EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4110836/2015

Heard in Glasgow on the 14, 15 and 16 June 2016

Employment Judge: Lucy Wiseman
Members: Ian Poad
Andrew Ross

Ms Kirsty McLeod	**Claimant** **Represented by:** **Ms M Dalziel - Solicitor**
The Royal Bank of Scotland plc	**Respondent** **Represented by:** **Mr W Rollinson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:-

(i) the claimant was unfairly dismissed by the respondent;

(ii) the claimant was wrongfully dismissed and

(iii) the claimant was discriminated against contrary to section 13 Equality Act.

A remedy hearing will now be arranged.

REASONS

E.T. Z4 (WR)

1. The claimant presented a claim to the Employment Tribunal on 10 September 2015 alleging she had been unfairly dismissed and discriminated against because of disability. The claimant also made claims in respect of notice, holiday pay and wages.

2. The respondent entered a response denying the claimant had been dismissed, denying the allegations of discrimination and denying any further payments were due to the claimant.

3. A Preliminary Hearing took place at which a List of Issues was agreed as follows:

    (1) Was the reason for the termination of the claimant's employment that she resigned;

    (2) If, alternatively, the claimant was dismissed, was the reason for the dismissal a potentially fair one under section 98(1) or (2) of the Employment Rights Act;

    (3) If the reason for the dismissal was a potentially fair one, did the respondent act reasonably in treating that potentially fair reason as a sufficient reason for dismissing the claimant in terms of section 98(4);

    (4) Was the claimant wrongfully dismissed;

    (5) Were any sums unlawfully deducted from the wages of the claimant;

    (6) If so, in what amount were the unlawful deductions;

    (7) Having conceded the claimant's son suffers from a disability (autism), did the respondent have knowledge of, or ought the

respondent reasonably to have had knowledge of, the claimant's child's disability at the time the claimant made her request for a career break;

(8) Did the respondent treat the claimant less favourably than it would have treated a hypothetical comparator because of her son's disability contrary to section 13 Equality Act;

(9) If so, what was that less favourable treatment and how did it impact on the claimant and

(10) How much accrued but untaken annual leave did the claimant have as at the date of termination of her employment and has she been paid in respect of same.

4. The claimant's representative clarified, at the commencement of this Hearing that the complaint in respect of holiday pay was no longer insisted upon. The claimant's representative further clarified, at the conclusion of the Hearing, that the complaint in respect of unlawful deductions of wages was also no longer insisted upon.

5. The representatives further clarified that the Hearing was restricted to determining liability only.

6. We heard evidence from the claimant and Mr Richard Afakwah the claimant's General Practitioner. We also heard evidence from Mr Jonathon Gibbons, the claimant's line manager.

7. We were referred to a jointly produced bundle of documents. We, on the basis of the evidence, made the following material findings of fact.

Findings of fact

8. The claimant commenced employment with the respondent on 27 September 2010. She was employed as a Customer Adviser at the respondent's Parkhead branch. The claimant's terms and conditions of employment were produced at page 30.

9. The claimant reported to Mr Jonathon Gibbons, Branch Manager. The claimant and Mr Gibbons had a very good working relationship: the claimant thought highly of Mr Gibbons, and he considered her to be an excellent employee who consistently achieved very positive reviews from customers.

10. The claimant had a period of maternity leave when her elder son, Reece, was born in 2012. The claimant returned to work following the birth of Reece.

11. The claimant commenced a second period of maternity leave in 2014 for the birth of her son, Alfie.

12. The claimant's son, Reece, has autism; ADHD; asthma and eczema. His behaviour is very challenging: he is unpredictable, struggles with communication, he doesn't sleep, needs to be fed and has no awareness of danger. The level of autism has been diagnosed as severe.

13. The claimant's physical and mental wellbeing have suffered because of the impact of dealing with Reece's disabilities. The claimant requires to constantly check and monitor Reece and ensure that he is not harming Alfie, or ensure that Alfie is not copying Reece's behaviour. The claimant rarely sleeps.

14. The respondent accepted the claimant's son Reece is a disabled person within the meaning of section 6 Equality Act.

15. The claimant became concerned, as her maternity leave for Alfie progressed, that she would not be able to cope with a return to work. The claimant sought advice from her GP and other support workers. The GP advised the claimant to consider a career break.

16. The claimant considered requesting a career break to be a very sensible option and so she contacted Mr Jonathon Gibbons in March 2015 to discuss it.

