



EMPLOYMENT TRIBUNALS

Claimant: Miss S Keogh

Respondents: (1) The Old School House Day Nursery Limited (in liquidation)
(2) Ms J Roberts

Heard at: Cardiff via CVP **On:** 4, 5, 6 and 7 January 2022

Before: Employment Judge S Jenkins

Members: Mrs B Currie
Ms B Roberts

Representation:
Claimant: In person
Respondents: (1) Not present or represented
(2) Mr J Lewis-Bale (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims of; discrimination on the ground of pregnancy, by reason of a failure to allow reasonable time off for ante-natal appointments (pursuant to Section 18 Equality Act 2010), and of unreasonable refusal to permit her to take time off for ante-natal appointments (pursuant to Sections 55 and 57 Employment Rights Act 1996), succeed against the First Respondent only.
2. The First Respondent is ordered to pay the Claimant the sum of £1, 035.10 in respect of those claims.
3. All of the Claimant's other claims against the First Respondent and all the Claimant's claims against the Second Respondent fail and are dismissed.

REASONS

Background

1. The hearing was to consider the Claimant's claims of pregnancy discrimination, contrary to Section 18 Equality Act 2010 ("EqA"), and unreasonable refusal to permit time off for ante-natal appointments, contrary to Sections 55 and 57 Employment Rights Act 1996 ("ERA").
2. The Claimant's discrimination claim had been brought against both Respondents, the First Respondent being her former employer and the Second Respondent being the owner and manager of the First Respondent. However, the discrete claim relating to a refusal to permit time off under Section 57 ERA can only be brought against the individual's employer and therefore fell to be considered against the First Respondent only.
3. The First Respondent, subsequent to the events that gave rise to the claims and the submission of the claim in this case, went into voluntary liquidation in July 2020, due to the impact of the COVID-19 pandemic on its business. The First Respondent therefore played no part in the hearing, although the evidence advanced by the Claimant and on behalf of the Second Respondent in any event also allowed us to address the claims against the First Respondent.
4. We heard evidence from the Claimant and her mother, Mrs Linda Keogh, on her behalf; and from Ms Jacqueline Roberts, the Second Respondent and formerly the Managing Director of the First Respondent; Ms Rebecca Williams, formerly Deputy Manager of the First Respondent; and Mrs Wendy Williams, formerly Deputy Manager of the First Respondent; on behalf of the Second Respondent.
5. We considered the documents in the hearing bundle spanning 648 pages to which our attention was drawn. We also viewed some CCTV footage, without audio, of events on 24 May 2019. Finally, we considered the parties' submissions, written and oral on behalf of the Second Respondent, and oral by the Claimant.

Issue and Law

6. The issues for us to consider had been identified by Employment Judge Harfield at a Preliminary Hearing on 31 July 2020 and had been set out by her at paragraphs 20-23 of the Summary produced following that hearing as follows:
 1. *Time limit / limitation issues*

- a. *Were the Claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA") and section 57 of the Employment Rights Act 1996?*
 - b. *Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; etc.*
2. *Equality Act, section 18: pregnancy & maternity discrimination*
- a. *Did the Respondents treat the Claimant unfavourably as follows:*
 - i. *Failing to complete pregnancy risk assessments promptly;*
 - ii. *Failing to allow reasonable time off for ante natal appointments;*
 - iii. *Putting the claimant through a disciplinary process;*
 - iv. *Dismissing the claimant*
 - b. *Did any unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?*
 - c. *Was any unfavourable treatment: because of the pregnancy or of illness suffered as a result of it; because the Claimant was on compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?*
3. *Section 55 and 57 Employment Rights Act 1996*
- a. *Was the Claimant pregnant?*
 - b. *Did the Claimant, on the advice of a registered medical practitioner, registered midwife or registered nurse, make an appointment to attend at any place for the purpose of receiving ante-natal care?*
 - c. *Did the First Respondent request confirmation of the appointment under s55(2) Employment Rights Act 1996 and if so was such confirmation provided?*

d. *Did the First Respondent unreasonably refuse to permit the Claimant to take time off as required by Section 55?*

4. *Remedy*

If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded.

