EMPLOYMENT TRIBUNALS

Claimant: Mrs L Williams

Respondent: Mersey Care NHS Foundation Trust

Heard at: Liverpool

On: 6, 7, 8 and 9 February 2024

Before: Employment Judge Horne, sitting with
Members: Mr A Clarke and Ms P Owen

Representatives
For the claimant: Mr R Ross, counsel
For the respondent: Mr J Kinsey, counsel

Judgment was announced on 9 February 2024 and sent to the parties on 3 May 2024. The claimant has requested written reasons for that judgment in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. The following reasons are accordingly provided.

REASONS

Introduction

1. It has taken longer to prepare these reasons than we would have liked. This is due to the pressure of hearing other cases and ensuring that judgment and oral reasons in those cases are announced promptly. Our employment judge understands that this results in parties being kept waiting for written reasons and recognises the frustration that this can sometimes cause.

Complaints and issues

2. By a claim form presented on 13 April 2023, the claimant brought the following complaints:

    2.1. Pregnancy and maternity discrimination in the provision of opportunities for promotion, by constructive dismissal, and by subjecting an employee to a detriment, within the meaning of section 18 of the Equality Act 2010 (“EqA”) and in contravention of section 39(2) of EqA;

2.2. Direct sex discrimination by subjecting an employee to a detriment and by constructive dismissal, within the meaning of section 13 of EqA and in contravention of section 39(2) of EqA;

2.3. Harassment related to sex, within the meaning of section 26 of EqA and in contravention of section 40 of EqA; and

2.4. Unfair constructive dismissal, within the meaning of sections 95(1)(c) and 98 of the Employment Rights Act 1996 ("ERA") and contrary to section 94 of ERA.

3. A preliminary hearing took place before Employment Judge Leach on 31 August 2023. One of the purposes of that hearing was to clarify the complaints and the issues that the tribunal would have to determine at the final hearing. The parties informed the tribunal that they had largely agreed a list of complaints and issues, but the respondent's solicitor had raised some queries about it. Counsel for the claimant (not Mr Ross) informed the judge that she would finalise the list of issues and send it to the tribunal in an agreed form. The claimant's solicitors e-mailed the agreed list of issues to the tribunal on 22 September 2023.

4. During the course of the final hearing, it became clear that, whatever agreement there might have been in September 2023, the parties did not think that the list of issues accurately reflected what was in dispute between them. They sought to depart from the list of issues in the following respects:

4.1. Under the heading of "Pregnancy and maternity discrimination", the list of issues asserted that the respondent had treated the claimant unfavourably "because of her pregnancy and/or because of an illness she suffered as a result of her pregnancy". It quickly became clear that the claimant wanted to argue that some of the unfavourable treatment had been because she had exercised her right to maternity leave. The respondent did not object to her putting her case in that way.

4.2. One of the allegations of unfavourable treatment (now labelled **Unfavourable Treatment 1**) was stated to be "the recruitment process for the secondment as a team leader". As the evidence unfolded, it emerged that there were a number of aspects to the recruitment process that were said to have been unfavourable to the claimant. In particular, these were:

(a) Mrs Houghton encouraging others to apply for the Deputy Team Leader role;

(b) The decision to require the claimant to interview for the role, despite being the only candidate left by the time of the interviews;

(c) Mrs Houghton speaking to the interview panel just before the interview, despite having promised not to be involved in the recruitment process;

(d) Mrs Houghton negatively influencing the panel against the claimant; and

(e) The panel not offering the claimant the role.

4.3. The list of issues, at paragraph 1(c), included an allegation by the claimant of discrimination because of maternity, consisting of a "failure to acknowledge and to offer support relating to a change in her personal circumstances following the death of her father in July 2022". That complaint was not in the

original claim. Mr Ross applied for permission to amend. He clarified what the "support" was that had been unfavourably withheld. According, to Mr Ross, the complaint was about a failure to communicate with the claimant at all about her father's death. We granted permission to amend, giving our reasons orally at the time.

4.4. This dispute blew up again during the parties' final submissions. Counsel disagreed about the scope of the complaint that we had permitted the claimant to pursue. The respondent had understood the allegation to be that *nobody* had communicated with the claimant about the loss of her father. If that was the correct interpretation, the allegation would be defeated if *anybody* (for example, Miss Parle) had communicated with the claimant on that subject. The claimant clarified that her case was that Miss Parle and Mrs Houghton had *each* treated the claimant unfavourably by failing to communicate with the claimant. If that was indeed the complaint that we had allowed the claimant to advance, it would mean that we would have to make findings about the actions of Miss Parle and Mrs Houghton separately and then examine each of their motivation. It was agreed that we would check precisely what allegation we had permitted to go forward, and if any further amendment were needed to the list of issues, we would make a decision about whether to grant that permission at the same time as determining the other issues in the case.

4.5. The list of issues was altered by further clarification of the complaint of harassment in relation to the facilities for expressing breastmilk. Paragraph 4 of the list of issues stated,

> "Did the respondent engage in unwanted conduct by failing to make arrangements to enable her to express breastmilk after her return from maternity leave?"

4.6. This was supplemented by paragraph 7, which "identified the following unwanted conduct:

> (a) Having to let down milk in her car to prevent engorgement between patient visits
>
> (b) Having to rush home before she started leaking milk
>
> (c) Expressing milk at her home between visiting patients
>
> (d) Expressing milk at her home after patient visits but before completing her documentation at the end of the working day."

4.7. During the parties' final submissions, counsel for the claimant took the position that the unwanted conduct included the respondent's alleged failure to provide facilities at the V7 Base, or an opportunity to express milk in time on her return from the V7 Base. The respondent disputed that such failures fell within the scope of paragraph 7. We had to decide whether the formulation of the list of issues prevented the claimant from advancing her complaint of harassment in this way.

4.8. The list of issues contained two allegations of direct discrimination. The claimant withdrew one of them. This was a complaint about the outcome of the claimant's grievance.

4.9. The issues in the surviving direct discrimination complaint were not as they first appeared. Paragraph 2 of the list of issues asked, "Was the claimant treated

less favourably the way the respondent treated her or would have treated others because of her protected characteristic of sex, in respect of …expressing breastmilk after her return from maternity leave[?]" At paragraph 3, it appeared to be agreed that "The Comparator would be …a male nurse requiring a private space to administer medication".

4.10. During the parties' closing submissions, Mr Ross argued on the claimant's behalf that no comparator was required at all. On the claimant's case, unfavourable facilities for breastfeeding must be regarded as less favourable treatment because of sex. The respondent conceded that there was no need for a *male* comparator, but argued that the correct comparator was a person (male or female) who required comparable facilities for some purpose other than breastfeeding.

4.11. At paragraph 8 of the list of issues, the parties asked us to determine the respondent's defence under section 109(4) of EqA. It appeared to relate to "any discriminatory acts" although it appeared under the heading of Harassment. The defence was not pursued in oral argument and we did not consider it.

4.12. There was a complaint of discriminatory constructive dismissal. The list of issues identified the question of whether the respondent had repudiated the contract by discriminating against the claimant. It did not spell out which contractual term the respondent had allegedly fundamentally breached. We took the claimant to be alleging that the respondent had breached the implied term of trust and confidence.

4.13. Under the heading, "unfair constructive dismissal", paragraph 10 of the list of issues posed the question: "…did the Respondent …Breach the implied term of trust and confidence[?]" It was agreed that this question should be split out into the component parts of the test in *Malik v. BCCI.*

4.14. The list of issues did not set out what the respondent had allegedly done that was calculated or likely to destroy or seriously damage the relationship of trust and confidence. In the absence of anything to narrow down the claimant's case, we looked to the original Particulars of Claim to tell us what the alleged conduct of the respondent was. Our employment judge suggested to the parties that this appeared to be the case on which we should adjudicate. Counsel for the claimant agreed. Counsel for the respondent did not oppose the suggestion.

4.15. During her oral evidence, the claimant confirmed that she made up her mind to resign from her employment early in her maternity leave and certainly by April 2022. She was prepared to work her notice period in order to avoid her enhanced maternity pay being clawed back. Beyond that, there was no way in which she would be prepared to continue working for the respondent. Nothing was alleged to have been done to undermine the relationship of trust and confidence in January, February or March 2022. During closing submissions, our employment judge put it to the parties that, for the claimant to have resigned in response to a breach of the implied term of trust and confidence, the claimant would need to show that that term been breached by the conduct of the respondent during the period from March to December 2021. Counsel for the respondent positively agreed. Counsel for the claimant did not advance any submissions to the contrary.

4.16. The list of issues contained issues related purely to the claimant's remedy. These issues were refined and determined at a later remedy hearing and we do not need to list them in these reasons.

5. We recast the list of issues to take account of all these changes. The list appears as an Annex to these reasons. The paragraph numbering may appear a little strange to a newcomer to the case, but we have tried to keep it as close as possible to the original paragraph numbering of the list of issues, as this will make the best sense to the parties.

Evidence

6. The claimant gave oral evidence on her own behalf. The respondent called Mrs Houghton, Miss Parle, Mrs Gordon and Miss Collins as witnesses. All five witnesses confirmed the truth of their written witness statements and answered questions.

7. We considered documents in a 417-page bundle. Seven further pages were added to the bundle by agreement during the course of the hearing.

Facts

8. The respondent is a provider of community health services. It is a product, in part, of a merger with Liverpool Community Health NHS Foundation Trust (LCH) in 2017. One of the respondent's services is palliative and end of life care. These services are delivered in patients' homes and at palliative care hubs. The hubs include hospices, one of which is the Marie Curie Hospice in South Liverpool. Care in a hospice setting is delivered in partnership with the hospice charity.

9. LCH operated from a base at Brunswick Dock in South Liverpool. At around the time of the merger, the base moved to Edge Lane in South-East Liverpool. Staff were informed that this was their new base, and believed that it would continue to be their base for the long term.

10. The claimant is a specialist palliative care nurse. She began employment with LCH in 2013 and her employment transferred to the respondent with the merger. She resigned by giving notice, which expired on 31 December 2022.

11. At the times relevant to this claim, the claimant lived in a house in South Liverpool.

12. At time of the merger, the claimant was employed at Band 6. In 2018, she successfully applied for a more senior role at Band 7. The interview panel was made up of three people. One of these was Miss Angela Parle. Miss Parle's role was Palliative Care Team Leader. At the time of the interview, the claimant was visibly pregnant.

