Case Number: 3202118/2018

STO

EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Camara**

Respondent: **East London NHS Foundation Trust**

Heard at: **East London Hearing Centre** **On: 29-31 October 2019**

Before: **Employment Judge O'Brien**
Mrs Berry
Mr T Burrows

Representation:

Claimant: In person

Respondent: Ms B Criddle of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of unfair dismissal on the grounds of pregnancy fails and is dismissed.**

2. **The claimant's complaint of discrimination on the grounds of pregnancy succeeds.**

3. **The claimant's complaints of direct discrimination on the grounds of race and/or religion and of harassment related to race and/or religion are dismissed upon withdrawal under rule 52 of the Employment Tribunals Rules of Procedure 2013 following their withdrawal under rule 51.**

REASONS

1 On 4 October 2018, the claimant brought complaints of discrimination and harassment on the grounds of pregnancy, race and religion, and unfair dismissal by reason of pregnancy. The respondent resisted all of the complaints in an ET3 submitted on 6 December 2018.

ISSUES

2 Consequential to a preliminary hearing before Employment Judge Hyde on 17 January 2019, the parties agreed a list of issues to be determined at the final hearing. However, on the first morning of the hearing before us, the claimant withdrew her complaints of discrimination and harassment on the grounds of race and religion, and we dismiss them pursuant to under rule 52 of the Employment Tribunals Rules of Procedure 2013. Furthermore, Ms Criddle confirmed that the respondent would not be relying on the statutory defence to any Equality Act complaints. The remaining issues therefore are set out below.

Automatically Unfair Dismissal:

3 Was the claimant an employee within the meaning of s230 of the Employment Rights Act 1996?

4 If so, did the respondent dismiss the claimant?

5 Was the claimant's pregnancy the reason or principal reason for her dismissal?

Pregnancy Discrimination

6 Did the respondent treat the claimant unfavourably because of her pregnancy, specifically by:

6.1 Paulette Douglas-Obobi saying the following things to the claimant, after the claimant advised Ms Douglas-Obobi of her pregnancy:

6.1.1 On 26 April 2018, 'Did you plan this?'

6.1.2 On 26 April 2018, 'Is the pay going to be coming out of my budget?'

6.2 On 24 July 2018, following the claimant's complaint to HR, Ms Douglas-Obobi putting the claimant under unnecessary pressure by:

6.2.1 Asking the claimant to attend an admin meeting.

6.2.2 Giving her additional work and an unrealistic deadline of 26 July 2018 by which to complete a piece of work in relations to a spreadsheet despite knowing that the claimant would only have a day and a half to complete this work due to an ante-natal appointment at 2:00pm on 26 July 2018.

6.3 Failing to carry out a risk assessment for expectant mothers between 26 April 2018 (when the claimant notified the respondent of her pregnancy) and 24 July 2018 (when the risk assessment was carried out) following the claimant submitting a grievance.

6.4 Deciding to end the claimant's assignment (notified to the claimant on 12 July 2018).

Harassment

7 In contravention of s26 of the Equality Act 2010, did the respondent engage in unwanted conduct on 24 July 2018, following the claimant's complaint to HR, by:

7.1 Ms Douglas-Obobi requiring the claimant to attend an admin meeting.

7.2 Ms Douglas-Obobi putting the claimant under unnecessary pressure by giving her additional work and an unrealistic deadline of 26 July 2018 by which to complete a piece of work in relations to a spreadsheet despite knowing that the claimant would only have a day and a half to complete this work due to an ante-natal appointment at 2:00pm on 26 July 2018.

8 If and insofar as any of the above conduct is made out, did it relate to the claimant's protected characteristic of sex (by virtue of relating to her pregnancy)?

9 If yes, did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?

10 In considering whether the conduct had that effect, the Tribunal must take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have the effect.

Time Bar for Discrimination Claims

11 Have the claims of discrimination been presented in time? This will involve consideration of the following questions:

11.1 Do the complaints relate to single acts or a continuing act/course of conduct? If the latter, what was the date of the last continuing act?

