

EMPLOYMENT TRIBUNALS



Claimant

Mrs. M. Holcombe

Heard at: London Central

Before: Employment Judge Mason
Members: Ms. S. Samek
Mr. B. Tyson

Respondent

Sunfly Music Group Limited

On: 23 October 2018

V

Representation

For the Claimant: In person.

For the Respondent: Mr. N. Shah, solicitor.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim that she was discriminated against because of pregnancy or maternity (section 18(4) Equality Act 2010) fails and is dismissed.
2. The Claimant's claim that she was automatically unfairly dismissed because she sought to assert her statutory rights (section 104(4) Employment Rights Act 1996) fails and is dismissed.
3. The Claimant's claim that she was subjected to detriment for a prescribed reason (s47 Employment Rights Act 1996) fails and is dismissed

The Remedy Hearing provisionally listed to be heard on 16 January 2019 is vacated.

REASONS

Background

1. In this case Mrs. Holcombe (“the Claimant”) claims that the Respondent discriminated against her on grounds of pregnancy or maternity. The Claimant was not pregnant at any time during her employment with the Respondent but made enquiries about her employment status and rights (holiday pay, sick pay and maternity pay) to the General Manager, Mr. Simmons, and the Respondent’s (third-party/external) bookkeeper (“MEA”). She says MEA appears to have misinterpreted her enquiries as an assertion that she was pregnant and copied to the owner/Managing Director, Mr. West, at least one email to that effect. She claims that Mr. West, working on the mistaken assumption that she was pregnant, first reduced her hours and then dismissed her. Having been given leave to amend her claim by EJ Norris on 28 August 2018, in the alternative, she says that she was dismissed for making enquiries about her rights. The Respondent denies her claims and says her hours were reduced and her employment was terminated because of a downturn in business which meant it could not afford to continue to employ her and others.
2. The Claimant initially also brought claims in these proceedings for holiday and sick pay but these were no longer issues at the final hearing:
 - 2.1 At a Preliminary Hearing on 22 February 2018, EJ Wisby held that the Claimant was a worker (section 230(3) Employment Rights Act 1996 (“ERA”) and regulation 2(1) of the Working Time Regulations 1998) and an employee (for the purposes of the Equality Act 2010 (“EqA”). She also found that:
 - (i) the complaint of failure to pay sick pay was not well founded and dismissed that claim; and
 - (ii) the complaint of failure to pay holiday pay was well founded and that remedy would be determined at a Remedy Hearing.
 - 2.3 On 28 August 2018, EJ Norris ordered the Respondent to pay the Claimant the agreed sum of £1,719.36 (gross) in respect of holiday pay.
3. At the Hearing before us, the Claimant mentioned in her witness statement [C w/s para. 32] that she is claiming 1 month’s wages in lieu of notice. Mr. Shah objected to this being considered and having checked her ET1, it was agreed that this was not claimed; it was not identified as an issued by EJ Norris and she has not at any time been given permission to amend her claim to include this claim. We therefore concluded we had no jurisdiction to consider this.

The issues

4. The issues to be determined by this Tribunal, as identified and agreed by EJ Norris on 28 August 2018 (para. 16) are as follows:
 - 4.1 Can the Claimant rely on section 18(4) EqA i.e. can she be said to have sought to exercise the right to maternity leave when she was not, at the relevant time, pregnant?
 - 4.2 In the alternative, does section 18(4) EqA include protection from discrimination based on someone’s perception of pregnancy?

- 4.3 If so, did Mr. West perceive the Claimant to be pregnant, and if so, did he treat her unfavourably by reducing her hours and eventually terminating her employment because of that perception?
- 4.4 In this case, the burden of proof starts with requiring the Claimant to show facts from which the Tribunal could conclude that there has been a contravention of the EqA and if she does, the Tribunal shall so conclude, unless the Respondent proves that it did not discriminate against her.
- 4.5 In the alternative, did the Respondent dismiss the Claimant because she sought to assert her statutory rights in general and in relation specifically to holiday pay (section 104(4)(d) ERA)?
- 4.6 The burden of proof is on the Claimant to show that the reason for her dismissal was her assertion of statutory rights, because she has less than two years' service.
- 4.7 if the Claimant is unable to bring a claim under section 18(4) EqA, and again in the alternative, has the Claimant proved that the reason for the reduction in her hours and/or her dismissal, contrary to section 47C ERA was that Mr. West thought she was pregnant?