13. In her new role, the claimant was one of a team of specialist nurses who reported to Miss Parle. The team was supported by a Care Coordinator.

14. Day-to-day work for the claimant included:

    14.1. Visits to patients at home;

    14.2. Visits to palliative care hubs to care for patients and/or to meet with other care professionals;

    14.3. An online "safety huddle" at the beginning of each day;

14.4. Visits to the respondent's base at Edge Lane (although we were unable to make a finding about how frequently this happened); and

14.5. Communication with other healthcare professionals and care providers to ensure that a patient's care needs were met.

15. Palliative care can be complex, especially as the patient nears the end of their life. Visits are of unpredictable length. The claimant would have to respond to whatever care needs she encountered when she arrived.

16. Patient visits were arranged by cooperation between the palliative care nurses and the Care Coordinator. The diary would mainly be populated by the Care Coordinator, but the claimant could make entries into her own diary. Nurses could, and did, swap appointments between themselves. If they swapped appointments, they would update the diary to reflect the change. Arrangements such as this generally worked effectively through collaboration between peers without the need for management intervention.

17. In January 2021, Mrs Barbara Houghton became the Principal Lead for Palliative Care. Mrs Houghton had expected the role to be primarily strategic in nature, but found herself landed with operational responsibility due to the departure of the previous operational manager. Mrs Houghton thus acquired responsibility for line-managing Miss Parle and leading the Palliative Care Team. Being new to the role, Mrs Houghton had many queries and sometimes looked to the claimant for advice. The claimant valued being asked. Over time, as Mrs Houghton became more familiar to the role, her dependence on others gradually decreased and she asked fewer questions.

18. In February 2021, the claimant successfully applied for the temporary role of Care Coordinator. The role was offered to her for a fixed term of six months. This meant that in August 2021 the claimant would revert to her substantive Specialist Palliative Care Nurse role. As things turned out, her fixed term was extended to November 2021.

19. In early 2021, the claimant began a course of *in-vitro* fertilization (IVF) treatment. By April 2021 the claimant believed that the treatment had been successful, although she had not yet had confirmation that she was pregnant.

20. In April 2021 the claimant's working days were changed so that she could work compressed hours, four days out of five. She took sickness absence from 12 April 2021 until 5 May 2021. On 6 May 2021, the claimant told Mrs Houghton that she was "potentially pregnant". There was a discussion about the assessment of pregnancy risks. At that point it was their shared understanding that the claimant was likely to be pregnant and that the pregnancy was at an early stage.

21. On 9 May 2021, an e-mail was sent to the whole Palliative Care Team. The e-mail invited expressions of interest for a Deputy Team Leader for a period of three months. The role was expressed to be "developmental". What this meant was that the successful candidate for the role would not necessarily be required to have developed all the skills and abilities needed of the substantive Team Leader. The thinking behind the creation of this "developmental" role was to put a potential team

leader into position working alongside Miss Parle, to support Miss Parle as she approached retirement.

22. One of the factual disputes in this case is about when Mrs Houghton decided to create the Deputy Team Leader role and when to recruit into it. Part of the route map towards resolving this dispute is a further clash of evidence about an alleged conversation in March 2021 when the claimant and Mrs Houghton were together at the Marie Curie Hospice. Our finding is that Mrs Houghton mentioned the possibility of a new Deputy Team Leader role. She did not say, as the claimant contends, that such a role had been created, or that the respondent would definitely be recruiting into that role. The e-mails suggest that the decision to recruit a Deputy Team Leader was made shortly before 9 May 2021.

23. On 10 May 2021 the claimant dropped a strong hint to Mrs Houghton that she was pregnant. Mrs Houghton replied, "I'm made up for you".

24. In May 2021, the claimant decided to apply for an award called the "Queen's Nurse" ("QN"). The purpose of the QN award was to recognise excellence and dedication in nursing. QN awards were administered by an independent body, the Queen's Nursing Institute ("QNI"). One of the requirements for a QN application was that it be supported by the applicant's "professional/clinical lead". Another requirement was that the supporting line manager had to have known the applicant for at least six months.

25. The closing date for the application was not displayed on the QNI website. The claimant believed that the deadline was "mid-June".

26. On 12 May 2021, the claimant e-mailed Mrs Houghton and Miss Parle separately to tell them that she was making a QN application and asking them for their support. Her e-mail did not spell out the eligibility requirements for a supporting professional/clinical lead. Instead, she provided a link to the relevant QNI web page.

27. Mrs Houghton opened the link and studied the guidance. When she saw the 6-month requirement, she approached the claimant for a conversation. She told the claimant that she was not sure that she would be able to support the application because she had only known the claimant for three months, and that she would have to go away and look at the guidance more carefully. Following that conversation, the claimant understood that it was unlikely that Mrs Houghton would be eligible to complete the form. Two days later, the claimant e-mailed two other people and asked them to support her application instead. One of the two alternative referees was Karina Woodyer-Smith.

28. Miss Parle received the e-mail, but did not reply. The claimant did not follow up or chase Miss Parle for a response.

29. It would be possible for the tribunal to conclude that Miss Parle was motivated by the claimant's pregnancy from the timing of Miss Parle's failure to reply, coming as it did only a few days after the claimant told Mrs Houghton that she was pregnant. Nevertheless, the respondent has proved Miss Parle's reason for not replying. It was simply that she missed the e-mail. That explanation would be harder to

believe if the claimant had chased Miss Parle, but she did not. Miss Parle's neglect of the claimant's request was nothing to do with the fact that the claimant was pregnant. Miss Parle had been on the panel that had promoted the claimant when she was pregnant with her first child.

30. The claimant took a further initiative of significance on 12 May 2021. She e-mailed Mrs Houghton, expressing her interest in the Deputy Team Leader role.

31. Another hopeful applicant for the role was a colleague of the claimant's, Mr David Lee. On 13 May 2021, Mr Lee e-mailed Mrs Houghton to express his interest. His e-mail asked for a "further conversation", suggesting that he and Mrs Houghton had discussed the Deputy Team Leader role before. Our finding was that indeed there had been such a conversation, and it had taken place after Mrs Houghton's expressions of interest e-mail on 9 May 2021. Mrs Houghton encouraged David Lee to apply, but did not offer any more encouragement than she gave to anybody else, or would give to anybody else who had approached her about it.

32. Mrs Houghton was not trying to encourage competitors to apply to reduce the claimant's chances of being successfully appointed. There would be no point in her doing so. In May 2021, she (correctly) believed that the claimant was in an early stage of pregnancy following recent IVF treatment. The proposed Deputy Team Leader role was only for three months. It would cause no inconvenience to the respondent to recruit the claimant into that role, as it would have come to an end before the claimant was expected to go on maternity leave. Indeed, it was not put to any of the respondent's witnesses that they expected the claimant's maternity leave to get in the way of her ability to complete the Deputy Team Leader role. There would, in fact, have been positive benefits to the respondent had they decided to give the Deputy Team Leader role to a nurse who was pregnant. The leadership responsibility would mean less face-to-face patient contact. As at May 2021, the coronavirus vaccination programme was still part-way through being rolled out. Infection from Covid-19 was still a real risk. The claimant's Care Coordinator role was due to come to an end in August 2021 – the Deputy Team Leader role would have enabled her to stay away from patient-facing duties for longer.

33. Other members of the team also spoke with Mrs Houghton about the Deputy Team Leader role. Conversations of this kind happened if the team member approached Mrs Houghton to try to find out more. Mrs Houghton did not seek them out pro-actively. The claimant did not initiate any such conversation with Mrs Houghton, and they did not speak about the role.

34. On 20 May 2021, the claimant reminded Mrs Houghton of her QN application and asked if there was any progress in getting a reference from Ms Woodyer-Smith. The next day, she sent an e-mail to Mrs Houghton, reverting to her original request for Mrs Houghton to be her supporting manager. When Mrs Houghton read the e-mail, she had a further conversation with the claimant. As she had done in the previous conversation, Mrs Houghton told the claimant that she had not known the claimant for 6 months and would therefore be ineligible to support the claimant's application. Neither Mrs Houghton nor the claimant mentioned the closing date. Mrs Houghton still did not know what the precise date was, and did not ask. The

claimant knew, however, that the closing date would be less than 6 months since Mrs Houghton had first started to manage the claimant.

35. Ultimately, the claimant submitted her QN application with support from Ms Woodyer-Smith. Her application was rejected on the ground that Ms Woodyer-Smith was not the claimant's professional or clinical lead.

36. The claimant was demoralised and disappointed by the collective failure of her managers to support her in her QN application. It is not difficult to understand why she felt that way. One would expect a supportive leadership team to be able to provide someone to write a reference to assist a colleague in their professional development. But when it came to the decision of Mrs Houghton not to support the claimant, the explanation is obvious, and was completely unrelated to the claimant's pregnancy. Mrs Houghton believed that she was ineligible. Not only was that belief genuine, it also happened to be correct, based on what the claimant herself knew about the closing date.

37. In June 2021, Mrs Houghton e-mailed the claimant assertively, asking her to complete a written form to evidence a decision-making process. There is no claim about this, but Mrs Houghton's treatment of the claimant here is said by the claimant to be evidence of Mrs Houghton having turned against the claimant once she discovered that the claimant was pregnant. In short, our finding is that this episode does not show any such change in attitude. To explain our finding, we ought to give something of the background. The decision at hand was the timing of the safety huddle for the Palliative Care Team. All concerned regarded the safety huddle as being an important part of the working day. It was an opportunity for specialist nurses to discuss problems with patients who had very complex needs as well as their own practical arrangements for getting through each day's schedule of patient visits. In June 2021, the Palliative Care Team was experimenting with a change to the safety huddle: instead of holding it in the morning, they tried holding it in the afternoon. The view of the claimant and other members of the team was that the experiment was not working. The claimant therefore moved the safety huddle back to the morning. At the time the claimant made that decision, the respondent was applying for accreditation as an evidence-based decision-making organisation. Accreditation depended on being able to show that important decisions had been made following a documented process. Mrs Houghton thought that the safety huddle was such an important part of the work of the Palliative Care Team that the paperwork should be completed before a significant change was made to it. She also believed that she and Miss Parle should have been copied into the claimant's e-mail communicating the change in timings to the rest of the team. When Mrs Houghton pointed these things out to the claimant, it was not because she had taken against the claimant because of her pregnancy.