11.2 Were the claims presented within 3 months of the date of the last continuing act (plus any period of extension pursuant to the ACAS pre-conciliation process)?

11.3 If the claim(s) was not presented in time, is it just and equitable for the Employment Tribunal to extend time to hear those claims.

EVIDENCE, SUBMISSIONS AND APPLICATIONS

12 Over the course of this hearing, the Tribunal took evidence on the basis of written witness statements. The claimant gave oral evidence on his own behalf. She relied on statements from a number of witnesses who were not called to give live evidence: Madi Hije (the claimant's husband); Oumie Camara (her sister); Allison Wallwork (a former CHC case co-ordinator); and Indiana Oguike (CHC case co-ordinator). To the extent that these witnesses gave contested evidence on material matters, we were unable to place as much weight on that evidence as we would have been able to do if they had been tendered for cross-examination. As it was, the witnesses were unable to give direct evidence on material disputes of fact.

13 On behalf of the respondent we heard oral evidence from: Paulette Douglas-Obobi (CHC Team Manager); Evelyn Ramkissoon (Deputy Team Manager); Chenelle

Charles (CHC case co-ordinator); Paulette Edmund (CHC team administrator); Helen Green (Deputy Director of Community Health Services) and Michael McGee (Service Director for Community Health Services).

14 The Tribunal was also provided with a bundle of documents from the respondent comprising a little over 1,000 pages. The claimant also provided her own bundle of approximately 560 pages. However, most of the relevant pages were already contained in the respondent's bundle and the respondent very kindly provided a list of cross-references between the bundles to assist the claimant and us.

15 The parties each made oral submissions, the respondent on the basis of a helpful skeleton argument, all of which we took into account when determining the issues before us.

FINDINGS OF FACT

16 In order to determine the issues as agreed between the parties, we made following findings of fact, resolving any disputes on the balance of probabilities.

17 The claimant worked for the respondent as a Band 4 administrator on the Continuing Healthcare (CHC) Team from 24 January to 16 August 2018. She was a bank employee whose assignment to the team had been initially been for the period from 24 January to 27 April 2018; however, for reasons set out below, her assignment continued thereafter until termination, 4 weeks' notice of which was given on 18 July 2018.

18 CHC is a team of specialist nurses who assess patients for eligibility for continuing healthcare funding. This is a clinical function requiring administrative support.

19 On 25 August 2017, Paulette Douglas-Obobi was promoted and appointed as CHC Team Manager (a Band 8A position). Her deputy managers were Evelyn Ramkissoon and Jackie Onacha (both Band 7s). Ms Douglas-Obobi's promotion had left a Band 7 vacancy in the team; however, Ms Douglas-Obobi and her immediate manager, Julia Callus, decided that two Band 7s were sufficient and that there was no need at the time to recruit a replacement.

20 Prior to Ms Douglas-Obobi's promotion, the team had not been managed effectively and key performance indicators were not being met. As Paulette Edmund, the permanent Band 4 administrator, was new to the role, a backlog of administrative work had built up. It was, therefore, decided to recruit some temporary administrative help through the Bank. It was the respondent's unchallenged evidence that the post was to be funded by the Band 7 vacancy.

21 Initially, Abdul Hassan, an administrator who had previously worked for the team on a permanent full-time basis, returned 3 days a week on a temporary basis in September 2017, prior to starting a new role in February 2018. However, Mr Hassan became unwell in October 2017 and was unwell for much of his intended period of engagement.

22 Consequently, the administrative backlog persisted and, in January 2018, the decision was taken to approach the bank for a temporary Band 4 administrator. Two individuals were interviewed, including the claimant. She was the unsuccessful candidate; however, the team's first choice left for family reasons after only a very short period of

time, and the team approached the claimant. It was agreed to that she would take the role on the basis that she would work 3 days a week.

23 The claimant understood that there would be a trial period for her to demonstrate her suitability, although we are satisfied on balance that no particular duration was specified. Ms Ramkissoon, acting manager at time, spoke to Ms Edmund in March 2018 to find out whether the claimant was performing satisfactorily and was told that everything was 'OK', and so was satisfied that the claimant had passed her trial and could continue with the assignment. We are satisfied that Ms Ramkissoon told the claimant at or around that time that it was 'fine for her to continue working'.

24 The first 6 days of the claimant's employment comprised a handover from Mr Hassan. We accept that, during that time, the claimant and Mr Hassan has discussions from which she came to believe that there was a distinct possibility that she could secure permanent employment if she performed well in the role. Of course, Mr Hassan was in no position to make any promises on behalf of the respondent.

25 It was Ms Edmund's practice to keep a daily to-do-list, which after C's appointment they discussed each morning. For the first 2-3 weeks of the claimant's employment, Ms Edmund assigned to her the most straight-forward tasks. Thereafter, the administrators each chose their own tasks from the list. However, Ms Edmund became increasingly disappointed that the claimant continued to select the most straight-forward tasks. Nevertheless, Ms Edmund did not at that time challenge the claimant about her concerns nor did she raise this issue with Ms Ramkissoon when asked about the claimant's performance in March 2018. Ms Edmund eventually raised with Ms Ramkissoon her issues with the claimant's work, not only regarding her choice of tasks but also the fact that the claimant was often on her personal mobile phone. Ms Ramkissoon was Ms Edmund's line manager.

26 Ms Ramkissoon eventually raised these concerns with Ms Douglas-Obobi, who was the claimant's line manager, in April 18. At or around this time, the claimant had also been complaining to Ms Douglas-Obobi that Ms Edmund was not doing her fair share of the administrative work, and so Ms Douglas-Obobi asked the claimant to arrange an administration meeting at which ways of working could be discussed and their issues could be resolved. The claimant arranged this meeting for 26 April 2018 but failed to invite Ms Douglas-Obobi. As it was, the claimant cancelled the meeting on 25 April 2018 because it clashed with an ante-natal appointment.

27 The claimant had not at that stage officially informed the respondent that she was pregnant. She did that the next day, 26 April 2018.

28 Of course, 27 April 2018 was the date on which the claimant's assignment formally ended. Ms Douglas-Obobi insisted to us that it had been the firm intention throughout that the claimant would cease working for CHC on that date. We are unable to accept that that was the case. There had been no attempt to arrange with the claimant to complete the expected end of assignment housekeeping and handover to Ms Edmund, contrary to when her assignment actually finished. There was a continuing expectation that an administration meeting would take place to facilitate the claimant's and Ms Edmund's ongoing working relationship.

29 Furthermore, on 27 April 2018, Ms Ramkissoon was communicating with the Bank administration thus:

> ‘I have a query about a band 4 admin bank staff who does not seem to be working put well and we have been thinking of replacing her.‘’

30 This email is inconsistent with a settled intention that the claimant’s assignment was always to have ended on 27 April 2018. It is, however, consistent with what we find to be the case: that the respondent was by then considering the need to terminate the claimant’s engagement.

31 The claimant informed Ms Douglas-Obobi on 26 April 2018 by phone that she was pregnant and Ms Douglas-Obobi congratulated her. However, when Ms Douglas-Obobi was next at the workplace on 27 April 2018 she invited the claimant into her office and said words to the effect of ‘did you plan this?’ and, ‘will this have to come out of my budget?’

32 There was a clear conflict of evidence on this point. However, we resolved this issue in the claimant’s favour because she has been entirely consistent about the words used, which would be striking if a fabrication. Moreover, it clear to us from the consistent evidence of the respondent’s witnesses and the limited contemporaneous documentation that Ms Douglas-Obobi had by 26 April 2018 been considering the likelihood of terminating and possibly replacing the claimant, and clearly saw the news of her pregnancy as a possible barrier. We find that she was frustrated as a result. Consequently, we find that Ms Douglas-Obobi made the ill-advised comments as alleged.

33 At that meeting, Ms Douglas-Obobi also commented that she would have to undertake a risk assessment of the claimant but made no further plans and did not mention it again until the issue was raised by the claimant sometime in May 2018. Ms Douglas-Obobi then said she would undertake a risk assessment but made no specific arrangements.

34 Also on 27 April 2018, Ms Douglas-Obobi asked Human Resources if the claimant was entitled as bank staff to the same maternity benefits as a substantive staff member.

35 At around this time planes were being made to move CHC to the respondent’s premises in Vicarage Lane, where the team would have access to a larger pool of administrators and there would no longer be a need for a bank administrator. On 1 June 2018, Helen Grimes (Head of Administration) emailed Gemma Kendall (HR officer) saying:

> ‘Haddi has worked as an A&C4 as administrator with the CHC team since 24th January 2018 (4 months) doing three days a week. The post is not funded under my admin budget as we don’t have the funding for it and the team needed support so they get ad hoc bank support as required paid for from the clinical team budget. The service is in Balaam Street and the plan is to move to VL in about 5 weeks time. At this point we will no longer need the temp admin.
>
> ‘I explained to the manager that bank staff are on a zero contract and she is not a long term temp so we officially we just need to give her a week’s notice. I did confirm this with Imran in Alie Street as well but as Haddi may have been in touch with you, not sure why but maybe to query her entitlement re pregnancy?
>
> ‘The manager will give her at least 4 weeks notice.

'Is this agreeable?'

36 Chenelle Charles is a CHC Case Coordinator, whose role includes managing caseload of patients with complex health needs and carrying out funded nurse care reviews. In or around June 2018, Ms Charles was working on the 'EMIS' (Electronic Management Information System) spreadsheet (a spreadsheet containing patient data) and noticed that a document she had expected to have been uploaded was missing. She asked the claimant about this and the claimant insisted that she had uploaded the document that morning. Ms Charles did not believe her and, when she looked again at that patient's record 20 minutes later, noticed that the document had by then been uploaded. Suspicious of the claimant, Ms Charles interrogated the spreadsheet's properties, which confirmed that the document had been uploaded in the intervening period. She motioned with her finger for the claimant to join her in the corridor and told her in no uncertain terms not to lie in the future. We would not be at all surprised if the claimant's colleagues noticed what transpired between her and Ms Charles.

37 On 20 June 2018, Ms Charles noticed that one of her patients had not been highlighted on the FNC (Funded Nursing Care) spreadsheet to indicate that their review was due the following month. As far as Ms Charles was concerned, this should have been done a month prior, and so she asked the claimant about it. The claimant was insistent that the patient had been highlighted.

38 The next day, the claimant sent Ms Charles an email stating that there were overdue tasks relating to 2 of the latter's patients. Ms Charles agrees that, had the information been accurate, sending such an email would have been part of the claimant's duties. Unfortunately, the information was inaccurate.

39 This series of issues in short succession prompted Ms Charles to bring them the attention of Ms Douglas-Obobi and Ms Ramkissoon. This in turn prompted Ms Douglas-Obobi to speak to Ms Grimes who chased a response to her earlier enquiry on 1 June 2018. She emailed, 'I'm away but now we need an urgent update re below. The temp is not performing now as well and we really need to let her go.'

40 Ms Kendall replied on 3 July 2018 asking if there were any notes to show performance concerns prior to notification of pregnancy or whether the performance issues were recent. In her email in reply, Ms Grimes made clear that the overarching issue wad that the budget could no longer sustain the temporary admin post.

41 It is clear from the documentation that the respondent was by then considering establishing a further permanent Band 7 clinical post in the team funded in part from monies saved by no longer having a temporary band 4 administrator.

42 On 4 July 2018, HR advised, 'there is a risk but you need to be clear the only reason you are terminating her bank assignment is because her post/duties are to be covered by the rest of the team for cost saving measures and ensure that she is given the appropriate notice.'

43 On 18 July 2018, Ms Douglas-Obobi gave the claimant 4 weeks' notice of termination of her assignment. The reasons given were that there were insufficient funds in the budget to retain her and that the team was planned to relocate to Vicarage Lane. These were, we find, the operative reasons for terminating the claimant's assignment.

44 This prompted the claimant to contact one of the respondent's 'Freedom to Speak up Guardians', Ade Dosunmu, asking for advice, and subsequently to contact HR on 21 July 2018. On both occasions, the claimant complained about Ms Douglas-Obobi's failure to undertake the promised risk assessment and her comments about the pregnancy in April 2018.

45 As a result, Ms Douglas-Obobi carried out a risk assessment on 24 July 2018, after an administration meeting that morning, involving the claimant, Ms Douglas-Obobi, Ms Edmund and Ms Ramkissoon. The claimant complains that being invited to this administration meeting placed her under unnecessary pressure; however, we do not consider that the claimant was in any way materially disadvantaged by being invited to or attending the meeting.

46 On balance, we accept that the meeting started at 10am and was followed by a meeting between the claimant and Ms Douglas-Obobi alone during which the claimant's email to HR on 21 July 2018 was discussed before the requested risk assessment was undertaken, which ended at 2pm. We consider it likely that Ms Douglas-Obobi, a diabetic, would have taken a short break at some point over this period.

47 At the administration meeting, the claimant agreed to undertake work on the FNC spreadsheet, which she estimated would take 1 ½ days to do. The claimant had an antenatal appointment in the afternoon of 26 July 2018, but nevertheless had sufficient time to complete the task and indeed did complete it. We reject the claimant's suggestion that she had been given an unrealistic deadline or that she was put under unnecessary pressure to complete the work.

48 In any event, we are satisfied that the administration meeting was called to address issues raised by the claimant and Ms Edmund with each other and that the FNC spreadsheet task simply needed to be done. Neither was in any way connected to the claimant's pregnancy.

49 As for the risk assessment, Ms Douglas-Obobi claimed that this was done in accordance with her personal practice of completing such assessments within 3 months of notification of pregnancy. This was inconsistent with her witness statement and unconvincing in any event, given that a risk assessment might in those circumstances not be completed before the third trimester of the subject's pregnancy. Instead, we find that Ms Douglas-Obobi had not felt the need to complete a risk assessment on an employee she expected soon to be leaving and only did one when told to by HR.

50 The claimant submitted a grievance about the respondent's treatment of her on 1 August 2018, which was investigated by Lucy Ingle and decided by Michael McGee, who met with the claimant on 4 October 2018 and notified her in writing of the outcome on 31 January 2019.

51 In the meantime. The claimant asked on 13 August 2018 for an extension to her notice period. This was refused on 14 August 2018 and her employment terminated 2 days later.

52 In his outcome letter, Mr McGee found that the reasons for claimant's termination were the need to recruit to a vacant Band 7 clinical post and because the temporary administration post was no longer needed. He confirmed that he placed little if any weight on the issues taken with the claimant's performance, as it had been necessary to

terminate the assignment in any event. All allegations were decided against the claimant, who was informed of her right of appeal and did so on 12 February 2019. Insofar as it is relevant, the appeal was heard on 18 April and 9 September 2019. The claimant was informed by letter dated 17 October 2019 that her appeal had was not been upheld.

THE LAW

Unfair Dismissal

53 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer. However, an employee may not ordinarily present a complaint of unfair dismissal to the Employment Tribunal unless he or she has 2 years' continuous employment with the employer.

54 The 2-year requirement does not apply to dismissal on certain automatically unfair grounds including where the reason or principal reason for the employee's dismissal is her pregnancy (s99 ERA and regulation 20(3)(a) of the Maternity and Parental Leave etc. Regulations 1999/3312).

