



# EMPLOYMENT TRIBUNALS

**Claimant:** Jessica Lowther

**Respondent:** (1) TACS (SW) Ltd  
(2) Jack Goldsby-West

**Heard at:** Exeter Employment Tribunal (by CVP)      **On:** Monday 16<sup>th</sup> and Tuesday 17<sup>th</sup> February 2021

**Before:** Employment Judge Mr. M. Salter

**Representation:**

Claimant: Ms. J Duane, counsel

Respondents: Both represented by Ms. K Zakrzewska (litigation rep)

## JUDGMENT

1. The Claimant's claim for holiday pay is dismissed upon withdrawal.
2. The Claimant was not automatically unfairly dismissed and her dismissal was not an act of unfavourable treatment because of pregnancy.
3. The complaint that the Claimant was subject to harassment related to sex and victimization by the First Respondent and Second Respondent contrary to sections 26 and 27 of the Equality Act 2010 is upheld
4. The Respondents shall pay to the Claimant:
  - (a) £14,000 for injury to feelings.
  - (b) £2,034.41 interest upon the injury to feelings award.
5. The awards above are on made a joint and several basis.

## REASONS

*References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.*

*References in round brackets are to the paragraph of these reasons or to provide definitions.*

### INTRODUCTION

1. These are my reasons for the judgment at the final hearing on 16<sup>th</sup> February 2021. In accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”) written reasons are not provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.
2. A request was made by the Respondents at the hearing for written reasons. As explained at the hearing the written record of the reasons may use more formal language than I used then, however the substance of the decision will remain the same.
3. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal’s Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness. The Appeal Tribunal has recently indicated there are limited powers to anonymise judgments in this way.

## BACKGROUND

### The Claimant’s case as formulated in her ET1

4. The Claimant’s complaint, as formulated in her Form ET1, presented to the tribunal on 17<sup>th</sup> July 2019, is in short, she was unfairly dismissed on grounds of her pregnancy and maternity, and that that same act was an act of discrimination. Further, the Claimant complains that after her employment

ended, the acts of the Second Respondent correspondence and communications amount to harassment and victimisation.

The Respondents' Response

5. In its Form ET3, received by the tribunal 23<sup>rd</sup> August 2019, the Respondent denied that that dismissal was unfair, contending it was for a potentially fair reason, namely that because of the Claimant's decision not to undertake payroll functions this meant her role was redundant, and they did not know about the Claimant's pregnancy until the Claimant appealed her dismissal. They denied the allegations of harassment and victimization.

Relevant Procedural History

6. The matter came before E.J Gray on 1<sup>st</sup> April 2020 for a Preliminary Hearing during which a list of issues was agreed. The Respondents confirmed they were not seeking to advance the employer's defence [26 §6].

7. The Claimant has subsequently received her holiday pay and so requests that that claim is withdrawn. I therefore dismiss that claim upon withdrawal.

8. At the outset of the Final Hearing I had to clarified the acts relied upon as acts of victimization and harassment. Ms Duane confirmed that the correspondence on pages [65, 71, 72, 74-77, 79-80, 81, 87, 88-90] was being relied upon as the acts complained of for the claims of harassment and victimization. It was also stated that the failure to provide the Claimant with an appeal, invite her to an appeal meeting and delay in paying her notice and holiday pay were acts of victimization.

**THE FINAL HEARING**

General

9. The matter came before me. The hearing had a three-day time estimate. The Claimant was represented by Ms Dunne of Counsel and both Respondents by Ms Zakrzewska a Litigation Consultant.

Particular Points that were Discussed

Timetabling

10. Although the matter was listed for three days, the parties made good progress through the evidence and had it all finished late on day 1. Written submissions were provided and brief hearing was conducted at 1015 on the

morning of day 2 when one small typo was amended by the Respondent and no further oral submissions were made by either party.

