Case Number: 3323814/2016

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss Emma Jarvis **v Davies and Davies Estate Agents Limited**

Heard at: Watford **On**: 7-10 March 2017
31 March and 13 April (in Chambers)

Before: Employment Judge Bedeau
Members: Mrs I Sood
Mrs G Bhatt (MBE)

Appearances

For the Claimant: Mr G Baker, Counsel
For the Respondent: Miss H Compton, Counsel

RESERVED JUDGMENT

1. The claimant's automatic unfair dismissal claim by reason of her pregnancy is well-founded, section 99 Employment Rights Act 1996.

2. The claimant's discrimination claim on grounds of pregnancy is well-founded, section 18 Equality Act 2010.

3. The claimant's victimisation claim is well-founded, section 27 Equality Act 2010.

4. The case is listed for a remedy hearing on Wednesday 2 August 2017 with a time estimate of one day, if not settled.

REASONS

1. By a claim form presented to the tribunal on 27 June 2016, the claimant made claims of automatic unfair dismissal, s.99 Employment Rights Act 1996; discrimination because of pregnancy s.18 Equality Act 2010; and victimisation on s.27 Equality Act 2010 arising from her employment with the respondent as a sales negotiator.

2. In the response, presented to the tribunal on 25 July 2016, the respondent averred that the claimant's employment was terminated as her performance fell short of the standards expected of her and that there was an irretrievable breakdown in the relationship between it and her. It denied liability.

The Issues

3. At the preliminary hearing held on 2 September 2016, with the assistance of the parties, Employment Judge Manley clarified the claims and issues.

4. It was agreed that the issues which the tribunal will determine are:

Automatically Unfair Dismissal (s.99 Employment Rights Act 1996)

4.1 Was the reason or principal reason for her dismissal the claimant's pregnancy/maternity?

Unlawful Discrimination on the grounds of pregnancy and victimisation

4.2 As a matter of fact, did the respondent treat the claimant as described in paragraphs (i) – (xi) on pages 10-12 of the claimant's Grounds of Complaint (the "Individual Complaints")?

Unlawful Discrimination on the Grounds of Pregnancy (s.18 Equality Act 2010)

4.3 In relation to each of the Individual Complaints:

4.3.1 Was the claimant treated unfavourably?
4.3.2 Was that treatment because of the claimant's pregnancy/ maternity?

Victimisation (s.27(1) Equality Act 2010).

4.4 Was there a "protected act" within the meaning of s.27(2) Equality Act 2010? (further details of the protected act to be supplied)

4.5 In relation to each of the Individual Complaints numbered (vi) – (xi):

4.5.1 Did the respondent subject the claimant to a detriment?
4.5.2 If so, was the reason for that detriment because the claimant had done a protected act?

Application to amend the claim

5. At the commencement of the hearing, Mr Baker, counsel on behalf of the claimant, applied to amend the claim form by adding a further act under the s.18 pregnancy discrimination claim. This application was unopposed by Miss Compton, counsel on behalf of the respondent.

6. The wording of the amendment is as follows:

> "(v)(a) On 14 April 2016, Claire Davies, accessed the claimant's computer and searched for pregnancy related messages in her personal email. Miss Davies took screen shots of the emails she found including one screen shot of an email in 2014 relating to the claimant's miscarriage."

The Evidence

7. The tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondent evidence was given by: Mr Mark Davies, director; Mr Mark Scales, sales manager; Miss Claire Davies, non-executive director; Mr Laurence Rudolf, director and manager of property management and accounts department; and by Mr Alexander Reach, lettings manager. Mr Davies lives in Cumbria and would visit the respondent's offices, on average, once a month.

8. The parties produced a joint bundle of documents comprising in excess of 189 pages. During the course of the hearing further documents were admitted into evidence namely, the respondent WhatsApp messages (R1) and from the claimant, a copy of her notes of a meeting held on 18 April 2016, (C1).

Findings of fact

9. The respondent is an estate agent with a staff compliment of 13 full-time employees of whom 10 are female and three male. There is a sales and lettings department, property management and accounts department and a marketing department. Its premises are at 85 Stroud Green Road, Finsbury Park, London N4.

10. The claimant commenced employment with the respondent on 9 November 2015, as a junior negotiator on a probationary period of three months. At the time her direct line manager was Mr Richard Stewart, sales manager, who left in February 2016.

11. In the claimant's contract of employment, there is a provision in relation to reviewing her performance. At paragraph 8.1 it states the following:

> "You are expected to perform your duties to a standard of diligence and skill reasonably expected of an employee in your position. You are also expected to keep up to date with the latest developments in your field of work and you are expected to discuss your reasonable training needs with your line manager. You are, when requested, expected to attend the relevant training courses."

12. A performance review is required to be carried out at least once a year. (54-61)

13. In relation to the respondent's document on standards of conduct, paragraph 3 requires a member of staff taking sick leave or other absence

from work, to consult with their line manager at the earliest opportunity before the start of the working day.

14. In relation to "personal appearance", paragraph 4 provides:

> "Members are always expected to be well dressed and of neat appearance, suitable not only for working with other members of the firm but also suitable to meet the public. It must always be borne in mind that all members are representatives of the firm and as such are ambassadors of the firm. Any dress code policy made by the firm must be adhered to by members."

15. In relation to consuming food and drinks in the office paragraph 8 2 states:

> "Members who work on the ground floor who wish to eat food will be expected to do so in the first floor meeting room, or if not available, in the second floor office; drinks in a suitable glass or cup may be consumed on the ground floor, but not bottles or cans."

16. Paragraph 9.2 states:

> "Failure to comply with these rules and expected standards may result in disciplinary proceedings. Breach of certain rules and expected standards will be regarded as gross misconduct depending on how serious the nature of the matter is." (62-65)

17. With regard to the respondent's disciplinary rules and procedure, in respect of minor conduct issues, it states the following:

> "6.1 Minor conduct issues can be resolved informally between you and your line manager. These discussions should be held in private and without undue delay whenever there is cause for concern. Where appropriate, a note of any such informal discussions may be placed on your personnel file but will be ignored for the purposes of any future disciplinary hearing. In some cases and informal verbal warning may be given, which will form part of your disciplinary records. Formal steps will be taken under this procedure if the matter is not resolved, or if informal discussion is not appropriate (for example, because of the seriousness of the allegation)."

18. The policy also provides for the employee to be accompanied to any disciplinary or appeal hearings and should be informed if they are required to attend a disciplinary hearing in writing.

