



# THE EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Miss O Havdan

v

(1)

Olesya Forbes

(2)

Bagelmania Limited

Heard at: London Central

On: 27-30 April 2021

In Chambers 6 & 7 May 2021

Before: Employment Judge Glennie  
Ms T Breslin  
Ms L Jones

## Representation:

Claimant: Ms P Mathur (Counsel)

Respondents: Mr J Forbes (Husband of First Respondent)

## JUDGMENT

The unanimous judgment of the Tribunal is as follows:

**1. The following complaints are well-founded:**

- 1.1 Against the Second Respondent, unfair dismissal under section 99 of the Employment Rights Act 1996 and regulation 20 of the Maternity and Paternity Leave Regulations 1999; and under section 98 of the Employment Rights Act 1996.**
- 1.2 Against the Second Respondent, breach of contract (wrongful dismissal).**
- 1.3 Against both Respondents jointly and severally, direct discrimination because of pregnancy in respect of complaints 1, 5, 7, 8, 9 and 10.**
- 1.4 Against both Respondents jointly and severally, victimisation.**
- 1.5 Against the Second Respondent, unlawful deduction from wages in respect of 10 days' holiday pay.**

- 1.6 **Against the Second Respondent, failure to provide a statement of employment particulars.**
2. **The following complaints are dismissed:**
  - 2.1 **Direct discrimination because of pregnancy in respect of complaints 2, 3, 4 and 6.**
  - 2.2 **Unlawful deduction from wages other than in clause 1.5 above.**
3. **Remedies will be determined at a further hearing on a date to be fixed.**
4. **A Preliminary Hearing by telephone with a time estimate of 30 minutes will take place before Employment Judge Glennie at 4.00 pm on 26 August 2021 in order to fix the date for the remedies hearing.**

## **REASONS**

1. By her two claims to the Tribunal the Claimant, Miss Havdan, made the following complaints:
  - 1.1 (Against the Second Respondent) Automatic unfair dismissal contrary to section 99 of the Employment Rights Act 1996 and regulation 20 of the Maternity and Parental Leave Regulations 1999.
  - 1.2 (Against the Second Respondent) Unfair dismissal contrary to section 98 of the Employment Rights Act 1996.
  - 1.3 (Against the Second Respondent) Breach of contract (wrongful dismissal, i.e. dismissal without notice).
  - 1.4 (Against both Respondents) Discrimination because of pregnancy and/or maternity leave contrary to section 18 of the Equality Act 2010.
  - 1.5 (Against both Respondents) Victimisation contrary to section 27 of the Equality Act.
  - 1.6 (Against the Second Respondent) Unlawful deduction from wages, including failure to pay holiday pay.
  - 1.7 (Against the Second Respondent) Failure to provide a statement of employment particulars contrary to section 1 of the Employment Rights Act.

### **The issues**

2. There was an agreed list of issues, which contained the following.

3. Unfair dismissal.

- 3.1 Was the Claimant dismissed (i.e. expressly dismissed)?
- 3.2 Was the Claimant constructively dismissed, i.e. did she resign in response to a fundamental breach of contract? The breach of contract relied on by the Claimant is the failure to offer her any shifts on her return from holiday in September 2019, which combined with a conversation in which the Second Respondent advised the Claimant that she would have to cease work in September, indicated an intention no longer to be bound by the contract.
- 3.3 If the Claimant was dismissed or constructively dismissed, was the reason or principal reason for the dismissal her pregnancy, or a reason connected with her pregnancy, contrary to regulation 20 of the Maternity and Parental Leave etc Regulations 1999 and section 99 of the Employment Rights Act 1996 (ERA).
- 3.4 If the Claimant was dismissed or constructively dismissed, was the dismissal fair or unfair having regard to section 98 of ERA?
- 3.4.1 What was the reason for the dismissal.
- 3.4.2 In the circumstances, did the First Respondent act reasonably or unreasonably in treating it as sufficient reason to dismiss the Claimant?

4. Wrongful dismissal.

- 4.1 If the Claimant was dismissed or constructively dismissed, was she provided with notice?
- 4.2 If not, was the First Respondent entitled to dismiss the Claimant without notice by reason of gross misconduct?

5. Pregnancy discrimination.

- 5.1 Was the Claimant treated unfavourably because of her pregnancy contrary to section 18 of the Equality Act 2010? The unfavourable treatment relied on by the Claimant is:
- 5.1.1 Failing to carry out a specific risk assessment once the Claimant was pregnant to identify any particular risks to her or her unborn child and protective measures to mitigate those risks.
- 5.1.2 Complaining that the Claimant's pregnancy made her "slow".
- 5.1.3 Suggesting that the Claimant "hide her belly" from customers.

- 5.1.4 Indicating that the Claimant would only receive part time work if she took time off for ante-natal appointments.
- 5.1.5 Failing to pay the Claimant for time off taken for ante-natal appointments.
- 5.1.6 Reducing the hours offered to the Claimant on the rota.
- 5.1.7 Suggesting that the Claimant would need to move to the London Wall branch after her holiday.
- 5.1.8 Failing to pay the Claimant for her holiday in September 2019.
- 5.1.9 Removing the Claimant from the rota at Fleet Street.
- 5.1.10 Dismissing or constructively dismissing the Claimant.

6. Victimisation.

- 6.1 Did the Claimant do a protected act? The Claimant relies on her conversation with ACAS in early conciliation regarding an allegation of pregnancy discrimination and her first Tribunal claim number 2204943/2019.
- 6.2 Did the Respondents subject the Claimant to a detriment because she had done a protected act? The Claimant relies on:
  - 6.2.1 The County Court claim brought against the Claimant on 19 November 2019.
  - 6.2.2 Continued threats of police action made by telephone and WhatsApp messages, including on 8, 11 and 16 December 2019
  - 6.2.3 The County Court claim made against the Claimant's boyfriend on 18 December 2019.
- 6.3 Did the alleged victimisation arise out of the employment relationship and/or is it closely connected with the employment relationship.

7. Holiday pay.

- 7.1 Was the Claimant entitled to be paid for her holiday in September 2019?
- 7.2 Was the Claimant paid for her holiday?
- 7.3 How much holiday had the Claimant accrued at the termination of her employment?
- 7.4 How much holiday had the Claimant taken?

7.5 Was the Claimant paid in respect of accrued but untaken holiday?

8. Unlawful deduction from wages.

8.1 The list of issues identified discrepancies between the contents of the Claimant's payslips and the amounts actually paid to her, but this aspect was not pursued at the hearing.

9. Employment Particulars.

9.1 Was the Claimant provided with a statement of particulars?

10. The Tribunal decided that it would hear and determine the issues as to liability before hearing any issues as to remedies.

**Procedural matters**

11. A translator, Ms Zinchuk, translated the proceedings into Ukrainian for the assistance of Miss Havdan, who gave her evidence in Ukrainian, which was then translated into English. Mrs Forbes gave her evidence partly in English and partly in Ukrainian, the latter being translated into English by Ms Zinchuk.

12. The Tribunal noted that all conversations between Miss Havdan and Mrs Forbes had been conducted in Ukrainian, and that the content of these was being relayed to us in English. The same was true of text and WhatsApp messages, which had been written in Ukrainian, and were the subject of agreed (non-professional) translations into English. The Tribunal had it in mind that we should be wary of placing too much reliance on the exact rendering in English of exchanges conducted in another language.

13. The Respondents sought to rely on an email dated 20 April 2021 as Ms Arleta Szynal's witness statement, and to call her to give evidence. The Respondents also sought to rely on an affidavit from Ms Hamichi and a letter from Ms Smedley, both produced for use in the County Court proceedings. Ms Mathur objected to all of these, saying that the Claimant had not been expecting Ms Szynal to be called, and that the County Court documents related to an allegation against Miss Havdan of taking food from the Respondents which was not, as such, in issue in the present claim, although the County Court claims were relied on as detriments in the victimisation complaint.

14. The Tribunal decided that Ms Szynal's evidence could be heard without prejudicing Miss Havdan, who was aware of the evidence that it was intended she should give; and that the County Court documents could be referred to as documents and given such weight as the Tribunal considered appropriate.

15. There was some pressure of time in the hearing, and the Tribunal had to restrict both Mr Forbes and Ms Mathur in terms of the time available for cross-examination of witnesses. It became apparent that in the 4 days allocated it would be possible only to hear the evidence, and the Tribunal expressed the intention of receiving written submissions and arranging further time in chambers (as in fact occurred). Some time was lost on the morning of day 3 because the Employment Judge was required to hear another matter for around an hour.
16. Ms Mathur had originally estimated that she would need a day for cross-examination of Mrs Forbes. Following a difficulty on Miss Havdan's part joining the hearing, cross-examination of Mrs Forbes began at 10.20 on day 4.
17. At lunchtime on day 4 Ms Mathur stated that she needed the remainder of that day and a further 2 hours to complete her cross-examination. The Tribunal took stock of the situation, including the practical consideration that if the evidence were to go part-heard, there would be a delay of months before the hearing could be resumed, because of the need for all parties and the members of the Tribunal to be available. By contrast, if the evidence were to be completed, the Tribunal alone was able to meet in chambers and consider written submissions on 6 and 7 May, only a week later.
18. The Tribunal considered that while the latter approach was not ideal, as it put Ms Mathur under pressure of time and involved written rather than oral submissions, it was preferable to a break measured in months in order to allow for a further 2 hours of evidence. We therefore unanimously decided and stated at 2.15 pm that we would sit for up to an additional hour on day 4 (to 5.30) and would require Mrs Forbes' evidence to be completed within that time. Ms Mathur asked the Tribunal to note that she contended that this decision was unfair to Miss Havdan. In the event, Ms Mathur and Mrs Forbes co-operated with the objective of completing the evidence, and the hearing concluded at 5.10 pm.

**Evidence and findings of fact**

19. The Tribunal heard evidence from the following witnesses:
  - 19.1 The Claimant, Miss Havdan.
  - 19.2 The Claimant's mother, Mrs Larissa Havdan.
  - 19.3 The Second Respondent, Mrs Forbes.
  - 19.4 Ms Arleta Szydal, a former employee of the Second Respondent.
20. There was a bundle of documents that had been prepared by the Claimant's solicitors. Although Mr Forbes expressed some concerns about

the bundle, he agreed that the hearing should proceed, using the bundle. Page numbers in these reasons refer to that bundle.

21. The Second Respondent, of which Mrs Forbes is the director and owner, operates two takeaway food shops, in London Wall and Fleet Street respectively. Mrs Forbes was on maternity leave from February 2019, and Mr Forbes came to work in the Fleet Street shop. His previous employment background was in health and safety, rather than in catering.
22. Miss Havdan began work for the Second Respondent on 15 August 2017, at the London Wall shop. She moved to Fleet Street in September 2018 because she did not get on with other staff (as put in her witness statement) and/or did not get on with the manager (as put in her oral evidence). It may be that there is no distinction intended between the two versions, and the difference is not material to the issues in any event.
23. Miss Havdan's evidence, which was not challenged, was that she worked around 35-40 hours per week at Fleet Street, including occasionally covering at London Wall. The system operated was that the rota showing the hours to be worked in the forthcoming week was sent out to employees each Sunday.
24. There was an issue about the provision of written particulars of employment. Miss Havdan's evidence was that she was not given these, and that she had a particular reason to ask for them as she needed them in connection with her application for indefinite leave to remain in the UK. She stated that Mrs Forbes told her that their oral conversations and the payslips were the contract.
25. When cross-examined on this point, Mrs Forbes said that Miss Havdan had a verbal, not a written contract, and that when she employed someone she would explain the terms and confirm the conversation with a text message. She said that the message to Miss Havdan existed, but was not in the bundle.
26. In the absence of a copy of a document setting out the particulars required by section 1 of the Employment Rights Act, and given the evidence about an oral conversation plus a text message, the Tribunal concluded that the required statement of employment particulars had not been provided.
27. Miss Havdan became pregnant in the summer of 2019. There was a dispute about when the Respondents became aware of this. In her claim form Miss Havdan stated that this was in early July, and confirmed this in her oral evidence. Mr Forbes challenged Ms Havdan's recollection, pointing to an entry in her medical records which referred to her having informed her employer of her pregnancy in late July, while maintaining on the Respondents' behalf that they had in fact been informed in late June.
28. The Tribunal did not find it necessary to resolve this particular dispute. The important point for the issues that we had to determine was that, on all

accounts, Mrs Forbes knew that Miss Havdan was pregnant by some point before the beginning of August. As will be described, an important conversation between Mrs Forbes and Miss Havdan took place on 2 August.

29. There were issues about events between the date at which Mr and Mrs Forbes became aware that Miss Havdan was pregnant and 2 August 2019. The dates for these were uncertain, and the Tribunal will set these out in the order in which they appear in the list of issues above, paragraph 5.1.
30. Miss Havdan's evidence on issue 5.1.1. was that no risk assessment was carried out after she informed the Respondents that she was pregnant. When cross-examining Miss Havdan, Mr Forbes suggested that he carried out a risk assessment, and referred to the document annexed to the ET3 for the second claim, at page 50. This referred to his health and safety qualifications, and asserted that he had completed a site-specific risk assessment for Miss Havdan. The annex then set out 7 numbered points which were recorded in the "meeting minutes". Mr Forbes said that he no longer had these minutes, although he had minutes of similar meetings with other employees.
31. When Mrs Forbes was asked about this aspect, she was taken to a risk assessment prepared for another employee at page 225. She said that a risk assessment for Miss Havdan was also prepared, but she would not sign it as she did not understand English: hence it was carried out orally. When Ms Mathur pressed Mrs Forbes on the point, she said that there was a risk assessment but Miss Havdan never signed it; and when asked why she did not get someone to help with translating it, she replied that her husband concluded a verbal risk assessment. Mrs Forbes added that Ms Havdan understands spoken, but not written, English.
32. The Tribunal considered that, had meeting minutes or an unsigned risk assessment existed, the Respondents would have retained them. Mr Forbes would have known the importance of retaining them, even if unsigned, given his experience in health and safety. We found Mrs Forbes' evidence about language difficulty to be implausible. We concluded that these documents had never existed, and that the Respondents' variable stance on this issue suggested that no risk assessment had ever taken place. The Tribunal found that there had been none.
33. Issues 5.1.2 and 5.1.3 concerned comments attributed to Mrs Forbes, respectively that Mr Forbes had said that Miss Havdan was slow due to her pregnancy, and that she should "hide her belly" from customers and wear loose fitting clothes in order to disguise her pregnancy. Mrs Forbes denied making these comments, and argued that it was unlikely that she would have said such things, having herself continued working in the shop while visibly pregnant.
34. The Tribunal concluded, as a matter of probability, that these things were not said. There was no obvious reason why an employer would be



reluctant to allow customers to see that an employee was pregnant. Mrs Forbes had continued working at the shop while pregnant, and so it seemed unlikely that she would have been concerned about Ms Havdan being visibly pregnant.

35. Issues 5.1.4 and 5.1.5 concerned time off work that Miss Havdan took for ante-natal appointments. These took place on 22 June, 15 and 30 July, 28 August and 2 September. Her evidence was that Mrs Forbes told her that, if she took time off for these appointments, she would only be offered part-time hours the following week, and that she was not paid for time that she took for such appointments. In paragraph 8 of her witness statement, Miss Havdan said that she asked for time off for all her appointments, but was not paid for these.
36. Mrs Forbes' evidence was that there was one occasion (15 July) when Miss Havdan asked for time off for an ante-natal appointment, when her mother collected her, and when she was paid in full. Mrs Forbes said that on other occasions, Miss Havdan did not refer to appointments, but just asked to leave work early or to take a day off. When challenged on the latter point, Mrs Forbes response was: "show me a message saying she has a doctor's appointment."
37. The Tribunal found it improbable that the Respondents would tell the Claimant that there was, or that they would impose, a sanction for attending ante-natal appointments of giving her only part-time hours the following week. There was no obvious logic to this. Furthermore, on the Claimant's evidence she nonetheless asked for time off for appointments, without apparently being sanctioned with part-time hours thereafter. The Tribunal concluded, as a matter of probability, that this was not said.
38. Conversely, the Tribunal found the Respondents' position on non-payment for appointments taken implausible. Mrs Forbes' case was that she did not refuse to pay Miss Havdan for time taken for ante-natal appointments, but that the latter never told her (other than on 15 July) that she had any to attend. The Tribunal considered that, if Miss Havdan had been given the impression that she would be paid for time taken for ante-natal appointments, there would have been no logic in her failing to ask for this. We concluded, as a matter of probability, that Ms Havdan was told that she would not be paid for ante-natal appointments, and that she was not paid for them.
39. Issue 5.1.6 involved an allegation that Miss Havdan's hours were reduced in July and August 2019, after the Respondents became aware that she was pregnant. There were calendars, prepared by the Respondents, at pages 330 and 331. These showed Miss Havdan as working 121 hours in May 2019 (and as having taken a week's holiday in that month); 149 hours in June, 169 hours in July and 145 hours in August. When Mr Forbes asked Miss Havdan about these, she replied that her working hours in July were fewer than those she worked before her pregnancy, and that her payslips and bank statements showed different amounts of pay.