## DOCUMENTS AND EVIDENCE

### Witness Evidence

11. I heard evidence from the Claimant on her own behalf and I also heard evidence from the following witnesses on behalf of the Respondent: Jack Goldsby-West, the First Respondent's Director and also in his personal capacity the Second Respondent, and Hilary Hemsley
  
12. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses were cross-examined

### Bundle

13. To assist me in determining the matter I have before me today an agreed bundle consisting of some 124 pages. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

## SUBMISSIONS

14. I had written skeleton arguments. Since the skeletons are in writing it is unnecessary to repeat them here.

## MATERIAL FACTS

### General Points

15. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant, Mr Goldsby-West and Ms Hemsley in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

16. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

Credibility

17. I make the following comment in passing: even giving all due latitude for the situation of giving evidence in tribunal, I was not impressed by any witness in this matter. The Second Respondent, in particular, was unimpressive, having to be reminded a number of times to answer the questions that was asked, being confrontational and often seeking to talk over counsel who was asking questions in an entirely appropriate and proper way.

The Parties

18. The First Respondent provides taxation, accountancy and corporate support services. The Second Respondent is its director. Ms Hemsley is a senior employee of the First Respondent. The First Respondent employs a total of 5 staff [18 §2.7]
19. The Claimant was employed by the First Respondent from 20<sup>th</sup> November 2017 to 23<sup>rd</sup> April 2019. She applied for the role of Accounts Assistant [41]. She was successful. After she had started her employment she saw a Statement of Particulars of employment that identified her role as Payroll Manager Trainee and Accounts Assistant [45] but this was never signed or agreed as, she tells me, there were matters that required clarification and correction in it.
20. She worked on a part-time basis, Mondays, Wednesdays and Fridays, for a total of 15 hours, although this was increased at some point to 18 hours.
21. It is common ground that there were no performance or conduct issues raised throughout the Claimant's employment. Indeed, the evidence I have before me is that the Claimant was valued and successful employee. She,

along with other members of staff, was given a pay rise at the beginning of 2019 and received 100 B class shares.

22. The Claimant had no payroll experience but was receiving training on the job from Ms Hemsley.

March and April 2019

23. In early 2019 the Claimant found out she was pregnant. She had a number of medical appointments for this within a short period of time of her finding out about her pregnancy. It is common ground that the Claimant experienced no difficulty in taking time off work for these appointments, and she always returned to work after the appointment.
24. The appointments were the 13<sup>th</sup> and 15<sup>th</sup> March 2019 and it is also accepted by both parties that the Respondents were unaware of the reason for appointments.
25. The Claimant asked to speak to the Second Respondent concerning improvements in the payroll system the First Respondent operated. The Second Respondent contends this meeting took place on the 13<sup>th</sup> March and that in this meeting the Claimant said she no longer wished to undertake payroll function so as to be able to focus on her other duties. Surprisingly, for a meeting where, if the Second Respondent is correct, an employee is refusing to undertake a considerable part of their employment, there is no contemporaneous record of this meeting or follow up after it. However, I note the WhatsApp message from the Claimant to Erika on 23<sup>rd</sup> April 2019 [66] where the Claimant says that the Second Respondent “told me it was fine [that I did not do payroll] and he didn’t mind as Mel would so it”. I consider this adds credence to the Respondent’s claim that it was the claimant who said she did not wish to do payroll.
26. Upon returning from her hospital appointment on the 15<sup>th</sup> March 2020, around 12:10, the Claimant states she requested a meeting with the Second Respondent and told him in that meeting that she was pregnant. The Second Respondent says that is not possible as he was on his way to a client meeting at Minehead, and used his debit card at the Cross Keys Garage to show this. I have not seen this receipt. There are also no minutes

from this meeting to assist, not unsurprisingly as the Respondent says it did not occur.

27. At some point, between the 18<sup>th</sup> and 25<sup>th</sup> March the Claimant had a meeting with Ms Hemsley. Again what occurred in this meeting is disputed and there are no minutes or record produced. The Claimant states she told Ms Hemsley of her pregnancy, indeed she contends that was the reason for the meeting: Ms Hemsley had been told, the Claimant says, about her pregnancy by the Second Respondent and wished to discuss it with the Claimant. Ms Hemsley denies this.
28. What is clear is that at some point the claimant informed a work colleague of hers, Erika, that she was pregnant. In print out of WhatsApp messages from 23<sup>rd</sup> April 2019 [66] and around 27<sup>th</sup> April 2019 [78] Erika refers to the Claimant's pregnancy. There is also evidence that the Claimant had a discussion with her college tutor. The Claimant was, therefore, telling people of her pregnancy around this time.
29. On 29<sup>th</sup> March 2019 the Claimant, Second Respondent and Ms Hemsley had a further meeting. The result of which was the claimant commencing a period of sick leave. After the meeting the claimant sent Ms Hemsley an email referring to "recurrent (and new) medical conditions". There is no mention of pregnancy, despite, on her case, both Ms Hemsley and the Second Respondent being aware of her pregnancy and having held a meeting to discuss that very thing.
30. The Claimant was due to return to work on 15<sup>th</sup> April 2019, however there was a fire at a building close to the First Respondent's offices and, on the advice of the Fire Service, the First Respondent's offices were to remain closed for a period of time owing to Asbestos being found in the building that had been subject of the fire.
31. The Claimant tried to contact the Second Respondent via telephone but her call was not returned. This led to her contacting Ms Hemsley and ultimately receiving a telephone call from the Second Respondent on 15<sup>th</sup> April 2019 during which the situation with the office was discussed.

