



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms C Kimberley

Respondent

Calibre Building Services
Ltd

and

Held at Croydon on 8, 9 & 19 January 2018

Representation

Claimant:

Ms Thornber, Counsel

Respondent:

Mr Seals, Solicitor

Employment Judge Harrington

Members: Ms MacDonald
Dr Fernando

RESERVED JUDGMENT

The Claimant was treated unfavourably within the meaning of section 18 of the Equality Act 2010 by accusations made to her in a meeting on 20 December 2016 and by her probationary period being extended for a second time.

REASONS

Introduction

- 1 This is the claim of Charlotte Kimberley, the Claimant, arising out of her employment with Calibre Building Services Limited, the Respondent. By an ET1, received on 25 April 2016, the Claimant brings claims of direct discrimination on the grounds of pregnancy / maternity contrary to section 18 of the Equality Act 2010. The Respondent denies the entirety of the claims.
- 2 At a Preliminary Hearing on 20 June 2017, the issues in the claim were defined as follows,

Section 18: Direct discrimination on grounds of pregnancy/maternity

‘4.1 Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act 2010, namely,

4.1.1 Her probation period was extended;

- 4.1.2 On the 7th July 2016 when she informed Kim Lowe she was pregnant she was asked why she couldn't have been 'more careful' and why she did not use contraception.
- 4.1.3 Being accused in a meeting on the 20th December 2016 with the Office Manager Kim Lowe of lying about her pregnancy (that she knew before she accepted the position with the Company) and informing her that she 'should be ashamed of herself';
- 4.1.4 Her probationary period was extended for a third time.

- 4.2 No comparators are required as this is a case of pregnancy discrimination.

- 4.3 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

- 4.4 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?' [27-28]

- 3 The Tribunal heard the evidence and submissions in this case on 8 and 9 January 2018 and then met in Chambers to reach its decision on liability on 19 January 2018. The Tribunal heard evidence from the Claimant, Ms Amanda Hynes and Mr Michael Hynes and, for the Respondent, from Ms Kim Lowe (Office Manager), Mrs Michelle Pepper (Contracts Administrator), Mr Matthew Mabey (Operations Director) and Ms De Villiers (Accounts). Each of the witnesses provided a written witness statement and the Tribunal was also given an agreed hearing bundle paginated 1 – 185. The numbers appearing in square brackets throughout this judgment, are references to pages within that bundle.

The Facts

- 4 From the evidence heard, the Tribunal finds as follows:

- 5 The Claimant is employed as a Contracts Administrator by the Respondent, a facilities management services company. The Respondent employs approximately 50 staff with about 20 of those staff working at Robert Denholm House near Redhill. Of these 20 staff, there are 8 men and 12 women (the Claimant being one of those women). The Claimant's employment commenced on 20 June 2016 and continues to date.

- 6 By way of background, in or around May / June 2016 the Respondent was looking to recruit a new Contracts Administrator. An agency, Your Recruit (UK) Limited, provided candidates to the Respondent for interview. A first round of interviews took place on 2 June 2016 and following this, two candidates were shortlisted to attend a second interview; the Claimant was one of the shortlisted candidates. Following the second interview, a decision as to who to recruit was taken by the Respondent's two directors, Matthew Maybey and Steve Welch, and the

Respondent's office manager, Miss Kim Lowe. It is clear from Miss Lowe's letter of 19 December 2016 to Ms Fragniere at Your Recruit that, when recruiting, the Respondent was particularly looking for an individual who could give 'longevity' – that was, so far as the Respondent was concerned, an employee who would work at least 12 - 18 months continuously [128]. On 8 June 2016 the Claimant was offered the role of Contracts Administrator. She accepted this role on the same day [49] with an agreed start date of 20 June 2016.

