Case Number: 3300021/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs T Stripp	**v**	(1) Volkswagen Financial Services UK Limited; (2) Alex Young; (3) Tracey Kennedy; (4) Trisha Horner

Heard at: Huntingdon **On:** 19, 20, 21, 22 November 2018 (No parties in attendance on 22 November 2018)

Before: Employment Judge Ord

Members: Mr P Devonald and Mrs S Timoney

Appearances
For the Claimant: Miss K Balmer, Counsel
For the Respondent: Mr R Barker, Solicitor

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The claimant's complaint that she was unfairly dismissed by the respondent is not well founded and is dismissed.

2. The claimant's complaint that she was dismissed for:

   2.1 A reason connected with her pregnancy; and / or

   2.2 For a reason connected with the fact that she had given birth to a child; and / or

   2.3 That the claimant had sought to take, or availed herself of, the benefits of ordinary maternity leave, or additional maternity leave,

   are not well founded and are dismissed.

3. The claimant's complaints that she was subject to unfavourable treatment in the protected period in relation to a pregnancy of hers, are dismissed. The claims are brought out of time, it is not just and equitable to extend time for them to be considered and the tribunal therefore has no jurisdiction to hear them.

4. The claimant's complaints that she was the victim of direct discrimination under s.13 of the Equality Act 2010, (relying upon the protected characteristic of sex), are not well founded and are dismissed.

RESERVED REASONS

Background

1. The claimant was born on 9 February 1979 and was continuously employed by the first respondent from 12 April 1999 until 23 October 2017 when her employment ended by way of resignation. The claimant says that her resignation amounted to a dismissal as defined by s.95(1)(c) of the Employment Rights Act 1996 and that such dismissal was unfair and / or automatically unfair as the reason, or principal reason for that dismissal related to pregnancy, the fact that the claimant had given birth to a child, or that she had sought to take, or availed herself of the benefits of ordinary maternity leave, or additional maternity leave, (contrary to regulations 20(3)(a), (b) and (d) of the Maternity and Parental Leave, etc., Regulations 1999.

2. The claimant also says that she was the victim of unfavourable treatment during the protected period relating to her pregnancies, contrary to s.18 of the Equality Act 2010 and a victim of direct discrimination because of sex, contrary to s.13 of the Equality Act 2010.

3. All of the claimant's claims were brought against the first respondent and the allegations of unfavourable treatment contrary to s.18 of the Equality Act 2010 and direct discrimination contrary to s.13 of the Equality Act 2010 also lay, in part, against each or some of the second, third and fourth respondents as set out below.

4. All claims were denied by each respondent.

The Claims

5. <u>Unfavourable treatment contrary to s.18 of the Equality Act 2010 (pregnancy and maternity discrimination</u>

   The claimant complained that she had been subject to the following treatment:

5.1 A failure to keep her informed of business developments and vacancies during her first maternity leave, (as set out in paragraphs 5 and 6 of her claim form);

5.2 The decision taken to fill her role permanently whilst she was absent on her first period of maternity leave, (paragraphs 6 and 7 of her claim form);

5.3 The respondent's handling of her flexible working request and the process followed, (paragraphs 8 – 22 of her claim form);

5.4 Her not being invited to the respondent's Christmas lunch whilst she was on maternity leave in December 2015, (paragraph 15 of her claim form);

5.5 The handling of her return to work after her first maternity leave, (paragraphs 23 and 26 – 28 of her claim form);

5.6 Comments made by the second respondent on 12 February 2016 in respect of her second pregnancy, (as set out in paragraphs 29 and 30);

5.7 The decision to extend the trial period for her flexible working which the claimant says was for pregnancy related and childcare / dependant leave reasons, (paragraphs 24, 32, 33 and 38 of her claim form);

5.8 The failure to send the claimant flowers on the birth of her second child, (paragraph 39).

6. Direct discrimination contrary to s.13 of the Equality Act 2010

6.1 The decision to go back on assurances given to the claimant before she commenced her sabbatical leave, (paragraphs 45 – 52 of her claim form);

6.2 The denial of the assurance given to the claimant with regards to receiving a redundancy payment if no job could be found for her following her sabbatical leave, (paragraphs 45 – 52);

6.3 Being told to bring her sabbatical to an end immediately, or risk the possibility of no job on her return and no redundancy payment, (paragraph 49 of her claim form).

7. Unfair dismissal

The claimant relied on the allegations of unfavourable treatment and discrimination set out above as contributing to a breach of the term of mutual trust and confidence. She identified the treatment of her within

paragraphs 49 – 52 of her claim form as being the, *"final straw".* These related to a telephone call on 29 September 2017, an email from the claimant on 3 October 2017, the reply from Tracey Kennedy the same day and the further email from the claimant the following day.

8. Automatically unfair dismissal

The claimant relied on the same matters as set out above in relation to her claims for discrimination under s.13 and s.18 of the Equality Act 2010, and for 'ordinary' unfair dismissal and attributed the dismissal to her pregnancy, the fact that she had given birth and / or that she had sought to take, or availed herself of the benefits of, ordinary or additional maternity leave.