32. The Claimant heard nothing more until the morning of 23<sup>rd</sup> April 2019 when the Second Respondent sent her a text message asking her to call him. She did, and the resulting telephone call lasted about a minute. During this call the Claimant was told she was dismissed on grounds of redundancy. The Claimant then had a text conversation with Erika sometime after 12 noon [66].
33. The next day the Claimant received a letter from the First Respondent, signed by the Second Respondent, confirming her dismissal. The letter refers to the Claimant's "request to be relieved of [payroll] duties" and that this was the reason for her redundancy [65], the First Respondent thanks the claimant for the work she had done during her employment.

#### The Appeal and Subsequent Conduct

34. The Claimant appealed this dismissal by way of her letter of 24<sup>th</sup> April 2019 [68], this letter raises various challenges to the dismissal including that there was no redundancy situation; that the Claimant had not refused to undertake the payroll function; there was no consultation process or pool; there was no notice provided and that monies were owed to her. Her letter continues:

*"As you can imagine I am naturally appalled by the way the organisation has managed this matter and handed the 'redundancy'. Consequently, for the above reasons I strongly believe that I have not been dismissed by way of a genuine redundancy but instead have been dismissed on grounds of pregnancy or maternity as protected by the Equality Act 2010"*

The Claimant requested a response in writing by post or email.

35. The next day the Claimant attended the office to collect her belongings. When she attended Ms Hemsley made a gesture towards her stomach: the Claimant contends it was a baby bump gesture, Ms Hemsley says she patted her stomach. The respondents contend the Claimant was aggressive in this meeting and "launched" at Ms Hemsley, the claimant denies this saying she explained how she was disgusted at how she had been treated.
36. The First Respondent did not offer the Claimant an appeal hearing. In evidence the Second Respondent said there was no point as he would not change his mind on this.



37. After receipt of the appeal letter, I find as a fact, there is a clear change in content and tone of the letters and communications sent by the Second Respondent on behalf of the First Respondent.

- a. On 25<sup>th</sup> April 2019 the First Respondent wrote to the Claimant [71] this letter commences with:

*Dear Mrs Lowther*

*Visit to the Office 25<sup>th</sup> April 2019*

*If you ever visit my offices again, please make an appointment with me and if you have anything to say about your redundancy, please say it to me. I have heard what you said to people present at the time and I am taking no regards to this as it was not said to me. You obviously had a lot to say so give me the opportunity to hear it firsthand.*

- b. On 26<sup>th</sup> April 2019 the Second Respondent refused to respond to the Claimant's appeal letter on the basis it was "not her prose" and was unsigned [72]. This is despite it bearing her name and coming from her email address. The Claimant then had to provide a signed copy of the letter [73];
- c. 26<sup>th</sup> April 2019 [74] the Second Respondent on behalf of the First Respondent replies requiring the claimant to answer a series of questions before it responds to the Claimant's appeal letter. There is also an accusation that it is not her letter
- d. The Claimant replies to this letter in an email [75] and received a reply:

*"I am not interested in office gossip just what was said to me so please answer my email from my point of view.*

*When did you inform me that it was confirmed you were pregnant.*

*As an aide de memiore not until your letter of 24<sup>th</sup>.*

*So please stick to the facts"*

- e. Without awaiting a response Second Respondent sent a further email to the Claimant [75-76]