55 However, where such an employee does not have sufficient continuity of service otherwise to bring a complaint of unfair dismissal, the burden lies on her to prove on the balance of probabilities that her pregnancy was the reason or principal reason for dismissal (**Smith v Hayle Town Council 1978 ICR 996**)

56 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

Pregnancy Discrimination

57 An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment (ss39(2)(c)&(d) of the Equality Act 2010 (EA)).

58 Pursuant to s18(2)(a) EA, a person discriminates against a woman if, in the protected period, he treats her unfavourably because of her pregnancy. The protected period begins with the start of the pregnancy and ends at the end of her additional maternity leave or when she returns to work (if earlier), or at the end of two weeks after the end of the pregnancy (if the woman does not have the right to ordinary and additional maternity leave).

59 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat other people (section 13 EA). Sex and pregnancy/maternity are such protected characteristics. However, s13 does not apply, for the purposes of alleging sex discrimination, to treatment of a woman of the kind prohibited by s18(2) which occurs during the protected period.

Pregnancy Risk Assessment

60 Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 (MHSWR) provides that:

> (1) Every employer shall make a suitable and sufficient assessment of—
> (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions ….

61 Regulation 16 MHSWR provides that:

> (1) Where -
> (a) the persons working in an undertaking include women of child-bearing age; and
> (b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, as amended by Directive 2014/27/EU,
> the assessment required by regulation 3(1) shall also include an assessment of such risk.
> (2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.
> …

62 There is no free-standing legal obligation to conduct a specific risk assessment when an employee tells her employer that she is pregnant.

63 In **Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516**, a decision under the Sex Discrimination Act 1975, the EAT held that a failure to carry out a risk assessment under regulation 16 MHSWR amounted, per se, to a detriment and thus constituted sex discrimination. However, in **Indigo Design Build and Management Ltd and anor v Martinez UKEAT/0020/14/DM**, a decision concerning s18 EA, HHJ Richardson sitting alone overturned the Employment Tribunal's finding that an employer's failure to conduct a risk assessment was pregnancy discrimination. The relevant paragraphs are:

> '13. Concerning failure to conduct a health and safety risk assessment following pregnancy, the tribunal said:
>
> > "84.2.1 There is an obligation under statute to carry out a specific risk assessment for a pregnant woman, one was not carried [out] and so again, that has to be regarded as unfavourable treatment. Again, it is based on the premise that the Claimant is pregnant and so is clearly because of her pregnancy. This aspect of the claim succeeds."
>
> …

29. The Tribunal was required by section 13(1) and sections 18(2) and thereafter to consider whether the alleged treatment of Mrs Martinez was "because of" the protected characteristic in question or "because of" pregnancy or maternity leave. The use of the term "because of" is a change from terms used in earlier discrimination legislation, but it is now well-established that no change of legal approach is required: see **Onu v Akwiwu [2014] ICR 571** at paragraph 40, Underhill LJ. The law requires consideration of the "grounds" for the treatment.

30. Onu also contains a concise statement of the law concerning what will constitute the "grounds" for a directly discriminatory act. In that case the worker concerned had no proper immigration status. She was subjected to ill-treatment at work. Underhill J said:

> "42. What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in Nagarajan called his 'mental processes' (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in Nagarajan: see pp. 885-6.
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> 43. The distinction between the two kinds of case is most authoritatively made in the judgment of Lady Hale in R (E) v Governors of the JFS [2010] 2 AC 728, at paras. 61-64 (pp. 759-760), though it is to be found in the earlier case-law: I would venture to refer to my own judgment, sitting in the EAT, in Amnesty International v Ahmed [2009] ICR 1450, at paras. 32-35 (pp. 1469-70).
>
> 44. The present case is plainly not of the 'criterion' type. Mr Robottom in his skeleton argument contended otherwise, but the contention is, with all respect to him, unsustainable. The various acts of which Ms Onu complains – underpayment, being required to work excessive hours etc. – are not inherently based on her immigration status. If her immigration status was (part of) the grounds for those acts it is only because, in the mental processes which led to their doing them, Mr and Mrs Akwiwu were significantly influenced by it."