The Hearing

9. Evidence was heard from the claimant and her husband. The three individual respondents each gave evidence as did Julia Johnson, on their behalf and for the first respondent. Reference was made to an agreed bundle of documents and both sides submitted written representations by way of closing submissions to which they added orally.

Facts

10. Based on the evidence presented to us we have made the following findings of fact.

11. The claimant was employed by the respondent continuously from the 12 April 1999. She was latterly employed as Assistant Controls Accountant. Her line manager was Mrs Horner who herself worked a four day week.

12. The claimant worked without problem, comment or incident prior to her commencing her first period of maternity leave in December 2014. Although her contract of employment and the terms thereof, have not been part of the bundle before us, it is accepted that up to that point she worked a full time, (35 hour) week.

13. The claimant's first period of maternity leave commenced earlier than anticipated in or about February 2015.

14. The claimant says that there was a meeting between herself and Mrs Horner in June 2015. That is not disputed by the respondents. However, the claimant says that at that meeting she advised Mrs Horner that she had wished to return to work after her maternity leave on a part time basis. According to her witness statement, she told Mrs Horner that she wished to spend more time with her daughter than she would have if working full time; was asked in return what the plan would be if that was not possible, to which the claimant says she replied, that she did not want to work full time so would have to consider her future in the company.

15. Mrs Horner, in cross-examination, did not dispute that this conversation had taken place and referred to meeting the claimant in a Costa coffee shop. She described the discussion as not being an, *"official work related conversation",* but rather an informal chat.

16. It was put to Mrs Horner that this conversation resulted in her altering her view of the claimant so that she was considered less career focused, which she denied. She denied that she considered that the claimant was unlikely to return but said that her possibly not returning was part of what was in her mind at the time.

17. The claimant said that she used her keeping in touch *("KIT")* days during her first period of maternity leave but accepted that she did very little work. These KIT days do not appear to have been structured in any way, but during the course of a KIT day in either September, or October 2015, the claimant became aware that Joe Cooper had been recruited into Mrs Horner's team.

18. The claimant says that this was a permanent replacement for her role and that Mr Cooper was taken on as her, *"replacement"* based on the respondent's belief that the claimant would not return to work. We do not accept that. We accept what both Mrs Horner and Mr Young told us, that the work of the team was increasing and that Mr Cooper was an additional resource. Both of them referred to increased work load within the team, changes in the regulatory environment in which the team worked, (including reporting to the Financial Conduct Authority, in place of the Financial Services Authority and the Department for Business Innovation and Skills), as well as an overall increase in the volume of work being handled by the team. We accept that that was the case.

19. The claimant's first period of maternity leave was due to end in February 2016 and on 26 October 2015, she made a flexible working request under the Flexible Working Regulations and the first respondent's Flexible Working Policy.

20. The claimant requested a change in her work pattern from a five day working week, (8 am to 4 pm with 1 hour for lunch), to a three day week, (working Monday, Wednesday and Thursday), on the same daily hours.

21. On 16 November 2015, there was a meeting to consider the flexible working request attended by the claimant and Mrs Horner. Mrs Kennedy was in attendance as HR Manager. The claimant advised that her mother, (also employed by the first respondent), had had a request to reduce her working week to four days approved by the company and that her mother would be looking after her daughter on that day. The claimant said she wanted a good work life balance, could afford to reduce her working time to three days per week and that three full days per week would make sense for her nursery and childcare arrangements.

22. There was some discussion about a 'job sharing' arrangement with another employee. The respondent took the view that a, 'job share' had to be an exact 50/50 split of the working hours of a full time employee, (35 hours per week), between two individuals. We can see no logic for that decision.

23. The claimant understood, however, that the other employee was unwilling to reduce her hours sufficiently to accommodate a job share so that proposed arrangement was not progressed.

24. The claimant offered other possible working patterns on the 18 November. She offered to work 8 am to 4:30 pm on the three days previously suggested, with a 30 minute lunch break, thus working 24 hours per week; alternatively, that the other employee reduces to 26 hours, (which she said was her ideal working pattern), and the claimant remained on her proposed 21 hours per week with the first respondent being able to recruit another part time worker. Mrs Kennedy told Mrs Horner that, *"from a budget and head count point of view"* she could allow those reduced hours and would be able to recruit a part time, (21 hour per week), *"back fill"*, thus giving a total of 68 hours of work per week from three part time workers.

25. On 30 November 2015, however, the claimant's application for flexible working was rejected because:

    25.1 The Controls Accounts team had increased demands placed upon it and the impact on customer delivery would be significant with a reduction of 14 hours per week, (the effect of the claimant reducing to 21 hours per week), and the respondent would be unable to recruit for 14 hours per week as the organisation has a minimum requirement for part time workers to work a minimum of 21 hours per week.

    25.2 The respondent would be unable to reorganise the work among existing staff due to the nature of the role and the volume of work currently being experienced.

    25.3 The job share proposal was not a viable option for the other employee and so was not considered further.

26. The claimant was advised of her right to appeal which she did on 7 December. The appeal was heard by Mr Young, (who had *"signed off"* on the original decision). We accept the claimant's submission that it would have been better if the appeal had have been heard by someone whom had not had any involvement at all in the original decision, but the level of involvement Mr Young had was not substantial. He had been asked, as the relevant senior manager, to *"sign off"* on the decision made by Mrs Horner. In any event, the matter was concluded by agreement.