19. The employee has the right to appeal any disciplinary action taken. (65A-65K).

20. There is also a grievance procedure which states that where a grievance meeting is held, the employee may bring a companion to the grievance meeting if a reasonable request is made in advance. If the grievance has not been resolved to the employee's satisfaction, they may appeal in writing to a director. (65L-65M)

21. The claimant successfully passed her probationary period and was promoted to sales negotiator from 1 February 2016 by Mr Stuart. (71)

22. On 10 February 2016, Mr Mark Davies emailed to congratulate her on her promotion to full negotiator status. (72-73)

23. Between 4 January and 8 February 2016, the claimant sold three properties meeting the standard expected of the sales negotiators. (66)

24. On 8 February 2016, Miss Claire Davies, marketing director, sales and lettings, emailed Mr Stuart regarding the claimant's her mother who was back in hospital for the second time with cancer and that it was very serious. The claimant had explained to Miss Davies that her mother was first diagnosed with breast cancer which spread to her stomach. She went into remission but the cancer was back and was more aggressive. She was visiting her mother every day in hospital and was helping in the care of her grandmother. Miss Davies suggested to Mr Stuart that the company should arrange to buy some flowers for the claimant and her mother. (69)

25. On 22 February 2016, Miss Davies emailed her father, Mark Davies, to inform him that the claimant had taken a sick leave day as her mother had been given an official diagnosis by her doctor and had been informed that she had an estimated 2 years' life expectancy. She asked her team not to disturb the claimant unless it was to wish her well. Miss Davies further stated that she and Mr Mark Scales, sales manager, would meet with the claimant the following day.

26. Mr Davies emailed the managers expressing his sadness and concern for the claimant's family. (74)

27. Mr Scales took over the role of sales manager following the departure of Mr Stuart and became the claimant's direct line manager.

28. The claimant was studying to be qualified as senior negotiator with a view to becoming an estate agent.

29. On 17 March 2016, she had a monthly review meeting with Mr Scales who recorded that she should keep reading the ledger; increase her knowledge; and "keep things simple, focus on selling". In relation to an action plan, he noted that she should keep a positive attitude on appointments and to sell more. She should focus on the core responsibilities, namely selling houses. It was further noted that she had not had a sale for some time. (79-81)

30. We find that the review meeting was positive and that no concerns were raised by Mr Scales about the claimant's performance, that is, that she was underperforming. She had, in March, made four financial services referrals. These were to a separate body set up by the Financial Services Authority to ascertain whether a potential purchaser has the requisite finance and income to meet mortgage commitments. In return the mortgage lender would give the respondent a commission.

31. From the internet searches conducted by the claimant, we find that in January 2016, she became aware that she was pregnant. We further find that her due date was on or around 15 September 2016.

32. On 23 March 2016, she was nearly three months pregnant. At or around 9am in the morning, Mr Alexander Reach, lettings manager, gave a presentation to the sales and lettings team. He instructed the team to engage in canvassing work which had been prepared by the marketing department. All staff were expected to take part in marketing including Mr Reach and Mr Scales, sales manager. After having explained the task, the claimant said in the presence of those in the room that it was a "waste of time". Her response surprised Mr Reach as she had only been employed by the company for 4-5 months. He felt that the comment undermined him and what the company was trying to achieve. After the meeting the claimant emailed him to apologise for the comment. She wrote:

> "Sorry about the canvassing, pretty worried about tomorrow!"

33. Mr Reach responded in the afternoon stating:

> "That's fine, I understand. I need you to be up for this regardless of your actual personal opinion. As a team we just need to do it and show willing. Know it sucks, nobody likes canvassing." (82)

34. On or around 1 April 2016, Mr Scales had a meeting with each of the sales negotiators and reminded them of the respondent's minimum sales target of, on average, three sales a month. When he spoke to the claimant about the target set she jokingly replied, "You might as well sack me now".

35. On Saturday 2 April 2016, she spoke to Mr Scales to inform him that there were rumours circulating that senior management, unidentified by her, said that all the negotiators were "rubbish" and were going to be replaced. Mr Scales was surprised and angry because as far as he was aware, the statement was not true and was potentially very disruptive. He sent an email to his team at 11.26 in the morning, on the same day, stating the following:

> "Guys, what is going on?
>
> I have just heard from Emma, that apparently you have heard from someone at the top that you are all rubbish and should be replaced.
>
> As you can imagine I have regular conversations with Mark D (the only other person who has an influence on whether you are good/bad and should stay or go) and this could not be further from the truth. I imagine this on the back of you all receiving a target of minimum of three sales a month. This is a genuine sales target to ensure we are all moving in the right direction and earn the money we all need and is not a tool to fire someone (although clearly the repercussions of not hitting targets could lead to that).
>
> Office gossip can be very harmful as we have all seen in the past. If anyone wants any clarification on this speak to me, Alex or to a member of management." (83-84)

36. The claimant accepted that she had made the comment to Mr Scales but objected to the specific reference to her in the email.

37. The sales negotiators were Miss Svetlana Nikitaeva, Miss Nazmin Begum and the claimant.

38. On 1 April 2016, Miss Begum requested a private meeting with Miss Davies, which was scheduled for the following Monday 4 April. During the meeting Miss Begum became upset and was crying. She explained to Miss Davies that someone had been spreading rumours about her and were comparing her with the claimant as they had both taken time off for illness or for personal reasons. Someone had said to her that staff were saying that she could not be bothered to come in to work but in the case of the claimant she would always soldier on, even if she had broken a leg she would turn up for work whereas she, Miss Begum, would take a sick day. As a consequence, she was nervous about coming in to work and was of the view that certain members of the team were victimising and bullying her. She said to Miss Davies that she loved her job but hated feeling that way. She had a suspicion who was spreading the rumour but did not name anyone. Miss Davies asked whether she would like her to investigate the matter, to which Miss Begum replied that she would and was also content for the matter to be reported to Mr Scales and to Mr Davies as she did not want to approach them directly. She was reassured by Miss Davies that she was a valued member of the team and that if she heard any further gossip or rumours she should immediately report them to Miss Davies.

39. Following the meeting Miss Davies, who is Mr Scales' partner, reported the matter to Mr Scales and to Mr Davies. They agreed that they would conduct an investigation and would speak to the sales, lettings and marketing staff privately.

40. The claimant was off work from Thursday 24 March and returned on 31 March 2016. During that time, she underwent and operation to have a cancerous cyst removed from her breast. It was by all accounts a minor operation and she was discharged on 28 March.

<u>Meeting with the claimant on 5 April 2016</u>

41. Following on from the interviews conducted on 5 April 2016 by Mr Scales and Miss Davies, they formed the view that the claimant was the source of two of the rumours and had spread gossip among the staff. She had instigated a rumour that upper management believed all negotiators were "shit" and should be fired; that Mr Scales and Miss Davies were on a "power-trip"; that Mr Scales was an incompetent manager; and comparisons were made between Miss Begum and the claimant, who both experienced illness, but the claimant would come in to work whereas Miss Begum would not bother. They reported their findings to Mr Davies.

42. Later that afternoon Mr Scales met with the claimant to inform her of the outcome of his investigation. It was Mr Scales' evidence and the respondent's case, that he had verbally warned the claimant about her conduct during the meeting with her. When Mr Scales was invited by the tribunal to clarify the difference between a verbal, informal and final warning, he appeared to be confused and treated all the same. In his statement, at paragraph 50, he wrote:

> "I then explained to her that I was giving her a formal and final warning and that if she were found to be spreading rumours or misinformation again that she would be subject to severe disciplinary procedures."

43. When the tribunal put the question to Mr Scales as to what exactly were the words he used when he issued a warning the claimant, he said:

> "I'm going to give you a verbal warning and going to draw a line under it. Nazmin was found crying and I don't want to hear about these gossips again."

44. Reference to a verbal warning is at odds with what he stated in his witness statement, namely that he had given the claimant a formal and final warning.