17. Mr Gibbons had previously spoken to the claimant in January 2015 regarding her son Reece's disabilities and her own difficulties in coping with it. Mr Gibbons had, at that time, granted the claimant's request to use accrued holiday at the end of her period of maternity leave.

18. The claimant, during the telephone call with Mr Gibbons in March 2015, informed him she was struggling with depression and with Reece's conditions. The claimant asked for a career break. Mr Gibbons responded to inform the claimant he would have to speak to HR and look into it with his Manager. Mr Gibbons enquired how long a break the claimant would need. The claimant did not know because she was not familiar with the respondent's Policy. Mr Gibbons suggested the claimant could put in for a year and the claimant thought this would be ideal because Reece had a big year coming up with pre-school.

19. The claimant contacted Mr Gibbons again in March and was told he was waiting to hear back from his Manager. The claimant phoned Mr Gibbons again in April to enquire how the application was progressing.

20. Mr Gibbons returned the claimant's phone call and stated "don't shoot the messenger" but a career break could not be granted. The claimant questioned the decision but Mr Gibbons told her it was out of his control. He also referred to the fact a year was not feasible, and that her son's condition could deteriorate and 1 year could lead to 3 years, and 3 years to 5 years. The conversation ended with Mr Gibbons informing the claimant that if she did not want to return to work, in reality the only option she had was to resign. The claimant told Mr Gibbons that if that was her only option, she did not know what option she had. There was some discussion regarding a Carers Allowance.

21. The claimant was devastated: she felt she had been backed into a corner. She had financial worries and was "really worked up and in a bad place". She sent Mr Gibbons a text message on the 12th May in the following terms: "*Hey Jonathan can you please forward me a formal copy of date of end of employment. Stating that my maternity pay finished on 28 January. I will forward a signed letter of my resignation. My address is 52 Quarryknowe, Bankhead, Glasgow, g73 2rh. I know you're a busy man but I would really appreciate it if you could attend to this asap. Would help me out a lot. Many thanks."*

22. The claimant spoke to her GP and a social worker who told her she had rights and should not be backed into a corner. The claimant did not send a letter of resignation.

23. The claimant received a letter from the respondent dated 27th May 2015 (page 75) in the following terms: "*Your line manager has told us you left the bank on the 17th May. Unfortunately you've been paid up to 31 May and have been overpaid by £450.27. We've recalculated your pay, enclosed a revised pay slip and we'll debit your bank account £450.27 on 11 June…."*

24. The claimant could not believe the respondent had simply issued her P45 without discussion. The claimant sought advice from the Citizens Advice Bureau.

25. The claimant received a further letter from the respondent dated 12 June (page 76) in the following terms: *We've been told by your line manager to amend your pay because of late advice unpaid sick leave which means your net pay for this month has been calculated at minus £415.64 and you won't be paid for June. We need to recover this money and will debit your bank account on 30/06/2015…*

26. The claimant did not know what this letter meant because she had not been on sick leave.

27. The respondent's Leave Policy was produced at page 41, and Employment Breaks are dealt with at page 67. The Policy stated "we therefore allow employees to request employment breaks for a minimum of 8 weeks and up to 26 weeks."

28. The claimant's colleague, Mr Gary Mackie, was granted a career break of 10 months to travel in Australia (page 78).

29. The claimant would have accepted a 6 month or 12 month career break. Dr Afakwah confirmed there had not been a formal diagnosis of Reece's autism until the end of 2015. However, although not formally diagnosed, there had been an understanding that he had autism. Dr Afakwah also confirmed the claimant was not ready to return to work at the end of her maternity leave, and there had been a discussion about sickness absence, however the claimant was not keen on this because sickness absence remains on an employee's record. The claimant's son Reece goes to school in August 2016 and Dr Afakwah confirmed that when this happens the pressures on the claimant will decrease because the constant checking and monitoring will reduce.

Credibility and notes on the evidence

30. We found the claimant to be an entirely credible witness. The claimant had a good recollection of the discussions she had had with Mr Gibbons, and although she was very tearful during her evidence, she was able to explain her belief that her request had been turned down because the respondent believed that with her son's disabilities time off would lead to more time off.

31. Mr Gibbons invited us to believe a different version of events. Mr Gibbons agreed the claimant had contacted him regarding a career break. He told us there had not been any discussion about the length of break, and he had simply told the claimant that he would look into it and get back to her. Mr Gibbons contacted HR to confirm what could be offered in terms of the

Policy (6 months) and he then spoke to his line manager to explore options to give the claimant a year off. The line manager told him to go back to the claimant to discuss how long she was looking for.

32. Mr Gibbons contacted the claimant and told her the Policy was six months but he was confident he could get her a year. The claimant told Mr Gibbons this was not suitable and that she needed 5 years because she wanted to ensure she was there for her son. The claimant also made reference to the respondent having to give her this leave.

33. Mr Gibbons went to back to check the policy and contacted the claimant again to confirm the position. The claimant told him she would have to resign. Mr Gibbons raised options such as flexible working and reduced hours, but the claimant was adamant she needed a 5 year break.

34. Mr Gibbons considered the claimant was calm and had clearly thought about her position. Mr Gibbons understood from the text on 12 May that the claimant would be sending through a letter of resignation, and that she wanted this to be processed as quickly as possible.

35. Mr Gibbons processed the claimant's resignation without waiting for the letter of resignation. Mr Gibbons was not aware of the subsequent letters sent to the claimant regarding overpayments.

36. We preferred the claimant's version of events to that of Mr Gibbons. We found Mr Gibbons' evidence was very clear except when he was pressed to answer questions in cross examination. Further, his account of the claimant's alleged resignation changed with each telling and Mr Gibbons introduced in cross examination points which he had not stated in examination in chief. This gave the impression that Mr Gibbons, having realised the weakness of what he said, sought to strengthen it.

37. Mr Gibbons' evidence regarding his authority to grant career breaks was less than impressive. Mr Gibbons' told us he could authorise career breaks,

but would always refer it to his line manager who would have knowledge of "the bigger picture" in terms of business need. Mr Gibbons thought he could grant a career break even if his manager refused it, but this response lacked credibility in circumstances where he did not grant the claimant's request.

38. We further considered there was a logic to the claimant's position which was lacking from the respondent's position and this is set out in more detail below.

39. We noted this whole matter was dealt with by Mr Gibbons informally, and by that we mean there was no written material to support his position. We considered it extraordinary that a verbal request for a career break was not even noted by the manager; telephone discussions were not noted and Mr Gibbons took no action whatsoever to enquire whether the claimant was going to resign, and did not follow up the text of 12 May with any correspondence. We, of course, acknowledged matters may be dealt with informally, but an informal approach did not explain what occurred in this case.

40. Dr Afakwah was an entirely credible witness whose evidence confirmed Reece's medical conditions, the effect on the claimant and the fact that once Reece goes to school the pressure on the claimant will be reduced. Dr Afakwah did not, in his evidence, state he had discussed taking a career break with the claimant: his evidence focused on his opinion that she was not fit to return to work and should consider a period of sickness absence. Mr Rollinson invited the Tribunal to find this undermined the claimant's evidence, but we could not accept this submission, because it was clear Dr Afakwah spoke to the claimant about her fitness for work and some form of break.

Claimant's submissions

41. Ms Dalziel invited the Tribunal to consider the claim of unfair dismissal, where the question to be determined is whether there was a dismissal. Ms Dalziel submitted the Tribunal would need to look closely at what had been said in terms of what the claimant asked for, what did the respondent offer, what was the claimant's response and what words were said regarding resignation. This should be considered in conjunction with the text message of 12 May.

42. Ms Dalziel submitted there was no dispute regarding the fact the claimant wanted a career break and told the respondent this. Mr Gibbons invited the Tribunal to believe the claimant did not refer to how long she may be seeking and that there had been no discussion about the matter at all. The claimant told the Tribunal that Mr Gibbons had asked her how long she would like and she did not really know, so Mr Gibbons had suggested she could perhaps put in for a year, and the claimant thought this was a good idea. Ms Dalziel submitted it was highly unlikely there would be no discussion whatsoever about length of break and suggested it would be natural to discuss it.

43. Mr Gibbons told the Tribunal he went to investigate the possibility of a career break and whether it was possible to have a break of more than six months. Ms Dalziel invited the Tribunal to accept that evidence because it supported the evidence that he had suggested to the claimant that she could put in for a year. Ms Dalziel suggested it had a ring of truth to it, particularly when there had been discussion of Reece having a big year ahead of him.

44. The claimant had made a telephone call to chase up Mr Gibbons and then another call. The claimant's evidence was, it was submitted, very very clear about that call: Mr Gibbons stated *don't shoot the messenger, there's nothing I can do about it – no break could be offered, and if she did not want to come back to work her only option was to resign.* The claimant was shocked. Mr Gibbons went on to say that she did not know what would happen with her son in the future and one year could turn into 3 years and 3 years into 5 years.

45. Ms Dalziel noted the version of events given by Mr Gibbons was opposite to the claimant's version of events, and both could not be right. Ms Dalziel submitted logicality suggested the claimant's version of events was true for the following reasons:-

- 5 years simply made no sense: it is an inordinate length of time to be out of work and must be extremely rare;

- 5 years was not necessary for the claimant. Reece was going to school at the end of the year and when that happens the pressure on the claimant will be reduced. Mr Gibbons thought the pressure on the claimant would increase because she would accompany him to school, but this was not put to the claimant and was unlikely to be true.

- The claimant could not have afforded 5 years out of the work place.

- 5 years was not insisted on by the claimant because it does not ring true that the claimant – who was stressed, depressed and under pressure – would look a gift horse of any break in the mouth and insist on 5 years.

46. Ms Dalziel submitted it was significant there was no tangible evidence placed before the Tribunal of Mr Gibbons' discussions with the claimant or HR or his line manager. It was very surprising that none of these discussions caused a written record. Mr Gibbons explained that everything had been informal, but contradicted himself by saying that if the claimant had accepted an offer he would have formally processed it. Ms Dalziel submitted there should have been a paper trail and the Tribunal should question why it is not here.

47. The respondent's position is that the claimant resigned. The claimant says she was given an ultimatum and backed into a corner. Her evidence was that she told Mr Gibbons, *well if that's my only option, I don't know what option I've got.*

48. Mr Gibbons' evidence was that the claimant said *I'm going to have to resign.* However, in cross examination he changed that to state *Could you take this as my resignation.*

49. Ms Dalziel invited the Tribunal to accept the claimant's evidence because she had been clear and consistent, stating she did not resign. Ms Dalziel invited the Tribunal to accept the claimant did not resign.

50. Mr Gibbons took the text of 12 May as confirmation of resignation. Ms Dalziel submitted the question for the Tribunal is to determine whether the words were capable of being construed properly as a resignation. If there was ambiguity, the Tribunal must consider how a reasonable employer would have regarded them. Ms Dalziel submitted the text was not capable of being properly construed as a resignation. The text was an intention to do something that in fact was never taken forward. There was no letter of resignation.

51. Ms Dalziel directed the Tribunal to consider the case of **Sothern v Franks Charlesly & Co 1981 IRLR 278** which was authority dealing with words said in the heat of the moment.

52. Ms Dalziel also referred to the case of **Graham Grays v Garrett EAT 161/97** where it had been held that any ambiguity should be construed against the person seeking to rely on it.

53. Ms Dalziel invited the Tribunal to find there was no resignation and the claimant had, in fact, been dismissed on 17 May 2015. The respondent had failed to show the reason for the dismissal and accordingly the dismissal was unfair.

54. The respondent had not given the claimant notice of termination of employment and accordingly the claimant was entitled to payment for notice.

55. The claimant brought a complaint of associative discrimination in terms of section 13 Equality Act. The question for the Tribunal is did the respondent treat the claimant less favourably than it treats, or would treat, others on account of disability. The less favourable treatment relied on by the claimant was the refusal of the career break and dismissal. The comparator relied on by the claimant was Gary Markie, who was granted a career break to travel round Australia.

56. Ms Dalziel submitted that if the Tribunal finds no career break was offered and accepts the claimant's evidence, then there was a prima facie case of discrimination. The burden would then shift to the respondent to show there was no discrimination. Ms Dalziel submitted the respondent had failed to do this. The respondent had pled a blanket defence with no alternative position: they had not led any evidence to show why a career break was not offered or why an ultimatum was issued.

57. Dr Afakwah told the Tribunal there had been a formal diagnosis of autism towards the end of 2015, which was after the claimant's employment had ended. Ms Dalziel invited the Tribunal to reject any suggestion by the respondent that, in those circumstances, they had no knowledge of the disability. Ms Dalziel invited the Tribunal to remember disability had been conceded and that the respondent, at the material time, knew Reece had a very severe condition. There had been a perception by the respondent of the child and his health requirements.

58. Ms Dalziel submitted the claimant had made out her case in all respects.

59. Ms Dalziel, in response to the respondent's submissions, reminded the Tribunal that if the claim was successful a remedy hearing would be arranged and evidence would be led at that hearing about mitigation.

60. Ms Dalziel acknowledged there had been no further contact by the claimant after the text of 12 May, but the claimant's evidence was that the reason for this was because she took advice and understood the issue was a legal one.

Respondent's submissions

61. Mr Rollinson invited the Tribunal to find Mr Gibbons a credible and consistent witness who had no reason to treat the claimant differently. He had always been accommodating and had no reason to dismiss the claimant. There had been a verbal resignation and text, which Mr Gibbons had processed quickly at the claimant's request. The facts were not consistent with dismissal for no reason: the facts were consistent with someone looking out for the claimant and telling the truth. The claimant wanted a 5 year career break and when she could not get it, she resigned.

62. Mr Rollinson referred to the good working relationship which the claimant and Mr Gibbons enjoyed, and submitted the claimant benefitted from the informal relationship. The claimant was aware she could contact HR. The care of her sons was paramount and it was unlikely her son's difficulties would alleviate within a year.

63. Mr Rollinson invited the Tribunal to find the claimant had been insistent on a 5 year career break and her informal enquiry had gone no further after this had been refused. It was not for the Tribunal to second guess the claimant's financial position.

64. Mr Rollinson submitted the claimant in fact resigned and was not forced to do so. The claimant was not refused a leave request and she was not treated differently. She was offered flexible hours or reduced hours options, but all she wanted was a 5 year break to take a step back to look after her son. Mr Rollinson invited the Tribunal to accept the claimant confirmed her verbal resignation by the text of 12 May.

65. Mr Rollinson submitted the claimant's actions post resignation were consistent with resignation: there had been no return to work, no discussion with anyone challenging the resignation or trying to revoke it. There had been no calls to Mr Gibbons regarding the P45. Mr Rollinson submitted there had been none of those things because the claimant had resigned.

66. Mr Rollinson invited the Tribunal to note Mr Afakwah did not refer to having discussed a career break with the claimant: he spoke of sick leave and not being fit to return to work. This conflicted with the claimant's evidence.

67. Mr Rollinson submitted the claimant resigned verbally and followed this up by text. This was processed quickly at her request and before the letter of resignation was received. The claimant was not dismissed. The onus was on the claimant to show she was dismissed and she had not discharged that onus.

68. Mr Rollinson referred the Tribunal to the case of **Edward v Surrey Police 1999 IRLR 456** and submitted the case of **Sothern** did not apply in the circumstances.

69. Mr Rollinson submitted that should the Tribunal find the claimant was dismissed, any compensation awarded should be reduced because of contributory conduct and failure to mitigate.

70. There should be no award in respect of notice because the claimant was not dismissed.

71. Mr Rollinson accepted Mr Gibbons knew of the claimant's son's difficulties, but there had been no diagnosis until after the claimant left her employment and in those circumstances Mr Gibbons could not have known with any certainty that the claimant's son was disabled.

72. Mr Rollinson submitted the claimant had failed to show there had been less favourable treatment and had failed to show that any such treatment had occurred because of her son's disability. The Bank has discretion to refuse career breaks.

73. Mr Rollinson referred to the case of **Laing v Manchester City Council 2006 ICR 1519** where it had been held that an employee must prove, rather than simply assert, there had been less favourable treatment.

74. If the Tribunal was persuaded there was a prima facie case of discrimination, then it must consider whether the claimant was treated less favourably. The comparator is someone who made a request but who does not have a disabled child. Mr Markie had been granted 10 months leave, however he was not an appropriate comparator because he had not asked for a 5 year break. Mr Rollinson suggested that even if the claimant had asked for up to one year, and this had been refused, there was no evidence the reason for the refusal was because of her son's disability. Mr Rollinson submitted the claimant's evidence simply did not add up.

75. There was, furthermore, no evidence to suggest the claimant had been dismissed because of her son's disability. There was no evidence to support it because it was not true. The claimant resigned voluntarily and all elements of the claim should be dismissed.

Discussion and Decision

76. The list of issues to be determined in this case is set out above, and the first issue for this Tribunal to determine is whether the claimant's contract of employment came to an end by way of resignation or dismissal. The claimant and Mr Rollinson gave completely different accounts of the discussions they had regarding a career break. We made the following findings of fact regarding those discussions:

- the claimant phoned Mr Gibbons in March 2015 to ask for a career break;

- Mr Gibbons told the claimant he would speak to HR and his manager and suggested to the claimant she could perhaps put in for a year;

- A career break of one year suited the claimant because it fitted in with her son Reece's pre-school year;

- The claimant had to chase Mr Gibbons for a response;

- Mr Gibbons phoned the claimant in April and said –

  - don't shoot the messenger" but a career break could not be granted;

  - it was outwith his control;

  - one year was not feasible;

  - the claimant's son's health could deteriorate and one year could lead to 3 years which could lead to 5 years and

  - if the claimant did not want to return to work, in reality her only option was to resign.

- The claimant told Mr Gibbons that if that was her only option, she did not know what option she had.

77. We preferred the claimant's version of the discussions she had with Mr Gibbons for a number of reasons. Firstly, we accepted the claimant's evidence that she did not know about career breaks and whether this was

something the respondent could/would offer. We considered that in those circumstances, her enquiry of Mr Gibbons would have been a very general one. Mr Gibbons suggested there was no discussion about length of time the claimant wished to have off, but we could not accept this because we were of the opinion that the question how long the claimant wanted to have off would follow the request for time off as night follows day.

78. Secondly, Mr Gibbons spoke to HR regarding the Policy and then spoke to his manager "to explore options to give her a year off". We considered this evidence was consistent with Mr Gibbons asking the claimant how long she wanted off; the claimant not knowing, and Mr Gibbons suggesting to her that she could perhaps ask for a year.

79. Thirdly, Mr Gibbons told us the claimant needed 5 years because she wanted to ensure she was there for her son; that she was adamant she wanted 5 years and that if she could not get it she would resign. Mr Gibbons' description of the claimant being calm and "adamant" about 5 years was at complete odds with Dr Afakwah's description of the claimant at that time, and our own observations of the claimant.

80. Dr Afakwah told us of the pressures the claimant was under in terms of the constant checking and monitoring of Reece, the lack of sleep and anxiety. Dr Afakwah considered the claimant unfit to return to work for those reasons. A description of the claimant as being "calm" and "adamant" and demanding 5 years off was wholly inconsistent and unlikely.

81. Fourthly, the claimant did not need a period of 5 years off to support her son. We accepted Ms Dalziel's submission that 5 years is an inordinate length of time to be on a career break, and for that reason it must be extremely rare. We accepted the claimant had no knowledge of career breaks, whether this was something the respondent would consider and if so, how long a break may be granted. In those circumstances we considered the suggestion the claimant would demand 5 years to be highly unlikely.

82. Fifthly, we did not hear any direct evidence regarding the claimant's financial circumstances, but there was reference to financial worries and Carers Allowance. We inferred from this evidence that the claimant was not in a secure financial position and accordingly it was unlikely she would have been in a position financially to take a career break of 5 years.

83. Sixthly, we did not, for the reasons set out above and not repeated here, find Mr Gibbons to be an entirely credible or reliable witness. He invited the Tribunal to accept the claimant had verbally resigned during their telephone discussion. We, having preferred the claimant's version of events to Mr Gibbons', were satisfied the claimant did not verbally resign.

84. We, having decided the claimant did not expressly resign during the telephone call with Mr Gibbons, considered the words which were uttered regarding resignation. We found as a matter of fact Mr Gibbons told the claimant that if she did not want to return to work then, in reality, her only option was to resign. The claimant responded that if that was her only option, she did not know what option she had.

85. These words are ambiguous: the claimant's statement that if that was her only option, she did not know what option she had, could be interpreted as an acceptance that that was her only option and therefore that is what she would be doing, or they could be interpreted as an acknowledgement that she could return to work or resign.

86. The test, broadly speaking, as to whether ostensibly ambiguous words give rise to a dismissal or a resignation is an objective one:-

- all the surrounding circumstances must be considered and
- if the words are still ambiguous, the Tribunal should ask itself how a reasonable employer or employee would have understood them in the circumstances.

87. We noted that when considering all the circumstances, we should have regard to preceding and subsequent events and take account of the nature of the workplace.

88. We considered the surrounding circumstances included the fact (i) the claimant had exhausted maternity pay/leave and holiday pay and was due to return to work; (ii) the claimant wanted a period of time to support her son Reece in his pre-school year; (iii) the claimant was not fit to return to work; (iv) the claimant could have been signed off as unfit to return to work, but she wanted to avoid this going on her record; (v) there was reference to Carers Allowance; (vi) the pressures on the claimant would reduce when her son Reece went to school; (vii) there were still options available to the claimant to use the respondent's internal processes to challenge Mr Gibbons' decision; (viii) the claimant's text of 12 May making reference to a formal date of end of employment and stating she would forward a signed letter of resignation and (ix) the claimant took advice about her situation after sending the text of 12 May.

89. We concluded the surrounding circumstances demonstrated the claimant intended to resign. The words uttered by the claimant indicated an acceptance that resignation was her only option, and the text message of 12 May confirmed an intention to resign.

90. A stated intention to resign is still ambiguous: a person could act on that intention or they could change their mind. We asked ourselves how a reasonable employer would have understood the words/text message in the circumstances. We considered a reasonable employer would have understood the words/text to mean that the claimant intended to resign and would let her employer have a letter of resignation. The key fact, however, is that no such letter arrived with the respondent, or was sent by the claimant. The claimant did not act on her intention: she did not resign.

91. Mr Gibbons acted on the claimant's intention: he acted too quickly. He actioned a resignation when none existed. He, by his actions, brought the

claimant's employment to an end: he dismissed her. We acknowledged Mr Gibbons may not have had any intention to dismiss the claimant, but the effect of his actions is that the respondent terminated the claimant's employment.

92. We decided the claimant did not resign from her employment. The claimant was dismissed on 17 May 2015.

93. It is for the respondent to show the reason for the dismissal, and that it was a potentially fair reason falling within section 98(1) or (2) of the Employment Rights Act. The respondent did not show any reason for dismissal. The respondent's position was that they did not dismiss the claimant: they did not seek to argue any esto position. We have decided the respondent did dismiss the claimant and the respondent has not shown any potentially fair reason for that dismissal. The dismissal is unfair for this reason.

94. The claimant was dismissed without notice in circumstances where she was entitled to notice of termination of employment.

95. We next turned to consider the claimant's claim of direct disability discrimination by association. The claimant, in bringing this claim, asserts that she was treated less favourably because of her son's disability. The European Court of Justice's decision in the case of **Coleman v Attridge Law 2008 ICR 1128** made clear that the Framework Directive protects those who, although not disabled themselves, nevertheless suffer direct discrimination or harassment owing to their association with a disabled person. Section 13 Equality Act took account of this ruling.

96. Section 13 Equality Act provides that an employer directly discriminates a person if it treats that person less favourably than it treats or would treat others, and the difference in treatment is because of a protected characteristic.

97. The first issue for this Tribunal to determine relates to the respondent's knowledge of the claimant's son's disability. We noted the respondent conceded the claimant's son, Reece, suffers from a disability (autism), and the first issue for the Tribunal to consider is whether the respondent knew, or ought reasonably to have known, of the child's disability at the time the claimant made her request for a career break.

98. Mr Gibbons told us that he was aware the claimant's son was "severely unwell" and although he had no formal details, he knew Reece was not speaking and that he had "aspergers/autism". We acknowledged there was no formal diagnosis of Reece's condition until the end of 2015, however we could not accept Mr Rollinson's submission that this altered the respondent's knowledge of the child's disability. It was very clear from Mr Gibbons' evidence that he knew of the child's condition and whilst he might not have formally known the diagnosis, he was aware it was aspergers or autism, and whilst those conditions can vary in degrees of severity, Mr Gibbons knew Reece was "severely" unwell.

99. We were satisfied the respondent knew of the child's disability at the time the claimant made her request for a career break.

100. The next issue to be determined is whether the respondent treated the claimant less favourably than it would have treated a hypothetical comparator. Ms Dalziel identified two instances of alleged less favourable treatment: (a) the refusal of a career break and (ii) the issuing of an ultimatum.

101. We accepted Mr Rollinson's submission that the claimant must prove less favourable treatment occurred, rather than merely asserting it occurred or would occur. We found as a matter of fact the claimant's request for a career break was refused, and that she was told Mr Gibbons that if she did not want to return to work her only option was to resign.

102. We next turned to consider the issue of a comparator. Ms Dalziel identified an actual comparator, Mr Gary Markie, who was granted a career break. Mr Rollinson suggested Mr Markie was not the correct comparator because he did not ask for 5 years off.

103. We noted the terms of section 23(1) Equality Act which provide that on a comparison for the purposes of establishing direct discrimination there must be "no material difference between the circumstances relating to each case". The Employment and Human Rights Commission Employment Code makes clear that the circumstances of the claimant and the comparator need not be identical in every way, rather, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator.