27. On 5 January 2016, the flexible working request appeal outcome letter was sent to the claimant, recording the parties' agreement that the claimant would be given a trial period working 32 hours per week over four days, (Monday, Tuesday, Thursday, Friday), working 8:30 am to 5 pm, (the claimant said that she was unable to work until 5:30 pm), with half an hour for lunch each day, thus working eight hours a day, four days per week, 32 hours. The reduction in hours was only three hours per week, but the claimant was working those hours in a condensed four day week rather than a five day week.

28. This pattern had been a further proposal from the claimant and one that Mr Young had considered over the Christmas break and agreed to. In particular the claimant had requested that she be allowed to take only a thirty minute lunch break so that she could work 8:30 am to 5 pm and not have to remain at work until 5:30 pm which would have caused her difficulties with childcare arrangements.

29. The claimant returned from her first period of maternity leave on 1 February 2016. She was by this stage, pregnant for a second time, (she had already put in place arrangements for her 12 weeks scan to take place on 10 February).

30. The claimant complained that during her period of absence through maternity leave, she was not informed of business developments and vacancies. However, she did not explain why 'vacancies' should be notified to her and the only 'business developments' she complained of was a reorganisation of Mr Youngs' management responsibilities and the recruitment of Mr Cooper. She says she found out about these *"in passing"* on keeping in touch days. She did not, however, indicate that she had sought further information or requested to receive any such information once she became aware of Mr Cooper's recruitment, nor did she seek to discover how, (as she complains she was not told), this change would affect her.

31. She also complains that whilst she was absent on maternity leave she was not invited to the Christmas lunch of 2015. She had been sent, to her work email, an invitation but she was not accessing her work email whilst on maternity leave, (as the respondents knew, or ought to have known). The failure to invite her specifically was described as an, "*oversight*". The claimant was aware of this failure to invite her in December 2015.

32. The claimant says that on her return to work on 1 February, Mr Young did not come to see her or welcome her back, leaving her feeling uncomfortable and isolated. She said that he did not speak to her for a few days and there was no formal hand over of tasks when the claimant returned. She also complained that she had a one to one meeting with Patricia Horner on 11 February when she was advised how Mrs Horner planned to distribute tasks between her and Joe Cooper. The claimant expressed concern that she would have insufficient work to do based on the distribution of tasks but then advised Mrs Horner that she was 12

weeks pregnant and had had her scan the previous day. Mrs Horner advised the claimant to tell Mr Young in person before she made any announcement at work and before she informed Human Resources. She says that at this point she was, *"struggling to understand why her request for 21 hours per week had been declined based on work load",* which became more obvious when she completed her tasks quickly leaving her with little work to do and long periods where she says she was left idle.

33. That is the extent of the claimant's complaints regarding the handling of her return to work and they were all concluded by 11 February 2016.

34. The claimant advised Mr Young of the fact that she was pregnant on 12 February 2016. Her complaints, (not pursued as a specific allegation of discrimination, but as background information and a contribution towards the alleged breach of mutual trust and confidence), were of comments relating to her second pregnancy. But they are cited as being as his, *"surprise",* that his reaction was to work out when the claimant would be going on maternity leave, that he was allegedly, *"begrudging"* regarding his congratulations and that at the end of that day he was heard to say, *"she's only been back two weeks"* when speaking to his line manager.

35. The claimant accepted before the commencement of the hearing that Mr Young had not said that to the line manager because of a subsequent email where the line manager was unaware of the claimant's pregnancy.

36. The claimant then had sporadic absence following her return to work. For a period of time these related to her taking holiday, attending for medical appointments, (or being absent for sickness), which related to her pregnancy and occasions of urgent dependent leave for her child.

37. On 18 May 2016, the claimant attended a formal review meeting for her flexible working arrangement. Mrs Horner conducted the meeting with Mrs Kennedy in attendance as HR Manager. The claimant agreed that she wished to continue the meeting without a representative present, agreed with Mrs Horner's assessment that following the agreement to work a 32 hour week on a four day basis there had not been a full week in which the claimant had fulfilled her agreed hours. She also agreed that the company was therefore in an unusual position of not really being able to consider if the trial period has worked or not. She had had a period of absence in April, (stress related), but described herself as being *"much better"* and *"the best I have been for several months"*. She asked, if there was no ability to assess the value of the trial period what would happen next.

38. Mrs Horner told the claimant that because no final assessment could be made and because the claimant was starting maternity leave in June, her view was that the best way forward was to postpone the trial period until the claimant returned to work after her next period of maternity leave at which time the situation could be assessed by both sides so that the *"clock"* would be restarted on the trial period for three months from her

return to work, but if the claimant's requirements changed between May 2016 and her return to work that would be considered at the time. The claimant said, *"okay, this makes sense".* She said she had no further questions and thanked Mrs Horner and Mrs Kennedy for their support.

