EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS; **MS J GRIFFITHS**
MS P KEATING

CLAIMANT **MS A ZALEWSKA**

RESPONDENT **DEPARTMENT FOR WORK AND PENSIONS**

ON: **10-14 JANUARY 2022**

Appearances:

For the Claimant: Mr N Toms, Counsel
For the Respondent: Ms S Idelbi, counsel

This hearing was carried out on CVP (Cloud Video Platform). The parties did not object to it being conducted in this way. It was not possible to conduct the hearing in person and all issues could be resolved using CVP

JUDGMENT

The Judgment of the Tribunal is that

(i) The Claimant's Claim of direct maternity discrimination succeeds in part.
(ii) The issue of remedy for the successful parts of her claim will be determined at a hearing on 19th and 20th May 2022.

REASONS

Introduction and Issues

1. In this case the Claimant, Ms Aleksandra Zalewska, brings a claim of maternity discrimination. The issues were agreed and were set out as an

appendix to a Case Management Order following a hearing on 14 April 2020, and are reproduced in the Schedule to this Judgment. They are not well crafted. Issue 1(f) was withdrawn.

2. As well as a claim under section 18 of the Equality Act 2010, the list of issues identifies breaches of Regulations 18 and 10 of the Maternity and Parental Leave Regulations 1999 which, as Mr Toms accepted, did not give rise to free standing claims where there had been no dismissal. Further there was an oblique reference to section 47C of the Employment Rights Act and Regulation 19 of the MPL, in a way that made no sense. In addition, the unfavourable treatment relied on was not wholly clear.

3. The Claimant was employed by the Respondent from 4th January 2016. At the time that she presented her complaint on 7 December 2019 she was still employed by the Respondent but on sick leave. She has since been dismissed for capability but, as was confirmed at the start of the hearing, there is no claim for unfair dismissal.

4. Essentially it is the Claimant's case that she was not permitted to return to the role that she was in prior to her maternity leave, and that she was put into an unsuitable role. (This was described in the issues as "not being able to return to the role she was employed to do before her maternity leave" but it was accepted by all that this was a complaint that she was not able to return to her role in Caxton House which we describe below.)

5. She also complains of inappropriate comments made by Ms Sadler and a failure to be kept informed during her maternity leave, both in terms of what was happening to her role, and in terms of new promotion opportunities.

6. We had an electronic bundle of documents and references to page numbers in this Judgment refer to the electronic page number. We heard evidence from the Claimant. For the Respondent we heard from the following witnesses

    a. Mr Gavin Forsdyke, who was the Claimant's line manager for most of the relevant period
    b. Ms Linda Sadler, who was the Claimant's line manager from June 2019
    c. Ms Bindu Surish who heard the Claimant's grievance; and
    d. Mr Brian Menzies who heard the Claimant's appeal against her grievance.

7. It appeared to us, after reading the witness statements, that the Respondent had not called the relevant decision-makers Mr Moore and Ms Curran to answer the Claimant's claim of maternity discrimination and we raised this before we had begun to hear any oral evidence. The point was acknowledged by the Respondent, but no further explanation was given.

<u>The relevant facts</u>

8. The Claimant began working for the Respondent in its Basildon Service Centre on 4 January 2016 in an operational delivery role as a Telephony Agent/Account developer (46). This is an AO grade and the Claimant's terms and conditions of employment (66) state that her job is a "grade Band B/AO" and that her designated place of work is the Basildon Service Centre. The advert for the job that the Claimant applied for is generic in terms and does not give precise details of exact duties that an AO may be required to do, though it relates to the payment of benefits.

9. In fact, the Claimant was moved into a different role, that of a Business Support Officer, on the last day of her Induction. She remained in this role until in September 2016 when she was successful in obtaining a role on a detached duty basis in the State Pensions policy team as Knowledge Management, Comms and Policy Adviser.

10. Detached duty is used by the Respondent to cover roles that are either temporary, or which are permanent but need to be filled quickly without the need to go through a formal process. In the latter case the intention is usually that the post will be subjected to a formal process in due course and the individual on detached duty would be able to apply for it in competition with others. A detached duty can either be at the same grade or at a higher grade. If an employee is on detached duty at a higher grade, they will receive a supplement to their salary known as Temporary Duty Allowance (TDA) while they are on detached duty and working at a higher grade. Detached duty is a temporary position and the expectation would usually be that the post-holder would return to this or her original job at the end of the duty, unless he or she was successful in a recruitment exercise. Before being released on detached duty the employee's home department has to agree that the individual can be released from their substantive post to the detached duty. Detached duty allows individuals to build skills in a higher grade - but does not guarantee them promotion. The Claimant accepts that the Respondent has the right to terminate a detached duty at any time, but says that in her experience, an individual would usually be given notice that the duty was coming to an end.

11. The Claimant's detached duty to the state pensions policy team came to an end in August 2017 when, following open competition, another individual obtained the permanent role. She then returned to Basildon for only 3 or 4 weeks as an AO until, on 11 September 2017, she started a second period of detached duty at the higher grade of Executive officer (EO) within the Private Pensions team. As the Claimant was operating temporarily in a role above her substantive grade, she also received TDA. This job was based at Caxton House in central London.

