EMPLOYMENT TRIBUNALS

Claimant: Miss R Richardson

Respondent: James Fisher Nuclear Limited

Heard at: Manchester (by CVP) **On:** 22-24 February 2021

Before: Employment Judge Phil Allen
Ms L Atkinson
Mr C Cunningham

REPRESENTATION:

Claimant: Mr N Flanagan, counsel
Respondent: Mr G Anderson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was treated unfavourably by the respondent because of her pregnancy, in breach of section 18 of the Equality Act 2010;

2. The claimant was automatically unfairly dismissed as the principal reason for her dismissal was her pregnancy, rendering the dismissal automatically unfair under section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999; and

3. The respondent did make an unlawful deduction from the claimant's salary, by failing to pay her for 4½ days accrued but untaken annual leave.

REASONS

Introduction

1. The claimant was employed by the respondent as a senior quantity surveyor from 5 September 2018 until 29 April 2019. The claimant was pregnant at the date of her dismissal. The claimant alleges that she was dismissed because of her

pregnancy and that she was treated unfavourably because of her pregnancy by being dismissed. The claimant also alleges that she was not paid for all of her accrued but untaken annual leave. The respondent denies discrimination and contends that the claimant was paid all sums due. The respondent contends that it dismissed the claimant during her probationary period, because the claimant had failed to meet the requirements of her role and the objectives set out in her induction plan.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 16 March 2020, albeit no one attended that hearing from, or on behalf of, the respondent. Appended to the case management order which followed that hearing was a list of issues. At the start of this hearing it was confirmed with the parties that those issues remained the ones which needed to be determined. It was agreed that the Tribunal would first hear and determine the liability issues (issues 1-4), with the remedy issues (issue 5) left to only be heard and determined if the claimant succeeded in her claim.

3. The issues identified were as follows:

Holiday Pay

1. Can the claimant show that the respondent made an unauthorised deduction from her final payment of salary by failing to pay her correctly for annual leave which was accrued but untaken?

Unfair Dismissal – section 99 Employment Rights Act 1996 and Regulation 20 Maternity and Parental Leave Etc Regulations 1999

2. Can the claimant show that the reason or principal reason for her dismissal was her pregnancy, rendering dismissal automatically unfair under section 99 and regulation 20?

Pregnancy and Maternity Discrimination – section 18 Equality Act 2010

3. Can the claimant prove facts from which the Tribunal could conclude that by dismissing her the respondent treated her unfavourably because of her pregnancy?

4. If so, can the respondent nevertheless show that there was no contravention of section 18?

Remedy

5. If any of the above complaints succeed, what is the appropriate remedy:

    (a) in respect of injury to feelings;

    (b) in respect of injury to health*;*

(c) for financial losses resulting from dismissal;

(d) for interest on any awards under the Equality Act 2010?

Procedure

4. At the start of the hearing the name of the respondent was amended, by consent, to James Fisher Nuclear Limited.

5. The claimant was represented at the hearing by Mr Flanagan, counsel. Mr Anderson, counsel represented the respondent.

6. The hearing was conducted by CVP remote video technology with both parties and all witnesses attending remotely and giving evidence via video technology.

7. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 252 pages (and where numbers are included in this Judgment in brackets, that refers to the page numbers in the bundle). The Tribunal was also provided with four witness statements. On the first morning of the hearing the tribunal read the witness statements and the pages in the bundle which were referred to in those statements.

8. The Tribunal was provided with a document which corrected one date, and a number of page references, contained in the claimant's witness statement. The Tribunal was also provided with and read an opening note, chronology and cast list, prepared by the respondent's representative (which the claimant's representative made clear was not agreed).

9. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. Mr Dawson also gave evidence on behalf of the claimant and he was briefly cross-examined by the respondent's representative.

10. The witnesses for the respondent from whom the Tribunal heard were: Mr A McCormick, formerly the respondent's Commercial Director; and Ms N Hewitt, the respondent's Group Head of HR. The witnesses were cross-examined by the claimant's representative and asked questions by the Tribunal.

11. After the evidence was heard, each of the parties was given the opportunity to make submissions. Each party provided the Tribunal with a written document containing their closing submissions, and the Tribunal read those documents. Each representative made verbal submissions.

12. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

13. The Tribunal was grateful to both representatives for the manner in which the hearing was conducted.

Facts

14. The claimant worked for the respondent from 5 September 2018. She was offered the role of Senior Quantity Surveyor on 20 July 2018 (46), albeit there was no dispute between the parties that the role she fulfilled was in reality the role of commercial manager. Mr McCormick, who interviewed her and was her manager, joined the company himself in March 2018 and part of his role was to recruit a commercial team, something which the respondent had not previously had. His evidence was that the claimant was the first person recruited as part of that process.

15. The claimant's contract of employment (48) included a provision regarding a probationary period, during which the period of notice would be one week rather than four weeks. The probationary period was described as lasting for six months, which may be shortened or extended by the respondent depending upon performance. Clause 10.4 stated "*Your probation period will not be confirmed until you have attended a probationary review meeting and had confirmation in writing from HR*". The contract also included: a clause which stated that the company would provide the claimant with a car allowance sum in line with the company car policy (although no such policy was provided to the Tribunal); and a requirement that the claimant was required to maintain a valid UK driving licence if she was required to drive on the respondent's business.

16. At, or near, the start of the claimant's employment, the claimant was provided with an induction plan document (128). That recorded (138) the claimant as having three things as the objectives plan for her first six months:

a. Produce a robust forecast of cost/value/damages/defect allowance/etc to establish anticipated completion margin, with a target date of 28 September 2018;

b. Assist with and creation of the relevant project plan, which was described as having an ongoing target date; and

c. Review commercial team and suggest tasking/organisation/responsibilities, which had no target date.

17. The induction plan also included a detailed probationary review form (140) which provided for a meeting or meetings at which the probation was reviewed, including in circumstances when the probationary period was to be extended. It was not in dispute that this document was never used for, or completed for, the claimant at any time (including on 9 January 2019).

18. The claimant's evidence was that she produced the document required to meet the first objective within the first week of her employment. There was no documentation provided to the Tribunal which evidenced that the claimant had not met her objectives, or that the respondent had raised with her any failure to meet the objectives at any time prior to her dismissal (such as after the expiry of the target

date set down for the first objective), save for the email from Mr McCormick of 18 December detailed below.

19. The claimant had been convicted of drinking while under the influence of alcohol on two occasions in 2017. This was something of which she was, understandably, not proud. She emphasised this in the Tribunal hearing and explained that she considered it to be private, and attributed the cause of it to certain life events. The claimant chose not to inform the respondent about this at interview or when she was first recruited. She only brought it to Mr McCormick's attention in October 2017, around the time that the information was recorded on a DBS check which she had needed to obtain for her role with the respondent. There was a dispute between the parties about whether the claimant had been dishonest or misleading in what she had told the respondent, and exactly what led to her bringing it to Mr McCormick's attention.

20. The claimant was assigned full-time to a very significant project which had already been in progress for two years. The claimant's evidence was that she was warned at interview that this was a problem project where: the project team had gone rogue; overspending was rife; and the progress on the project was behind. In any event, there had previously been no commercial manager involved in the project and it appeared to be the case that those working on the project did not welcome the introduction of a commercial manager onto the project.

21. One particular issue with the project was the conduct of the project manager towards the claimant. Mr McCormick spoke to the project manager on 17 December 2018 about his conduct towards the claimant, after the issue had been raised with Mr McCormick by a number of others. It was Mr McCormick's evidence that, when he did so, the project manager also made complaints about the claimant. It was Mr McCormick's intention to address these issues with the claimant, albeit he did not make any formal arrangements to do so prior to the events of 18 December.

22. The Tribunal was shown two reports prepared for the client for November and December 2018, both of which included a page which stated that "Commercial report will be inserted in issue B early next week due to commercial manager illness". The Tribunal could not understand why this was stated in a client report irrespective of the circumstances. The evidence appeared to be that the report was prepared by the project manager. The claimant at the time was unaware of what was reported and did not agree that illness led to the reports being incomplete. Inasmuch as these reports demonstrated anything of relevance to the Tribunal, they were accepted as demonstrating the issues addressed at paragraph 20.

23. On 17 December 2018 the claimant exchanged emails with a Ms Bux regarding annual leave and carry-over. That exchange culminated in an email which confirmed that: for 2018 the claimant had eight days entitlement; the claimant had taken one day on 22 October; she was taking three days over the Christmas shut down; whilst the claimant was not working Christmas eve, she was taking an option which had been offered to instead work five hours in the preceding week so that it would not count as annual leave; and the claimant was to let Ms Bux know about her remaining days, as Ms Bux had directed her to talk to her line manager. The

claimant's evidence was that she discussed carry over with Mr McCormick and it was ultimately agreed, Mr McCormick denied that was the case.