7. The underlying law, set out in Section 18 EqA and Section 55 ERA, was encapsulated in those issues, but we bore the following additional points in mind.
8. We were conscious that our focus in relation to the discriminatory treatment, if we considered that the matters alleged had taken place and did amount to unfavourable treatment, was on whether such treatment was “because of” the Claimant’s pregnancy; the pregnancy must have been the reason for the treatment.
9. The Employment Appeal Tribunal (“EAT”) made clear, in ***Interserve FM Limited -v- Tuleikyte* [2017] IRLR 615**, applying an earlier EAT decision of ***Amnesty International -v- Ahmed* [2009] ICR 1450**, and in ***Sefton Borough Council -v- Wainwright* [2015] IRLR 90**, that the mere fact that a woman happens to be pregnant or on maternity leave when the asserted unfavourable treatment occurs is not, of itself, sufficient to establish that discrimination has taken place. In that regard claims of pregnancy discrimination under Section 18 EqA are on the same footing, albeit without the need for any comparison, as claims of direct discrimination under Section 13 EqA as noted by the Court of Appeal, in ***Madarassy -v- Nomura International PLC* [2007] ICR 867**, which noted that the bare facts of a difference in status or a difference in treatment only indicate a possibility of discrimination and they are not without more sufficient material from which a Tribunal can conclude that, on the balance of probabilities, a respondent had committed an unlawful act of discrimination.
10. We were also conscious that the burden of proof provisions, set out in Section 136 EqA, provided that we would first need to consider whether there were any facts from which we could decide, in the absence of a non-discriminatory reason from the Respondent, that an act of unlawful discrimination had taken place. If so, the burden would then shift to the Respondent to demonstrate a non-discriminatory explanation.
11. With regard to time limits, we noted that there were different tests for us to apply. With regard to the claim under Section 57 ERA, Section 57(2) notes that an Employment Tribunal shall not consider a complaint unless presented before the end of the period of three months beginning with the date of the ante-natal appointment concerned, or within such further period

as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.

12. There has been a considerable amount of case law in relation to the reasonable practicability test over the years, which has made clear that it is a strict test. It is for a claimant to justify the conclusion that the claim was not able to be reasonably practicably brought within time and that it was then brought within a reasonable time thereafter. One factor which may make it not reasonably practicable for a claim to have been brought in time is the impact of illness.
13. If a decision is reached that it was not reasonably practicable for the claim to have been brought in time then the EAT has confirmed, in ***Cullinane -v- Balfour Beatty (UK EAT 0537/10)***, that consideration of whether the claim was brought within a further reasonable period will require an objective consideration of the relevant factors causing the delay and what period should reasonably be allowed in the circumstances, having regard to the strong public interest in claims being brought in time.
14. With regard to the discrimination claim, Section 123(1) EqA notes that proceedings on a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.
15. Again, there has been a lot of case law on this point over the years, with the Court of Appeal, in ***Robertson -v- Bexley Community Centre [2003] IRLR 434***, noting that, whilst the test is not as strict as that for the reasonable practicability test, there is nevertheless no presumption in favour of extending time in discrimination claims and it is for the Claimant to convince the Tribunal that it is indeed just and equitable to extend time.
16. The case of ***British Coal Corporation -v- Keeble [1997] IRLR 336***, noted that the provisions of Section 33 of the Limitation Act 1980, which applied to civil claims, should also be applied in relation to Tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case, which include; the length of and reasons for the delay, the extent of which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with requests for information, the promptness with which the claimant acted once they knew of the facts, and the steps taken by the claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.

17. Recent further guidance on this issue was provided by the Court of Appeal in ***Adedeji -v- University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, that the guidance provided in the ***Keeble*** case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal guidance was that the best approach for a Tribunal, in considering the exercise of its discretion, is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay.
18. We also noted that we needed to consider the potential liability of each Respondent separately. As we have noted, the claim under the ERA could only lie against the First Respondent as the Claimant's employer. The claim under Section 18 EqA could lie against the First Respondent as employer and the Second Respondent individually, Section 18(2) referring to "a person". However we noted that we would have to be satisfied that the person or persons, i.e. one or both of the First and Second Respondents, had treated the Claimant unfavourably because of her pregnancy.