12. The post that the Claimant took on detached duty was a permanent post. It was offered on detached duty because the previous post-holder had secured promotion to another role and the vacancy needed to be filled quickly. The post was advertised for 6 months, but with the possibility of

extension. There seemed to be no written confirmation of this arrangement (or if there was the Tribunal was not provided with it.)

13. The Claimant joined Mr Forsdyke in the Private Pensions team on detached duty on 11 September 2017. It was a small team with only the Claimant and Mr Forsdyke working in that area. They were supported by Mr Forsdyke's line manager (at that time Mr Blower) and the deputy director's personal assistant. It was an administrative role in which the Claimant was responsible for logging ministerial correspondence, parliamentary questions and briefing requests, and then allocating the correspondence to the appropriate policy advisers to draft a response. The Claimant was also responsible for tracking progress and following up with the policy advisers to chase any responses that were not sent in time. She performed well in her role and got on well with Mr Forsdyke.

14. In February 2018 it was agreed with the Claimant's home team in Basildon (80) that the detached duty would be extended for a further 6 months to 11 September 2018.

15. In February 2018 the Claimant became pregnant. Shortly afterward the Claimant fell sick with a pregnancy related illness and, on 22 February 2018, the Claimant was signed off work and had to remain off work for the remainder of her pregnancy.

16. In her absence the Claimant's duties were covered by Mr Forsdyke and the Deputy Director's personal assistant, and no other cover was sought. The Claimant's sick leave was followed immediately by her maternity leave which began on 18 September 2018. The Claimant notified the Respondent that she would return to work after 52 weeks in September 2019.

17. Mr Forsdyke agreed with Basildon that, as her period of detached duty was due to end only a few days before her Maternity Leave was due to start, she would remain on detached duty in her EO role at Caxton House until the end of her maternity leave, which was due to end on 17 September 2019. This was beneficial to the Claimant as she would be paid maternity payments based on the higher salary.

18. We accept that Mr Forsdyke proposed this is a supportive measure, as the Claimant did not know the managers in Basildon. Mr Forsdyke considered that it would be better for him to be responsible for keeping in touch with the Claimant as he got on well with the Claimant and thought she did a good job. An email sent from Mr Forsdyke to HR on 3 September 2018 notes that the Claimant "*would like to return to work here after her maternity leave and I have explained that we cannot guarantee that a post will be available and that returning to work here will involve successfully applying for permanent post or agreeing a further extension with Basildon Benefit Centre near the end of her maternity leave."* (76)

19. The Claimant accepts that she was told that the Respondent may not be able to guarantee that the post would be available at the end of her maternity leave, and that this would depend upon business needs for her post or similar. (Claimant's ws para 11). However, we also accept that Mr Forsdyke made generally encouraging remarks which led her to believe that she would probably be returning to Caxton House. Mr Forsdyke said that his expectation was that the position would be advertised, and a formal competition launched for the post towards the end of the Claimant's maternity leave, and that she would be entitled to apply for it. This was also the message he passed on to Basildon (95).

20. During the Claimant's absence, first on sick leave and then on maternity leave, Mr Forsdyke kept in touch with the Claimant by telephone and made an informal social visit to her home at the end of November 2018 after her baby was born. The Claimant also visited Caxton House with her baby in January 2019. These telephone calls and visits were informal and Mr Forsdyke did not make any formal notes. The Claimant was not informed about the possibility of Keeping in Touch (KIT) days. Mr Forsdyke gave evidence that he was not aware that the Claimant was entitled to KIT days, nor did anyone in HR inform him or the Claimant. (Although the lack of KIT days was a part of her grievance, it was not part of the issues before the Tribunal.)

21. Mr Blower moved to a new job role in summer 2018, after which there were a number of short-term managers in his role. In November 2018 Mr Moore became Mr Forsdyke's line manager. They did not have a good relationship. In or around March 2019 Mr Forsdyke secured a new job on promotion and moved to that new role in April 2019. However, it was agreed that he would continue to line manage the Claimant during her maternity leave.

22. In February 2019 a colleague was looking at the staffing numbers for the Policy Group and asked Mr Forsdyke to confirm whether the Claimant was still on detached duty or was now a permanent member of the department. (92) Mr Forsdyke responded that the Claimant remained on detached duty until the end of her maternity leave on 17 September 2019. He said that her entitlement to maternity pay would end on 20 March 2019.

23. This seems to have prompted an email from Mr Moore to Mr Forsdyke on 22nd February 2019 as follows

> *"As discussed, we have agreed Aleksandra's detached duty ends on 20th March. You said she will then go on unpaid maternity leave up until 17th September. I think we need some clarity from HR on the following.*
> *Are we required to keep Aleksandra in the team until the end of her maternity leave - 17 September? If so, whilst she will not be on paid maternity leave, so no cost to the Directorate, will this count towards headcount for the team?*
> *If not, can we transfer Aleksandra from the Directorate back to Ops from 21 March? Given she is still on maternity leave is this allowed under*

DWP policy? A view from HR would be helpful. There is a degree of urgency on this issue."

24. We have no response to this email in the bundle. Mr Forsdyke tells us he did not agree with this approach, but that he forwarded the query to HR. Although he was aware that Mr Moore and his manager, Ms Curran, subsequently met with Ms Boswell to discuss the Claimant's position, he was not invited or consulted. It is not clear why there was any urgency on the issue or why, as her line manager, he was not consulted.