31. It was not in dispute before me that this approach is appropriate in a direct discrimination claim under section 18 just as under section 13. I am sure that this is the case. There is, in fact, authority in the Employment Appeal Tribunal following this general approach: see Johal v Commissioner for Equality and Human Rights [2010] UKEAT/0541/09, HHJ Peter Clark. The question is whether the tribunal applied this approach.

32. I have reached the conclusion that the tribunal did not apply this approach in respect of the section 18 findings. My reasons are as follows. There is a very plain difference between the way the Tribunal reasoned in respect of the sex discrimination claim and the way it reasoned in respect of the pregnancy and maternity discrimination claim. The reasoning in respect of the sex discrimination claim involves a two-stage process entirely appropriate where the Tribunal is considering whether to find direct discrimination established in a case where the mental processes of the alleged discriminator are in issue. No such reasoning is found when the Tribunal considered the pregnancy and maternity discrimination claim.

> 33. This difference is particularly stark when the Tribunal considered the failure of Indigo to address the grievance of Mrs Martinez. The Tribunal found the very short period of delay at the outset to be maternity discrimination, without any reference to the burden of proof and despite acknowledging that the period was very short and not at all unusual. The Tribunal then adopted the conventional two-stage approach in determining whether the much longer period of delay amounted to sex discrimination.
>
> 34. The difference also appears to my mind from the use of the phrase "based on the premise that she is pregnant" in paragraphs 8 .1.1 and 84.2.1. The reasoning seems to be that, since a notification and risk assessment were required under statutory regulations to do with pregnancy or maternity leave, failure to provide them, or even in the case of the notification providing it a few days late, must be direct discrimination. This is not the law. Failure to provide a notification or a risk assessment relating to pregnancy or maternity leave may be, but is not necessarily, "because of" pregnancy or maternity leave. It may, for example, be a simple administrative error. The same process of reasoning is required in such a case as is required in any other discrimination case.
>
> 35. I have asked myself whether the Tribunal may have regarded the claims as falling within the first of the two categories which it identified in paragraph 14 of its Reasons. If so, it has misunderstood the approach in Amnesty International v JFS. The position is summarised on Onu which I have quoted. This is not a “criterion” case where TQIPS or Indigo applied the unfavourable treatment because of some rule or criterion which was inherently based on pregnancy or maternity. It is a case where the mental processes of the persons concerned fell to be considered.’

Harassment

64 In respect of harassment, s26 EA provides:

> (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.
> …
> (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;
> …

65 Where harassment is alleged, the Tribunal should consider separately whether any conduct proved was a) unwanted, b) had the proscribed effect and c) was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**).

Burden of Proof

66 Pursuant to s136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

67 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two. Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

Time Limits

68 A claim to the Employment Tribunal in respect of a breach of the Equality Act 2010 must be brought within the 3-month period (extended as appropriate for early conciliation) beginning with the date of the breach in question. The Tribunal may extend time when it considers it to be just and equitable to do so.

69 Pursuant to s33 of the Limitation Act 1980 (power to extend time in personal injury actions), a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

70 In **British Coal Corpn v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**). The burden lies on the claimant to persuade the Tribunal that it should exercise its discretion.

CONCLUSIONS

71 Consequent to our findings of fact above, we have reached the following conclusions.

Unfair/Discriminatory Dismissal

72 As is clear from our findings above, we are satisfied that the reason for terminating the claimant's assignment was budgetary pressures and the lack of continuing need for a temporary administrator post. Whilst the claimant had notified the respondent of her pregnancy before advice was sought from HR about managing her termination, we are satisfied that termination of her assignment had already begun to be discussed within management.