Findings

19. Our findings, in relation to the matters relevant to the issues, on the balance of probability where there was any dispute, were as follows.
20. The First Respondent was a private nursery looking after babies and pre-school children. It was set up by the Second Respondent in 2001 and was owned by her at all times. The Second Respondent, as well as being the owner and sole director of the First Respondent, was also one of the Responsible Individuals for the purposes of Care Inspectorate Wales regulations. Her focus, in terms of day to day matters, was on the financial aspects of the First Respondent's business including payroll.
21. Ms Rebecca Williams was the First Respondent's Deputy Manager at the relevant times and was also one of the Responsible Individuals. Her focus was on the operational management of the nursery including the arrangement of staff rotas.
22. As a nursery, with a predominantly female workforce, pregnancies and periods of maternity leave were commonplace for the First Respondent. The Second Respondent's evidence, which we saw no reason to doubt, was that there had been some 25 to 30 pregnancies during the period in which the First Respondent operated, and that adjustments would be made to working days and working hours to take account of childcare responsibilities of employees on a regular basis.

23. The Claimant, having previously obtained a psychology degree and having worked at another nursery, was employed by the First Respondent as an Apprentice Nursery Nurse commencing on 25 February 2019. The contract she entered into indicated that her working hours would vary between a minimum of 10 and maximum of 50 per week, between the hours of 7.30am and 6.00pm. In the period the Claimant effectively worked for the First Respondent, she typically worked 9.5 hour shifts over 4 days each week, i.e. approximately 38 hours per week in total. The Claimant was paid the minimum apprentice hourly rate, initially £3.70, rising to £3.90 from April 2019.
24. The First Respondent operated a comprehensive set of policies and procedures, including ones relating to security and safeguarding, and they were covered in the Claimant's induction on 26 February 2019. The Claimant confirmed that she had read and understood those policies on that day.
25. The First Respondent had a policy relating to new and expectant mothers and had put in place a general risk assessment for expectant mothers and pregnant workers.
26. The Claimant informed the First Respondent of her pregnancy on 29 March 2019. There was a dispute between the parties as to whether the Claimant informed the Second Respondent on that day. It appeared that the primary notification was to another manager, with the Claimant asserting that the Second Respondent was also present, but with the Second Respondent asserting that Ms Williams had also been present and not her. On balance, whilst not materially relevant for the issues we were considering, we were satisfied that Ms Williams was the person additionally present on 29 March 2019. However, regardless of that, the Second Respondent accepted that she had become aware of the Claimant's pregnancy the following week, i.e. in the first week of April 2019.
27. The Claimant asserted that she made several requests for a specific risk assessment to both the Second Respondent and Ms Williams, and that she had noted that she had underlying health conditions which potentially made her more tired. The Second Respondent's witnesses equally asserted that the Claimant made no such requests and that she did not inform them of any such underlying health conditions. Their evidence was that Ms Williams had arranged to carry out a specific risk assessment for the Claimant on 24 May 2019, shortly after the end of her first trimester, that being the point at which such specific assessments were typically undertaken.
28. We concluded that it was more likely than not that the Claimant had raised the question of whether and when a specific risk assessment would be undertaken. However, we also concluded that the Claimant had accepted

that any specific assessment would be undertaken at around the 16 week mark of her pregnancy, and we did not consider that the issue had been raised by her on multiple occasions, or that the Claimant had raised her underlying health conditions. In the event the assessment took place at 16 weeks 5 days due to staff absences, but we did not consider that anything material arose from that.