- 7 The role of Contracts Administrator is a relatively demanding one – the Administrator has a portfolio of sites that he or she oversees from an administrative perspective, working with a Contracts Manager. The Contracts Administration team has 11 staff, all of whom are women. The Claimant's portfolio of sites was managed by Mr Joe Dunning, Contracts Manager and the Claimant was required to work closely with him although she was line managed by Miss Lowe. It was agreed by the parties that being the Administrator to Mr Dunning had its challenges. Miss Lowe described Mr Dunning as 'old school' explaining that he was not as fast as some managers and had a particular concern with regards to the detail of relevant matters. Again, it is agreed that at the start of her employment, the Claimant was told that Mr Dunning would need 'pushing in the right direction'.
- 8 On 15 June 2016, five days before her first day at the Respondent, the Claimant took a home pregnancy test and received a positive result. Both the Claimant and her partner, Mr Michael Hynes, describe being shocked by the result. On the same day the Claimant telephoned Michelle Fragniere at YourRecruit and told her she was pregnant. The Claimant asked whether she would still be allowed to begin her employment with the Respondent. After seeking some advice on the point, Ms Fragniere called the Claimant back and confirmed that her pregnancy did not prevent her from commencing her employment on 20 June. It follows from the findings of fact set out in this paragraph but, for the avoidance of doubt, the Tribunal is satisfied that when the Claimant accepted the Respondent's offer of employment on 8 June 2016 she was unaware that she was pregnant.
- 9 From the conversation with Ms Fragniere on 15 June 2016, the Claimant understood that she was not required to tell the Respondent of her pregnancy at that stage. Of course, it is entirely correct that a woman is not obliged to disclose the fact that she is pregnant before accepting a job opportunity offered to her.
- 10 In the event, the Claimant commenced her employment on 20 June 2016. In July 2016 the Claimant confided in a work colleague, Rose Robertson, that she was pregnant. The following day the Claimant spent her lunch hour with Ms Robertson and another colleague, Michelle Pepper. Whilst shopping together Ms Robertson made a comment about whether an item of clothing would fit the Claimant in the future and the Claimant then felt the need to explain to Ms Pepper that she was

pregnant. The Claimant did not tell either Ms Robertson or Ms Pepper that she knew of her pregnancy at the time she accepted the job with the Respondent on 8 June 2016. The Claimant did tell her colleagues that she had known of the pregnancy before commencing work on 20 June 2016.

- 11 On 25 July 2016 the Claimant met with Miss Lowe to inform her of her pregnancy. At this stage the Claimant had been pregnant for a little over 12 weeks. Miss Lowe was extremely surprised by the news. It was entirely unexpected to her and she describes that she was 'completely thrown' and 'caught off balance'. Miss Lowe's initial response was that she did not know what effect the Claimant's pregnancy would have on her employment and what the implications were for the Claimant's continuing employment. The meeting was therefore adjourned at that stage.
- 12 Ms Lowe proceeded to telephone Michelle Fragniere. During the conversation she asked that Your Recruit provide the Respondent with a discount on the fee owed for the introduction of the Claimant. She also contacted both the Respondent's Human Resources Consultant and Mr Mabey. Miss Lowe then met again with the Claimant and it was confirmed that the Claimant's employment would continue. It was during this second discussion that the Claimant and Miss Lowe discussed contraception. The Claimant alleges that Miss Lowe asked why she couldn't have been more careful and why she did not use contraception.
- 13 To the contrary, Miss Lowe describes the conversation in terms of her being concerned for the Claimant and the Claimant's comments that the pregnancy wasn't planned. It is agreed that contraception was mentioned, that Miss Lowe shared with the Claimant her own experience of having an unplanned pregnancy and that the meeting ended with the two women hugging each other. Miss Lowe denies mentioning contraception by way of accusation, criticism or using a moralistic tone as alleged by the Claimant. The Claimant described in evidence that she genuinely believed that Miss Lowe was concerned for her and that she spoke a lot about her experience, it seeming to the Claimant at this stage that they had had a similar experience.
- 14 Having considered the accounts carefully and, on the balance of probabilities, the Tribunal accepts that in respect of references to contraception Miss Lowe's account is to be preferred. In making this finding the Tribunal has noted the surrounding context of the conversation, that the Claimant and Miss Lowe gave each other a hug at the end of the discussion and that the Claimant was content to maintain social contact with Miss Lowe following the discussion including attending a party at Miss Lowe's house at Halloween and travelling back from the Christmas party with her and actually driving her home. These factors and the Claimant's own evidence, that she both considered Miss Lowe was genuinely concerned for her and that as at the Christmas party on 2 December 2016 she had no problem with Miss Lowe, support our

findings that references to contraception were made but not as stated by the Claimant either in content or tone.