*Dear Jessica*

*Lets get straight to the truth and answer these facts.*

*1. Am I the type of person to let pregnancy be a problem bearing in mind my attitude to persona sickness and well-being of my staff/*

*But*

*2. If someone on my staff stated they did not want to do the job.*

*That is the member of staff not caring about my wellbeing*

*Employment is a two way street Jessica and everyone involved should have their position respected to the extent of the wellbeing of both parties*

*5, 6, 7, 8 are relevant, your reasoning is that if you answered then it would jeopardise the situation you are trying to fabricate.*

- f. On 2<sup>nd</sup> May 2019 [79] the Second Respondent emailed the Claimant with a breakdown of the payments she was to receive. The email commences with:

*Set out below are the hours we believe you have worked in April, if you could confirm these that would be good. I am meeting with our Solicitors HR partner on Tuesday to work out your redundancy and answer your letter of 24<sup>th</sup> April 2019 especially the comments in relation to the equality act and your defamation of my character.*

- g. On 31<sup>st</sup> May [81]

*Hope you pregnancy is going well.  
May I point out that contrary to what you claim in no way was the fact that I found out you were pregnant after I made the decision to make you redundant because you did not want to deal with payroll, which is why I employed you, that is evidenced.  
From what errors we have found in the processing of payroll its very evident that you were not interested in Processing Payroll at all, very elementary mistakes were made on peoples pensions which has cost us much time in remedying the mistakes.  
I await your claims under whatever act you are going to tribunal under as its amazing that you were not really interested in the work but very keen to take payment for attending college and the mileage for the same.  
I look forward to hearing your claim. I have employed people since 1989 and never had anyone accuse me of anything under the equality act I treat all staff well and equally hence the paying for attending college, which I understand you missed exams.*

This is the first time any issue of capability and errors was raised.

38. On 2<sup>nd</sup> June 2019 [81] the Claimant requests the Respondent not contact her owing to the effect the communications were having on her, and that any future communications should be through her solicitor. In an email to her solicitor the Claimant refers to the Second Respondent's email as "rather unpleasant".
39. On 30<sup>th</sup> July 2019, the First Respondent wrote to the Claimant directly [87]. This letter is entitled Pre-Action-Protocol Letter. In evidence the Second Respondent accepted he did not know of a particular pre-action protocol he was purporting to comply with. This letter says the Second Respondent will be bringing a claim for defamation against the Claimant.

40. In subsequent correspondence with the Claimant's solicitor the First Respondent, through the Second Respondent, cc's the Claimant into an email entitled "Defamation of Character" [89] this email was asking where his defamation proceedings should be served. The Claimant's solicitor reminds the Respondents of the possibility of a claim for aggravated damages. The Second Respondent continued to make allegations and accusations against the Claimant and the difficulties she was having in her relationship with her husband, which he says were "severe" and who he states is "on the fringes of HR".

41. I am not told if defamation proceedings have been commenced.

## THE LAW

### Statute

42. So far as is relevant the Equality Act 2010 states:

#### **4 The protected characteristics**

The following characteristics are protected characteristics—

...  
pregnancy and maternity;

...  
sex;

#### **13 Direct discrimination.**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

#### **18 Pregnancy and maternity discrimination: work cases**

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

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

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

...

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

- (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
- (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

**26 Harassment.**

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and .
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
  - (a) A engages in unwanted conduct of a sexual nature, and .
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and .
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—
  - ...
  - sex;

**27 Victimisation.**

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
  - (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
  - (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act; .
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

...

**108 Relationships that have ended**

**Case Number: 1403020/2019**

- (1) A person (A) must not discriminate against another (B) if—
  - (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
  - (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
- (2) A person (A) must not harass another (B) if—
  - (a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and
  - (b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.
- (3) It does not matter whether the relationship ends before or after the commencement of this section.
- ...
- (7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.

Detriments

43. In order for a disadvantage to qualify as a “detriment”, it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, Shamoon v Chief Constable of RUC [2003] UKHL 11.

Causation

44. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant, per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572, 576.