25. It is the Respondent's case that Mr Moore and Ms Curran decided that the EO grade role that the Claimant was doing on detached duty was no longer required and that the role would be deleted but there is no contemporaneous written evidence of this decision. The closest that we get is information obtained in November 2019, provided to Mr Menzies as part of the enquiries he made during the Claimant's grievance appeal. In response to a query from Mr Menzies. Mr Moore says this *"I spoke to Deborah Boswell on how to handle the ending of Aleksandra's DD/TDA. Deborah agreed we could restructure the team and exclude Aleksandra from our plans. It was agreed she should be transferred back to Basildon UC service centre. We agreed Alexandra's detached duty/TDA ended on 20 March 2019, and this could be the transfer date. However, Deborah was of the view that, as Aleksandra was not on our payroll and her 6 months unpaid maternity leave was due to end on 17th September, the sensible approach was to inform Aleksandra she would be going back to Basildon on 17 September. Gavin was asked to inform Aleksandra of this decision." [our underlining].*

26. *When* Ms Boswell was asked to comment on that response she only says that "*the team brought to my attention that there was no EO role on the team going forward and hence no role for Aleksandra*." There is no further explanation.

27. The role that the Claimant was doing at Caxton House was a permanent role, although the Claimant's tenure of that role was temporary pending a proper recruitment exercise.

28. Despite these discussions in February Mr Forsdyke was not informed by Mr Moore that a decision had been made that (i) the EO role that the Claimant had been doing had been deleted or (ii) she would not be able to return to Caxton House. There is no document to record that decision. In fact, nothing seems to have happened at all until an email was sent from Basildon on 29th May 2019, asking Mr Forsdyke whether the Claimant would likely to be returning to Basildon following to her maternity leave or whether she would receive an extension to her current detached duty, and noting that he had previously indicated that he would be looking to extend her detached duty following her maternity leave.

29. Mr Forsdyke forwarded this to Mr Moore who responded that "*I can confirm that Alexandra's detached duty/TDA ended on 20th March… We*

agreed earlier <u>today</u> that Aleksandra will return to Basildon UCS with effect from 20th June."

30. If the Claimant's detached duty had ended on 20th March no one had told Mr Forsdyke, the Claimant or Basildon. We accept that this was the first that Mr Forsdyke knew that a decision had been definitively taken to return the Claimant to Basildon and he was then tasked with informing the Claimant.

31. Mr Forsdyke telephoned the Claimant on 14 June to inform her that she would be transferring back to Basildon from 20th June 2019, that Basildon (Linda Sadler) would now take over her line management and she would be returning to Basildon at the end of her maternity leave on 17 September. There is no formal note of this conversation, but we accept that the Claimant says that she was only told that her detached duty would end early, that the team she had been in at Caxton House was no longer there and that everyone had moved on. Mr Forsdyke effectively agrees with this account as he said that he explained that the "agreed arrangements had been changed", that her detached duty would end on 19 June and that he, Mr Forsdyke, did not agree with this decision which he considered was contrary to the agreement that he had with the Claimant and Basildon that her detached duty would not end until the end of her maternity leave period. Mr Forsdyke also emailed Ms Sadler (97) and affected the necessary changes on the Respondent's database.

32. The change had no immediate practical impact as the Claimant was by then on unpaid leave, so there was no question of any loss of TDA, although the Claimant was upset by the fact that she had been moved so abruptly and without warning or proper explanation, and without the chance to apply for the job.

33. Ms Sadler wrote to the Claimant on 12th July to invite her to the Basildon office to talk about when she might be returning to work and to update her on changes in the department. The Claimant went to the Basildon office on 17th July to meet with Ms Sadler.

34. During the Claimant's absence there had been substantial changes to means tested benefits in the UK and universal credit had been introduced. Basildon was transitioning to a full-service site for Universal Credit and the previous AO grade roles had merged into a single role of Case Manager, which was a mix of telephony and casework. There had already been a round of training for Basildon staff for the Case Manager role. Further training had been scheduled for a number of individuals who were joining the team on a return from periods of long-term absence (sickness or maternity leave). The Claimant was to join a team made up of these returners for the purposes of training with the intention that, once trained, they would move across to Universal Credit and be dispersed into a variety of different teams so they could be paired with more experienced colleagues as buddies.

35. The Claimant was upset to be returning to Basildon into a role that she had not done before, and which was at a lower grade. Ms Sadler showed the Claimant round the offices. Ms Sadler told the Claimant that she also had been at Caxton House and her detached duty had ended abruptly due to her sickness. The Claimant's evidence was that "this conversation went on for some time where she then informed me that most of the team are either returning from maternity leave or sick leave which then led her to state "welcome to the naughty corner". Ms Sadler, on the other hand, says that while she was showing the Claimant round the office she pointed to the far corner and said words to the effect of "that is where I sit, I'm in the naughty corner". She said this to the Claimant because her desk was in the far corner of the room, away from the light, and the only desk in the row with a lot of boxes. She says she made the comment because she was trying to relax the Claimant.