- 15 On 11 August 2016 the Claimant signed a maternity form indicating to the Respondent that she wished to work up until her due date on 3 February 2017. Following this there was a conversation in the office between the Claimant, Kim Lowe and Michelle Pepper during which both Miss Lowe and Ms Pepper suggested to the Claimant that working up until a due date was usually unrealistic due to feeling too tired and uncomfortable. In the event, the Claimant later indicated to the Respondent that she wished to bring the commencement of maternity leave forward to 23 December 2016 [98].
- 16 The role of Contracts Administrator is roughly split as 50% telephone communications, including talking to clients and engineers, and 50% dealing with paperwork and using the Respondent's computer system. It is not disputed that the Claimant was good on the telephone. However the Respondent had concerns about the Claimant's performance in respect of the paperwork part of her role. For example, Miss Lowe considered that the Claimant spent too long on the telephone to the detriment of her paperwork. Whilst the Claimant was on annual leave in August 2016, Miss Lowe had access to the Claimant's emails in order to provide appropriate holiday cover. It was at this time that Miss Lowe raised concerns about various work matters in two emails to the Claimant dated 23 August [72, 73] and an email dated 24 August 2016 [74]. She sent further emails with queries in September 2016 [76 and 90].
- 17 In a meeting with the Claimant in September 2016, Miss Lowe informed the Claimant that her probation period would be extended for a further 3 months until 20 December 2016. This extension was in accordance with clause 2.3 of the Claimant's contract of employment which stated,

'The company may, at its discretion, extend the probationary period for up to a further 3 months.' [54]
- 18 Miss Lowe told the Claimant that she must make sure her engineers maintenance work was planned and booked in, that her paperwork was up to date and that she should deal with the work in progress ('WIP') drawer efficiently. Although the Tribunal has considered it unnecessary to make a positive finding on the matter, it is noted that the Claimant says that she received a letter detailing the extension of her probation period although this letter has not been produced to the Tribunal and the Respondent denies that such a letter was ever written.
- 19 In her evidence the Claimant told us that she accepted the points raised by Miss Lowe and that going forward she had made every effort to rectify 'what she had told me in the meeting'. During the second probation period, a number of issues arose with the Claimant's performance. These included the Claimant, in error, calling out the incorrect contractor

to deal with an air conditioning query [91], an apparent failure to organise a fire alarm service as required at 1 Tenter Ground [92 -94, 101, 104-105, 119], a delay in organising the disposal of rubbish at 31 Vernon Street [110-114] and a delay in ordering light bulbs [referenced at paragraph 24 Miss Lowe's statement].

- 20 It is agreed that in October 2016 the Claimant was instructed by Mr Mabey to produce 15 folders or log books to be delivered to a new site known as Sovereign House. The Respondent considered this task to be relatively straightforward with relevant templates to follow being provided. The Claimant however saw this as a significant piece of work that was given to her at a time at which she was continuing to attempt to master her regular duties. In addition to the preparation of the folders, the Claimant felt she was put on the spot by Mr Mabey to answer various queries during Mr Dunning's absence on annual leave.
- 21 A further difficulty related to the application invoices. Ms De Villiers gave evidence that she had to chase the Claimant when she was not required to chase other administrators. Application invoices were important to the financial running of the Respondent and the Claimant had approximately 4 such invoices to organise per month. Ms De Villiers was concerned that the generation of these invoices was being delayed and that the Claimant was apparently failing to chase up the relevant parties and would provide work orders for invoicing which did not contain the required purchase order detail.
- 22 In addition to these work issues around October 2016, the Claimant was experiencing a very low mood. She describes often having suicidal thoughts and feeling unable to discuss this with medical professionals or her parents. The Claimant accepts that the Respondent would not have been aware of these issues as she continued to attend work and wished to join in with activities with her colleagues including attending the Halloween Party and Christmas Party.
- 23 On 24 October 2016 the Claimant had a health scare at work when she had not felt movement of her unborn baby. It is accepted that Miss Lowe helped the Claimant and was very sympathetic on this occasion. The Claimant attended hospital and after her baby's heartbeat was detected, she was discharged to rest at home.
- 24 On 20 December 2016 the Claimant and Miss Lowe met for the purposes of considering her probation period. Miss Lowe informed the Claimant that the period would be extended for a second time due to ongoing performance concerns. This would have the effect that upon the Claimant's return from maternity leave, she would restart her probationary period for the following three months. During the meeting, Miss Lowe also raised issues connected with the Claimant's pregnancy.
- 25 By way of background, prior to the meeting it had come to Miss Lowe's attention from colleagues in the office, that the Claimant had told others

in the office about her pregnancy before sharing the news with her. Miss Lowe also thought that the Claimant had told other colleagues that she had known about her pregnancy before accepting the Respondent's offer of employment. Miss Lowe evidently met with these colleagues, including Michelle Pepper, to discuss these matters prior to her meeting with the Claimant.