104. We could not accept Mr Rollinson's submission that a hypothetical comparator had to be someone who had requested a 5 year break. We could not accept that submission because we did not accept Mr Gibbons' evidence to the effect the claimant had asked for a 5 year break. Our findings of fact reflect that the claimant did not know how long a break she wanted, and accepted Mr Gibbons' suggestion that perhaps she could get a year.

105. We noted there was no evidence before the Tribunal regarding the numbers of employees who request a career break, the length of career breaks usually granted, the number of requests refused and the reasons for refusal. We inferred from the fact the respondent has a Policy regarding career breaks that requests for a 6 month career break would more likely than not be granted.

106. We accepted Ms Dalziel's submission that Gary Markie was an actual comparator. He had requested and been granted a career break of 10 months. The claimant had requested a career break and her request had been refused: the respondent treated the claimant less favourably than it treated others.

107. We next asked ourselves what was the reason for the less favourable treatment. We had regard to the case of **R v Governing Body of JFS and the Admissions Appeal Panel of JFS 2010 IRLR 136** where the Supreme Court emphasised that in deciding what were the grounds for discrimination, a Tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination.

108. The respondent placed no evidence before the Tribunal to explain the factual criteria applied by them to determine requests for career breaks, and in particular the claimant's request for a career break. Mr Gibbons spoke to his manager about granting a break of one year: after he had spoken to his manager, he informed the claimant her request could not be granted. Mr Gibbons offered no explanation for the decision beyond saying it was outwith his control; a year was not feasible and making reference to the health of the claimant's son, which could deteriorate and [accordingly] one year could lead to 3 years which could lead to 5 years.

109. We inferred from these findings in fact that the reason why the claimant's request for a career break was not granted was because of her son's disability and the respondent's concern that one year would lead to 3 years, which would lead to 5 years. We concluded the claimant was treated less favourably because of her son's disability contrary to section 13 Equality Act.

110. The second aspect of this complaint related to the ultimatum issued by Mr Gibbons when he told the claimant that if she did not want to return to work her only option was to resign. Mr Gary Markie is not an appropriate comparator in this respect, and we therefore had to have regard to a hypothetical comparator and how such a comparator would be treated by the respondent in similar circumstances.

111. We considered a hypothetical comparator would be an employee who was unfit to return to work but did not want to have a period of sickness absence;

who had requested a career break but had this refused and who had exhausted their entitlement to annual leave and holiday pay. We were of the opinion the respondent would, in those circumstances, have treated a hypothetical comparator in the same way as the claimant. There must be some basis for an employee not being at work, for example, sickness absence, annual leave, career break, flexible working, special leave etc. If an employee has no basis for not being at work, we concluded the respondent would issue an ultimatum to the effect that if the employee did not want to return to work, they would need to resign.

112. We accordingly concluded the claimant was not treated less favourably in respect of the ultimatum issued by Mr Gibbons. We should state that even if we had been satisfied the claimant had been treated less favourably, there was no direct evidence, or findings from which we could have inferred, that the ultimatum was issued because of the claimant's son disability.

113. We, in conclusion, decided the claimant was treated less favourably by the respondent because of her son's disability, when it refused the claimant's request for a career break, but not when it issued the ultimatum to the claimant.

114. The final issue for this Tribunal to determine is how the less favourable treatment impacted on the claimant. The evidence regarding this issue was clear: the refusal of the request for a career break left the claimant believing that her only option was to resign. The claimant told Mr Gibbons, in the text message of the 12 May, that she would forward a signed letter of resignation. Mr Gibbons acted on this and brought the claimant's employment to an end. We were satisfied the impact of the less favourable treatment was the termination of the claimant's employment.

115. We have decided:-

- the claimant was unfairly dismissed by the respondent in terms of section 98 Employment Rights Act;

- the claimant is entitled to a payment in respect of notice and

- the claimant was discriminated against contrary to section 13 Equality Act, and the impact of that discrimination was that it led to the termination of the claimant's employment.

116. A remedy hearing will now be arranged. Mr Rollinson made submissions regarding contributory conduct and mitigation but it was not appropriate to give consideration to those matters at this stage, and until we have heard the claimant's evidence and Ms Dalziel's submissions in this respect.

Lucy Wiseman
Date of Judgment: 28 July 2016
Entered in register and copied to parties: 1 August 2016