40. Ms Mathur submitted that the calendars showed that Miss Havdan's working hours had reduced in August (which they had, as compared to July, but not to any significant degree as compared to June). Mr Forbes made the point, which the Tribunal found plausible, that there were fewer people in the City, and therefore less need of hours to be worked in the shop, in August as opposed to other times of the year. We concluded that the allegation that Miss Havdan's hours had been reduced (in a way other than reflecting the amount of business being done) had not been made out as a matter of fact.
41. It was common ground that Mrs Forbes and Miss Havdan had a conversation on 2 August 2019 about the latter's continuing employment in the light of her pregnancy, and her proposed holiday in September. Miss Havdan recorded this conversation, which took place in Ukrainian. There was at pages 152-153 a translation of the transcript of the conversation prepared on behalf of Miss Havdan, and at page 154 the Respondents' criticisms of, or differences from, that translation.
42. In the event, the Tribunal found that these differences had no material effect on the matter. The undisputed elements of the transcript showed that Miss Havdan said that she intended to work until November. Mrs Forbes said that it would "more possibly" be until the end of September, and then part-time, because that would be the end of month 6 (of Miss Havdan's pregnancy) and that starting from month 7-8 anything could happen. Miss Havdan queried the suggestion of part-time work. Mrs Forbes further stated that Miss Havdan needed to consider the end of September because she (Mrs Forbes) would need to hire a new person, train them, and provide them with hours.
43. Mrs Forbes then suggested that Miss Havdan should "work till the end of September and I will give £200", which she later said would be "for your work here, for your baby." Mrs Forbes said "If anything changes and I will not be able to find a replacement you will be working because there won't be any other way out. However, I can't pay. You want the hours and that person will want the hours, and who's going to pay. I have no one to borrow from and nothing to sell I've already sold my flat. You still have the whole August and September to work and you will leave starting from October".
44. Mrs Forbes then suggested that Miss Havdan could come in one day a week, but said that there would no longer be full-time work available, saying that Mr Forbes would be working shifts to save money. She added "ok, we have an agreement", and asked Miss Havdan not to tell anyone about the £200.
45. The Tribunal approached the transcript with a degree of caution, given that it was recounting a conversation that took place in a different language, and was not a professional transcription or translation. However, Mrs Forbes agreed that she meant that, when Ms Havdan returned from her holiday at

the end of September, she would not be able to do the hours, and that her intention was to engage a new person at Fleet Street. She said that there had been an earlier part of the conversation in which she had mentioned Miss Havdan going to London Wall, which the latter resisted (the Tribunal could see that the transcript began part of the way into a conversation, with the words “I was supposed to go on holiday”) and that she was trying to convince her to do so. Mrs Forbes said that she intended to give Miss Havdan the £200 regardless of whether or not she went to London Wall.

46. In paragraph 17 of her witness statement Miss Havdan said that she had 2 weeks holiday beginning on 7 September 2019, and that shortly before this, Mrs Forbes told her that she wanted her to move to London Wall when she got back. It was not clear to the Tribunal whether this evidence was intended to refer to the conversation on 2 August, or to one on another occasion. This was, however, of little significance, because it was common ground that, before Miss Havdan went on holiday, Mrs Forbes had said that she wanted her to move to London Wall on her return. When asked about the reason for this, Mrs Forbes denied the suggestion that this was because there were more staff at London Wall than at Fleet Street, which would mean less disruption to the business if Ms Havdan were restricted by the effects of her pregnancy. She said that she and her husband thought that the move would be better for Miss Havdan on health and safety grounds (meaning, in relation to her pregnancy).
47. The Tribunal concluded that the “health and safety grounds” were in reality the same as what was put to Mrs Forbes, i.e. that the larger number of staff members at London Wall mean that it was thought to be easier to cover for any restrictions on Miss Havdan’s ability to do her job. It was difficult to see what else they could mean.
48. Miss Havdan went on holiday on 7 September 2019. On 20 September she sent a text message (in Ukrainian, again informally translated) at page 168 querying why she had not been paid while on holiday. Mrs Forbes replied, seemingly accepting that she had not paid the Claimant for September, but observing that she had been paid for 2 days in May. When asked about this, Mrs Forbes pointed to page 369, which was an extract from Miss Havdan’s bank statements from April 2019. This showed two payments, and Mrs Forbes stated that one of these was on account of holiday pay. The Tribunal was left with no coherent account from the Respondents about payment for the holiday in September (although our conclusions on the question of dismissal will bear on this).
49. In her oral evidence, Miss Havdan stated that on 21 September, having returned from holiday, she enquired about the rota for the following week. On 22 September Mrs Forbes sent her a WhatsApp message at page 169 which read (again translated) “Hi Olga, I didn’t put you in the rota next week...with £640 I can’t pay you” and then “we will talk”.
50. Following this (a note made by Mrs Forbes at page 171 suggests that it was on 25 September 2019, although in her oral evidence she recalled it as 22

September) Mrs Forbes and Mrs Havdan spoke. Mrs Forbes' evidence in cross-examination was that they spoke about the possibility of Miss Havdan working at London Wall, and that she expected Mrs Havdan to come back to her about this. In cross-examination Mrs Forbes said that on 25 September 2019 she spoke to Miss Havdan, who said that she did not want a position at London Wall. Mrs Forbes said that at around this time Miss Havdan asked for her P45 and P60, and although her evidence on the point was somewhat confusing, it appeared from a WhatsApp message at page 172 that she had asked her accountant for these documents on this date.