39. That outcome was confirmed in writing on 1 June 2016.

40. The claimant's second period of maternity leave began on 6 June 2016.

41. As was usual, she received a gift basket and a card from her work colleagues but complains that she was not sent flowers when her second child was born which was the usual practice. Mrs Horner accepts that she failed to do this and says that it was a pure oversight. The claimant does not pursue it as a stand alone claim of discrimination. This issue was complete by late August/early September 2016.

42. On 19 January 2017, the claimant attended a KIT day. She spoke to Mrs Horner and Mrs Kennedy. She said that she wished to take a career break and add a 12 month sabbatical, (allowed for under the respondent's policies), to the end of her maternity leave. She said that she would like to use up her holiday entitlement immediately upon her return to work and thereafter take a 12 month sabbatical once the holiday period had ended. She said it was no longer financially beneficial for her to work with the cost of childcare for two children and hoped that as maternity cover was already in place, it should be simple to extend that cover. She asked for a decision to be made as quickly as possible so that she could rethink her plans and submit a flexible working request if the sabbatical was not allowed.

43. On 27 January, Mrs Kennedy advised the claimant that her return to work date would be 25 June 2017 and she would be entitled to take holiday cover up to and including Monday 26 July. The claimant said she was, *"happy with what [had been] suggested"*. Mrs Horner confirmed to Mrs Kennedy and Alex Young on 9 February that the company was happy to support the claimant's request for sabbatical leave and that the claimant would be invited to the office to discuss and confirm details.

44. In fact, a conference call took place between the claimant, Mrs Horner and Mrs Kennedy to discuss the sabbatical.

45. The contents of that discussion and the follow up discussion the next day, are the subject of significant dispute between the participants.

46. According to the claimant, she was told that her post would, (as she was on maternity leave and then taking a sabbatical), be filled on a permanent basis with a new recruit. She was told that under the sabbatical policy there was no guarantee of a return to her previous job and that if that was not possible the first respondent would seek to find an appropriate post for her. The agreed comments were that the likelihood of no post being found for the claimant at the end of her sabbatical was one per cent.

47. The claimant says that she asked what would happen if that one per cent prospect came to pass and that she was told that in that circumstance she would be redundant. The respondents denied that such a discussion took place. Mrs Horner did not recall 'redundancy' being mentioned or discussed at all. She maintained this during the course of cross examination. Mrs Kennedy who was also a party to the call, explained that there had been a number of emails prior to the call as the claimant raised questions about accrued holiday entitlement, how to obtain a 'no-claims' letter in relation to her car insurance, (having previously had a company car), and her bonus entitlement, but in none of them did she question what would happen if there was no post for her at the end of the sabbatical. She denied that there was any mention of the redundancy during the course of the discussion, the concept of which Mrs Kennedy has described as, *"not even in my head".*

48. The claimant then had a further telephone call with Mrs Kennedy on 16 February. Although the claimant asked what would happen if there was no role available for her on return, Mrs Kennedy's reply was that that was simply highly unlikely and there was no discussion, she says, about redundancy.

49. On 24 February, the arrangements concerning the sabbatical were set out and that letter referred to, *"all reasonable attempts"* being made to place the claimant back into her original role, or a similar role, with similar terms, but that there was no guarantee. The letter makes no mention of redundancy. A signed copy was returned by the claimant.

50. On balance, we accept the respondent's evidence in this regard. We are satisfied there was no discussion about, and no promise made of, redundancy in the event that when the claimant returned to work she could not return to either her own job or a suitable job.

51. It was submitted on behalf of the claimant that it was *"implausible"* that the claimant would not have fully explored what would happen in the event of that one percent risk. However, it is the case that in none of the written communications passing between the parties, does she raise the issue at all. It is not raised in writing until some months later. If, as the claimant now maintains, this was a crucial element of her decision to take a career break, it is highly surprising that whilst she took time to raise issues regarding holiday entitlement, a no-claims letter in relation to car insurance and bonuses, she did not raise the issue which she says was so important to her decision making process.

52. Equally, we also accept Mrs Kennedy's evidence and Mrs Horner's, both stating that the prospect of there being no role for the claimant was so remote that they did not consider what would happen if no post could be found. The respondent's witnesses all described a situation where there were a number of vacancies on a regular basis and that they did not envisage that it would be difficult to find the claimant a role, (if not a return

to exactly the same role), on her return. None of the witnesses gave evidence of a previous experience where a person returning from a 12 month sabbatical could not be accommodated.

53. On behalf of the claimant, it was submitted that the filling of her role with a permanent replacement was an act of unfairness or discrimination because had a man taken a 12 month sabbatical, his role would not have been filled permanently. We note that that was not a complaint or claim that was advanced beforehand. Further, evidence was adduced of one individual, a man, who took a 22 month sabbatical due to an opportunity to travel overseas with his wife, (whom was working overseas). The circumstances of that individual were completely different, (this was not a sabbatical within the respondent's policy, he was permitted to work whilst on sabbatical), but the respondents pointed out that in those circumstances they did permanently fill that individual's role. We accept the respondents' evidence which was that the cumulative effect of the length of absences including the sabbatical made it such that it was appropriate to fill the role permanently. Thus, even if this had been advanced as an act of discrimination, we would not have accepted it to be so.

54. In any event, matters proceeded without further incident until 29 September 2017 when the claimant was called by Mrs Kennedy. This was two months into her sabbatical, (which formally began on 24 July).