Procedure at the Hearing

5. It was agreed with the representatives that the Tribunal would hear evidence and determine liability and remedy would be determined at a separate hearing if the Claimant was successful. We were provided with two bundles of documents; the Respondent provided a bundle which we will refer to as bundle R and the Claimant provided a bundle which we will refer to as bundle C; any reference in this Judgment to [x] refers to page [x] in either bundle R or C; many of the documents appear in both bundles. We have only considered documents which are cross-referred to in the witness statements or which we were taken to at the Hearing and made it clear we would disregard without prejudice correspondence in the Claimant's bundle [C37-40]. Both parties provided insufficient copies and Mr. Shah arranged further copies during an adjournment prior to hearing any evidence.
6. The Tribunal heard from the Claimant and, on behalf of the Respondent, from Mr. Colin Simmons, General Manager; they adopted as their evidence-in-chief their respective witness statements. The Tribunal heard submissions from Mr. Shah and the Claimant and reserved its decision, having agreed with the representatives a provisional date for a Remedy Hearing. The Tribunal then met in chambers to make a decision which we now give with reasons.

Findings of fact

7. Having considered all the evidence we make the following findings of fact having reminded ourselves that the standard of proof is the balance of probabilities. We have adopted and woven in the relevant findings of fact made by EJ Wisby ("EJW") in her Judgment in which she found that the Claimant was a worker and an employee as that Judgment has not been challenged. By agreement with the parties, we have

referred to individuals only by their initials, with the exception of Mr. Simmons and Mr. West.

8. Mr. John West is the sole director and shareholder of the Respondent company. Live Music Quotes (“LMQ”) and Sunfly Karaoke are trading divisions. The Respondent sells content on iTunes and other stores such as Spotify, Google Play, Amazon, Microsoft and Ebay and their own website. In 2016 they launched a new streaming service. They also sell hardware. Sunfly karaoke receives royalties from karaoke bars across the world where their songs are used and receives licensing fees from media outlets including TV production companies.
9. Following an interview with Mr. Simmons, the Claimant commenced work for the Respondent on 26 April 2016. There was no set end date to that work; the Respondent did not know what its business requirements going forward would be in relation to the volume of work that needed to be undertaken [EJW para. 36].
10. The Claimant initially worked two days per week for the Respondent as a part-time freelancer. After the interview, the Claimant emailed Mr. Simmons on 22 April 2016 to ask if he would mind sending over the remuneration package he had in mind [R19]. It is not in dispute that no written contract was put in place and there was no discussion about benefits such as annual leave or sick pay at that time and no terms were agreed about those matters [EJW para. 37]. Shortly after the Claimant commenced work, the way in which she was paid changed from a day rate of £100 per day to an hourly rate of £12.50 per hour [EJW para. 41].
11. She worked in two different sections of the business: Live Music Quotes (“LMQ”) and Sunfly Karoke. The Claimant undertook roles such as graphic design, studio editing, content uploading, and business development; she was involved in the recruitment of new staff for the business alongside the general manager and others [EJW para. 42]. She was given the job title of “Digital Music Manager” and “Head of DJ Services” [R29] which the Respondent explains was to help with interactions with clients and third parties [EJW para. 48]. The Claimant gives further details of her roles and duties in her witness statement [C w/s paras. 5 and 6] and says she was “*regarded as an important member of staff with several vital roles that facilitated the operation of 2 companies*”. She was given some training in relation to matters such as specialist software. [EJW para. 40].
12. The Respondent’s work levels increased and in **April 2017** it was agreed that the Claimant would increase her working hours to four days a week [EJW para. 51]. Around April/May 2017, discussions took place between the Claimant and Mr. Simmons about the possibility of her converting to a “permanent” PAYE position. Mr. Simmons was “*hopeful*” that the Respondent could put her on the payroll [CS w/s para. 7]. The says Mr. Simmons “*offered*” her “*to go onto PAYE as a PT/permanent member of staff*” [C w/s para. 8] but we accept Mr. Simmons evidence that whilst he was hoping he could make such an offer, he did not in fact do so.