29. The risk assessment was undertaken by Ms Williams on 24 May 2019. The assessment of risk was low, but the assessment noted that the First Respondent would be able to reduce the Claimant's working hours if she was fatigued or required more time off to rest. The assessment noted that regular risk assessments would be undertaken and that the Claimant would inform the management team if she required support.
30. After the risk assessment was completed and signed, the Claimant approached Ms Williams and noted that a particular condition she had could cause issues and that she would be having blood tests every four weeks. Ms Williams confirmed that she would keep that under review when putting rotas together. In the event, the Claimant was only in work on a handful of occasions after that, being off sick from 3 June 2019 until she was dismissed on 18 July 2019.
31. As would be expected during any pregnancy, the Claimant had a number of ante-natal appointments. It seemed to us that the Claimant did her best to arrange those appointments outside her working hours, e.g. with a midwife appointment taking place at 6.15pm where her hours were adjusted to 7.30am to 5.30pm that day as opposed to 8.00am to 6.00pm, to enable her to attend.
32. Whilst there was only direct evidence of one such appointment in the bundle, it appeared to us that there had in fact been three occasions on which ante-natal appointments had been arranged during working hours, on 9 April 2019, 15 May 2019 and 23 May 2019. The Claimant contended that she had also attended an ante-natal appointment on 23 April 2019, but we preferred the evidence of the Second Respondent's witnesses that that had been a dental appointment.
33. Of the three appointments, two, those on 15 May and 23 May, were recorded in the staff rota and in the Claimant's summary of hours as "NR" i.e. that she was "not required". In other words, the appointments had been dealt with by recording the particular day as a day on which the Claimant would not work and consequently would not be paid. As we have noted, the Claimant's hours records indicated that it was quite normal for her to work on only four days each week.

34. The other appointment, that on 9 April 2019, was recorded in the staff rota as “UL” i.e. “unpaid leave”. However in the Claimant’s hours records, the day was recorded as “AL” i.e. “annual leave”, with 9.5 hours being recorded for her and for which she was paid. We noted that the hours form on which the Claimant’s working hours each day were recorded did cater for an “AA” entry i.e. “agreed appointment”, with the form indicating that that entry could be used for “doctors/dentist etc.”.
35. We also noted that the preparation of rotas and the granting of leave for appointments or for any other reason was a matter for Ms Williams as the person in charge of the day-to-day operations. The Second Respondent was only involved in the calculation and processing of payments for hours worked and authorised paid leave.
36. In relation to the Claimant’s general work, some issues were observed by Ms Williams and by other employees about the Claimant’s performance. None of these were raised with her, it being intended that they would be addressed with her during a performance review meeting at the end of May, a period in which reviews would be carried out for all staff, the nursery being quieter during the Whitsun half term break. In the event, due to the Claimant’s absence, that review with her never took place.
37. An incident relating to a child being left unattended for a short period, which did not involve the Claimant, occurred on 15 May 2019. Following that, the two employees involved were, following a disciplinary process, issued with formal written warnings. Also, a new supervision and child safety policy was issued to all staff, including the Claimant, on 17 May 2019. This included a requirement that sleeping babies and children should never be left unattended, that staff should not chat in groups and should pay attention to and supervise children at all times, and that staff should be strategically placed outdoors to ensure that all visible areas are covered.
38. The Claimant contended that there had been a further incident shortly after this, involving the two employees who had been issued with written warnings. Ms Roberts and Ms Williams were however very clear in their evidence that, whilst the potential leaving of a child unattended on this further occasion had been investigated, it had transpired that the child had not, in fact, been left unattended as an employee from a different department had indicated that she would look after that child. We preferred the evidence of Ms Roberts and Ms Williams on that point and concluded that there was no second incident involving those two employees.
39. On 24 May 2019 another incident relating to a child being left unattended for a short period arose, this time involving the Claimant. The Claimant was supervising several children having a post lunch nap in a room. A register of the children in the room and the time at which they had started to sleep had

been taken by other members of staff, and the Claimant recorded when the various children woke up and then supervised their handover to other staff outside the room. When what the Claimant thought was the last sleeping child awoke, the Claimant left the room. However, the Claimant had not noticed a further child sleeping in the corner of the room. After about a minute and a half, that child's absence was noted, and Ms Williams discovered her still asleep. The Claimant contended that she had been unable to see the child as a double buggy, in which other children had been sleeping, had been in her line of sight. Whilst we accepted that that may have been the case, the Claimant had in front of her the record which she herself had been completing when children woke up, and that would have noted that the child had not woken up. In the event, the child slept further for some twenty minutes without incident.