Burden of Proof and Inferences

45. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in Igen v Wong [2005] ICR 931 at para 76 and the Annex to the judgment. The Guidance refers to race discrimination but applies equally to other forms of discrimination:

- (1) Pursuant to s136 Equality Act 2010 it is for the claimant who complains of race discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has

### **Case Number: 1403020/2019**

committed an act of discrimination against the claimant which is unlawful by the Act or which is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of race discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word 'could' in s136. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s138 of the Equality Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s138 Equality Act.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.s15(4) of the Equality Act 2006. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of race, then the burden of proof moves to the respondent.
- (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

### Unreasonable Treatment

46. The EAT has commented in London Borough Of Islington v Ladele [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. "That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in Zafar v Glasgow City Council [1997] IRLR 229:

*'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'*

47. So far as is relevant the Employment Rights Act 1996 states:

**99 Leave for family reasons.**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
- (a) the reason or principal reason for the dismissal is of a prescribed kind, or
  - (b) the dismissal takes place in prescribed circumstances.
- (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
- (3) A reason or set of circumstances prescribed under this section must relate to—
- (a) pregnancy, childbirth or maternity,

**CONCLUSIONS ON THE ISSUES**

General

48. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues

Pregnancy and Maternity Discrimination [27 §9]

*Was the Claimant pregnant and/or inside the protected period at the time of her dismissal*

49. She was pregnant at the time of her dismissal.

*Id the Respondent treat the Claimant unfavorably by dismissing her?*

50. It is accepted the Claimant was dismissed. I find this was unfavourable treatment

*S18(2) Does the unfavourable treatment take place in a protected period and/or was it the implementation of a decision taken in that period?*

51. I find that the Claimant was dismissed during the protected period, indeed this does not appear to be disputed.

*If so, was it because of pregnancy?*

52. It is here that I have had the biggest difficulty. I remind myself that the burden of proof is on the Claimant to show the Respondents were aware of her pregnancy.

53. I can see that there is clear evidence that Erika was aware. However the First Respondent and Ms Hemsley are clear they did not know.

54. The paucity of any written records of any meeting where ill health (on the Respondent's account) was discussed and where (again on the Respondent's case) the Claimant refused to continue to do part of her role was alarming, but in line with what can only be described as lax and unsatisfactory practices within the First Respondent when it comes to HR matters (e.g. no minutes, no contracts of employment, not seemingly consulting with staff at risk of redundancy, not offering appeals), I do not consider there is anything sinister about the absence of records, rather this reflects the Respondent's apparent approach to HR matters.

55. Against this I weigh the Claimant's account that she did tell the Respondent and Ms Hemsley. However, if that is correct I consider it odd, at the very least, that in an email to Ms Hemsley after this discussion the Claimant did not refer (either expressly or implicitly) to pregnancy instead referring to a "recurrent (and new) medical conditions, I would like to politely request some time off to recoup" [61]. I do not accept the Claimant's evidence that this was a reference to pregnancy. In context this email is sent by the Claimant to someone who, she says, is aware of her pregnancy and I do not accept that it relates to pregnancy. The reference to "recoup"-ing is also an odd phrase to use if it was referring to pregnancy.



56. In the circumstances, having considered the specific evidence and having stood back and considered the totality of the evidence I have heard as to the events in question I do not feel that it is appropriate for me to properly draw an inference that the Respondent knew about the Claimant's pregnancy prior to her dismissal. However intemperate the correspondence after the entry of the Claimant's letter of appeal (of which i will come to more below) it does not, I feel, provide me with a foundation to support the Claimant's case of knowledge, or infer knowledge of pregnancy before the dismissal of Claimant, nor does the Respondent's abject failure to offer any sort of an appeal to the Claimant. without more, therefore, I do not raw any inference of knowledge or discrimination prior to the dismissal.
57. The Respondent is a small employer and provided an explanation for the failure namely the size of the business. They should be under no illusions though if this was a s98 unfair dismissal claim their failure to offer an appeal could have rendered that dismissal unfair, in this context however I do not consider that the failure is sufficient to give rise to an inference of discrimination prior to the appeal letter.
58. Left with this I come to the conclusion that Claimant has failed to prove to me, on the balance of probabilities, that the Respondents were aware of her pregnancy prior to their dismissal of her.
59. The claim for automatically unfair dismissal and for discrimination on grounds of pregnancy or maternity therefore fails.

#### Harassment and Victimization

##### *Acts Complained of for claims of Victimization and Harassment*

60. Did these occur, I find that they did. Indeed they are all set out in writing and the Respondents do not seek to backtrack from these letters. Their position is that there were no detriments.

