EMPLOYMENT TRIBUNALS

Claimant: Miss L. Grant

Respondent: Dreamz Hair and Beauty Limited (1)
Ms K. Hollington-Coombs (2)

Heard at: **London South, Croydon**
On: **11 March 2019 and in chambers on the 12 March 2019.**

Before: **Employment Judge Sage**
Members: **Ms. S. V. MacDonald**
Ms. S. J. Murray
Representation

Claimant: Mr. N. Clarke of Counsel

Respondent: Ms. J. Fairclough-Haynes Consultant

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant's dismissal was automatically unfair contrary to section 99 Employment Rights Act;
3. The Claimant was treated unfavourably because of her pregnancy contrary to Section 18 Equality Act 2010
4. The Claimant's claim for harassment is not well founded and is dismissed.
5. The First Respondent is ordered to pay to the Claimant compensation for unfair dismissal of £1813.48.
6. The Second Respondent is ordered to pay to the Claimant for injury to feelings of £11,017.78

These sums are not subject to recoupment.

REASONS

1. By a claim form presented on the 6 June 2018 the Claimant claimed unfair dismissal, discrimination and harassment related to maternity and pregnancy. The claim is essentially about the way she was treated with regard to her pregnancy, maternity leave and her attempted return to work. The respondent defends all the claims and asserts that it did not treat the Claimant unlawfully as alleged, they claim that there was a consensual termination on the grounds of redundancy.

The Issues

The issues were agreed to be as follows:

2. The respondent claims that any claims before the 24 January 2018 were out of time

3. If the Tribunal find there to be a dismissal within section 98(4), was the dismissal within the band of reasonable responses?

4. Was the Claimant dismissed or was it a forced resignation or a forced redundancy?

5. Did the respondent breach the common law duty of trust and confidence? The Claimant relies on the following:

    a. Preventing her from returning to work when there was work available;
    b. Attempting to lay her off without pay;
    c. The respondent stated that they proposed to lay the Claimant off and in turn she asked for redundancy.

6. Under Section 18 Equality Act 2010 (or under the Maternity and Parental Leave Regulations 1999) did the respondents treat the Claimant unfavourably (or subject her to a detriment):
    a. Dismissing her or refusing to allow the Claimant to return to work;
    b. Failing to communicate properly with the Claimant while she was on maternity leave;
    c. The comments made by the Second Respondent to clients about the Claimant’s pregnancy and maternity (see paragraphs 7 and 17 of the ET1).

7. Did the unfavourable treatment take place during the protected period?

8. Was any unfavourable treatment because of the pregnancy or because the Claimant had taken ordinary maternity leave?

9. The Claimant also claims harassment under section 26 Equality Act 2010 on the grounds of sex. The unwanted conduct is set out in paragraph 23 of the ET1.

10. In relation to remedy the Respondent claimed that if found to be procedurally unfair then a reduction for Polkey should apply and a reduction should be made for contributary fault.

Witnesses

Witnesses before the Tribunal were:
The Claimant and for the Respondent we heard from:
Ms. Maher Administrator
The Second Respondent

Findings of fact

11. The Claimant commenced employment with the First Respondent as a nail technician on the 5 November 2014. The Second Respondent is a Director of the First Respondent and also works in the business as a nail technician, hairdresser and a beautician. The Second Respondent started the business in 2005. The Second Respondent's mother also works for the First Respondent as an Administrator.

12. The tribunal heard that the Claimant and the Second Respondent grew up together, going to the same school as children and they had been friends for some time. The Claimant accepted in cross examination that the Second Respondent had supported her when she started experiencing panic attacks about 9 years ago; she then suggested that she felt intimidated that the Second Respondent knew that she suffered from panic attacks. Both the Claimant and the Second Respondent indicated that they felt intimidated by the other, but this was not reflected in their communications at the relevant time, which appeared to be honest and expressed in terms which could be described as forceful and candid. It was clear to the tribunal that although they had grown up together and had been friends, their friendship appeared to end around the time the Second Respondent became aware that the Claimant was pregnant with her fourth child around February 2017.