24. On 18 December 2018 the claimant felt that she had to leave a meeting which was also attended by the project manager, because of his behaviour towards her (shouting and using abusive language). She went to speak to Mr McCormick about the issue. Mr McCormick was in a meeting at the time, so the claimant instead spoke to Mr Ibell, the project office Manager. The claimant says that he said to her "*it's ok, we already know*" and, when Mr McCormick returned and asked if everything was ok, Mr Ibell simply informed him of the name of the project manager (to which they both nodded knowingly).

25. After Mr McCormick returned, he met with the claimant. There was a dispute about what was discussed in this meeting. The claimant believed that the reason for the meeting, and the focus of it, was on the project manager's conduct towards her and how it could be addressed. There is no dispute that the claimant was very upset in the meeting. It was agreed that she would work from home in the period leading up to Christmas. Mr McCormick drove the claimant home.

26. At 9.50 pm on 18 December 2018 Mr McCormick wrote a lengthy email to HR which covered a variety of issues: the discussion with the claimant that day; the claimant's disclosure of her conviction; the claimant's allegation of bullying regarding the project manager; an allegation made by the project manager that the claimant had routinely been under the influence of alcohol at work; an allegation by the project manager that the claimant had falsified timesheets; and an allegation by the project manager that the claimant had failed to complete work required of her. This was a detailed email which assisted the Tribunal as it recorded Mr McCormick's views and opinions at the time. Of relevance, what it recorded was:

a. Mr McCormick had agreed to the claimant working from home and taking some holidays to achieve some space from the project manager;

b. On the DBS checks, Mr McCormick recorded that he had told the claimant that the trust issue did not affect her ability to complete her role, but it may result in the respondent deciding to extend the claimant's probationary period when the probation period meeting was reached;

c. It was clear that Mr McCormick saw no issue with the claimant being paid a car allowance despite being unable to drive, as she was spending the amount on travel and would be getting her licence back in early 2019;

d. Several people who were identified in the email had raised with Mr McCormick the project manager's behaviour towards the claimant. Mr McCormick sought assistance from HR with the appropriate approach to the claimant and her well-being, as she had clearly been in an unfit state to work after the meeting that morning;

e. Mr McCormick had no issue with the claimant's work and confirmed that he would raise the issue of alcohol with the claimant on the next occasion when he smelt alcohol (which he thought had occurred before, but it was not disputed never occurred again). Routine testing was available;

f. The project manager had also previously made accusations against two members of the project team that they had falsified timesheets, and Mr McCormick concluded that he was not sure that the same allegation, made about the claimant, had much basis;

g. In terms of incomplete work, Mr McCormick identified a number of reasons for this: the claimant being understaffed, new recruits being junior and needing time to get up to speed; the senior members of staff who were there to support the claimant making repeated mistakes; and there was simply too much work for the claimant to complete effectively while she sorted her team out. His email explained that he was developing a report which would enable him to identify a demonstrable measure of the claimant's performance. Until then he recorded this as being a watching brief.

27. The respondent's office was closed for a Christmas shut down over the Christmas period. The claimant was absent on annual leave for the first three days of January 2019 after New Year's day. She returned to work the following Monday.

28. A meeting took place on 9 January 2019 between Mr McCormick, the claimant and Ms Hewitt, the Group Head of HR. This meeting was formally arranged and the invite described it as being to discuss issues pre-Christmas with human resources.

29. There was a conflict about what was said in this meeting. There were no notes of this meeting taken by Ms Hewitt. Mr McCormick had taken some notes in a day book, which were provided to the Tribunal (97) but which were clearly not taken as, or intended to be, a complete or formal record of the meeting. It was clear from the evidence to the Tribunal that the note included two meetings: a pre-meet with Ms Hewitt; and the meeting itself with the claimant. The note of the former was clear about the probationary period being extended, but that was not as clearly re-produced in the note of the latter.

30. The claimant's evidence was that she understood the meeting to be one which followed from the conduct of the project manager towards her prior to Christmas and her evidence was that the attendees apologised to her for what had happened, which was unacceptable. Mr McCormick had referred to the project manager as a misogynistic bully. He referenced the issues the project manager had raised, but dismissed the alcohol issue as a cheap shot and was broadly dismissive of the claimant with regard to the other issues.