45. All of the respondent's managers did not have much knowledge or experience in dealing with disciplinary matters. The last time Mr Davies was involved in disciplinary issues was some 30 years ago. He said in evidence that staff issues were normally dealt with informally.

46. Mr Scales told the tribunal that he contacted Mr Davies prior to meeting with the claimant in the afternoon of 5 April 2016 and after concluding his investigation. In his witness statement, he wrote that he contacted Mr Davies after meeting with the claimant and after having told her that she was being given a formal and final warning. From Mr Scales' evidence, we were not satisfied that he had issued the claimant with a verbal warning. He has no knowledge of disciplinary matters. He candidly admitted that he was not familiar with human resources issues and he had not conducted a disciplinary hearing before.

47. If a warning was issued, whether verbal or informal, we were satisfied that the claimant would have asked that it be put in writing. Her previous experience was that of a personal assistant. She told us that she was aware that a warning had to be confirmed in writing.

48. We do not accept that Mr Scales took notes at the meeting and later destroyed them. Notes were taken of the interviews with the respondent's staff during the investigation and were kept. We were, therefore, satisfied that if the meeting he had with the claimant had been formal, notes would have been taken and kept.

49. We bear in mind that the way in which the respondent conducts issues to do with conduct and performance, is by way of an informal discussion with the employee concerned. In the light of that we are satisfied that Mr Scales did

speak to the claimant and told her that she was responsible for the gossip and that he was going to draw a line under it.

50. The claimant was in the habit of updating her WhatsApp group comprising of herself as well as three members of staff from property management. She would update them on matters relating to work as well on personal issues. From the WhatsApp messages provided by the respondent, they do not refer to the claimant having received a warning whether verbal, informal, final or otherwise. (R1)

51. After the meeting with the claimant Mr Scales spoke to Mr Davies and informed him that he had a meeting with her following the outcome of his investigation. Mr Davies told the tribunal, in evidence, that he instructed Mr Scales to put the alleged warning in writing. We shall come to what Mr Scales emailed to Mr Davies on 13 April 2016.

52. We find although the claimant knew that she was pregnant, she decided to Mr Scales on 6 April 2016 of the same. Her case is that thereafter she had been subjected to discriminatory treatment because of her pregnancy.

Eating lunch

53. From either early February or March 2016, the claimant was in the habit of eating her lunch with the property management team in the property management room. Previously staff would have their lunch in the boardroom but were instructed by Miss Davies, in either February or March 2016 that they could not eat their lunch in the boardroom as it was required by the marketing team. Thereafter she had lunch with the property management team in their room.

54. The sales and lettings department is situated on the ground floor. As the staff there deal with the public they are not allowed to eat their lunch on the ground floor. The marketing department is on the first floor which also doubles as a meeting room. The property management and accounting department is on the second floor. One desk is available for staff members from other departments to eat their lunch. The third floor was used, at the material time, by the Bare Faced Company. They provided a large table and two benches which were available for the ground floor staff to eat their lunch. The reason why, from March 2016, no-one was allowed to eat their lunch on the first floor, was because the marketing department's concerns that they were continually being interrupted by people having their lunch.

55. On 7 April 2016, at or around 12.15pm, the claimant came to eat her lunch in the property management team room and sat at the vacant desk. To the left of her was Jai Mistry and behind Miss Mistry sat Miss Annette Nelson. The only person not working was the claimant who was chatting to the other two who were not at lunch. Mr Laurence Rudolf, director and manager of the property management and accounts department, found it hard to concentrate and was of the view that the claimant was disrupting and distracting the whole department. At 12.45 he spoke to her saying that she

needed to be careful not to disturb staff who were working while she was having her lunch. He then left the office to get something to eat.

56. According to the claimant, she was upset at having been told that she was no longer allowed to eat in the property management team room and that if she chose to do so, she should eat her lunch in silence. We accept Mr Rudolf's account of this incident. The claimant was chatting to other members of staff which was disruptive. He told her that if she wanted to eat her lunch in the property management team room, she should be careful not to disturb staff.

57. When Mr Rudolf became aware that the claimant was upset following his instructions to her, within the hour, he text her stating:

> "Hi Emma,
> The girls said that you got upset. Please can we have a chat?
> Best, Lol" (99)

58. Mr Rudolf gave unchallenged evidence that he met with the claimant in the kitchen, who appeared visibly upset and held her hand to reassure her. She told him that she was feeling very emotional and that everything was making her cry. He asked her what he had said to distress her. She spoke about the conversation he had with her in the property management room. He said that she could eat her lunch there but not to disturb the other staff members who were working. He asked her whether there was anything else she wanted to say and she replied "No". They then left the kitchen on a friendly basis.

59. We find that the instruction to the claimant by Mr Rudolf was unrelated to her pregnancy and was a statement made in order to allow those working in the property management room, to carry on with their work without being distracted or interrupted. The claimant was allowed to continue to have her lunch in the room, but not to engage in a discussion with staff who were working.

<u>The claimant's dress</u>

60. On 8 April 2016, the claimant attended work wearing a short sleeved top with a cardigan over it. She said to the tribunal the staff on the ground floor were prohibited from putting on the air conditioning or from opening the door to let in some air. Due to the warm weather and her higher than normal body temperature, as a result of her pregnancy, she took off her cardigan. She acknowledged that the respondent's dress code policy is that staff must be well dressed and of neat appearance. She was, however, of the view that she was not inappropriately dressed. Mr Scales emailed her in the afternoon with regard to her dress stating:

> "…. another point is just be careful with your dress code, short sleeves are not part of the dress code.
> Happy to discuss either of these in person if you like but should be all straightforward." (92-93)

61. The claimant responded shortly thereafter by email stating:

> "….so a top like today I'm not allowed to wear, what is appropriate to wear when it's baking in the office but no-one wants the aircon on? Just for future reference. Am I just meant to bake, because with me being pregnant that's not helpful or right for my condition?" (92)

62. Mr Scales replied 15 minutes later:

> "…I like a cool office as you know, we will absolutely have the aircon on! It does need to be long-sleeved shirts though a standard. In regards to your pregnancy we will adopt any rules, procedures/dress codes so you are comfortable and can safely work. Let me know if there are any tasks which you are not comfortable with or anything we can do to make you feel more comfortable and we will help."

63. We are satisfied from the evidence that the claimant's other colleagues on the ground floor did not want either the air conditioning on or the door open. It was, therefore, her colleagues' decision and not Mr Scales'. There was no evidence that they had in mind, at the time, her pregnancy.

64. We find that the claimant did not explain to Mr Scales that the reason why she turned up for work wearing a short sleeved top was because her higher than normal body temperature due to her pregnancy. When she disclosed in her email that she was wearing a short-sleeved top because it was due to her pregnancy baking hot on the ground floor, Mr Scales emailed her stating that he was prepared to adopt any rules, procedures/dress codes in order to make her feel comfortable. His email informing her of the dress code, we are satisfied, was not influenced by her pregnancy.

