence on 14th and 15th February.

27. Mr Lowton responded to the Claimant's grievance by letter dated 4th March 2022 **[e67]**. He upheld the Claimant's grievance regarding the meeting on 16th February 2022. He concluded that work had been taken from the Claimant, but asserted that this was part of a handover process ahead of the Claimant's maternity leave and thus not pregnancy related discrimination. He also concluded that an over familiarity between management and staff had lead to the formal return to work process not being undertaken.

28. Mr Lowton had also been tasked to determine whether Mr Abbott had made the 'TV in the bedroom' comment (which Mr Abbott had untruthfully denied) and whether Ms Smith had made the 'what 3 kids' comment (which she admitted was said, but not maliciously). Both were relied on by the Claimant as example of unfavourable treatment because of her pregnancy. He told us in evidence that he covered these allegations in his report with the line '*it appears that over familiarity between the management team has led to … at least two instances of inappropriate comments being made, all of which are recorded in your complaint*' **[e68]**. We consider this to be a wholly inadequate and unsatisfactory response to the Claimant's complaints. There is no specific reference to either comment, what they were, who made then, when, whether the Respondent accepted that they were considered unfavourable by the Claimant, and whether they were made because of the Claimant's pregnancy. We are asked to assume he was referring to the 'TV' and '3 kids' comments. Mr Lowton goes on to partially uphold this part of the complaint and concludes that he intends to improve communications between management and staff. There is no reasonable basis

upon which the Claimant could know from this decision whether the Respondent accepted that its managers had made discriminatory comments. This is a failing of investigation by the Respondent. The failure amounted to a failure by the Respondent to co-operate with the provision of information, that would have enabled the Claimant to make an informed decision on her claims.

29. On 23rd March 2022 Daniel Abbott was issued with a 6 month verbal warning for his harassment of the Claimant at the meeting on 16th February 2022. There is nothing to indicate that this verbal warning was in made respect of a finding of discriminatory conduct. If Mr Lowton's assertion that his expression '*at least two instances of inappropriate comments being made*' included the 'TV in the bedroom' comment then it must follow that Mr Lowton had rejected Mr Abbott's denial of the comment and concluded that it was made. Notwithstanding that conclusion, it is clear that no disciplinary sanction was imposed for that comment, which on any analysis was unfavourable and because of her pregnancy. The failure to deal with this appropriately suggests that the Respondent had failed (certainly in this instance) to protect its staff from acts of discrimination.

30. Ms Smith gave notice to the Respondent of the termination of her employment to take effect on 10th June 2022. On 6th June 2022 she sent the Claimant an invitation to a disciplinary investigation arranged for 9th June 2022 (Ms Smith's penultimate day in the Respondent's employment) into an allegation that Ms Duggan was guilty of missing information on the interim tracker report that has caused reporting errors and misleading information being provided to the board **[e70]**. Whilst the invitation did refer to what support the Claimant required to improve her work, there is no doubt and we find that this was an invitation to start a disciplinary process and not a capability process. There is no reference to the possibility of a performance improvement plan. There are multiple references to formal disciplinary hearings and disciplinary action. Ms Duggan responded by making the point that the interim tracker was a live system that at least 3 others had access to and could input, edit or remove data. She asked if all those with access were being subject to the same investigation. The Claimant received no response to this challenge, but it did cause her stress. She did not attend the

investigatory hearing arranged for the 9th June. The following day, 10th, she worked from home. She then took the following week off work (13th to 17th June) due to stress and brought forward her maternity leave to 20th June, which was at least a month earlier than when she had intended to take it (her daughter was born in August 2022).

31. On the same day that her maternity leave started Daniel Abbott sent out an email to the work addresses of the Team Leaders, namely, George Demetri, Storm Strugnell, Sonia Terry and the Claimant **[e72]**. The email informed the team leaders that Sarah Smith had left the Respondent and it invited all of the team leaders, including the Claimant to express an interest in the role. No reply was received by the Claimant. On the balance of probabilities we find that it was received by her work email address, and that she did have access to that email if she wished to read her work emails. She did do this on occasion after her maternity leave started. Ms Terry **[e77]** and Mr Demetri **[e78]** both declined the opportunity to be considered. Ms Strugnell was the only team leader that expressed an interest in the role **[e79]**. Accordingly, on 20th June Ms Strugnell was appointed on a temporary basis pending an interview. She was confirmed permanently in the new role just over one week late on 1st July 2022 **[e82]**.