73 Similarly, whilst we have found that Ms Douglas-Obobi made comments on 27 April 2018 about the claimant's pregnancy and its potential effect on the team, we are satisfied that this was a consequence of her frustration at how the claimant's pregnancy might prevent timely termination of her assignment rather than being evidence that the termination decision was influenced by the pregnancy. Therefore, we find that the claimant's pregnancy was neither the sole nor principal reason for termination.

74 Neither was it, we find, a material influence in the decision to terminate. On the contrary, we find that the claimant's pregnancy prolonged rather than curtailed her employment with CHC.

Remaining Pregnancy Discrimination/Harassment Allegations

75 Turning to the claimant's other allegations of discrimination and harassment, we have found that the events of 24 July 2018 were neither unfavourable treatment nor did they have the proscribed effect, even taking into account the claimant's perception of events. Even if we had found to the contrary, we discern no connection whatsoever to her pregnancy or sex.

76 Similarly, we find that Ms Douglas-Obobi failed to undertake a risk assessment on the claimant not because the latter was pregnant but entirely because she believed that the claimant's appointment would soon be terminated and so it would be unnecessary to complete the risk assessment. In any event, no true disadvantage has been identified by claimant arising from the respondent's failure to undertake a risk assessment. We are not convinced that the claimant faced any risk from stretching and bending, which was raised only on one occasion, and she was provided with a footstool when she asked for one. No other issue has been raised by the claimant. Consequently, we do not find that the respondent's failure to promptly undertake a risk assessment was discrimination contrary to s18 EA.

77 We were however, persuaded that Ms Douglas-Obobi made the comments alleged in late April 2010 in direct reaction to the claimant's announcement of her pregnancy. These comments were objectively inappropriate and upsetting to the claimant. They were manifestly made because of the claimant's pregnancy, were made during the protected period and were objectively unfavourable to her.

78 To that limited extent we find, therefore, that the respondent discriminated against the claimant contrary to ss18 and 39 EA.

Time Limits

79 At the time, the claimant was experiencing housing problems and significant financial difficulties. She already had a child and was expecting her second. We readily

infer from all of the claimant's circumstances that she was reluctant at the time to take any steps which might jeopardise her continuing employment.

80 As soon as the claimant had been given notice of termination, she raised this allegation as a grievance, and initiated ACAS early conciliation on the date of her termination.

81 We find that exchange in question probably happened on 27 April 2018, meaning that the ordinary time limit for bringing a complaint about it to the Employment Tribunal expired on 26 July 2018. The claimant did not initiate early conciliation until 16 August 2018, by which time the ordinary time limit had expired some 3 weeks prior. She did not bring her claim until 4 October 2018, within a month of the early conciliation certificate being issued on 16 September 2018 but a little over 2 months after expiry of the ordinary time limit. On either view, the delay was not excessive.

82 We bear in mind that the claimant has acted throughout in person and with very limited resources. The prejudice to the claimant in not being allowed to pursue this allegation is that she would not be able to seek redress for a meritorious claim. Conversely, there is no material prejudice caused to the respondent is allowing the claim to go forward. The relevant witnesses were available to the Tribunal (being witnesses who dealt with the unarguably in time allegations) and were capable of dealing with this discrete point. At no point did Ms Douglas-Obobi assert that she was unable to remember the events of the period in question. On the contrary, she was able to give definite evidence, albeit evidence we ultimately rejected.

83 Consequently, whilst we have found that the claimant has established only a relatively minor, one-off act of discrimination which occurred outside the ordinary time limit, we were satisfied nevertheless that it was just and equitable to extend time.

84 The matter has been provisionally listed for a remedy hearing on 14 January 2010. Unless the parties are able to reach agreement in the meantime, a remedy hearing will be necessary. The respondent applied in December 2019 for the presently listed hearing to be vacated, so that the parties would have time to prepare their respective positions if necessary. The respondent is invited to confirm whether, in light of the extent to which the claim has succeeded, it still requires the hearing to be relisted.

Employment Judge O'Brien

02 January 2020