55. The claimant complains that on this call, Mrs Kennedy:

    55.1 Withdrew the assurance that the claimant would be redundant if there was no post for her on her return; and

    55.2 Told the claimant that she would have to bring her sabbatical to an end immediately or risk the possibility of no job being available on her return.

56. The circumstances of the call were these. The respondent had arranged a secondee from another department to cover the claimant's absence. It was intended that that secondment, if successful, would become a permanent appointment as the claimant knew.

57. In fact, the secondment was not a success and was brought to an end. The respondent then needed to recruit to replace the secondee and Mrs Kennedy called the claimant to advise her of this. Although on the face of it, there was no reason why she should have done so as nothing was changing so far as the claimant was concerned. Mrs Kennedy described this as a, *"courtesy call"*. In fact, it went further than that because she advised the claimant of the opportunity to shorten the period of her sabbatical if she wished to return to her old role. This would of course have avoided the respondent's need to recruit a new employee and as Mrs Kennedy said, the claimant's situation may have changed.

58. Mrs Kennedy said that she did not tell the claimant that she had to return to work immediately and indeed, when the claimant emailed to complain about the content of the call of 29 September, on 4 October, she said, inter alia, that,

"if I wanted to return to my current role, I need to do so by returning immediately from my sabbatical leave or I would run the risk of possibly no other job being available for me when I returned".

Mrs Kennedy replied the following day, stating that the reason for her call was,

"to see whether you wanted to consider returning to work sooner into your previous role as we were restarting the recruitment process. If you do not wish to return now and would prefer to continue with your career break, this is fine and the company will continue to support your extended leave. In this instance nothing changes from the terms of your career break…"

In relation to the possibility of an early return from sabbatical Mrs Kennedy said

"If you need more time to consider this I am happy to extend the deadline, therefore could you please email… by 12 pm on Monday 9 October 2017 which will enable you to have the weekend to consider… If you were to accept this option, you would need to return to work by no later than 1 January 2018".

59. Thus, it was not the, 'return to work' that was immediate, but the respondent was asking for an answer, within a short period of time, to a question of whether or not the claimant would like to return to work early. That return to work would need to be by no later than 1 January, (three months from the date of the original call and just less than three months of the date of the emails).

60. On 6 October, the claimant made a further response saying that she did not agree with the points that Mrs Kennedy had made, *"and in particular"* her *"denial that you told me that I would get a redundancy payment at the end of my sabbatical if there were no suitable alternative employment for me".* She said she was upset and stressed and would raise a formal grievance shortly addressing all the concerns. She disputed Mrs Kennedy's comment that she had not previously raised concerns of detrimental treatment.

61. Mrs Kennedy replied to express concern, but saying that based on the strength of her feelings, it was not appropriate to respond until they were raised using the grievance policy.

62. On 17 October 2017, the claimant submitted a grievance running to some 59 numbered paragraphs over 12 pages. It was submitted to the Employee Relations and HR Compliance Manager, Nicola Rice.

63. On 17 October, the claimant made a data subject access request to the respondent for all personal data processed by, or on behalf of the company, to be disclosed to her. In particular in relation to her employment from 1 December 2014.

64. On 23 October 2017, Nicola Rice invited the claimant to a grievance hearing to take place on 26 October 2017.

65. That letter was sent by email and at 4.33 pm, 1 hour and 28 minutes after receiving it, the claimant replied to say that she found her situation upsetting and stressful and had therefore decided to resign with immediate effect for the reasons set out in her grievance letter. She wished to continue with the grievance but said she was too distressed to attend a grievance meeting and asked for the grievance to be dealt with in writing.

66. Under the respondent's grievance policy there is no obligation to consider grievances from ex-employees but Miss Johnson, who was appointed to deal with the grievance, interviewed Mrs Horner, Mrs Kennedy and Mr Young, concluded her investigations on that basis and submitted a grievance summary report. The grievance was rejected and this was confirmed in writing along with the right of appeal, which the claimant did not exercise.

67. No complaint is made regarding the handling of the grievance process in these proceedings.

68. It is against that factual background that the claimant brings her claim.

The Law

69. Under s.94 of the Employment Rights Act 1996, every employee has the right not to be unfairly dismissed.

70. Under s.95(1)(c) an employee is dismissed if they terminate the contract under which they are employed, with or without notice, in circumstances in which they are entitled to terminate it without notice by reason of the employee's conduct.

71. Under the Equality Act 2010, s.4, sex is a protected characteristic.

72. Under s.13, a person discriminates against another if, because of a protected characteristic, they treat that person less favourably than they treat, or would treat, others.

73. Under s.18 of the Equality Act 2010, a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, they treat her unfavourably because of the pregnancy or because of illness

suffered by her as a result of it. A person also discriminates against a woman if they treat her unfavourably because she is on compulsory maternity leave, because she is exercising, or seeking to exercise, or has exercised, or sought to exercise the right to ordinary or additional maternity leave.

74. For the purpose of that section, the protected period in relation to a woman's pregnancy begins when the pregnancy begins and ends at the end of the period of maternity leave, or further, when she returns to work after the pregnancy.