##### *Relationships that have ended*

61. This matter was not identified as an issue at the Preliminary Hearing, nor, for reasons I suspect are obvious, did any party address me on this matter, however for the sake of completeness, as far as s108 Equality Act 2010 is concerned I consider that these acts arise out of or are closely connected with the relationship that used to exist between the Claimant and

Respondents arising, as they do, out of the Respondent's response to the Claimants appeal against dismissal and the Respondents' response to it.

Victimization (Paragraph 10 of the list of issues)

*Protected Act*

62. The Claimant relies on her appeal against dismissal [68] this expressly makes an allegation that she had been the victim of a breach of the Equality Act 2010. It is a protected act.

*Were any proven acts a detriment?*

63. The Equality Act 2010 requires any act of victimization to be a detriment, namely something that a person could reasonably consider to be detrimental to themselves.

64. Looking at the failure to offer an appeal or conduct one, I have little hesitation in finding that this was a detriment to the Claimant who is denied the opportunity to challenge her dismissal. Also, not receiving her payments was also a detriment to her.

65. The correspondence raises allegations of errors in the claimant's work for the first time; repeated threats (going so far as requesting address for service of proceedings and purported compliance with pre-action protocols) of litigation and accusations (albeit implicit) of lying and dishonesty. These continue even after the Second Respondent had informed the Claimant they were going to meet the Respondent's solicitor's HR Partner.

66. Having read the correspondence and heard the witnesses give evidence on the letters and their contents I consider that the Claimant did and could reasonably consider that this correspondence did change her position for the worse or leave her at a disadvantage. As is pointed out in the EHRC Employment Code this can include threats which they take seriously and it is reasonable for them to take seriously. I find the Claimant did and could reasonably consider these to be real threats of litigation being in purported compliance with pre action protocols and also seeking address for service of proceedings, with some of this correspondence being sent to her solicitor.

67. The Claimant has shown therefore detrimental treatment.

*Were these detriments because of the protected act?*

68. I remind myself this is not a “but for test” but on where I need to consider what was the real cause, or core reason for the detriments.
69. I find as a fact that these comments, emails, allegation, letters were because of the protected act. The Second Respondent accepted in cross examination that the letters were brought about by the protected acts, and indeed they expressly refer to the contents of the protected act.
70. I do not find that the delay in paying the Claimant or offering her an appeal against her was caused in anyway by the protected act, I consider that this is another example of the First Respondent’s less than adequate approach to human resource matters.
71. The factual circumstances of this matter satisfy me that the Claimant has established a prima facie case of victimization and reversed the burden of proof onto the Respondents to show that there was no causation between the detriments and the protected act. I find the Respondent has failed to discharge this burden. The protected act was the real cause or the core reason of the detriments. Accordingly the claim of victimization succeeds.

Harassment (Paragraph 11 of the list of issues)

72. In law you cannot harass someone on grounds of pregnancy and maternity, the Equality Act does not include pregnancy or maternity in list of protected characteristics within s26(5). However s212(5) of the Equality Act states:

“where this Act disapplies the prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of section 13 because of that characteristic”

73. The claim of harassment on grounds of pregnancy or maternity must therefore fail.
74. If I were to amend the claim to one of direct discrimination I consider the Claimant would fail here on grounds that the conduct of the Respondent, whilst a detriment under s39, would not have been conducted because she was pregnant, rather it was because of her protected act. Indeed, counsel

confirmed to me during the brief hearing on the morning of the second day that this was the very reason the Claimant had not pursued a direct discrimination claim.

75. However, the harassment claim is brought on the alternate protected characteristic of sex.

*Was the treatment unwanted*

76. Clearly the conduct was unwanted after 2<sup>nd</sup> June 2019 as the Claimant requested that correspondence go via her solicitor, a request the Second Respondent failed to comply with on three occasions, and no good reason was provided.

*If so, was it related to the Claimant's sex?*

77. Here the case law directs me to consider the context in which the conduct occurs, especially where such conduct is not inherently discriminatory. I am satisfied that the acts here are not inherently discriminatory on grounds of sex, however they do arise in the context of the Claimant raising an allegation of a breach of the Equality Act in that she was discriminated against on grounds of pregnancy and maternity. I consider that the conduct is, therefore, "related to sex" as required by s26 of the Equality Act.