- 26 Accordingly at the meeting on 20 December 2016 there was a considerable focus by Miss Lowe on issues regarding the Claimant's pregnancy. She raised these issues with the Claimant, challenging the Claimant as to when she had found out she was pregnant, whether this was before she had accepted the job with the Respondent and what discussions she had about the matter with Your Recruit. During the meeting the Tribunal accepts that Miss Lowe told the Claimant that she thought the Agency was a disgrace and that she told the Claimant that she was disappointed in her because she had lied to her and not told her the truth about her pregnancy.
- 27 Miss Lowe challenged the Claimant about when she had known that she was pregnant. The Claimant felt forced into agreeing with Miss Lowe's assertions that she knew she was pregnant before accepting the role. The Tribunal accepts that the Claimant felt intimidated and trapped by Miss Lowe's forceful questioning and accusations and that it was in this context that she accepted a position that wasn't actually true. Miss Lowe was annoyed and angry and this was clear to the Claimant. Miss Lowe expresses in her statement that she was angry because the Claimant had misled her about the pregnancy and that the recruitment agency were involved in this (see Miss Lowe's statement, paragraph 36). She told the Claimant that a letter of complaint would be written to Your Recruit requesting a refund and suggested that the Claimant should support this course of action.
- 28 The Claimant was given a letter dated 20 December 2016 setting out the extension to her probationary period. The final paragraph of the letter stated as follows,
- 'It has been brought to my attention that you were aware of your pregnancy when you accepted the role as Contracts Administrator within Calibre Building Services Ltd. If this is correct, I am extremely disappointed that you chose not to discuss this directly with me but instead to discuss this information openly with my team. You have put them all in a very difficult position of keeping this fact from me. If my understanding of the situation is incorrect, please let me know. [130]*
- 29 Ms Lowe also wrote to Your Recruit in a letter dated 19 December 2016 albeit, it's accepted this letter was sent following the meeting on 20 December 2016. That letter stated, in part, as follows,

'I have been made aware of advice you directly gave Charlotte Kimberly which I find to be totally unethical and that you have taken monies from Calibre under false pretences.

Over the last few years and following numerous discussions with yourself and Laura about the position at Calibre as a Contracts Administrator I have made myself very clear that I am looking for a member of staff that will give me longevity and at least 12-18 months continuous employment.

I spoke to your company confirming our intention of offering Charlotte the permanent position as Contracts Administrator; you came back to me and advised me that she had accepted the role. At that point I entered into a contract with her and issued an offer letter and accepted her as a permanent member of my team in all good faith.

I have since been made aware that you were told by Charlotte that when you were having the discussion about my offer of employment that she informed you that she was pregnant. Your response to her was to 'lie' and withhold this information from me.

At this point I would have expected Recruitment Solutions to have shown Calibre loyalty as we have worked together for a number of years. I had re-interviewed two of your delegates either of which I would have offered the position to, but Charlotte had that slight edge due to having Human Focus experience on her cv. But it appears you totally disregarded all conversations we have had regarding employing staff and encouraged one of your delegates to withhold the truth and so I entered into a contract with Charlotte which I feel was under false pretences.

When Charlotte informed me of her pregnancy 4 weeks later of which you were fully aware I phoned you directly and asked the question if you were aware of this of which you said no. We then discussed if there would be a refund of invoice 101594 dated 20/6/16 due to her only being employable until December 2016. Following your discussion with your management you emailed me on 18/8/16 and informed me of the following:

.....