36. On the balance of probabilities, the Tribunal prefers the evidence of Ms Sadler. The Claimant's evidence was that Ms Sadler's account was not true as her desk was in the middle of the room, and that she knew this from when she had worked Basildon previously. However, the Claimant had not worked Basildon for nearly 2 years, so would not know where Ms Sadler sat. It is significant that the Claimant did not raise this comment either in her subsequent grievance or at appeal. Ms Sadler's evidence about the location of her desk was credible, which in turn lends weight to the context in which the words were said.

37. The Claimant also says that Ms Sadler said to her that "sometimes we have to take a step back in order to continue forward." Ms Sadler denies that she said this, saying it would not be appropriate to do so. However, on balance we find it likely that Ms Sadler did say this. The Claimant had made it plain that she considered moving to the AO role in Basildon was a step back, that she did not want to do the role and that she was capable of more. In the circumstances we do not consider that this comment was unfavourable treatment related to the Claimant's pregnancy or maternity leave. It may have been said to anyone returning from detached duty who had been working at a higher grade and who considered that returning to their original grade was a step back.

38. The Claimant told Ms Sadler that she wanted to be put into a business support role and that she had a right to return to the same job that she had been doing. However, there were no Business Support roles in Basildon at an AO grade. Ms Sadler told the Claimant that if an opportunity came up in a business support role, the Claimant should let her know and Ms Sadler would help with her application. The Claimant made it clear to Ms Sadler that she was keen to get a promotion and to advance her career. The same day the Claimant and Ms Sadler discussed the possibility of the Claimant returning to work part-time and about the possibility of the Claimant taking the balance of her annual leave at the end of her maternity leave. After the meeting Ms Sadler sent the Claimant a change of work pattern form for completion, although the Claimant did not complete it.

39. Ms Sadler and the Claimant spoke again on 30th July by telephone. The Claimant remained unhappy at being required to go back to Basildon and said that, if her role was no longer available, she wanted to be put into a business support role or to be considered for redundancy. She referred to her right to return to the same job. (111) She said she had been advised of the change after the fact.

40. There were various conversations between Ms Sadler and the Claimant after that. It was clear that the Claimant was looking for a promotion or another opportunity to further her career. On 13th August Ms Sadler activated the Claimant's outlook email account, which had been suspended during her maternity leave, so that the Claimant could change her email address on the Civil Service Jobs website. This would allow her to obtain notifications about vacancies and opportunities from the CSJ site using her personal email address.

41. The Claimant met with her union representative on 15 August 2019 and presented a grievance on 21 August 2019 (see below).

42. On 23 August 2019 Ms Sadler was notified of a vacancy for a diary manager based at Caxton House at EO grade "initially for 3 months with a view to becoming permanent". The same day Ms Sadler notified the Claimant of this vacancy by email and post (156), though the Claimant tells us that this role was not suitable for her.

43. On 23 September 2019 Ms Sadler received details for another potential vacancy for a Business Support Officer role at EO grade with a deadline for application of 30 September. Ms Sadler sent an email to the Claimant's work address to notify her of the job role. Ms Sadler told the Tribunal that she did this in error; she had intended to send the job opportunity to the Claimant's personal email address but that when she started to fill in her email address, outlook had populated the email address as her work address by default. The Claimant therefore did not get the email. On 1st October (the day after the deadline for the application) Ms Sadler wrote to the Claimant saying that she had not had a response to the 24th September email enclosing an EOI for a business support team role.

44. The Claimant did not immediately respond to this, nor did she seek an extension of time for the application. She did respond to Ms Sadler 2 weeks later on 15th October complaining that (i) the email had been sent to the Claimant's work address and the follow-up letter had been sent after the closing date and (ii) that she should have been considered for the position before the EOI was shared with others. She said that this was the role she had held prior to moving to Caxton House. She also informed Ms Sadler that she had been diagnosed with an anxiety disorder and was signed off work from 10th October to 21 November. (In fact, the Claimant never returned to work and was subsequently dismissed for capability.) Happily, she has now found another role in a different Government department.

45. Ms Sadler (who was already a substantive EO) applied for this role along with some 10 other applicants and was successful.

Grievance process

46. The Claimant notified ACAS of a potential dispute on 10 October 2019 and her claim form was presented on 7 December 2019. In the meantime, she remained on sick leave.

47. The Claimant had presented a grievance on 21st August. She complained about
    - Continued failure to communicate and keep me informed with changes to, and decisions made, regarding my role at DWP without my involvement;
    - Change of role to one less favourable;
    - Expected loss of earnings relating to change in role;
    - Data breach (loss of personal file);
    - Lack of Keeping In Touch (KIT) days;
    - Failure to communicate promotional exercises.

48. Ms Surish was appointed as the grievance manager. After interviewing the Claimant, Ms Surish interviewed Mr Forsdyke, who made it plain that the decision to end the detached duty was not his decision. She did not however speak to or ask for any information from Mr Moore. She told the Tribunal that it was not necessary to interview Mr Moore because she had an email saying that it was a business decision to end the Claimant's detached duty, (which of course begs the question of why that business decision was made). It also led her to conclude that from the time that the Claimant went on maternity leave "there were no further discussions or decisions made regarding her role until May 2019" – overlooking the emails in February and March.