13. The Claimant worked a 19 hour week working on a Wednesday and Saturday. Her gross pay was £138.46 per week and her annual salary was £7904 (see page 72 of the bundle). The Claimant's terms and conditions of employment were on page 46-8 of the bundle. On page 47 there was a right reserved to the First Respondent to lay off staff where there was a "temporary shortage of work for any reason". During a lay off the Claimant would only be entitled to a statutory guarantee payment.

14. The Claimant took a maternity leave for her third child on the 3 September 2016. The evidence in the bundle showed that the Second Respondent and all the staff were supportive of the Claimant and they threw her a baby shower and she was given several free treatments. The relationships at that time appeared to be friendly and supportive.

15. The only complaint that the Claimant made about this pregnancy and the maternity leave period was that she alleged that the Second Respondent asked her to see the midwife on her days off. The Claimant however accepted in cross examination that she changed appointments so that they did not fall on working days. This allegation appeared in the Claimant's statement at paragraph 3 and no dates and times were provided of dates when it was alleged that the Second Respondent

refused to allow the Claimant off have time off to attend ante natal clinics. The allegation lacked detail and the Second Respondent denied declining any requests to attend midwife appointments. The Tribunal noted that the Claimant did not complain about this at the time and this allegation related to incidents that occurred prior to August 2016. The Tribunal find as a fact that the Claimant's evidence of this point lacked credibility and consistency. This occurred at a time when the parties were on good terms and no concerns were raised at the time. This claim was also significantly out of time and the Claimant did not lead any evidence to suggest that time should be extended to allow this complaint to proceed or that it was just and equitable to do so.

16. Although in the Claimant's statement she said she returned from maternity leave in March 2017 (paragraph 6 of her statement), the Claimant told the Tribunal that she returned to work on the 10 December 2016 and this was consistent with her ET1 at page 14 which stated that although she planned to return to work in March 2017, she returned after only four months on maternity leave (paragraph 6). The evidence in the bundle corroborated that the Claimant attended work on the 10 December 2016 (page 71). Although it was not necessary to establish exactly the date that the Claimant returned to work, this was another example of the inconsistent nature of some of the Claimant's evidence.

17. The Claimant discovered that she was pregnant again and in her statement at paragraph 6 her evidence was that she told the Second Respondent she was pregnant in work in March 2017. Although this was in the Claimant's witness statement, this date could not be correct as we referred below to the text messages which indicated that this issue was discussed on the 7 February 2017. The Claimant accepted in cross examination that she informed the Second Respondent of her pregnancy as she was opening the salon. The Claimant alleged that the Second Respondent ignored her for the rest of the day; this was denied by the Second Respondent, who told the Tribunal that she had other things going on in her life that were troubling her (paragraph 18 of her statement) and she denied ignoring the Claimant for a reason related to her pregnancy.

18. The Claimant alleged that the Second Respondent announced the Claimant's pregnancy to the staff at a meal and alleged that she told the staff that she "probably would not be back at work".

19. The Claimant made a number of allegations against the Second Respondent, One particular allegation was that she stated that the Claimant "couldn't keep her legs closed" (paragraph 10 and 13 of the Claimant's statement). It was noted that this allegation did not appear in the ET1 and appeared to be an exaggeration. This was not corroborated by the evidence before the Tribunal. This was denied by the Second Respondent and on the balance of probabilities we prefer the evidence of the Second Respondent to that of the Claimant on this issue.