31. The respondent's evidence about this meeting differed from the claimant's. Mr McCormick and Ms Hewitt contended that the claimant had been informed that her

probationary period was formally being extended to September 2019 and that was explained by the trust issue and the DBS checks.

32. It was common ground that the claimant agreed that she did not wish for the matters with the project manager to be addressed formally.

33. Following the meeting, the claimant was not sent anything in writing regarding either the probationary period or the issues raised by the project manager. All that was sent was a short email from Ms Hewitt to the claimant which said "*Here are my details if you ever need a confidential chat. Take care*".

34. The Tribunal finds that the claimant did not complete her probationary period, as the terms of the contract (as detailed above) required HR to confirm in writing that the probationary period had been completed. That did not occur. Whatever had been intended by the respondent's attendees at the 9 January meeting, the Tribunal accepts that the claimant did not leave the meeting with an understanding that the probationary period had been formally extended (which was not confirmed in writing as the Tribunal would have expected), nor did she understand that the meeting had been called partly to address issues with her (as opposed to addressing the issues with the project manager's treatment of her).

35. The claimant had a scan on 7 March 2019, which confirmed that she was pregnant. This was very early in her pregnancy; the scan being required due to health concerns. The claimant telephoned and informed Mr McCormick that she was pregnant immediately after the scan. The claimant's evidence was that he seemed thrilled for her.

36. On 19 March 2019 Mr McCormick met with a member of the project team, Ms Coghlan. Mr McCormick informed Ms Coghlan that she was to be line managed by the claimant. Ms Coghlan was not happy about this and made allegations to Mr McCormick supporting why she did not want that to occur. Mr McCormick neither provided any notes of the meeting, nor were there any emails shown to the Tribunal which followed the meeting to or from him, including him raising issues with HR. What the Tribunal was provided with, was an email from Ms Coghlan apparently sent to herself of 20 March in which it was recorded that she thought Mr McCormick was a rather dismissive audience (at least at first). The issues raised by Ms Coghlan were never raised with the claimant. Ms Coghlan was part of the team who had not welcomed the introduction of a commercial manager. The Tribunal found this email to be part of the acknowledged picture of the team resisting change.

37. On 28 March the claimant emailed Mr McCormick (114) as she had a medical appointment the following day (it was a scan) and would be unable to make the monthly meeting with the client for whom the respondent was undertaking the relevant project. The Tribunal accepts that the claimant's attendance at such meetings would have been considered important.

38. On the same date, a Ms Bortfield, an employee relations adviser, prepared a letter inviting the claimant to a disciplinary hearing which was to be heard by Mr McCormick on a specified date and time. This was stated to be to consider allegations of fraud in relation to working hours and falsification of company

documents. This letter was never sent to the claimant and the respondent's witnesses were unable to explain why it was prepared. Mr McCormick was very clear in his evidence that he did not consider the issues raised to be matters for which such a procedure was required.

39. The claimant took two days of annual leave on 4 and 5 April 2019. The form (117), approved by Mr McCormick, recorded these two days as being the first two days of leave taken from the 25 day entitlement for the year, and showed 23 days remaining for the leave year (which is the same as the calendar year).

40. On 4 April 2019 Mr McCormick sent an email to the claimant and others about various matters connected with work to be undertaken during his forthcoming holiday (116), as that day was his last day in the office until 15 April. The email confirmed a change in structure which involved the claimant taking on additional line management responsibility. In it, Mr McCormick stated that he still had not worked up a standard report. He asked the claimant to undertake tasks relating to the following month's report. The email was positive in tone. The Tribunal did not find the content of the email to contain significant criticisms of the claimant, as was submitted by the respondent.

41. Following that email, it was not in dispute that Mr McCormick was on annual leave between 5 and 14 April, and he was clear that when on holiday he did not address work-related issues. The claimant herself was absent by the date upon which he returned to work. She was certified as not fit for work in the period between 13 and 22 April 2019 due to severe morning sickness (205). Whilst off, the claimant emailed Mr McCormick on 16 April (118) asking him to advise her on the process for formalising her pregnancy with the respondent.