75. Under regulation 20 of the Maternity and Parental Leave etc., Regulations 1999, an employee whom is dismissed is entitled under s.99 of the Employment Rights Act 1996 to be regarded as unfairly dismissed if the reason or principal reason of dismissal is a kind specified in paragraph 3(3).

76. The kind of reasons referred to are, under regulation 20(3), pregnancy, the fact that the employee has given birth, or the fact that she took, sought to take or availed herself for the benefits of ordinary maternity leave or additional maternity leave, (as identified in regulation 20(3)(a)(b)(d) respectively).

77. Under s.123 of the Equality Act 2010, proceedings on a complaint under the Equality Act may not be brought before an Employment Tribunal after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

78. Under s.136 of the Equality Act 2010, in proceedings before an Employment Tribunal if there are facts from which the tribunal could decide in the absence of any other explanation that a person has contravened the provisions concerned, the court must hold that the contravention occurred.

79. In Barclays Bank Plc v Kapur [1991] ICR 208, the House of Lords drew a distinction between a continuing act and an act that has continuing consequences for the purposes of discrimination legislation. Where there is a discriminatory regime, rule, practice or principal then such a practice will amount to an act extending over a period, but in the absence of that, an act that affects an employee will not be treated as continuing even though that act has ramifications which extend over a period of time.

80. In Robertson v Bexley Community Care Centre t/a Leisure Link [2003] IRLR 434, the Court of Appeal set out that when an Employment Tribunal considers exercising discretion under s.123(1)(b) of the Equality Act 2010, (as it now is), to extend time because it is just and equitable to do so, there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to

extend time so the exercise of the discretion is the exception rather than the rule.

Conclusions

81. Although it was not part of the claimant's pleaded case, nor of her specific complaints set out in the list of issues in this case, the claimant in submissions via Counsel, sought to convince us that there was a discriminatory regime, or institutional approach, against part time workers which led to discrimination against the claimant when she brought her flexible working request.

82. That was not part of the claimant's case against the respondent and we have sympathy with Mr Barker's submission that he and his clients were not fully prepared to respond to it. However, we do not accept that such a regime existed in any event. The claimant was particularly relying upon three undisputed pieces of evidence. The first was an email from Mr Young dated 23 December 2015 regarding the flexible working request where he set out the background, 'pros', 'cons' and 'other considerations'. In that email, under the, 'cons' section, he said that the request, *"doesn't promote the cultural change we are trying to make, (professional, dedicated, going the extra mile, dynamic, committed, career minded)"* and describes the claimant as, *"a valued specialist with a good work ethic and has been in business 15 years, she has high energy and was previously seen as a performer with potential".* The second was the grievance summary report prepared by Mrs Johnson, which includes these words, *"senior managers had a desire to maintain 9 to 5 with one hour lunch as much as possible and are reluctant to support FWRs as could put teams under pressure".* The third was comment made by Mrs Kennedy when she was interviewed as part of the grievance process that, *"a lot of us are working mums but still expected to do [their] job".* Which it was submitted and put to the claimant was a case of, *"get on with it"*. Mrs Kennedy denied that portrayal of her position.

83. We accept what Mr Young said about the email which he had written. The team and the department were, on his evidence, under pressure with increased work load, increased demand, and head count shortage. He denied, (and we accept), that his description of the claimant as having been, *"previously seen as…"* a high performer does not mean that he did not still see her that way, merely that she was at that stage out of the business.

84. The claimant has not satisfied us, (even if this had been part of her claim), that there was an overriding culture within the respondent of a rejection of flexible working. Indeed, as the claimant pointed out, her own mother was granted flexible working to a four day week in order to assist the claimant with childcare, (and the claimant ultimately accepted a flexible working arrangement whereby she worked 32 hours instead of 35, compressed into a four day week).

85. In addition, data was provided regarding the break-down of full time / part time staff within the first respondent's business. In the finance department, where the claimant worked, in January 2016 13 out of 59 staff worked part time and in January 2017, 19 out of 68 staff worked part time. Within the team managed by Mrs Horner where the claimant worked, in January 2016 there were three full time and two part time staff, in 2017 three full time and three part time.

86. In those circumstances we do not find that there was an institutional approach to reject flexible working, or reject part time working, although there was a preference, (operated within, we conclude, all legal obligations), to prefer full time staff working 'regular' hours. We find that this did not operate, however, to the detriment of those making flexible working requests or seeking to work part time, including the claimant.

87. The claimant relies on eight items amounting to 'detriment' contrary to s.18 of the Equality Act 2010, occurring as they did during the protected period of her first and second periods of maternity leave, or during either pregnancy.

88. These claims are all out of time. The claimant did not commence early conciliation until 2 November 2017. We deal with them in turn.

89. The alleged failure to keep the claimant informed of business developments during her first period of maternity leave specifically refers to events of September or October 2015.

90. The claimant has adduced no evidence to explain why she did not bring a claim earlier or why it is just and equitable to extend time in her favour. In oral submissions, on her behalf, Counsel for the claimant said that she was reluctant to bring a claim during the period when she was employed, but the claimant did not give this evidence herself and it is inappropriate for Counsel to make submissions of that type when evidence in that regard has not been given.