20. The other allegations of harassment that the Claimant made against the Second Respondent that appeared in the ET1 and in the Claimant's statement were comments that she thought the Claimant had "too many

kids" and the Second Respondent indicated that she did not want any more children and commented that she was not 'crazy' (implying that the Claimant was crazy having that many children). There were no details of when the words were spoken, and which clients were in attendance when the comments were made. The Second Respondent denied saying these things and said that to make these comments in the salon would have been unprofessional. The Tribunal find as a fact that on this point the Second Respondent's evidence was preferred to that of the Claimant. The allegations in the Claimant's statement (at paragraphs 11 and 12) were vague and lacked specific times, dates or details of any witnesses to the alleged incidents. The Tribunal also conclude that had the Second Respondent made comments that offended the Claimant, she would have complained about them. The Tribunal refer below at paragraph 21 to the Claimant's forthright approach towards the Second Respondent when she had concerns about the Second Respondent's treatment of her. The Tribunal felt that if any such comments were made, the Claimant would have communicated her concerns as she had done, by sending a text. We therefore find as a fact that these allegations lacked credibility and consistency and we prefer the evidence of the Second Respondent on this point.

21. The Tribunal were taken to an exchange of texts between the Claimant and the Second Respondent at pages 88-99, this reflected the frank and open way that they communicated. The texts were all dated the 11 February 2017 and on page 88 the Second Respondent stated about the Claimant's fourth pregnancy that she was unhappy that she "*was the last to know as a friend and a boss is quite upsetting to be honest …Iv (sic) heard along the lines of you won't be returning after the baby. So yes that's something I have to think about as you will need replacing. I can't run a shop with no staff in it. I'm happy for you I really am but at the same time I have to think about myself and the shop…*" on page 89 the Second Respondent also said that her other employees had told her that they needed more people. The Claimant text back (see page 91) making it clear that she needed the job and explained about the circumstances under which she told the Second Respondent about her pregnancy. The Claimant stated she had to make a serious (medical) decision before she told anybody and she added that "*it's very clear how u feel about me being pregnant again so why would I want to?"* Although the Claimant made it clear that she felt that the Second Respondent wasn't happy about the new pregnancy, she said nothing about the Second Respondent ignoring her or subjecting her to unpleasant comments and harassment in front of customers. These emails reflected the honest and candid manner in which they communicated and there was no evidence that the Claimant had voiced any concerns about the Second Respondent's treatment of her in the salon. The Second Respondent offered to speak to the Claimant to resolve the matter but there was no evidence that any meeting was held after this exchange of texts.

22. The Claimant commenced her maternity for her fourth child in June 2017 but returned to work to attend her baby shower on the 27 July 2017; the Second Respondent did not attend. The Claimant gave birth on the 24 August 2017. The Claimant said that throughout her maternity leave she received no communication from the Second Respondent.

23. The Claimant discovered that the First Respondent had arranged a Christmas party in December 2017. It was the evidence of Ms. Maher that she arranged the party and she did not invite the Claimant because she was on maternity leave. The Tribunal saw text messages between the Claimant and the Second Respondent about this issue on pages 74-6 dated the 10 December. The Second Respondent explained that she had left her in peace to enjoy her babies however the Claimant saw it differently explaining that she felt "*left out and down that I wasn't thought of, its becoming a habit lately and I'm curious as to know why?".* The Second Respondent told the Tribunal that although she did not arrange the Christmas party "100%" she accepted in cross examination that the Claimant was not invited because she was on maternity leave. In the Second Respondent's statement at paragraph 14 she expressed a concern that the Claimant would accuse her of harassment if she contacted her during her maternity leave. The Second Respondent told the tribunal that she arranged the Christmas Party with her mother, but she had input into who attended and then accepted that it was her decision not to invite the Claimant. The respondent's evidence is consistent that the decision not to invite the Claimant to the Christmas party was because she was on maternity leave. The Tribunal find as a fact that the failure to invite the Claimant to the party was unfavourable treatment because of her pregnancy that left her feeling excluded because she was on maternity leave.

24. The tribunal saw the Second Respondent's reply to the Claimant's email about the Christmas party dated the 16 December (6 days after the Claimant's email) at page 76 of the bundle where she stated *"I don't have to explain why you was (sic) not informed….it was an informal works do and you are currently on maternity leave and you haven't requested any keeping in touch days…*". This reply reflected the deterioration in the relationship and the Second Respondent did not apologise or try and make amends for the Claimant's exclusion from the party.