38. On 24 June 2021, Paula Whitfield, Clinical Services Manager for Specialist Nursing, sought advice from Sally McConnell, Senior Human Resources Business Partner, about the arrangements for selecting the Deputy Team Leader. At that point, both the claimant and Mr Lee had expressed an interest in the role. Ms McConnell advised, "If there's more than one colleague expressing an interest I'd suggest some form of assessment, ie a suitability discussion, to determine who the most appropriate person is for the acting up opportunity."

39. On 5 July 2021, the claimant was informed that she would be invited to interview for the Deputy Team Leader role.

40. The claimant complained about the selection arrangements. Her complaint led to a facilitated meeting between the claimant and Mrs Houghton on 6 August 2021. Mrs Houghton took careful notes of that meeting. We accept that they are accurate.

41. During the meeting, the claimant said that she believed that she had been treated differently since she had informed Mrs Houghton of her pregnancy. She said how let down she felt over her QN application. She expressed her view that there had been a lack of communication with her about the Deputy Team Leader role, despite Mrs Houghton having spoken about it with other members of the team. Mrs Houghton explained that about half the team had approached her with queries about the role. The claimant put to Mrs Houghton, "you don't ask me questions anymore", to which Mrs Houghton explained that she did not need to ask as many now that she had learned the role.

42. At the conclusion of the meeting, it was agreed that there would need to be a competitive interview process for selecting the Deputy Team Leader post, and that Mrs Houghton would not be involved in the interviews.

43. By e-mail on 15 August 2021, both the claimant and Mr Lee were invited to interviews scheduled to take place on 24 August 2021.

44. The interview panel was made up of Miss Parle and Mrs Carol Gordon. Mrs Gordon was the Operational Lead for Community Nursing, a role at Band 8A. Her role sat outside the line management structure that housed Mrs Houghton, Miss Parle and the claimant. She reported to a different line manager from Mrs Houghton. Mrs Gordon was experienced at recruiting into roles, both where the interview was competitive and also where there was only one candidate.

45. Mrs Gordon and Miss Parle prepared the interview questions in advance. Their starting point was the clinical framework and the written job description for Deputy Team Leader. They tailored the questions to the grade of the role, and also to the fact that the post-holder would be expected to develop their skills as they went along. They devised a scoring system for the answer to each question. To be successful, the candidate had to gain a minimum benchmark score and also outscore the rival candidate.

46. Mrs Gordon was unfamiliar with the term, "suitability discussion", that had been used by Ms McConnell on 24 June 2021. As far as Mrs Gordon was concerned, selection for a role was required to be evidence-based, and the way candidates should present that evidence was by answering questions at interview.

47. On the morning of 24 August 2021, Mr Lee informed the panel that he was withdrawing his expression of interest. As a result, the claimant was the only applicant for the role. This fact did not cause Mrs Gordon and Miss Parle to change their approach. They proceeded with the same interview, with the same questions, as they would have done if the claimant had been competing against

another candidate. As Mrs Gordon saw it, the claimant still needed to demonstrate her suitability by gaining the benchmark score.

48. Mrs Houghton set up the interview room. Whilst she was inside, Miss Parle and Mrs Gordon walked in. They had a conversation. The claimant was waiting outside the room and observed that they were talking together. She was unnerved and flustered by it. She did not know what they were saying behind the closed door, but she feared the worst. By this time, the claimant had started to mistrust Mrs Houghton. It was important to her that Mrs Houghton had agreed to step back from the recruitment process and it appeared to her that Mrs Houghton had gone back on her word.

49. Although the claimant had no way of knowing this, the conversation was unrelated to the merits of the claimant's application. The closest the conversation got to the question of appointability was a passing remark by Mrs Houghton along the lines of "she's lovely" or "a good candidate". We are satisfied that Mrs Houghton did not say anything negatively to influence Mrs Gordon or Miss Parle.

50. It is a pity that none of the people in the interview room considered how this conversation would appear to the claimant. Most readers of these reasons will remember having waited nervously for an interview at some point in their lives. The last thing a candidate needs is for something to unsettle them further.

51. Perhaps for this reason, perhaps not, the claimant performed badly in her interview. Miss Parle and Mrs Gordon each gave the claimant less than 50% of the available mark relation to some questions and a score of zero in relation to others. As a result, both Miss Parle and Mrs Gordon independently decided that the claimant was not suitable to be appointed for the role.

52. At some point after the interview had finished, and the claimant had left the interview room, Mrs Houghton walked back in. They had a further conversation. Mrs Houghton did not try to persuade the panel either to select or reject the claimant for the role. In any case, any such attempt would have been futile. We accept the evidence of Miss Parle and Mrs Gordon that they had already made their decision by the time they next spoke to Mrs Houghton.

53. The claimant was informed that her application was unsuccessful. She met with Mrs Houghton the following day. During that conversation, the claimant told Mrs Houghton that she understood that she had not interviewed well.

54. Pausing there, we have asked ourselves why Mrs Houghton spoke to the interview panel before the interview. We could not find any facts from which we could conclude that the reason was that the claimant was pregnant. Mrs Houghton did not say anything to try and influence the panel's decision. She had agreed with the claimant not to be involved in the recruitment process, but the important part of that agreement was that Mrs Houghton would not be involved in the *decision.* It was unrealistic to expect Mrs Houghton to remove herself from the process entirely. An important part of the context was that Mrs Houghton would have operational responsibility for the Deputy Team Leader and it was her idea to create the role in the first place.

55. In case we are wrong about that, we are in any case satisfied that Mrs Houghton's decision to speak to the panel was wholly explained by the fact that she happened to be setting up the interview room when Miss Parle and Mrs Gordon walked in.

56. We have also considered Mrs Houghton's reason for speaking to the panel after the interview. For largely the same reasons as for the pre-interview conversation, we were unable to find any facts from which we could conclude that the reason was because the claimant was pregnant. There was nothing inherently suspicious about a post-interview conversation. Although we did not hear evidence about the precise reason for it, some obvious reasons spring to mind. At the very least, a manager in Mrs Houghton's position is likely to have wanted to thank Mrs Gordon for her work on the panel when it was not part of her role. Moreover, Mrs Houghton would quite obviously be curious to know what the panel had decided. Anyone recruiting into a role would be interested to know if the recruitment panel had found a suitable candidate.

57. The list of issues also requires us to find the reason why Miss Parle and Mrs Gordon decided that the claimant was unsuitable to be a Deputy Team Leader. The claimant was pregnant and was the only candidate, and yet she was not recruited. From these facts it would be possible to conclude that her pregnancy influenced the decision. We are satisfied, however, that the claimant's pregnancy had nothing to do with it. Miss Parle had previously selected the claimant for promotion, knowing that she was pregnant. The interview panel genuinely thought that the claimant should demonstrate her suitability by answering interview questions, and the answers she gave did not give them the evidence they needed.

58. From 31 August 2021 to 13 October 2021, the claimant was absent on sick leave. For some of that time, the claimant was in hospital due to complications with her pregnancy. When the claimant returned to work, it was agreed that the claimant would not have any face-to-face patient responsibility. A role was essentially crafted for her which involved completion of tasks and referrals across the service and to work with others to set up a virtual clinic. The claimant did this work remotely from home.

59. In November 2021, the claimant's Care Coordinator secondment came to an end and she reverted to her substantive Specialist Palliative Nurse role. In practice, very little changed. Because of the temporary arrangements to accommodate her pregnancy, the claimant was working remotely and not seeing patients face-to-face.

60. An exchange of e-mails took place on 23 November 2021. That was prompted by a conversation in which the claimant thought that Mrs Houghton had spoken to her as "an angry parent would speak to a child". We did not need to make findings about the conversation itself. What is important is that this was a challenging email for Mrs Houghton to read. Mrs Houghton nevertheless responded in measured terms. She explained why it was important for her to have tried to get across the message that she had. This exchange of emails indicates to us that by this stage the relationship between the claimant and Mrs Houghton had very significantly cooled.

61. In December 2021 the claimant became infected with the coronavirus. It was an anxious time for her because of her difficult pregnancy. She had only a few working days left until her maternity leave was due to start. When Miss Parle learned that the claimant had Covid-19, she asked Rachel Buckle to collect the claimant's equipment from her home. The only reason she could have had for giving this instruction was that she believed that the claimant's Covid absence had triggered the start of her maternity leave. It was her practice to collect equipment from staff who were on maternity leave, but in fact her maternity leave had not started and could not be treated as having started. This was because the claimant's illness was not pregnancy-related.

62. In the morning of 21 December 2021, Ms Buckle told the claimant that she had been instructed to collect the claimant's equipment from her home. In response, the claimant emailed Mrs Houghton. Mrs Houghton denied giving the instruction. We find that Mrs Houghton did not personally give the instruction to collect the equipment, but became aware that it had been given at a later time.

63. The claimant worked on Boxing Day, 26 December 2021, and one other day, and then went on maternity leave on 10 January 2022. Happily, the claimant had a healthy baby girl in early 2022.

64. Early in her maternity leave the claimant made a definite decision to leave the Trust. She did not want to return to work in what she thought was a “toxic environment”.

65. We accept the claimant’s oral evidence to us that, at the time of making her decision to resign, she had in mind:

    65.1. The way in which the respondent dealt with her application for the Deputy Team Leader role and her belief that it was motivated by her pregnancy

    65.2. The lack of support for her QN application and

    65.3. The instruction to collect her equipment before her maternity leave had started.

66. The claimant applied for a nursing role with the Marie Curie Cancer Charity. Her application was successful.

67. On 1 April 2022, the claimant emailed Mrs Houghton saying that she intended to leave the respondent following her maternity leave. She asked if she could be allowed to give a shorter period of notice than the period required by her contract. She made this request in order to avoid having to repay her maternity pay. Under the respondent’s policies, employees on maternity leave received enhanced maternity pay, but the enhanced element would be repayable if the employee did not work their full notice period. The claimant’s contractual notice period was 12 weeks.

68. On 26 April 2022 Dr Chapman, the Medical Director at Marie Curie, intervened, asking if it was possible to shorten the notice period. It was clear from that email that the claimant had made a definite decision to leave the Trust.

69. By April, as far as the claimant saw it, there was no question that she would ever change her mind about resigning. She was determined to leave as soon as she could do so without having to repay her maternity pay.

70. The respondent refused the claimant's request. There was an operational need for palliative care nurses. The claimant was required to work her notice period if she wanted to retain the enhanced element of her maternity pay.

71. On 6 July 2022, the claimant gave notice to terminate her employment on 1 January 2023.

72. A meeting was arranged between the claimant and Miss Parle for Monday 8 August 2022. Both the claimant and Miss Parle believed that the purpose of this meeting was to discuss annual leave arrangements for the claimant's return to work. That was the purpose of the meeting that the claimant earlier sought in a text message in May 2022. The claimant was not told that there would be anything else to be discussed at this meeting and she did not think it was for any other purpose.

73. Shortly before the meeting was due to take place, the claimant's father very sadly died.

74. On 7 August 2022 the claimant texted Miss Parle to say,

    "Hi Ange. I won't be coming up to LIP on Monday to sort out annual leave as we had planned. I'm not feeling up to much after dad died so will leave it a few weeks."

75. On Tuesday 9 August 2022 Miss Parle replied:

    "Hi Lucy. Sorry to hear about your dad. Let us know when you feel you can meet and where if you don't want to come into LIP. Take care. Ange"

76. A decision was therefore taken that the meeting that was due to take place on 8 August 2022 would not take place for a few weeks.

77. At some point in 2022, the respondent was informed that the lease of the building at Edge Lane would come to an end. A decision was made to move the base to a building known as "V7" in Prescot. There is a conflict of evidence about how widely known it was among the nursing staff that the base would move, and for how long. On this point we prefer the claimant's evidence to that of Mrs Houghton. There was no documentation in the bundle to suggest that staff were forewarned at any point before 1 January 2022 of the expiry of the lease at Edge Lane or that this would result in the base having to be moved.

78. By 19 August 2022, eight members of the team had had one-to-one consultations about the proposed base move. Five members of the team had been offered one-to-one conversations and had not responded. Those who had been offered one-to-ones were almost certainly told something about what it was going to be about. Inviting somebody to a one-to-one meeting without any indication of what it would be for would be an intimidating thing to do to a member of one's team.

79. The respondent moved into V7 on 7 September 2022.

80. This was never going to be a consultation with a view to changing the respondent's mind about whether to move base to V7 or not – the decision to move had already been taken by 7 August 2022 at the latest. The useful purpose of this consultation was to inform each member of the team at an early stage that it was going to happen, when it was going to happen, and how it might affect them to give them an opportunity to raise concerns about the consequences for them of the move and to give an opportunity for consideration of their responses and for action to be taken if necessary. The people who were consulted raised queries about the practical arrangements and consequences of the move. Practical points that were in fact raised during those conversations included charging points for electric vehicles and increased travelling time to Prescot.

81. During this time, the claimant was still on maternity leave. She was intending to return to work, serve her notice period and then go off to work at Marie Curie. Timely consultation would nonetheless have benefited her. The benefits of consulting the claimant would have included letting her know that the move would happen in advance of the actual change, informing the claimant of the proposed date of the move. This would have caused her to ask what days of the week she might be expected to work there, and for how long at a time. This would be important for planning her childcare. V7 was further away from her South Liverpool home than the existing base in Edge Lane. The claimant also would have benefited from knowing in advance what arrangements there might be or facilities there might be at the new base for breastfeeding or expressing milk in case she decided to continue once she had returned to work.

82. On 9 September 2022 there was a meeting at the V7 base in Prescot between Mrs Houghton and the claimant. The claimant was invited to that meeting shortly beforehand. It was only when she arrived at V7 on 9 September 2022 that she was informed that this was to be her new base.

83. Neither Miss Parle nor Miss Houghton communicated with the claimant at any time prior to 9 September 2022 to inform her that the respondent was moving its base. We have to resolve a conflict of evidence here. It is Mrs Houghton's evidence that she spoke on the phone to the claimant during August 2022 about the base move and about the death of her father. The claimant's evidence was that she could not remember any such conversation and would have been very surprised if she had had any conversation with Mrs Houghton at that time. It was the last thing she would have wanted to do. We prefer the claimant's evidence on this point. The claimant had firmly decided to resign and had lost trust in Mrs Houghton. We do not think it likely that the claimant would have wanted to speak on the phone to Mrs Houghton during her maternity leave. There are no notes of any such conversation, even though there was a documented process of consulting people with regard to the base move. Mrs Houghton was generally a scrupulous notetaker of conversations she had had of any significance with the claimant. There had already at that stage been a complaint made about her. Had there been any conversation about the base move, Mrs Houghton would have noted it. When preparing for this hearing, Mrs Houghton would have looked for those notes. Her evidence to us was that she did not look for notes of any conversation about the base move.

84. There was nothing to stop either Miss Parle or Mrs Houghton texting or e-mailing the claimant about the proposed move. The claimant had asked to postpone the 8 August face-to-face meeting because of the death of her father, but Miss Parle and Mrs Houghton did not need to wait for a face-to-face meeting before passing on this important piece of information.

85. As a result of the failure to inform the claimant before 9 September 2022, the claimant found it more difficult to arrange childcare than she otherwise would have done.

86. The claimant drove to V7 in Prescot on 9 September 2022 and met Mrs Houghton there. The conversation was almost exclusively about the claimant's annual leave arrangements. That was the conversation that the claimant had been requesting since May 2022. Mrs Houghton made detailed notes, and they were all about annual leave. In short, the claimant told Mrs Houghton what leave she thought she had available to her and what leave she would like to take in the coming months. The individual dates were identified, and it was agreed that Mrs Houghton would come back to the claimant with an answer as to whether she could take that leave and whether it would be approved. They had a brief conversation about the claimant's intention so far as breastfeeding was concerned. The claimant said that she was not sure whether she would be breastfeeding or not. Mrs Houghton told her that a plan would be put in place. There was no structured opportunity to discuss breastfeeding opportunities or to raise any other concern about travelling time, childcare or any other consequences of the move to V7. In short, there was no consultation about the base move at all.

87. At some time afterwards (and we do not know the precise date), Mrs Houghton spoke with Miss Parle. Some of the dates that the claimant had given were difficult to accommodate. This was because (in their words) there was insufficient "headroom", which is to say, there was either so much sickness absence or pre-booked annual leave already that they did not have enough people to care for their patients. For the days where there was insufficient headroom, Mrs Houghton agreed to approach members of the team to ask if any of them would be prepared to swap leave dates. As a result of having to have these conversations, there was a delay in getting back to the claimant with which dates were approved.

88. On 29 September 2022, some 20 days after the meeting, Mrs Houghton e-mailed the claimant setting out which dates were approved and which were not. The email was not entirely clear in its response to some of the dates that the claimant had requested. The claimant raised queries the same day, in particular asking whether 21 and 22 December had been approved. She also made some further requests. Strictly speaking these were not requests for annual leave, but for days off in lieu of weekends that she offered to work. These were not part of the original request discussed at the meeting. The claimant did not receive a reply by 3 October 2022, so she sent a chasing email.

89. Mrs Houghton replied on 4 October 2022. Her reply covered most of the queries but did not specifically include a reference to 28 November, which was a date that had been identified as impossible to approve.

90. The claimant was frustrated by this delay. She had less than a month to do until her return to work from maternity leave and she needed to plan her childcare. She had been asking for meetings to discuss her annual leave from May 2022.

91. Mrs Houghton had been waiting since January 2021 to relinquish operational responsibility and to concentrate on the strategic element of her role. This finally happened in October 2022. Responsibility for the Palliative Care Team was passed to Ms Kerrie Owens, Operational Manager. On 6 October 2022 the claimant asked to speak to Ms Owens, and they eventually spoke on 21 October 2022. Following that conversation Ms Owens gave clear answers to the claimant about the outstanding uncertainty that the claimant was seeking to have clarified.

92. The claimant raised a grievance on 10 October 2022.

93. On 31 October 2022 the claimant returned to work. On her return, as one might expect, her work colleagues in her team formed a group around her, excitedly discussing her new baby and looking at baby photographs that the claimant showed them. Miss Parle and Mrs Houghton stood back. They kept their distance deliberately. This was because they could see the warm conversation that the claimant was having with members of her team and found it awkward to try and intervene. It was not because the claimant had been on maternity leave or had been pregnant or had a baby – it was simply because of that awkward social dynamic.

94. There was a return to work interview between the claimant and Miss Parle. During that meeting, the claimant confirmed that she was continuing to breastfeed. The claimant asked about the facilities at V7 for expressing breastmilk. Either at that meeting, or very shortly afterwards, Miss Parle informed claimant that there were no suitable facilities. There were no private rooms available and no private fridge for the claimant to use. Miss Parle agreed that the claimant would not routinely have to work at V7. Day-to-day, the claimant’s role would involve visiting patients in the South Liverpool area and the Marie Curie hospice so that, in between patient visits, the claimant would be able to go home. There, she would be able to express milk or feed her baby. There was nothing formal agreed about the extent to which the claimant would be required to travel to the V7 base and there was no conversation about milk expressing facilities at any other hub. For her part, the claimant did not ask to be able to express milk anywhere apart from her own home. She did not, for example, ask to be provided with a private room or a fridge at the Marie Curie hospice. She did not ask for a reduced patient caseload, or for any other measures to be put in place to make it easier for her to return home between patient visits.

95. The claimant was disappointed that there had not been advance planning of the claimant’s breastfeeding arrangements prior to the return-to-work interview. She did not, however, think that the failure to plan it in advance had violated her dignity, or created an intimidating, hostile, degrading, or humiliating environment for her.

96. On 1 November 2022, the following day, the claimant was shadowing a colleague at the Marie Curie hub. Some confusion arose between her and Miss Parle about whether she also needed to go to V7 that day. We did not make a finding as to exactly what took place there. We did not find that necessary.

97. Miss Parke emailed the claimant in the afternoon of 1 November 2022. She asked the claimant to go to V7 in the afternoon of the following day. The claimant had a reason to be there in the morning to sort out some IT issues. She arrived at 8.30am on 2 November 2022. Whilst doing her own work, she also waited for Miss Parle to return from Ashworth Hospital. Miss Parle had indicated in her email that she would be at Ashworth in the morning, but she did not in fact arrive back until about 3.30pm. The claimant did not telephone or text Miss Parle to ask her where she was and what time she might arrive. The claimant did not ask Miss Parle if she would be able to go home and express milk in the meantime. For her part, Miss Parle did not text the claimant to keep her updated about when she was likely to arrive. Miss Parle arrived back about 3.30pm, finding that the claimant was not there. This was in our view a simple failure of communication. Both the claimant and Miss Parle could have done considerably more to try and establish each from the other as to what the arrangements were for that afternoon.

98. Over the following weeks, the claimant got on with her work. Almost all of it was done at patients' homes or at Marie Curie hospice, or from home. The morning safety huddle happened as before. She participated in the safety huddle from home, using Microsoft Teams. She visited hubs, mainly Marie Curie, to speak with District Nurses. When visiting hubs, the claimant was largely in control of her own timetable. The claimant could work remotely from home to make telephone calls and to view patient notes. She had influence on what went into her diary and she worked collaboratively with the coordinator to make sure that the visits that she went to were all local. That is how it turned out in practice. Part of the evidence in the case was a spreadsheet showing all the patients' addresses that the claimant visited. They were all within a short drive of the claimant's home address.

99. One thing that was beyond the claimant's control was how long she would have to spend at each patient's house. The claimant was visiting patients with complex palliative care needs and would not know exactly what she would face, how many telephone calls she would have to make and what intervention would be needed when she arrived. We find that there were occasions when the claimant found herself at a patient's house and did not have sufficient time to drive home before expressing milk or feeding her baby. At such times, she experienced engorgement that was enough to make her physically uncomfortable and which could potentially harm her health. That was primarily as a result of the unpredictability of the regime that was in place. The claimant did not think on these occasions that her working arrangements had violated her dignity or created any particular kind of environment for her.

100. At no point did the claimant raise any concerns about her working arrangements, either with Miss Parle or with Mrs Houghton, or with Ms Owens. She did not ask for a reduced patient caseload, she did not ask for any facilities at a hub, and she did not ask for her role to be changed from a face-to-face patient visiting role to one that was based at the hubs.

101. There is no evidence that we could find of any specific occasion when the claimant found it difficult to express milk because of the requirement to go to the V7 hub. Even on 2 November 2022, when she was waiting at V7 until some time before 3.30pm, there is no specific evidence that she had any difficulty in expressing milk on that day.

102. Whilst the claimant was working out her notice, the respondent started to investigate the claimant's grievance. There is no longer any claim about the grievance investigation or outcome, but the grievance is nevertheless notable for something that was said during the investigation. Part of the grievance was about the extent of consultation over the base move. When Miss Parle was asked about that, her reply was accurately noted as, "Lucy is on mat leave there is an onus on her to consult". Miss Parle gave oral evidence to us about what she meant by these words. We did not find her explanation easy to follow. Our finding is that, even if the precise meaning is lost, Miss Parle was telling the investigator that her lack of communication with the claimant over the base move was, at least in part, because the claimant was on maternity leave.

103. On 31 December 2022, the claimant's notice period expired and the claimant ceased to be an employee of the respondent. In the New Year she started working for the Marie Curie charity.

104. At no time during her employment with the respondent did the claimant inform her employer:

104.1. that she believed herself to be entitled to resign without notice; or

104.2. that she was remaining in employment so as to allow the respondent to investigate her grievance; or

104.3. that she was remaining in employment because she could not afford to resign earlier (although she did make clear that she did not want to have to repay her enhanced maternity pay).

Relevant law

<u>Direct discrimination</u>

105. Section 13(1) of EqA provides that 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.

106. Sex is a protected characteristic.

107. Section 23(1) of EqA provides, relevantly,

> "(1) On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case."

108. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

109. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the

age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

110. As is clear from paragraphs 4.9 and 4.10 above, the parties do not agree about what section 13 means when "B" is a breastfeeding woman. The claimant's position is that the provision of unfavourable breastfeeding facilities to a woman is treating her less favourably than others because she is a woman. On that view, no comparator is required. The respondent's refined submission is that that is not enough. There must be less favourable treatment of a woman *because* she is breastfeeding.

111. We prefer the respondent's submission. The respondent must treat a worker less favourably than it would treat somebody else who was not breastfeeding, and the treatment must have been because she is breastfeeding, either in that it is inherently because she is breastfeeding or by being motivated by the fact that she is breastfeeding.

112. Here are our reasons:

112.1. Section 13(6) of EqA provides, "If the protected characteristic is sex- (a) less favourable treatment of a woman includes less favourable treatment of her because she is breastfeeding…" This is the same form of words as in section 13(1). Both formulations should be interpreted in the same way.

112.2. At the time with which this claim is concerned, section 13(7) disapplied section 13(6)(b) in work cases. From 1 January 2024, section 13(7) was removed by the Equality Act 2010 (Amendment) Regulations 2023. This meant that, from 1 January 2024, less favourable treatment of a woman because she was breastfeeding amounted to sex discrimination at work which would potentially contravene section 39 of EqA.

112.3. In our view, this legislative provision is an important indicator of the law as it stood prior to 31 December 2023. The Explanatory Memorandum to the 2023 Regulations indicates that their purpose was "to reproduce in domestic law the effects of certain retained EU law, as interpreted by the relevant court judgments."

112.4. For the purposes of direct discrimination against a breastfeeding woman, the relevant retained EU law was believed by the legislator to have derived from the decision of the Court of Justice of the European Union in *Otero Ramos v. Servicio Galego de Saude* C-531/15.

112.5. *Otero Ramos* was a decision about the interpretation of EU Directive 2006/54. Article 2(2)(c) of the Directive states that "discrimination includes…(c) any less favourable treatment of a woman related to pregnancy or maternity leave…"

112.6. At paragraph 59 of *Otero Ramos,* the Court stated that "the condition of a breastfeeding woman" was "intimately related to maternity" and, "in particular, 'to pregnancy or maternity leave', such that "workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth".

112.7. "Accordingly," the Court held at paragraph 60, "any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling within the scope of Article 2(2)(c) of Directive 2006/54 and therefore constitutes direct discrimination on grounds of sex".

112.8. So far, all *Otero Ramos* does is state that less favourable treatment of a worker because she is breastfeeding must be equated with less favourable treatment of a worker because she is a woman.

112.9. *Otero Ramos* is also authority for the proposition that, as a matter of EU law, an employer's failure to assess the risk posed by the work of a breastfeeding worker in accordance with Directive 92/85 must be regarded as less favourable treatment of a woman related to pregnancy and therefore to be treated as direct discrimination. (See paragraph 63 of the judgment for that statement of the law.) It is a moot point whether section 13 of EqA can bear that interpretation. If it is part of the retained EU law by which section 13 must be interpreted, it is notable that the 2023 Regulations did not seek to make this clear in its amendments to EqA. Ultimately we did not have to decide the point. It has never been the claimant's case that the respondent failed to carry out a risk assessment, or that the risk assessment failed to comply with any particular requirement of Directive 92/85.

112.10. Our conclusions about the meaning of section 13 are reinforced by the Employment and Human Rights Commission's *Employment Code of Practice.* Paragraph 8.45 of the *Code* reads:

> "… • A refusal to allow a woman to express milk or to adjust her working conditions to enable her to continue to breastfeed may amount to unlawful sex discrimination.
>
> Example: An employer refused a request from a woman to return from maternity leave part-time to enable her to continue breastfeeding her child who suffered from eczema. The woman told her employer that her GP had advised that continued breastfeeding would benefit the child's medical condition. The employer refused the request without explanation. Unless the employer's refusal can be objectively justified, this is likely to be indirect sex discrimination."

112.11. Unfavourable working arrangements for a breastfeeding worker, appear, therefore, to amount to indirect discrimination in the view of the EHRC. Direct and indirect discrimination are mutually exclusive: the same treatment cannot be both at once: *R(E) v. Governing Body of JFS* [2009] UKHL 15 *per* Baroness Hale.

<u>Discrimination because of pregnancy and maternity</u>

113. At the time with which this claim is concerned, section 18 of EqA provided, relevantly:

> "…
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably (a) because of the pregnancy…
>
> …

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising … or has exercised… the right to ordinary or additional maternity leave…"

114. Treatment is "unfavourable" to an employee if the employee could reasonably understand that it has put them at some disadvantage. When deciding whether or not treatment is unfavourable, it is important to be clear about what the treatment was. Treatment does not become unfavourable just because someone else was treated, or would have been treated, more favourably: *Williams v. Trustees of Swansea Pensions & Assurance Scheme* [2018] UKSC 65.

115. Just because a woman is treated unfavourably *after* she becomes pregnant does not necessarily mean that she has been treated unfavourably *because* she is pregnant. The tribunal must examine the motivation of the decision-maker: *Alcedo Orange Ltd v. Ferridge-Gunn* [2023] EAT 78.

116. When considering alleged discrimination because of maternity, the tribunal must also be careful to differentiate between unfavourable treatment that was motivated by the maternity leave itself (on the one hand) and unfavourable treatment that was motivated by something arising in consequence of her having taken leave (on the other): *Blackdown Hill Management Ltd v. Tuchkova* [2023] EAT 156.

<u>Harassment</u>

117. Section 26 of EqA relevantly provides:

(1) 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.

(4) 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.

118. Subsection (5) names sex among the relevant protected characteristics.

119. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in

respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

120. In *Pemberton v. Inwood* [2018] EWCA Civ 564, Underhill LJ gave the following guidance in relation to section 26:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

Burden of proof

121. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

122. The initial burden of proof is on the claimant: *Royal Mail Group Ltd v. Efobi* [2021] UKSC 33.

123. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) 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 sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

124. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

125. Where an employer treats an employee unfavourably shortly after discovering that she is pregnant, it would be surprising if the tribunal were not to find that the burden of disproving discrimination has shifted to the employer: *Ciochon v. Kempe t/a Neville Arms* [2024] EAT 48.

<u>Time limits in discrimination cases</u>

126. Section 123 of EqA provides, so far as is relevant:

> (1)…proceedings on a complaint [of discrimination] 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

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section:

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

127. Where it is reasonably arguable that conduct extended over a period, the tribunal should not generally try to determine that question until it has heard the evidence: *Hendricks v. Metropolitan Police Commr.*

128. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

129. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

130. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

130.1. the length of and reasons for the delay;

130.2. the effect of the delay on the cogency of the evidence;

130.3. the steps which the claimant took to obtain legal advice;

130.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

130.5. the extent to which the respondent has complied with requests for further information.

131. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

<u>Unfair constructive dismissal</u>

132. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and… only 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. …

133. An employee seeking to establish that he has been constructively dismissed must prove:

133.1. that the employer fundamentally breached the contract of employment; and

133.2. that he or she resigned in response to the breach.

(*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

134. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

135. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> "12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> > "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract."

136. An employee may lose the right to treat himself as constructively dismissed if he or she affirms the contract before resigning.

137. An employee is entitled to a reasonable period of time in which to resign before being taken to have affirmed the contract: *Air Canada v. Lee* [1978] ICR 1202, EAT. The length of that period is not fixed. Relevant factors include the consequences to the employee of losing their job and their prospects of finding alternative work: *Chindove v. William Morrison Supermarkets* EAT/0201/13.

138. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443. Remaining in employment on leave, such as maternity leave, and collecting salary, is essentially passive. It is unlikely, by itself, to amount to an affirmation.

Amendments to claims

139. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the importance and complexity of the issues. Tribunals must seek to achieve the overriding objective in the exercise of any powers given to them under the rules.

140. Rule 29 gives the tribunal wide case management powers. These include the power to allow a party to amend their claim, although that power is not expressly included.

141. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

141.1. A careful balancing exercise is required.

141.2. The paramount consideration is that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

142. The following factors identified in *Selkent* may help the tribunal to conduct that balancing exercise:

142.1. The tribunal should consider whether the amendment is merely a re-labelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

142.2. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

142.3. The tribunal should have regard to the manner and timing of the amendment.

143. The factors identified in *Selkent* should not be used as a checklist. What is required in every case is an analysis of comparative disadvantage: *Vaughan v. Modality Partnership* UKEAT 0147/20.

Conclusions – pregnancy discrimination

Unfavourable Treatment 1 – Deputy Team Leader role

(a) Encouraging others to apply

144. Mrs Houghton spoke to colleagues of the claimant and offered them some encouragement to apply for the Deputy Team Leader role. This was in response to queries and approaches from those colleagues. It was not unfavourable treatment of the claimant. She could not reasonably think that it would put her at a disadvantage. Mrs Houghton circulated the expressions of interest e-mail to the whole team. The claimant did not try to speak to Mrs Houghton about the role.

145. If we are wrong about that, we would in any case find that Mrs Houghton's actions in speaking to others were not motivated by the fact that the claimant was pregnant. We were able to make a positive finding that this was the case: see paragraph 32.

(b) Requiring the claimant to interview

146. The respondent treated the claimant unfavourably by requiring her to interview for the Deputy Team Leader role. The unfavourable treatment happened when Mr Lee pulled out, leaving the claimant as the sole candidate. Had Miss Parle and Mrs Gordon chosen to do so, they could have looked at the claimant's job description as Care Coordinator and examined how well aligned that role was to the proposed Deputy Team Leader role. They could have held what Ms McConnell described as a "suitability discussion" to check whether the claimant had the skills and experience required of the elements of the Deputy Team Leader role that were new to her. Instead, they required the claimant to evidence all her skills and abilities by answers to formal interview questions. The claimant could reasonably understand this requirement to put her at a disadvantage.

147. We are satisfied that the unfavourable treatment was not at all because the claimant was pregnant. It would, in fact, have been more convenient to recruit a pregnant employee into the Deputy Team Leader role: see paragraph 32 again. More fundamentally, Mrs Gordon and Miss Parle had already designed the process for a competitive selection exercise. The interviews were about to happen. Mrs Gordon, in particular, believed that recruitment decisions were required to be evidence-based: see paragraph 47. That fully explains the decision to proceed with the claimant's interview, as opposed to a matching exercise or a suitability discussion.

(c) Mrs Houghton speaking to the interview panel

148. Mrs Houghton unwittingly treated the claimant unfavourably by speaking to the interview panel in the interview room. The claimant could reasonably think that she had been put to a disadvantage, because it could reasonably appear to the claimant that Mrs Houghton was going back on her promise to stay out of the recruitment process. This, as we have found, was something that the claimant found off-putting.

149. As we found at paragraphs 54 and 56, however, there are no facts from which we could conclude that Mrs Houghton spoke to the panel because the claimant was pregnant. Paragraph 55 records, in any case, that the respondent proved that the reason for the pre-interview conversation was that Mrs Houghton was setting up the room when Miss Parle and Mrs Gordon walked in.

(d) Mrs Houghton negatively influencing the panel

150. Without a doubt, had Mrs Houghton influenced the interview panel against the claimant on the morning of the interview, that treatment of the claimant would have been unfavourable. But Mrs Houghton did not treat the claimant that way, either before or after the interview: see paragraph 49.

(e) Not offering the claimant the role

151. The claimant reasonably understood that she had been disadvantaged when she was told her application was unsuccessful. In that respect she was treated unfavourably.

152. Our finding, however, was that the interview panel was in no sense influenced by the fact that the claimant was pregnant: see paragraph 57.

Unfavourable Treatment 2 – QN application

153. "Management" is alleged to have treated the claimant unfavourably by failing to support her QN application. Amongst the management, the two individuals specifically accused of acting with the alleged discriminatory motivation are Miss Parle and Mrs Houghton. We must examine how each of them treated the claimant.

Miss Parle

154. Miss Parle treated the claimant unfavourably by not replying to the claimant's e-mail. Although we could not find evidence to establish definitively that Miss Parle was the claimant's "professional/clinical lead", Miss Parle could reasonably have been understood by the claimant to be eligible to act as the claimant's supporting referee. She had known the claimant for more than six months. Despite being apparently eligible, Miss Parle did not respond to the claimant's request for help. That was reasonably thought by the claimant to put her at a disadvantage.

155. This complaint nonetheless fails, again, on our finding that Miss Parle was not motivated by the claimant's pregnancy. She just overlooked the claimant's e-mail and the claimant did not chase her – see paragraph 29.

Mrs Houghton

156. Mrs Houghton's treatment of the claimant was not unfavourable. Mrs Houghton's refusal to fill in the form could not have been reasonably understood by the claimant to put her at any disadvantage. Had Mrs Houghton been the supporting referee for the claimant's QN application, it would inevitably have failed. Mrs Houghton had not known the claimant for six months and still would not have

known her for six months by the time of the closing date. She could not have been reasonably expected to hold that information back from QNI.

157. In any case, as we have explained in paragraph 36, Mrs Houghton's omission to support the claimant was not motivated to any extent by the claimant's pregnancy.

Conclusions – discrimination because of maternity leave

Unfavourable Treatment 3 – consultation over base move - time limit

158. Before considering the merits of this complaint, we must first determine whether we have jurisdiction to consider it at all.

159. The failure to consult the claimant over the move to V7 must be treated as having been done when the respondent decided not to consult. There is no evidence of such a decision, so the decision has to be treated as having made when the respondent acted inconsistently with consulting the claimant. There was an inconsistent act on 7 September 2022 when the respondent moved to V7 without having consulted her. In our view, there was also an act inconsistent with consultation about the *impact* of the base move. That was on 9 September 2022 when Mrs Houghton discussed annual leave with the claimant and did not discuss the consequences of moving to V7.

160. For reasons which will later become apparent, there was no later contravention of EqA that could be said to have been part of the same conduct extending over a period.

161. The last day for presenting the claim in respect of Unfavourable Treatment 3 was therefore 6 or 8 December 2022. The claimant did not actually present her claim until 13 April 2023, a delay of just over four months. We must consider whether that additional period is just and equitable.

162. We examined the disadvantage that could be caused to the respondent by extending the time limit by a four-month extension of time. The disadvantage is lessened by the fact that the claimant raised a prompt grievance. The respondent therefore had an opportunity to investigate the facts whilst they were fresh in everyone's minds. The appeal was still ongoing at the time of the presentation of the claim. The delay did not affect our ability to find the facts. The was a gap in the evidence, namely the absence of any notes taken by Mrs Houghton of any consultation conversation. That gap was not caused by fading memories or any other aspect of the delay. This was not a case of the notes having been lost or destroyed. They never existed in the first place. We concluded that Mrs Houghton did not take notes because she had not had the conversation. Had Mrs Houghton taken notes of any conversation round about that time, she would have looked for them when the time came to disclose relevant documents. That conclusion is just as easily drawn in a case where there has been delay as where the claim was issued promptly.

163. Having eliminated the major usual sources of disadvantage caused by an extension of the time limit, we have then compared the disadvantage to the claimant if we were to refuse to extend the time limit. This was something about

which she felt strongly and had raised a grievance about from October 2022. Refusing to extend the time limit would be denying the claimant the opportunity to bring that claim. The disadvantage to the claimant outweighs the disadvantage to the respondent and that leads us to conclude that it is just and equitable to extend the time limit. We must therefore consider the complaint on its merits.

Unfavourable Treatment 3 – consultation over base move - merits

164. Nothing was done to consult with the claimant over the move to V7. This was unfavourable to the claimant in two ways:

164.1. The claimant did not know of the move until 9 September 2022. Had she been consulted at the same time as her colleagues, she would have had an additional four weeks in which to plan her childcare arrangements. The move had an impact on her childcare plans, because Prescot was much further away from her home than Edge Lane, with a real risk of it taking substantially longer for her to drive there. The lack of consultation therefore made childcare planning more difficult.

164.2. The claimant did not have an opportunity to discuss the impact of the base move before she returned to work. In particular, prior to her return to work interview on 31 October 2022, there had been no structured conversation about the effect of moving to V7 on her ability to breastfeed, or the effect that increased travelling distances might have on her ability to balance work with childcare.

165. There are facts from which we could conclude that the reason why the claimant was not consulted was because she was on maternity leave. In particular:

165.1. Colleagues who were in work were consulted, following a documented procedure.

165.2. Miss Parle told the grievance investigator that the claimant's maternity leave was a factor placing the onus on the claimant to consult.

166. The respondent has not proved to us that the reason for failure to consult was not because of maternity. No real reason was put forward. Mrs Houghton's evidence was not that she had held back from consultation for a reason; rather, Mrs Houghton told us that she had consulted the claimant, and we found that she had not done so. There is no non-discriminatory reason to be inferred from the background facts. It would have been easy to send the claimant an e-mail or text message, or for Miss Parle to make a telephone call about the proposed move, yet nothing was done.

167. The respondent therefore discriminated against the claimant because of maternity by failing to consult with her in relation to the base move.

Unfavourable Treatment 4 and Unfavourable Treatment 6 – annual leave

168. The complaint in relation to annual leave, as we understand it, relates to the delays by Mrs Houghton in responding to the claimant's leave requests following their meeting on 9 September 2022.

169. Mrs Houghton and Ms Owens treated the claimant unfavourably by not giving the claimant a final response until 21 October 2022. Although the claimant had made a complicated and evolving series of requests, she could nevertheless understand that the delay in responding to them was putting her at a disadvantage. It was particularly important to give the claimant a timely response if at all possible. As mothers often do when returning from maternity leave, the claimant was trying to coordinate her annual leave and her childcare arrangements to ensure a smooth transition back to work. It was clearly a matter of importance to the claimant not to leave this process to the last minute – otherwise, she would not have started asking to discuss annual leave in May 2022.

170. We have examined the motivation of Mrs Houghton in delaying her response. Our positive finding is that it is entirely explained by the difficulties that Mrs Houghton faced in accommodating the claimant's requests within the "headroom" available to her. The claimant asked for additional days part-way through the process. Mrs Houghton also delayed her response because she was waiting to hear back from other team members about whether they would be prepared to swap shifts. It was nothing to do with the fact that the claimant was on maternity leave. There were no facts to suggest that the process would have been conducted any more quickly had the claimant been present at work.

<u>Unfavourable Treatment 5 – bereavement</u>

171. We approached Unfavourable Treatment 5 by following our route map agreed with the parties. The first step was to be clear about what exactly was the allegation of unfavourable treatment in the original list of issues. That was the allegation that we had allowed the claimant to introduce by way of an amendment to her claim. If that was different from the case that the claimant wished to pursue at the hearing, we had to decide whether to give her permission to amend her claim further.

172. In our view, on a fair reading of the list of issues, the claimant had alleged that there had been a complete collective failure to communicate with her about the loss of her father. The claimant had not singled out a particular person as having failed to acknowledge or communicate with her. The failure was alleged to have been done by "the respondent". It would reasonably have appeared to the respondent that the allegation of unfavourable treatment would stand or fall on the question of whether *anybody* in a management position had communicated with the claimant about her bereavement. That was how the respondent evidently did understand the allegation. That is apparent from the way Mr Kinsey asked questions of the claimant on behalf of the respondent. Once he had established from the claimant that Miss Parle had messaged her about her father's death, he did not ask any questions about any discussions of bereavement between the claimant and Mrs Houghton, or whether it would have been a good idea for Mrs Houghton to try and have that kind of conversation.

173. Further permission is therefore required for the claimant to allege that Mrs Houghton discriminated against the claimant by not discussing the subject with her.

174. We refuse permission to amend. This is because:

174.1. The disadvantage that the respondent would face is clear. The new case only arose during the parties' closing submissions. The respondent was deprived of the opportunity to ask further questions on the subject. It would have been theoretically possible for us to reduce the disadvantage by giving the respondent an opportunity to ask further questions of the claimant, but that would not help to achieve the overriding objective. It would create a real risk of failing to complete the hearing during its time allocation.

174.2. The disadvantage to the claimant caused by the refusal of the amendment is relatively slight. This is because of the slim prospect of the allegation succeeding on its merits. Based on the facts we already found, there would be little chance of the claimant establishing that Mrs Houghton's omission to discuss her bereavement with the claimant was unfavourable. The claimant did not want to speak to Mrs Houghton at all, let alone about a topic so sensitive as her father's death.

175. What we are left with is the complaint as it appears in the list of issues. That complaint fails. The alleged unfavourable treatment did not happen. Miss Parle acknowledged and communicated sensitively with the claimant when her father died.

Conclusions – sex discrimination

176. We now turn to the complaint of direct sex discrimination.

177. The allegation is that, because the claimant is a woman, the respondent treated her less favourably than it would treat others "in respect of expressing breastmilk".

178. Before we can decide whether claimant was treated "less favourably", we must first establish how she was treated.

179. Our factual findings were:

179.1. There were no suitable facilities for expressing breastmilk at the V7 Base. This was a source of concern for the claimant, particularly on 2 November 2022, but did not actually result in the claimant having to express milk in her car or endure physical discomfort on a day when she worked at V7.

179.2. There were no suitable facilities for expressing breastmilk at any other hub, for example, the Marie Curie hospice. The claimant did not ask for any facilities there.

179.3. The working arrangements put in place on 31 October 2022 were intended to allow the claimant to travel home from patient visits in time to express milk or feed her baby before any physical discomfort set in, or any adverse effect of engorgement on her health. Because of the unpredictable nature of patient visits, she could not always get home in time. This meant that there were occasions when the claimant had to express breastmilk in her car. The claimant did not tell the respondent that this was happening.

179.4. Pro-actively giving the claimant a lighter patient schedule and/or a home-based or hub-based role and/or suitable expressing facilities at a hub would have avoided such occasions or reduced their number.

180. Was this treatment less favourable than the treatment that the respondent would have given to others? Any meaningful answer to that question would have to take into account the "others'" circumstances. Relevant circumstances would include the need for access to a clean, private space and access to secure, hygienic storage, at predictable intervals during the working day. To enable a comparison under section 13, a hypothetical comparator would need access to those facilities for reasons other than breastfeeding. An example comparator might be a person (male or female) who was dependent on insulin to control diabetes. There are no facts from which we could conclude that a person in such circumstances would have been treated any differently.

181. Another way of making essentially the same point is to say that the respondent's treatment of the claimant in relation to expressing breastmilk was not *because* she was breastfeeding. Any shortcomings in the way the claimant was treated in respect of expressing breastmilk were entirely because: (a) by the time the claimant started work, there was no private room for use at the V7 Base, (b) the claimant and Miss Parle agreed what the claimant's role would entail, (c) the nature of that role was not fully predictable and (d) the claimant did not report any problems or ask for the working arrangements to be any different. The fact that the claimant was breastfeeding meant that her working arrangements put her at a disadvantage when compared to a person who was not breastfeeding. Had the claimant brought a complaint of indirect sex discrimination, the respondent may well have had to justify those working arrangements objectively. But that is not enough to meet the definition of direct discrimination in section 13.

Conclusions - harassment

<u>Harassment 1 and Harassment 6 – is an amendment required?</u>

182. We started by resolving the dispute about what the claim was actually about. What unwanted conduct was alleged?

183. In our view, the harassment complaint included an allegation that the respondent had engaged in unwanted conduct by failing to make arrangements for the claimant to express breastmilk (Harassment 1), which included failure to provide suitable facilities at the V7 Base (Harassment 6).

184. The starting point is the claim form. It alleged that the respondent harassed the claimant by failing to make arrangements for the claimant to express breastmilk. It did not say what arrangements should have been made, but referred to her grievance, which contrasted the facilities at V7 with the facilities at the previous base in Edge Lane.

185. The respondent says that this allegation was impliedly curtailed by the specific allegations of unwanted conduct in the list of issues. (We have labelled them Harassment 2 to 5). We do not agree. The list of issues preserved the general allegation of failing to make arrangements for expressing breastmilk (which we

labelled Harassment 1). Any reasonable reader of the list of issues would think that the specific allegations (Harassment 2 to 5), though labelled as “unwanted conduct” were a distraction from the general allegation (Harassment 1). The specific unwanted conduct alleged at Harassment 2 to 5 was the conduct of the claimant, not the respondent. That left to be clarified what arrangements the respondent had failed to make. From the evidence, it was clear that one of the alleged failures was to put in place expressing facilities at the V7 Base.

186. That said, both Harassment 1 and Harassment 6 fail on their merits, for these reasons:

186.1. The claimant did not perceive that the failure to plan her breastfeeding arrangements in advance had violated her dignity or created one of the kinds of environment described in section 26 of EqA.

186.2. The claimant did not perceive that the lack of milk expressing facilities at V7 had that effect either.

186.3. The claimant did not perceive that her ongoing working arrangements had that effect, even at the times when, occasionally, she had to express milk in her car.

186.4. In any case, the reasonableness of any such perception would have to be evaluated in all the circumstances. These would include the opportunity to alter her patient schedule, or to ask for a hub-based role, or to request additional facilities, and the absence of any request on her part for any of those things.

186.5. There were no facts from which we could conclude that Miss Parle’s or Mrs Houghton’s or Ms Owens’ purpose in failing to make breastfeeding arrangements was to violate the claimant’s dignity or to create one of the relevant kinds of environment. Indeed, we did not understand that to be the claimant’s case: it was not put to any of the respondent’s witnesses.

Harassment 2 to 5

187. There is a short answer to the allegations of Harassment 2 to 5. As we have stated, they do not allege any conduct on the part of the respondent. They are no more than circumstances relevant to whether Harassment 1 and Harassment 6 are well-founded. For the reasons we have given, they are not.

Conclusions – discriminatory constructive dismissal

188. We can express our conclusions on discriminatory constructive dismissal in short order.

189. There was only one well-founded complaint of discrimination. That was discrimination because of maternity (Unfavourable Treatment 3 – base move consultation).

190. We did not determine whether or not this discrimination breached the implied term of trust and confidence, whether on its own or cumulatively with other

conduct. This is because the claimant did not resign in response to the discrimination. It did not affect her decision at all. By the time of the move to V7, the claimant had given her notice, accepted another job, and formed an unshakeable decision to leave the respondent's employment. No amount of consultation over her base move would have made any difference to her resignation.

Conclusions – unfair constructive dismissal

Did the claimant resign in response to a breach of contract?

191. Our starting point was the conduct that was alleged to have breached the implied term of trust and confidence. For the reasons given at paragraph 4.15, we focused our attention on the conduct from March to December 2021. We further narrowed our focus onto the conduct during that period that the claimant actually had in mind at the time she decided to resign.

The Deputy Team Leader application

192. Mrs Houghton had reasonable and proper cause to discuss the Deputy Team Leader role with Mr Lee. The expressions of interest e-mail had gone to the whole team. It would be surprising if a recruiting manager had no reasonable cause to talk about a prospective role with those who were interested in applying for it.

193. Mrs Houghton did not, objectively, have reasonable and proper cause to hold a conversation with the interview panel in an interview room with the claimant waiting outside. She had agreed not to be involved in the process. Although it was not realistic to expect Mrs Houghton to divorce herself from the process altogether, there was no need to have a conversation with the panel just before the interview was about to start.