91. In any event, there were no special circumstances relating to the claimant which prevented her from bringing, or made it inappropriate for her to bring a claim whilst employed given that many people do so and the tribunal is well used to dealing with claims from employees whom remain employed but complain about discriminatory conduct.

92. We are mindful of the fact that it is for the claimant to establish that it is appropriate for us to exercise our discretion in her favour and to explain why it is just and equitable to extend time on her behalf. She has failed to do so, and therefore this claim, (and others, as we shall see), are out of time and it is not just and equitable to extend time to allow them to proceed.

93. In any event, we would dismiss this element of the claim on its merits. The claimant attended KIT days and it was on a KIT day that she found out

matters about which she complained she was not informed. It is notable that the claimant did not seek to speak to Mrs Horner, Mr Young or anyone else and advise them of her desire to have a more formal KIT day, or indeed to be advised of managerial or other changes whilst she was absent on maternity leave.

94. The second complaint is of a decision to fill her role permanently whilst on her first maternity leave period. That also relates to the period September / October 2015 and is out of time. It is not just and equitable to extend time for the reasons already given.

95. In any event that complaint fails on its' merits. Mr Cooper, whilst he had been recruited on a permanent basis, was an additional resource and not a replacement for the claimant.

96. The claimant's third complaint relates to the handling of the flexible working request and the process followed. Specifically, in the list of issues and specifically in her claim, the claimant limits this to the period between 26 October 2015 when she submitted the flexible working request, up to 5 January2016 when she accepted the trial period and agreed to the new flexible working pattern. That claim was also substantially out of time and for the reasons already given it is not just and equitable to extend time to allow the claimant to proceed.

97. In closing submissions, the claimant's Counsel sought to say that because the trial period was subsequently extended and a final decision was never made regarding the permanency of the working arrangements, this was an ongoing state of affairs and time did not start to run against the claimant.

98. We reject that argument. The thing the claimant complains about is the handling of her flexible working request up to, (and not beyond), the 5 January 2016. Nowhere in her claim does she seek to pursue a complaint that that issue was ongoing. To do so in closing submissions is inappropriate.

99. In any event, we would reject this complaint on its merits. The respondent's rejection of the claimant's original request was on grounds, set out in the rejection letter, on which they were entitled to reject the request pursuant to s.80(G) of the Employment Rights Act 1996, in particular the inability to reorganise work amongst the existing staff and a detrimental effect on the ability to meet customer demand. The conclusion of the request process was by agreement. Given that the claimant's initial request was rejected, and her counter proposals were agreed on appeal, we do not find that the first respondent discriminated against the claimant by treating her unfavourably in their handling of a flexible working request whether on the ground of her pregnancy, illness suffered by her as a result of it, or because of her exercise of her right to maternity leave.

100. The claimant was not invited to the Christmas lunch whilst on maternity leave in December 2015. Again, this claim is substantially out of time and

it is not just and equitable to extend time in the claimant's favour for the reasons already given.

101. The claimant complains about the handling of her return to work after her first maternity leave period and in her claim form she limits this to the period 1 February 2016 until 11 February 2016. Again, these claims are substantially out of time and it is not just and equitable to extend time to allow them to proceed.

102. The complaint regarding comments made by Alex Young on 12 February 2016 was effectively withdrawn as a stand alone complaint but remains as part of the 'background' for the claimant's unfair dismissal claim, (including automatic unfair dismissal). Had we been required to do so we would have found that this claim was out of time and that it was not just and equitable to extend time in the claimant's favour. In any event, it is accepted that Mr Young did not say to his line manager that the claimant, *"had only been back two weeks".* In fact, the claimant did not pursue this issue in any meaningful way at all, and we do not find that Mr Young was guilty of making any comment whatsoever on the day which was pointed towards, or was intended to be detrimental towards the claimant. Having withdrawn her claim it was not set out what the claimant alleged she had heard and whether it was of any relevance at all.

103. The seventh alleged detriment was the decision to extend the claimant's trial period under the Flexible Working Regulations which it was said were for pregnancy related and childcare / dependent leave reasons.

104. The decision to extend the trial period was made on 18 May 2016 and is substantially out of time. For the reasons already given it is not just and equitable to extend time.

105. Again, in submissions, Counsel on behalf of the claimant sought to persuade us this was an ongoing state of affairs because a trial was still extended at the time the claimant resigned. The complaint, however, is not and never was that the flexible working request had not been concluded. The complaint was about the decision to extend the trial period. That was explained to the claimant at the time it was made and the decision was one which she is recorded as agreeing with. To now belatedly claim, as was submitted on her behalf, that the extension of the trial period, (in fact a deferment of the trial period until the claimant returned to work), amounted to a continuing state of affairs, particularly bearing in mind that the period of so called extension of the trial period was increased at the claimant's own request by her taking a sabbatical, is not in our view sustainable. The claimant's complaint was of the decision to extend the period. It is out of time.