40. In light of what had happened, Ms Williams notified the Claimant that an investigatory meeting would take place on 28 May 2019. She had intended to give that notification by handing the Claimant a letter she had prepared, but was unable to do so before the Claimant left in the evening, and she therefore notified the Claimant by direct Facebook message that evening.
41. As the Claimant was absent due to sickness the investigation meeting actually took place on 30 May 2019. Ms Williams also obtained statements from two other employees who had been in the vicinity at the time of the incident. Ms Williams concluded that a disciplinary hearing should take place to consider the incident and gave the Claimant a letter on the evening of Friday 31 May 2019, noting that a disciplinary hearing would take place on Monday 3 June 2019 at 11.00am. The letter noted that the outcome of the meeting could be that the Claimant would be issued with a disciplinary warning.
42. In the meantime, on 30 May 2019, the Second Respondent had had a meeting with a child's father. During that meeting, the Second Respondent looked at the child's file and noted that an accident report, completed by the Claimant, relating to a fall the child had had on a slide on 24 May 2019, did not have the time recorded as required. On 31 May 2019 therefore, the Second Respondent and Mrs Wendy Williams viewed the CCTV footage of the play area between 10.30am and 11.30am on 24 May 2019, the time period which the rota indicated was the relevant one. In that, the fall was noted as having taking place at 11.15am.
43. On viewing the footage, the Second Respondent became concerned that the Claimant had not adequately supervised the children, spending time talking to other staff members and not being in a position to prevent the child's fall, and also had picked up another child from behind and put him over her shoulder to take him for a nappy change.

44. The Claimant emailed the Second Respondent on the evening of 31 May 2019 asking for more time to prepare for the disciplinary hearing, which the Second Respondent read on the morning of 3 June 2019. She replied to the Claimant, noting that the disciplinary hearing could be delayed to 7 June 2019. She also noted that other concerns had arisen following the viewing of the CCTV footage of the events of 24 May 2019.
45. The Second Respondent then sent a further email to the Claimant on 5 June 2019 noting that other matters were to be investigated. She noted that these issues had been viewed on CCTV, that statements had been taken from staff, and that it would be appropriate to give the Claimant the opportunity to view the CCTV footage. She also confirmed that the disciplinary hearing scheduled for 7 June 2019 would not take place until the investigation into the other incidents on 24 May 2019 had been concluded.
46. The Claimant attended at the nursery on 10 June 2019, with her mother, to view the footage and attended again, again with her mother, on 19 June 2019, to view further footage taken from a different angle.
47. The Claimant was absent due to sickness during this period and, on 1 July 2019, Ms Williams emailed her noting that the issues that had arisen needed to be dealt with at a formal disciplinary hearing. That was arranged for 12 July 2019. The Claimant was notified of her right to be accompanied and that Ms Williams would be accompanied by an external HR Consultant. Ms Williams listed the three issues of concern as follows:
 - (i) Supervision of children – seriously negligent conduct by failing to supervise children in your care. Leaving a child unattended in the sleep room on 24/5/19 and lack of supervision for children in your care whilst outdoors (main garden) 24/5/19.
 - (ii) Safeguarding and child protection – not supervising children during an incident where a child sustained an injury to their face whilst falling off play equipment 24/5/19.
 - (iii) Manual handling of children – seriously negligent conduct by failing to communicate with a child during nappy change and inappropriate handling of a child who was grabbed by their hips and lifted onto shoulders (main garden) 24/5/19.
48. Ms Williams also noted the various policies which were thought to have been breached. She noted that the incidents were regarded as potentially gross negligence and/or gross misconduct and that, if found guilty, the Claimant could be given a warning or dismissed.