13. On **16 May 2017**, the Claimant messaged Mr. Simmons to say: *“All I’m after is just clarity on the new terms as you said I would get the same benefits as everyone else like holidays etc.”* [R29]. Mr. Simmons responded *“Yep” “Will do it tomorrow”* [R29]. In her witness statement, the Claimant says (and we accept) that around this time she *“started to research and enquire”* into her holiday entitlement with Mr. Simmons and discussed with him *“findings from GOV.uk and other websites about freelancer/self-employed employment rights”* [C w/s para 10].
14. On **14/15 June 2017**, the following emails were exchanged:
 - 14.1 **14 June 2017** at 18.41: Mr. Simmons emailed the Respondent’s bookkeeper (“MEA”) of Chowdhary and Co the Respondent’s chartered accountants (cc Mr. West) [R32 and C7]. The subject line in the email was “Statutory Maternity pay and leave” and stated:

“We need some solid advice as to whether a freelancer – i.e. [the Claimant], who works for Sunfly/LQM for a fixed 32 hours per week and exclusively, is entitled to SMP and workplace pension.
“In order to retain her talent we are looking to offer her the same benefits as the FT employees receive such as 20 days holiday and SSP sick pay but not put her on the payroll as a full employee right now.
“She continues to pay her own tax and NI.
There does not appear to be any clear guidance on the government’s website <https://www.gov.uk/employers-paternity-pay-leave>
Can you offer us any advice or do I need to speak to an employment lawyer?”
 - 14.2 **14 June 2017** at 19.35: Mr. West emailed Mr. Simmons [R31 and C6] stating:

“I don’t think we are in a position to offer her the benefits of a full time employee, I understand she was going to be doing some extra hours whilst we were blitzing the catalogue over 3 months, but to make it 32 hours on a permanent basis is something I cannot commit to as I mentioned when we discussed her extra hours, especially as we now have the WCM [Web Content Management] issues”.
 - 14.3 **15 June 2017** at 12.59: MEA emailed Mr. Simmons (cc Mr. West) [R33 and C8]:

“[The Claimant] is not eligible for SMP through Sunfly, even having been employed for around 3 months. She can however apply directly to WPD using the following link: <https://www.gov.uk/maternity-allowance/how-to-claim>.
Attached is a document with further details on the SMP and eligibility.
Also because she is self-employed, she is not entitled to holiday pay, pension, or SSP either”.
15. The Tribunal accepts that Mr. Simmons agreed that the Claimant was to be paid for the May bank holidays in 2017 as a gesture of goodwill due to the length of time it was taking to confirm if she could have a “permanent PAYE” role; Mr. Simmons thought that he had also authorised payment for four days’ leave in August 2017 on the same basis since he knew that the Claimant had booked herself a holiday in August in the expectation that that change would happen [EJW para. 56].
16. On **20 July 2017**, the Claimant *“applied for early conciliation with ACAS to attempt mediation”* [C w/s para. 21]. The Claimant says [C w/s para. 18] that she was in *“constant contact”* with Mr. Simmons about *“getting clarity”* on her employment benefits and mentioned ACAS early conciliation as a way of getting impartial advice. At the Hearing in verbal evidence she said that she wanted to get advice about her status as a worker. The Claimant did not at any time indicate to the Respondent that she wanted to exercise her maternity rights; she confirmed this in her verbal evidence. She said she was however asking for clarity as evidenced by her skype conversation with Mr. Simmons [R42] but this was in the context of enquiring about

her employee benefits as a whole. Mr Simmons acknowledged in oral evidence that he had several conversations with the Claimant about her employment benefits.

17. In **July 2017**, the Claimant exchanged a number of emails with the bookkeeper, MEA:

17.1 On **20 July 2017** the Claimant emailed MEA [R41-44] to enquire about her entitlement to benefits. The email begins:

"It's never that clear but from what I've read I've [sic] take it that as a self-employed "worker" I'm entitled to most of the same employment rights such as holiday pay and sick pay". The Claimant then cut and pasted into her email some information downloaded from the ACAS website which explains the difference between a worker, a self-employed person and sets out certain employment rights workers may be entitled to including paid holiday statutory sick pay and statutory maternity pay and leave.

The email concludes:

"If there's still some confusion I think it would be best to call up HMRC, GOV.UK or ACAS, or whoever it is, to get absolute clarity.

Thanks for looking into this for me.

I had a meeting with [Mr. Simmons] last week and couldn't come to an arrangement so I made an early enquiry with ACAS".

The Claimant chased MEA for a response on **25 July 2017** [R41 and C14] and he replied the same day [R40-41]:

"I did have a look on the link; thank you for that. But I am unable to decide in which category you are if you can kindly please check with [Mr. Simmons] or [Mr. West]."

