



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Fariba Ghazaeepour

**Respondent:** Hamlin Knight Limited

**HEARD AT:** Watford Employment Tribunal

**ON:** 10, 11 & 14 September 2020 (by CVP). Deliberations on 24 September 2020 (by CVP).

**BEFORE:** Employment Judge Michell, Ms Betts and Mr Kaltz.

**REPRESENTATION:** For the Claimant: In person  
For the Respondent: Ms Zakrzewska (consultant)

## RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the Claimant's claim of discrimination on grounds of pregnancy under s18 of the Equality Act 2010 is not well founded. The claim is therefore dismissed.

## REASONS

### BACKGROUND

1. The respondent is a specialist recruitment consultancy. The claimant was employed by the respondent from 6 August 2018 until her dismissal, purportedly by reason of failing to achieve targets during her probationary period, on 8 February 2019.
2. Following compliance with the Early Conciliation procedure (for which 'Day A' was 5 February 2019 and 'Day B' was 20 February 2019), on 20 March 2019 she presented a claim alleging discrimination on grounds of

pregnancy, contrary to s.18 of the Equality Act 2010 ("EqA"). (Her child was thereafter born on 8 April 2019.)

## **EVIDENCE**

3. We were referred to a bundle of some 495 pages, to which further documentation was added during the hearing. This was because the respondent had not given full disclosure of all relevant paperwork. The numbering of the bundle was convoluted, because the respondent (advised by Croner) had declined to insert various documents which the claimant had asked to be included -which meant that new pages and new numbering had to be added by the claimant. This approach was not of assistance to the tribunal, or in accordance with the overriding objective.
4. We heard oral evidence from the claimant, who produced a 50 page witness statement. Though it was rather long, it was thorough. The claimant covered all relevant matters in it.
5. By contrast, the statements produced by Croner on behalf of the respondent were much too short. They did not condescend into anything like the detail one would expect in such a case -especially given that the respondent had legal representation from Croner throughout. We were not helped by the respondent's statements, which were poorly executed and wholly inadequate.
6. On behalf of the respondent, we heard from Ms Karen Balmer (Operations Director), Ms Suky Rahim (recruitment consultant) and Mr Jonathan Hinch (Managing Director). We were not asked by Ms Zakrzewska to read the undated and unsigned 2 page statement of Ms Hannah Worshwick, who apparently could not attend the hearing due to unspecified health issues. We therefore disregarded it.
7. All witnesses gave their evidence patiently, despite the technological challenges which intermittently poor internet connection and -in the client's

case on Day 1- difficulties with electronic equipment presented at the CVP hearing.

8. We heard oral submissions from the parties upon the conclusion of the evidence. We also received brief written submissions from Ms Zakrzewska, which we had asked her to produce at the close of the hearing on Friday 11 September, and to provide to the claimant as soon as possible. As it transpired, she provided them to the tribunal and the claimant at 9.58am on Monday 14 September 2020. She did not refer us to any authorities in her submissions, which were very limited in content.

## **ISSUES**

9. The liability<sup>1</sup> issues for us to determine today were helpfully set out in the Case Management Order (“CMO”) of EJ Lewis following a preliminary hearing on 5 September 2019.
10. Subject to minor clarification on some points as incorporated into the list below, the parties agreed that the CMO accurately and comprehensively set out the acts/omissions about which the claimant complains. To recap, the following matters are relied upon as acts of unfavourable treatment for the purpose of the s.18 EqA<sup>2</sup> claim. (There is some overlap and duplication in the items listed at para 8 of the CMO. Below, we rationalise that list somewhat, though some overlap remains.)
  - a. On 25 September 2018, certain client accounts -including ‘Todd Doors’- which had been managed by Ms Hayley Johnson were allocated as ‘house accounts’, rather than -in the case of Todd Doors- as accounts allocated to the claimant “individually or personally”. The claimant asserts this was “contrary to the respondent’s practise (sic)

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<sup>1</sup> It was agreed that there would need to be a separate remedy hearing if necessary, due to lack of time, and because the claimant had not produced the remedy bundle which she had been asked to submit at the preliminary hearing. It was also agreed that -especially given the very late arrival of the argument on the part of the respondent- any issues relating to the claimant’s alleged clandestine recording of various meetings could be dealt with at the remedy hearing.

<sup>2</sup> The CMO refers to the claim as being brought under s.13 EqA. However, this cannot be correct, in the light of the claimant’s assertion that her pregnancy (rather than sex) caused her to be unfavourably treated, given the dates of the protected period, and given the provisions of s.18(7) EqA. Thus, with the parties’ agreement, our focus was on alleged *unfavourable*, rather than *less favourable*, treatment by the respondent.

previously when a consultant such as Ms Johnson had left”, and was “financially disadvantageous” to her. (**“The house account allegation”**.)