49. Ms Surish did not uphold the grievance. She acknowledges that there was a clear intention to let the Claimant return to her detached duty at Caxton House provided that the post was still available, but the post was not still there. Equally, Ms Surish did not uphold the Claimant's grievance about a lack of KIT days - seeming to have understood that the issue was about keeping in touch generally, rather than funding and organising specific KIT days

50. The Claimant appealed the outcome of her grievance on 24 October 2019 (192). By way of outcome the Claimant said she wanted the job back that she was doing at Caxton House or a job which better suited her skills. As a part of the appeal Mr Menzies sought information by email (but did not speak to) Mr Moore.

51. Mr Menzies partially upheld the Claimant's grievance. Mr Menzies did not uphold the Claimant's complaints about her change of role or the failure to communicate promotional exercises but did uphold the complaint about the lack of KIT days.

The law

52. Section 18 of the Equality Act 2010 makes it unlawful to discriminate against a woman by dismissing her or subjecting her to any other detriment. Section 18 Equality Act provides

:

> "(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.
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (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.
>
> (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
>
> (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
>
> (b) it is for a reason mentioned in subsection (3) or (4)"

53. The meaning of treating someone "unfavourably" as a concept is broadly analogous to the concepts of detriment found elsewhere in the Equality Act 2010.There is no need for a comparator. The test for unfavourable treatment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

54. In considering whether unfavourable treatment is because of pregnancy / maternity leave, we must consider whether the fact that the Claimant was pregnant or took maternity leave had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or subconscious. It need not be the main or sole reason, but must have a significant (i.e., not trivial) influence and so amount to an effective reason for the cause of the treatment.

55. Section 136 of the Equality Act sets out the relevant burden of proof. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which a Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258*,

56. It is not enough to show that the Claimant has been treated differently or unfavourably and is pregnant or took maternity leave. There must be some evidential basis on which it can be inferred that the Claimant's pregnancy or the fact that she took maternity leave is the cause of the unfavourable treatment. However direct evidence or an admission of discrimination is rare, and Tribunals often have to infer discrimination from all the material facts.

57. If the Claimant does not prove any primary facts, the claim fails at stage one. If, however, the claimant succeeds at stage one, the burden of proof shifts to the respondent. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory. Again, we can consider numerous factors when testing the reason put forward by the respondent for the treatment.

58. Regulation 18 of the Maternity and Parental Leave Regulations 1999 (the MPLR) provides that an employee who returns to work after a period of additional maternity leave is entitled to *return "to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances."* Regulation 18A provides that the employee's right to return is a right to return with her seniority, pension rights and similar rights as they would have been if she had not been absent and on terms and conditions not less favourable than those which would have applied if she had not been absent.

59. Regulation 2 of the MPLR defines the word "job" in this context as "*the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she is so employed."*

60. A failure to comply with the obligation to allow an employee to return to the same job may amount to discrimination under section 18 of the Equality Act. The issue remains as to why the Respondent failed to comply. Was it because of the Claimant's maternity leave? (Sefton Borough Council v Wainwright 2013 IRLR 90)

61. In Blundell v The Governing Body of St Andrews Catholic Primary School 2007 IRLR 652 the EAT confirmed that what the employee's job was, was a question of fact, and that the contract itself was not definitive. "*The Regulations aim, as we see it, to provide that a returnee comes back to work situation as near as possible to that she left. Continuity, avoiding dislocation, is the aim."* The degree to which the job must be exactly the same in terms of its nature, capacity and place (the relevant terms used in the definition of job in Regulation 2) are matters of judgment for the Tribunal.

Submissions

For the Claimant

62. Mr Toms submitted that the Claimant had a right to return to her role at Caxton House. It was a permanent role which she was covering on detached duty. He submitted that while the Claimant accepted that she was never guaranteed a return to the Caxton House role, there was a clear intention she would return to it unless it was not available for a nondiscriminatory reason. He submits that there was at least a prima facie case that the deletion of the role at Caxton House, so she could no longer return to it at the end of maternity leave, was an act of maternity discrimination and that the Respondent was not able to show that the unfavourable treatment was not in any way whatsoever influenced by her maternity leave. He points in particular to the fact that the Respondent had not called Mr. Moore and Ms Curran, the decision-makers, to give evidence.

63. He submits that if the role that the Claimant was covering was generally redundant, so that it was not practicable for her to return to that role, then, by virtue if Regulation 10 of the MAPLR, the Claimant was entitled to be offered a suitable alternative vacancy ahead of other candidates, and that the Claimant should have been slotted into the role that was in fact obtained by Ms Sadler. He submits that in deciding whether a role is suitable and appropriate in the circumstances, regard must be had to what the Claimant had been doing in practice- and this was an EO role in business support. He submits that following Blundell v The Governing Body of St Andrews Catholic Primary School 2007 IRLR 652 the Claimant's contract was not the only consideration and regard needed to be had to what the Claimant had been doing in practice, to avoid as little dislocation as possible to the Claimant when she returned after her maternity leave.

For the Respondent

64. As we have said, we had raised with the parties on the first morning of the hearing the fact that it appeared to the Tribunal that the relevant decision-makers, Mr Moore and Ms Curran, had not been called as witnesses.