*If so, did it have the purpose of creating a threatening, intimidating atmosphere*

78. I find that the purpose of the correspondence post 2<sup>nd</sup> June was to create an intimidating atmosphere for the Claimant with repeated threats of facing litigation for defamation going to the stage of seeking addresses for service and purported compliance with pre-action protocols.

*If not, did it have the effect of creating a threatening, intimidating atmosphere?*

79. In any event, the Claimant gave evidence of the impact this correspondence had on her, and I accept it had the effect of creating a threatening, intimidating atmosphere. Taking into account the factors in section 26(4) I consider it was reasonable for these acts to have that effect as the correspondence was aggressive and confrontational, the claimant was effected by that conduct and her dismissal and, in all the circumstances of the matter, it was reasonable for the conduct to have the effect on the claimant as it was targeted at her and was deliberate.

*Burden of Proof*

80. The Claimant having proven the unwanted conduct and the effect it had on her was also able to show me a link between these and sex, namely her appeal of 24<sup>th</sup> April and the contents. I accordingly consider the Claimant again had established a prima facie case and had reversed the burden of proof onto the Respondent. For the reasons given above I do not consider the Respondent has satisfied this burden of showing that the conduct was not related to sex, and so, the Claimant's claim succeeds here.

*Remedy*

81. The Claimant confirmed her statement to me on quantum. The Respondent did not wish to cross examine her on this so I accept her evidence as to the effect the conduct had on her.
82. I heard submissions from both parties.

*Declaration*

83. I make a declaration that the Claimant was harassed on grounds of sex and victimized for making a protected act by both the First and Second Respondent.

*Injury to feelings*

84. I considered my powers to award compensation pursuant to section 124 of the Equality Act 2010 and the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction Ltd* [2017] EWCA Civ 879 second addendum 25 March 2019 (the original Presidential Guidance being issued on 5 September 2017) This is the Presidential Guidance that was in force at the time of the presentation of the Claimant's claim, and not the Third Addendum as set out in the Schedules of Loss. The difference has a modest effect on the appropriate level of compensation.
85. The Presidential Guidance relates to what are commonly known as the Vento Guidelines arising from the case of *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102 as it has been affected by subsequent case law and updated to take into account inflation.

86. The relevant bands applicable at the time the Claimant presented her claim are therefore £900 to £8,800; £8,800 to £26,300 and £26,300 to £44,000
87. In her witness statement the claimant explained the impact the conduct had had on her and I do not propose to set this out as it is in writing as it relates to personal medical matters relevant to the Claimant and was, as I say, uncontested and unchallenged before me.
88. I have taken into account the:
- a. fact the claimant was pregnant at the time and feeling vulnerable;
  - b. fact the repeated acts took place over a period of time;
  - c. the fact the Second Respondent ignored the Claimant's request to correspond with her solicitor;
  - d. impact on the claimant as set out in her statement and the evidence; and
  - e. fact the acts were done with the purpose of creating the prohibited environment for the Claimant.
89. Bearing all this in mind I consider an award in the middle of the middle band is appropriate in this regard to reflect the severity of the conduct and its impact on her. This is £14,000.00.
90. The award of aggravated damages is compensatory not punitive. I do consider the conduct of the Second respondent as being high-handed, malicious and oppressive and, as I found, he had the purpose of creating an intimidating atmosphere for the Claimant. However I do not feel it appropriate, in this case to award aggravated damages, which I consider to have been sufficiently compensated for in the award of injury to feelings as the conduct complained of in the harassment and victimization is the same conduct relied upon as aggravating those damages.
91. With regards the claim of personal injury, I do not consider that the claimant has established, on the balance of probabilities, a personal injury caused by the proven acts of discrimination.

*Interest*

92. The Claimant is entitled to interest on the sum awarded. Both parties agreed there had been 663 days from the date of the first act of discrimination to the assessment of compensation. The Claimant is entitled

to interest on the full period at a rate of 8%, so £3.07 per day, or £2,034.41 to the date of assessment.

93. This makes a total award of £16,034.41 which the First and Second Respondent are jointly and severally liable.

Employment Judge Salter

Date: 06 March 2021

Judgment and reasons sent to parties: 09 March 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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