49. The Claimant asked if her mother could attend the disciplinary hearing as her companion, which was agreed, and the disciplinary hearing went ahead on 12 July 2019. It was covertly recorded by the Claimant's mother.
50. During the hearing the allegations were discussed with the Claimant and she, whilst generally accepting that the failures had arisen, contended that she had not received adequate training or supervision, and also that other staff had not been disciplined and that she had been "singled out", contending that this may have been because she was pregnant.
51. Ultimately, Ms Williams concluded that the allegations had been made out, that the Claimant had been adequately trained and supervised, and that formal action had been taken against other members of staff where required (referring we thought to the 15 May 2019 incident). Under cross-examination, Ms Williams confirmed that no disciplinary action had been taken against the other staff present in the play area on 24 May 2019, although they had been "spoken to". She indicated that, in her view, the cumulative effect of the substantiated allegations against the Claimant led to the conclusion that she had been grossly negligent and that she should be dismissed. That was confirmed in a letter dated 18 July 2019.
52. The Claimant was informed of her right of appeal, and did appeal by letter dated 25 July 2019. She noted the reason for her appeal being that, "the decision to dismiss myself is/was too severe".
53. The Second Respondent wrote to the Claimant on 8 August 2019, inviting her to an appeal hearing on 16 August 2019. The hearing took place on that date with the external HR Consultant again present to advise the Second Respondent and with Mrs Williams present as a notetaker. The Claimant was again accompanied by her mother who again covertly recorded the meeting.
54. The incidents which led to the Claimant's dismissal were discussed, with the Claimant again accepting that there had been breaches of policy and procedure on her part, but again contending that she had been inadequately trained. She also contended that she felt that she was being singled out because she was pregnant, particularly as her dismissal would enable the First Respondent to avoid paying maternity pay to her at the same time as paying a replacement employee. During this Tribunal Hearing however the Claimant confirmed that she subsequently clarified that she had not been employed for sufficiently long to become entitled to statutory maternity pay.
55. Ultimately, the Second Respondent considered that Ms Williams' decision should be upheld, and she wrote to the Claimant on 4 September 2019 to confirm that.

56. Other relevant facts we noted were that the Claimant had experienced a deep vein thrombosis in August 2019, which had led to her being hospitalised for seven days, and that she had continued to suffer ill health after that.
57. The Claimant had contacted ACAS for the purposes of early conciliation on 13 October 2019, with the ACAS Certificate having been issued on 31 October 2019. The Claimant had then submitted her Claim Form on 1 November 2019. Whilst we were not told the formal date of birth of the Claimant's child, we anticipated that that took place some time in early November 2019.
58. As far as the First Respondent was concerned, it continued to operate up to the onset of the COVID-19 pandemic in March 2020, before it then closed. Some employees were made redundant at the start of July 2020, with the First Respondent going into liquidation, and with all remaining staff being made redundant, on 17 July 2020.

Conclusions

59. Applying the evidence and the applicable law, our conclusions in relation to the claims and issues identified for us to consider were as follows. We set them out by reference to the order of the List of Issues.

Claim of pregnancy discrimination – Section 18 EqA

(i) Allegation of failure to complete pregnancy risk assessments promptly

60. We noted that a general risk assessment, covering expectant mothers, was in place prior to the commencement of the Claimant's employment, and that a specific risk assessment for her had been undertaken on 24 May 2019, shortly after the 16 week mark of her pregnancy, the point at which the First Respondent typically carried out specific risk assessments.
61. The risks to pregnant employees were broadly covered in the generic risk assessment in relation to matters such as lifting, climbing and exposure to harmful products and illnesses. We noted the Second Respondent's evidence that managers were regularly reminding pregnant employees not to do things such as lift heavy loads and that they had, on one occasion, suspended a pregnant employee on pay when there was an outbreak of an infectious disease. Overall therefore, we concluded that the risks to the Claimant were largely covered in the generic risk assessment, indeed the specific risk assessment did not materially expand upon them.