42. Mr McCormick's evidence was that he spoke to Mr Avis, an employee who reported to the claimant, who told him that his working relationship with the claimant was strained and words to the effect that he could no longer work with her. His evidence was also that Mr Avis told him that two other members of staff were looking for other work because they could no longer work for the claimant, and he then spoke to each of them. His witness statement described the meetings as taking place in around March/April 2019, but he could not recall when exactly they occurred. There were neither any notes of the meetings provided to the Tribunal nor were there any emails sent following what was said (including any emails from Mr McCormick to HR seeking advice, of the type sent in December 2018). Mr McCormick's evidence in his statement was that these issues raised by junior staff were the straw that broke the camel's back and this led to a conclusion that the claimant's position was untenable.

43. Mr McCormick could not recall when he had reached the decision to dismiss and could not recall whether it was prior to, or immediately following, his holiday. It must have been by 18 April due to his email of that date – see below. The Tribunal finds that the decision can only have been reached after Mr McCormick's return from leave on 15 April, as the content of the email of 4 April, and the confirmation that the claimant was to take on line management responsibilities for other staff, was inconsistent with a decision having been reached to have dismissed her by that date.

Mr McCormick would not have changed line management responsibilities if he had already decided to dismiss the claimant.

44. On 18 April 2019 (120) Mr McCormick emailed his HR advisors seeking advice about the procedure which needed to be followed to dismiss an employee in their probationary period. He stated: "*I'm looking to dismiss a member of staff next week*". He provided no reason for his decision, save that he generally referred to "*a history of issues with the individual*". There was no dispute that the email related to the claimant and it was clear to the Tribunal that the decision to dismiss her had been made by the time that this email was sent. The Tribunal noted, and considered important, that at the time this email was sent: the claimant was absent due to a pregnancy-related illness; had recently emailed Mr McCormick about her pregnancy; and had recently failed to attend a meeting with the client due to a pregnancy-related medical appointment. Mr McCormick had not actually been present at work at the same time as the claimant after his email of 4 April (which had confirmed that the claimant was being given additional line management reports).

45. On 29 April 2019 Mr McCormick met with the claimant and informed her that her employment was being terminated with immediate effect. The claimant's evidence was that she was told that it just "*hadn't worked out*" and, despite her pleading with Mr McCormick, it was explained that the decision had already been decided. Mr McCormick's statement recorded that he told the claimant that she was being dismissed because she had not met her objectives. He said that when the claimant asked him to ask staff what they thought of her, he at that point explained that he had spoken to staff and that was part of his reason for making the decision. No notes were provided to the Tribunal of this meeting, nor was anything provided which had been sent by the respondent to the claimant immediately after it, which confirmed what had been said. There was no dispute that the meeting was very brief, so even if anything was referred to as a reason for dismissal, it was not explained.

46. The evidence showed that a letter had been sent to the claimant immediately following the dismissal, but a copy of that letter was not provided to the Tribunal. On 16 May 2019 (that is over two weeks after the dismissal) a letter was sent to the claimant providing the reason for her dismissal (166). That stated that the reason for the dismissal was that the claimant had failed to meet the objectives set out in her induction plan. The letter reproduced the three objectives detailed at paragraph 16 above.

47. In the course of his evidence to the Tribunal and in answering questions, Mr McCormick's evidence was that the real reason for the claimant's dismissal was her failure to prepare the required report for the client for her project. That is, the real reason he said he dismissed her was neither of the reasons he said he informed the claimant in her dismissal meeting, nor those given in the letter from the respondent two weeks later explaining the reasons for dismissal. Mr McCormick's evidence was that he read the third objective in the induction plan as covering issues relating to the management of junior staff, and the first objective as relating to client reports. The Tribunal did not accept Mr McCormick's assertion that the third objective incorporated the need for the claimant to support her team, as it is not what the objective said (albeit the objectives are vaguely and generically drafted). The first

objective could have covered client reports generally, but the completion target date and the fact that there was no documentation raising with the claimant that she had not completed it, suggested that the objective was not intended to apply to such a significant report or that the contended failure to produce it as required was not considered a breach of the induction objectives.

48. The Tribunal accepts the respondent's evidence that the cost of maternity leave and pay was not significant for the respondent. However, it finds that the project upon which the claimant worked was one which was very important to the respondent and to Mr McCormick. The Tribunal heard evidence that there had been a significant turnover of staff who worked on the project. The claimant had been brought in to, and tasked with, addressing the dysfunctional team working on the project, and to work with the client. The Tribunal can see that the claimant being absent during her pregnancy (including from meetings with the client) and thereafter taking a period of maternity leave, may have been a significant issue for the respondent and Mr McCormick.

49. Following her dismissal, the claimant exchanged emails with the respondent about holiday entitlement. What the claimant alleged in the emails she was entitled to, is now accepted as being incorrect; the claimant's evidence being that she was writing such emails at a time when she had just lost her job and without access to records.

50. There appears to be no dispute that the claimant was entitled to 8 days annual leave for leave year 2019, and the claimant was paid in lieu of 1½ days accrued but untaken annual leave. The claimant had taken two days annual leave in April 2019. The respondent deducted from the 2019 entitlement the three days taken at the start of January 2019, but the claimant believed that those days had been carried over. In an internal email of 13 May 2019 (152) Mr McCormick stated that there were no carried over dates and in his evidence to the Tribunal he stated that he did not authorise any carry over of annual leave. The respondent provided no explanation for the non-payment of the other 1½ days of 2019 leave (which were unaccounted for).

51. The respondent provided the Tribunal with some redacted letters about the claimant's ill health. These were not relevant to the liability issues to be determined. The respondent contended that the claimant's redactions and her evidence about them was relevant in determining the claimant's credibility. The Tribunal did not find the documents or the evidence about them to have any relevance to the issues to be determined.

The Law

52. Under section 99 of the Employment Rights Act an employee who is dismissed shall be regarded as unfairly dismissed if, the reason, or the principal reason, for the dismissal is of a prescribed kind. A prescribed kind includes pregnancy. If a dismissal is of a prescribed kind, it is automatically unfair and the requirement for two years continuity of employment does not apply. Regulation 20 of the Maternity & Parental leave etc Regulations 1999 states that an employee who is dismissed is entitled under section 99 of the Employment Rights Act 1996 to be

regarded for the purposes of the relevant part of that Act as unfairly dismissed if the reason, or principal reason, is a reason connected with the pregnancy of the employee.

53. The burden of proof is on the employee to show the reason for the dismissal was a reason connected with pregnancy. Connected with pregnancy is a wide definition. The question is what was the principal reason? If the dismissal is found to be because of a reason connected to pregnancy, the respondent does not have the ability to argue that the dismissal is otherwise fair.

54. The claimant claims direct discrimination because of the protected characteristic of pregnancy. There is no requirement for a comparator for pregnancy discrimination, it is unfavourable treatment not less favourable treatment which needs to be identified.

55. Section 18(2) of the Equality Act 2010 provides that:

> "**A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy."**

56. The protected period commences when the pregnancy begins.

57. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes the employer dismissing the employee.

58. In this case, the respondent will have subjected the claimant to direct discrimination if, because of her pregnancy, it treated her unfavourably. There is no requirement for a comparison in cases of pregnancy discrimination.

59. In deciding what was the cause of the dismissal, the Tribunal must ask itself what was the effective and predominant cause, or the real and efficient cause, of the act complained of – the dismissal (**O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided School [1996] IRLR 372**). It is the motivation of the decision maker which is the issue to be determined, in considering the cause.

60. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

61. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated unfavourably; there must be something more.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

62. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the Employment Appeal Tribunal summarise the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

63. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

64. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.**

65. The holiday pay claim relies upon both the respondent's contractual provisions regarding annual leave and the Working Time Regulations 1998. The claim is that the claimant was not paid the sum due for the accrued but untaken annual leave outstanding on termination.

Conclusions – applying the Law to the Facts

66. The Tribunal first considered the claimant's direct discrimination claim.

67. The claimant was dismissed from her employment while she was pregnant. The decision to dismiss her was made by Mr McCormick on, or shortly before, 18 April 2020; in the period between 15 and 18 April 2020. At the time that the email which recorded Mr McCormick's decision was sent: the claimant was absent due to a pregnancy-related illness; had recently emailed Mr McCormick about her pregnancy;

and had recently failed to attend a meeting with a client due to a pregnancy-related medical appointment. Mr McCormick had not actually been present at work as the same time as the claimant since 4 April. On 4 April Mr McCormick had emailed to confirm that the claimant was taking on additional line management responsibility, which the Tribunal finds to be inconsistent with a decision to dismiss her having already been made by that date, so the decision can only have been made after his return from holiday.

68. There was a lack of consistency from the respondent in the reason or reasons relied upon for dismissing the claimant. This is addressed in more detail below, when the reasons are addressed. However, the respondent's reliance upon reasons which were clearly not the genuine reasons for dismissal, was a factor taken into account when considering whether the claimant had demonstrated a prima facie case. The subsequent reliance by the respondent upon issues which been resolved, or at least not considered grounds to dismiss, was a relevant factor.

69. The Tribunal finds that there are facts from which it could decide, in the absence of any other explanation, that the respondent had discriminated against the claimant because of pregnancy by treating her unfavourably during the protected period by dismissing her. In identifying the "something more" required to shift the burden of proof the Tribunal has identified: the timing of the decision to dismiss; the absence of contemporaneous evidence about the basis upon which the decision was reached; and the reliance of the respondent on reasons for dismissal, which were not the genuine reasons.

70. The burden of proof then turns to the second stage outlined above, under which it is for the respondent to show that the dismissal was in no sense whatsoever because the claimant was pregnant (or because of pregnancy-related absence).

71. The various reasons relied upon by the respondent during the proceedings for dismissing the claimant were as follows:

a. Paragraphs 6-10 of the grounds of response addressed the issues arising from the DBS check and the claimant's non-declaration of her convictions. This was not a genuine reason why Mr McCormick made the decision to dismiss. He did not attribute dismissal to this reason in his own evidence and it is clear from his conclusions in the 18 December 2019 email that he had decided by that date that it did not affect her ability to undertake her role and was not considered to be grounds for dismissal;

b. Paragraph 11 of the grounds of response includes amongst the reasons given, the claimant: not being contactable; not being in the office; and claiming for hours for work not undertaken. The latter was also addressed in Mr McCormick's witness statement. The Tribunal was presented with absolutely no evidence at all which substantiated any of these issues and Mr McCormick himself did not evidence these as being the reason why the claimant was dismissed (he was particularly clear in his evidence that he did not believe the claiming for hours issue was one which merited any action);

c. In the letter sent two weeks after the dismissal meeting, the reason for dismissal was stated to be failure to meet the objectives set out in the induction plan. The Tribunal finds that this was not the reason for the claimant's dismissal. Had the respondent dismissed the claimant for such matters, there would have been contemporaneous records of meetings and discussions about the objectives. The first objective had a target date of 28 September, but there was no record of a failure to achieve it having been raised with the claimant. Whilst the 18 December email recorded Mr McCormick explaining why the claimant had not achieved certain thing she had been asked to do (and apparently accepting that there were good reasons), it did not record her failing to meet induction objectives. The objectives were in any event somewhat vague and non-specific. They were not the reasons evidenced by Mr McCormick for his decision, when answering questions during the hearing;

d. One of the factors referred to in paragraph 11 of the grounds of response, and particularly emphasised in evidence in Mr McCormick's statement, was the alleged failure by the claimant to support her team. Mr McCormick also described this as being a reason which was given to the claimant at her dismissal meeting (albeit after the claimant herself raised her staff). Mr McCormick's statement described this as the straw which broke the camel's back. There was no documentary evidence which substantiated there being significant issues raised by junior staff, except for the email of 19 March when Ms Coghlan was arguing not to be managed by her (which was consistent with the project team's general approach to the claimant). The Tribunal does not find Mr McCormick's evidence about this issue, its importance and it being the reason for dismissal, to be credible. If the issues raised with him had the importance suggested to the Tribunal, there would have been some record of, or follow-up to, the discussions, such as notes, emails, an entry in his day book, or an email to HR. The issues about staff management were HR issues (not what Mr McCormick referred to as the "day job", which was his explanation as to why HR advice was not sought on the lack of reports), and therefore (if they had the level of importance given) he would have raised those issues with HR in a similar way to earlier issues on 18 December. Mr McCormick could not recall where or when he had discussed the issues with the junior employees, even though it must have been in the window between 15 and 18 April if they were the reason why he made his decision. He had confirmed on 4 April (prior to his holiday) that the claimant was taking extra line-management responsibility, something which would be inconsistent with her being dismissed for her failure to support the team. It is also notable that the respondent could have called other witnesses to substantiate these issues, but did not do so. There is no evidence which contradicts Mr McCormick's evidence that junior members of the team did speak to him as he explains, but the Tribunal does not find that the fact that they did so was the reason for dismissal. Had it been the reason, it would have been very straightforward for the

respondent to have given that reason in: the dismissal meeting (and not just in a response to something said by the claimant); the letter confirming why the claimant was dismissed; and in the response form (in a clear way rather than as one factor in a number in a single paragraph);

e. The reason which Mr McCormick in fact emphasised in his answers to questions as being the reason for dismissal, was the claimant's alleged failure to complete a key report for the client (or key reporting). There is no contemporaneous evidence that shows this being raised with the claimant as an essential failing. Mr McCormick's own witness statement did not provide sufficient detail about, or emphasis to, this if it was the principal reason for dismissal as he described when answering questions. Indeed, the statement explained what is described as the claimant's failure to take control of forecasts, as being due in part to other members of the team not producing properly the contributions she needed from them. The 18 December email recorded that Mr McCormick was himself developing a report which would enable him to identify a demonstrable measure of the claimant's performance, but there was no evidence that a demonstrable measure was ever prepared and the Tribunal was not shown any demonstrable measures (or those demonstrable measures not being met). The content of the email of 4 April was also not consistent with failures in reporting by the claimant being a reason to dismiss her fourteen days later. If this were the genuine reason for dismissal, it could have been more clearly and straightforwardly explained in: the dismissal meeting; the letter providing reasons; the response form; and Mr McCormick's witness statement. If the reporting failures were the reason for the dismissal, it would have been very straightforward for Mr McCormick and the respondent to have said so.

72. The burden of proof was on the respondent to show the non-discriminatory reason for dismissal. There is an unexplained paucity of evidence to prove, on the balance of probabilities, that any of the above reasons were genuinely the reason for dismissal. Where there is evidence, it is inconsistent and was not sufficient to show that was the genuine reason at the time. There was a multiplicity of alleged/potential reasons put forward. It was clear from the evidence heard that some of the reasons referred to in the response form were not the reason for the dismissal. The Tribunal finds that: the respondent has not shown on the balance of probabilities a non-discriminatory reason for dismissal; and the respondent has not shown with cogent evidence that the dismissal was in no sense whatsoever because the claimant was pregnant (or because of pregnancy-related absence).

73. As a result, the Tribunal's finding is that the claimant was treated unfavourably because of her pregnancy by being dismissed. Having reached that finding and for the same reasons, the Tribunal also finds that the principal reason for her dismissal was her pregnancy, rendering her dismissal automatically unfair.

74. On holiday pay, the first question which the Tribunal has considered is whether or not there was an agreement that the claimant carry over three days

annual leave from holiday year 2018. There was conflicting evidence on this. On 17 December (65) it is clear that the claimant wanted to carry three days leave over, but it was left with her to obtain permission from her manager. The claimant took the first three days of 2019 as annual leave, which supported the claimant's evidence that she was allowed to carry the leave over. However, there is a direct conflict between the claimant's evidence and that of Mr McCormick about whether carry over was approved.

75. The only contemporaneous evidence (or at least evidence from close to the time) about this dispute available to the Tribunal, was the leave record (117) which showed the 4 and 5 April 2019 being taken as leave, which was approved by Mr McCormick. That recorded those two days as being the first two days of leave taken from the 25 day entitlement for the 2019 year, and showed 23 days remaining for the leave year. On the basis that there was no objection raised at the time by Mr McCormick or the respondent to what is recorded on that form, that supports the claimant's case that the first three days of 2019 had been taken as approved carried over annual leave. As a result, the Tribunal finds that the claimant was allowed to carry over three days leave and that was what she took in the first three days of the 2019 year.

76. In terms of leave entitlement, what the claimant asserted in her emails after she left employment, was clearly confused and incorrect. It is not in dispute that the claimant was entitled to 8 days for 2019 for the period which she worked. Two days leave was taken in April 2019. 1½ days were paid in lieu. That leaves the claimant with a further 4½ days pay accrued but untaken annual leave, for which she is entitled to be paid in lieu.

Summary

77. For the reasons explained above, the Tribunal finds that the claimant: was treated unfavourably by the respondent because of her pregnancy, in breach of section 18 of the Equality Act 2010; and was automatically unfairly dismissed, as the principal reason for her dismissal was her pregnancy, rendering the dismissal automatically unfair under section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999. The respondent did make an unlawful deduction from the claimant's salary, by failing to pay her for 4½ days accrued but untaken annual leave.

Employment Judge Phil Allen

23 March 2021

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

24 March 2021

FOR THE TRIBUNAL OFFICE

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