106. In any event, we would have found this claim to fail on its merits. The decision was taken not because of pregnancy or maternity but because the trial had not been satisfactory completed. It had not been completed because the claimant had a series of absences, some of which related to

pregnancy and some of which related to childcare arrangements. However, it was the fact of absence, and not the reasons for the absence, which meant that the trial period could not have been said to have been satisfactorily completed. In those circumstances the respondent chose not to terminate the trial period, but to suggest extending it to cover the period when the claimant returned to work after maternity leave, (as she was then expected to do), to which the claimant agreed. Given that the claimant agreed with the decision we would not have found that it amounted to an act of detriment.

107. The claimant was not sent flowers when her second baby was born. She indicated at the commencement of the proceedings that this was not pursued as a stand alone claim, but in any event, it is substantially out of time and for the reasons already given we would not have found it just and equitable to extend time in her favour.

108. For those reasons the eight matters about which the claimant complains as amounting to unfavourable treatment under s.18 of the Equality Act 2010 are all out of time and it is not just and equitable to extend time on their behalf. That part of the claimant's claim is therefore dismissed.

109. In relation to allegations of direct sex discrimination, these relate to:

108.1 The decision to go back on the assurances given to the claimant before she commenced sabbatical leave, (relating to the provision of a redundancy payment if no job could be found for her on her return from sabbatical);

108.2 The denial that that assurance had been given; and

108.3 Being told to bring her sabbatical to an end immediately, or risk a possibility of no job on her return and no redundancy payment.

110. We have found as a fact that the claimant was not "assured" or told at all that in the very unlikely, (approximately 1%), chance that on her return from sabbatical, if she could not return to her previous role and there was no suitable role available for her, she would be redundant. We have found as a fact that the issue of redundancy was not discussed at all. We are bound to say that the findings which we are making in relation to both this and the third element of the claims for direct discrimination are indicative of the claimant not hearing the information she was being given and coming to incorrect assumptions. We conclude that that did happen in this case. She assumed, or presumed that in the circumstances described she would be redundant but we have found as a fact that she was not told that.

111. Accordingly, the denial that the "assurance" of redundancy had been given cannot be an act of discrimination because no assurance was made and there were no assurances to go back on. Thus, the first two elements of the complaints that the claimant was the victim of direct sex discrimination fail on their merits.

112. With regard to the third element, being told to bring her sabbatical to an end immediately or risk the possibility of no job on her return and no redundancy payment, we have the following comments:

112.1 First, the claimant was not told to bring her sabbatical to an end immediately. As confirmed in the exchange of emails, she was being asked to make a decision as to whether or not she would return early within short order, (as the respondent needed to recruit), but that the return from sabbatical was not necessary until the beginning of the following year, three months after the discussion in question;

112.2 The risk of the possibility of no job on return was no higher in September 2017 when the telephone discussion took place, than it had been when the sabbatical was first discussed in January 2017;

112.3 Third, the position of *"no redundancy payment"* was not a change because we have found as a fact that the claimant was never told that she would be redundant if the unlikely event of there being no job for her after her return from sabbatical came to pass.

The claimant's assumption or understanding that she was told she would have to return, *"immediately"* from sabbatical if she wished to avoid the risks which had been spelled out to her in January was incorrect, as was confirmed in email correspondence. Notwithstanding that, she pursues this as a claim. We find that just as she assumed, or presumed, that she would be redundant if no suitable role was found after a return from sabbatical when no such statement was made by the respondent, she assumed or presumed that she was being required to return to work, *"immediately"* when that was patently not the case, as she was immediately advised in writing.

113. The 'final straw' that the claimant relies upon in support of her contention to have been dismissed, was in terms, the same matters as she relied upon in support of her direct discrimination claim.

114. The claimant was not given an assurance that she would be made redundant if there was no role for her at the end of her sabbatical. Therefore, the denial of that state of affairs by Mrs Kennedy was not a change of position. It was the clarification of a misunderstanding which the claimant may have been labouring under, but that was not as a result of any promise made by the respondent.

115. Accordingly, there was no 'final straw' on which the claimant can rely.

116. Telling the claimant that she was not entitled to a redundancy payment was a wholly innocuous act by the respondent because it was never the case they had promised that to the claimant or indicated that that would be

the case. It cannot have contributed to a breach of the claimant's contract of employment.

117. Given that these are the only matter which are brought 'in time' and that the last act complained of before the events of September 2017 as contributing to a breach of the implied term of mutual trust and confidence, were more than one year before the decision to resign, the claimant cannot rely upon them as founding a claim for unfair (constructive) dismissal. During the intervening period the claimant had delayed too long before resigning and by her actions had clearly affirmed her contract of employment, in particular by organising her sabbatical under the first respondent's policies.

118. Accordingly, the claimant was not dismissed within the meaning of the Employment Rights Act 1996. She resigned and at the time she did so she was not entitled to terminate her contract of employment without notice as a result of any conduct on behalf of the respondent.

Summary

119. The claimant was not dismissed, her employment ended by way of resignation.

120. The claims brought under s.18 of the Equality Act 2010 are out of time and it is not just and equitable to extend time on her behalf.

121. The complaints of direct discrimination fail on their merits.

122. For the reasons set out above the claimant's complaints, and each of them, are dismissed against each of the respondents.

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Employment Judge Ord

Date: …28.12.18……..

Sent to the parties on: .....28.12.18...

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For the Tribunal Office