Sick leave

65. The claimant claimed that she was further discriminated against because of her pregnancy in respect of sick leave. She was off work on sick leave while recovering from a private operation which took place on 26 March 2016. She had previously been ill and off in January/February 2016 and was not asked to provide any evidence in support of her absence but was merely asked to contact her line manager before 8.30 in the morning on the day she would not be attending work. In Mr Scales' email with reference to the dress code, he wrote in respect of the claimant's sickness absences, the following:

> "As you may be aware there was some confusion over discretionary pay last month. As such we are trying to be more transparent as to what or wont be paid in good time towards staff. Could you please provide a doctor's note for the day off after recovering from the operation you had so we can grant the pay for this. Moving forward you may have more doctor's appointments, just let me know if you do, if it is like yesterday when you popped out for a short while then this can be taken as lunch or time owed etc."

66. The claimant's response was sent shortly thereafter. She wrote:

> "….I don't have a doctor's note as I didn't stay in hospital – I was released on the Monday – which was a bank holiday….! The Tuesday I took off because I didn't feel well enough to come to work, not sure how I can prove this."

67. In Mr Scales' reply he said that her doctor would be able to get a note for her time in hospital and that it would be absolutely fine.

68. The claimant in her follow-up email stated that she was going to ask her doctor for the fit notes and was content with that, however, in respect of her absence on Tuesday, it would not prove that she was out of the office. She did not understand why it would be needed and if money was an issue that he should not worry about paying her. She wrote that it seemed a little odd as he had not been asked for doctor's notes for the times she had been absent due to sickness and invited him to clarify the position.

69. Mr Scales then replied,

> "A doctor's note will now always be required as standard." (91-93).

70. On Friday 5 April 2016, Mr Scales informed Mr Davies that he had conducted an investigation into the rumours which were spreading in the workplace and advised him that he concluded that the claimant was the main instigator of them. He had given her what he described as a verbal warning. According to Mr Davies, in his written statement, he stated that Mr Scales had advised him that the claimant's performance had dropped alarmingly and that he told her that her performance was unacceptable and needed to be improved. In Mr Davies' oral evidence before us, he said that he instructed Mr Scales to type up his notes of the meeting held with the claimant on 5 April 2016.

71. On 13 April 2016, Mr Scales emailed Mr Davies, copying Mr Rudolf and Miss Claire Davies, in which he gave an account of his investigation and the precise nature of the rumours as well as his conclusions. This email has typographical errors in it. Mr Scales wrote that he decided to hold a formal meeting with the claimant to highlight the areas in which she had committed "gross misconduct" namely:

> " 1. Making a disclosure if fails [false] every or misleading information maliciously for personal gain or otherwise in bad faith.
> 2. Making untrue allocations [allegations] in bad faith against a colleague.
> 5. Bullying another member of staff."
>
> I explained to her that she had admitted to spreading rumours and while she would not admit to instigating many of them there is enough evidence from other members of the team to conclude that she had been the main party responsible. I then explained that this was a formal and final warning and that if she was to be caught spreading malicious rumours or misinformation she would be subject to severe disciplinary procedures, I further explained how rumours and gossip such as this could upset other members of staff and cause distress to the business. Furthermore, that by make [making] allegations against management and undermining management she was committing gross misconduct.

> I reminded Emma that she is already under observation for persistently not hitting her targets." (94-95)

72. None of the three allegations referred to above formed part of the investigation conducted by Mr Scales and Miss Davies. They are deliberately misleading and paints a much more serious picture of the claimant's conduct. Although the claimant was to blame for her part in spreading the rumours, to allege that she had acted for personal gain and in bad faith and had been bullying another member of staff, do not accurately reflect the matters which were investigated. We have already found that the outcome of the meeting between Mr Scales and the claimant was that he decided to draw a line under her conduct and for all parties to move on. She was not given either a verbal, informal, final or a written warning. Her behaviour was not treated as seriously as Mr Scales had portrayed in the email. Furthermore, the email was not a verbatim account of the meeting. Mr Davies said that he had no reason to believe that the content of Mr Scales' email was incorrect.

Eating on the stairs

73. On 14 April 2016, Mr Rudolf came out of his office and made his way downstairs when he noticed the claimant sitting on the stairs eating her lunch. He thought that it was not appropriate for anyone to eat their lunch in such an uncomfortable position and told the claimant that she should not be eating on the stairs. The claimant said that Mr Rudolf said to her, "You need to move". She did not put the alleged comment in context. However, in Mr Rudolf's evidence he said that he told her she should eat in the property management office or go to the top floor but she told him that she had almost finished her lunch and wanted to finish eating. After the conversation, he instructed Miss Davies to send an email to clarify where staff could eat their lunch and that lunch should not be eaten on the stairs. Miss Davies emailed staff the same day in which she wrote:

> "Hello good peoples of sales and lettings,
>
> This is just a reminder that you are all welcome to eat your lunches up on the top floor. We have a picnic bench, perfect for your eating needs, or you're welcome to use the chairs if they're free. I'm fine with having a couple of you up here chatting, we play music and chat a lot ourselves. Plus I possess a canny ability to 'zone out'. I don't bite. Josh might. If he does just tell me and I'll put him back in his cage.
>
> You are also welcome to eat on the property management floor, however please do not make lots of noise or distract the property managers as they are working.
>
> Please do not eat on the stairs, this is a health and safety hazard!
>
> So there you have it folks – two options of where to eat your lunch." (98)

74. We do not find that the claimant had been singled out by Mr Rudolf and/or by Miss Davies in the email Miss Davies sent to all staff as she was not referred to by name and the email stressed that eating on the stairs was a

health and safety hazard. The claimant had already been spoken to by Mr Rudolf and the email was directed to all staff.

Miss Svetlana Nikitaeva

75. Miss Svetlana Nikitaeva, sales negotiator, was interviewed by Mr Scales and Miss Davies on 13 April 2016. This was prior to Mr Scales' email to Mr Davies, Mr Rudolf and Miss Davies. Miss Nikitaeva was questioned in relation to the rumours and gossip which were upsetting members of staff. At the time of the initial investigation Miss Nikitaeva was on annual leave. The was decided to interview upon her return to work . The claimant had alleged that Miss Nikitaeva had been the initiator of some of the rumours, namely that management had said that all of the negotiators were "shit at their jobs and should be fired" and had said to the claimant that she assumed that Miss Davies was the source of the comments. The claimant had said that she was shown text messages by Miss Nikitaeva from Miss Nazehat Uddin, marketing manager, referring to the rumours.

76. Miss Nikitaeva said that she overheard a private conversation between Miss Uddin and Miss Naomi Smith, marketing manager, regarding the need to complete a client database. She said that Miss Smith said that she had worked with a number of good negotiators in the past and that they would happily do some of the administrative tasks as they were part of the job role. After the conversation Miss Nikitaeva approached Miss Uddin as the conversation worried her as she was concerned about her job security. Miss Uddin explained that Miss Smith had said the sales negotiators often have to do administrative based tasks as part of their role and that was the extent of the conversation. Miss Nikitaeva then explained that at no time did she speak to anyone other than Miss Uddin about the conversation. She was then involved in another conversation with the claimant about the database. Miss Nikitaeva said that the claimant had said that she did not think she should have to perform database tasks and thought it was a pointless exercise. She asked Miss Nikitaeva for her opinion to which Miss Nikitaeva replied that she did not care and the claimant should just do the work.

77. The upshot of the meeting with Miss Nikitaeva, Miss Davies and Mr Scales was that she denied that she had been the source of some of the rumours and/or malicious gossip. A summary of the meeting was forwarded by Mr Scales to Mr Davies on 13 April 2016. In the final paragraph, he wrote:

> "Svetlana was visibly upset by allegations from Emma that she was an instigator of part of the gossiping and rumour spreading. She also explained that she does not trust Emma and finds it difficult working with her because of this, she also then commented that this latest occurrence would make it even more difficult for her to work with Emma because the trust was now completely broken. She asked why Emma was trying to 'bring her down and say these bad things about me' and that she would not make claims about other staff or directors as she knows it is 'not the right thing to do'. Both Claire and myself felt we had no reason to not believe Svetlana as her explanation matched that of the other team members we conducted meetings with

> – except Emma Jarvis' account of events, which was contradictory to all the other accounts." (96-97)

78. The notes of the meeting with Svetlana were not produced during the course of the tribunal hearing nor were they were forwarded to Mr Davies, only the summary by Mr Scales. We do, however, find that the picture created of the claimant was an unfavourable one having regard to the wording of Mr Scales' email to Mr Davies. Miss Nikitaeva was not called as a witness.

Access to the claimant's computer

79. At or around 8.30 in the morning of Thursday 14 April, Miss Davies began work for the day. She wrote in her witness statement that it was a stressful time for her as she had been dealing with staff members' personal problems as well as issues with her own business, a marketing company. Her business partner had decided to part company with her and were, for many months, negotiating terms through their respective solicitors but without much success. As a consequence, she was unable to grow her business and was losing money. At the time, she was suffering from anxiety and was struggling to keep things together. She said that due to her workload plus the problems with her own company and the respondent company, she was suffering from severe stress and was near breaking point.

80. She wrote that during the day she needed to access files from the company's server regarding marketing but was unable to access the server from her laptop. She went downstairs to the sales floor in search of an available desktop computer. The only one that was free was the claimant's. She opened the computer to look for the files she needed but instead saw a large number of opened tabs on the browser which mostly seemed to be shopping websites. She became concerned as the respondent had problems previously with members of staff attending to non-work related matters during their work hours, rather than during their lunch break. She looked at the tabs which were almost all to do with shopping, however, one was an Outlook email account which was open to anyone who sat down at the computer. The respondent uses Outlook for emails so she looked at the email thinking it was a company account. The email that was opened was recent and from a Karen Jarvis which Miss Davies assumed was the claimant's mother. As the claimant had told her that her mother was in a coma, Miss Davies' feelings at the time were that she had been deceived by the claimant and appalled by what the claimant appeared to have done. She stated that she felt cheated and that her trust and confidence in the claimant had been completely undermined. Miss Davies' sister, at the time, was suffering from cervical cancer and had recently undergone treatment but was in remission. This caused Miss Davies to take the alleged deception very personally. Her concern was that the claimant's mother could not be in a coma if she was able to send emails. Miss Davies was angry and decided to see if the deception ran even further or whether she had been mistaken.

81. She looked to see if there were any more emails and recalled thinking "there must be something to say her mother is in hospital" but could not find anything. She

thought to herself what else had the claimant lied about? The claimant had announced that she was pregnant the day after she had been given a warning. She, therefore, wanted to establish whether the claimant was telling the truth about her pregnancy. She wrote that she did not believe a word the claimant said anymore. She went on in her statement to say that without thinking she took some screengrabs and was at the time very upset, emotional and tired as she had been working for about 12 or 13 hours. It then dawned her that what she had done was wrong and deleted the screengrabs or at least thought that she had and tried, unsuccessfully, to call Mr Davies, her father. As it was very late in the day, she realised that her father was most likely to be helping her youngest brother, who is disabled, to get to bed. She then left the office and went home.

82. We do not accept Miss Davies' account that at the time she was under severe stress. The email she sent to staff about eating on the top floor and not eating on the stairs was, in our view, light-hearted, witty and inviting. The length of time spent in her search does not sit comfortably with her claimed stressed state of mind.

83. She accessed the claimant's computer for in excess of 90 minutes. During that time, she opened: the claimant's emails reading her correspondence with her partner, Mr Henry Redshaw; an email from Miss Karen Jarvis dated 5 January 2016; an email from the claimant to Mr Redshaw regarding maternity information referring to advice from mother; and an email from Miss Karen Jarvis dated 5 April 2016, to the claimant in which Karen Jarvis wrote: "My phone is not now working so don't know if you got my last message??" It was this email that caused in the mind of Miss Davies some suspicion as she had been told by the claimant that the claimant's mother was in a coma. From the screenshots provided, they numbered a total of 18, but a large amount of the information was deleted by Miss Davies.

84. Miss Davies had also searched the word 'hospital' and came up with an email from the claimant sent to someone called, Liz Bayram, on 10 October 2014, referring to an operation that she had had to remove the pregnancy sack and that she would not be able to return to normal duties until the following week. This was a very personal, private matter which Miss Davies had accessed as it revealed that the claimant had suffered a miscarriage at the time.

85. On Friday 15 April 2016, the claimant arrived for work as normal and discovered that someone had created a word document entitled, "Davies Davies" on her computer and had taken screenshots between 20.03 and 21.09, the night before of her hotmail account emails including wedding costs, holidays and emails going back to 2014 when she suffered a miscarriage. The person's access was last modified at 21.13 the night before. There were screenshots of her browsing history. The claimant could not understand why anyone would access her computer and the details contained therein. She became emotional, stressed and tearful. She knew that Miss Davies and Mark Scales were the only employees who were in the office after 7.00pm the night before and that Mr Scales was watching

a football match on the television with Mr Reach. She, therefore, surmised that the person likely to have created the document was Miss Davies but could not be sure.

86. She spoke to Mr Reach at approximately 10.00am in the morning to inform him that she had been treated differently by Mr Scales, Miss Davies and Mr Rudolf in comparison with her non-pregnant colleagues and gave examples of previous incidents. She wanted answers.

87. She alleged that Mr Reach did not advise her of her right to raise a formal grievance but based on her knowledge of employment rights, we find that she would have been aware that she had a right to raise a grievance in relation to her treatment. She provided Mr Reach with a printout of the documents accessed on her computer. He contacted Mr Davies to discuss what the claimant had brought to him and what she had said about her treatment. She explained that she felt bullied and isolated and gave the names of the managers who had treated her less favourably because of her pregnancy. Mr Davies advised Mr Reach to meet with the claimant immediately, ask her to go home while her claims of bullying were investigated and to take notes.

<u>The claimant's suspension</u>

88. At 11.04am on the same day, Mr Reach met with the claimant and explained that she would be suspended on full pay while he conducted the investigation into her allegations of bullying. In his note of the meeting he wrote that he had a conversation with Mr Davies over the telephone and it was decided that the best and most appropriate action, in the short term, was to suspend the claimant on full pay until the conclusion of his investigation. The claimant was upset and said that she would take legal advice. It is also recorded that Mr Reach said that it was decided for the good of the business and in order to remove the tensions which had developed over the two weeks that the claimant be suspended on full pay. He requested a copy of the claimant's log of the incidents. (124-125)

    From the WhatsApp messages, we find that staff became aware after the meeting between the claimant and Mr Reach that she had been suspended. (R3)

89. Mr Reach had a conversation with Mr Davies regarding his meeting with the claimant and informed him that he had suspended her. He then emailed his notes to Mr Davies at 13.52.

90. It is very difficult to understand why raising issues do with privacy the claimant was then suspended from work.

91. Mr Davies replied at 14.33, stating the following:

    "Hi Alex,

> I have now read your notes, and I hope you fully appreciate there was a misunderstanding about asking Emma to go home; it could never be a suspension, as a complaint about being bullied cannot result in a suspension for anyone other than the person alleged to be doing the bullying. The only reasons we want Emma away from the office is to protect her if she is being bullied, investigate the matter without her being in the office and hence embarrassing her and if the atmosphere in the office is as bad as she infers at the moment, then her present absence is for the benefit of the office until we know what should be done.
>
> By the way, for sensitive emails like these it may be better to use personal email accounts." (126)

92. Mr Reach emailed the claimant at 14.44 apologising for using the word either "suspension" or "suspended" and that he did so unwittingly. He put it to the claimant that if she preferred to return to work she was welcome to do so. He stated that he had referred the matter to Mr Davies who would be meeting with her following Monday, in the afternoon. The claimant replied to Mr Reach's email over two hours later, stating that staff had been informed of her suspension after her meeting with him and she requested CCTV footage from close of business on 14 April to 10.00pm as she considered that what had occurred was a gross invasion of her privacy and that someone had deliberately logged into her account. (127)

93. In evidence Mr Reach told the tribunal that he had no idea of the legal implications of suspending someone. Suspension was something he had taken from his days at school and that from 5-18 April 2016, he did not have any concerns about either the claimant's conduct or her performance.

94. Prior to meeting with the claimant, Mr Davies canvassed the respondent's managers to find out whether they had any concerns with regard to her conduct and/or performance. He primarily spoke to Mr Reach, as the claimant's line manager and received an email from Miss Alina Elena Danila, assistant manager.

95. Miss Danila wrote that in a conversation with the claimant, the claimant said that the claimant did not trust Mr Scales because he had disclosed her personal information; that things were different and that it was not like when her previous line manager was at the branch; she implied that Mr Scales was the best manager and felt that Miss Davies was interfering in the work of the sales department; she said that everyone was anxious to earn commission and was stabbing themselves in the back and she was keen to focus on her exams as she wanted to become a senior sales negotiator. The claimant had a lot on at the time with her mother not being well. Miss Danila then reported the conversation to Mr Rudolf saying that she heard some worrying things about the sales department. (131)

96. This email was not disclosed by Mr Davies to the claimant.

97. From the email correspondence between Mr Reach and the claimant, although the claimant asked that the meeting to be held with Mr Davies, be at a neutral venue, this was not allowed as Mr Reach stated that the

meeting would be informal and that the claimant was not entitled to be accompanied. (136)

Meeting on Monday 18 April 2016

98. Mr Mark Davies; the claimant; and Miss Davies, who was the notetaker were present at the meeting on Monday 18 April 2016. It began at 17.22. Mr Davies informed the claimant that she was not on suspension. The claimant discussed the documents taken from her computer and said that having had a discussion with the Information Commissioner, she was informed that the respondent had breached a number of policies. She alleged that the conduct was criminal and asked for the disclosure of the CCTV footage. She wanted to know, before leaving the meeting, who had accessed her computer.

99. Mr Davies began to explore matters which were the subject of the earlier investigation conducted by Mr Scales and Miss Davies, namely the rumours and the gossip but these were resolved, according to Mr Scales, who drew a line under them. Mr Davies said that he informed the claimant that she had been issued with a formal and final warning because she was found to have spread malicious rumours and that if her conduct was to be repeated she would be the subject of disciplinary proceedings. He further stated that she was told that she was under observation for not hitting her targets. The claimant denied that Mr Scales had said she was under observation for not hitting her targets and further denied that he had given her a warning for gossiping. Mr Davies questioned the claimant with regard to the information obtained from her computer. He asked her to explain who were Karen Jarvis, Henry and Danielle. The claimant explained that Henry was Henry Redshaw. With regard to her family and friends she was not prepared to make a comment but said that her mother was in a coma and had been given until the end of March 2016 to live.

100. We find that part way through the meeting, after the claimant had challenged Mr Davis' assertion that she had been issued with a warning and had been told that she would be under observation for her performance, the format changed to a disciplinary hearing based on the claimant's conduct and performance. It was, therefore, not a meeting to address the claimant's complaints. She had earlier been told that it would be informal without the need for a workplace companion. The meeting concluded at 19.17 with a further meeting arranged for the following day. (140-148)

101. At 17.30 on 19 April 2016, Mr Reach emailed the claimant stating:

> "I have now heard from Mark Davies unfortunately he will not be able to meet with you today. However, there is no reason you should continue to be absent from work. You are therefore, expected to return to work as from tomorrow, Wednesday, at the usual time of 8.30am for the daily meeting. Please confirm you will return to work as required.
>
> During the course of tomorrow, Mark Davies will meet with you." (149)

102. In an email entitled, "without prejudice", the claimant replied to Mr Reach at 17.50, stating:

> "Hi Alex,
>
> Until I've had a proper consultation with my solicitor, which I am waiting to be confirmed for later this week. I have been advised that it would not be appropriate for me to return to work.
>
> I will let you know once my appointment with my solicitor has been confirmed. Also I would refer you back to
> my previous request:
>
> 'Also please could you get Mark Davies to confirm my employment status in writing by close of play today'." (151)

103. Mr Reach replied the same day:

> "Thank you for your email, please note you are required to return to work. A failure to attend will be treated as unauthorised absence.
>
> I look forward to seeing you tomorrow at the office.
>
> Thank you." (152)

104. The claimant wrote the following day to Mr Reach:

> "Hi Alex,
>
> Just wanted to let you know that I will not be attending work today due to being unwell.
>
> I will be in contact with you tomorrow to let you know how I'm feeling." (153)

105. Mr Davies wrote in his witness statement, at paragraph 51, that the claimant had already made her reasons for absence quite clear, in that she was refusing to attend work. He stated that she had been advised to be ill which had been confirmed in her WhatsApp message. This is a reference to the claimant's message on 20 April 2016, at 10.52.22, in which she wrote:

> "I've been advised to be ill, until I can hand over all the documentation I have to my solicitor which is tomorrow!" (R1, page 14)

106. We find that at the time the claimant was over three months' pregnant and had gone through a particularly difficult meeting with Mr Davies, the orientation of which changed from a grievance to a disciplinary hearing and was clearly stressed by the whole experience. In cross-examination she said that she was also suffering from morning sickness hence her email to Mr Reach on 20 April. Mr Davies, however, formed the view that her absence on 20 April, was unauthorised. He said in evidence that had he been made aware of the WhatsApp conversation at the time which misrepresented the reason for her absence, he would have treated it as gross misconduct. He said that for him her refusal to attend work was the last straw.

107. Without a further meeting with the claimant to discuss her absence, Mr Davies sent her a letter on 20 April 2016, terminating her employment. He wrote the following:

> "Dear Emma,
>
> Termination of employment
>
> Further to our meeting on Monday, this letter is to notify you that, with regret, Davies and Davies is terminating your employment in accordance with clause 4.2 of your contract of employment dated 17 February 2016. Your last day of employment including the notice period will be one week from today, and will terminate on 27 April 2016. You will not be required to attend work during your notice period.
>
> I am very sorry to take this action, but having investigated the matter I am satisfied that there is an irreparable breakdown in relations between you and the company. In particular:
>
> 1. You have made various remarks to staff about managers, confirmed by Alina Danila and Nazehat Uddin, which included assertions that Mark Scales and Claire Davies being on "power trips" and questioning their competence.
>
> 2. On or about 15th March 2016 in front of all of our staff you declared that a marketing and database exercise devised by Alex Reach were a waste of time, which caused offence and undermined his authority and position as a manager.
>
> 3. In your meeting with Mark Scales on 5th April, you asserted that Nazehat Uddin had sent Svetlana Nikitaeva text messages saying that the upper management had been heard saying the sales team were all "shit" and should be fired, and that these were shown to you. From separate interviews held with both Svetlana Nikitaeva and Nazehat Uddin, the managers were satisfied that there were no such text messages.
>
>   Mark Scales provided me with a full record of his discussion with you and the informal warning that he gave you in relation to your future conduct. He made it clear to you that it has serious repercussions on staff relations and morale. When we discussed this on 18 April, you denied that Mark had given you any such warning. Furthermore, I was left with the impression that you did not consider that you had done anything wrong. I had hoped that you would have demonstrated an understanding of why your conduct was not appropriate and a willingness not to repeat it, but I now do not have confidence that the sort of unacceptable behaviour that I have detailed will not repeat itself.
>
> 4. Having been given a reasonable instruction to attend work, you refused to do so. Whilst you have today said you are "unwell", your email 19th April had already stated your reasons for today's absence. This is an unauthorised absence.
>
> You have three days outstanding holiday entitlement, for which you shall receive payment in lieu as part of your final payment of salary. We do not propose to make any deductions from your pay for unauthorised absences apart from your unauthorised absence today.
>
> If you have not already done so, you must return any property belonging to Davies and Davies still in your possession, including the company mobile phone and office keys, to Mark Scales by Thursday 21st April 2016. We aim to return to you any personal effects and belongings currently on Davies and Davies' premises by the same date.

> Please note that you remain bound by the restrictive covenants in clause 19 of your contract of employment in respect until 27th April 2017.
>
> Once again, I am sorry that this action has proved necessary, and I wish you well for the future." (154-155)

108. Miss Davies knew all along that she was the person responsible for accessing private information on the claimant's work computer yet she did not disclose that fact during the meeting held with Mr Davies on 18 April 2016. She only disclosed it in her witness statement dated 31 January 2017 which was served on the claimant's solicitors some time in February of this year. She said in evidence that she told Mr Scales in January what she had done. Mr Davies said that she told him, in a telephone conversation, a couple of months after the event.

109. We are satisfied after having considered the claimant's WhatsApp messages that on 20 April, in the evening, she was aware that her contract of employment with the respondent had been terminated. In her message on 18 April, she told her friends that she was contemplating criminal charges for "breaking data protection" and for "going to the press and fucking the reputation of them!", (R1)

Submissions

110. We heard submissions from Mr Baker, counsel on behalf of the claimant and from Miss Compton, counsel on behalf of the respondent, who referred to their detailed written submissions and spoke to those when they addressed us. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The Law

111. Section 99 Employment Rights Act 1996 states,

> "(1) An employee who is dismissed shall be regarded for the purposes of the Part as unfairly dismissed if –
>
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.
>
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of state.
>
> (3) A reason or set of circumstances prescribed under this section must relate to --
>
> (a) pregnancy, childbirth or maternity."

112. Section 18 Equality Act 2010, provides,

> "(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered as a result of it.
>
> (3) a person discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave..
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of the decision taken in the protected period, the treatment is to be regarded as occurring in the period (even if the implementation is not until after the end of that period).
>
> (6) The protected period, in relation to a woman's pregnancy, and begins when the pregnancy begins and ends –
>
> (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
>
> (b) if she does not have that right, at the end of the period of two weeks beginning with the end of the pregnancy…."

113. Section 18 does not require the claimant to show that she is being treated unfavourably by reference to the treatment that would have been afforded to a male comparator or to a non-pregnant female comparator. Evidence of the treatment afforded to others may be useful to help determine if the treatment is in fact related to pregnancy or maternity leave. The unfavourable treatment must be because of a woman's own pregnancy, paragraphs 8.16 – 8.19, Equality and Human Rights Commission Code of Practice on Employment (2010).

114. Unfavourable treatment means having "been put at a disadvantage." This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

115. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage and does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently

116. “A woman's pregnancy or maternity leave does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause." paragraph 8.20. See O’Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and another [1997] ICR 33, a judgment of the Employment Appeal Tribunal.

117. As regards victimisation, we have taken into account section 27 Equality Act 2010.

> “27 Victimisation
>
> (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.”

118. For there to be unlawful victimisation the protected act must be the reason for the less favourable treatment, Nagajan v London Regional Transport [1981] IRLR**.**

119. In the case of Waters v Commissioner of Police of the Metropolis [1997] ICR 1073, Waite LJ, in the Court of Appeal stated that:

> “The allegation relied on need not state explicitly that an act of discrimination has occurred- that is clear from the words in brackets in section 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer.”

120. Once the claimant has proved facts from which the tribunal could decide that she had been unfavourably treated because of pregnancy or maternity leave, the tribunal must look to the respondent for a non-discriminatory explanation if they are to avoid liability, section 136 Equality Act 2010.

121. Section 136 EqA is the burden of proof provision. It provides:

> " (1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions 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."

122. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

123. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

124. The Court then went on to give this helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

125. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual

orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

126. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities that its treatment of the claimant was not because of the protected characteristic, for example, race, sex, religion or belief, sexual orientation, pregnancy and gender reassignment.

127. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal which accepted her argument that the tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

128. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory. In the case of, B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not to lead to the legal conclusion that the dismissal occurred because she was a woman.

129. The tribunal could bypass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently

clear that the reason for the treatment is non-discriminatory, it is not necessary to consider whether the claimant has established a prima facie case particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This approached was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords and by Mr Justice Elias in Laing-v-Manchester City Council [2006] ICR 1519, EAT.

Conclusions

Pregnancy dismissal

130. We consider whether the reason or the principal reason, if more than one, for the claimant's dismissal, was her pregnancy? The claimant was over three months' pregnant at the time of her dismissal and had informed the respondent of her pregnancy on 6 April 2016.

131. We are satisfied that she had not been the subject of either an informal or formal warning following the meeting with Mr Scales on 5 April 2016 and that he would not have dismissed her at the time. Mr Davies referred to the matters which were considered by Mr Scales as forming part of the reasons for her dismissal, first that the claimant said that Mark Scales and Claire Davies were on "power trips".

132. The second reason relied upon by Mr Davies in his dismissal letter was that the claimant had said that marketing and database was a waste of time. We found, however, that this was resolved by Mr Reach in his email in response to the claimant's email who apologised for her comment. He wrote on 23 March 2016:

> "That's fine I understand. I need you to be up for this regardless of your personal opinion. As a team we just need to do it and show willing, I know it sucks nobody likes canvassing."

133. The third was the claimant's statement that Nazehat Uddin had sent Svetlana Nikitaeva text messages saying that the upper management had been heard saying the sales team were all "shit" and should be fired.

134. It is difficult to understand why the above three matters were revisited by Mr Davies after Mr Scales had decided to draw a line under them. We also could not find a basis for Mr Davies' conclusion that there had been an irreparable breakdown in relations between the claimant and the respondent.

135. Some of the documents produced following access by Miss Davies to the claimant's computer were of: information in relation to pregnancy; pregnant employees' rights; early signs of pregnancy; and a hospital search that showed that the claimant had suffered a miscarriage in October 2014. The

purpose of the meeting with Mr Davies was to investigate the claimant's grievance of discriminatory treatment because of her pregnancy against three managers. It was not to advise her to raise a formal grievance. There was no investigation into her complaint of breach of privacy and discriminatory treatment because of her pregnancy. We are of the view that the outcome of an investigation into the claimant's complaint, if proved, would be serious for the managers involved. The respondent was seeking to avoid that potential outcome by dismissing the claimant on the pretext that there were issues about her conduct, performance and that she had taken unauthorised absence.

136. When Mr Davies became aware, through Mr Reach, of her allegations and of threatening legal action based on pregnancy discrimination, it was at that point he, Mr Davies, wanted the managers to provide him with information on her to, in our view, discredit her.

137. Having regard to the way in which the meeting was conducted by focussing on her performance, it became a disciplinary hearing which, at that point, she should have been advised of her right to be accompanied.

138. It was not necessary for Mr Davies to have been involved in performance issues as he lives in Cumbria and travels to the offices about once a month. The appropriate person was the claimant's line manager, Mr Reach, and he told the tribunal that from the 5 to 18 April 2016, he did not have any concerns about the claimant's performance but was aware that she was complaining about pregnancy discrimination.

139. What about the claimant's performance? She had sold two properties in February 2016, two in March and one by 6 April. During that latter period, she had been away either because of her mother or on sick leave. In the March 2016 monthly review there was no suggestion by Mr Scales that she was underperforming. Yet Mr Davies raised performance issues and asked her why she disclosed her pregnancy on 6 April 2016 which was irrelevant to her allegations but of significance to her claims before this tribunal as it presented an insight into Mr Davies' attitude towards her genuine grievance.

140. The claimant was clearly upset at her treatment by Mr Davies and wanted to know more about her rights. She was pregnant at the time and was concerned about going into work. She was stressed and suffering from morning sickness. She was not on unauthorised absence because she was not in a fit state to work and took legal advice to which she was entitled to rely upon. Her absence was to do with her stressed state of mind and her morning sickness at the time. Mr Davies was aware that she was consulting with her solicitors about her treatment on grounds of her pregnancy yet without a disciplinary hearing he dismissed. We accept that this is not a section 98(4) ERA 1996 unfair dismissal case.

141. We have come to the conclusion that the claimant has established that the reason or the principal reason for her dismissal was related to her pregnancy. We do not accept that it was for her performance as it was not an issue for either Mr Scales or Mr Reach. It follows from our conclusion

that her automatic unfair dismissal claim under section 99 ERA 1996, is well-founded.

Discrimination on grounds of pregnancy

142. Was the claimant discriminated on grounds of her pregnancy, section 18 Equality Act 2010? We are satisfied that reference in Mr Scales' email to the claimant having more doctor's appointments and that a doctor's note would be required as standard, were references to her pregnancy, namely that she would be required to provide medical notes of any pregnancy related absences. We did not find that this was a standard provision that applied to someone who was expecting but was a requirement only of the claimant given the fact that she was pregnant. The stipulation was a reason related to her pregnancy. It was unfavourable treatment of her as she was required because of her pregnancy, to furnish a doctor's note for every absence. We do not accept that the respondent had provided a satisfactory explanation as why that stipulation was made.

143. In relation to accessing the claimant's computer and email account, we do not accept that Miss Davies was stressed at the time and was near breaking point as we have found that she sent a light-hearted and witty email to staff on where they should eat and she spent an inordinate amount of time on the claimant's computer searching for information. After completing her search in relation to marketing, she decided to look at the computer one more time. In our view, there was no reason for doing so other than to search for information that would have been relevant for some ulterior purpose. It was not until she prepared her witness statement dated 31 January 2017, was it disclosed to the claimant that she was the person responsible for accessing her computer. She kept silent during Mr Davies' meeting with the claimant on 18 April when that matter was raised. She invaded the claimant's privacy for an extraordinarily long period of over 90 minutes.

144. Although Miss Davies said she became suspicious because she read an email from Karen Jarvis, whom she believed was the claimant's mother. At the time she had been told by the claimant that her mother was in coma. She, therefore, questioned the claimant's credibility and looked for further information in relation to her conduct. We question why, after completing her marketing enquiry, she would search the claimant's computer. More importantly, she took screen shots of the claimant's searches in relation to pregnancy as well as her miscarriage. Taking away those screen shots was unfavourable treatment of the claimant as it was not necessary and a gross breach of her privacy as, by that stage, she knew that what she was doing was wrong. We reject the explanation that the reason for this was that Miss Davies believed the claimant had been untruthful. There was, in our view, the absence of credible evidence of the claimant's untruthfulness. She was put at a disadvantage as private information became available to the claimant's managers. The claimant suffered as a result because she was upset and felt violated.

145. In the above two respects, we have come to the conclusion that the claimant's unfavourable treatment claim is well-founded.

Victimisation

146. Was the claimant victimised having regard to section 27 EqA? We find that there was a protected act by the claimant, in that she said to Mr Reach, on 15 April 2016 that she had been treated less favourably because of her pregnancy. Mr Davies, in his email to Mr Reach on 16 April 2016, acknowledged that she was contemplating issuing proceedings against the respondent for "discriminating against her because she is pregnant."

147. For the reasons given in relation to the section 99 ERA 1996 claim, paragraphs 131 to 140, we have come to the conclusion that the protected act had significantly influenced the decision to dismiss the claimant as the whole orientation of Mr Davies' approach to the claimant was to seek to avoid addressing her grievance and to discipline her. The reason why he adopted such an approach was that she had complained about her discriminatory treatment because of her pregnancy. Accordingly, this claim is well-founded.

Contribution

148. Miss Compton submitted that the claimant contributed to her dismissal by her actions as she took an aggressive stance in referring to legal action and mentioned that she would go to the press. She was also difficult and aggressive during the meeting on 18 April 2016 and had spread rumours and made remarks about staff.

149. We find that she only threatened legal action because she believed that she had been discriminated against. The conduct of the meeting on 18 April did not accord with any recognised employment practice and procedure and the claimant wanted her allegations to be investigated. She is an intelligent, articulate person who had some knowledge of employment rights. She is strong willed. It was to be expected that someone like her would be a strident advocate of their rights. We do not accept that she was aggressive. The earlier rumours and remarks were already dealt with and a line drawn under them. We, therefore, have come to the conclusion that there is no basis for finding that the claimant had contributed to her dismissal.

150. The case is listed for a remedy hearing on Wednesday 2 August 2017 with a time estimate of one day.

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Employment Judge Bedeau

Date: 13 June 2017

Sent to the parties on: .....

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For the Tribunal Office