65. We were surprised to find in the closing written submissions (and not before) that the Respondent now suggests that the Claimant had changed her case by challenging the integrity of the decision-making in 2019, and that what was previously posited as background information had been raised to the status of the operative complaint. Ms Idelbi submits that the decision made in February 2019 to end the Claimant's detached duty was not a complaint in her grounds of claim or in the issues; and that it was too late to throw that decision into the ring because (i) it was not pleaded and (ii) was out of time; and that the Respondent has been prejudiced in their ability to respond to the claim.

66. While we have our own criticisms of the list of issues it was always the case that the principal issue had been defined "as not being able to return to the role she was employed to do prior to her maternity leave", and that the role that the Claimant was referring to was her temporary EO role at Caxton House. It follows that in considering whether the Claimant was treated unfavourably in that respect it was for the Tribunal to consider the reason why. The Respondent acknowledges as much in their Response because the explanation which they give for that treatment is that "the team was restructured and there was no longer a requirement for the detached duty role." The decision to restructure the team had been taken by Mr Moore and Ms Curran.

67. No suggestion was made then that the Respondent did not accept that this was the central issue in the case or that, if it was, time points arose. (Until disclosure no doubt it may not have been clear to the Claimant how that decision had come about or who took it but that was always information available to the Respondent.) Nor do we accept Ms Idelbi's submission that the decision taken was "a corporate decision" rather than a decision that could be attributed to Mr Moore and Ms Curran.

68. She submits that if the Claimant's position that the decision to remove her EO post which prompted the end of her detached duty in June was an act of maternity discrimination then that act is out of time. The decision was taken – at the latest – by 4 June 2019 and the claim was not issued until 7 December 2019, over 6 months after the relevant act. (ACAS was notified on 10th October). She submits that the decision to restructure the team is a part of the background but not part of the actual claim.

69. If that submission was not accepted, the Respondent submits that the Claimant was employed to work as an AO and that her temporary postings on detached duty did not alter the nature of the work that she was employed to do. She had joined Mr Forsdyke's team on a temporary basis on detached duty and it was made clear to her that there was no guarantee that there would be a post available to her at the end of her detached duty. While the Claimant may have hoped to return Mr

Forsdyke's department, she never had an entitlement to return to it on detached duty.

70. While there was no direct evidence from Mr Moore the explanation that he gave to Mr Menzies in November was that he had decided that, since the team had successfully operated without the Claimant, there was no longer the requirement for the post (286). This was not "because of" the Claimant's maternity leave". At its highest this was unreasonable but unreasonable does not necessarily found an inference of discrimination. Further the fact that Mr Moore delayed deleting the EO post until the point that the Claimant's maternity pay would not be affected, suggested that the deletion of the post was not motivated by the Claimant's maternity leave.

71. The Claimant was entitled to return to the job in which she was employed – this was an AO role. In the alternative it was not reasonably practicable for the Claimant to return to her EO post in Private Pensions as that post had been deleted.

Conclusions

Issue 1a. Did the Respondent treat the Claimant unfavourably because she had exercised her right to ordinary and additional maternity leave in that she was not able to return to the job that she was employed to do before her maternity leave.

72. Regulation 18(4) of the MAPLR provides that an employee has a right to return from maternity leave "to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances." However, as acknowledged by Mr Toms it does not provide a free-standing right in the absence of dismissal.

73. This claim however is brought under Section 18(4) of the Equality Act 2010. This provides that it is unlawful for a person to treat a woman unfavourably because she is exercising or has exercised or sought to exercise, the right to ordinary or additional maternity leave. The issue is (i) whether she was treated unfavourably and (ii) why she was treated unfavourably- was she treated in that way because she exercised her right to maternity leave.

74. The reference to the job that she was employed to do seeks to link the unfavourable treatment with the right to return in Regulation 18. However, what the Claimant was complaining about in her claim form (and throughout the grievance) and as identified in the list of issues, was that she was treated unfavourably because of her maternity leave when she was not allowed to return to Caxton House– and to that extent the issue of whether or not the Claimant would be considered, for Regulation 18 purposes, to be returning to the role "she was employed to do before her maternity leave" is a relevant, but not a necessary, feature of that test.

75. Mr Toms submits that the Claimant's primary right under Regulation 18 of the MPLR was to return to the Caxton House role. We do not accept that. The Claimant was on detached duty, and she accepts that there was no guarantee that she would obtain this role on a permanent basis. In normal circumstances, the role would have been made available for open competition and the Claimant would have had a chance to apply, but it was not the role in which she was employed in September 2019. The Claimant did not become entitled to the role just because she had been on maternity leave. We do not read Regulation 18 as requiring a Respondent to place a woman who has been on maternity leave into a permanent role without having to go through the normal application processes, not does it prevent an employer from restructuring a team for a non discriminatory reason.

76. Was the reason that the Claimant could not return to Caxton House influenced by her taking of maternity leave? Whose decision was it? The decision was that of Mr Moore and Ms Curran.

77. The fact that the Claimant had been away from the role so long was the factual background to a determination by Mr Moore that the Claimant should return to Basildon and that the role was no longer needed. It may be that "but for" the fact that the Claimant had been on maternity leave Mr Moore may not have decided that the role was not required. However, it is well established that in determining the "reason why" an act was done, the "but for" test is not the correct one. What the Tribunal has to do is to examine the reason for the unfavourable treatment. If that reason was, consciously or subconsciously, significantly influenced by the fact that the Claimant had taken or was taking maternity leave then it is a discriminatory reason.