- b. On 18 October 2018, Ms Balmer and Ms Worshwick accompanied the claimant to a client meeting with Todd Doors “because she was pregnant”. (**“The Todd Doors meeting allegation”**).
- c. Ms Balmer at a review meeting on 15<sup>3</sup> October 2018 did not raise concerns about the claimant’s performance “because there were no concerns” . However, on 22 October 2018, in the course of another meeting, she told the claimant that there were concerns. The claimant asserts that there were no valid concerns that could have been raised at the time, and that they were raised because of her pregnancy. (**“the 15 October allegation”**.)
- d. “Four steps” were set out at the meeting on 22 October 2018. The claimant’s case is that none of those steps were appropriate for her to take, and that they were articulated “because of pregnancy”. (**“The 22 October allegation”**.)
- e. Under cover of an email dated 23 October 2018, the claimant was told of (unfounded) concerns about targets and her “probationary review was brought forward”- i.e. carried out earlier than it otherwise would have been. (In this respect, the claimant compared herself with Ms Johnson, who had resigned shortly before her 6 month probationary review meeting, but who had not had her probationary review “brought forward”.) (**“The 23 October allegation”**.)
- f. On about 22 October 2018, Ms Balmer introduced a new 75%/25% commission rate for all consultants and all clients, “but exempted Ms Worshwick from it”. The claimant asserts the decision was made because of her pregnancy, and that it reduced her “potential” earnings. (**“The commission allegation”**.)
- g. On 6 November 2018, Ms Balmer told the claimant that probationers such as her could no longer remove the office laptop for use away from the office. (**“The laptop allegation”**.)

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<sup>3</sup> The ET1 gives the wrong date, of 16.10.18.

- h. On various (unspecified) dates only after Ms Balmer became aware the claimant was pregnant, Ms Balmer began conversations with the claimant using the phrase “as a senior consultant” in a belittling sense. (“**The ‘senior consultant’ allegation**”.)
- i. On 8 November 2018, Ms Balmer sought to turn colleagues against the claimant. Specifically, she caused or encouraged Miss Mills-Barrington (aka Miss Mills), a recruitment support coordinator, to give the claimant misleading information “in relation to her setting up the email facility on my work mobile”. (“**The Miss Mills allegation**”.)
- j. On 8 November 2018, “in a hurry to conduct the claimant’s review meeting”, Ms Balmer told the claimant to “rush a candidate meeting”, “when previously her approach had been to tell the claimant to take what time she needed for candidate meetings” (“**the rushed candidate allegation**”).
- k. On 9 November 2018, Ms Balmer was hostile to the claimant, unduly pressured her to stop writing an email, and asked her what she had been writing (“**the 9 November allegation**”).
- l. Under cover of emails dated 23 & 29 October 2018, 7, 8, 9, and 29 November 2018, and 14 December 2018, Ms Balmer was “unsupportive, harsh and negative” towards the claimant (“**the harsh emails allegation**”).
- m. On 8 February 2018, the claimant was dismissed “for pregnancy” (“**the dismissal allegation**”).

11. So, we had to determine:

- a. Are the acts/omissions about which the claimant complains as set out above factually correct?
- b. In so far as any of those matters are factually correct:
  - i. Did they amount to “unfavourable treatment”?
  - ii. Were they on grounds of pregnancy?
  - iii. Are the matters pre-dating 5 November 2018 set out above part of “conduct extending over a period” beyond that date for s123(3) EqA purposes? (Insofar as they are not, the claimant did not assert that it would otherwise be just and equitable to extend time in her case. )

## **FACTUAL FINDINGS**

### **The parties**

12. The respondent is a relatively small business, with a total of about 25 staff at the material time. It has several offices, including one at Uxbridge where the claimant worked. At the time, no more than about six members of staff worked at the Uxbridge office. They were all female. Several of them were of child-bearing age. Some, such as Ms Rahim, have had children whilst working for the respondent, and maternity leave has not been an issue. There has been a previous recent instance where a female probationer, Miss Simms, fell pregnant during her probationary period in 2017. She successfully passed her probation, despite having had no recruitment experience beforehand. During her six month probationary period Ms Simms billed nearly £20,000, comfortably exceeding her target of £18,000.
13. The claimant has a background in recruitment, in the niche area of sonography where conditions were probably rather different. Apparently, in her previous job she achieved very significant sales figures.

### **Commencement of employment**

14. Ms Balmer interviewed her for the job in March and May 2018. At the interview, billing targets were discussed, amongst other things. The claimant was told she would be expected to bill £18,000 within the first six months.
15. Her start date was delayed at the request of the claimant, because her young son required hospital treatment. Ms Balmer accommodated this request without complaint. By all accounts, the relationship between Ms Balmer and the claimant was cordial at this time.
16. The claimant began work at the respondent (at 4 days a week) on 6 August 2018. Her employment was made subject to a six month probationary period. The respondent reserved the right to shorten or lengthen that period as appropriate.
17. The claimant was not the only probationer. A Ms Hayley Johnson had started her six months probationary period in about March that year. She

was subject to the same sales targets as the claimant. Her first client meeting had been attended by Ms Balmer as a supportive measure. This was not unusual.

18. Following a week long induction, the claimant was sent her various targets during the probationary period, under cover of an email dated 13 August 2018. That email spells out how much the claimant was expected to bill in the first 6 months, how many jobs she would be expected to have in her pipeline and as 'WIP', and the number of clients she would be expected to have on her Business Development list (the majority of which were expected to be "jobs you have brought in yourself"). It also gave her specific weekly targets in respect of sales calls, candidate calls, client meetings, candidate registrations, permanent and temporary jobs taken, interviews, and leads. The claimant did not seek to suggest at that time that any of the targets were unclear, or unrealistic.

**September 2018 meeting**

19. The claimant and Ms Balmer met on 14 September 2018. At that meeting, the claimant was asked if she required any additional training or support. She said she did not. She was reminded to keep her targets in mind, and "keep all plates spinning".

20. On 20 September 2018, the claimant told Ms Balmer that she was pregnant. Ms Balmer thanked the claimant for telling her.

21. On or about 21 September, Ms Johnson (senior recruitment consultant) handed in her notice. Before having done so, she discussed her intended resignation with the claimant. She explained to her that she did not think she was going to reach her targets, and thus that she was likely to fail her probation. Hence, she chose to resign rather than be dismissed. (On this point, we accept Ms Balmer's evidence that, if Ms Johnson had not resigned, it was "99.9% likely" that her employment would have been terminated for not reaching her targets. This was so even though Ms Johnson came far closer to reaching those targets than the claimant did.)

**Todd Doors**

22. Ms Johnson had dealt with various clients, including 'Todd Doors' and 'Lookers'. Rather than assigning these clients to any particular consultant, Ms Balmer and Mr Hinch decided on about 25 September 2018 that both these clients -and some others- should be assigned as 'house clients' (which theoretically meant that any member of staff could 'earn' up to 100% of such clients' business.) The decision impacted on all consultants, and not just the claimant.
23. The prompt for the change was Ms Johnson's resignation. The reason for the change was in order to ensure the client had sufficient points of contact, in circumstances where there had been quite a high turnover of staff. Moreover, it transpired that Ms Johnson (and before her, Hanna Worshwick) had not shared out jobs from Todd Doors as she ought to have done, and that the client had been inconvenienced as a result. Designating the clients as 'house clients' would, Ms Balmer hoped, reduce the chance of recurrence.
24. We accepted the evidence of Ms Balmer that similar such decisions were made from time to time in the business, and that this particular decision had nothing to do with the pregnancy of the claimant. (We also accept Ms Balmer's evidence that, when she discussed this matter with the claimant, she did not herself raise the issue of maternity leave. Rather, the claimant said words to the effect that she supposed when she went on maternity leave "clients would have to get used to another person".)
25. The claimant was nevertheless assigned as the Account Manager -i.e. principal source of contact -for Todd Doors. This gave her, amongst other things, a short exclusivity period within which to submit CVs to the client in respect of new vacancies, before those roles were opened up to the respondent's other consultants. Ms Rahim was assigned as principal Account Manager for Lookers.



26. The claimant did not suggest in her evidence before us that she actually lost any money in practice as a result of either of those accounts being assigned as 'house accounts'.

**October 2018 meetings**

27. On 15 October 2018, the claimant and Ms Balmer met. It is the claimant's case that no concerns were raised at that meeting about her performance. However, Ms Balmer's hand-written notes of that meeting to which we were referred at pages 123 and 124 of the bundle corroborate Ms Balmer's evidence that she flagged up to the claimant, if only in relatively summary form, several respects in which her performance was (to use the wording in the notes) "falling down". For example, the claimant had not set up any interviews or client meetings -notwithstanding the targets which had been clearly outlined to her in August 2018.

28. On 18 October 2018, the claimant attended a client meeting with Todd Doors. It was her first client meeting. The meeting was constructive and cordial. Ms Balmer attended -just as she had attended Ms Johnson's first client meeting- along with Ms Worshwick. This was partly for client care purposes; partly -as far as Ms Balmer's attendance was concerned- to support the claimant, and partly to introduce Mrs Worshwick to the client in order to provide the client with an additional 'face to the name' for the purposes of any future contact. (The client had previously expressed dissatisfaction with inadequate contact points at the respondent.)

29. This was not the only client meeting Ms Worshwick attended. She went to meetings at Lookers, JD Wetherspoons, Martin Baker and Action For Children.

30. On 22 October 2018, the claimant and Ms Balmer met again. This was because Ms Balmer, having discussed matters with Mr Hinch, felt another meeting was required. Ms Balmer took the claimant through the targets which had initially been set for her in August, and outlined the specific respects in which the claimant had failed to meet those targets.

31. After the meeting, under cover of an email dated 23 October 2018, Ms Balmer again set out those various targets and failings. She told the claimant:

*“... Following on from our conversation late yesterday afternoon, as discussed, Jonathan and I are very worried that you are showing no signs of hitting your Revenue target of £18,000 at this stage. We would **very much** like for you to turn this around, but as discussed the only way you are going to make Permanent placements is by arranging Interviews and so far you have had 'O' interviews attended and we are nearly at the end of your first 3 months with us. Taking this into consideration, we really need to see a drastic change within the next 2 weeks.”*

32. The email concludes:

*“... To recap: As you are nowhere near your £18K target, as mentioned above we are extremely worried about your desk. In order to give yourself a chance of hitting your target, you now need to be urgently improving your WIP and also getting interviews on a weekly basis. I will review all of this with you again in 2 weeks' time, on Monday, 5th November and if I cannot see things improving then we will have to bring your probationary review forward. I'm here to support you, so let me know if there is anything you need help with.”*

33. In the light of the claimant's financial and other figures by that date when measured against the targets set for her at the beginning of her employment, we accept that the respondent had genuine and valid concerns about the claimant's performance. It is factually incorrect to suggest that the respondent had “no valid concerns that could have been raised at the time” about the claimant. Sadly, the claimant was not delivering as she had intended or been expected to do.

34. Also on 23 October 2018, the claimant and Ms Balmer exchanged WhatsApp messages regarding the claimant's use of the company laptop at home, in circumstances where Ms Worshwick also wanted to use it to “source additional CVs”. The messages are cordial. They conclude with Ms Balmer saying:

*“...[Ms Worshwick] is gagging to use it. But I also want to give you the best possible chance that you can of sending CVs and arranging interview so I'm happy to leave it with you.”*

**Commission rates**

35. The respondent had a commission rate which apportioned 50% to consultants and 50% to resourcers in respect of revenue generated from clients. On about 22 October 2018, Mr Hinch decided as part of a company-wide change of policy to revise this percentile apportionment so as to allocate 75% to consultants, and 25% to resourcers. This was because it was felt consultants were not receiving a fair 'slice of the pie' for doing most of the selling work. As the claimant was a consultant, this change in the split of commission rate was -as she accepted in her evidence to us- theoretically advantageous to her.
36. Ms Worshwick was a resourcer. However, she often performed functions over and above those of a resourcer. For example, she provided Ms Balmer with client profiles, "selling the candidates" to her. For this reason, and because Ms Worshwick was by this time also being aligned as a trainee recruitment consultant, Ms Balmer decided that if, in any specific case, Ms Worshwick had in fact provided services over and above those expected of her as a resourcer, she could (at the management's discretion) earn commission on up to 50% rather than being capped at 25%.
37. As the claimant worked with Ms Worshwick, this might have theoretically meant that there was less commission 'in the pot' for the claimant to earn. However, the claimant accepted that she was never actually disadvantaged by the arrangement - because there was no instance where Ms Worshwick earned 50% (or more than 25%) and the claimant got less as a result.
38. This notwithstanding, we do think it would have been sensible and appropriate for the precise mechanics of commission payments as between the claimant and Ms Worshwick to have been the subject of fuller discussion between the claimant and Ms Balmer. Such an explanation might have served to allay the claimant's increasing feelings of suspicion and alienation (even if unfounded) by this time.

**Email exchanges**

39. On 29 October 2018, the claimant wrote a long email taking issue with much of Ms Balmer's 23 October email, and asserting that she had been unfairly treated. Amongst other things, she said:

*"... Regarding "the 13th August I emailed confirmation of what our expectations are regarding stats/targets", could you please forward this email to me as I cannot see an email from you regarding this on the 13th August 2018..."*

In fact, as we find it, not only had the claimant been sent the 13 August email but it had also been the subject of discussion, and had been produced for reference by Ms Balmer, at the meeting on 22 October 2018.

40. Ms Balmer responded under cover of an email sent later that same day. Amongst other things, she explains:

*"... I mentioned at the very beginning of your review meeting, that in preparation for your Monthly Review I had looked at your KPI's and Stats [sic] and that I was extremely worried by quite a few of these stats, including the fact that you hadn't had any Perm Interviews attended at all so far - which was a major concern of mine. I also mentioned that at this stage we would have expected any Senior Recruitment Consultant that works for Hamlin Knight to have had interviews arranged/attended at this stage/timescale of employment with us. In addition, I reminded you that for you to pass your probationary review at least 20% of the revenue you Invoice to make up your £18,000 target, should be temp revenue, and that as you hadn't taken or filled any temp jobs, this was also a major concern of mine.*

*The first paragraph in your email to me below, mentions that you believe I did not highlight any concerns about you hitting your revenue target of £18,000. As mentioned above this is definitely not the case at all."*

*... regarding my decision on House Accounts, I just wanted to reiterate that I definitely did NOT bring up the fact that you were going to be going off on maternity leave, it was you that brought this up..." (underlining added).*

41. She concludes:

*"In your closing paragraph you have mentioned that you don't feel that you have been treated the same as other team members nor previous*

*consultants. I can assure you that this is not the case as all rules & processes are applied fairly and consistently across the office.*

*Returning to the principal point of the 23rd October email to you, it is the fact that you have been with us for almost 3 months and have yet to bill any revenue. The most recent Senior Consultant to join the company before you was Emma Herron and after 3 months she had billed £7.7k.*

*The reason I said a drastic change was required quickly is down to your low level of activity. In September, you had 0 interviews attended, 2 CVs sent and 4 candidate registrations. In October, through 3 weeks, you had 0 interviews attended, 0 CVs sent and 3 candidate registrations. This activity is very low and won't produce the results we all want.*

*We will have your next Monthly Review on 5th November, where we will analyse October and set goals for November”.*

42. We consider it unfortunate that, by this stage, both the claimant and Ms Balmer felt it increasingly necessary to write to each other long emails justifying and paper-trailing their position. But we do find that the concerns raised by Ms Balmer about the claimant's performance by that time in that email were genuinely held, justified, and in any event unconnected to pregnancy.

43. As regards the words underlined at paragraph 40 above, it is clear that in this email, and quite possibly on other occasions in the office, Ms Balmer referred to the fact that the claimant was a “senior recruitment consultant” when contrasting what her abilities and performance ought to be with the reality of the situation (i.e. no sales etc). Particularly if said in an open-plan office, we understand this might have come across as somewhat officious or patronising. However, any reference to the claimant's “senior recruitment consultant” status was intended to flag up disappointment in the claimant's attainment levels (which, as the claimant accepted in her evidence, were very poor). The claimant's pregnancy had nothing to do with use of the formal moniker.

### **Laptop issues**

44. On 6 November 2018, the claimant was due to leave the office at about 1:15pm. That morning, she asked Ms Balmer if she could use the office laptop at home.

45. According to the claimant's 15 November 2018 grievance letter referred to below, Ms Balmer was initially receptive to that idea (as she had been on 23 October):

*"... Hannah [Worshwick] brought the laptop back to the office. Karen checked the laptop and said that the laptop is in working order, should I want to take it (I had prenatal hospital appointment that day and had to leave by 13:15, with a possibility that I may not make it back to the office). This was before Karen had opened her email and seen an email from me, sent to her that morning.*

*Approximately 13:00 Karen approached me and advised that I am not to take the laptop as the sign in and out sheet was not yet authorised by Jonathan. Yet Hannah had the laptop all last week even though the sign sheet had not been authorised and Hannah also failed to bring it in each morning..."*

46. We find that Ms Balmer had, in the preceding few days, been discussing with Mr Hinch an office-wide policy- i.e. the need for staff to sign a document (which Mr Hinch was to prepare) before they removed the laptop from the office. Accordingly, at 10:56am, Ms Balmer emailed Mr Hinch stating:

*"...Reference the LAPTOP doc my team needs to sign... Any chance you can get a final version doc me before Fariba leaves work today (she is leaving work at 1:15 PM today) ... as I need for her to SIGN for the laptop before she takes it today?"*

47. Mr Hinch replied at 12.03pm, saying:

*"...I'm in meetings in Sheffield for next few hours so won't be able to get form to you by 1:15. She will have to wait and laptop will have to stay in the office..."*

48. So, it is clear from this email that Ms Balmer did not intend to prevent the claimant from taking the laptop home (still less, that she was ill-disposed towards the claimant in this respect on grounds of pregnancy). Rather, she wanted to ensure that the claimant had first signed off on the document she had asked for Mr Hinch to send over. His email and instruction, rather than the claimant's pregnancy, motivated Ms Balmer into telling the claimant she could not take the laptop home that day. Mr Hinch's Sheffield meeting and the decision to ensure sign-off by staff, rather than pregnancy, motivated Mr Hinch.

49. Under cover of an email dated 8 November 2018, Mr Hinch reiterated his wish:

*“... to apply the same rules across all offices, to the effect that nobody takes a computer laptop off site unless they have signed a laptop declaration [and that] ... we shouldn't allow laptops to be taken off site by people still in probation as it is an expensive piece of kit and we have had a couple of issues in the past...”*

50. In her witness statement, the claimant asserts that Ms Balmer told her on 8 November that *“no one on their probation period is to take the laptop off site anymore. This seems like a rule change yet again at my expense. ... just felt like another coincidence that they are changing and bringing in all these new rules. ... any upset to Ms Balmer and she will change another rule to my disadvantage”*.

51. For the reasons explained above, “upset” to Ms Balmer does not appear to have been the motivation behind telling the claimant she could not take the laptop. (In any event, of course, “upset” without a link to pregnancy cannot assist the claimant for present purposes.) It might nevertheless have been more diplomatic and constructive for Ms Balmer to have shown the relevant emails to the claimant at the time, in order to try and reassure her that she was not being ‘picked on’.

### **Email access**

52. By about 8 November 2018, the claimant was having issues with accessing emails from her mobile phone. The claimant had a conversation about it with Miss Mills, who (it seems) was more ‘computer savvy’. Miss Mills summarises events in her 6 December 2018 email<sup>4</sup>, which Ms Balmer broadly corroborated in her evidence and which we find is a broadly accurate reflection of events relating to the phone:

*“... Fariba told me she couldn't access her emails so I went to sit at her desk to help her, although I thought that her emails would already be set up as it takes you through it step by step when you first set up the phone. The phone was already set up but the email account was not, I wasn't sure how to do*

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<sup>4</sup> Ms Worshwick and Ms Rahim wrote on the same date, complaining about the claimant’s allegedly negative/aggressive/hostile behaviour. We consider it very likely they did so at the behest of Croner, rather than simply spontaneously complaining on the same day. But it is plainly of concern that half the Uxbridge staff would write in such terms.

*this without the step by step guide. As I couldn't do it this way, I showed Fariba that you could log in remotely via Safari and access your emails that way as this is how I do it on my own phone. Fariba watched me do this and I then gave her phone back to her and said that all she needed to do was enter his login and password and she could use it this way. I believed she was ok with this as she didn't ask for any more help afterwards...*

*....Karen called me later on in the day to see if the internet was back up and then asked if I would be able to set up Fariba's emails on her phone once everything was sorted. I explained to Karen that although I wasn't sure how to set them up on the Mail App, I set them up on Safari and she was able to access them this way.*

*The next day, I was sat at my desk and Fariba came over and stood right next to me.... she ... asked why I had told Karen that I had set up her emails when I hadn't done it. I was so confused and asked what she meant by this as we had set it up together the day before and she said 'no you didn't. We couldn't do it as we didn't have internet.' I then explained that we didn't use the internet and that we were using the data from her phone to which she said 'no we didn't, Karen must be lying then' and walked off... . I went to the toilet... and then came back to my desk ... Karen then arrived at work ... I was then stood by the printer with Karen next to me on one side and Fariba on the other and Karen asked if I could show her what I had done and whether I had actually set it up as Fariba had told her I still hadn't done it. Fariba gave me her phone I clicked on Safari and straight away the login page popped up and I said this is how I set it up, asked Fariba to type in her login details to which she did and her emails opened..."*

53. We can well imagine there may have been some confusion/misunderstanding as to precisely what Miss Mills did or did not do as regards setting up the telephone (and as regards the precise mechanics involved). However, we reject the allegation that Ms Balmer somehow "turned staff against" the claimant, by deliberately getting Miss Mills to change her account. Amongst other things, it is hard to envisage why Ms Balmer would contrive to get Ms Mills to alter her account of what she had/not done in the way alleged (or at all)- still less, that she would do so because the claimant was pregnant. We do not regard that allegation as plausible.

54. Miss Mills' account of the claimant's unduly defensive and hostile demeanour that day (and Ms Balmer's firm but appropriate conduct) also accords with the evidence of Ms Rahim, which we essentially accepted on this point.



**Candidate pre-interview**

55. On the same day, the claimant was due to conduct a pre-interview meeting with a candidate. The date had already been earmarked by Ms Balmer for a review meeting (the need for which had been emphasised in Ms Balmer's 23 & 29 October emails, as set out above). The review meeting had been postponed on several occasions in the preceding few days -amongst other things, because the claimant had failed to complete her review report for October 2018 in preparation for the meeting. (Further details are set out in Ms Balmer's 8 November 2018 email at page 129 on the bundle.)
56. The candidate arrived over 1 hour late. As a result, Ms Balmer said that the claimant may need to rush the candidate's pre-interview, as she could not keep on postponing the review meeting. As it was, the claimant did the pre-interview, and the review meeting was then started -but not finished, because it transpired that the claimant had not still not fully completed her monthly review report.
57. We do not think it was sensible for Ms Balmer to propose that the candidate's pre-interview be rushed. Especially as the claimant was not in fact in a position to complete the review meeting in the absence of a monthly review report, the most prudent course would have to have been to agree yet another adjournment. However, the motivation behind asking the claimant to rush the pre-interview was due to the fact the review had been postponed so many times, because the candidate was late, and because Ms Balmer's patience with the claimant had -to some extent, understandably- diminished. We do not think the claimant's pregnancy was part of the motivation.

**9 November 2018**

58. On 9 November 2018, the claimant sent a series of emails to Ms Balmer/Ms Tracey Rose (support administrator) primarily complaining about Ms Balmer.

59. These emails followed emails from Ms Balmer to the claimant on 7 & 8 November 2018, when Ms Balmer had set out in forthright and at times exasperated terms her expectations regarding completion of a monthly review report in readiness for the next review meeting, and her reply to a long email from the claimant dated 6 November in which the claimant had raised various issues. For instance, the 7 November email begins:

*“Hi Fariba,*

*Following on from your email dated 6th November, I honestly do not know why you feel the need to go back on points that I have already answered in my previous email to you as I 100% stick to the answers given previously in my reply email to you.*

*Please keep in mind, that as discussed on quite a few occasions NOW, the **REASON** Jonathan and I have asked you to make drastic changes and the reason we are concerned about you at present is that you have now been with us for 3 full months (as you know, you started on the 6th August and it is now the 6th November) and **still to date you have had ...***

- ***'O' candidate interviews***
- ***'O' Perm Revenue invoiced***
- ***'O' temps out.***

60. The number, length and tone of the claimant's 9 November emails (e.g. at 9.47am, 9.48am, 10.06am, 2.17pm, 2.31pm and 3.33pm) shows the extent of the claimant's distrust and dissatisfaction at that time.

61. For consultants, each day from 10am to 12pm and from 2pm to 4pm is set aside for sales calls. Accordingly, having appreciated that the claimant had been spending a lot of time email-writing, and having noticed her typing emails shortly after 2pm, Ms Balmer instructed her to stop, and to concentrate on making calls instead. We think she was within her rights to give that instruction. She also asked the claimant what she had been writing. The claimant declined to say what she was writing or to show Ms Balmer the text, according to the evidence of both Ms Balmer and Ms Rahim- which we accept. Instead, she carried on writing her emails for a time, had a robust discussion with Ms Balmer near the printer when she declined to show Ms Balmer the document which she had printed, and then left for lunch shortly after 2.30pm.

### **Grievance**

62. On 13 November, the claimant was signed off sick with work related stress for 2 weeks. On 15 November, the claimant wrote a formal letter of grievance to Ms Rose. The grievance was duly dealt with by Jenny Taylor of Croner, who spoke with several of the individuals concerned (and did then carry out a reasonably thorough investigation).

63. In her 27 November 2018 report, Ms Taylor says: “...*the role of the Croner consultant is to provide an impartial service*”. This was not the full picture. We consider Croner ought to have explained in full detail to the claimant the ‘full’ service which Croner provided to the respondent (e.g. legal advice), to put her on notice of a potential perceived (if not actual) conflict of interest.

64. Ms Taylor rejected most of the allegations, and all the allegations of pregnancy-related discrimination. She did nevertheless uphold some of the complaints about how Ms Balmer had dealt with matters.

65. The claimant returned from sick leave on about 27 November. Upon her return, Ms Balmer wrote on 29 November as follows:

*“I am pleased that you are now well enough to return to work- it’s good to have you back.*

*Thinking ahead -you may remember that in one of my last emails to you dated 9<sup>th</sup> Nov, I mentioned that your next review will take place on Monday, 3<sup>rd</sup> December at 9.30am.*

*As you have been poorly for the last few weeks, I think that it is only fair to delay your Monthly Review for circa 2 weeks so that we have more to talk about when we do sit down.*

*Although we won’t be meeting for the November review on Monday, I would still like you to send me your December forecast activity and GP on Monday as this is always required towards the start of every month (please refer to the target activity I wrote about in my email of 9<sup>th</sup> November as a guide}.*

*Any questions, let me know”.*

66. This is one of the emails said to have been “unsupportive, harsh and negative”. We do not consider it to be such.

67. On 14 December 2018, Ms Balmer emailed the claimant setting out the respects in which the claimant’s figures remained very poor. We consider that was a necessary thing to do. The email concludes:

**“To summarise:**



71. By a letter dated 7 February 2019, the claimant was told that in the light of her poor financial performance, and failure to meet the targets which had been set for her, her employment would not be extended beyond the six month probationary period. The termination date of 8 February 2018 was given. Amongst other things, the letter explains:

- (1) The principal reason [for termination] is how badly you performed against your GP target. As you re aware, your GP target when you started was £18k as you were taken on as a senior consultant. You have achieved a GP of only £1,976 (89% below target), this from 1 placement at Todd Doors, a House Account. I appreciate, however, that you have been off sick for 37 days, off looking after your son for 5 days and on holiday for 8 days, so only being at work for 52% of your probation period. Adjusting your target for the level of absence would still leave your adjusted target as £9,360 so you have still materially missed this.*
- (2) Your [WIP] board was very unhealthy when you went sick consisting principally of difficult to fill roles which had been on the board for a considerable amount of time along with some roles from the House Account Todd Doors. From experience and from company ratio analysis, this WIP board would not have delivered the target GP you needed.*
- (3) Your activity figures during the first 5 months (off sick in month 6) were below where you needed to be in order to be successful. You picked up only 12 jobs, this resulting in only 1 placement. The company would also say that 12 jobs should result in 3 placements so indicating that the jobs you took were difficult to fill. This is further shown in that 12 jobs should have resulted in circa 12-18 interviews; however you only managed to get 3 interviews over this period”.*

72. The claimant did not seek to suggest in her evidence to us that the figures set out in the letter were materially incorrect. She candidly accepted that she had wholly underperformed when measured against the August 2018 targets -even allowing for the fact that, on her case, her attempts at generating work were sometimes frustrated or sabotaged.

## **THE LAW**

### **Unfavourable treatment**

73. Section 18 EqA lays down the parameters of pregnancy and maternity as protected characteristics. Pursuant to s 18, a woman will suffer unlawful discrimination if, amongst other things, she is treated unfavourably during the 'protected period' of her pregnancy because of the pregnancy or an illness resulting from the pregnancy (s 18(2)).

74. By analogy with the approach adopted in disability discrimination (see **Williams v Trustees of Swansea University Pension & Assurance Scheme** [2018] UKSC 65, [2019] IRLR 306, 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. As was held in the EAT by Langstaff P in **Williams**: *“treatment which is advantageous cannot be said to be “unfavourable” merely because it is thought it could have been more advantageous ... Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.”*

### **Causation**

75. When there is an allegation of pregnancy or maternity discrimination, what is important is the existence of a causal connection between the treatment and the pregnancy. Put simply, why was the complainant treated less favourably? See **Johal v Commission for Equality and Human Rights** UKEAT/0541/09, [2010] All ER (D) 23 (Sep).

76. The reason for the unfavourable treatment has therefore to correspond to pregnancy; it is not sufficient for pregnancy to simply be part of the background context. See **Interserve FM Ltd v Tuleikyte** [2017] IRLR 615, EAT. There, it was held (per Simler P) that any discrimination for s.18 purposes could only arise from a finding that the claimant's maternity leave was the reason (conscious or unconscious) for the treatment: *“The mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination”*.

### **Burden of proof**

77. Firstly, It is for the claimant to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that the respondent's unfavourable treatment of her was *because of* pregnancy. Cf **Ayodele v Citylink Ltd**<sup>5</sup>.

78. If the claimant does not prove such facts, she must fail.

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<sup>5</sup> [2017] EWCA Civ 1913.

79. Secondly, where the claimant has proved facts from which it could be inferred that the respondent has treated her unfavourably on proscribed grounds, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

80. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on proscribed grounds.

81. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the relevant protected characteristic was not any part of the reasons for the treatment in question. If the respondent can do this, the claim fails.

### **APPLICATION TO THE FACTS**

82. Given our factual findings as set out above, and having considered the case in the round as well as the specific allegations set out at paragraph 10 above, we now address each of those allegations.

#### **The House account allegation**

83. We do not consider that reallocating clients such as Todd Doors as house accounts had anything to do with the claimant's pregnancy. See paragraphs 22-24 above.

#### **The Todd Doors meeting allegation**

84. Ms Balmer and Ms Worshwick attended the meeting for reasons which had nothing to do with pregnancy. See further paragraphs 28 & 29 above. In any event, we do not consider that the events relating to that meeting constituted "unfavourable treatment" for s.18 EqA purposes.

**The 15 October allegation**

85. As explained at paragraph 27 above, Ms Balmer outlined concerns about the claimant's performance on 15 October. She went into much more detail on 22 October. The concerns raised on 22 October were perfectly valid. The fact that Ms Balmer raised them in detail on 22 October but not in such detail on 15 October had nothing to do with pregnancy. (We also observe that in making her assertion to the contrary, the claimant has not explained what could have changed between 15 and 22 October to make Ms Balmer suddenly raise 'bogus' concerns. The only event of note was the 18 October Todd Doors meeting, which by all accounts went well.)

**The 22 October allegation**

86. As explained at paragraph 30-33 above, Ms Balmer referred back to the targets (or 'four steps') which had initially been set out in the 13 August 2018 email. We find it difficult to see how this could amount to "unfavourable treatment", given that this was a restatement of the basis on which the claimant started pre-pregnancy. In any event, the expression of concerns on 22 October had nothing to do with pregnancy and everything to do with the perceived (and actual) need for the claimant to improve her performance.

**The 23 October allegation**

87. Similar points in relation to the 23 October email can be made as those set out in the preceding two paragraphs. The claimant was essentially reminded in the email of the targets that were originally set for her, and of the fact she was not meeting those targets. Moreover, her probationary review was not in fact "brought forward" at all. It took place at the very tail end of her 6 months' employment. Nothing in the email, as we find, amounted to unfavourable treatment on grounds of pregnancy.

**The commission allegation**

88. The general change in commission ratios to 75:25 in favour of the consultant theoretically favoured the claimant. We understand how, in theory at least, it might have been "unfavourable" treatment for Ms Worshwick to have in



effect taken commission out of from the claimant's 75% 'share' by remaining entitled to up to 50:50 in certain cases. But she never did so in practice. Moreover, we do not consider that the 'favourable' treatment meted out to Ms Worshwick had anything to do with pregnancy. Rather, as explained at paragraphs 35-37 above, it was because of the role she performed.

#### **The laptop allegation**

89. Pregnancy played no part in the fact the claimant was told she could not take the laptop on 6 November 2018. The reasons are as set out in our factual findings at paragraphs 44-51 above.

#### **The 'senior consultant allegation'**

90. The fact that Ms Balmer may have addressed the claimant with the words "as a senior consultant..." might have been heavy handed or patronising, especially in an open plan office. But it had nothing to do with the claimant's pregnancy, and everything to do with Ms Balmer's increasing disappointment and frustration with the claimant's lack of sales etc (and also, perhaps, with their increasingly frosty relationship). See further paragraph 43 above.

#### **The Miss Mills allegation**

91. We do not think Ms Balmer tried to 'turn Miss Mills' against the claimant. In any event, any confusion/misunderstanding about email access was not motivated by the fact the claimant was pregnant. See further paragraphs 52-54 above.

#### **The rushed candidate allegation**

92. The claimant ought not to have been rushed in respect of her pre-interview with the candidate. But, for the reasons explained above, the reason she was rushed had nothing to do with pregnancy and everything to do with Ms Balmer's wish to complete the several-times-delayed review meeting. See further paragraphs 55-57 above.

#### **The 9 November allegation**

93. Miss Balmer was not unduly hostile to the claimant on 9 November 2018. She may have felt a degree of exasperation at the claimant's various emails and surliness. Ms Balmer may have been somewhat stern in her response, as a result. But we do not think she applied undue pressure on the claimant to "stop writing an email" or to divulge what she had been writing. In any event, the fact the claimant was pregnant did not motivate Ms Balmer's behaviour that day. See further paragraphs 58-61 above.

#### **The harsh emails allegation**

94. The emails on which the claimant relies are all referred to above. Most of them we consider were perfectly appropriate in tone, and not 'unfavourable'. There were instances – e.g. in the 7 November email- where Ms Balmer strayed into exasperation. We do not condone this in a manager. Nor do we view as best practice the exchange of long emails of the kind passing between Ms Balmer and the claimant at around that time. However, we are satisfied that the reason why Ms Balmer wrote as she did had nothing to do with pregnancy, and everything to do with the claimant's performance and (as she and others saw it) poor attitude.

#### **The dismissal allegation**

95. For the reasons set out above, we reject the assertion that the claimant was dismissed on grounds of pregnancy. We find that failure to meet targets was the primary reason -and comparison with Ms Johnson's case, as explained above, fortifies us in making that finding. The breakdown in her relations with colleagues probably did not help. But her signal failure to meet the financial and other targets set for her -even taking into account her absence-meant dismissal was inevitable. Her pregnancy was irrelevant to the decision to dismiss her. See further paragraphs 69-72 above.

#### **Time issues**

96. It follows that we do not need to consider whether or not we have jurisdiction in respect to the allegations which predate 5 November 2018.

97. **Conclusion:** For the reasons set out above, this claim must be dismissed. We nevertheless hope that the respondent (and Croner) will take on board the points we have set out above, for future reference.

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Employment Judge Michell, Watford

Date: 29 September 20

JUDGMENT SENT TO THE PARTIES ON

19 October 20

FOR THE SECRETARY TO THE TRIBUNALS