25. On the 14 February 2018 (in the bundle at page 116) Ms. Mather wrote to the Claimant responding to her request to take accrued annual leave. In this email Ms. Mather stated that the business was slow at that point and she went on to state that "*if you were due back next week, for instance, we would be looking at laying you off until it gets busier*". This was the first time that the Respondent had referred to the laying off provisions in the contract.

26. The Claimant requested to come back to work on Keeping in Touch "KIT" days on the 21 and the 28 March 2018 (page 118 of the bundle), this email was dated the 24 February 2018 and also went on to state that the Claimant wished to return to work in April 2018. The KIT days were not agreed and instead the Claimant was invited to a meeting on the 26 March 2018. The Claimant was not warned that redundancy or lay off would be discussed, all she was told was that "*everything would be discussed at the meeting*". It was clear from the exchanges of emails that the Claimant was under the impression that she was attending a KIT day (page 122).

27. The Claimant attended the meeting on the 26 March 2018 and in attendance for the First Respondent was Ms Maher and the Second Respondent. The Second Respondent accepted that it was her decision to covertly record the meeting. The minutes were accepted to be verbatim and were in the bundle at pages 126-134. At the very start of the meeting the Claimant was told "*we are going to have to lay you off till we've got more work basically*", an alternative to lay off was offered which was redundancy. The minutes reflected that Ms. Maher told the Claimant that if she took lay off she would receive 3 days' pay over a three month period and that they could lay her off for a maximum of three months. The Claimant offered in the meeting to work different days, if that helped, but the Second Respondent told the Claimant that "*it doesn't matter what days*". The Claimant indicated that she wished to continue working for the Respondent but accepted that "every year gets like this" which appeared to be recognition that the business suffered seasonal downturns. In cross examination the Claimant accepted that the Respondent's business tended to be slow in January and February however the Tribunal took into account that this conversation took place in March. The Claimant was given time to think about which option she preferred, lay off or redundancy. Although Ms Maher told the Tribunal that the lay off period was designed to give the Respondent a chance to build up the Claimant's business, this was not a reason given to the Claimant in the meeting.

28. The Second Respondent accepted in answers given in cross examination that she had decided before the meeting on the 26 March 2018 that she would lay off the Claimant and this was reflected in the minutes. The Second Respondent also accepted that as of the 26 March 2018 it was her view that the Claimant's role was redundant.

29. The Second Respondent accepted in cross examination that she had employed two people after the Claimant went on maternity leave, Holly C and D. It was accepted that they were employed to undertake some of the work that the Claimant carried out. The Second Respondent's evidence was vague as to when she employed Holly C and D save for confirming that they were both employed in June 2017 or later. She could provide no evidence as to their relevant skills and experience but accepted that were taken on to carry out some of the work of a nail technician, the work that the Claimant used to do before going off on maternity leave. The tribunal find as a fact that employing these two people to partially cover the Claimant was entirely consistent with the text the Second Respondent sent to the Claimant on the 11 February 2017 (see above at paragraph 21) where she confirmed she would have to take on staff to cover her. The tribunal therefore find as a fact that either one or both of the employees taken on during the Claimant's maternity leave were employed to cover the work of the Claimant.

30. The Second Respondent confirmed in cross examination that no one else was laid off or made redundant at this time. Although the Second Respondent told the Tribunal that the employee Nikki had her hours reduced that appeared to be in January or February 2017, there was no evidence to suggest that any employee had their hours cut in March or April 2018.

31. The Tribunal find as a fact that the Claimant was identified as redundant prior to the meeting on the 26 March 2018. The Claimant was not provided with any information to enable any meaningful consultation to take place. The Respondents did not appear to consider any alternatives to dismissal and did not consider whether those who had been employed for a shorter period of time (and who had been found as a fact to have been hired to cover some of the Claimant's work) should be considered in the pool for selection. There was no evidence that the Respondent followed any fair process prior to deciding that the Claimant was redundant and failed to consider any alternative suggestions that the Claimant had to offer. By the time of the meeting the Respondents had already decided that the Claimant was to be either laid off or made redundant. The Tribunal also find as a fact that the reason or principal for the lay off or redundancy was because the Claimant was returning from maternity leave, there being little or no evidence before the Tribunal to suggest that the Claimant's role was redundant.