17.2 On **27 July 2017**, the Claimant, having done more online research, emailed MEA again [R39-40 and C13-14] stating:

"That's a dead end really. I have had numerous conversations about this with [Mr. Simmons] and he said [Mr. West] is convinced I am not entitled to benefit rights. I'm not entirely sure he has seen the information I have sent him as its clear to me that I am regarded as a "freelance worker", based on the info I sent you, and the conversation I had myself with ACAS.

Is there no way you can make enquiries with ACAS on my behalf and speak to [Mr. Simmons] about the info you receive? I have called them myself already."

MEA replied on **28 July 2017** [R39 and C12-13]:

"As I tried to explain to you during our last minute chat last time, to be entitled for statutory payments such as holiday pay, a person needs to be paid through PAYE and not through invoicing, be it an employee or worker i.e. their wages processed through the payroll and issued with a payslip.

But I can't advise whether you are an employee, worker or self-employed unfortunately."

On **1 August 2017**, the Claimant replied [R38 and C12]:

"Ok from the information I've read and supplied it does seem I can be self-employed for tax purposes but classed as a worker for employment rights"

17.3 At the Hearing the Claimant accepted that Mr. Simmons and Mr. West were not copied in on these emails and we find that they did not in fact receive them until 6 January 2018, after the Claimant's employment had ended [C10]

18. In **July 2017** the Claimant's hours were reduced from four days a week to two days a week and that she was no longer allowed to work from home. The Claimant says two other members of staff were still allowed to work from home [C w/s para 19] but she does not identify the members of staff and we are unable to make a finding that this was the case.

19. The Claimant says there was no discussion on “*the success/decline*” of either of the companies she was working for. We accept this.
20. On **18 September 2017**, the Claimant was dismissed with immediate effect on the basis the requirements for the work carried out by the Claimant had diminished. We accept Mr. Simmons’ evidence that the Respondent took the view that it no longer required someone to upload new releases to the digital music stores as only previously uploaded audio was selling and sales in the sector in which the Claimant was employed (digital music management/sales) were falling. We accept Mr. Simmons’s evidence for the following reasons:

20.1 Mr. Simmons says [CS w/s para. 11] that by April 2017, it was clear the LMQ business was failing and sales in the digital music stores were decreasing. He says this was “*despite a “short sharp shock” effort to stimulate sales in the digital music stores by allocating extra resources in the form of extra part-time staff and interns helping over an intensive 3-month period from May to July*”. He says this effort began “*at the beginning of May and the quantity of ringtone products submitted increased to 1600 over those 3 months*”. Mr. Simmons says the Claimant was assisted in trying to increase sales by DB (at that time a fulltime employee), an intern CT and freelancers DU and EM.

The Claimant on the other hand says that in June 2017, she facilitated the recruitment of 3 new members of staff to help with the increase in the workload of LMQ and Sunfly [C w/s para. 12] [R30 and C5] and that her duties for LMQ increased as one member of staff (SG) left to work abroad and she was then “*in charge of web development, hiring DJs, business development, training/managing staff, amongst other roles previously mentioned for Sunfly*” [C w/s para 13].

The Claimant’s position is not inconsistent with Mr. Simmons’ evidence that there was a “short sharp shock” effort around this time to try and stimulate sales and we accept Mr. Simmons’ evidence that the Claimant’s work load only increased temporarily as a result of this short intensive burst of effort to stimulate sales.

20.2 R46 is a document created by Mr. Simmons and summarises 20-30 pages of information he obtained from iTunes connect. This shows in graph form the Respondent’s average weekly and monthly iTune sales for the years 2015 to 2017. It shows that daily sales fell from 2116 units on 1 January 2015, to 1443 units on 26 April 2016 (when the Claimant’s employment commenced) and fell further to 616 units by 18 April 2017.

The Claimant points out that the Respondent’s overall turnover has increased since 2015 and relies on a Credit Report [C32-34] and questions the veracity of Mr. Simmons’ report [R46] and asks us to compare it with a report she has obtained unconnected to the Respondent’s business for the purposes of comparison [C43]. However, we accept that R46 is a summary and therefore the content is not presented in the same manner as C43; in any event, this is insufficient evidence to justify a finding that the figures produced by Mr. Simmons are false. Whilst we accept that the Respondent’s overall turnover was increasing this is not inconsistent with the Respondent’s position that the Respondent’s requirements for the particular work she was employed to do had diminished given that the Respondent’s business included several other areas of business which remained buoyant.