51. Ms Szynal was referred to a text message to Miss Havdan dated 25 September 2019 at page 172(b), in which she said that she had asked Mr Forbes whether Miss Havdan was coming back after her holiday, to which he had replied that she was not because she "wasn't nice for customers". Ms Szynal stated that Mr Forbes had not said that Miss Havdan had been dismissed and that she was supposed to go to London Wall, where she could take more breaks.
52. Miss Havdan contacted ACAS with regard to the potential complaint on 25 September 2019.
53. Mrs Forbes also stated that she had further discussions with Miss Havdan on 26 September, in which she maintained that there was a position available at London Wall. She agreed that she did not put Miss Havdan back on the rota for Fleet Street. Miss Havdan stated that the offer with regard to London Wall was for 3 hours per day around lunchtime and that, apart from her general reluctance to go to London Wall, this would not be an economic proposition given the travel time and fares involved for 3 hours' work each day.
54. Miss Havdan stated in paragraph 20 of her witness statement that she understood that she had been dismissed when she received the WhatsApp message telling her she was not on the rota: hence her request for the P45. The Tribunal considered that, if there were further discussions on 26 September, they evidently did not change the situation in any way.
55. On 28 September (as shown by the original in Ukrainian on page 169, and not 22 September as it appeared from the English translation) Mrs Forbes asked Miss Havdan for the MATB [maternity benefit] form, and Miss Havdan replied asking for her payslip, P45 and P60.
56. Mrs Forbes' evidence in cross-examination was that she was contacted by ACAS on 14 October 2019 and that she replied on 28 or 29 October. Miss Havdan had received her early conciliation certificate on 25 October.
57. Miss Havdan and Mrs Forbes exchanged further text messages on 26 October 2019. Again, these had been translated from Ukrainian, and it was not always easy to follow exactly what was meant. Mrs Forbes referred to having offered Miss Havdan a position at London Wall, which she did not want. Miss Havdan said that London Wall was not economically viable for

her, and that she had been fired by SMS message. Mrs Forbes stated that hours at London Wall had not been raised, only the offer of work there, and that the 3 hours per day related to Fleet Street. Miss Havdan asked why London Wall was involved at all when she had worked and got pregnant at Fleet Street. Mrs Forbes replied "Because there are more girls at LW and you worked there for 2 years. And your hours can be blocked if you don't go to work. On FS I can't do that (if 3 people work). You didn't want to go to LW and it's not my fault."

58. Ms Mathur put it to Mrs Forbes that this last message reflected the real reason why she wanted Miss Havdan to go to London Wall, i.e. that it would be easier for the business to work around any difficulties arising from her pregnancy than would be the case were she to stay at Fleet Street. Mrs Forbes denied this. The Tribunal could not see what else the message might realistically mean, and found that this was indeed the reason why the move was proposed.
59. On 1 November 2019 Miss Havdan received her P45 from the Respondents (at page 193). This showed the last date of her employment as 6 September 2019. When asked about this in cross-examination, Mrs Forbes said that this was Miss Havdan's last working day.
60. Miss Havdan presented her first claim to the Tribunal on 17 November 2019. There is no evidence to show that Mrs Forbes was immediately aware that this had occurred. (The claim form was evidently sent to the Respondents by the Tribunal on about 25 November 2019, given the deadline for presenting a Response by 23 December). However, on 19 November the Second Respondent issued a County Court claim against Miss Havdan (at pages 198 (a) to (c)) for £1,500, for "stealing products" during the period February to May 2019. The claim form asserted that Miss Havdan had been giving free food to her friends and boyfriend over a 4 month period and that "I" (presumably Mrs Forbes, although the statement of truth on the claim purported to be signed by the company) wanted to be compensated for the products and the stress and upset caused. Mrs Forbes also stated in paragraph 3.2 that "I have been informed recently of this and after viewing CCTV have proof that she was giving away my products Monday to Saturday". The claim form also included this: "I have a police reference number and will proceeding with a criminal case against her for stealing".
61. Miss Havdan filed a defence at pages 199 – 201 asserting that the claim had been brought to punish her for claiming unfair dismissal and pregnancy discrimination. She stated that, with her employer's agreement, she had taken out of date stock and that she had once given a bagel that she had made for herself to a friend: she had agreed not to do this again.
62. On 8 December 2019 Mrs Forbes sent a WhatsApp message to Miss Havdan at page 202. Miss Havdan relies on this as an act of victimisation, and the Tribunal will set it out In full:

“Hello Olga, thank you for your response.

The CCTV clearly shows you cutting fresh bagels (are these off too!) from the display unit then going to the kitchen fridge (fresh food) and wrapping in paper meant for customers. I think the court will find this very interesting as your defence statement is shown to be a complete Lie. Also I thank you for making and stealing coffee for your boyfriend Mr B[ ], this will also be shown in court.

What’s going to be your excuse for this?

One occasion you said in your swear statement....I’ve got 10 videos saved of this...and I can get more if I need.

We also have three affidavits signed by different people saying that you did steal this food and your response is a lie. Also how can you give food away that is off....if....the shop is still open selling it.

I’ve been informed by my Solicitor that once we have finished with the civil matter we will be referring this to the crown prosecution [sic] for a criminal case against yourself and your boyfriend and may sue you again as I believe you stole more now I’ve been given additional information. And we will be going after both of you for a criminal conviction.

If you want to discuss this let me know as I don’t want you to have a criminal conviction for stealing as well. I have a form to sign which I will be doing on Wednesday after that then I will not be offering any mediation for this and we see you in court.”

63. Miss Havdan replied on 10 December at page 202 asking what Mrs Forbes would like to discuss and saying that she had been dismissed without notice. She said that she was not afraid to go to court and would like to see the videos. She referred to the offer of £200, and concluded “if you have any proposition, let me know”.

64. Mrs Forbes sent another message on 11 December 2019 (at page 203) which again is relied on as an act of victimisation. It included the following:

“In your swear statement you also say your friends turned up. We will require you to provide your friends names and contact details as we only have one individual on cctv WHY ARE YOU LIEING AGAIN?  
Are you misleading the court because your afraid they will know the truth it’s your boyfriend (as we all know).

Or are you not telling the truth because this individual is your boyfriend and illegal and should not be living with you paying money with people receiving any form of benefit.

Your swear declaration is being evasive from the truth and we can prove this so easily. You know it’s not very smart lying to the courts on this form, you will be in big trouble when they find out and I have all the information to show this.”

65. In another message of the same date on page 204, Mrs Forbes wrote:  
“If I prove in court you were taking items in early 2019 it is instant dismissal (gross misconduct) from that date.....”

If you want to meet to discuss and end this like two people that help each other a lot then as I said before I’m prepared to meet you and move on.”

66. The Tribunal considered that the reference to instant dismissal and gross misconduct showed that Mrs Forbes had the Tribunal proceedings in mind when she wrote this message. We concluded that the words “discuss and end this”; “help each other a lot”; and “move on”; meant coming to an agreement to end the Tribunal proceedings, the County Court claim, and the threat of being reported to the police.

67. On 15 December Mrs Havdan and Mrs Forbes spoke on the telephone (the former’s phone record being at page 204(a)). Mrs Havdan’s evidence was that Mrs Forbes said that if Miss Havdan did not drop her Tribunal claim she would get a criminal record. Mrs Forbes denied saying this. In the light of the message sent on 11 December, the Tribunal concluded as a matter of probability that Mrs Forbes did say something to this effect: that would be consistent with the content of the message.

68. Miss Havdan instructed solicitors, who wrote to Mrs Forbes on 16 December 2019 at page 206. They stated that they had been instructed in the existing Tribunal claim and had been instructed to bring a complaint of victimisation arising out of the County Court claim and the WhatsApp messages. They said:

“We will add each and every occasion you threaten our client in this manner as a new complaint of victimisation. We strongly suggest that you desist in this action.”

There was a further telephone conversation between Mrs Forbes and Miss Havdan on the evening of 16 December, presumably before Mrs Forbes had received the solicitors’ letter. The Respondents provided a transcript of a recording of this made by Mrs Forbes, at pages 209-211. This clearly did not contain the whole conversation, as it began with Mrs Forbes saying “yes, but Olia, look, do you remember that you couldn’t.....” which could not have been the opening words between the parties. Miss Havdan maintained that Mrs Forbes had again threatened her with police action in the missing part of the conversation, and Mrs Forbes denied this. For the reason given in relation to the conversation the previous day, the Tribunal concluded as a matter of probability that some further reference was made to the police. In the recorded part of the conversation, there was some further discussion of London Wall, including Mrs Forbes repeating the point that there were more staff members there than at Fleet Street.

69. In cross-examination Mrs Forbes said that she first spoke to Miss Havdan about this allegation on 7 September 2019, which was when she first knew about it. Miss Havdan made the point that 7 September was the first day of her holiday. The Tribunal did not consider that the precise date was very important; Mrs Forbes was saying that she had learned of the alleged thefts shortly before the Claimant's holiday and had spoken to her about it then. We found this to be improbable. We considered it unlikely that the exchange of messages in September and October would have taken place without reference to the very serious matter of the alleged theft of food to a value of £1,500 if Mrs Forbes had discovered the same at that time. The Tribunal accepted Miss Havdan's evidence that the allegation was not raised before she had approached ACAS.
70. On 18 December 2019 the Second Respondent issued a County Court claim at pages 219-221 against Ms Havdan's boyfriend, claiming £2,000 on the basis that he had, with an accomplice (meaning Miss Havdan), stolen food during the period February to May 2021. He filed a defence denying the claim and asserting that it was intended to victimise Miss Havdan and intimidate her into dropping her Tribunal claim.
71. Miss Havdan's solicitors wrote again to Mrs Forbes on 19 December, complaining that the further threats about contacting the police were additional acts of victimisation.
72. In the County Court proceedings the Respondents relied on affidavits from Ms Szynal and another employee in which they said that they had seen Miss Havdan giving food to her boyfriend without payment during the relevant period. The Tribunal did not hear in detail about the further progress of the County Court claims, but recorded that the claim against Miss Havdan was heard and dismissed and that the claim against her boyfriend was struck out for non-compliance with an order.
73. Meanwhile, Miss Havdan contacted ACAS and subsequently issued proceedings with regard to her second claim, of victimisation.

### **The applicable law and conclusions**

74. The Tribunal returned to the issues as set out above, and addressed them in that order.

#### Unfair dismissal

75. Section 99 of the Employment Rights Act 1996 provides as follows:
- (1) An employee who is dismissed shall be regarded....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.....*

76. Regulation 20 of the Maternity and Parental Leave Regulations 1999 prescribes reasons connected with the pregnancy of the employee.

77. Section 98 of the 1996 Act includes the following provisions:

*(1) In determining.....whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

*(a) The reason (or, if more than one, the principal reason) for the dismissal, and*

*(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.*

*(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.*

78. The Tribunal first considered whether there had been a dismissal. We concluded that Miss Havdan was expressly dismissed on 22 September 2019 when Mrs Forbes sent her the WhatsApp message stating that she was not on the rota for the following week. Standing alone, this message might have meant something other than that Miss Havdan was dismissed. The Tribunal concluded, however, that when all the circumstances were taken into account, its natural meaning was a dismissal. The relevant circumstances were:

78.1 On 2 August Mrs Forbes had stated that Miss Havdan could or should work until the end of September, when Miss Havdan had said that she intended to work until November.

78.2 Mrs Forbes took the view that Miss Havdan could not return to Fleet Street after her holiday, and that to whatever extent and for whatever period, she should work at London Wall thereafter (although there was no evidence that Miss Havdan was put on the rota there) while Miss Havdan’s position was that she was not prepared to go to London Wall.

78.3 The WhatsApp message stated that Mrs Forbes could not pay Miss Havdan. The Tribunal considered that an employee who was told that

they were not to come to work because the employer could not pay them would take it, in the absence of any indication that this was a temporary state of affairs (and there was no evidence that this had ever happened previously), that their employment had come to an end.

- 78.4 On around 22 or 25 September, Miss Havdan asked for her P45. Mrs Forbes did not query this, or suggest that her employment was still continuing, but asked her accountant to send it. Both parties evidently understood that Miss Havdan's employment had come to an end.
79. The P45 showed Miss Havdan's last day of employment as 6 September 2019 (which was the last day on which she attended work). Whether this backdating was an innocent reflection of the Respondents' understanding of what was required, or whether it was an attempt to avoid having to pay Miss Havdan for her holiday, the Tribunal was satisfied that the effective date of termination of Miss Havdan's employment was 22 September 2019.
80. If the Tribunal is wrong about this being an express dismissal, we would find that there was a constructive dismissal. This would involve a breach of contract by the employer that was sufficiently serious as to entitle the employee to treat herself as dismissed. The relevant facts are essentially the same as those that led the Tribunal to conclude that there was an express dismissal. Mrs Forbes told Miss Havdan that she could not return to Fleet Street after her holiday, and could not or should not work beyond the end of September. Mrs Forbes told Miss Havdan that she was not on the rota for the week following 22 September.
81. If the correct analysis of the situation is (contrary to the Tribunal's primary finding) that Miss Havdan resigned, we find that she did so in response to the matters listed above. The Tribunal found that informing an employee that she could not return to her usual workplace; that she would have to stop work earlier than she wished because of her pregnancy; and that she was off the rota and would not be paid; amounted together to a breach of the implied term of trust and confidence (usually described as a term of the contract that the employer will not, without good reason, act in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence with the employee).
82. There was, therefore, an express or a constructive dismissal. The Tribunal then considered the reason for the dismissal. On either approach, the reason was Mrs Forbes' view that it would be easier for the Respondents to cover the perceived limitations on Miss Havdan's ability to do her job if she were based at London Wall, and that she would not be able to work effectively at all beyond the end of September. The Tribunal found that, in essence, this amounted to a single reason of Mrs Forbes' view of the impact of Miss Havdan's pregnancy on her ability to do her job.

83. The Tribunal found that this was inescapably a reason connected with Miss Havdan's pregnancy, and therefore unfair within section 99 of the Employment Rights Act.
84. The Tribunal also found that the dismissal was unfair within the terms of section 98 of the Act. The reason was not one that fell within subsection (2), nor was it some other substantial reason of a kind such as to justify the dismissal.
85. The complaint of unfair dismissal is therefore well-founded. The Second Respondent, as employer, is liable to her in respect of this complaint.

### **Wrongful dismissal**

86. Miss Havdan was not given any notice of her dismissal. She had not committed an act of gross misconduct such as would entitle the Respondents to dismiss her. The complaint of wrongful dismissal is therefore well-founded. Again, the Second Respondent, as employer, is liable to her in respect of this complaint.

### **Pregnancy discrimination**

87. Section 18 of the Equality Act 2010 includes the following provisions:
- (3) *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.*
- (4) .....
- (5) *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.*
- (6) *The protected period in relation to the woman's pregnancy begins when the pregnancy begins.....*
88. The Tribunal had in mind the provisions about the burden of proof in section 136 of the Equality Act in relation to this complaint and the complaint of victimisation. Section 136 provides as follows:
- (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.*

89. In the well-known cases of Igen v Wong and Madarassy v Nomura, decided under the earlier anti-discrimination legislation, the Court of Appeal identified two stages to the application of the burden of proof. At the first stage, the Tribunal would consider whether the facts were such that, in the absence of an explanation from the Respondent, it could properly find that discrimination had occurred. For such a finding to be “properly” available, there would have to be something more than a difference of protected characteristic (e.g. pregnancy) and a difference in treatment. The something more might not, in itself, be very significant, but it had to be present. If such a finding could properly be made, the burden would be on the Respondent to show that discrimination had not occurred.
90. In Hewage v Grampian Health Board [2012] UKSC 37, Lord Hope made the following observation about the burden of proof:
- “.....it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”
91. In some instances in the present case the Tribunal has made positive findings one way or the other, in the manner discussed by Lord Hope. In others, as explained below, we have applied the burden of proof provisions.
92. As shown in the list of issues above, there were 10 allegations of direct discrimination. The Tribunal has determined these as follows, using the same numbering:
- 92.1 The Tribunal has found that a risk assessment was not carried out. In determining whether this was an act of discrimination, the Tribunal had regard to the burden of proof provisions. Mr Forbes asserted in the course of cross-examining Miss Havdan that he had taken minutes of a risk assessment, but had not retained them. We have found that not to be the case. Mrs Forbes gave a further explanation about language difficulty which we found to be implausible and which would not, in any event, explain why an unsigned risk assessment had not been retained. The Tribunal concluded that the implausible explanations put forward provided the “something more” that would enable a finding of discrimination to be made in the absence of the Respondents proving that this had not occurred. The same point about the implausibility of the explanations led the Tribunal to conclude that the Respondents had not shown this. This complaint was therefore well-founded.
- 92.2 The Tribunal has found that the allegation of making a comment about being “slow” has not been made out on the facts.

- 92.3 The same is the case for the allegation of making a comment about “hiding her belly”.
- 92.4 The same is also the case for the allegation of threatening Miss Havdan with part-time hours.
- 92.5 The Tribunal has found that Miss Havdan was not paid for time taken off for ante-natal appointments. We concluded that this was unfavourable treatment and that it occurred because of Miss Havdan’s pregnancy, this being the reason why she needed the time off. This complaint was therefore well-founded.
- 92.6 The Tribunal has found that the complaint of reducing Miss Havdan’s hours on the rota has not been made out on the facts.
- 92.7 Miss Havdan was undoubtedly told that she would have to move to London Wall on her return from holiday. She had reasons, described above, for not wishing to do this. The Tribunal found that this was unfavourable treatment. It might not have been such, had there been a risk assessment and discussion with Miss Havdan about the pros and cons of working at Fleet Street or London Wall. In the event, however, Miss Havdan was just told that she had to go to London Wall. On the Respondents’ own evidence, this was because of her pregnancy. This complaint was therefore well-founded.
- 92.8 Miss Havdan was not paid for her holiday in September 2019. This amounted to unfavourable treatment. The Tribunal concluded that this was an aspect of the dismissal (in that the Respondents either concluded that they need not pay Miss Havdan for her holiday because her employment had come to an end before she took it, or that they could avoid paying for it if they backdated the termination). For the reasons given below in relation to the dismissal, the Tribunal concluded that this was also an act of discrimination and that this complaint was well-founded.
- 92.9 Miss Havdan was removed from the Fleet Street rota. This followed from the requirement to move to London Wall, which the Tribunal has found to be discriminatory. For essentially the same reasons, we found that this complaint was well-founded.
- 92.10 The dismissal amounted to unfavourable treatment. The Tribunal has found that the reason for the dismissal, whether this was express or constructive, was a reason related to her pregnancy. We found that the facts were such that, in the absence of an explanation from the Respondents, the Tribunal could properly conclude that the dismissal occurred because of Miss Havdan’s pregnancy, the “something more” being the fact that the dismissal was clearly linked to her pregnancy. The Respondents have not advanced any argument to show that the dismissal was nonetheless not “because

of” her pregnancy. We therefore concluded that they had not discharged the burden of proving this, and that this complaint was well-founded.

93. Complaints 1, 5, 7, 8, 9 and 10 of direct discrimination are therefore well-founded. The Tribunal then considered liability for these complaints as between the Respondents. We considered that the Second Respondent, as employer, was liable for all of these. Mrs Forbes was directly involved in all of them except for the first. In relation to that complaint, however, the Tribunal found that she allied herself personally with the case being put forward, by advancing the explanation (which the Tribunal has rejected) about language difficulty. We found, therefore, that she was personally liable on a joint and several basis with the Second Respondent for all the successful complaints of direct discrimination, including the first.

### **Victimisation**

94. Section 27 of the Equality Act provides as follows:

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

- (a) B does a protected act, or*
- (b) A believes that B has done, or may do, a protected act*

*(2) Each of the following is a protected act –*

- (a) Bringing proceedings under this Act;*
- (b) Giving evidence or information in connection with proceedings under this Act;*
- (c) Doing any other thing for the purposes of or in connection with this Act;*
- (d) Making an allegation (whether or not express) that A or another person has contravened this Act.*

95. Miss Havdan relied on contacting ACAS on 25 September 2019 and presenting her first claim on 17 November 2019 as protected acts. In her written submissions Ms Mathur stated that Miss Havdan contacted ACAS for early conciliation of an anticipated pregnancy / maternity discrimination claim. The ACAS certificate does not, in the usual way, give any information as to what complaints were put forward. Miss Havdan did not address this particular point in her witness statement, and Mrs Forbes was not asked what complaints she understood Miss Havdan to be making when she contacted ACAS.

96. The Tribunal raises these points because under section 27 the protected act has to relate to the Equality Act, and not to Tribunal proceedings in general. The Tribunal nonetheless concluded that Ms Havdan must have contacted ACAS with reference to a potential complaint under the Equality Act, as well as in relation to unfair dismissal and non-payment of holiday

pay. The Respondents did not at any point suggest otherwise. Miss Havdan had included Equality Act complaints in her first claim: it would be surprising if she had not raised them via ACAS.

97. Contacting ACAS in this way would fall within limbs (c) and (d) of section 27(1). Bringing proceedings would fall within limb (a).
98. The Tribunal therefore concluded that Miss Havdan had done protected acts in contacting ACAS and in presenting her first claim.
99. The Tribunal found that the bringing of the County Court claim against Ms Havdan and the threats of police action, all of which indisputably occurred, were plainly detriments. We also found that the bringing of the County Court claim against Miss Havdan's boyfriend was a detriment to her. It was likely to put pressure on her in relation to the claims she had brought in the Tribunal, and was likely to cause her concern about the relationship with him.
100. The Tribunal also found that these things were done because Miss Havdan had done the protected acts. We have rejected Mrs Forbes' evidence that she first discovered the alleged taking of food in September 2019 and raised it with Miss Havdan then. Mrs Forbes brought proceedings alleging theft, and threatened Miss Havdan with police action and a criminal record, in November and December 2019, soon after Miss Havdan had made allegations of breaches of the Equality Act. The allegations related to the period February to May 2019. The Tribunal agreed with Ms Mathur's submission that the chronology spoke for itself. If there be any doubt in the matter, Mrs Forbes' messages of 8 and 11 December 2019 about discussing and / or resolving matters showed, in the Tribunal's judgment, that she regarded the civil claims and threat of prosecution as bargaining counters against the Tribunal complaint.
101. Although the relevant events occurred after the termination of Miss Havdan's employment, the Tribunal found that the subject matter of the communications concerned showed that the victimisation arose out of the employment relationship.
102. The Tribunal therefore found that the complaints of victimisation were well-founded. Mrs Forbes was the person who committed the acts of detriment and is personally liable for them. The Second Respondent, as the employer, is vicariously liable for her acts, and the Tribunal concluded that the liability should be joint and several.

### **Holiday pay**

103. The Tribunal did not consider it necessary to set out the statutory provisions on holiday pay. There was no dispute that Miss Havdan took 10 days' holiday in September 2019, and that she was not paid for them. The Respondents have not advanced any coherent explanation for this. The

Tribunal concluded that this complaint was well-founded. Liability in this regard would rest with the Second Respondent.

**Employment particulars**

- 104. Section 1(1) of the Employment Rights Act provides that, where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment. Subsections (3) and (4) set out the particulars that are to be given, either initially or subsequently.
- 105. The Tribunal has found that the no written particulars were not provided. This complaint is therefore well-founded. Liability rests with the Second Respondent.

**Remedies**

- 106. Unless the parties reach agreement about remedies, a further hearing will be required. In order to arrange this, and to make any necessary further case management orders, a preliminary hearing by telephone will take place before the Employment Judge on 26 August 2021 at 4.00 pm. The parties should have details of their availability for the period 12-15 October and 1-5 November 2021.

---

Employment Judge Glennie

Dated: .....31 July 2021.....

Judgment sent to the parties on:

31/07/2021.

For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.