



EMPLOYMENT TRIBUNALS

Claimant: Ms Jowita Parsons

Respondent: International Forest Products (UK) Limited

Heard at: Reading Employment Tribunal, in person

On: 24th-25 April 2023 (25th April 2023 – In Chambers)

Before: District Tribunal Judge A Shields (sitting as an Employment Judge)
Ms J Cameron (Member)
Ms B Osborne (Member)

Representation:

Claimant: In person

Respondent: Mr D Brown, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was not unfairly dismissed and the unfair dismissal claim is dismissed.
2. The claimant was not indirectly discriminated against on the grounds of sex and the indirect sex discrimination claim is dismissed.

3. The claimant was not discriminated against on the grounds of pregnancy and maternity and the pregnancy and maternity discrimination claim is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as an import coordinator between 4 March 2019 and 11 February 2022.
2. This claim arises from circumstances where the claimant had difficulty in returning to work at the respondent's premises following periods of maternity and other leave and was subsequently dismissed.
3. The Respondent contests the claims stating that the claimant was unfairly dismissed for Some Other Substantial Reason and that no discrimination took place.
4. The tribunal held a preliminary hearing on 24th November 2022 and set out case management orders to deal with the preparation of the claim for hearing. It further set out a case summary and the issues to be determined in the final hearing.
5. The Claimant represented herself with the assistance of her brother at the hearing. She gave sworn evidence. The Respondent was represented by Mr Brown and presented sworn evidence from 3 witnesses: Ben Wallace, Jonathan Heywood and Abigail Williamson.
6. Early conciliation started on 9th April 2022 and ended on 27 April 2022. The claim form was presented on 10th May 2022 and the ET3 was received by the Tribunal on 30th June 2022.
7. The tribunal panel considered the documents from an agreed bundle of documents consisting of 236 pages which the parties introduced in evidence.
8. There were written witness statements from Ben Wallace, Jonathan Heywood and Abigail Williamson. There was a witness statement from the claimant in an email dated 19th January 2023.
9. Further documents agreed between the parties were as follows: a chronology, a cast list and a key documents list. Counsel for the respondent produced a skeleton argument for the final hearing. This was provided to the claimant and the tribunal on the morning of the hearing.

Claims and issues:

10. The claimant is making the following claims:
 - 10.1. unfair dismissal,
 - 10.2. indirect sex discrimination, and
 - 10.3. discrimination on the grounds of maternity.
11. The issues to be determined by the tribunal were set out in the case management order dated 24th November 2022 and were confirmed by the Parties at the start of the

hearing, with two additional dates (added into paragraph 14.1 below and underlined) being requested by the Respondent and provided by the claimant.

12. Unfair dismissal

- 12.1. It is common ground that the claimant was dismissed.
- 12.2. What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely the claimant, at the time of dismissal, had expressed no intention to return to work at all or in a reasonable timeframe.
- 12.3. Did the respondent act reasonably in all the circumstances, including following a fair process, in treating that as a sufficient reason to dismiss the claimant?

13. Remedy for unfair dismissal

- 13.1. Does the claimant wish to be reinstated to their previous employment?
- 13.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 13.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 13.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 13.5. What should the terms of the re-engagement order be?
- 13.6. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 13.6.1. What financial losses has the dismissal caused the claimant?
 - 13.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 13.6.3. If not, for what period of loss should the claimant be compensated?
 - 13.6.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (Polkey v AE Dayton Services Ltd [1987] UKHL 8)?
 - 13.6.5. If so, should the claimant's compensation be reduced? By how much?
 - 13.6.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 13.6.7. If it did apply, did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
 - 13.6.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

- 13.6.9. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 13.6.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 13.6.11. Does the statutory cap apply?
- 13.7. What basic award is payable to the claimant, if any?
- 13.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

14. Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

- 14.1. Did the respondent treat the claimant unfavourably by doing the following things:
 - 14.1.1. rejecting the claimant's request for unpaid leave on 1st February 2022
 - 14.1.2. rejecting the claimant's request for homeworking on 14th December 2021
 - 14.1.3. dismissing the claimant.
- 14.2. Was the unfavourable treatment because the claimant had exercised or sought to exercise, the right to ordinary or additional maternity leave?

15. Indirect sex discrimination (Equality Act 2010 section 19)

- 15.1. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:
 - 15.1.1. The respondent's practice of restricting the ability of employees to work from home.
- 15.2. Did the respondent apply the PCP to the claimant?
- 15.3. Did the respondent apply the PCP to men or would it have done so?
- 15.4. Did the PCP put women at a particular disadvantage when compared with men, in that more women than men have childcare responsibilities and are unable to work in the office as required by the respondent?
- 15.5. Did the PCP put the claimant at that disadvantage?
- 15.6. Was the PCP a proportionate means of achieving a legitimate aim?
- 15.7. The Tribunal will decide in particular:
 - 15.7.1. was the PCP an appropriate and reasonably necessary way to achieve those aims;
 - 15.7.2. could something less discriminatory have been done instead;
 - 15.7.3. how should the needs of the claimant and the respondent be balanced?

16. Remedy for discrimination

- 16.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 16.2. What financial losses has the discrimination caused the claimant?

- 16.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 16.4. If not, for what period of loss should the claimant be compensated?
- 16.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 16.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 16.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 16.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 16.9. If it did apply, did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
- 16.10. If so is it just and equitable to increase or decrease any award payable to the claimant?
- 16.11. By what proportion, up to 25%?
- 16.12. Should interest be awarded? How much?

Procedure, documents and evidence heard:

17. We heard evidence from the claimant and each of the Respondent's witnesses in person. For the benefit of the tribunal, the Parties had produced witness statements and these were "taken as read" (that is, we had already read them so they did not need to be read out to us).
18. The parties had prepared a single bundle of documents as directed, and where necessary, this Judgment will refer to the relevant page numbers. The Tribunal read the witness statements of both Parties and the required documents before the hearing.
19. The evidence was completed in one day and the second day was used to deliberate on the evidence and reach a decision on the claims. The Parties were not required to attend on the second day.

Findings of fact

20. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we have indicated how we have done so at the material point. References to page numbers are to the agreed bundle of documents.

Commencement of Employment

21. The claimant commenced employment with the respondent on 4th March 2019 as an import coordinator. Her role involved the administration for fulfilling and delivering orders. It required regular communication both with office staff and third parties, sometimes in different time zones.

22. Her employer was the respondent, International Forest Products (UK) Limited. It is a trader of forest products commodities and, in the UK, this involves sales of forest products such as paper and packaging. They employ 21 people in the UK. The details of the full-time role are contained in a letter dated 22nd February 2019 on page 39 of the bundle.
23. When the claimant commenced her employment, she was a co-worker of Ben Wallace and she reported directly to the Managing Director, Jonathan Heywood. Ben Wallace was an import administrator between March 2017 and June 2019. In June 2019, he was promoted to the role of UK Operations Supervisor. Shortly before his promotion, he was assigned to be the claimant's line manager.

Performance Issues

24. On 25th March 2019 the respondent met with the claimant and dealt with an unauthorised absence by way of a misconduct meeting and a report was produced Page 148.
25. On 5th August 2019, the respondent held a disciplinary meeting with the claimant regarding her punctuality. The notes of the hearing are on page 141 of the bundle. The reason for the disciplinary meeting was punctuality: lateness, additional breaks, and standard of work: mistakes, reliability, duties. The outcome of the meeting was that a six week progress review to: improve punctuality monitor workload to eliminate stress, additional training, to take ownership of duties, to reduce mistakes, and to inform the respondent of any issues requiring additional support. On this date, there was no mention of the claimant's pregnancy and the respondent was not aware of the claimant's pregnancy. The tribunal considered that the conversations were constructive and that positive action points were agreed between the claimant and the respondent. The tribunal considered the documentation and the recording of the performance issues was relatively good. The documents were countersigned and robust.
26. The tribunal found that the respondent had performance and punctuality issues with the claimant before she notified them of her pregnancy. We found these to be genuinely held performance issues and noted that the respondent did not choose to terminate the employment during the probationary period of employment.
27. The claimant was therefore a permanent employee who had completed her probationary period before she commenced her first period of maternity leave.

Notification of Pregnancy

28. On 27th August 2019, the claimant notified the respondent formally that she was pregnant and would be taking maternity leave. She requested that her maternity leave begin from 15th November 2019. A maternity leave risk assessment was carried out.
29. On 10th October 2019, the claimant complained about an e-mail from Ben Wallace to her. The e-mail was regarding a work mistake raised by Ben Wallace in relation to the claimant's work. The complaint was investigated by a separate manager, Charlie Gray. The complaint was not upheld. Charlie Gray issued the claimant with a

disciplinary warning due to the claimant's aggressive and inappropriate behaviour towards Ben Wallace. The warning was not produced for the tribunal bundle. The claimant did not deny the warning was given. She accepted that she had "not got off to the best of starts" with the respondent regarding her performance.

30. The tribunal found that the claimant was subject to a disciplinary warning at the point she commenced her first maternity leave. The tribunal also found that there were punctuality and standard of work issues that the respondent genuinely held between the commencement of the claimant's employment and the commencement of her first period of maternity leave. The tribunal did not consider these were related to the pregnancy of the claimant.

First Maternity Leave Period

31. On 14th October 2019, the claimant began her maternity leave. The claimant telephoned on the morning of 14th October 2019 to commence her maternity leave early. The details of the maternity leave are contained in a letter on page 40 from the respondent to the claimant dated 14th October 2019.
32. The respondent allowed the claimant to commence her maternity leave without providing the requisite 4 weeks notice.
33. The tribunal accepted the evidence of Ben Wallace that, on 14th of October 2019, he was on annual leave. He was in the Philippines and he therefore had to arrange suitable cover for the claimant's role at short notice. This resulted in poor performance of the business during this time and resulted in additional stress to both him and the claimant's colleagues.
34. On 24th March 2020, Ben Wallace, wrote to the claimant regarding her arrangements to return to work. A copy of this letter is on page 41 of the bundle. It is worth noting at this stage, that this letter is written one day after the national lockdown in response to the Covid-19 pandemic.
35. On 25th March 2020, the claimant informed Ben Wallace that she will not be able to return and that she would like to extend her maternity leave to 12 months. In her email, she states that she will not be able to return to work because her mother is not able to look after her child and therefore, she would have to stay at home. She asked to extend her maternity leave to the full 12 months, in order to find childcare, page 44.
36. On 26 March 2020, Ben Wallace stated that any changes to her return date must be sent to her employer in writing a minimum of eight weeks before she was due to return. He pointed out that it was less than 8 weeks until her return date and asked how she wished to proceed.
37. On 26th March 2020, the claimant in her response stated that she was three days short of providing 8 weeks notice but, due to the global pandemic, her mother would not be able to care for her child because her mother was returning to Poland and therefore, she again asked to extend her maternity leave and thanked the respondent for their understanding.
38. On 30th March 2020, Ben Wallace stated that it had put the respondent in a difficult situation, but they accepted her request to extend her maternity leave and updated

her records to show her new return date as Monday 12th October 2020. She was asked to consider the needs of the respondent as well as her personal needs in future, in order to allow the business sufficient time to find appropriate cover particularly in light of the start of the pandemic. This is on page 47 of the bundle.

39. The claimant accepted the extension of maternity leave by e-mail on 30th March 2020.
40. On 30th April 2020, the claimant queried her April pay and on the same date the respondent confirmed they would investigate it immediately. There were additional queries from the claimant regarding pay slips and these were dealt with appropriately by the Respondent.
41. On 13th July 2020, the claimant informed the respondent of her second pregnancy and requested that her second period of maternity leave continue and be attached to the period of her first maternity leave so that she did not return to work on 12th October 2020.
42. Ben Wallace wrote to the claimant on 10th August 2020 and confirmed that her first maternity leave finishes on 12th October 2020 and that she is entitled to 20 days holiday to run consecutively. This bridged the gap between the end of the first period of maternity leave and the start of the second period of maternity leave. He explained that the first day of the claimant second maternity leave will be 9th November 2020. She was asked to supply her maternity form. (Page 57).

Second Maternity Leave Period

43. The claimant commenced her second maternity leave on 9th November 2020 with the proposed return to work date of 10th November 2021.
44. On 30th November 2020, the claimant raised a pay query on her maternity leave and this was resolved by the respondent on the same date. The response e-mail is at page 66 of the bundle. The claimant was informed that she would have no earnings in August or September 2020. A further e-mail on 2nd December 2020 confirmed the statutory maternity pay and the maternity allowance entitlement for the claimant. The claimant was provided with the maternity allowance form by e-mail.
45. Thereafter, the claimant and Ben Wallace exchange emails where the claimant is upset that she was not advised to claim maternity allowance by the respondent at an earlier date. The maternity allowance form was re-sent by e-mail to the claimant on 7th December 2020.
46. In early 2021, the claimant experienced a serious family issue. It is not necessary to repeat in the public domain the details of the family issue. The details were provided during the hearing by the claimant. Those details were not in dispute by the respondent.
47. This document will refer to the matter as “the family issue”. The reason for that is that this document remains a publicly available document. It is important to emphasise to the claimant that the tribunal wholly accepts the details of the family issue. It understands and accepts that this was a highly distressing matter and we extend our sincere sympathy to the claimant in the very difficult circumstances she experienced in 2021. The tribunal fully took into account those very difficult circumstances.

48. In mid-August 2021, the claimant telephoned Ben Wallace and explained the family issue to him. She requested further time off after the end of her second period of maternity leave which was due to end on 9th November 2021.

First Period of Unpaid Parental Leave

49. Ben Wallace contacts the claimant on 20th August 2021 and clarifies that the claimant asked for her maternity leave to be extended by a further two weeks of paid holiday leave and then a further four weeks of unpaid parental leave before a return to work on 3rd January 2022. He asked the claimant to confirm that the position was correct. If it was, then they would agree to that on the basis that they could manage without her until the year end, and she would then have a return to work date of Monday 3rd January 2022 (page 88).
50. On 23rd August 2021, having clarified her holiday entitlement for the year 2021, the claimant stated that she was happy with the proposal and thanked the respondent for the change (page 91).
51. On 13th December 2021, Ben Wallace writes to the claimant by e-mail reminding her of her expected return to work date of 3rd January 2022 and asked for her confirmation that she would be back in the office so that they could plan for her re-training, page 91.
52. In response to the e-mail from Ben Wallace, the claimant asks to speak to him on a call. Ben Wallace confirmed that he was free all the afternoon and the following day the claimant and Ben Wallace take part in a telephone call.
53. The claimant advised Ben Wallace that she was not able to return to work on 3rd January 2022. At this point in time, the claimant had actively carried out her role for 6 1/2 months and had been on maternity leave for two years, two months and two weeks.
54. The Tribunal found that during the telephone call on 14th of December 2021, Ben Wallace stated that the claimant would require more training and that the training was not really possible to complete at home. The respondent considered that she needed to be retrained in order to fulfil her role. The tribunal found that there was an exploration between Ben Wallace and the claimant about home working and other options but this was in general terms only. Ben Wallace asked the claimant to put any suggestions in writing to the respondent. The Tribunal did not consider that he made any statements that rejected any suggestions during that call nor did he make any decisions on behalf of the respondent during the call.
55. The claimant asserted in her evidence that she had various working from home options but that she did not tell Ben Wallace because he should have explored them with her. The tribunal decided, that on the evidence, that a general discussion with Ben Wallace on returning to work and possible suggestions took place but that he stated that any suggestions had to be put in writing from the claimant to the respondent. We therefore found that he did not make any decisions or communicate any decisions to the claimant during the call on 14th December 2021.

56. The tribunal acknowledges that the claimant may well have had other options in her mind at that time, such as, a friend coming to look after the children. However, these were not specifically raised with the respondent at the time, nor did she put any suggestions to the respondent in writing.
57. On Monday 20th December 2021, at 14.29 hours, Ben Wallace asks the claimant that, following their telephone call, could she put her intentions into an e-mail so that he can notify the right people that she was not planning on returning on 3rd January 2022. The claimant responded at 14.56 hours and stated that she was informing the respondent that due to her personal circumstances she will not be able to return to work on 3rd January 2022. (page 97)
58. Ben Wallace responds to her e-mail and asks her whether it is her position that she wanted to continue with unpaid parental leave and if that was the case how long she expected to be off for. She responds by stating that she can't tell how long she will need.
59. On 21st December 2021, Ben Wallace asked the claimant for clarity because the respondent needed to know the length of her leave before it could be agreed. He stated that the respondent was trying to be flexible but the request needed to be in writing and for a set period of time, rather than open-ended so that they could know when they expected her back in the office otherwise it would put them in a difficult position. He also stated that the respondent's position was that it would only grant unpaid leave as required by law and he emphasised that the business needed clarity in terms of what she was asking for so that they could know when to expect her back in the office.
60. On the same date, the claimant states that she cannot tell the respondent when she could possibly return as she could not afford childcare and her Mother had not returned from Poland. She did not know when her Mother would be able to return from Poland and so it was difficult for her to provide the return date. She asked the respondent to make suggestions. The claimant does not make any suggestions nor offers any solutions to her return to work or the date of return. She does not mention working from home nor a friend offering to help with childcare.
61. Ben Wallace responded on the following day stating his concerns that human resources would record her absence as unauthorised absence and that he did not know what to suggest that she could do.
62. The claimant did not return to work on 3rd January 2022.

Second Period of Unpaid Parental Leave

63. Ben Wallace emailed the claimant on 5th January 2022. The contents of the e-mail are set out on page 104. This informed the claimant that she was now on an unauthorised absence and she was asked to clarify the request for unpaid leave again. It was suggested to her that she used further unpaid parental leave to extend her return to work date. It was emphasised that there was a business requirement to cover and plan for her work otherwise it causes a lot of strain on everybody else. It was stated

as a reminder that the respondent did not offer unpaid leave except where required by law. No response was received from the claimant.

64. On 12th January 2022, having received no response or suggestions from the claimant, Ben Wallace emails the claimant again. This is on page 105 of the bundle. He stresses the importance of informing the respondent of her required leave so that the current leave was not unauthorised absence. He emphasises the disruption to the business and other employees of not knowing a return date. He states that unauthorised absence is grounds for disciplinary action and breach of contract. He asks for the leave request to be in writing. He states that the respondent does not offer unpaid leave except as required by law.
65. The claimant responds to the e-mail on the same date and provides the birth dates of her children. She repeats that she cannot give a specific date of return and states that she does not know how to proceed at this stage. She had been offered further unpaid parental leave to extend her return to work date by the respondent but she does not respond on that point. She does not make any suggestions to return to work nor working from home. Ben Wallace, in response, reminds the claimant of her obligations to telephone the office to report absences and that the respondent offers unpaid leave as required by law only. He also stated that they were a small office and unauthorised leave is difficult to cover meaning others are overburdened.
66. On 13th January 2022, the claimant emails the respondent informing them that she is awaiting further instructions from them. She does not ask for unpaid leave or make any suggestions to return to work.
67. On 17th January 2022 (and 19th January 2022), the respondent invites the claimant to a disciplinary hearing regarding unauthorised absence. The claimant asks for the meeting to take place on teams and Ben Wallace asks that she come to the office. In the end, the meeting is held on teams on Friday 21st January 2022. The details of the invitation letter are set out on page 114 of the bundle. The invitation to the disciplinary hearing is in respect of unauthorised absence. It states that the absence has caused significant disruption to the business. The claimant is offered the right to bring a companion with her to the meeting.
68. Before the disciplinary hearing, the claimant asks for confirmation of when she spoke to Ben Wallace and advised him that she would not be returning to work. She does not add any further additional details as to her return to work or make suggestions to return. Ben Wallace confirms that it was 14th December 2021.
69. On 21st January 2022, the claimant met with Ben Wallace. The summary notes are on page 152 of the hearing bundle. The tribunal considers that the notes are a contemporaneous record of what was discussed.
70. The tribunal decided that it accepted the evidence provided by Ben Wallace as to what took place during the meeting on the 21st of January 2022. This was consistent with the contemporaneous notes on page 152 and is set out in paragraph 14 of his witness statement.
71. We found that the claimant said that she could not return to work in any capacity and that a part time or flexible job would still not suit her. She could not work at all. The

tribunal accepted the evidence that the claimant did not want to find childcare due to the cost and that she wanted to spend time with her children. Her mother had been assisting with childcare but was not able to do so as she was in Poland. The claimant did not want to return to work until her divorce proceedings and expected house sale had been finalised.

72. The respondent reminded the claimant that she needed to be retrained and that typically that would take place in the office. She was reminded that she had a current disciplinary warning with performance concerns and the respondent stated they had concerns with her ability to properly fulfil the job on a remote basis.
73. Ben Wallace stated that there was flexibility around appointments during working hours and that current employees had a flexible working routine to allow for childcare requirements.
74. The Tribunal found that there were two home based employees at the respondent's company: Edward and Elli. A further employee worked on a flexible basis between the office and their home.
75. It was raised with her that using all her remaining entitlements of parental leave and holiday would give a final return date of 9th February 2022. She said she would not return on that date she declined to give any indication of when she could return to work. She was asked whether it would be days, weeks or months until she could return and that was when she stated she did not want to return until her divorce proceedings were completed and the house sale had been finalised.
76. It was agreed between the claimant and Ben Wallace that the time period between 3rd January and 8th February 2022 would be classed as unpaid parental leave and that the respondent's expectation was for her return on 9th February 2022. This was confirmed in a letter dated 24th January 2022. Page 151. The letter further stated that the respondent does not allow unpaid leave, except as required by law.
77. On 24th January 2022, the claimant emailed Ben Wallace, having received the disciplinary hearing outcome letter on page 151, and stated that she would not be returning on 9th February 2022 and asked what the next steps would be. This is on page 129 of the hearing bundle.
78. On page 130 of the hearing bundle, Ben Wallace responds to the claimant and states that by not returning on 9th February 2022 this would be classed as unauthorised leave and would potentially lead to her dismissal. He asks her to try and find a way to return to work.
79. On 31st January 2022, the claimant restates in an email that she will not be able to return to work on 9th February 2022 as it was very difficult for her to give a return date. Again, she does not mention any alternatives or suggestions for her return.
80. Ben Wallace asks for clarification of her e-mail stating that she will not be able to return to work on 9th February 2022. He asks whether she is asking for unpaid absence or whether she is planning to return at all. He specifies that the respondent does not allow unpaid leave except where required by law and that her unpaid parental leave is drawing to an end. She is asked to put any resignation in writing for the Managing Director, page 132

81. The Claimant responds by stating that she does not wish to resign but she wishes to extend her parental leave. She restates that she is not able to provide a return date. There are no suggestions for flexible working or any other suggestions made by the claimant.
82. Ben Wallace again responds on 1st February 2022 and states he understands how difficult it is for her but she has used all her parental leave allowance and, if she doesn't return to work on 9th February 2022, it will be an unauthorised absence and will result in a disciplinary procedure.
83. On 9th February 2022, the claimant did not attend her workplace. Ben Wallace telephoned her and the claimant informed him that she would not consider returning for at least several weeks, until she had resolved her personal issues including the sale of a house which she advised could take months as it was linked to her divorce. Ben Wallace then writes to her at 11.18 hours confirming the contents of the telephone call.

Termination of Employment

84. On 11th February 2022, Jonathan Heywood, the Managing Director of the respondent writes to the claimant and terminates her employment. The contents of the termination letter are at page 153-156 of the tribunal bundle. The letter sets out the chronology of the claimant's refusal to return to work and the steps taken by the respondent to accommodate her return to work.
85. The letter states that "the Company could instigate further disciplinary proceedings and the process might go on indefinitely. However, what is really at the heart of the problem here is that you have consistently made clear not only that you cannot return to work but also that you cannot say at all, and at least without any degree of certainty whatsoever, when the position might change. We could have further correspondence and meetings, or even disciplinary or other types of hearings, but this is likely to lead to more stress for you. Perhaps more importantly, it also will not resolve the matter as you have told us that you simply cannot give any date or estimation within the near future when you might return to work.... I am afraid that I have concluded that it is no longer tenable to keep your role open indefinitely, given, amongst other things, the pressure on other team members, disruption to operations and our ability to plan ahead and your own very clear, honest, unequivocal and consistent statements that there will be no immediate return to work and you cannot give any idea when this might change. These are substantial reasons justifying termination of your employment."
86. The Managing Director stated that she could appeal against the dismissal and should set out in writing her grounds for appeal within five working days of receiving the notice of dismissal. The letter was emailed to the claimant on 11th February 2022.
87. The Tribunal accepted the evidence of Jonathan Heywood.
88. On 25th February 2022, the claimant responds to a query on the key to the building and completes her e-mail by stating that she would like to thank the respondent for

the opportunity to be part of the team and for the support. The claimant does not raise an appeal against the decision to terminate her employment. Page 137.

Appeal

89. On 7th March 2022, the claimant writes to the respondent with her appeal. The contents of the appeal are on page 139A of the bundle. She has taken advice from the Citizens Advice Bureau. She states her belief that it was unduly harsh to dismiss her for two days absence and that her unpaid leave application was treated differently to how the respondent would have treated a request for unpaid leave from an employee who had never taken maternity leave or parental leave. She further states that she believes she has suffered discrimination and victimisation by being dismissed after two days of unauthorised absence that the refusal to agree to homeworking amounted to indirect sex discrimination and that her dismissal was unfair and unreasonable.
90. On 8th March 2022, Jonathan Heywood emails the claimant and states that although the appeal was submitted after the deadline it has been investigated by the respondent. He referred the investigation to an impartial department head to investigate the appeal. He stated that the termination reason was not two days unauthorised absence. The termination reason was the unwillingness / inability to provide a return to work date after repeated efforts by the respondent to allow the maximum leave allowance possible. This e-mail is at Page 140 of the bundle.
91. The tribunal accepted that the appeal investigation report on page 157 to 158 was an accurate contemporaneous report of the appeal process. The tribunal accepted the evidence of Abigail Williamson as contained in her witness statement. Abigail Williamson was, in effect, a reviewer of the termination decision.

Law

Unfair Dismissal

92. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111 ERA 1996.
93. There are two stages within section 98.
94. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
95. Some Other Substantial Reason dismissals are varied in nature. The principles are set out in this section, and in particular, the dismissal must be within the reasonable

range of responses as set out below. The onus of proof is on the respondent to show that it is a substantial reason that could justify the dismissal

96. The reason for dismissal 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] ICR 323, CA.).
97. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
98. It is acknowledged that the law is set out for unfair dismissal in section 98(4) of the Employment Rights Act 1996. Section 98 of the 1996 Act deals with the fairness of dismissals.
99. Under s98(4) '... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'
100. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason.
101. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.
102. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. If the Tribunal is satisfied that Some Other Substantial Reason is the reason for the dismissal, then it may not be covered by the ACAS Code on Disciplinary and Grievance Procedures. (See Phoenix House Limited v Stockman (UKEAT/0264/15).
103. If conduct is the reason for the dismissal, then by virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.
104. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.
105. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so.
106. Under s123(6) of the Employment Rights Act 1996, where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it

shall reduce the amount of the compensatory award by such proportion as it considers just and equitable

107. Where the dismissal is unfair on procedural grounds, the tribunal must also consider whether, by virtue of *Polkey v AE Dayton Services* [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Pregnancy and Maternity Discrimination

108. By section 18 of the Equality Act 2010:

(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).

109. The protected period is during pregnancy and during the periods of ordinary and additional maternity leave only.

110. The word "because" requires the tribunal to examine the reason why an employer acted as he did, and whether the protected characteristic had "a significant influence on the outcome" – *Nagarajan v London Regional Transport* (2001) AC 501. It is not "but for" causation – *Amnesty International v Ahmed* (2009) UKEAT 0447/08. In *Interserve FM Limited v Tuleikyte* (UKEAT/0267/16), The EAT stated that the "because of" question is that the unfavourable treatment must be "because of" maternity leave.

111. In discrimination claims based on protected characteristics other than pregnancy and maternity, the tribunal can consider how the employer treats or would treat others without the protected characteristic. Because pregnancy is unique to women, there is no provision in section 18 for an actual comparator. However, a male comparator can be a relevant hypothetical comparator for considering an employer's reason for the treatment of a pregnant employee, or one who has exercised maternity leave – *Madarassey v Nomura International* 2007 EWCA Civ 33.

112. A reason is a set of facts known to the employer or beliefs held by him which operate on his mind and cause him to act as he does – *Abernethy v Mott Hay and Anderson* 1974 IRLR 213. If there is more than one reason for the employer’s treatment, the tribunal must consider whether the protected characteristic was the “effective cause” -*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* (1996) IRLR 372.
113. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof for all claims brought under it. Section 136 provides: “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”
114. How this is to operate is discussed in *Igen v Wong* (2005) ICR 931. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is “in no sense whatsoever” because of the protected characteristic. Tribunals are also to bear in mind that many of the facts required to prove any explanation are in the hands of the respondent.
115. The Equality Act provides at section 123 that claims must be presented within three months of the act complained of. By section 123(3)(a), “conduct extending over a period is to be treated as done at the end of the period”. A series of similar acts on the part of the same person may amount to conduct extending over a period. It is also provided that a tribunal has discretion to allow a claim to proceed out of time where it is just and equitable, and that discretion must be exercised having regard to the effects of delay on the balance of prejudice to each side in achieving a fair trial- *British Coal Corporation v Keeble* (1997) IRLR 336.

Indirect Sex Discrimination

116. By section 19 of the Equality Act:
- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
 - (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory if
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

117. Sex is a relevant protected characteristic for indirect discrimination, but not pregnancy and maternity.

118. When deciding whether a provision is a proportionate means of achieving a legitimate aim, the tribunal must consider four points, as analysed in *MacCulloch v ICI* (2005) IRLR 846. The burden of proof is with the respondent. The means chosen must correspond to a real need on the part of the undertaking, and be both appropriate and reasonably necessary with a view to achieving the objective - *Bilka-Kaufhaus GmbH v Weber von Hartz* (1986) IRLR 317. The discriminatory effects of the provision must be balanced against the objective needs of the undertaking, and the more disparate the impact, the greater the weight of the objective needs. Lastly, the tribunal must itself weigh up the needs and make its own assessment, rather than relying on whether the employer's decision was within range of reasonable responses – *Hardy and Hanson plc v Lax* (2005) IRLR 720

Conclusions

119. We have applied these legal principles to the facts as we have found them, to reach our decisions on the issues for determination by us. We have first considered whether the claimant was unfairly dismissed, then the complaint of pregnancy and maternity discrimination and finally, the complaint of indirect sex discrimination.

Unfair Dismissal

120. This is a two stage process as to whether the dismissal was fair or unfair. The first stage is for the respondent to show a potentially fair reason for dismissal and secondly if that is done the question then arises whether dismissal is fair or unfair.

121. The first matter we have had to decide is what was the reason or principal reason for dismissal? We were satisfied the respondent has shown that the reason for the dismissal was for Some Other Substantial Reason.

122. The Some Other Substantial Reason was capable of justifying dismissal of the claimant holding the position which she held.

123. The claimant was asked about her return to work and on eight separate occasions she categorically stated that she was not able to return at all. She was further asked to put her alternative suggestions to return to work, in writing. She did not do so at any time. The claimant persistently put the question back to the respondent to find and offer solutions to her.

124. The tribunal findings above show that the claimant was asked and categorically stated that she would not be returning at all, on the following dates:
- 124.1. 20th December 2021, page 96,
 - 124.2. 20th December 2021, page 99,
 - 124.3. 21st December 2021, page 101,
 - 124.4. 12th January 2022, page 106,
 - 124.5. 13th January 2022, page 108,
 - 124.6. 24th January 2022, page 129,
 - 124.7. 31st January 2022, page 131, and
 - 124.8. 1st February 2022, page 132.
125. She said on two occasions that she would not be able to return to work until her divorce and the related sale of her house was completed. These last two statements were made on the 21st January 2022 and on 9th February 2022. She could not provide a timeframe on when either of those matters would be completed.
126. On five separate occasions, the respondents stated that there were real pressures on the respondent, that they needed her to provide her return date or details of when she might be in a position to return. They stated that it was disruptive to the business and overburdening both the business and other employees by her failure to provide information of when she would return. This was noted by the tribunal on the following dates:
- 126.1. 21st December 2021, page 100,
 - 126.2. 5th January 2022, page 104,
 - 126.3. 12th January 2022, page 105,
 - 126.4. 12th January 2022, page 107, and
 - 126.5. 19th January 2022, page 114.
127. The Claimant was repeatedly asked to provide a reasonable time frame in which she would be able to return to work. She was not able to provide a reasonable time frame. Furthermore, she stated on multiple occasions that she would not be able to return to work. Finally, she had no plans for childcare that were shared with the respondent. The reason that the claimant was dismissed was because she refused to return to work and the respondent could no longer keep her role open indefinitely.
128. The question then arises whether the dismissal is fair or unfair. Turning to section 98(4), this deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
129. The respondent is a small employer, with 21 employees in the United Kingdom.
130. Taking into account the size and resources of the employer, which is a small employer, I am satisfied that the process followed was procedurally fair.
131. The tribunal was satisfied that appropriate procedural safeguards were adhered to with regard to the process that the respondent followed. The tribunal noted that the

disciplinary invitation letter offered the claimant a right to a representative to be present at the hearing and in the termination letter she was provided with a right of appeal.

132. We were further satisfied that the respondent did everything that they could to assist the claimant in the difficult circumstances that she found herself in. The respondent informed the claimant on a number of occasions that her employment might be at risk if she did not provide a return to work time frame or dates.
133. The findings of fact show that the respondent was flexible in its approach. The claimant started her maternity leave without notice. The additional maternity leave was provided without the requisite notice. Holiday entitlement was used to bridge the gap between the two periods of maternity leave. Unpaid parental leave was applied retrospectively. The full annual entitlement to unpaid parental leave was applied to the claimant.
134. The appeal was accepted out of time and, although Abigail Williamson was not more senior than the Managing Director, a review was carried out of the decision and the outcome was communicated to the claimant.
135. The tribunal concluded that it was reasonable for the employer to proceed to terminate the employment of the claimant's employment without a further meeting based on the fact that the claimant had categorically stated on 8 occasions that she would not be returning at all and on two occasions that she would only return when her divorce and the sale of the property was completed of which she could not provide a time frame. The tribunal agreed with Jonathan Heywood that a further meeting would have caused stress to the claimant and was unnecessary in the circumstances. The position would not have changed with the claimant even if a further meeting had been held.
136. The termination letter at page 155 indicates that the respondent did consider holding a further disciplinary meeting but expressly considered that it would not make any difference to do so. Ben Wallace's evidence was that at all stages he referred the issues to human resources for advice and that they had decided on this occasion not to hold the further meeting based on the advice received.
137. The tribunal were also satisfied that there were real pressures on the respondent to fulfil the role of import coordinator and to have the claimant in her position and completing the work. The five occasions set out above indicate that there was a genuine disruption and overburdening of a small company whilst the claimant was not in her role and that this was not simply an annoyance to the respondent but was in fact disruptive to their business.
138. The tribunal was satisfied that the respondent terminated the employment because the claimant was unwilling to give any details on when she would be ready to return and on what basis. The set of facts known to the employer as detailed above caused them to dismiss the claimant.
139. On this basis, there was a fair reason for the termination of the claimant's employment and a reasonable process was followed; it was reasonable for the respondent to dismiss the claimant for Some Other Substantial Reason. The dismissal was within the band of reasonable responses open to a reasonable employer.
140. The ACAS code on disciplinary and grievance procedures does not apply.

141. The claimant was not unfairly dismissed.

142. Therefore, the unfair dismissal complaint fails and no remedy is awarded for the complaint of unfair dismissal.

Pregnancy and Maternity Discrimination

143. Moving on to the second complaint of pregnancy and maternity discrimination, the tribunal considered the time limit with respect to the claimant's request for home working which she stated was made on the 14th of December 2021. The tribunal considered that if such a request for home working was made it would be part of a series of similar acts extending over a period of time and that there were no time limit issues regarding the claimant's claim.

144. This complaint related to section 18 of the Equality Act 2010, paragraph 4. The claimant stated that the respondent treated her unfavourably by rejecting her request for unpaid leave on the 1st February 2022, by rejecting her request for homeworking made on 14th December 2021 and by dismissing her.

145. The tribunal has found above that the claimant did not make a home working application on 14th December 2021. There were no formal verbal or written requests for home working. Therefore, the claimant was not treated unfavourably by having her request for homeworking rejected because no such application was made.

146. With regard to the request for unpaid leave, the respondent was clear that there was no basis for unpaid parental leave once the claimant's statutory rights had been exhausted. This was made clear to the claimant on page 132 and is referred to in our findings above. The Tribunal finds above that there were 6 separate occasions where the claimant was informed that unpaid parental leave was only permitted by the respondent where it was a statutory right. There was no obligation on the respondent to extend unpaid parental leave beyond the statutory entitlement. There was no policy or precedent to extend unpaid leave or provide a career break. The respondent did not permit ongoing unpaid leave without a statutory right. They did not reject unpaid leave because the claimant had exercised her right to ordinary or additional maternity leave.

147. The respondent was able to prove that the claimant's treatment was in no sense whatsoever because she had exercised her right to ordinary or additional maternity leave. The reason that unpaid leave was not permitted was because there was no statutory right to further unpaid leave. The claimant had exhausted her right to unpaid leave under statute and the Tribunal found above that the respondent had informed the claimant on 6 occasions that the respondent only permitted unpaid leave in accordance with the statutory entitlement.

148. The tribunal did not consider that the claimant was treated unfavourably by being dismissed by the respondent. The tribunal found that the respondent did everything it could to maintain the employment relationship with the claimant but, based on the findings of fact, it was reasonable to terminate the employment. It was not unfavourable treatment because the claimant had exercised her right to ordinary or additional maternity leave. The dismissal was not because the claimant had availed herself of the periods of statutory maternity leave but was because the claimant refused to return to work or provide a return date.

149. The remaining paragraphs of section 18 of the Equality Act 2010 do not apply to the claimant as she was not within the protected period, as defined by law. The protected period is during pregnancy and during the periods of ordinary and additional maternity leave only. The claimant had completed her additional maternity leave and was on unpaid parental leave at the date of dismissal.
150. The claimant was not discriminated against on the grounds of pregnancy and maternity.
151. Therefore, the pregnancy and maternity discrimination complaint fails and no remedy for discrimination is awarded.

Indirect Sex Discrimination

152. Turning to the final complaint of indirect sex discrimination. The tribunal found that the respondent did not restrict the ability of employees to work from home. There was no provision, criterion or practice that the respondent operated that meant employees could not work from home. The Tribunal found that the respondent had two employees who worked from home and an additional one who worked both from home and the office. They were flexible in their approach to childcare responsibilities and appointments.
153. The Tribunal found that there were very limited discussions on the issue of working from home because the claimant had been categorical that she could not return to work at all on 8 separate occasions and on 2 occasions stating that she could only do so once her divorce and the sale of her house had been completed and she did not know when that would be. It was raised by Ben Wallace during the Teams meeting with the claimant but the Tribunal found that she did not consider she could return to work at all. The respondent did not apply a practice to restrict her from working from home. As stated above, the tribunal found that the claimant did not make a home working application on 14th December 2021. There were no formal verbal or written requests for home working. There was no rejection of any such request by the respondent. There was no PCP in place at the respondent and therefore it could not be applied to the claimant.
154. On that basis, the remaining elements of the indirect sex discrimination complaint fall away. The tribunal found that there was no request for home working and at no time did the respondent say that working from home was not permitted. The findings of fact show that there may have been general discussions and the respondent did want retraining of the claimant to take place at the office but these were provisional discussions only.
155. The tribunal relies on the findings of fact that on eight separate occasions the claimant categorically stated she would not be returning at all and on two further separate occasions that she would only be able to return once her divorce and the sale of the property had been completed and upon which she could give no timescale. The respondent did not put in place any PCP that restricted the ability of employees to work from home and the tribunal accepted their evidence that they did in fact have employees working from home.
156. The claimant was not indirectly discriminated against on the grounds of sex.
157. The indirect sex discrimination complaint fails and no remedy for discrimination is awarded.

158. The claimant's three complaints are dismissed.

159. **Finally, I would like to sincerely apologise to the Parties for the time it has taken to supply this Judgment and Written Reasons to them. We carefully considered all of the evidence following the hearing but due to ongoing sitting commitments it has taken some time for me to write up the Written Reasons and send it you. I thank both Parties for their patience whilst I have done so and, once again, sincerely apologise to you for the delay.**

**District Tribunal Judge Shields
(Sitting as an Employment Judge)**

Date 28/07/2023

Reasons sent to the parties on: 31 July 2023

For the Tribunal Office

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