194. From an objective standpoint, this conduct created the risk of putting the claimant off her stride in the interview. That is in fact what happened. Trust and confidence was dented.

195. Mrs Houghton had reasonable and proper cause to speak to the interview panel after they had made their decision. Although we do not know Mrs Houghton's subjective reason, there were obvious reasons why, objectively, a manager in Mrs Houghton's position would want to speak to the panel, including to thank them.

196. Miss Parle and Mrs Gordon had reasonable and proper cause to hold an evidence-based selection interview, despite the fact that the claimant was the only candidate. The fact that alternative methods of selection were available does not change the objective reasonableness of Mrs Gordon's approach. The panel also had reasonable and proper cause to decide that the claimant was unsuitable to be a Deputy Team Leader. The claimant did not perform well in her interview. She did not provide the evidence needed to satisfy the panel that she had the skills and abilities for the role.

The QN application

197. Mrs Houghton had reasonable and proper cause to tell the claimant that she could not support her QN application. She was ineligible to be a supporting referee.

198. Miss Parle did not have reasonable and proper cause to neglect the claimant's request for support. The fact that Miss Parle missed the e-mail by accident does not mean that her cause was a reasonable or proper one. A team leader can generally be expected to read e-mails from members of their team. There is even less cause for failing to read an e-mail if it contains a request for support.

199. Miss Parle's omission had some impact on the relationship of trust and confidence. The extent of the impact is considerably softened, however, by the fact that the claimant did nothing to chase Miss Parle into action. Objectively, an employee can be expected to realise that, occasionally, their manager might miss an e-mail, and that their failure to respond might be a simple oversight. Faith is more likely to be lost where the employee has sent a reminder and still nothing is done.

The request for equipment

200. Miss Parle did not have reasonable and proper cause to ask Ms Buckle to collect the claimant's laptop. Miss Parle assumed that the claimant's maternity leave had automatically started when in fact it had not. This had some effect on the relationship of trust and confidence. When assessing the magnitude of that effect, we bear in mind that the claimant knew that she would be handing in her laptop in any event after a few more working days.

Cumulative effect

201. We have now identified all the conduct which:

    201.1. Was alleged in the Particulars of Claim;

    201.2. Was without reasonable and proper cause;

    201.3. Had some effect on the relationship of trust and confidence; and

    201.4. Had some influence on the claimant's resignation.

202. That conduct consisted of Mrs Houghton speaking to the interview panel before the interview, Miss Parle failing to respond to the claimant's request to support her QN application, and Miss Parle asking Ms Buckle to collect the claimant's equipment.

203. We have stood back and asked whether, taken together, that conduct demonstrated an intention to abandon and altogether refuse to perform the contract. In our view, it fell considerably short of that high hurdle. Even cumulatively, the conduct was not calculated or likely to destroy or seriously damage the relationship of trust and confidence.

204. The respondent did not fundamentally breach the claimant's contract. The claimant was not entitled to resign without notice. She was not constructively dismissed.

Affirmation

205. Even if the claimant had been entitled to resign in December 2021, she had lost the right to do so by the time her employment ended.

206. In coming to this view, we did not regard the claimant as having affirmed the contract merely by being on maternity leave and receiving maternity pay from January to October 2022. That was essentially passive. Objectively, it did little if anything to tell the respondent that the claimant was prepared to continue in employment despite the breach.

207. The claimant did, however, take some positive steps that would objectively demonstrate her willingness to continue and put any breach of contract behind her.

207.1. The claimant worked on Boxing Day and one other day before starting her maternity leave.

207.2. The claimant worked for 12 weeks following her return from maternity leave, and, as her reason, told the respondent that she was doing so to avoid having to repay her enhanced maternity pay.

207.3. During her return to work interview, the claimant actively agreed to a new working routine to accommodate her need to breastfeed.

207.4. The claimant gave 25 weeks' notice of termination when she was only contractually required to give 12 weeks.

208. None of this conduct was accompanied by any reservation of the right to resign without notice, or any assertion that the claimant was only continuing in employment to give the respondent a chance to remedy the breach of contract.

209. We must consider how these steps would appear objectively to the claimant's employer. This involves applying the law of contract in the real world. It should be obvious to most employers that their employees are at an economic disadvantage. Accepting a repudiatory breach of contract immediately is not generally an easy step for an employee to take, because they are likely to depend on their salary to pay for their basic living costs. Where an employer has breached an employee's contract, and the employee who carries on working, even for a few weeks or months, the employer may often have to be alive to the possibility that the employee's only reason for continuing is so that they can find a replacement income before they leave. In those circumstances, the employee's continued work will not necessarily demonstrate that they have forgiven the breach of contract. Likewise, where an employer breaches the contract whilst the employee is on maternity leave, it ought to be apparent to the employer that the employee is likely to be particularly financially vulnerable, and may not have the economic resources available to her to accept the employer's repudiation straight away. If she finds another job, she is unlikely to be able to receive a substantial income from that job until her maternity leave is over and she is ready to start working. She may delay,

and even return to work for a short time, without necessarily indicating that she is prepared to let the contract continue despite the breach.

210. Even making allowances for all of that, however, we consider that in this case, the claimant's conduct clearly demonstrated that she was willing to forgo her right to resign without notice. From a neutral point of view, the claimant's actions had every appearance of the claimant having chosen to put the respondent's breach of contract behind her so she could maximise her maternity pay. The claimant was not indicating that her only reason for continuing was that she could not afford to repay the enhanced element. Nor should that have been obvious to the respondent from the context. In practice, the claimant would have started to earn a regular salary from Marie Curie before the respondent could make any repayment demand.

Outcome

211. For the above reasons, the claimant succeeds in her complaint of discrimination because of maternity (Unfavourable Treatment 3), but the remainder of her claim is not well-founded and is dismissed.

____

Employment Judge Horne

10 July 2024

SENT TO THE PARTIES ON
17 July 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX

LIST OF ISSUES

Pregnancy and maternity discrimination

1. Did the respondent treat the claimant unfavourably in the protected period because of her pregnancy and/or because of an illness she suffered as a result of her pregnancy, by:

    Unfavourable Treatment 1 – In relation to the role of Deputy Team Leader:

    a. Mrs Houghton encouraging others to apply for the Deputy Team Leader role;

    b. The decision to require the claimant to interview for the role, despite being the only candidate left by the time of the interviews;

    c. Mrs Houghton speaking to the interview panel just before the interview, despite having promised not to be involved in the recruitment process;

    d. Mrs Houghton negatively influencing the panel against the claimant; and

    e. The panel not offering the claimant the role.

    Unfavourable Treatment 2 - The management's failure to support her application for Queen's Nurse, because of her pregnancy and/or because of an illness she suffered as a result of her pregnancy?

1A. Did the respondent treat the claimant unfavourably in the protected period because she had exercised her right to maternity leave, by:

- Poor communication during her maternity leave, which have been identified as

    Unfavourable Treatment 3 – Not consulting her regarding the change of her base,

    Unfavourable Treatment 4 – Failure to respond to her annual leave requests, see [Unfavourable Treatment 6]

    Unfavourable Treatment 5 – Failure to acknowledge or communicate with the claimant relating to a change in her personal circumstances following the death of her father in July 2022,

- **Unfavourable Treatment 6 –** Failure to deal with her annual leave requests in a timely manner after the meeting of 9 September 2022 to enable her to finalise childcare arrangement[s] for her return to work?

1B. Does the claimant require the tribunal's permission in order to allege that Miss Parle and Mrs Houghton each treated the claimant unfavourably by failing to communicate with the claimant in relation to her father's death? If so, should permission be granted?

Direct sex discrimination

2. Was the claimant treated less favourably [in] the way the respondent treated her or would have treated others because of her protected characteristic of sex, in respect of expressing breastmilk after her return from maternity leave?
3. Is it necessary for the claimant to identify a hypothetical comparator who would have been treated more favourably than she was treated? If so, would the hypothetical comparator be a person (male or female) who required the same (or not materially different) facilities for a purpose other than breastfeeding?

Harassment

4. Did the respondent engage in unwanted conduct by **(Harassment 1)** failing to make arrangements to enable her to express breastmilk after her return from maternity leave?
5. If so, was any unwanted conduct relate[d] to sex?
6. If so, did the unwanted conduct:

    (a) Have the purpose or the effect of violating the claimant's dignity; or

    (b) Create an intimidating, hostile, degrading, humiliating or offensive environment for her

    In either case taking into account: the perception of the claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect.

7. The claimant has identified the following unwanted conduct:

    (a) **Harassment 2 -** having to let down milk in her car to prevent engorgement between patient visits

    (b) **Harassment 3 –** having to rush home before she started leaking milk

    (c) **Harassment 4 –** expressing milk at her home between visiting patients

    (d) **Harassment 5 –** expressing milk at her home after patient visits but before completing her documentation at the end of [her] working day

8. Does the claimant require the tribunal's permission to allege **(Harassment 6)** that the respondent also engaged in unwanted conduct by failing to provide adequate expressing facilities at the V7 Hub, or an opportunity to express milk in time when returning from the V7 Hub? If so, should permission be granted?

Discriminatory dismissal

9. Did the claimant … resign in response to the alleged discriminatory conduct set out in her claim?

    (i) Did the respondent subject the claimant to detrimental treatment for the prohibited reasons (sex/pregnancy)?

(ii) If so, did that treatment by the respondent repudiate the contract of employment?

(iii) Did the claimant resign in response to that?

Unfair constructive dismissal

10. Did the respondent do the things alleged in the Particulars of Claim so far as they concern the period March to December 2021?

11. Was that conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

12. Did the respondent have reasonable and proper cause?

13. Did the claimant resign in response to the breach? If the claimant had mixed motives for resignation, did the alleged breach play a substantial part in her decision to terminate her employment?

14. If so, did the claimant nevertheless delay in resigning and therefore affirm her contract of employment?

Time limits

15. Were the claimant's claims brought in time within the period set out in section 123(1)(a) and 140B of EqA?

16. Do any or all of the claims (on any ground) form part of conduct extending over a period of time under section 123(3)(a) EqA or are they distinct acts?

17. If not in time, would it be just and equitable for the Tribunal to extend time for submission of these claims under section 123(1)(b) of EqA?