- 20.3 We accept Mr. Simmons' evidence that LMQ ceased trading by Christmas 2017:
- (i) The Claimant says that after her dismissal, the Respondent "*started training a new member of staff (role: adding text for karaoke videos)*" [C w/s para. 23]. However, she does not identify this new member of staff and we are unable to conclude that this was in fact the case. We accept Mr. Simmons' evidence that Mr. West's daughter came into the office on a few occasions as an unpaid intern and did a variety of unpaid tasks such as texting karaoke videos [CS w/s para. 16] [R35].
 - (ii) The Claimant says LQM is still running as a business; however, she acknowledged in verbal evidence that she did not know if LQM was still operating at the end of 2017.
 - (iii) The Claimant says another member of staff, EM, who had been hired at the same time as the Claimant, and had "*far less experience*" was retained by the Respondent [C w/s para 24]. She relies on [C35] a facebook post by LMQ published by EM on August 2018; we accept Mr. Simmons' evidence that EM was "let go" 2 months later (November 2017) and his explanation that the LQM website is "down" but the facebook page is still "live" and that EM accidentally published in error in August 2018.
 - (iv) The Claimant says that DB is still engaged by the Respondent as a freelancer [C w/s para. 31] and relies on a message from DB to her dated 25 September 2018 [C41] in which DB states he is "*technically still working*" for the Respondent on a "*freelance basis*" as he still gets "*good revenue from ... ringtone sales*". However, C41 is only an extract of the full message and therefore the Tribunal places little weight on it. In any event, we accept Mr. Simmons' evidence that DB was made redundant in October 2017 [CS w/s para. 15] and has not in fact been retained in his previous capacity but the Respondent splits with him 50/50 revenue from his ringtone sales.
 - (v) She says that during this time a large part of her role "*was also managing the new website production for LMQ, which was still in launch stage*" [C w/s para. 22] and in oral evidence said that she was still working on this when she left. At the Hearing, Mr. Simmons said the website was a "nightmare" and that accepted that the Claimant was involved with the website at the time of her dismissal but this is not an indication that the LMQ business had not declined and we have accepted his evidence that the website was subsequently taken down.
21. We therefore accept Mr. Simmons' evidence that the reduction in the Claimant's hours and her dismissal was "*part of general cutbacks in staffing which saw several other members of staff leave*" [CS w/s para/ 14] and due to the slump in digital sales.
22. In October 2017, after termination of her employment, the Claimant fell pregnant and her child was born in July 2018.

The Law

23. Section 13 Equality Act 2010:

"13Direct 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.

24. **Section 18 Equality Act 2010:**

“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.

(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)”

25. **Section 104 ERA 1996:**

“104 Assertion of statutory right.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b) the right conferred by section 86 of this Act,

(c) the rights conferred by sections 68, 86, 145A, 145B, 146, 168, 168A, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off)

(d) the rights conferred by the Working Time Regulations 1998, the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018, the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003, the Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008, and

(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

(5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3)).”

26. **Section 47C ERA:**

“47C Leave for family and domestic reasons.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—

(a) pregnancy, childbirth or maternity,

(aa) [N/A]

(ab) [N/A],

(b) ordinary, compulsory or additional maternity leave,

(ba) [N/A],

(bb) [N/A]

(c) [N/A]

(ca) [N/A]

(d) [N/A].

(3)-(7) [N/A].”