32. The Tribunal saw an Instagram post, dated the 27 March 2018 (see page 136 in the bundle) posted by the Respondent indicating that they were busy saying "phones had not stopped all day" and asking clients to bear with them to provide appointments to suit them all. This appeared to be evidence that the Respondent was busy or that they had started a busy period. The Second Respondent said that this email was a bluff but then said that other treatments were busy, but nails were quiet. The Second Respondent's evidence appeared to be inconsistent with the message being delivered to their customers and the message given to the Claimant the day before. The Second Respondent also accepted that at this time the Claimant had been blocked from her personal Facebook account around the 26-29 March 2018.

33. After the meeting on the 26 March 2018 Ms Maher emailed the Claimant asking whether she had made a decision and the Claimant asked for a copy of her contract (page 123 dated the 3 and the 10 April 2018 respectively). Ms. Maher then contacted the Claimant on the 18 April asking again if she had made a decision and informing her that her Statutory Maternity Pay ended on the 13 April 2018 (page 124). There was no evidence to suggest that the emails from Ms Maher were harassment, they were polite and merely chased the Claimant up for a response and were sent to the Claimant within a reasonable time frame. The Claimant did not indicate that she was distressed by them. The Claimant then replied on the 18 April 2018 (page 125) stating as follows "*I don't really see any other option because that's what I'm being pushed towards by you and Kylie, so I'll take redundancy, when can it be paid into my account*". The reply was that the money would be in her account on the 27 April 2018. The effective date of termination was the 18 April 2018. The Respondent did not write to the Claimant confirming the termination of her employment and no good wishes were sent to her for the future. The Claimant confirmed that she never heard from the First or Second respondent again. The manner of termination reflected the deterioration in their relationship since the Claimant's fourth pregnancy.

34. Since the termination of her employment the Claimant has not undertaken any work. she stated that she had been suffering from panic attacks and depression, however the Tribunal saw no GP records in the

bundle to corroborate her ill health or the effect that it had on her ability to work. The Claimant confirmed she was not on any medication but had been offered it by her GP. The Claimant had attended talking therapies which we saw in the bundle (page 141B and 142-3) in July 2018. She did not apply for benefits. The Claimant confirmed that she could not work from home as she had four children

The Law

Employment Rights Act 1996
47C Leave for family and domestic reasons

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

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

(a) pregnancy, childbirth or maternity,

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

35. (a) the reason (or, if more than one, the principal reason) for the dismissal, and
36. (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(c) is that the employee was redundant, or

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) 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
(b) shall be determined in accordance with equity and the substantial merits of the case.

99 Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if--

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to--

(a) pregnancy, childbirth or maternity,

and it may also relate to redundancy or other factors.

(4) A reason or set of circumstances prescribed under subsection (1) satisfies subsection (3)(c) or (d) if it relates to action which an employee--

(a) takes,
(b) agrees to take, or
(c) refuses to take,

under or in respect of a collective or workforce agreement which deals with parental leave.

122 Basic award: reductions

(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) Subsection (2) does not apply in a redundancy case unless the reason for selecting the employee for dismissal was one of those specified in section 100(1)(a) and (b), [101A(d),] 102(1) or 103; and in such a case subsection (2) applies only to so much of the basic award as is payable because of section 120.

[(3A) Where the complainant has been awarded any amount in respect of the dismissal under a designated dismissal procedures agreement, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that award.]

(4) The amount of the basic award shall be reduced or further reduced by the amount of--

(a) any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or

(b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise).

Employment Rights Act 1996

123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include--

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of--

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by--

(a) calling, organising, procuring or financing a strike or other industrial action, or
(b) threatening to do so,

was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the

amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

[(6A) Where--

(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and
(b) it appears to the tribunal that the disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.]

(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

[(8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.]

Equality Act 2010
18 Pregnancy and maternity discrimination: work cases

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

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

(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

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

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

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as--

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

26 Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Maternity and Parental Leave Regulations 1999
10 Redundancy during maternity leave

(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that--

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

Closing Submissions

These were oral and were taken into consideration by the Tribunal when reaching our decision. They will be referred to in our decision where appropriate.

Decision

The unanimous decision of the Tribunal is as follows:

37. The Tribunal will first deal with the detriments the Claimant relied upon in 2016 and 2017. We have found as a fact that the Claimant made no complaints about the alleged detriments in 2016 and she accepted that she changed her midwife appointments to fit in around work. There was no evidence to suggest that the Claimant had been denied the right to attend ante natal appointments or that she had been subjected to a detriment because she attended those appointments. There was also no evidence that the Claimant was concerned that she had been treated unfavourably because of her maternity or pregnancy at the time. The burden of proof does not shift to the Respondent in respect of this head of claim.

38. We also found as a fact that the allegation dating back to 2016 was out of time and it was not part of a continuing act. The Tribunal heard no evidence from the Claimant to suggest it was just and equitable to extend time. This claim therefore lacks any consistent evidential basis and is out of time. This claim is therefore dismissed.

39. Turning to the Claimant's detriments in 2017 during her fourth pregnancy, relating to the offensive comments allegedly made by the Second Respondent which were dealt with in our findings of fact at paragraph 19 above. We concluded that the more serious and unpleasant allegation amounted to an exaggeration; we considered that had such a comment been made, the Claimant would have complained to the Second Respondent. She did not do so. We conclude that the Claimant's evidence on this pointed lacked credibility and we preferred the evidence of the Second Respondent on this point. We conclude that the burden of proof does not shift to the Second Respondent.

40. The Tribunal concluded that the Claimant had complained in February 2017 about comments made by others which we found as a fact above at paragraph 21 and we concluded that had she been concerned about comments made by the Second Respondent she would have voiced her concern. As there was no evidence of the Claimant complaining of unpleasant comments being made at the time in the salon in front of clients, we conclude that there was insufficient consistent evidence to suggest that this was the case. The burden of proof does not shift to the First and Respondent in respect of the allegations of harassment or unfavourable treatment in relation to the comments referred to above at paragraph 20 allegedly made between February to June 2017.

41. The next issue before the Tribunal is in relation to the Christmas Party and we refer to our findings of fact about this above at paragraphs 23-4. The Respondent's witnesses confirmed that the Claimant was not invited to the Christmas party because she was on maternity leave. The Claimant's communication showed that she was distressed and hurt by this and when she asked for an explanation, the Second Respondent informed her that she did not need to provide her with an explanation; this was evidence that the previous close relationship had ended. The tribunal conclude in the absence of any other explanation for the hostility between the parties, that this was due to the Claimant's fourth pregnancy. This was

unfavourable treatment during the protected period; the only reason given by the Respondent for not inviting the Claimant to the Christmas party was because she was on maternity leave. This allegation is well founded.

42. We considered whether this claim was out of time and although it was, we concluded that at this stage of the Claimant's employment, it formed part of a continuing act. The Tribunal saw the deterioration of the workplace relationships after the Second Respondent learnt of the Claimant's fourth pregnancy and thereafter the communications between them became less frequent and more strained. The Tribunal noted that there was a substantial difference in the way the Claimant was treated by the First and Second Respondent on her third and then her fourth maternity leave period. The Second Respondent told the Tribunal that they did not contact the Claimant because they didn't want to be accused of harassment, this suggested that the parties were by now wary of each other. This also explained why the only communication from the Second Respondent appeared to be hostile (the Christmas party email). This hostility appeared to begin in February 2017 and persisted until the termination of the contract. The Tribunal conclude on all the facts that this incident is in time as it forms part of a course of conduct and is therefore a continuing act.

43. The Tribunal now turn to the meeting of the 26 March 2018, we refer to our findings of fact above at paragraphs 27-9. We noted that the Claimant had no prior warning that the meeting had been scheduled by the First and Second Respondent to inform her that she was to be either laid off or made redundant and this was a decision that had been made prior to the meeting. We do not accept the oral submission made by the Respondent that there was no intention to dismiss the Claimant when they went into this meeting, the Respondent's witnesses accepted that the outcome had been decided before they called the meeting. It had also been put to us by the Respondent that the Claimant volunteered to take redundancy. Although the Claimant accepted redundancy, her email showed that she felt that she had no choice. This was not a consensual dismissal, the Claimant was faced with two options, neither of which were for her to return to work. The Second Respondent accepted in evidence that she believed the Claimant's role to be redundant as of the 26 March 2018 (above at paragraph 28).

44. The Second Respondent provided no evidence to support their decision that the Claimant's role was redundant as of the 26 March 2018. The Second Respondent accepted that she took on two employees to cover some of the Claimant's work and this was consistent with her text dated the 11 February 2017 which confirmed she would need to take staff on to cover the Claimant's work. The tribunal saw no evidence in the bundle of the dates of appointment of those taken on during the Claimant's maternity leave, or of the tasks that they were employed to carry out. We saw no figures to suggest that business had ceased or diminished in respect of nail technician work and one of replacements was accepted to have done this work for the First Respondent. There was no evidence to suggest that the business of nail technician work had at the 26 March ceased or dismissed. The Second Respondent also failed to consider a pool for selection or to consider whether there were any alternative roles the Claimant could perform as the Claimant's evidence to the Tribunal was

that she had attended a course in eyelash extensions. There was no consistent evidence to show that the Claimant's role had ceased or diminished and we particularly referred to the Instagram post, dated the 27 March which gave an entirely different picture of the state of the business. We conclude that there was insufficient evidence to suggest that the Claimant's role was redundant, and we further conclude that the reason the Claimant was not allowed to return to her role was because she was returning after a maternity leave absence.

45. The next issue for the Tribunal is whether this was a dismissal or whether it was a consensual termination. We have already referred to the Claimant's email indicating that she felt she had no other choice; that strongly suggested that she was not taking that step willingly. The Claimant's counsel has referred the Tribunal to the case of *Optare Group Limited v TGWU [2007] IRLR 931*, which decided that in a case where employees are faced with a request from the employer for volunteers for redundancy the "*question of causation can properly be expressed as being "who really terminated the employment" or "who was responsible for instigating the process in the termination of employment*". The case went on to state that in such a situation if an employee 'volunteers' for redundancy, then it is enough to enable the tribunal to conclude that the cause of the termination of their employment was volunteering to be dismissed. We conclude that this case is on all fours with the facts before us. The Claimant was faced with two alternatives, one to face a period of time on lay off or to be made redundant, she reluctantly chose the latter making it clear that this was not her choice but the lesser of two evils. We conclude therefore that this was a dismissal.

46. Even if we are wrong about that, we have considered the actions of the Respondent and whether they could amount to a fundamental breach that would entitle the Claimant to resign and treat herself as dismissed. It was noted above in our findings of fact that the Respondent reserved the right in the contract to place to the Claimant on a lay off for a short period of time. No indication was given as to what was considered to be a short period of time. We heard no evidence from the Respondent as to the circumstances that led them to conclude that a lay was appropriate in these circumstances and at this time. The Claimant was not given any indication as to how long it would last but was told that it could last up to three months. This could not amount to a breach of itself as the right to invoke a lay off was included in the contract however the timing, the circumstances of it being suggested and the probable length of the lay off could amount to conduct that amounted to a fundamental breach.

47. In addition to the suggestion of a long lay off, we considered that the failure to invite the Claimant to the Christmas party because she was on maternity leave was also conduct that entitled the Claimant to form the view that the Respondent no longer intended to be bound by the essential terms of the contract, especially in the light of the Second Respondent's response to the Claimant's text. We also considered that the meeting on the 26 March provided the Claimant with two options, neither of which was to return to work. The Claimant was entitled to return to work at the end of her maternity period however there was no evidence to suggest that the First or Second Respondent considered whether there was a suitable vacancy to offer her.

48. It has been put to us that the final straw was the Instagram post on the 27 March where the Respondent indicated how busy they were. Even if as has been suggested by the Second Respondent, that this was a marketing ploy, it would have been deeply distressing to the Claimant. The Claimant could be forgiven for feeling that she was being excluded from all the Respondent's communications and this was further emphasized when the Second Respondent blocked her from Facebook account. Although this was only a personal account, it was evident from all our findings of fact that the Second Respondent was the business and to be excluded from any contact reflected that the Respondent considered that by the 26 or the 27 March 2018 the relationship was over. The Claimant was entitled to consider herself to be dismissed on the 18 April 2018, relying on the Respondent's conduct. The Tribunal also conclude that there was no delay or acquiescence by the Claimant in indicating her decision to accept the offer of redundancy. The tribunal therefore conclude in the alternative that the Claimant was constructively dismissed.

49. The Claimant's claim for unfair dismissed is well founded.

50. We then must consider whether the Respondent has shown a potentially fair reason to dismiss. The Respondent says the potentially fair reason was redundancy however there was no credible evidence to support this. The Respondent's witnesses admitted that they had decided before they spoke to the Claimant that she was redundant, neither witness referred to considering whether the Claimant could be offered any work that would be suitable or appropriate. There was no evidence that they considered whether those employed to carry out some of the Claimant's work during her maternity leave should be dismissed. The Respondent has therefore failed to show that the Claimant was dismissed for a potentially fair reason.

51. The Respondent having failed to show a potentially fair reason to dismiss, we conclude that the dismissal is automatically unfair for a reason related to the Claimant pregnancy or maternity. We also conclude that the dismissal or the failure to allow the Claimant to return was unfavourable treatment because of the Claimant's pregnancy, there being no other credible explanation for her dismissal at that time.

52. We now move on to remedy. The Claimant had not looked for work and was not signed off sick after the termination of her employment. The Claimant claimed no benefits. The Respondent has submitted in closing submissions that there has been a failure to mitigate. The Tribunal saw no reason why the Claimant could not seek work or to sign on. The Claimant is claiming one year's money as a compensatory award. We believe that this is too high as there was no evidence to suggest that the Claimant had been unable to obtain work or that she was unable to work. The Tribunal believe that it is just and equitable to award to the Claimant three months money as a compensatory award of £1675.02 (to include notice pay). We also award the Claimant a payment for loss of statutory rights of one week's pay of £138.46. We have not awarded the Claimant a basic award as she was paid a redundancy payment therefore this must be deducted

from the basic award. The total award for unfair dismissal to be paid by the First Respondent is £1813.48.

53. The Claimant claims a payment for injury to feelings. We noted that the actions taken by the Second Respondent in relation to the Christmas party caused the Claimant distress. The Claimant's sense of distress was further exacerbated by the way the meeting on the 26 March was conducted. The way in which the meeting was conducted was callous, the first thing that was said to the Claimant was that she was to be laid off. The Claimant was provided with no warning that this would be a potential dismissal meeting. She was not advised that she could be accompanied or that they would be discussing a potential termination of her contract. The very stark choices she faced could only have been made worse when she discovered she had been locked out of the Second Respondent's Facebook and, at the same time, they were advertising how busy they were. The facts before the Tribunal showed that the Respondent had treated the Claimant with little or no compassion or respect, this was particularly harsh when we considered that the Claimant thought she was attending her workplace to talk about her return to work. We conclude that the Second Respondent make a payment for injury to feelings of £10,000 together with interest of 8% from the 10 December 2017 to the 12 March 2019 which comes to £1,017.78 the total being £11,017.78.

54. The total sum to be paid to the Claimant is £12,831.26.

Employment Judge **Sage**

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Date 15 March 2019