78. The following matters are relevant

    a. The role was permanent, and prior to the Claimant going on maternity leave there was a clear intention that the role would be advertised in due course.
    b. Mr Forsdyke gave evidence that, had he remained in post, it was likely that he would have started a recruitment process for the role shortly before the Claimant returned, for which the Claimant would have been able to apply. That had been their mutual expectation, but there were no guarantees.
    c. It was unusual that detached duties lasted longer than 24 months.
    d. It had been agreed that the Claimant's detached duty would, unless extended, come to an end at the end of the Claimant's maternity leave on 17th September 2019. Mr Forsdyke had anticipated, but not guaranteed, that the Claimant would return to Caxton House.
    e. Although unusual the Claimant could have remained on detached duty on her return to work, but agreement would need to have been reached with Basildon for that to happen

f. The Respondent was able to cope with the workload without an EO carrying out the work that the Claimant had previously been doing, although it was a stretch.
g. The deletion of the EO role is not documented and the process is opaque. On 22nd February (84) Mr Moore tells Mr Forsdyke that they "had agreed" that the detached duty would end on 20th March, but not why. His email asks "are we required to keep Aleksandra in the team until the end of her maternity leave? He asked if they could transfer the Claimant "back to ops" from the last date of her paid maternity leave. There is no reference in that email to the deletion of the EO role. There is no reference to the fact that the work has been adequately covered in her absence. The email is about an individual and not about the role.
h. The only information given to Mr Menzies is that it had been agreed that we "could exclude Aleksandra from our plans."
i. No information is given to the Claimant at the time that the EO role which she had been occupying on detached duty had been deleted from the Respondent's organisation.
j. Mr Forsdyke, the Claimant's line manager, was not involved in any decision to delete the EO post. He considered that the role was still required.

79. There are factors that point both ways. It is true that the Respondent had managed without anyone doing the work that the Claimant had been doing in Caxton House for a considerable period of time, and that it might have been reasonable to conclude the role was no longer needed. However, there is simply no contemporaneous evidence that this is what happened. On the other hand, the reference to "Aleksandra" rather than the deletion of the role, and the lack of transparency in the process, leads us to conclude that the decision to return the Claimant to her substantive role in June 2019 (or put another way the failure to allow her to return to the Caxton House role) was influenced by the fact that she had taken maternity leave.

<u>Did the Respondent treat the Claimant unfavourably because she had been on maternity leave by being required to return to a role that was less suitable?</u>

80. Mr Toms submits that if the Tribunal were to accept, (contrary to the Claimant's case), that the removal of the post was for a genuine business reason then the Respondent was under a duty to return her to another job which was suitable and appropriate. He submits that the job in Universal Credit was neither suitable nor appropriate.

81. We have found that the decision to remove EO post was tainted with discrimination. However, if it had not been then we consider that the Respondent would have been entitled to return the Claimant to her substantive grade. She had been on detached duty. This was a temporary post only, akin to "acting up". If she had not been successful in getting appointed to the permanent post it was appropriate to return her to her

substantive job as an AO in Basildon, in the same way as she had returned to her substantive role after her first period of detached duty. In that way she was in the same position as someone who was not a returnee. It was inevitable that, over the nearly 2 years that the Claimant had been absent, jobs would have changed. In any event we accept Ms Idelbi's submission that the Claimant was appointed to a generic role.

Did Ms Sadler treat the Claimant unfavourably because of her maternity leave when she referred to the Claimant joining the naughty corner and having to take a step back to continue forwards

82. As set out in our findings of fact above, we do not accept that Ms Sadler told the Claimant she would be joining the naughty corner. We also considered that the reference to having to take a step back to continue forwards was not unfavourable treatment because the Claimant had taken maternity leave, but was a comment made in a context in which Ms Sadler was aware that the Claimant viewed the role as a Case Manager in Universal Credit as a step back after she had been working in a higher grade for some time.

Did the Respondent treat the Claimant unfavourably because she had taken maternity leave by failing to keep her informed with changes to and decisions made regarding her role?

83. The Claimant was not informed about the deletion of the post or the reasons for it. Mr Forsdyke simply told her that her detached duty had come to an end and that he did not agree with it. The reason that Mr Forsdyke failed to keep her informed was that he himself had not known and was not involved. By June he himself was in another role. However, if Mr Moore had not explained matters to Mr Forsdyke then it was incumbent upon him to explain matters to the Claimant himself. The Respondent treated the Claimant unfavourably in not keeping her informed about what was happening to her role, and this was influenced by the fact that she was on maternity leave.

Did the Respondent (Ms Sadler) treat the Claimant unfavourably because she had taken maternity leave in failing to advise the Claimant of proposed promotion opportunities, specifically an internal vacancy in the Business Support team?

84. On the balance of probabilities, we conclude that Ms Sadler sent the email to the Claimant's work email account by mistake, and that this was not a deliberate action designed to prevent the Claimant from applying because she had been on maternity leave.

Sending the Claimant email to her work email address which the Claimant did not have access to

85. We only had evidence of one email which went to the Claimant's work email address rather than to her home address and as we say we have found, on the balance of probabilities that this was an error.

Time Limits

86. The Respondent submits that if the Claimant now challenges the integrity of the decision-making in February/March 2019 then her claim is out of time. If the reason why the Claimant could not return to Caxton House at the end of her maternity leave is in reality another decision, then the active complaint must be that decision. What happened at the end of her maternity leave was the result of a decision made in February/March and was a single act rather than an act with continuing consequences.

87. She also submits that as the Claimant had provided no evidence as to why she should not bring her claim sooner, the Tribunal could not conclude that it would be just and equitable to extend time. The Claimant did not know of the decision until June, but even that was some 6 months prior to the presentation of the ET1, and, even allowing for early conciliation, out of time.

88. We accept that that what is being challenged is in fact the earlier decision. The Claimant was not aware of the decision until June. She was on maternity leave and was not given any reason why her detached duty had come to an end. She made it clear to the Respondent that the decision was challenged, and she was unhappy with the change of role. She may have challenged the decision (wrongly in our view) under Regulation 18 of the MAPLR on the basis that she had a right to return to the Caxton House or another EO role, but challenge it she did. This is a complicated are of the law. The Respondent is not prejudiced by the slight delay in presenting her claim. As she was on maternity leave the practical effect of that decision did not take effect until 17th September 2019 when her maternity leave came to an end. We conclude it would be just and equitable to allow the claim to proceed out of time.

Remedy

89. We have found that the Claimant was subject to unfavourable treatment when Mr Moore took the decision to end the Claimant's detached duty early and without explanation. We have also found that that decision was influenced by the fact that the Claimant had taken maternity leave.

90. The tribunal will consider remedy issues at a hearing by CVP on 19th and 20th May 2022.

91. There is considerable uncertainty as to what would have happened had the Respondent not discriminated against the Claimant. We have made no finding that the Claimant would have obtained a permanent post at Caxton House had there been no unlawful discrimination, and there will be issues as to the loss which flows form that treatment as well as the level of the award for injury to feelings. The Claimant has happily now found a good and better paid job, and was out of work for only 10 months.

92. The parties are encouraged to seek to arrive at terms of settlement as to the appropriate remedy in advance of the remedy hearing and if they are successful the Tribunal should be notified at the earliest opportunity.

93. If that is not possible then

a. The parties should liaise to agree a list of issues to be determined at the remedy hearing, primary responsibility for its preparation being with the Respondent, so that a draft list of issues is sent to the Claimant for agreement on or before 8th April 2022. The agreed list of issues should be sent to the Tribunal no later than 12 May 2022.

b. The Claimant and any witnesses who will be called to give evidence for the Respondent should prepare written witness statements to be provided to the other party/exchanged no later than 28th April 2022.

c. The parties should liaise to agree a bundle of documents relevant for the remedy hearing. The Respondent will be responsible for collating it and sending an electronic version to the Tribunal no later than 12th May 2022

_____

Employment Judge Spencer
28th February 2022

JUDGMENT SENT TO THE PARTIES ON

28/02/2022.

FOR THE TRIBUNAL OFFICE

THE SCHEDULE

Maternity Discrimination (section 18 Equality Act 2010)

1) The Claimant alleges that she was subjected to the following acts:

   a) Not being able to return to the role she was employed to do before her maternity leave;

   b) Being required to return to a role that was less suitable;

   c) Reference being made by her new line manager Linda Sadler to her joining the "naughty corner" and "having to take a step back to continue forward";

   d) A failure by the Respondent to communicate and keep her informed with changes to and decisions made regarding her role;

   e) Failing to advise her of promotion opportunities, specifically an internal vacancy in the Business Support team, with a deadline of 30 September 2019;

   f) Losing her personnel file;

   g) Sending the Claimant emails to her work email address which the Claimant did not have access to.

2) In respect of allegation 1(e), did this fall within the protected period? The Respondent asserts that it did not given a return to work date of 19 September 2019.

3) In the case of each allegation, has the Claimant been subjected to unfavourable treatment or a detriment?

4) If so, was this because she exercised her right to ordinary and additional maternity leave? (Section 18 (4) Equality Act 2010);

5) If so, was this because she took, sought to take, or availed herself of the benefits of the benefits of ordinary and additional maternity leave? (Section 47C of the ERA 1996 and Regulation 19 MPL Regs 1999);

Breach of the Maternity and Parental Leave Regulations 1999

Regulation 18

6) Can a Regulation 18 claim be brought as a freestanding claim?
7) What was the Claimant's substantive / contractual role immediately prior to her commencing maternity leave?
8) Has the Respondent allowed the Claimant to return to that role?
9) Was it reasonably practicable for the Respondent to return the Claimant to that role?
10) If it was not reasonably practicable to do so, did the Respondent offer another job to the Claimant which was both suitable for her and appropriate for her to do in the circumstances?

Regulation 10

11) Does the tribunal have jurisdiction to determine a freestanding complaint of a breach of Regulation 10, particularly where there has been no dismissal?
12) Did a redundancy situation arise in that there was a reduced requirement for employees to carry out work of a particular kind?
13) Was it not reasonably practicable, by reason of redundancy for the Respondent to continue to employ the Claimant under her existing contract of employment?
14) Was there a suitable alternative vacancy?
15) If so, was the Claimant offered it?