Conclusions

27. Applying the relevant law to the findings of fact to determine the issues, we have concluded that all the Claimant’s claims fail for the following reasons.
28. It is not in dispute that the Claimant was not at any time pregnant during the course of her employment with the Respondent. We also conclude that the Claimant has not shown sufficient facts from which the Tribunal could conclude that the Respondent perceived that she was pregnant. The focus of the Claimant’s research, communications with Mr. Simmons and MEA and contact with ACAS was only to clarify her employment status and her right to benefits in general:
- 28.1 In May 2017 [R29] in her message to Mr. Simmons she sought clarity on her benefits “like holidays etc” and says she discussed with him “findings from GOV.uk and other websites about freelancer/self-employed employment rights”.
- 28.2 Whilst the subject line of Mr. Simmons’ email to MEA (cc Mr. West) dated 14 June 2017 [R32] was “Statutory Maternity pay and leave”, it is apparent from the content of the email that Mr. Simmons was seeking clarification in general as to the Claimant’s right to benefits, including SMP, workplace pension, holiday pay and sick pay.
- 28.3 There is no suggestion in Mr. West’s email in response [R31] that it was his understanding or assumption that the Claimant was pregnant and his focus was on the viability of offering her a permanent position.
- 28.4 MEA’s email of 15 June 2017 [R33] (copied to Mr. West) sets out his understanding of her rights to SMP but also deals with holiday pay, pension and sick pay.
- 28.5 The Claimant’s own evidence is that she contacted ACAS in July 2017 to seek clarity on her employment benefits in general.
- 28.6 The Claimant exchanged further emails with MEA in July 2017 but again this was to clarify her right to employment rights “such as holiday pay and sick pay” and the focus of that exchange was very much on establishing her employment status in general. In any event, Mr. Simmons and Mr. West were not copied in on these emails and we

find that they did not in fact receive them until after the Claimant's employment had ended.

29. It follows that we must conclude that the reduction in the Claimant's hours and her dismissal was not because of a perception on the Respondent's part that she was pregnant. The Respondent has persuaded us that these decisions were based on the performance of the areas of the business in which the Claimant was engaged (paras. 20 and 21 above). It is regrettable that the Respondent did not share its concerns regarding the performance of the business with the Claimant and this has understandably led to suspicion on her part.
30. The Claimant's claim under section 18(4) of the EqA must fail for the following reasons:
 - 30.1 The "protected characteristic" relied on by the Claimant is "pregnancy and maternity".
 - 30.2 It is accepted that she was not at any time during the course of her employment actually pregnant and did not take maternity leave. This means it was not possible for the Respondent to discriminate against her during the "protected period" which began with the start of her pregnancy (18(6)) and rules out discrimination contrary to 18(2) and 18(3).
 - 30.3 The Claimant was not pregnant at the time she made enquiries about her rights (including maternity leave/pay); she did not at any time *exercise* her right to maternity leave and did not *seek to exercise* her right.
 - 30.4 We are also satisfied that section 18(4) does not include protection from discrimination based on someone's perception of pregnancy. The wording of 18(4) is unambiguous and is predicated on an employee exercising or seeking to exercise her right to maternity leave and we have concluded (above) that the Claimant did not do so. In any event we have concluded (para. 28 above) that the Respondent did not perceive that the Claimant was pregnant.
31. The Claimant's claim under section 104 ERA 1996 that her dismissal was automatically unfair must also fail for the following reasons:
 - 31.1 As the Claimant was not dismissed for bringing proceedings to enforce a relevant statutory right (s104(1)(a)), she must therefore show that she *alleged* that the Respondent infringed a relevant statutory right (s104(1)(b)).
 - 31.2 As she lacks the requisite continuous service to claim "ordinary" unfair dismissal; (i.e. two years) she has the burden of proving, on the balance of probabilities that the reason for dismissal was an automatically unfair one.
 - 31.3 As rehearsed above (para. 28) the thrust of the Claimant's communications was to seek clarity as to her employment status and her rights; she did not at any point allege that any statutory right had in fact been infringed. We accept that she made several attempts to clarify her rights and to seek information but this does not amount to an assertion. We cannot identify any occasion on which she alleged that the Respondent had infringed her statutory rights.
 - 31.4 In any event, we have found (paras. 20 and 21 above) that her employment was terminated because of the decline in performance in the areas of the business in

which the Claimant was engaged and therefore her enquiries about her rights were not the reason or principal reason for her dismissal

32. The Claimant's claim under section 47C ERA fails as we have concluded that the Claimant was not subjected to any detriment for a prescribed reason i.e. one which relates to pregnancy, childbirth, maternity or maternity leave. The detriments relied on by the Claimant are the reduction in her hours in July 2017 and her dismissal and we have found that that this was because of the decline in performance in the areas of the business in which the Claimant was engaged.
33. In summary, the Tribunal's unanimous conclusions are that all the Claimant's claims fail and are dismissed. In view of this, the Remedy Hearing provisionally listed for 16 January 2019 will be cancelled.
34. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 4 all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 7 to 22; statement of the applicable law is at paragraphs 23 to 26; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 27-33.

Employment Judge Mason
on 6 November 2018

Judgment sent to Parties on
7 November 2018