Following a meeting with Charlotte today I am now in the position to dispute all of the above as you had previously had the conversation with Charlotte regarding her pregnancy in June, and request a full refund back as the position of Contracts Administrator. This position was offered to Charlotte in all good faith and you have intentionally lied and withheld information to ensure I was unable to make an informed choice of candidates. You as a recruitment company have acted totally unethically and have acted extremely underhanded and not at all in my Company's best interest and have caused Calibre considerable financial loss.

I feel totally aggrieved that the relationship and loyalty I had built up with Laura Hitchins over a number of years has been swiftly destroyed over a number months.

I look forward to your response and a cheque for the full amount to be issued to Calibre Building Services Ltd by return.’ [128-129]

- 30 When challenged about the content of the letter, Miss Lowe accepted that the issue was the Claimant’s pregnancy and Miss Lowe not knowing this prior to 25 July 2017. She stated in evidence that it ‘looks that way’ and that she was saying that the Claimant had lied to her by not telling her sooner about her pregnancy. The Tribunal finds that the underlying point being made in the letter by the Respondent was that it would not have recruited the Claimant if they had known she was pregnant.
- 31 YourRecruit responded to the letter on 12 January 2017 [134], describing the Respondent’s letter as ‘*offensive and quite frankly libellous*’. Following this, the Respondent sent a further letter dated 13 January 2017 in which Miss Lowe confirmed that she had had meetings ‘with each individual’ about the Claimant’s pregnancy news. Again, Miss Lowe makes the point that the Claimant not telling the Respondent of her pregnancy earlier, amounts to a lie – ‘*...she had informed Your Recruit who had advised her to withhold this information from Calibre which I can only interpret as being a lie*’ [135].
- 32 In late December 2017 the Claimant contacted ACAS and she began to write a letter of grievance dated 29 December 2016 [132]. Due to ill health and the arrival of her son on 19 January 2017, she completed the letter and sent it at the end of the month, the Respondent receiving it on 1 February 2017.

The Law

- 33 Under section 18 of the EqA 2010, a person (A) discriminates against a woman if in the protected period in relation to a pregnancy of hers, A treats her unfavorably because of the pregnancy. The protected period in relation to a woman’s pregnancy begins when the pregnancy begins.
- 34 The burden of proof in respect of these provisions is contained in section 136 of the EqA 2010. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed a discriminatory act. If the claimant does that, the tribunal shall uphold the complaint unless the respondent proves that he did not commit that act.

- 35 It is recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246.
- 36 At the first stage, the tribunal has to make findings of primary fact. It is for the claimant 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. At this stage of the analysis by the tribunal the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The Court of Appeal reminded tribunals that it was important to note the word 'could' in respect of the test to be applied. At this point, 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. The tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the claimant and the respondent, save for any evidence that would constitute evidence of an explanation for the treatment.
- 37 Guidance from the Court of Appeal in Madarassy emphasised that the burden of proof does not shift to the employer simply if the claimant establishes a difference in status (in this case that she was pregnant) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude on the balance of probabilities the respondent had committed an act of discrimination. 'Could conclude' must mean that a reasonable tribunal could properly conclude from all the evidence before it (see Madarassy). As stated in Madarassy, 'the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'.
- 38 If the claimant does 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 the act of discrimination, unless the respondent is able to prove on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of her protected characteristic (pregnancy in this case), then the claimant will succeed. The Court of Appeal said in Igen that at this stage, it is for the respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. 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 and to prove that the treatment was in no sense whatsoever on the prohibited ground.

- 39 The Tribunal must consider whether there is a causal connection between the treatment complained of and the pregnancy – in other words, was the complainant treated unfavorably because of her pregnancy (see Johal v Commission for Equality and Human Rights UKEAT/0541/09, [2010] All ER (D) 23 (Sep) and also O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372 - was the pregnancy an 'effective cause' of the treatment complained of).
- 40 Section 18 is an express prohibition on employers treating employees unfavourably because of their pregnancy. As it is a form of direct discrimination, pregnancy discrimination cannot be justified and the consequences of the pregnancy for the employer, financial or otherwise, are irrelevant in considering whether there has been pregnancy discrimination.
- 41 The Tribunal reminds itself that cases in which the reason for the employee being unfavorably treated is the pregnancy per se will be rare. More commonly, the employer points to a reason connected with the pregnancy – for example, in the case of Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus [1992] ICR 325 the respondent would have had to pay the pregnant applicant maternity allowance which would not have been recoverable under the relevant insurance policy. The reason for the refusal to appoint was therefore not the pregnancy per se but the substantial irrecoverable costs of the appointment. The European Court of Justice was however clear in its approach to the case, that the basis of the refusal to appoint was on the ground of pregnancy.
- 42 A woman is not obliged to disclose the fact that she is pregnant before accepting a job or other opportunity offered to her (see, for example, Tele Danmark A/S v Handels-og Kontofunktionaerernes Forbund I Danmark (acting on behalf of Brandt-Nielsen) (Case C-109/00) [2001] All ER (D) 37 (Oct)).

Closing Submissions

- 43 On behalf of the Respondent, Mr Seals provided written submissions and supplemented these with further oral argument. Mr Seals submitted that there were problems with the Claimant's performance and, in respect of the other allegations, the Claimant has manipulated what was said and that Miss Lowe did not actually make any discriminatory comments. In particular Mr Seals submitted that there was significant documentary evidence to support an extension of the probation period on the first occasion and that the conversation in July 2016 between the Claimant and Miss Lowe was one employee showing solidarity to another. In respect of the meeting on 20 December 2016, Mr Seals

referred to this as a 'crazy conversation about pregnancy' and that the Respondent has learnt its lesson that it should never have got into a conversation about what the Claimant knew about her pregnancy. However he submits that it was not a reason for extending the probation period again which was entirely due to performance concerns. The issue for the Respondent was the Claimant withholding information and that there was 'an element of deceit here'. In summary the Respondent says there is no unfavorable treatment of the Claimant in a situation in which she has been accused of being less than honest over her pregnancy news.

- 44 Mr Seals also raised an argument that the first two of the Claimant's complaints were out of time. However he accepted that this point had not been put to the Claimant during her evidence, she had therefore not had the opportunity to give any relevant evidence on the point and, for example, the Tribunal could have no understanding of what might have been said by the Claimant in respect of the Tribunal's discretion to allow a claim brought out of time to proceed if it was just and equitable to do so. Mr Seals accepted that this was correct. It is also right to note that although Mr Seals written submissions refer to prejudice caused to the Respondent by two of the claims being potentially out of time, again the issue of prejudice was not one which was raised before the Tribunal at any point during the case prior to the closing submissions.
- 45 On behalf of the Claimant, Ms Thornber submitted that there was insufficient evidence to demonstrate poor performance necessitating an extension of the probation period on the first occasion. In respect of the second extension, a paragraph in the letter dated 20 December refers to pregnancy matters and therefore it cannot be said that pregnancy didn't figure in the Respondent's decision making on this occasion. Ms Thornber describes the Respondent not liking the fact that having just entered the role, the Claimant is pregnant and that it is of particular concern that the letter was thought about and had HR input prior to sending. In respect of the July 2016 conversation, Ms Thornber submitted that as Miss Lowe was so shocked about the Claimant's news, it was more likely that she made unacceptable comments about contraception.
- 46 Ms Thornber then returned to 20 December meeting, highlighted the fact that the word 'ashamed' had been used in the context of the Claimant's pregnancy news and that an accusation of lying or deceit was made. She emphasised the fact that Miss Lowe was purposely looking for information about the Claimant's pregnancy from colleagues, just before the Claimant commenced her maternity leave.

Conclusions

- 47 Mr Seals raised arguments that the Claimant's first two complaints (set out in paragraphs 4.1.1 and 4.1.2) were, on the face of it, out of time and therefore not capable of being considered by the Tribunal unless

'they are considered part of conduct extending over a period and the claim was brought within 3 months of that period (s.123(3)) or the Tribunal believes it would just and equitable to extend time (s.123(1)(b)).' (paragraph 13, Respondent's closing submissions).

- 48 These arguments were not developed at the start of the hearing in this matter and, as Mr Seals accepts, they were not put to the Claimant when she was cross examined and consequently, she had no opportunity of giving evidence on, for example, whether it is just and equitable for the claims to proceed if they were presented outside of the primary limitation period. This presents a very real difficulty for the Tribunal in adjudicating upon the issue. In the event, the Tribunal has considered each of the Claimant's allegations in chronological order, as set out below. Due to the Tribunal's findings in this case, it has not been necessary to turn to the issue of time limits. The Respondent accepts that the allegations set out in paragraphs 4.1.3 and 4.1.4 were presented in time and it is only in respect of these complaints, that the Tribunal is satisfied that the Claimant has been treated unfavorably pursuant to section 18 of The Equality Act 2010.
- 49 Taking the Claimant's complaints, as set out in the List of Issues [27-28] in chronological order, our conclusions are as follows:
- 50 Whilst we accept, as set out in the findings of fact, that contraception was referenced in the discussion on 25 July 2016, we do not accept that Miss Lowe's remarks in that conversation amount to unfavorable treatment of the Claimant because of her pregnancy. Whilst the reference to contraception is unusual in the circumstances of a discussion during which an employee is informing her employer of her pregnancy, we accept that the context of the reference is key in this case. The Tribunal is satisfied that Miss Lowe's reference to contraception wasn't made in an accusatory way or by means of a telling off, as asserted by the Claimant, but rather as part of an empathetic discussion between two women about unplanned pregnancies. In essence, Miss Lowe did not treat the Claimant unfavorably during the discussion; she was supportive and caring. These conclusions are supported by the fact that the women hugged at the end of the conversation and the Claimant's view, as stated in her evidence before us, that there was nothing of particular note prior to December 2016 that would have caused her to avoid social interaction with Miss Lowe.
- 51 The next allegation relates to the first extension of the Claimant's probation period in September 2016. The Claimant admitted that there were issues with her performance in or around September 2016 such that she did not consider the first extension of her probation to be untoward. Rather, the Claimant's reaction to the extension was to seek to improve her work performance. There is no evidence that the Claimant's pregnancy was considered as part of the decision to extend the probation period or was an effective cause of the decision to extend.

The Tribunal accepts the Respondent's explanation that there were genuine concerns about the Claimant's performance and it was on that basis that the decision to extend the probation was reached.

52 With regards to the meeting on 20 December 2016, the Tribunal is satisfied that in that meeting Miss Lowe accused the Claimant of the following matters:

52.1 Lying by failing to tell the Respondent of her pregnancy once she knew she was pregnant;

52.2 Lying about her pregnancy on the basis that the Claimant knew about the pregnancy before accepting the Respondent's job offer;

52.3 That she was disappointed in the Claimant because she had told other team members of her pregnancy before telling Miss Lowe.

53 The Tribunal concludes that by Miss Lowe making these accusations, the Claimant was indeed subjected to unfavorable treatment because of her pregnancy.

54 The Tribunal does not accept that Miss Lowe told the Claimant that she 'should be ashamed of herself'. As set out in our findings of fact, Miss Lowe did make comments about the Agency and that it was a 'disgrace' but we consider that her comments in this regard were restricted to the Agency rather than also describing the Claimant as either a disgrace or that she should be ashamed of herself.

55 With regards to the final issue, namely the Claimant's probationary period being extended for a second time (it is noted as being 'for a third time' in the List of Issues but both parties agree that this should read 'for a second time'), the Tribunal finds that there were significant references made by Miss Lowe to the pregnancy matters, identified above, during the meeting discussing the extension. The Tribunal is satisfied that Miss Lowe placed some emphasis on those issues and the importance of those matters in her mind is further underlined by the fact that they are referenced in the letter to the Claimant notifying of an extension to the probation period [130]. There would be no reason to reference these matters in that correspondence if they did not form part of the Respondent's consideration of the Claimant's future employment. They did form part of the rationale, Miss Lowe was disappointed in the Claimant because of the pregnancy matters she referenced and that was in her mind when she decided to extend the Claimant's probationary period.

56 Accordingly, we are entirely satisfied that the Claimant's pregnancy was an effective cause of her probationary period being extended for a second time and that the Claimant was therefore, again, subjected to unfavorable treatment because of her pregnancy. The Respondent did have some ongoing legitimate concerns about the Claimant's

performance but in our judgment, the concerns around her pregnancy were a substantial factor for the extension of the probationary period.

CASE MANAGEMENT ORDER

- 1 A remedy hearing has been listed before the Tribunal on 5 April 2018 commencing at 10.00 am at the Employment Tribunals, Montague Court, 101 London Road, West Croydon, Surrey, CR0 2RF.

Employment Judge Harrington
9 February 2018