32. Mr Abbott told us in evidence that he had called the Claimant about the return of her computer a week or so after the expression of interest email had gone out. The Claimant accepts that there was a call. Mr Abbott told us in evidence that during this conversation he told the Claimant about the expression of interest and asked she why had not applied. The Claimant denied this part of the conversation. She said Ms Smith's role was an obvious career move for her and she would have expressed an interest if she had known. We accept the Claimant's evidence on this. Mr Abbott has already demonstrated a willingness to lie to his senior managers in an investigation, and an capacity to rebut that investigation by telling Mr Lowton he was pissed off by having to engage in the process and then refusing to do so. My his own admission Mr Abbott shouted and swore at his stage. Completely unbidden he told us he shouted and swore at wife, Ms Smith. We have no doubt that Mr Abbott will lie if he perceives it to

be in his interest to do so. We conclude that he did not tell the Claimant of the opportunity when he spoke to her about the return of her computer.

33. Some 4 months later, on 28th November 2022, the Claimant checked with the Respondent's HR payroll system as she believed her payslip of that date may be wrong. She saw, for the first time (which we accept) that Storm Strugnell was recorded as being her manager. She complained that she had been denied the opportunity to apply for that roll **[e84]**. We make two findings on this point. Firstly that the Claimant was sent the expression of interest in Ms Smith's role to her work address on 20th June and secondly that the Claimant missed the email and did not realise the competition was progressing without her involvement.

34. On 8th December 2022 Mark Lowton responded to this 2nd grievance **[e86]**. He concluded that the IT department considered that the Claimant had 'read' the expression of interest email. He stated that Ms Strugnell had been the only applicant for the role. He said that the business had not fully appreciated the business need for the role and that he was prepared to offer the Claimant an interview for it. The Claimant declined as by that point Ms Strugnell had been in role for over 5 months. Mr Abbott stated in his witness statement **[DA14]** that he told Mr Lowton that there should be more build work for Openreach and that he would need another Noticing Manager (in addition to Ms Strugnell) and that he would be happy to interview the Claimant for the role. We consider this to be a disingenuous statement and we reject it. There is nothing whatsoever in Mr Lowton's grievance decision to indicate to the Claimant that there was a second Noticing Manager opportunity for which she could apply. We consider it entirely reasonable for the Claimant not to complete for a role against a sitting incumbent of 5 months, which was all she was given to understand the position to be.

35. That day the Claimant contacted ACAS again, took advice and formally commenced early conciliation. On the day that process ended, on 9th January 2023, she submitted her Claim Form. She did not resign at that point. She took the decision not to because she was, at that time, still being paid maternity pay and was still accruing holiday pay during her maternity leave. She could not

afford to loose those benefits. She resigned on the day her maternity was due to end, on 3rd April 2023.

36. We shall turn now to the legal principles relevant to this claim:

The applicable Law

37. Turning firstly to pregnancy discrimination. The relevant provisions of s18(2) **EqA** state:

> 'A person 'A' discriminates against a woman, if 'A' treats her unfavourably because of the pregnancy'.

38. The burden of proof provisions are set out at S136(2) **EqA**, which states:

> *'If there are facts from which the Court could decide, in the absence of any other explanation, that a person 'A' has contravened the provision concerned (here s18(2) **EqA**) the Court must hold that the contravention occurred'.*

39. It is for the Claimant to prove the fact of the incidents of unfavourable or detrimental treatment said to have occurred and that the reason for the detrimental treatment was because of her pregnancy.

40. It is for the Claimant to prove the facts from which the Employment Tribunal could conclude an unlawful act of discrimination, ie that the alleged discriminator has treated another person less favourably and did so on grounds of pregnancy. Did the discriminator, on pregnancy grounds, subject the Claimant to less favourable treatment than others?

41. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the Claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

Where the Claimant has proved facts from which conclusions may be drawn that the Respondent has treated the claimant less favourably on the ground of pregnancy then the burden of proof moves to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

42. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of pregnancy. That requires the tribunal to assess not merely whether the Respondent has proved an explanation but that it is adequate to discharge the burden of proof on the balance of probabilities that pregnancy was not a ground for the treatment in question. The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (pregnancy) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

43. Turning now to constructive unfair dismissal. The statutory basis for constructive dismissal is set out in section 95(1)(c) of the **Employment Rights Act 1996** ('the ERA').

> *'(1) For the purposes of this Part an employee is dismissed by his employer if … (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

44. The following principles apply: If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance.

45. The employer shall not without reasonable and proper cause conduct itself in a manner calculated and/or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

46. The Claimant must resign in response to the breach (causation) and not delay too long in terminating the contract in response to Respondent's breach (waiver). In respect of the causation question "*it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. … it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him*".

47. The employee must be entitled to say 'You have behaved so badly that I should not be expected to have to stay in your employment' and the Tribunal must be prepared to conclude that overall that the faults of the employer were so egregious that no reasonable employer could have acted in that way.

48. Turning now to the law on time. The onus is always on the Claimant to convince the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule.

49. The same considerations apply in considering 'just and equitable' as apply to consideration section 33 of the **Limitation Act 1980** for extending the time limit in personal injury cases. The considerations are as follows:-

    49.1 the length and reasons for the delay;
    49.2 the extent to which the cogency of the evidence is affected;
    49.3 the extent to which the Respondent has co-operated with requests for information;
    49.4 the promptness of the Applicant once he knew of the facts giving rise to the cause of action;
    49.5 the steps taken by the Applicant to obtain appropriate advice when he knew of the possibility of taking action.

50. In the Court of Appeal authority of **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA Lord Justice Mummery expressed the issue to be determined as follows (at paragraph 2) *"The main issues are concerned with statutory time limits on bringing proceedings for discrimination, when an act is alleged to extend over a period. If the act extends over a period, it is treated as having been done at the end of that period; whereas, in the case of an isolated act, time runs from when that act was done"*.

51. Turning now to our conclusions.

Our Conclusions

52. We shall deal firstly with the time arguments.

53. The Claimant notified ACAS of a dispute with the Respondent on 8th December 2022. This means that the 'cut off' for claims is 9th September 2022. If a series of incidents are considered by the Tribunal to be part of single discriminatory act (for example a campaign of harassment by one manager against an employee) the Tribunal looks to the last date to see whether it is in time.

54. In this case there are five incidents that we are tasked to consider. The first two occurred in January 2022. The third in February 2022. The fourth and fifth both in June 2022. In this context we have to determine when the alleged discrimination took place, and not when the Claimant found out that it had, if later. The invitation to an investigatory meeting happened in June and the expression of interest email for the Noticing Manager role was also sent out in June. These two incidents occurred nearly three months before the cut off date of 9th September 2022. In the circumstances the latest incident is itself nearly 3 months out of time. There can be no continuing act point if all of the incidents that make up the continuing act are out of time.

55. We turn then to consider whether it would be just and equitable to extend time to allow the claims to proceed. In so doing we have considered the factors relevant to this determination as follows:

55.1 The length and reasons for the delay. Broadly speaking, the length of the delay is 8 months for the January 2022 incidents, 7 months for the February incident and 3 months for the June incidents. The reason for the delay is that the Claimant hoped that the January and February incidents would be resolved by way of the grievance process and a worry over 'rocking the boat' and jeopardising the Claimant's vulnerable financial position. She was a mother of two with a third on the way, and was about to switch to maternity pay. She acted promptly once she discovered the possibility that she had been excluded from the Noticing Manager vacancy.

55.2 The extent to which the cogency of the evidence is affected. All of the matters complained of were investigated at the time with a record taken of the explanations provided at the time. The Respondent rightly accepted that the delay had caused no prejudice and/or that the cogency of the evidence had not been affected.

55.3 The extent to which the Respondent has co-operated with requests for information. We conclude that the Respondent, and Mr Lowton in particular failed in one very important regard. The Claimant raised a grievance of pregnancy discrimination regarding the 'TV in the bedroom' and the 'what with 3 kids' comments. He investigated both matters with the relevant witnesses, yet failed to reach an decision on them. The Claimant did not know whether they had been upheld or not, and was, we think, entitled to believe that they had not been progressed.

55.4 The steps taken by the Applicant to obtain appropriate advice when he knew of the possibility of taking action. The Claimant did take advice from ACAS in February 2022 regarding how to write a grievance. She clearly was capable of taking advice at that time and did so in the areas

she wanted help with. She took advice promptly again after the rejection of her final grievance.

55.5 The promptness of the Applicant once he knew of the facts giving rise to the cause of action. The Claimant acted quickly once she became aware of the June 2022 expression of interest email, in early December 2022. She did not act on the January, February or other June incident until December. In respect of the January, February or other June incident the Claimant cannot be said to have acted promptly. However, she has explained why, which was a mix of hoping the internal grievance will resolve matters for her and not wishing to jeopardise her perilous financial position in the run to and start of her maternity leave.

56. This has been a difficult decision for us and it is finely balanced. There are competing arguments. The principle one against the Claimant is her lack of prompt action after the January and February incidents. Against that, we understand her rationale for her delay. We also consider we did take advice promptly. The delay has caused no prejudice to the Respondent and the cogency of the evidence is unaffected. Mr Lowton's failure to deal with key parts of her grievance did have the effect of denying her all of the information upon which Claim decisions could have been made. In the circumstances we consider that it would be just and equitable to extend time for all incidents and accordingly we do so. We shall now turn to each factual issue in turn.

57. **Issue 1: The TV in the bedroom incident**. Mr Abbott was a poor witness. He lied to Mr Lowton about making the comment. He got (and stated himself to be) 'pissed off' with Mr Lowton for investigating it and refused to co-operate. Before us he admitted making the comment. Whilst he denied adding '*to stop having sex and getting pregnant*' he admitted before us that that was what he meant. Mr Abbott thinks it is fine to shout and use foul and abusive language to female employees, including his own wife. We prefer the Claimant's evidence on this and conclude on the balance of probabilities that the full comment was made. It is plainly related to the Claimant's pregnancy and it was plainly unfavourable. This allegation succeeds and is upheld.

58. **Issue 2: The 'what with 3 kids' comment**. The Respondent chose not to call Ms Smith to provide us with an explanation for what she meant, and context in which it was said, and whether it was unfavourable or not. The investigation notes reveal that Ms Smith admits she made the comment, but said it was not malicious. Miss Akers rightly accepts that the Claimant's pregnancy was the reason for the comment, but submitted that as the Claimant had not set out in her statement how she received the comment, there were no facts from which we could conclude that the comment was malicious and/or unfavourable. She asserts that without those facts this allegation must fail. However, we conclude that there are facts from which we could conclude a contravention of s18(2) **EqA** namely the Claimant's grievance timeline **[e54]** in which she described the comments to be inappropriate. Whilst the Claimant did not cover this point in her witness statement, she did give evidence in cross examination on it, saying (after the break ending at 3.50pm on day 1) in explanation '*I was uncomfortable, I needed a job so I just got on with things*'. These matters we accept as facts that establish unfavourable treatment. Accordingly, the effect of s136(2) shifts the burden to the Respondent to explain what was meant by the comments and their context. The Respondent adduced no evidence at all from Ms Smith. We were left with no other explanation. In the circumstances we are bound by s136(2) **EqA** to hold that the contravention of s18(2) occurred. By reason of the Respondent's failure to provide an explanation we conclude that this allegation succeeds and is upheld.

59. **Issue 3**: **foul and abusive language shouted at the Claimant on 16th February 2022**. Unlike Issue 2, the Respondent did call Mr Abbott to give evidence. It is clear that his treatment of the Claimant that day occurred as the Claimant asserts and was unfavourable. The issue of us is whether it was because of the Claimant's pregnancy. Whilst we have found, for the reasons already stated, that Mr Abbott was a deeply unimpressive witness, we do accept the explanation that he gave to Mr Lowton in his first grievance investigation **[e58]** as the reason why he got so upset. He believed the Claimant to be responsible for a defects report that recorded a large number of outstanding issues that required fixing when they no longer did, thus causing engineers to be

sent to jobs that had already been resolved. We find on the balance of probabilities that this was the reason why he shouted at the Claimant, subjected her to foul and abusive language and told her to pack up and leave. His conduct at that meeting was wholly unreasonable and unacceptable, however we conclude that the Claimant's pregnancy was not the reason for it, so this allegation fails.

60. **Issue 4**: **The Disciplinary Hearing invitation**. The issue here is similar to the one we faced on issue 2 and the operation of s136(2) **EqA**. Sarah Smith sent out this invitation as one of her last acts in employment. She did not given evidence to explain why she did it, or why she treated this as a disciplinary matter and not a capability matter. The Claimant objected on the grounds that at least 3 others had access to the interim tracker, and that all would need to be investigated to find out the source of any inaccuracies. The Respondent has not adduced any evidence from Ms Smith to answer this point. The invite was unfavourable. Was it because of the Claimant's pregnancy? The following facts are before us to conclude that the Claimant's pregnancy was the explanation:

60.1 The invite letter itself;
60.2 That it is clearly a disciplinary investigation invite and not a capability investigation invite, when a good reason is needed to know why a capability issue was treated as a disciplinary matter;
60.3 The Claimant's apparently valid concerns that three other managers, who were not pregnant, were not subject to an investigation;
60.4 The failure of Ms Smith to reply to that concern;
60.5 The Claimant's evidence that she believed Ms Smith's motivation was to force her (the Claimant) to bring forward her maternity leave and leave the business.

61. These matters, taken together, require an explanation from the Respondent, and in particular Ms Smith, as to why she sent out the letter. The Respondent has not provided any explanation, and in the absence of any explanation and upon the operation of s136(2) EqA this complaint succeeds and we uphold it.

62. **Issue 5: The expression of interest email**. The Claimant has invested quite some time in explaining why she did see this email and how, she believes, Mr Abbott should have done more to bring the job opportunity to her attention. However the issue here is whether the Claimant has provided facts from which we could decide that she had been excluded from the competition because she was pregnant. On this issue we conclude that the Claimant has failed to do that and accordingly the burden does not shift to the Respondent for an explanation. Whether the Claimant spotted the email **[e72]** is not the key question. The key question is whether the email establishes the Claimant's exclusion. The email does the opposite, as the Claimant was on the distribution list. Accordingly the contention that she was excluded fails on its facts. This allegation fails and is dismissed.

63. **Constructive dismissal**. The behaviour recited above at Issues 1, 2 and 4 were discriminatory. They all are capable of destroying trust and confidence in the employment relationship. We are required however to determine whether the Claimant delayed in terminating the relationship and whether she had accepted the behaviour by reason of choosing to remain in employment. Following the guidance referred to above we conclude that the Claimant did not consider issues 1, 2 or 4 to be matters that required a resignation. She remained an employee through to 3rd April 2023, which is over a year from issues 1 and 2, and only just under a year for issue 4. She made the decision, from a constructive dismissal perspective, to continue in employment until her maternity period ended.

64. In the circumstances we think this resignation falls outside of the ambit of s95 **ERA** and accordingly the Claimant's unfair dismissal claim fails and is dismissed.

65. We shall now turn to the issue of remedy.

Remedy.

66. As a result of our findings any salary losses caused by the Claimant's decision to resign as late as 3rd April 2023 are not recoverable in this litigation. In the circumstances remedy is limited to the appropriate injury to feelings award for the claimant to compensate her for the acts of pregnancy related discrimination that she has suffered. These are:

    66.1 On 10th January 2022 being told by Dan Abbott to get a television for her bedroom so she may have less sex and not get pregnant.
    66.2 On 30 January 2022 Sarah Abbott's reaction to learning Miss Duggan was intending to return to work, by saying 'What? With three kids? How will that work?
    66.3 On 6th June 2022 being invited to a disciplinary investigation meeting into errors in an interim tracker report when other non-pregnant employees with access were not invited, in order to push the Claimant into early maternity leave.

67. The Claimant told the Respondent at the time of the 10th and 30th January incidents that they made her feel uncomfortable. In her witness statement she said:

> *'[15] This whole situation has frankly ruined my working life whilst I'm now working again, but within a completely different role in different industry. My confidence in a role and industry I once loved is now non-existent. I'm terrified that if I go back into management position in any industry and have another baby, this will happen to me again. The first year of my daughter's life has been totally overshadowed by Kelly Traffic management and the treatment I've received. The total lack of compassion and understanding they have shown his devastated me.*
>
> *[16] I believe I was discriminated against from my pregnancy from the moment I informed Daniel Abbott about it and I believe my not returning to the company is exactly what he wanted from doing this along with his wife Sarah Abbott.*
>
> *[17] I believe my claims to be clearly proven with the evidence provided and also believe I've provided an extremely fair and honest schedule of loss. It took me 8 months to find work to fit around my families needs and that I felt confident in taking on after what I had been through. … My Injury to Feelings*

failings claim is on the lower end of the Vento guideline, again I feel this is more than fair after what I've been through.'

68. In the Claimant's written submissions she stated:

'There has been a cloud over my life and particularly the last 18 months of my daughter's life when I should have been enjoying time with my daughter, I spent my time terrified about what I would do once my maternity leave was over and had zero confidence in myself to be able to jump back into my career. Whilst I found work since I haven't found anything that works alongside my family or anything secure. I feel a massive amount of sadness when I remember the time since my daughter was born in in August 2022. It has been a time filled with stress, sadness and disbelief that I was treated this way and that the upper management have made the decision to defend a member of their staff who they openly admit made inappropriate comments, use foul and abusive language and discriminated against me instead of defending myself whilst I was pregnant, vulnerable and needed their support.'

69. During oral remedy submissions that Claimant told us that the Respondent's failure to respond to her discrimination grievance caused her great upset and stress.

70. In this matter, when the Claimant refers to stress, she does so in the context of injury to feelings rather than a separate personal injury. We have approached the exercise of assessing loss on that basis. There is no medical evidence to establish any injury or link any injury to any acts of discrimination.

71. The claimant asks us to value her injury to feelings in the sum of £29,250.00 or towards the top of the middle **Vento** band. Miss Akers, on behalf of the Respondents, reminds us that injury to feelings is compensatory and not punitive than any indignation the Tribunal may have felt about the Respondents' conduct at the liability stage should not be part of our deliberations on remedy. We agree with these principles.

72. Miss Akers also argues that the extent of the Claimant's injured feelings as she describes them are based on all 5 incidents in her Claim Form and in particular the last one relating to the expressions of interest. It is that incident, Ms Akers says, that caused the Claimant to issue her claim.

73. That incident was not an act of pregnancy discrimination, so we discount it. We must then reduce our injury to feelings awards to ensure we are not compensating the claimant for that incident. As a result, the Respondent invites us to pitch injury to feelings between £9,000.00 and £11,000.00, in other words, in the lower band albeit at the top of the lower band.

74. This is not a case of an isolated incident. This is a campaign by a married couple, the claimant's managers, of discriminatory conduct in relation to the her pregnancy. Marriage and pregnancy discrimination can attract higher rewards as both of those times are meant to be periods of joy and that joy is or can be reduced or destroyed by acts of discrimination.

75. In the circumstances, we see this as a middle band case or be it towards the lower end. We reject the Claimant's valuation as this is too high. This is not and it is nowhere near the top band **Vento** cases. In the circumstances, doing the best we can with the evidence we have heard, we value injury to feelings in the sum of £14,000.00. We have run interest from the midpoint of the discriminatory events starting on the 10th January an ending on the 6th June. This midpoint is the 25th March. Interest runs from then at 8%. The calculations are set out in the schedule attached to this Judgment.

13th April 2024

Employment Judge Gidney

Schedule of Remedy Calculations

1. Details

Date of birth of claimant	09/06/1993
Date started employment	08/01/2019
Remedy hearing date	12/04/2024
Net weekly pay at date of claim	168.81
Gross weekly pay at date of claim	176.32
Estimated net weekly pay the claimant should have been earning	176.32
Date of discriminatory act	25/03/2022
Calculation date	12/04/2024

2. Compensatory award (immediate loss)

Loss of net earnings Number of weeks (0) x Weekly loss (7.51)	0.00
Total compensation (immediate loss)	**0.00**

3. Non financial losses

Injury to feelings	14,000.00
Plus interest @ 8% for 749 days	2,298.30
Total non-financial award	**16,298.30**

4. Summary totals

Compensation award including statutory rights	0.00
Non-financial loss	16,298.30
Total	**16,298.30**