62. The specific risk assessment noted that reduced hours could be implemented if required, but we noted that the Claimant was only effectively in work for some three days after that such that no action fell to be taken.
 63. We also noted that the risk assessments were undertaken by Ms Williams as the person in charge of operational matters, and that the Second Respondent was not directly involved. Overall however, we were not satisfied that there had been any failure to complete risk assessments promptly, such that there had been no unfavourable treatment of the Claimant.
- (ii) Allegation of failing to allow reasonable time off for ante-natal appointments
64. We noted that there were three days on which the Claimant had ante-natal appointments when she was either noted within the First Respondent's records as "NR" or "AL".
 65. We noted that the obligation under Section 55 ERA is to allow paid time off for ante-natal appointments. With regard to the appointments on 15 May and 23 May, whilst the Claimant broadly worked four days each week, we were not satisfied that there was any agreement that she would take those specific days as non-working, and consequently unpaid, days. Rather, we concluded that it was Ms Williams' response to being told by the Claimant that she had appointments on those days. Whilst we did not consider that Ms Williams intentionally refused the paid time off on those days, we considered that her actions, in using the Claimant's NR days for these purposes, did amount to a failure to allow the Claimant reasonable time off for the ante-natal appointments.
 66. Similarly with regard to 9 April 2019, we noted that the appointment was initially recorded in the work rota as UL and then in the worked hours sheet as AL. We noted however that there was an option to include the appointment as AA, which we considered could, and should, have been used. A consequence of recording the day as AL was that the Claimant, whilst paid for the day, used up a day's annual leave, when Section 55 provides that she should have been granted paid time off, i.e. not as a day of annual leave.
 67. As with the risk assessments, we noted that responsibility for the rotas and the granting of leave, whether paid or otherwise, was exclusively that of Ms Williams, with the Second Respondent only involved in relation to the calculation and processing of salary payments. Whilst we concluded that the First Respondent, by virtue of Ms Williams' actions, treated the Claimant unfavourably by reason of her pregnancy in failing to allow paid time off for ante-natal appointments, we did not consider that the Second Respondent had done so as well.

(iii) Allegation of putting the Claimant through a disciplinary process

68. We noted that the First Respondent had put two other employees through a disciplinary process in relation to deficiencies in relation to supervision and that they had been issued with written warnings. We also noted that the original notification to the Claimant, when the proposed disciplinary hearing was arranged to consider a single similar incident, anticipated a similar outcome.
69. As we have noted, we did not consider that the two employees who had been disciplined had committed a second disciplinary offence as contended by the Claimant. We also noted that the Claimant had been disciplined for multiple offences whereas the employees in the play area on 24 May 2019 had only been guilty of individual incidents.
70. We also noted that the Claimant accepted during the disciplinary hearings, and indeed in this Tribunal Hearing, that her actions had amounted to breaches of the First Respondent's policies.
71. Overall therefore, whilst being taken through a disciplinary process was, on its face and in broad terms unfavourable, we did not consider that there was any unfavourable treatment of the Claimant by reason of her pregnancy. The First Respondent was justified in implementing the disciplinary processes in light of the Claimant's actions, and we did not consider that the Claimant was in any way singled out.

(iv) Allegation of dismissing the Claimant

72. Similarly, and whilst we may have considered that the imposition of the sanction of dismissal may possibly have been harsh from the perspective of unfair dismissal, we did not consider that the act of dismissal, whilst again being obviously unfavourable, was on the ground of the Claimant's pregnancy.
73. We noted the Claimant's admitted failures and that the First Respondent, in the form of Ms Williams, viewed them as serious. Whilst some of the language used regarding the incidents referencing safeguarding was, in our view, a little excessive, and indeed the Respondent's witnesses appeared to recognise that before us, the Claimant had committed serious breaches, certainly more serious in terms of cumulation than her colleagues.

74. We also noted that the Claimant was in her probation period and that had the Respondents been minded to remove her because she was pregnant, and therefore, as the Claimant asserted, a burden, whether in terms of cost or otherwise, there would have been a much simpler method of achieving that, by confirming that she had failed her probation period, particularly when concerns existed about her performance.
75. We also noted the significant number of employees of the First Respondent who had become pregnant and taken maternity leave over the years.
76. Overall therefore we concluded that the decision to dismiss the Claimant was not motivated by her pregnancy.

Claim of failure to allow time off for ante-natal appointments - Section 55/57 ERA

77. As we have noted above, we did conclude that the First Respondent had unreasonably refused the Claimant to take time off for ante-natal appointments on three occasions. We concluded that that involved pregnancy discrimination. For the same reasons, we also concluded that the Claimant's claim under Section 57 ERA was made out. As we have already noted however such a claim could not lie against the Second Respondent, but only against the First Respondent as the Claimant's employer.

