EMPLOYMENT TRIBUNALS

Claimant: Mrs A L Sanderson

Respondent: Bespoke Digital Agency Limited

HELD AT: Manchester **ON:** 11 – 13 December 2018
1 February 2019
(In Chambers)

BEFORE: Employment Judge Slater
Mr Q Colborne
Mr S T Anslow

REPRESENTATION:

Claimant: Ms J Connolly, Counsel
Respondents: Mr S Tettey, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:-

1. The complaints of unfavourable treatment contrary to Sections 18 and 39 of the Equality Act 2010 are well founded.

2. The complaint of unfair dismissal contrary to Sections 94 and 99 of the Employment Rights Act 1996 is well founded.

3. The complaint about failure to provide a written statement of employment particulars is dismissed on withdrawal by the claimant.

4. There will be a Remedy Hearing on 26 April 2019 beginning at 10.00 am.

REASONS

Claims and Issues

1. The claimant made complaints of unfavourable treatment because of her pregnancy, or because of illness suffered as a result of pregnancy, or because she was seeking to exercise her right to maternity leave contrary to Sections 18 and 39 of the Equality Act 2010 (EQA). She also brought a complaint of unfair dismissal contrary to Sections 94 and 99 of the Employment Rights Act 1996 (ERA), arguing that the reason or principal reason for her dismissal was a reason relating to her pregnancy or proposed maternity leave. The claimant had, in her claim form, included a complaint about failure to provide her with a written statement of employment particulars but she withdrew this complaint at the start of the hearing.

2. The issues to be considered by the Tribunal were agreed to be as follows.

1. Pregnancy/Maternity Discrimination – S.18 & S.39(2)(c) and (d) EQA 2010

1.1 Did the respondent treat the claimant unfavourably as follows:

1.1.1 On 21 August 2017, Ms Grice was critical when the claimant telephoned to report sickness absence saying it would be detrimental to the team and would have a knock-on effect.

1.1.2 Between 28 November 2017 and 1 December 2017, Mr Brennan or Mr Gardner decided to dismiss the claimant without having a disciplinary meeting with her in circumstances where she was unable to attend because of pregnancy complications exacerbated by stress.

1.1.3 On 1 December 2017, the respondent dismissed the claimant.

1.1.4 On 19 January 2018, Ms Moville, acting in accordance with Mr Brennan's wishes, dismissed the claimant's appeal against dismissal.

1.2 Was any unfavourable treatment (including the claimant's dismissal) because of her pregnancy or illness suffered as a result of it or because the claimant was seeking to exercise the right to maternity leave? For the assistance of the Tribunal, the claimant set out a broad list of the material from which she asserted the Tribunal could infer discrimination. The list was not intended to be exhaustive.

1.2.1 On 6 July 2017, Mr Brennan reacted negatively to being informed that the claimant was pregnant and stated "There's just too many people in that (the claimant's) team and not enough work. You know what that means don't you?? P204-5

1.2.2 On 17/19 July 2017, Ms Grice expressed to the claimant's colleagues that she was unhappy that the claimant was working from home and asked how they felt about it despite the fact that Ms Grice and Mr Brennan had given the claimant permission to do so p209.

1.2.3 On 20 July 2017, Mr Brennan was irritable, angry and dismissive when the claimant asked if he had time for a brief meeting/discussion by saying "not really" and subsequently making various comments including "I thought the brief was self-explanatory … I don't understand why you are not able to get on with it" p206.

1.2.4 During the claimant's one-week annual leave from 14 – 18 August 2017, Mrs Grice and Mr Brennan met various of the claimant's colleagues and questioned them in relation to their view of the claimant in such a way as to prompt those colleagues to inform the claimant on her return that Mr Brennan and Ms Grice were "digging for information/dirt" about her" page 210

1.2.5 On the claimant's return from annual leave, Mrs Grice accessed the claimant's emails when the claimant was in the office without informing her that she was doing so or why p210

1.2.6 In September, Mr Brennan questioned how the claimant's pregnancy was affecting her work and made comments that some people think family is more important than work, that she may find part time work more beneficial etc p150

1.2.7 After Mr Gardner's appointment on 17 September 2017, as manager for the team in which the claimant worked, Mr Brennan arranged personal development meetings with Mr Gardner and all the team members except the claimant p150

1.2.8 The timing of the claimant's suspension and the date of the proposed disciplinary hearing which, if it resulted in her dismissal, would mean that she was not eligible for SMP p96, p98.

2. **Unfair Dismissal – S94 and S99 ERA 1996**

2.1 What was the reason or, if more than one, the principal reason, for the claimant's dismissal, in particular, was it a reason relating to her pregnancy or proposed maternity leave?

3. **Remedy**

3.1 What compensation or damages should be awarded?

Facts

3. The respondent is engaged in the business of digital consultancy and, amongst other things, provides search engine optimisation services to commercial clients. Steve Brennan is the founder, sole owner and Chief Executive Officer of the respondent.

4. The claimant began work with the respondent as a Digital Content Strategist on 9 January 2017. She was one of two Content Specialists on the Optimisation Team. Part of her role was to manage client accounts. As well as dealing with external paying clients, the claimant had the respondent as a client, with Mr Brennan giving her instructions in relating to work for the respondent as a client.

5. The claimant's probationary period came to an end on 7 April 2017 and her employment was confirmed. Some issues arose during the probationary period, as indicated by the letter dated 15 May 2017 which informed the claimant that her probationary period was passed, subject to certain conditions. The issues raised related to understanding the respondent's approach to matters rather than failing to deliver work. We find that there were no significant problems at this stage because, if there had been, the claimant's employment would not have been confirmed.

6. The letter dated 15 May 2017 referred to the claimant's next appraisal being scheduled for late July.

7. At the end of April 2017, the claimant had a miscarriage. She had not notified the respondent of her pregnancy prior to the miscarriage. She informed the respondent of the reason for her absence and she was off work for two weeks. The claimant makes no complaints about how she was treated during that sickness absence, or immediately on her return to work. She makes no complaint about any matter until she told Mr Brennan about her subsequent pregnancy on 6 July 2017.

8. The claimant's line manager was Lauren Grice. The claimant makes no complaints about anything done by Lauren Grice until a telephone call about illness on 1 August 2017.

9. On 22 June 2017, the claimant had a meeting with Lauren Grice to give the claimant feedback. A letter confirming the discussion was sent on 28 June. The feedback related to a number of matters. The first was matter raised was about means of communication used for external and internal communication, informing the claimant that phone and face to face conversations should be the normal way in which internal and externa relationships are managed. Ms Grice referred to the Boxed Up (also known as Belmont Packaging) retainer renewal, where the account had become at risk because the previous relationship manager had used email rather than direct conversations with the client. Issues later arose as to the claimant's work for this client. This letter indicates that there had been relationship issues with the client prior to the claimant taking on the account. A further matter raised was not meeting deadlines. The claimant was responsible for producing a monthly newsletter. It was highlighted that the main newsletter had been late and the timing of the newsletters was currently out of synch. An issue was also raised about a video for the respondent as client being four weeks behind its agreed

deadline. The letter makes no express recognition that the claimant had been absent for two weeks because of her miscarriage. Mr Brennan accepted in cross examination that the miscarriage must have affected the timing of the video; Ms Grice did not accept this. Both disagreed that the work for the newsletter would have been affected by the claimant's absence, saying this was only one day's work.

10. On 6 July 2017, the claimant met with Steve Brennan and told him that she was pregnant. There is a dispute as to the way in which Mr Brennan responded to this news. Mr Brennan said he was congratulatory; the claimant said his reaction was cold and she found comments by him worrying.

11. After this meeting, the claimant spoke to a colleague, Ian Wood on the morning of 7 July, about Mr Brennan's reaction. Mr Wood advised her to keep notes to protect herself. The fact of this conversation with Ian Wood, in which he advised her to keep records of relevant things, is confirmed by the claimant's email to herself of 7 July and Ian Woods' email of 24 November 2018.

12. After this conversation, the claimant then began making and emailing notes to herself about events which happened. On 7 July, the claimant made the first of these notes, in which she wrote about the meeting on 6 July, and emailed it to herself. Mr Brennan has speculated that the claimant was building a false narrative from this point on. He has suggested that she has fabricated quotes in these notes and this is part of an attempt to creative a narrative which the claimant felt might benefit her financially. We consider it highly improbable that the claimant would have had such a scheme in mind from 7 July 2017 and consider it much more likely that what was recorded in her notes from this date was her genuine recollection and perception of events. We consider that she spoke to Ian Wood about her concerns soon after the meeting and then started writing these notes because something had been said or done at the meeting with Mr Brennan which caused her real concern. We consider that the claimant's note of this meeting and subsequent conversations which she has recorded soon after the event are more likely to be accurate than the recollection, at a much later stage, of Mr Brennan and Ms Grice. We reject the hypothesis of Mr Brennan and Ms Grice that the claimant was telling lies and fabricating matters for potential financial gain from as early as 7 July 2017.

13. We consider, therefore, the record made by the claimant of the meeting on 6 July to be our best source of evidence as to what happened in that meeting, being the closest contemporaneous account of events. Based on this, we find that Mr Brennan's reaction to the claimant telling him that she was pregnant was to say "well that's good news isn't it" but in such a way that the claimant did not find this to be celebratory in tone. She recorded that he did not ask her when she was due and did not congratulate her, which she found to be strange and a little bit cold. After a discussion about a client's account and the claimant expressing disappointment that some clients were not able to get the budget he needed, Mr Brennan said, "the Optimisation Team is not in a good way" and "there's just too many people in that team and not enough work, you know what that means don't you".

14. We accept the evidence of Beth Plowright that she saw the claimant upset after the meeting with Mr Brennan, which is consistent with the claimant's evidence.

15. The claimant was tasked by Mr Brennan with the project management of the creation of a new website for the launch of the respondent's London office. The claimant had no previous project management experience. The work was allocated to the claimant even though the respondent had a Project Manager, Mel Moville, and the claimant expressed concern about her inexperience.

16. On 17 July 2017, the claimant worked at home, with permission from Mr Brennan and Ms Grice, because the software at work would not work for the task she was doing. She subsequently learnt that Ms Grice went around asking other staff how they felt about the claimant going home to work. Although Ms Grice has denied this, we make the finding that this occurred, based on a contemporaneous note from the claimant that she had been told this by her colleague Beth Plowright.

17. On 20 July 2017, the claimant approached Mr Brennan to ask for clarification on a brief he had given her. She asked if he was free for a quick five minutes and he replied, "not really". Despite this, he agreed to speak to her but said "I thought that the brief was pretty self-explanatory Amy". Mr Brennan has accepted that he said these things, which are recorded in the claimant's contemporaneous note. We accept that the claimant perceived Mr Brennan's response to be cold and unfair, as recorded in her contemporaneous note. We accept Mr Brennan's evidence that he was expecting a client, to whom he was to pitch for new business, at the time the claimant approached him. The claimant may not have been aware of this.

18. On 26 July 2017, the claimant had a meeting with Lauren Grice. Ms Grice wrote to the claimant on 27 July, following the meeting. The claimant says that Mr Brennan was in the meeting. Although Mr Brennan's evidence was that he was not at the meeting, and the letter does not explicitly refer to Mr Brennan, the use of "we" by Ms Grice suggests that she was not alone in the meeting with the claimant. The letter raised issues in relation to deadlines and communication. The claimant says that the letter is not accurate in the respect that it refers to discussion about the video for Bespoke, which the claimant said was not discussed. The letter recording the meeting is in the name of Ms Grice. However, the document's properties show that Mr Brennan edited it on 31 July i.e. after the date on the letter. The change made was to change the reference to "the example" in relation to an issue with communication to "one of the examples". The claimant alleges that Mr Brennan was editing the letter after the event to make it look as though there was more incomplete or overdue work than was actually discussed. The claimant agrees that, at the meeting, Ms Grice reiterated her support for the claimant and agreed to reduce the claimant's workload because of the time the project management or relationship management work was taking. Ms Grice denied that this was because of the level of work the claimant had.

19. On 1 August 2017, the claimant was off work with a headache/migraine. She called the office and spoke to Ms Grice. The claimant made a note of the conversation. We accept that this note accurately recorded what was said. The claimant explained that she had had migraines and tension headaches throughout the previous day, which had not got better overnight, she wasn't able to take anything strong due to being pregnant, so she was going to see the doctor. Ms Grice then said: "so you are going to be off work tomorrow then". The claimant said she

would speak to the doctor to see what they recommended, Ms Grice then commented that being off work was detrimental to the team and would have a knock-on effect.

20. The claimant attended her GP. We have seen the GP's notes which record that the claimant told her GP that she had recently told her boss that she was pregnant and she was getting bullied and being shouted at, treated badly at work and this was making her stressed. The doctor recorded that they discussed legal rights and the doctor advised her to speak to the Citizens Advice Bureau. We accept that what the claimant told the doctor was how she was feeling at the time about events at work.

21. The claimant's feelings about what was happening at work at the time are also evidenced by CAB records. These record that the claimant telephoned the CAB on 1 August 2017 and that the claimant felt, when she told her boss that she was pregnant, that he was angry about this and said that her team had not been doing enough work and said, "you know what that means don't you". The CAB notes support that the claimant was feeling that her managers had been treating her badly and that, when she phoned to say she was going to the GP, her manager shouted at her down the phone saying "does this mean you will be off again". The claimant expressed concern to the CAB advisor that her employer was trying to dismiss her.

22. When cross examined about the comment that being off work would have a detrimental effect on the team, after denying that she made such a comment, Ms Grice added that, within two hours of the conversation, the claimant had driven 2 hours to the CAB. Ms Grice claimed that this was "absolutely relevant" but could not then explain why. When it was put to Ms Grice that the claimant had not driven to the CAB but phoned them, Ms Grice said she did not know that.

23. The claimant returned to work on 2 August 2017.

24. In mid-August 2017, the claimant took one week's pre-arranged annual leave. She returned to work on 21 August 2017. On her return, colleagues told her that Mr Brennan and Ms Grice had been "digging for information" about her. Beth Plowright told her that Mr Brennan was asking questions about her work and whether there was any underperformance. In making this finding, we prefer the claimant's contemporaneous note to the denials of Ms Grice and Mr Brennan that this occurred. The claimant's version of events is also supported by a letter the claimant wrote to the CAB on 21 August 2017. In this letter, she wrote that she had been told by team members that meetings were held individually during her absence with each of her colleagues about "team morale" and, in each of the meetings, the CEO brought up the claimant's name and was, in the words of her colleagues, "digging for dirt" on her, questioning her ability to do her job and had mentioned that her manager had said that a client of theirs had made a complaint about the claimant, even though there was no record of this anywhere and the complaint had not been mentioned to the claimant since returning to the office.

25. Mr Brennan said in evidence that colleagues had alerted managers when they realised the work had not been done by the claimant but, when questioned about this when giving evidence, could not identify who had raised this.

26. The claimant also found that someone had been accessing her email account whilst she was in the office. The respondent had an open email access policy so the claimant had no issue with emails being accessed when she was not at work but questioned why anyone would need to access her emails whilst she was at work and was available to answer any questions. The claimant suspected that Lauren Grice had been accessing her emails, saying that Lauren Grice knew things that she could only know from reading the claimant's emails. However, it is possible that such knowledge could have been gleaned from reading the claimant's emails during her absence. We do not consider the evidence to be sufficient to make a finding, on a balance of probabilities, that Lauren Grice was accessing the claimant's emails at times when the claimant was at work.

27. On 22 August 2017, the claimant booked a meeting with Mr Brennan, Ms Grice and Ms Bamber for 24 August. She wished to have a minuted meeting to raise concerns about her treatment since announcing her pregnancy. She did not tell Ms Grice and Mr Brennan what the meeting was to be about. She asked Ms Bamber to be present to take a note.

28. Lauren Grice asked the claimant what the meeting was about and the claimant said she would rather discuss the matters at the meeting itself.

29. An hour or so after Ms Grice asked the claimant about the purpose of the meeting, the claimant's email system logged her out unexpectedly. When she checked her email settings, it stated there had been a recent log in from a different location with the same IP address. The claimant suspected that Ms Grice had logged into her email, perhaps to find out what the meeting was about.

30. On the afternoon of 23 August, Ms Grice told the claimant that she was very busy the next day and would prefer to have the meeting that day. The claimant said she would prefer to have the meeting as arranged because she wanted Steve Brennan, Ms Grice and Ms Bamber to be in the meeting, but Ms Grice said she would not be able to make the meeting the next day and that Steve Brennan may not be able to make it but Ms Bamber would be in the meeting. The claimant then agreed to go ahead with the meeting that afternoon.

31. The claimant sought to record the meeting on her phone but it appears the recording did not work. It is common ground that, in the meeting, the claimant raised the issue of her treatment at work and whether this was related to pregnancy. She asked whether the respondent was building a case for dismissal against her because they were unhappy she was pregnant. Ms Grice suggested that they end the meeting and have it the following day.

32. Ms Grice told Mr Brennan that the claimant wanted to raise with them that they were building a case for dismissal, that people were looking at her emails and that the treatment was related to pregnancy.

33. Ms Grice's evidence to the Tribunal was that there were major issues with the claimant's work at this time. However, Ms Grice and Mr Brennan had not called the claimant to a meeting about her work since the meeting on 26 July. The meeting on 24 August was as a result of the claimant initiating a meeting to discuss her treatment and whether this was related to pregnancy. It was not, as suggested by

the respondent's response, a formal meeting which was called to discuss issues relating to her work.

34. Although the meeting on 24 August was intended as a continuation of the meeting initiated by the claimant, in fact, at that meeting, Mr Brennan questioned the claimant about her workload and performance. The claimant again tried to record the meeting. This time there is a partial recording and a transcript has been prepared of this. The Tribunal listened to the partial recording and noted that both the claimant and Mr Brennan appeared calm in tone during this meeting. The claimant initiated a discussion about the respondent's account, saying she had struggled with things on that account in terms of the additional work. We accept the claimant's evidence that Mr Brennan did not answer her questions about whether the company was building a case for dismissal and whether this was because she was pregnant during the course of the meeting.

35. Mr Brennan did seek to address the claimant's questions in a letter dated 24 August 2017. In relation to the question whether the company was building a case for dismissal, Mr Brennan wrote that employers document their staff's performance, and, in the claimant's case, there had been more meetings around her performance than most colleagues and, therefore, more documentation. He clarified that no disciplinary process or meetings had occurred to date. In relation to the question about whether this may occur because she was pregnant, he wrote that the company had a culture and history of supporting its staff in family related matters over many years, including maternity, and this would continue to be the case in the future.

36. In September 2017, Paul Gardner joined the respondent and became the claimant's line manager. He held personal development meetings with other members of the team but did not hold one with the claimant. We received no satisfactory explanation as to why the claimant did not have such a meeting.

37. On 12 September 2017, the claimant wrote to the respondent informing them that her baby was due in the week beginning 19 February 2018 and that she would like to start her maternity leave and pay on 22 January 2018. She wrote that she would be able to provide the MATB1 certificate once she was 21 weeks' pregnant. The claimant's proposed dates of maternity leave did not change but, when the MATB1 form was subsequently provided on 16 October 2017, this gave a later date for the expected week of confinement, being 25 February 2018.

38. The claimant says she had a meeting with Mr Brennan sometime in September 2017 about the respondent client account in which Mr Brennan asked, "How is your pregnancy affecting your work?" and talked about trying to understand where the claimant's head was at and made a statement about some people thinking that family is more important than work. Mr Brennan denied ever making such comments. The claimant did not make any contemporaneous note of this meeting. There is an undated note made by the claimant which refers to this alleged conversation but this appears, from the rest of the note, to have been written on or after 14 November 2017. The allegation is not contained in the claimant's solicitor's letter of 16 November 2017, and the allegation does not appear in the claim form. The burden is on the claimant to satisfy us on a balance of probabilities that facts

occurred as alleged by her. In relation to this particular incident, the claimant has not satisfied us on a balance of probabilities that events occurred as she described.

39. On 29 September 2017, Mr Brennan sent the claimant a letter enclosing written feedback on the video project and management/organisation of work. The letter asserted that the claimant had requested this documented feedback following what he described as a "special HR meeting" on 24 August. He wrote that they had spoken that morning and agreed the two most useful topic areas where further written feedback would be most useful. The claimant says the criticisms made in the letter are not well-founded and that she did not request this feedback. We prefer the evidence of the claimant that she had not asked for this specific feedback. It appears odd that it should come more than a month after the meeting on 24 August.

40. We note, in the transcript of the meeting on 24 August, that the claimant did say that she wanted to "find out what was going on, if there is anything going on, and if there's not then that's fine I'll crack on, try harder, if he's got any feedback for me that's fine". We do not consider this to be a request for additional documented feedback which the respondent alleges the claimant asked for.

41. The respondent has produced an email from Kate Hulley from the client, Belmont Packaging, to Lauren Grice dated 10 October 2017. This indicates some dissatisfaction with work done but relates to a competitor analysis done which did not correctly identify their competitors. The claimant says, and we accept, that this email was never shown to her prior to her dismissal. It is also not about the number of links produced, which was the matter which was then raised with the claimant.

42. A note dated 16 October 2017, made by Lauren Grice, referred to issues raised by Belmont Packaging. One issue raised was value for money for the number of backlinks built and results achieved from the lack of links. Ms Grice wrote about a KPI being of three links per month.

43. As previously noted, the claimant submitted her MATB1 form on 16 October 2017 with the expected week of confinement being identified as beginning 25 February 2018. We find, based on the subsequent correspondence between Steve Brennan and HR advisers, that Steve Brennan was not aware of the change in the expected week of confinement since he sought advice on the basis of the date previously notified.

44. On 18 October 2017, the claimant was called into a meeting with Steve Brennan, Lauren Grice and Paul Gardner. Steve Brennan informed the claimant that Kate Hulley of Belmont Packaging had made a complaint against her. Mr Brennan asked the claimant for a report showing all the outreach articles she had published for her client between January and October 2017.

45. Mr Brennan sent the claimant an email on 18 October, following that meeting. He wrote that Belmont Packaging had escalated some complaints regarding the SEO and optimisation work on their account and suggested they may want to exit their retainer as a result. He wrote that the client was going to see the respondent on 30 October and they needed to be clear ahead of that on exactly what the client had paid for and what the client had received. He wrote that one of the things they needed to be certain on was exactly how many outreach links the client had received

that year. He asked the claimant for a list of all the links she had obtained for the client so they had the correct detail ready on this when they did meet with the client.

46. The claimant gave evidence that there had been problems with the Belmont account before she took over and that the client had been looking for a way to get out of the retainer. This is supported by the letter from Lauren Grice of 28 June 2017 in which she wrote that the "Boxed Up" retainer had been at risk because the previously relationship manager had used email rather than direct conversations with the client. "Boxed Up" is another name for Belmont Packaging.

47. The claimant duly provided information to Mr Brennan which she believes demonstrates that she had completed the necessary work for Belmont Packaging.

48. Mr Brennan says that the claimant did not provide what the client had paid for. There is a difference between what the respondent says in the response and what Mr Brennan says in evidence was agreed should be done for the client. The response also says that, as a result of its investigations, the respondent was obliged to provide a substantial cash rebate to the client in relation to its failure to carry out work for which it had been invoiced and which it had been given to understand had been completed. There is no evidence in the respondent's witness statements to support this assertion. When questioned about this statement in evidence, Mr Brennan said he could not remember the detail but thinks they agreed to reduce the recurring fee.

49. In the email of 18 October, Mr Brennan told the claimant that Lauren Grice would be the main contact with the client until they were back on track. It appears that subsequently Lauren Grice did do some work for Belmont Packaging.

50. On 24 October 2017, Mr Brennan had a discussion with Nicola of HR Savvy about the claimant. On the following day, Mr Brennan sent Nicola an email saying he was thinking that they may advise the claimant on Monday that a disciplinary process would begin and they would suspend her then. He wrote that he was keen to use Nicola's services where possible. Nicola replied the same day. Her response included the following:

> "What I will reiterate is that there are risks in this case due to Amy's pregnancy and therefore it will be key to get it right at this stage. If she does subsequently pursue a claim, I can't stress enough how important it is that the disciplinary is managed and documented correctly in terms of mitigating risk and justifying the dismissal decision. Getting this wrong tends to be the main reason employers struggle to defend a claim."

51. It appears from the terms in which this is written that the discussion between them had been to the effect that Mr Brennan was intending to dismiss the claimant.

52. The correspondence between Mr Brennan and HR Savvy was disclosed only during the course of the hearing. Mr Brennan, when asked about their disclosure, said they had disclosed documents previously which were "relevant to points we wanted to make". The respondent has been represented by solicitors since no later than the presentation of the response.

53. In an email on 26 October, Mr Brennan wrote to Nicola:

> "I think we are happy, the evidence is very clear, however we have the client involved visiting on Monday [30 October] so we are going to meet with them first in case anything new comes to light then too, so most likely we will sit with Amy late Monday or early Tuesday."

54. The respondent produced in evidence a note which they said was a contemporaneous note of a call between Lauren Grice and Kate Hulley on 26 October 2017. The note set out the following points as being covered:

- "Client raised their concern that they felt they had not received all of the outreach work that they had paid for. Complained and asked us to investigate.
- Client stated they were unhappy with the quality of work delivered. Specifically on case study pages (broken links, pixelated images) which Amy had delivered.
- Client unhappy that local search work scheduled and paid for in October had not been delivered. (A colleague had to step in and deliver this).
- Client said they had become unhappy with Amy's performance as relationship manager. Said she had become "disconnected" from the account. Said she had been intending to ask for somebody else to be appointed."

55. The claimant accepted that this was one of the enclosures with the letter of 8 November 2017 inviting her to a meeting on 10 November 2017.

56. On 27 October 2017, Nicola sent Steve Brennan a draft suspension letter.

57. The claimant had two days' sick leave on 30 and 31 October 2017.

58. As indicated in earlier correspondence, there had been a scheduled feedback meeting with Belmont Packaging on 30 October 2017. No notes of this meeting have been disclosed and nothing arising from this meeting formed an enclosure with the letter sent to the claimant prior to the disciplinary hearing.

59. Mr Brennan informed Nicola in an email on 30 October that the claimant's due date was week commencing 19 February 2018. This was in line with the claimant's letter but not the correct date in the MATB1 form.

60. In an email dated 1 November 2017, Nicola sent Steve Brennan advice about the investigation and disciplinary process. She advised that the claimant should be given three days' notice of the hearing. After advice about the process, she wrote:

> "Whilst I know we discussed this before, I just wanted to reiterate the risks of this case if it does lead to dismissal. She is likely to claim that it is due to her pregnancy and whilst we are doing all we can to mitigate this she will have nothing to lose by making a Tribunal claim for unfair dismissal and pregnancy related discrimination. Unlike other forms of discrimination, it would be for the

> employer to prove they have not discriminated rather than her to prove that you have – the law is very biased towards pregnant ladies!
>
> "We now have the added risk of suspending her from work when she has just been off work with high blood pressure. Plus she miscarried earlier in the year.
>
> "This is worst case scenario and it may be that she doesn't claim through Tribunal as she will be receiving her maternity pay whatever the outcome, however I wouldn't want the above to arise and me not to have advised you fully."

61. In an email of the same date, Steve Brennan wrote to Nicola that perhaps he would do the investigation "given I have not been involved in the work directly". This was despite the fact that he had been in meetings and was the client for the claimant on the respondent's account. The following day, Nicola suggested that he should not do the investigation because, if he did this, he would not be able to pick up any appeal against the outcome.

62. On 6 November 2017, the claimant was called into a meeting with Mr Brennan, Mr Gardner, Mel Moville and Rebecca Bamber. Mr Brennan informed the claimant that she was suspended pending an investigation into her work. She was given a letter of the same date. The letter alleged that the claimant had not delivered all the work paid for by the client they had spoken to the claimant about on 18 October. He referred to there having been several occasions over the course of the year when there had been issues arising from work she was responsible for being delivered late or not at all. He referred to this being discussed and documented on 15 May, 28 June, 27 July, 24 August and 29 September. He confirmed this was being considered a disciplinary matter and she was suspended on full pay to allow the investigation to take place. The claimant was then blocked from access to the respondent's system, which meant she was not able to access any documents which might have assisted her.

63. The claimant attended her GP on 8 November 2017 and was given a note certifying her as unfit for work for six weeks due to pregnancy complications exacerbated by stress.

64. By a letter dated 8 November 2017, the claimant was required to attend a disciplinary hearing on 10 November 2017 at 9.45am. The letter referred to "a full investigation of the facts surrounding the complaint" having been made by Rebecca Bamber. It is clear from the evidence that all Rebecca Bamber did was to compile documents from the claimant's HR file for the hearing. These documents were listed in the letter and sent to the claimant. These were as follows:

(1) HR letter – 15 May.

(2) HR letter – 28 June.

(3) HR letter – 27 July.

(4) HR letter – 24 August.

(5) HR letter – 29 September.

(6) Client complaint – 18 October (agreed to be page 44 of the bundle).

(7) 2017 outreach report dated 18 October (agreed to be pages 49-50 of the bundle).

(8) Client complaint conversations notes – 26 October 2017 (page 77 of the bundle).

65. The document at page 49 of the bundle, which is one of these enclosures, is a document prepared and compiled by Steve Brennan.

66. Steve Brennan was involved in drafting the invitation to the disciplinary hearing and met with Lauren Grice and Rebecca Bamber to compile the letter and enclosures. The allegations set out in the letter were as follows:

- "That a significant amount of work promised to and paid for by the company's clients which you are responsible for delivering personally or for managing the delivery of was not properly or not delivered at all.
- That this has adversely affected the company's relationships with some clients'
- That this is a pattern over many months rather than an isolated or exceptional issue."

67. The letter stated the company's view that these allegations constituted gross misconduct. Although the allegations referred to "clients" in the plural, the only evidence provided by way of the enclosures to the letter related to the client, Belmont Packaging. The claimant was advised in the letter that the outcome of the disciplinary hearing could result in her dismissal. The letter advised her of her statutory right to be accompanied at the hearing.

68. Although Nicola of HR Savvy had advised that the claimant should be given at least three clear days' notice of the meeting, she was given only one clear day before the scheduled date.

69. The claimant, understandably, having notified the respondent of the corrected date for her expected week of confinement in the MATB1, formed the view that the respondent was trying to dismiss her before she qualified for statutory maternity pay. If dismissed on 10 November 2017, the claimant would not have qualified for statutory maternity pay. However, it is clear from the correspondence between Mr Brennan and HR Savvy that Mr Brennan and his adviser were working on an earlier expected week of confinement and thought, by the time of the scheduled disciplinary hearing, that the claimant would already have qualified for statutory maternity pay.

70. On 8 November 2017, the claimant emailed the respondent to tell them that, on medical grounds, she would not be able to attend the disciplinary hearing arranged for 10 November. She wrote that, on the recommendation of her doctor, she had been signed off for six weeks due to pregnancy complications derived from

stress, and, on the advice of medical professionals, would not be able to attend the meeting.

71. On 10 November 2017, after the time of the scheduled disciplinary hearing, Steven Brennan replied to the claimant by email. He asked her to send her doctor's note and said she may be asked to attend an Occupational Health appointment the following week. The claimant emailed a copy of her doctor's note the same day. She asked for an update on the status of the meeting which was booked in for that morning. Mr Brennan replied by email on 13 November. He wrote that they did not hold the planned meeting but, instead, HR ran through options for progressing the claimant case. He wrote that they may want to progress the Occupational Health assessment with a view to holding her meeting as soon as possible. He wrote:

> "An alternative which may be available to you is a 'without prejudice' meeting. This is a meeting to discuss your case which is protected in that what is said at the meeting cannot then be used against you in any way in the hearing when it does occur. This could potentially be at a neutral venue such as the HR company's office rather than at our offices given that attending our offices may feel more stressful than a neutral venue. You could ask literally anything in such a meeting."

72. Mr Brennan asked the claimant for comments on whether she might find this useful or not.

73. The claimant replied on 14 November that she did not feel that a "non prejudice" meeting at his HR company's headquarters would be beneficial or helpful at this point. However, she said that, if they felt an Occupational Health assessment was necessary at this stage, then she would await their instruction.

74. An Occupational Health adviser contacted the claimant. The claimant explained the position and the adviser said it would not be relevant to have an appointment at that time. Mr Brennan's witness statement is incorrect in asserting that the claimant declined to cooperate with the Occupational Health assessment.

75. The claimant instructed solicitors and, on 16 November, they wrote to the respondent on the claimant's behalf. They set out the claimant's account of events since she had informed Mr Brennan she was pregnant on 6 July. They wrote that, since that date, the manner in which the claimant had been treated by Mr Brennan made it plain that he was unhappy that the claimant was pregnant. The letter stated that the evidence which had been sent to the claimant to purportedly support the allegation that a significant amount of work she was responsible for delivering had not been properly delivered or delivered at all had been considered by the claimant and raised a further concern on the part of the claimant that the allegations of gross misconduct had been fabricated by the respondent in an attempt to justify dismissing a pregnant employee. They wrote that neither they nor the claimant had seen any evidence that the client, who the respondent had alleged made a complaint about the claimant, was dissatisfied with the claimant's performance. The letter asserted that the client was already extremely dissatisfied with the respondent when the claimant took over the account and had already made attempts to terminate the company's retainer.

76. On the same day, the claimant's solicitors wrote a further letter "without prejudice and subject to contract". The parties have waived privilege in this document. The claimant's solicitors wrote that they inferred from the invitation to the claimant to attend a "without prejudice" meeting that the respondent wished to discuss with their client severance terms which would bring about a mutual termination of her employment. The claimant's solicitors set out terms on which the claimant would be prepared to agree that her employment would terminate, with no admission of liability on the part of the respondent. The respondent has described this letter as "blackmail". Mr Brennan's witness statement describes it as "a cynical attempt to extort money from the company". Given the respondent's invitation to attend a "without prejudice" meeting, we consider this was a perfectly understandable and proper response to what could only reasonably have been understood as an invitation to discuss settlement terms.

77. Mr Brennan discussed the letter with his management team and his view that it contained lies. He gave evidence that what he considered to be "foul play" on 16 November changed things and he was not then prepared to wait until the claimant was fit to attend a disciplinary hearing.

78. Mr Brennan forwarded the two emails of 16 November to Nicola of HR Savvy on 17 November, and commented that there was "a lot of nonsense and false truth" in the letters. He questioned whether this strengthened their case for setting a new hearing date or at least inviting a written statement in relation to the allegations. He wrote:

> "Overall my aim would be to hold the hearing in the fairest and most reasonable way possible and achieve a fair and correct outcome in relation to the performance issues. If there is a dismissal it will be for those reasons only and they should be clear and evident. I feel this letter helps with our intention to move the process on and obviously, the letter itself or at least the false claims within constitute gross misconduct in themselves too."

79. Nicola of HR Savvy responded, suggesting rearranging the hearing. She wrote:

> "As an alternative option, I can call the solicitor for you if you like and have a conversation with them where we look to agree a figure equivalent to Amy's notice and maternity pay (rather than the £23k stated!) to end her employment through a settlement? It is up to you as this would be jumping the gun slightly however gets to the end position more quickly – providing we reach agreement which is a big 'if'."

80. Mr Brennan wrote to the claimant's solicitors on 20 November responding to a point which had been raised about qualifying for maternity pay. He wrote that the disciplinary process began "due to what appeared to be serious issues with Amy's work over many months". He wrote that due process would be followed to achieve the best outcome for the claimant and affected colleagues in relation to those issues. He wrote that they would advise the claimant of a new hearing date shortly.

81. The claimant's solicitors wrote again on 21 November 2017 and asked for a full reply to their open letter of 16 November, asserting that Mr Brennan's reply of 20

November did not address any of the concerns which the claimant had raised about the manner in which she had been treated since she notified him that she was pregnant.

82. The claimant's solicitors replied to the point about maternity pay, disagreeing about the date on which the claimant was entitled to SMP. Mr Brennan replied to that on 22 November 2017. It is apparent from that letter that the respondent was calculating the qualifying date for statutory maternity pay based on the due date of 19 February which had been notified by the claimant prior to the MATB1 which gave a revised later date.

83. There was further correspondence about the maternity pay, from which it appears that the claimant's solicitors were unaware that the claimant had previously advised an earlier expected week of confinement.

84. On 23 November 2017, Rebecca Bamber wrote to the claimant requiring her to attend a re-scheduled disciplinary hearing on 28 November to be chaired by Paul Gardner. She wrote that the claimant may supply a written statement ahead of the hearing if she wished and could be accompanied by a colleague.

85. On 24 November 2017, a letter in Paul Gardner's name was sent to the claimant. This was unsigned. The letter referred to a response via the claimant's solicitors where they had suggested that the claimant might choose not to attend her hearing. The letter wrote that the claimant had shown, through her solicitor, her ability to produce, at the very least, a thorough written statement in relation to the allegations regarding her work which the hearing would consider. They offered an alternative time and/or venue to help her attend the hearing if she wished.

86. The claimant's solicitors wrote on 24 November 2017 to say that the claimant did not wish to prejudice her health or that of her unborn child by attending a hearing which would inevitably induce further stress and anxiety. They drew a distinction between speaking to her own lawyers and having to travel to Bamber Bridge to face a disciplinary panel. They wrote that, if they decided to proceed with the disciplinary hearing on 29 November, then the claimant would have been unreasonably denied the opportunity to participate in that hearing and put her case to the panel.

87. Mr Brennan forwarded this reply to HR Savvy. He wrote:

> "Whilst it appears likely Amy will not attend, I am concerned that several of our staff's wellbeing is clearly being affected by this being drawn out. Some are showing stress and others reporting stress as a result of this directly. Some are having to pick up work Amy should have done in October but did not (we have become aware of several more examples in the last few days)."

He asked for advice. He wrote:

> "My feeling is we could hold the hearing with the evidence we have if Amy is refusing to submit so much as a written statement, but there are other very serious issues which have since come out and I am not sure we should give a verdict until these are also dealt with and documented."

88. Nicola of HR Savvy advised going ahead with the hearing in the claimant's absence. She advised sticking with what they had at the moment and not over complicating by adding more allegations at this stage. She wrote that she would come in the next day to meet with Paul for him to consider everything and hold the hearing with or without the claimant.

89. Mr Brennan gave evidence that Mr Gardner had a meeting with Nicola Scott from HR Savvy on 28 November and went through the documents, and that Mr Gardner told Mr Brennan they had concluded that the claimant was guilty of gross misconduct and that she should be summarily dismissed. No notes have been disclosed of such a meeting and we have not heard evidence from Mr Gardner. The claimant told us that she had spoken to Mr Gardner who has since left the respondent and he made it clear to the claimant that he did not write or send any of the letters in his name, including the letter of dismissal dated 1 December. She gave evidence that the respondent had indicated initially that they were going to call Paul Gardner as a witness but he had been unwilling to act as a witness for the respondent. She had discussed with him whether he would agree to appear as a witness in support of her claim but he did not wish to get involved.

90. Mr Brennan gave evidence that he had spoken to Mr Gardner on the phone on 29 September 2018. Mr Brennan said that Mr Gardner told him that he had had a call from the claimant asking for him to attend as a witness but he had refused. Mr Brennan said that Mr Gardner told him that he would prefer not to be involved in the hearing given that he no longer worked for them. The respondent did not apply for a witness order to compel Mr Gardner's attendance at the hearing.

91. On 29 November 2017, Mr Gardner sent an email to Mr Brennan. He wrote:

> "I am writing this to air some concerns I have over the situation with Amy's dismissal whose decision, as I understand it, over whether or not to commit to is my responsibility. The evidence I have been shown shows clearly that the work allocated to Amy was not completed on time, or even not done at all."

92. Mr Gardner wrote about his concerns about his role in this, including his involvement in the situation late on in the process and that "although you have provided consistent and tangible documentation which pertains to her incompetence" that he was not present at the respondent before 1 September. He suggested that, because of this, it might be better for either Mr Brennan, or perhaps Lauren Grice, to commit to the decision of dismissal. He questioned why it was he who ought to make the specific decision on Amy's dismissal, writing that both Mr Brennan and Ms Grice were far more fluent with the details of Amy's incompetence. He asked whether Mr Brennan had taken advice and guidance from a solicitor.

93. Nothing Mr Gardner wrote indicated that he had come to a conclusion that the claimant had deliberately misled the client or the respondent about work which had been done.

94. Mr Brennan replied that Mr Gardner's role was to take a decision with guidance from HR when he needed it, based on the evidence he had seen and that he had no responsibility beyond that. He suggested putting a letter in Mr Gardner's file in relation to this when the outcome letter was signed off to say that the company

supported his letter and findings. It is unclear whether we have been shown the entire email since it ends somewhat abruptly without the type of sign off which appears on other emails from Mr Brennan.

95. The outcome letter, sent to the claimant on 1 December 2017, in Mr Gardner's name was unsigned, and we note his surname in the sign off is incorrectly spelt.

96. Given all these circumstances, the Tribunal has serious doubts that Mr Gardner made the decision to dismiss the claimant, and, if he did, that he had made that decision on 28 November 2017. On a balance of probabilities, we find that Mr Gardner did not make the decision himself but it was the decision of Steve Brennan. Even if we were wrong on that and Mr Gardner did make the decision, we find that it was on the basis of selective information put before him by Mr Brennan, who had compiled the evidence. This evidence led Mr Gardner to write in his email that the evidence showed that work allocated to the claimant was not completed on time or not done at all. He described the documentation as pertaining to the claimant's incompetence.

97. We would have expected there to be correspondence with HR Savvy relating to the drafting of the outcome letter. However, no such correspondence with Mr Gardner or anyone else about the drafting of the outcome letter has been disclosed to us.

98. Mr Brennan gave evidence that the outcome letter was sent to him to approve but we were not shown the covering email.

99. As previously noted, the outcome letter of 1 December was unsigned by Mr Gardner. We consider it unlikely that Mr Gardner would have approved a letter in which his own name was incorrectly spelt.

100. The outcome letter in the name of Mr Gardner informed the claimant that her employment was terminated with immediate effect due to gross misconduct and the final date of her employment was 1 December 2017. The letter wrote that the hearing went ahead in her absence since her letter via solicitors indicated that she was able to engage heavily with the process and would have been capable of producing, at the very least, a detailed written statement but she chose not to do so to assist her hearing. The letter wrote that some staff members had been directly affected by the issues with the claimant's work and by the delay in the hearing, and some had to pick up and complete some of her incomplete work from October, and it was in that context with the wellbeing of every team member in mind that the hearing went ahead. This section of the letter seems to be directly based on the email Mr Brennan had sent to Nicola of HR Savvy on 27 November.

101. The letter set out the allegations "that a significant amount of work promised to and paid for by the company's clients which you are responsible for delivering personally or for managing the delivery of was not properly or not delivered at all. This has adversely affected the company's relationships with some clients and that this is a pattern over many months rather than an isolated or exceptional issue". The letter referred to the documents in the evidence pack. The letter wrote the weight of evidence was very substantial and there was "a clear pattern overall of you regularly

not delivering your work". The letter set out the conclusion that a significant amount of work promised to and paid for by the company's clients which the claimant was responsible for delivering personally or for managing the delivery of was not properly or not delivered at all, and that this had adversely affected the company's relationships with some clients and that this was a pattern over many months rather than an isolated or exceptional issue. The letter set out the conclusion that:

> "The circumstances you have presented the company with were clearly aligned with the 'gross misconduct' category [examples in the employee handbook] rather than the 'misconduct' category."

102. The letter referred to the claimant's solicitors' letter and concerns raised about the claimant's treatment by the company since she had advised that she was pregnant. The letter wrote, "I note that you have not previously raised concerns regards your treatment". This was plainly incorrect as the claimant had raised concerns in meetings on 23 and 24 August. The letter incorrectly asserted that the claimant had refused to attend the planned Occupational Health assessment.

103. The claimant was advised of her right of appeal. The claimant appealed by letter dated 12 December 2017.

104. In her letter of appeal, the claimant asserted that the allegations of gross misconduct were invalid, based on fabricated and incorrect information and not even closely matched to the severity of gross misconduct given in the guidance of the employee handbook. She implored them to provide proper detail and evidence for accusing her of gross misconduct regarding the points they had made for her dismissal. She made some points in relation to the reasoning in the letter of dismissal. She wrote that the respondent had not taken into consideration any documents that she had produced or sent to them and they did not take into account the company's fractured relationship with the client in question prior to her taking the account over. She asserted that blocking her from her email account had meant that she had unable to find and provide much of the evidence relating to their allegations against her. She questioned why, if her apparent "repeated failure to deliver work" was so severe, that the problem had not been dealt with by any member of management or by way of the proper disciplinary process before this point, and why no support in the form of proper training had ever been offered to her. She wrote that, as she was still signed off from work and her doctors were still advising against her attending any type of meeting with them due to stress levels, she would be continuing to take their advice, so requested them to consider her appeal based upon the letter and some evidence she attached.

105. The respondent appointed a new person to the claimant's role on 13 December 2017. Mr Brennan gave evidence that they recruited one new contents person each year and that they would have done so whether or not the claimant had been dismissed.

106. Mel Moville was appointed to deal with the appeal.

107. On 8 January 2018, the claimant answered questions from Mel Moville over the phone by pre-arrangement.

108. The appeal hearing took place on 9 January 2018 in the claimant's absence.

109. Mel Moville wrote to the claimant on 19 January 2018 informing her that the decision to dismiss was uphold. Mel Moville wrote that she had spoken to Paul Gardner, Mr Brennan and Ms Grice. However, no notes about her conversations with them were disclosed.

110. The outcome letter included the conclusion that the pattern over months of the claimant's work being not properly delivered or not delivered at all constituted serious negligence rather than being careless. It also asserted that the pattern of non-delivered work remained hidden from managers between January and October 2017 and was either an act of dishonesty or negligence. These were not allegations which had been put to the claimant and were not reasons given in the letter in the name of Mr Gardner for the claimant's dismissal. Ms Moville also wrote:

> "We learned in the appeal hearing that you went away and continued to not deliver work fully or on time. That you went away and made your own private notes with a different tone for later use, misled your managers as to your position and constitutes an act of dishonesty resulting in a serious breach of confidence."

111. This was a further allegation which had not been put to the claimant and had not formed any part of the original decision to dismiss, as explained in the letter in the name of Mr Gardner.

112. We consider the appeal outcome letter reflects the views held by Mr Brennan since 16 November 2017. Mr Brennan was senior to Ms Moville. Ms Moville had been aware of Mr Brennan's views since the letter of 16 November, which he had discussed with staff, expressing his view that the letter was all lies.

113. In its response form, the respondent refers to an alleged investigation into the client account for a further client, CHiL. The claimant says the respondent had not previously indicated any dissatisfaction with this account. There was no reference to this client in the allegations in the disciplinary proceedings.

114. The response included the statement: "the respondent's investigation led it to believe that there was clear evidence of the claimant failing to carry out basic contractual duties, but actively misleading clients so that the failure to produce work was not identified, and also taking deliberate steps to mislead her manager as to the state of her workload. The respondent was satisfied that it was a clear obligation of the claimant to provide truthful and transparent reports both to the client and to her manager, and that the claimant had knowingly made false reports, causing clients to pay for work which had not been undertaken." These serious allegations of dishonest behaviour were never put to the claimant. There is no evidence of an investigation to this effect. Ms Bamber, who was presented as having conducted the investigation, made no investigation into such allegations. The correspondence from Mr Gardner to Mr Brennan gives no indication that Mr Gardner was considering such allegations. There are no conclusions to this effect in the letter informing the claimant of the reasons for her dismissal. Allegations of this nature appear for the first time in the outcome letter from the appeal.

Submissions

115. Mr Tettey, for the respondent, made oral submissions.

116. Ms Connolly, for the claimant, produced written notes for her submissions which she supplemented with oral submissions.

117. Both representatives made submissions about the facts and credibility of the evidence which we do not seek to summarise.

118. The representatives did not disagree on the legal principles to be applied. Ms Connolly referred us to a number of authorities which are referred to in her written submissions.

119. Mr Tettey submitted that it was clear Mr Gardner had made the decision to dismiss and that Ms Moville upheld that decision in good faith. Dismissal was not a foregone conclusion. He submitted that there was no discrimination. There were multi-faceted reasons for the claimant's dismissal but these did not include pregnancy.

120. Ms Connolly submitted that pregnancy/maternity was a cause or materially influenced what the respondent chose to do. In relation to the s.99 ERA claim, she submitted that pregnancy/maternity was the principal reason or the real reason that the claimant was dismissed (referring to *ASLEF v Brady [2006] 576).*

The Law

121. Section 18(2) of the Equality Act 2010 (EqA) provides: "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……"

122. Section 18(4) provides: "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."

123. The protected period begins when the pregnancy begins and ends, if the woman 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.

124. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by dismissing the employee or subjecting that employee to a detriment.

125. Section 136 provides: "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

126. The Court of Appeal in *Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913,* reaffirmed that there is an initial burden of proof on the claimant; the claimant must show that there is a prima facie case of discrimination which needs to be

answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as *Igen Ltd v Wong [2005] IRLR 258,* remained good law and should continue to be followed by courts and tribunals. The interpretation placed on section 136 EqA by the EAT in *Efobi v Royal Mail Group Limited (UKEAT/0203/16)* was wrong and should not be followed.

127. Unfavourable treatment will be because of the protected characteristic if the characteristic is an "effective cause" of the treatment; it does not need to be the only or even the main cause.

128. Section 99 ERA, read with Regulation 20 of the 1999 Maternity and Parental Leave etc Regulations, provide, amongst other things, that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee is pregnant or that she sought to take statutory maternity leave.

129. In *Kuzel v Roche [2008] IRLR 530,* the Court of Appeal considered that, where a claimant has less than two year's service, in a complaint brought under s.103A ERA, the tribunal must ask the following questions:

a. Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent is the true reason?

b. If so, has the respondent proved the reason for the dismissal?

c. If not, has the respondent disproved the s.103A reason advanced by the claimant?

d. If not, the dismissal is for the s.103A reasons.

Conclusions

Dismissal – s.18 and s.39 EQA claim

130. We consider first the complaint of s.18 unfavourable treatment about the claimant's dismissal.

131. We consider whether the claimant has proved facts from which we could conclude that pregnancy or maternity was a cause of the decision to dismiss the claimant. If she has, the burden passes to the respondent to satisfy us that the decision to dismiss was not materially influenced by the claimant's pregnancy or maternity.

132. Direct evidence of discrimination is rare. We must consider what inferences we can properly draw from all the relevant surrounding circumstances.

133. We consider first the matters which were identified in the list of issues as matters from which, on a non-exhaustive basis, the claimant would invite us to draw inferences of discriminatory treatment.

134. The claimant relies on Mr Brennan's reaction to being informed on 6 July 2017 that the claimant was pregnant. We found that Mr Brennan's reaction to the

claimant telling him that she was pregnant was to say "well that's good news isn't it". He did not ask her when she was due and did not congratulate her, which she found to be strange and a little bit cold. We found that Mr Brennan said, after some discussion about work, "the Optimisation Team is not in a good way" and "there's just too many people in that team and not enough work, you know what that means don't you". We conclude that this was a negative reaction. We conclude that this is a matter from which, together with other matters, an inference of discrimination could potentially be drawn.

135. The claimant relies on Ms Grice's actions on 17/19 July 2017 when the claimant was working from home. We found that Ms Grice went around asking other staff how they felt about the claimant going home to work, although Ms Grice and Mr Brennan had given the claimant permission to work from home. We conclude that this behaviour, which does not appear to have any rationale, other than to stir up discord in relation to the claimant, is a matter from which, together with other matters, an inference of discrimination could potentially be drawn.

136. We found that Mr Brennan did make the comments alleged on 20 July 2017. However, we conclude that these comments are not material from which inferences of discrimination could potentially be drawn. The comments are not, on their face, of a discriminatory nature and the context in which the comments are made, when Mr Brennan was expecting a client, provides an explanation as to why he appeared cold towards the claimant, and reluctant to engage with her, which is unrelated to pregnancy or maternity.

137. The claimant relies on the critical comments of Ms Grice on 1 August 2017 when the claimant telephoned to report sickness absence, related to pregnancy since the claimant told Ms Grice she could not take anything strong for migraine/headache because of her pregnancy. We found that Ms Grice said that being off work was detrimental to the team and would have a knock-on effect. We conclude that such a negative comment in reaction to absence related to pregnancy is a matter from which, potentially, an inference of discrimination could be drawn.

138. The claimant relies on Ms Grice and Mr Brennan "digging for information/dirt" about her during her absence on annual leave in the period 14-18 August 2017. We found that Mr Brennan and Ms Grice had been questioning the claimant's colleagues about her, "digging for information," asking questions about her work and whether there was any underperformance. We conclude that these actions are matters from which, together with other matters, an inference of discrimination could potentially be drawn.

139. The claimant believes that Ms Grice had been accessing her emails when the claimant was in the office without informing her that she was doing so or why. Whilst it appears an odd coincidence that the claimant's emails were accessed, at a time when Ms Grice was asking about the reasons for the meeting the claimant was calling, we did not consider the evidence sufficient to find, on a balance of probabilities, that Ms Grice had been accessing the claimant's emails in the way alleged. This is not a matter from which we can draw any inference of discrimination.

140. The claimant did not satisfy us on a balance of probabilities that Mr Brennan made the remarks alleged in September about where her head was at, in terms of

pregnancy, and of some people thinking that family is more important than work. This is not a matter from which we can draw any inference of discrimination.

141. The claimant relies on Mr Brennan having arranged personal development meetings for all team members except the claimant with Mr Gardner. We received no satisfactory explanation as to why the claimant did not have such a meeting. We conclude that the exclusion of the claimant from such a meeting, when meetings were held with other team members, is a matter from which, potentially, an inference of discrimination could be drawn.

142. We conclude that the claimant formed an honest, but mistaken, belief that the respondent was trying to hold the disciplinary hearing on a date when, if it resulted in her dismissal, it would mean she was not eligible for statutory maternity pay. The correspondence with HR Savvy, disclosed at a late stage in proceedings, shows that Mr Brennan was working on the basis of an earlier expected week of confinement which would have meant that the claimant had already qualified for statutory maternity pay. This is not a matter from which we can draw any inference of discrimination.

143. In addition to these matters, we consider the following matters to be matters from which, together with other matters, we could potentially draw an inference of discrimination.

144. The evidence for the respondent has been unsatisfactory in a number of respects. There are obvious differences between the formal response to the claim, drafted with the assistance of solicitors, and the subsequent witness evidence. An example is the allegation that the respondent was obliged to provide a substantial cash rebate to the client in relation to its failure to carry out work for which it had been invoiced and which it had been given to understand had been completed. There was no evidence in the respondent's witness statements to support this assertion. When questioned about this statement in evidence, Mr Brennan said he could not remember the detail but thinks they agreed to reduce the recurring fee.

145. The response misrepresented the nature of the meeting of 24 August 2017, as a formal meeting regarding the claimant's work, when it was as a result of the claimant raising concerns about her treatment at work being connected to her pregnancy.

146. The allegation made by Mr Brennan and Ms Grice that the claimant was seeking to build a case against the respondent from 6 July 2017 is simply fanciful. It does not bear any form of examination. Contemporaneous notes and Mr Wood's email show that the claimant was genuinely concerned about Mr Brennan's reaction to the news of her pregnancy from 6 July 2017.

147. Mr Brennan's expressed view that the claimant's solicitors without prejudice letter of 16 November 2017 was an attempt at blackmail is an extraordinary reaction when the letter was written in response to an invitation from Mr Brennan for the claimant to attend a "without prejudice" meeting.

148. We conclude that Ms Grice's allegation, made for the first time in cross examination, that, within two hours of the conversation on 1 August about being on

sick leave, the claimant had driven 2 hours to the CAB (when the claimant had, in fact, phoned the CAB), is indicative, as was suggested to Ms Grice, of a fixed view of the claimant and an attempt to reconstruct the evidence around that view.

149. We found that the decision to dismiss the claimant was, in fact, that of Mr Brennan, but it was presented as the decision of Mr Gardner.

150. We have considerable reservations as to the reliability of the evidence compiled by Mr Brennan, on the basis of which the respondent asserted in the dismissal letter that it had concluded that a significant amount of work promised to and paid for by the company's clients which the claimant was responsible for delivering personally or for managing the delivery of was not properly or not delivered at all, over many months. The evidence presented related only to one client: Belmont Packaging. The claimant disputed that the information was correct as to what was promised to the client and that the claimant had failed to provide what had been promised. The claimant was hampered in responding to the allegations by not having access to her work email account. However, even on the assumption that the respondent genuinely came to this conclusion, we conclude that the categorisation of this as gross misconduct, warranting dismissal, was so misconceived that we find it hard to believe was a genuine view of the decision maker at the time. The type of conduct of which the respondent says it found the claimant guilty bears no relation to the non-exhaustive list of examples given in the company's handbook of gross misconduct or to any reasonably informed view as to what constitutes gross misconduct. Since the respondent was receiving HR advice, one must assume that they had a reasonably informed view. The "clear pattern overall of your regularly not delivering your work" could indicate either a capability or a misconduct reason, depending on the reason for not delivering the work. The categorisation of the conduct as gross misconduct suggests a conclusion of misconduct, rather than capability but the basis for this conclusion is unexplained.

151. What was referred to in the invitation to the disciplinary hearing as "a full investigation of the facts surrounding the complaint" by Rebecca Bamber was nothing of the sort. As we noted in the findings of fact, it is clear from the evidence that all Rebecca Bamber did was to compile documents from the claimant's HR file for the hearing with the assistance of Ms Grice and Mr Brennan. Mr Brennan compiled the document which allegedly showed that the claimant had not carried out work which had been promised for the client, Belmont Packaging.

152. Mr Gardner, in his email to Mr Brennan, was categorising what he understood from the evidence presented to him to be incompetence on the part of the claimant. This suggests more an issue of capability, rather than conduct, let alone gross misconduct.

153. The respondent has provided varying explanations for the reasons for dismissal of the claimant e.g. whether this related to failures in relation to one client only, as suggested by the material enclosed with the disciplinary invitation letter, or more clients, as suggested later. The dismissal letter referred to not delivering work as required but made no findings about dishonesty or negligence. At the appeal stage, completely new allegations about dishonesty and negligence, never put to the claimant, make their way into the reasons for upholding the dismissal. The response

asserted that conclusions had been reached on serious charges of dishonest behaviour which had never formed part of the allegations against the claimant.

154. There are pointers to the decision to dismiss having been taken before the disciplinary process had started. Although some of the later correspondence from HR Savvy is couched in more conditional terms, the initial email of 24 October 2017 points strongly to Mr Brennan having already indicated that dismissal was to be the outcome of the process to come. Nicola of HR Savvy wrote:

> "What I will reiterate is that there are risks in this case due to Amy's pregnancy and therefore it will be key to get it right at this stage. If she does subsequently pursue a claim, I can't stress enough how important it is that the disciplinary is managed and documented correctly in terms of mitigating risk and justifying the dismissal decision. Getting this wrong tends to be the main reason employers struggle to defend a claim."

155. This email was one of a number of documents disclosed only during the course of the hearing by the respondent. The respondent was professionally represented by experienced employment solicitors from, at the latest, the stage of preparation of the response to the claim so we can assume that the respondent was properly advised as to its disclosure obligations. However, there were clear and obvious failures of disclosure by the respondent. These appear to be as a result of a conscious decision to disclose only documents which helped the respondent's case, and not all relevant documents. Mr Brennan was admirably frank in saying, when asked about failures to disclose documents, that they had disclosed documents previously which were "relevant to points we wanted to make". Even after late disclosure, we had concerns as to whether the respondent had fully complied with its disclosure obligations since there were documents that we would expect to have existed, which had not been disclosed e.g. correspondence with HR Savvy around the drafting of the outcome letter.

156. The claimant's difficulties and concerns arose after she informed Mr Brennan of her pregnancy on 6 July 2017. Having regard to that and all the matters referred to above, we conclude that the claimant has proved facts from which we could conclude that her pregnancy or intended maternity leave was a material factor in the decision to dismiss her. The burden, therefore, passes to the respondent to satisfy us that the reason for dismissal was not materially influenced by the claimant's pregnancy or intention to take maternity leave. We conclude that the respondent has not satisfied us that pregnancy or maternity had no material influence on the decision to dismiss. We accept that the respondent had some concerns about the claimant's performance, but these clearly did not amount to gross misconduct, even if the concerns were as presented by the respondent. The respondent has not satisfied us, on the evidence, that the concerns about the claimant's performance were of such a serious nature as they seek to make out. Had there been such serious concerns, over such a lengthy period as the respondent seeks to persuade us, we conclude that the respondent would have taken formal disciplinary proceedings or capability proceedings at a much earlier stage. Rather, it appears to us that Mr Brennan took a decision, even before disciplinary proceedings were initiated, that the claimant was to be dismissed and concerns were exaggerated in such a way as to attempt to justify a finding of gross misconduct. As previously noted, the respondent's explanation as to why the claimant was dismissed has varied over time. We

conclude that the respondent has not discharged the burden of proof and we conclude that the complaint of unlawful discrimination, contrary to s.18 and s.39 EQA, relating to dismissal is well founded.

The other complaints of unfavourable treatment contrary to s.18 and s.39 EQA

157. The claimant alleges that Ms Grice's conduct in making the comment, when the claimant reported sick on 1 August 2017, that the claimant's absence would be detrimental to the team and would have a knock-on effect, is an act of unlawful discrimination. We found that the comment was made, as alleged. The claimant's sickness absence was related to pregnancy in that the claimant could not, because of pregnancy, take medication to relieve the migraine/headache and allow her return to work. She informed Ms Grice that she could not take such medication because of her pregnancy. The comments we found were made by Ms Grice, although Ms Grice denied making them, were more critical than we would normally expect from a manager when an employee is reporting sickness absence. We have heard no evidence that Ms Grice routinely takes such a critical approach to sickness absence for any reason other than pregnancy. We conclude the claimant has proved facts from which we could conclude that Ms Grice's conduct was influenced, in a material sense, by the claimant's pregnancy. The burden of proof passes to the respondent. Since the respondent has provided no explanation for the comments, which it denied were made, we conclude that the respondent has not discharged the burden of proof. We conclude that this complaint is well founded.

158. The next allegation of unfavourable treatment is that, between 28 November 2017 and 1 December 2017, Mr Brennan or Mr Gardner decided to dismiss the claimant without having a disciplinary meeting with her in circumstances where she was unable to attend because of pregnancy complications exacerbated by stress. On the evidence we have seen, it was the decision of Mr Brennan to go ahead with a decision to dismiss without a disciplinary meeting which the claimant was able to attend. Mr Brennan knew that the claimant was signed off sick for six weeks and that she was saying she was acting on the advice of her doctor in not attending a hearing at that time. There is no apparent reason as to why the respondent could not have waited, at least until the end of that six week period, to see if the claimant was then fit to attend a hearing. Since the respondent's evidence was that they would have recruited an additional person, whether or not the claimant had been dismissed, they could have got on with recruitment, regardless of the disciplinary process, if the claimant's absence from work was causing serious problems. We conclude that the claimant has proved facts from which we could conclude that the decision to go ahead with the decision to dismiss at that time was materially influenced by the claimant's pregnancy. The burden then shifts to the respondent.

159. Mr Brennan gave evidence that what he considered to be "foul play" on 16 November, with the "without prejudice" letter from the claimant's solicitors, changed things and he was not then prepared to wait until the claimant was fit to attend a disciplinary hearing. As noted previously, we consider Mr Brennan's expressed view that the claimant's solicitors without prejudice letter was an attempt at blackmail is an extraordinary reaction when the letter was written in response to an invitation from Mr Brennan for the claimant to attend a "without prejudice" meeting. Mr Brennan was aware from the solicitors' "open" letter of 16 November and from the meetings on 23 and 24 August 2017, that the claimant was alleging that he had treated her

unfavourably since she informed him of her pregnancy. In these circumstances, we do not consider that the evidence given by Mr Brennan as to the reason for the "rush to justice" to be a reason which is not influenced in any material way by the claimant's pregnancy. We conclude that this complaint is well founded.

160. The remaining complaint of unfavourable treatment is that, on 19 January 2018, Ms Moville, acting in accordance with Mr Brennan's wishes, dismissed the claimant's appeal against dismissal. We found that the outcome of the appeal, as expressed in the outcome letter, reflects the views held by Mr Brennan since 16 November 2017. Mr Brennan was senior to Ms Moville. Ms Moville had been aware of Mr Brennan's views since the letter of 16 November, which he had discussed with staff, expressing his view that the letter was all lies. We conclude that the decision of Ms Moville was, in effect, the decision of Mr Brennan. He was confirming the decision he had already taken to dismiss the claimant. For the same reasons that we concluded the decision to dismiss was unfavourable treatment on the ground of pregnancy or maternity, we conclude that the decision to dismiss the claimant's appeal against dismissal was an act of unlawful discrimination. We conclude that this complaint is well founded.

Unfair dismissal – s.94 and s.99 ERA

161. We must consider, in relation to this complaint, whether pregnancy or maternity was the reason or the principal reason for the dismissal. Since the claimant had less than two years' service, we consider it appropriate to adopt the approach in *Kuzel v Roche [2008] IRLR 530 CA.* Although this case concerned a section 103A ERA unfair dismissal claim, we consider the approach should be the same for a s.99 unfair dismissal. In accordance with this approach, we must ask first whether the claimant has shown that there is a real issue as to whether the reason put forward by the respondent is the true reason. We conclude that she has. All the matters on which we relied to draw an inference of discrimination in relation to the s.18 EQA complaint relating to dismissal lead us to the conclusion that there is a question as to whether pregnancy or maternity was the reason or principal reason for dismissal, rather than reason relating to the claimant's conduct. The extraordinary categorisation of the claimant's conduct as gross misconduct, even assuming the respondent's expressed concerns were genuine and well founded (over which we have considerable doubt), and the respondent's varying explanations for the claimant's dismissal also raise questions as to whether the respondent's expressed reasons for dismissal are the true reasons.

162. We then consider whether the respondent has proved the reason for the dismissal. We accept that the respondent had some concerns about the claimant's performance, but these clearly did not amount to gross misconduct, even if the concerns were as presented by the respondent. The respondent has not satisfied us, on the evidence, that the concerns about the claimant's performance were of such a serious nature as they seek to make out. Had there been such serious concerns, over such a lengthy period as the respondent seeks to persuade us, we conclude that the respondent would have taken formal disciplinary proceedings or capability proceedings at a much earlier stage. Rather, it appears to us that Mr Brennan took a decision even before disciplinary proceedings were initiated that the claimant was to be dismissed and concerns were exaggerated in such a way as to attempt to justify a finding of gross misconduct. As previously noted, the respondent's explanation as to

why the claimant was dismissed has varied over time. We conclude, having regard to these matters, that the respondent has not proved the reason for dismissal.

163. We then consider whether the respondent has disproved the s.99 reason advanced by the claimant. We conclude that it has not. We have regard to all the matters relied on by us in drawing an inference of unlawful discrimination. The respondent's explanation has not satisfied us that pregnancy or maternity was not the reason or principal reason for the claimant's dismissal.

164. We conclude that the complaint of unfair dismissal, contrary to sections 94 and 99 ERA, is well founded.

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Employment Judge Slater

Date: 27 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

04 March 2019

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FOR THE TRIBUNAL OFFICE