Time limits

78. The one element of the Claimant's claim that we considered was substantiated was that relating to ante-natal appointments. As we have noted the last of those was on 23 May 2019.
79. Noting the dates of the Claimant's contact with ACAS, i.e. 13 October 2019, that meant that only matters going back as far as 14 July 2019 were in time, whether applying the time limits under Section 123 EqA or Section 57 ERA, of three months from the act complained of or from the date of the appointment concerned. On the face of it therefore the claims regarding ante-natal appointments had been brought out of time.
80. We noted the different tests for us to apply in relation to whether to allow the claims to proceed out of time. We first considered the stricter test under Section 57 of whether it had been reasonably practicable for the claim to have been brought in time and, if not, whether it had been brought within a further reasonable period.
81. In that regard, we noted that the event complained of took place on 23 May 2019, which would have required contact to have been made with ACAS by 22 August 2019. We noted that the Claimant suffered a serious illness in

August and indeed was hospitalised for seven days, and that her ill health continued afterwards. Fairly obviously, the Claimant was also in the late stages of pregnancy in August, September and October 2019.

82. In our view, looking at the period up to 22 August 2019, we considered that the Claimant's seriously debilitating ill health meant that it had not been reasonably practicable for her to have brought the claims in time.
83. We then considered whether the claims had been brought within a further reasonable period, noting that contact with ACAS had not been made until 13 October 2019, i.e. some six weeks after the expiry of the primary time period. Again however we noted the context of the Claimant's ongoing medical issues which would have had an understandably significant impact on her in the latter stages of her pregnancy. Overall therefore we considered that the claim had been brought within a further reasonable period and should therefore be allowed to proceed.
84. With regard to the discrimination claim, we noted that the test under Section 123 EqA is less rigorous than the test under Section 57 ERA. We noted the reason for the delay in submitting the claim, in the form of the Claimant's health, and that the delay was relatively short, with all matters being advanced via ACAS in October 2019. It did not seem to us that the cogency of any evidence had been affected and we considered overall therefore, that it would be just and equitable to extend time to allow the discrimination claim to proceed as well.

Remedy

85. With regard to the Claimant's claim under Section 57 ERA, the remedy was to award financial loss for the unpaid ante-natal appointments that had arisen. We considered it appropriate to allow three hours for each appointment, the evidence of both parties being that the Claimant had a journey of some 20 minutes to the hospital. The Claimant was, at the relevant times, being paid at the rate of £3.90 and therefore, taking into account three appointments lasting three hours in duration, that led to an order that the First Respondent should pay the Claimant the gross sum of £35.10 in respect of her claim under Section 57 ERA.
86. Turning to the discrimination claim, the only financial loss incurred by the Claimant, arising from the acts we found to have been discriminatory, was the loss of salary for the ante-natal appointments, which we have covered under the Section 57 claim. What remained was for us to consider the award for injury to feelings.
87. The Claimant in her Schedule of Loss contended that injury to feelings should be assessed in the middle *Vento* band. We noted however that her

comments in her Schedule of Loss, about the impact of the incidents on her, focused very much on her dismissal, and made no reference to the impact of the failure to allow her to take paid leave for the ante-natal appointments.

88. We also noted that the Claimant appeared willing to look to arrange her ante-natal appointments for the convenience of the First Respondent and therefore did not consider that she had been materially affected by that.
89. As we have also noted, we did not consider that Ms Williams was in any sense malicious in indicating that the Claimant should take these appointments as a “not required” day or as annual leave, and we therefore concluded that the injury to feelings should fall within the lower *Vento* band.
90. At the relevant time, that band was from £900 to £8,800. Assessing the impact of the identified failures on the Claimant as best we could, we considered that the award of injury to feelings would be very much at the lower end of this lower band. We ultimately concluded that an award of £1,000.00, to be paid to the Claimant by the First Respondent, would be appropriate.

Employment Judge S Jenkins
Dated: 21 January 2022

JUDGMENT SENT TO THE PARTIES ON 25 January 2022

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche