



EMPLOYMENT TRIBUNALS

Claimants: Miss G Serban
Miss R Khajeh

Respondent: Emax Trading Limited

HELD AT: Manchester

ON: 10-13 January 2022
and 14 January 2022
(in chambers)

BEFORE: Employment Judge Slater
Miss M T Dowling (by CVP)
Mr I Taylor (by CVP)

REPRESENTATION:

Claimants: Mr P O'Callaghan, counsel
Respondent: Mr Wilson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. Miss Serban's complaint of automatic unfair dismissal (pregnancy) is not well founded.
2. Miss Serban's complaint of unfavourable treatment because of pregnancy about failing to carry out a risk assessment and that Mr Abdelmoeti "fobbed her off" when she raised it is well founded.
3. Miss Serban's other complaints of unfavourable treatment because of pregnancy are not well founded.

4. Miss Serban's complaint of direct sex discrimination in relation to male employees talking about women sexually and/or in a derogatory manner when Miss Serban was bending over to take photos of items to be sold, is well founded.
5. Miss Serban's other complaints of direct sex discrimination are not well founded.
6. Miss Khajeh's complaint of unfair dismissal is well founded.
7. The Tribunal will make no reduction in compensation for contributory conduct or under the "Polkey" principle.
8. Miss Khajeh's complaint of direct sex discrimination in relation to male employees talking about women sexually and/or in a derogatory manner when Miss Khajeh was bending over to take photos of items to be sold, is well founded.
9. Miss Khajeh's other complaints of direct sex discrimination are not well founded.
10. Miss Khajeh's complaints of direct race discrimination are not well founded.
11. The Tribunal will decide at the remedy hearing what increase, if any, should be made to compensation for the respondent's failure to comply with the ACAS Code of Practice on Discipline and Grievance.
12. Both claimants' complaints of failure to provide a written statement of employment particulars are well founded and the Tribunal will decide at the remedy hearing on whether to award an additional 2 or 4 weeks' pay to each claimant in respect of this complaint.
13. Any other complaints brought by Miss Khajeh are dismissed on withdrawal by the claimant.
14. Remedy for the successful complaints will be determined at a remedy hearing on 29 April 2022.

REASONS

Claims and Issues

1. Both claimants claimed direct sex discrimination. Miss Serban also claimed unfavourable treatment because of pregnancy and/or because of illness suffered because of her pregnancy and automatic unfair dismissal based on pregnancy. Miss Khajeh also claimed direct race discrimination and "ordinary" unfair dismissal.

2. If successful in any of their claims, the claimants also sought an additional award under section 38 of the Employment Act 2002 because of failure to provide them with a written statement of particulars. Mr Wilson accepted, on behalf of the respondent, that written particulars had not been provided.

3. The claimants had particularised their claims with the assistance of counsel (not Mr O'Callaghan who represented them at this hearing). A list of issues had been agreed between the parties. There were a few amendments made to this list in discussion with the parties at the start of the hearing. The amended list is annexed to these reasons. We have also incorporated the relevant parts of the particulars of claim which set out the matters complained of as being unlawful discrimination. Although the particulars of claim in relation to Miss Khajeh might suggest that she was claiming victimisation, this was not pleaded and no such complaint was included in the agreed list of issues. No application was made to amend the claim to include a complaint of victimisation. We have, therefore, considered the complaint about Miss Khajeh's dismissal as a complaint of direct sex and/or race discrimination and "ordinary" unfair dismissal, as put by Miss Khajeh with assistance from her legal advisers.

4. There was reference in Miss Khajeh's claim form to complaints of breach of contract in relation to failure to give notice, a claim of entitlement to a statutory redundancy payment and a complaint about holiday pay. However, these complaints were not included in the agreed list of issues, so the Tribunal understands that they have been withdrawn and, therefore, dismisses them.

Summary

5. The claimants both worked in office administration for the respondent, which is a provider of white goods. Mr Abdelmoeti is the sole director and owner of the company. Mr Abdelmoeti dismissed Miss Khajeh summarily on 4 April 2019. He dismissed Miss Serban summarily on 12 April 2019. Miss Serban was pregnant at the time she was dismissed. Miss Serban had not completed two years' service when dismissed. There is a dispute as to whether Miss Khajeh had completed two years' service when dismissed. Both claimants complain of various matters prior to their dismissal, including alleged discriminatory behaviour by Mr Abdelmoeti and male employees towards them. Miss Serban alleges that Mr Abdelmoeti's attitude to her changed when she was pregnant and that she was dismissed for a reason related to pregnancy. Miss Khajeh argues there was no fair reason for her dismissal and that it was sex and race discrimination, because of raising issues in a meeting with Mr Abdelmoeti and related to her complaint of discrimination. Mr Abdelmoeti argues that the claimants were dismissed because of their behaviour.

Evidence

6. We heard evidence for the claimants from the claimants themselves and Mr Zahir Aziz, the partner of Miss Khajeh. We heard evidence for the respondent from Mr

Abdelmoeti, Mr Daniel Nitu, an employee of the respondent, and Mr David Light, the owner of a business in the neighbouring unit to the respondent. There were written witness statements for all these witnesses. There was also a written witness statement for a further witness for the respondent, Ms Yasmin Bakir, an employee of the respondent. Ms Bakir attended the hearing, prepared to give evidence. However, Mr O'Callaghan said that he did not wish to cross examine Ms Bakir so she was not required to give evidence. We have accepted the evidence given in Ms Bakir's statement, with the exception that there appears to be an error in the start date of employment given by her.

7. All the witness statements were provided to us in English, initially with no translations. Before Mr Abdelmoeti gave his evidence, the respondent provided us with a translation of his statement in English into Arabic, made on the evening of 11 January 2022, together with a witness statement from the translator confirming that the Arabic translation was a true and accurate translation of the original English statement and that he had read the contents of the Arabic witness statement and statement of truth to Mr Abdelmoeti and that Mr Abdelmoeti had confirmed that he understood the contents of the Arabic witness statement and approved them, in the translator's presence, as true and accurate English and Arabic statements. We did not hear how Mr Abdelmoeti's original statement in English came to be produced.

8. Mr Abdelmoeti's first language is Arabic and he had the assistance of an Arabic interpreter throughout the proceedings. It was apparent from the evidence, and accepted by Mr Abdelmoeti, that he had difficulties with written and spoken English. Given the difficulties with language, we have not drawn any conclusions as to Mr Abdelmoeti's credibility as a witness or any inferences of fact from the use of particular words or phrases.

9. Mr Nitu's first language is Romanian. His statement was provided in English. He told us that he had written out what he wanted to say in Romanian, put it through Google translate, and given that to the respondent's solicitors. The respondent's solicitors had then produced the statement in English. There was no certified translation of Mr Nitu's witness statement. It became apparent to the tribunal as soon as Mr Nitu began to give evidence, that it was unlikely that Mr Nitu was going to be able to give his best evidence without a Romanian interpreter. No Romanian interpreter had been requested. Both counsel agreed that Mr Nitu could not continue to give evidence without an interpreter. We, therefore, adjourned so that we could try to obtain a Romanian interpreter. We were able to obtain a Romanian interpreter for the afternoon of 12 January 2022 and Mr Nitu gave his evidence, using the services of the interpreter, on that afternoon. The judge read aloud Mr Nitu's witness statement in English and the interpreter interpreted it into Romanian. Mr Nitu confirmed the truth of the statement.

10. English is not the first language of the claimants. Their first language is Romanian. They did not request an interpreter. The tribunal had no concerns,

hearing their evidence, that they were not able to give written and oral evidence accurately in English.

11. We learnt, in the course of Mr Aziz's evidence, that he had been a solicitor but had been struck off the roll for dishonesty. He was the source of the money which Miss Khajeh lent to Mr Abdelmoeti. Mr Aziz said not all the money had been paid back. Mr Abdelmoeti disputed this. In these circumstances, we felt unable to put much weight on the evidence given by Mr Aziz.

12. We had a bundle of documents provided in physical and electronic form, of 464 pages. During the course of the hearing, the respondent provided two further pages of documents, being WhatsApp messages between Miss Khajeh and Mr Abdelmoeti on 16 June 2017 and 6 July 2017, which were inserted at pages 465 and 466 of the bundle. The respondent also brought to the hearing some bank statements for other companies of which Mr Abdelmoeti is a director. These were shown to Mr O'Callaghan. Neither party asked for these documents to be included in the bundle provided to the tribunal.

13. The documents included a transcript of a recording of much, but not all, of the meeting between the claimants and Mr Abdelmoeti and another employee on 22 March 2019. The recording had been made by Miss Serban without Mr Abdelmoeti knowing. Mr Wilson played us a short section of the recording whilst cross-examining one of the claimants. Mr O'Callaghan played us a short section of the recording whilst cross-examining Mr Abdelmoeti. Mr Abdelmoeti asserted in cross-examination that the transcript was not a complete transcript of the recording and that important things had been omitted. However, the transcript and recording had been provided to the respondent during disclosure and the respondent's legal representatives had not disputed that the transcript was an accurate record of the recording. It was not put to the claimants in cross-examination that not all the recording had been transcribed. We find, on a balance of probabilities, that the transcript is an accurate transcript of the whole recording. However, it is apparent that the recording did not start right at the beginning of the meeting so there is part of the meeting which was not recorded and, therefore, there is no transcript of this part of the meeting.

14. There was very little documentation provided by the respondent in the bundle. Mr Abdelmoeti, when being cross-examined, frequently said that he could provide documents which would prove various matters in issue. However, if these documents exist, they were not disclosed by the respondent and, therefore, were not put in evidence before the tribunal. He also said he could bring the coat which he said Miss Khajeh had purchased on his behalf, but he did not bring this to the hearing. The respondent has been represented throughout these proceedings by a firm of solicitors experienced in employment law; the Tribunal would expect these solicitors to have explained to the respondent their obligations to disclose relevant documents. The Case Management orders included orders about disclosure of relevant documents.

Facts

15. The respondent company is a provider of white goods. Mr Abdelmoeti is its sole director and owner of at least 75% of the shares. Mr Abdelmoeti is also a director of other companies. The respondent company was incorporated on 25 January 2016.

16. Both claimants worked for the respondent in the office, doing administrative roles. They had no job descriptions and their tasks appeared to vary over time.

17. Miss Khajeh identifies herself as White European.

18. Miss Khajeh started work before Miss Serban.

19. Miss Khajeh started work, on her account, on 1 April 2017. On Mr Abdelmoeti's account, she began on 1 May 2017. Miss Khajeh came to work for the respondent at the suggestion of an existing employee, Ina, who is the ex-wife of Miss Khajeh's cousin.

20. Miss Serban is a friend of Miss Khajeh's, and shared a house with her for some time, and was introduced to the respondent by Miss Khajeh. There is no dispute that Miss Serban began her employment with the respondent on 1 November 2017.

21. On 28 April 2017, Miss Khajeh sent a message to Mr Abdelmoeti with her bank details. This was the first message between them. On the same day, Mr Abdelmoeti transferred to the claimant the sum of £210 from his personal account. Mr Abdelmoeti says this was for the claimant to buy a coat like the one she had been wearing to the interview, which he had admired, from Romania. Mr Abdelmoeti says that the claimant was interviewed on this day and it was the first day he met Miss Khajeh. In his witness statement for the preliminary hearing on 16 November 2020, Mr Abdelmoeti said that he had admired an accessory. The claimant says that she was interviewed on 1 April 2017 and began work on that day. She says that Mr Abdelmoeti did not admire what she was wearing or ask her to buy an item on his behalf. We have heard no evidence that Miss Khajeh had any plans in the near future to go to Romania or for anyone to visit her from Romania. Mr Abdelmoeti says the coat was brought from Romania by a relative of Miss Khajeh some months later. The claimant says that the payment of £210 was to make up a shortfall in wages, which had otherwise been paid in cash. Mr Abdelmoeti denies that he ever paid Miss Khajeh in cash and, in his witness statement for the preliminary hearing on 16 November 2020, denied that anybody had been paid in cash at any time. At this hearing, Mr Abdelmoeti said he had recently paid several employees in cash for some period.

22. Miss Khajeh's bank records show that she was not paid through the payroll until the end of June 2017. As noted above, she was paid £210 from Mr Abdelmoeti's personal account on 28th of April 2017. She was paid a further £100 from Mr Abdelmoeti's personal account on 20 May 2017. Miss Khajeh's bank records show

no other payment to Miss Khajeh from Mr Abdelmoeti in May 2017 and no payment to her from the respondent in May 2017. The respondent did not produce its bank statements prior to 4 July 2017.

23. It is agreed that Miss Khajeh was initially working at least 20 hours per week. There is a dispute as to whether she did additional hours on Saturdays, other than to make her hours up to 20 hours per week. She was initially paid at national minimum wage rate, which was £7.50 per hour at the time. A weekly wage for 20 hours per week at £7.50 per hour would be £150 gross. At that rate of pay, unless the individual had other taxable income, there would be little, if any, deduction to be made for tax and national insurance contributions.

24. The respondent's bank records do not show payments through payroll for as many employees as Mr Abdelmoeti has said were employed by the respondent at the relevant time.

25. On 23 June 2017, Ina Todea emailed the respondent's accountant, giving them details of Miss Khajeh, asking for her to be put on the payroll. She asked that Miss Khajeh be put on the payroll, backdated to 1 May 2017, writing that this was because Miss Khajeh started on 1 May 2017. We did not find this document to be conclusive evidence as to Miss Khajeh's start date. The use of 1 May 2017 in this document could have a number of explanations e.g. that Mr Abdelmoeti had made a mistake in recollecting the start date, or because backdating to 1 April 2017 would mean going back into an earlier tax year which might be more complicated. We find, for the reasons which follow, that this evidence as to Miss Khajeh's start date is outweighed by evidence which points to the start date being 1 April 2017.

26. We found Mr Abdelmoeti's evidence about transferring money to Miss Khajeh to buy a coat which she had admired, to be implausible. It appears to us to be very unlikely that, having only just met Miss Khajeh, Mr Abdelmoeti would transfer money to her, particularly as there was no immediate prospect of Miss Khajeh buying a coat on his behalf in Romania. Even on Mr Abdelmoeti's account, Miss Khajeh was employed from, at the latest, 1 May 2017. The only bank transfer to her in May 2017 was £100 on 20 May, from Mr Abdelmoeti's personal account. This would not have covered her wages for the month of May. We find it more likely than not that the balance in wages was paid in cash. It appears to us, from the respondent's bank records, where the bank transfers do not match the number of employees, that the respondent has a practice of paying some employees in cash. We reject Mr Abdelmoeti's evidence that the difference between the bank transfers and wages due to Miss Khajeh was because he gave her goods in lieu of pay. This evidence is not contained in Mr Abdelmoeti's witness statement and it was not put to Miss Khajeh in cross-examination. In cross examination it was put to Miss Khajeh that Mr Abdelmoeti provided her with free appliances (which she denied – saying she paid for a fridge and washing machine by working extra on Saturdays) but it was not put to her that she was not paid her normal wages because pay was deducted for goods she received. There are no payslips to show that deductions were made for the

provision of goods. We consider it more likely than not that the evidence that Miss Khajeh was given goods in lieu of pay was created by Mr Abdelmoeti whilst giving evidence to try to explain the discrepancy between payments shown to have been made by bank transfer and the minimum amount which Miss Khajeh would have been paid. We consider it unlikely that Miss Khajeh would have started work on a bank holiday. Mr Abdelmoeti gave evidence that employees did not normally work on bank holidays. 1 May 2017 was a bank holiday. For these reasons, we prefer the evidence of Miss Khajeh about her start date and way she was paid and find that she started work on 1 April 2017 and was paid cash initially.

27. We have not relied on the evidence of Mr Aziz or the evidence of Miss Serban in making our finding of fact about when Miss Khajeh started work. We explained previously the reasons why we do not feel able to place much weight on the evidence given by Mr Aziz. We think it unlikely that Miss Serban would be able to reliably recall whether Miss Khajeh started work in early April or May 2017.

28. It is agreed that the claimants were not provided with written statements of employment particulars.

29. At work, the claimants communicated with Mr Abdelmoeti in English. It is apparent from the transcript of a recording of a meeting on 22 March 2019 that there were sometimes difficulties in understanding between the claimants and Mr Abdelmoeti.

30. On the basis of WhatsApp messages we have seen, we find that there was a good relationship between Miss Khajeh and Mr Abdelmoeti until at least the end of 2018. Miss Khajeh would often collect Mr Abdelmoeti's children from school and they would play with her children. Miss Khajeh invited Mr Abdelmoeti to celebrate her birthday with her in August 2018.

31. Mr Abdelmoeti paid for a holiday combined with a business trip to Brussels for both claimants at the end of September 2018 and for a holiday in Corfu in July 2018.

32. Miss Khajeh asked, and Mr Abdelmoeti agreed, that Miss Khajeh could use Mr Abdelmoeti's address as her own on an application for a school place for one of her children.

33. The claimants claim that female staff, including the claimants, cleaned the toilets and kitchen and men did not have to undertake this menial work. The claimants did not give evidence that they were told they had to do this. However, we accept that they felt compelled, by the dirty state of the toilets and kitchen, to clean them so that they could use them and that there may have been an unspoken expectation that the women in the office would carry out the cleaning. We accept that the claimants had genuine health concerns relating to use of dirty facilities. We reject Mr Abdelmoeti's evidence that Miss Serban carried out cleaning work, at her request, for extra pay. Miss Serban disputes this. There is no documentary evidence of any additional

payments, which we would expect to see, if this were true. We also reject the late addition to the respondent's evidence, in oral evidence from Mr Abdelmoeti, that there was a cleaning rota, which included him doing cleaning. If this had been the case, we would have expected to see this evidence in his witness statement and this put to the claimants in cross examination. There may also have been documentary evidence of the rota. We reject the respondent's evidence, from Mr Abdelmoeti and Mr Nitu, that the respondent employed cleaners prior to the meeting on 22 March 2019. There was no mention of cleaners being employed in the discussion about cleaning at the meeting on 22 March 2019 and Miss Serban spoke, in that meeting, about having spent two hours cleaning the kitchen. If the respondent had employed a company to clean, there would have been documentary evidence to this effect; none was produced. The Grounds of Resistance assert that cleaners were hired when Mr Abdelmoeti was informed that Miss Serban was pregnant. We find this was not the case; Mr Abdelmoeti knew of Miss Serban's pregnancy by the time of the meeting of 22 March (and we have found that he knew in January 2019) but there was no mention of cleaners in the meeting.

34. Miss Khajeh alleges that Mr Abdelmoeti called her "rubbish" and that this was an act of direct sex and race discrimination. Miss Khajeh's evidence about this was that he had said "rubbish". She has not satisfied us that Mr Abdelmoeti called her "rubbish" as opposed to describing something she had said or done as "rubbish". She gave evidence that everyone was called rubbish. We find, based on Miss Khajeh's evidence, that Mr Abdelmoeti frequently used the term "rubbish" and that this was not directed at things done by women, but not men, or people of Miss Khajeh's race, but not people of other races.

35. The claimants both assert that they were required to carry large amounts of cash to deposit at the bank or post office. However, only Miss Khajeh brings a complaint that requiring her to do so was direct sex discrimination.

36. We find that both claimants carried substantial amounts of cash to deposit, usually doing this on their own. However, we are not satisfied, on the evidence we have seen, that either claimant carried up to £50,000 or £60,000 on any one occasion to deposit in one or a number of different accounts.

37. Miss Serban stopped taking cash to be deposited in February or March 2019.

38. The only man we heard of working in the office, other than Mr Abdelmoeti himself, and Mr Nitu, who had duties in the office and warehouse, was Mr Lamin who dealt with IT matters. We heard no evidence that there was any man working in a comparable role to Miss Khajeh in the office. We are not satisfied that, at the time, either claimant was unhappy about carrying out the task of depositing cash, although carrying a substantial amount of cash bears with it a risk of assault for any employee, male or female, particularly if they carry out the task alone. We consider this may be a matter which Miss Khajeh has reflected on later and, with the benefit of hindsight, is unhappy about having done this.

39. Mr Abdelmoeti gave oral evidence, not in his witness statement, that he also made cash deposits. We do not find it necessary to make a finding of fact as to whether this was the case.

40. The claimants allege that, when they and other women, who were white European, made drinks, comments were made “put your finger in sweet” or “your finger is sweet enough” making a gesture with the middle finger, which the claimants interpreted as sexual. The claimants clarified in evidence that the allegation related to comments made by a male customer. We find that the customer did make comments of the nature alleged. Miss Khajeh’s witness statement refers to these comments but does not state that the comments were made specifically to her. The comments were referred to at the meeting on 22 March 2017. Mr Abdelmoeti spoke about the customer saying this to Ana (another employee), referring to this as joking, and Miss Serban said it had happened to her. There was no mention of a gesture with the middle finger. The claimants have not satisfied us, on a balance of probabilities, that a gesture was made with the middle finger in a way which would be generally understood as being of a sexual nature. We find that the comments were probably made in a clumsy attempt to be charming, complimenting the recipient on their beauty. Whatever the intention of the customer, we accept that the claimants found the comments offensive. Miss Serban made this clear in the meeting, saying that she did not accept this kind of joke.

41. The claimants allege that men would talk about them and other women, who were white Europeans, sexually and/or in a derogatory manner and that they would not talk about men in the same way. The claimants clarified that this complaint relates to male employees, who worked in the warehouse, giggling and staring at them when they were taking photos of goods, which involved them bending over. We find that this conduct occurred. During the meeting on 22 March 2019, this is referred to as happening to Ana and Miss Serban. Although, at the meeting, Miss Khajeh did not refer to this happening to her, we accept her evidence that she also took photos as times and experienced this conduct. We find that Miss Khajeh experienced this conduct over a period ending some time around March 2019. Miss Serban experienced it until she stopped taking pictures some time after she announced her pregnancy, probably no later than she visited an Accident and Emergency department for a pregnancy related reason in February 2019.

42. Whilst the claimants could not understand the words which were being said in Arabic, we accept that it was clear from the staring and giggling that the male employees were watching and commenting on the women as they were bending over to take photos and find it more likely than not that the comments were of a nature which related to the claimants’ sex. We find that they would not have acted in the same way had it been a man bending over to take photos. Mr Nitu’s evidence that he did not observe this does not cause us to disbelieve the evidence of the claimants about this conduct. Mr Nitu would not necessarily notice this happening, since it did not relate to him, or he may not have been there when it happened. He

would also have reason to support Mr Abdelmoeti, since Mr Abdelmoeti has been of considerable assistance to him since Mr Nitu came to work in the UK.

43. There is no evidence that links this conduct of staring and giggling to the race of the claimants.

44. A male employee had slapped another female employee, Ana, on the bottom. This employee was not dismissed at the time, although he was dismissed later.

45. Although the claimants spoke in the meeting on 22 March 2019 about the staring and commenting when women were taking photos, we heard no evidence to suggest that Mr Abdelmoeti carried out any form of investigation after the meeting about these allegations or took any action as a result of the allegations.

46. We find that Miss Serban informed staff in the office, including Mr Abdelmoeti, that she was pregnant in January 2019. Mr Nitu's evidence confirmed this. Mr Abdelmoeti asserted that he had not known of the pregnancy until March 2019. We prefer the evidence of Miss Serban and Mr Nitu to that of Mr Abdelmoeti on this matter.

47. Miss Serban makes a number of allegations of unfavourable treatment by Mr Abdelmoeti which she alleges was because of her pregnancy and/or because of illness suffered as a result of pregnancy.

48. Miss Serban alleges that Mr Abdelmoeti exhibited a negative reaction to her refusal to attend the bank and her inability to drive, in the period between end January and end of March 2019. She alleges that when she was ill because of her pregnancy, his attitude to her altered, creating a negative environment in which to work, from February to the date of dismissal. She alleges that Mr Abdelmoeti had a negative reaction when she was unable to unload/load lorries from end January to the date of dismissal. Miss Serban has not specified what Mr Abdelmoeti did or said, which demonstrated such a negative attitude. The most specific evidence given by Miss Serban in relation to these allegations in her witness statement was that Mr Abdelmoeti more or less ignored her when she refused to take cash to the bank and was unable to drive, because of her pregnancy. However, this does not appear consistent with the calling of the meeting for 22 March 2019 and the interactions recorded in this meeting. The way Mr Abdelmoeti responds to Miss Serban in that meeting does not appear any different to the way he responds to Miss Khajeh, who was not pregnant. We find, based on Miss Serban's oral evidence in cross examination, that she never loaded or unloaded lorries; she stood outside while lorries were being loaded by others, putting on tickets and keeping written records. Miss Serban has failed to satisfy us, on a balance of probabilities, that Mr Abdelmoeti behaved worse to her after he was aware of her pregnancy than before.

49. We find that the respondent never carried out a risk assessment. We find that Miss Serban raised this orally with Mr Abdelmoeti before the meeting on 22 March

2019, but Mr Abdelmoeti “fobbed her off”. Because of this reaction, Miss Serban took advice from ACAS and wrote the letter dated 27 March 2019 to which we refer below.

50. The respondent engages Mr Bond on a consultancy basis to deal with health and safety matters. There is no evidence that Mr Bond was asked to carry out a risk assessment because of Miss Serban’s pregnancy.

51. Miss Serban alleges that Mr Abdelmoeti told her to “think”, she suspected in relation to the risk assessment. There is no evidence of the context in which this alleged comment arose. If Mr Abdelmoeti did say this, we are unable to make any finding as to what was meant by this comment, given the lack of surrounding information.

52. Miss Serban alleges, in the particulars of claim, that, after she announced her pregnancy, Mr Abdelmoeti told her that she should name her child “Ahmed” and said “otherwise what was the point of working there.” Miss Serban gave no evidence in support of this allegation in her witness statement. In oral evidence she said that, when she announced her pregnancy, Mr Abdelmoeti said that hopefully it would be a boy and she could call him Ahmed. Miss Serban has not satisfied us that Mr Abdelmoeti said what was alleged in the particulars of claim. If some comment was made, we consider it more likely to be as described by Miss Serban in oral evidence and to be an attempt at a light hearted comment, rather than something with a more sinister connotation.

53. Miss Serban alleges that Mr Abdelmoeti told her, after the end of January, and again at the meeting on 22 March, that she had to work alone. Miss Serban’s witness statement does not deal with this, but alleges that, after the meeting on 22 March, she was told to work alone. From the transcript of the meeting on 22 March 2019, it appears that a reference to Miss Serban working alone, is to avoid her dealing with customers. We accept Mr Abdelmoeti’s oral evidence, which is consistent with what is in the transcript, that Mr Abdelmoeti meant that she should not deal directly with customers because he felt she was being rude to them. We reject Miss Serban’s oral evidence that she never shouts at anyone. This evidence is inconsistent with what she said in the meeting on 22 March (p.193): “This is the way I am, I always explode, I scream at my parents, I scream, because when I think I am right and nobody’s....” We accept Mr Light’s evidence that he observed Miss Serban raising her voice to a customer and saying “OK, leave if you don’t like my attitude” and that he mentioned this to Mr Abdelmoeti. We find that Mr Abdelmoeti told Miss Serban to work alone, in the sense of not dealing directly with customers, because he thought she was being rude to customers.

54. We do not accept Mr Nitu’s evidence about a conversation with Miss Serban in which he says she said she thought she would leave her job and go back to Romania to raise her child, and about an overheard conversation between the claimants in which he alleges they were talking about forcing Mr Abdelmoeti to close

his business and claiming benefits against him. This was not contained in Mr Nitu's witness statement. We do not consider it plausible that the claimants would be speaking in this way. They would have had no reason to believe, at that stage, that Mr Abdelmoeti was going to dismiss them. Miss Serban would have had to provoke Mr Abdelmoeti into dismissing her in order to be able to make a substantial claim against the respondent.

55. The claimants and another employee met with Mr Abdelmoeti on 22 March 2019. Mr Abdelmoeti initiated the meeting. This is the meeting which was, apart from a section at the beginning of the meeting, covertly recorded by Miss Serban. Since there was no recording at the start of the meeting, we do not have a record of why Mr Abdelmoeti said he had called the meeting. However, it appears from the discussion that it was an opportunity for the claimants, the other employee and Mr Abdelmoeti to discuss problems which had arisen. These included an ongoing issue about cleaning of toilets and Mr Abdelmoeti's concern that Miss Serban was being rude to customers. In oral evidence, Mr Abdelmoeti said that he arranged the meeting because his aim was to sort out any problems; he was trying to sort out and understand their problems.

56. Mr Abdelmoeti used the word "conspiracy" in describing the claimants' behaviour. We consider that it may be that Mr Abdelmoeti was attempting to describe a feeling that, in the meeting, the claimants were "ganging up" on him. From Mr Abdelmoeti's evidence, we find that he felt the claimants were not according him sufficient respect. Having read the transcript of the meeting and heard parts of the recording, we find that, in the meeting, the claimants were vocal in challenging Mr Abdelmoeti about various things. The matters they were raising were legitimate complaints e.g. about the cleaning.

57. On the basis of evidence in Mr Abdelmoeti's witness statement, we find that Mr Abdelmoeti decided to dismiss Miss Khajeh during or shortly following that meeting. He states that he knew, in that meeting, that the working relationship was beyond repair and that he had to dismiss her. He did not feel respected by her. We consider that this evidence is more consistent with events than the explanation for Miss Khajeh's dismissal given in the Grounds of Resistance and dismissal letter. The Grounds of Resistance assert that Miss Khajeh was dismissed because her attitude to work was poor and her work rate was extremely slow and that she was dismissed for poor performance and refusal to follow reasonable instructions. There has been no evidence of poor performance and slow work rate. The only evidence about refusal to follow reasonable instructions is Mr Abdelmoeti's evidence that she would often challenge his instructions on dispatches and ask why she had to do certain administration jobs he asked her to do. Miss Khajeh disputed this, saying that it was part of her job to bring up things which went wrong. The messages we have seen, which passed between Mr Abdelmoeti and Miss Khajeh, suggest that Miss Khajeh was a highly valued employee, who enjoyed a close working relationship with Mr Abdelmoeti until shortly before her dismissal. We find that the turning point was the

meeting on 22 March 2019 and Mr Abdelmoeti forming the view that he was not being treated with respect by Miss Khajeh.

58. Mr Abdelmoeti consulted with solicitors soon after the meeting on 22 March. We find that the gap between the meeting and the dismissal of Miss Khajeh was because of taking this advice and getting a letter of dismissal drafted. Mr Abdelmoeti said he went to see solicitors to consult about what he needed to do to accommodate Miss Serban's pregnancy. We consider it more likely than not that he consulted solicitors about dismissing both claimants and not about accommodating Miss Serban's pregnancy. He had known about Miss Serban's pregnancy for weeks before the meeting on 22 March so, if he had been going to take advice about accommodating this, we would have expected him to do so at an earlier stage. Also, if his intention was to accommodate her pregnancy, rather than dismiss her, we would have expected him to arrange a risk assessment shortly after the meeting or, at the least, reply to her letter of 17 March 2019, which we deal with below. He did neither. If he took advice about her pregnancy, we consider it more likely that it was about any difficulties the pregnancy might cause in being able to dismiss Miss Serban.

59. We consider it more likely than not that Mr Abdelmoeti decided to dismiss both claimants because of the way the claimants addressed him in that meeting, which made him feel they were not respecting him. We deal below with the reasons the dismissal of Miss Serban did not take place at the same time as Miss Khajeh was dismissed.

60. On 27 March 2019, Miss Serban wrote to the respondent, notifying them in writing of her pregnancy and asking that they assess any health and safety risks that arise during her pregnancy or that may affect her baby and take reasonable action to remove any risks. We accept that the proof of posting dated 28 March 2019 relates to this letter and that it was sent on that day. We accept the evidence of Miss Serban that she checked online, on the Royal Mail's tracker service, and saw that the letter had been signed for by Mr Abdelmoeti. We find that Miss Serban wrote this letter on the advice of ACAS to put her notification and request in writing, after oral requests for a risk assessment had not resulted in any action. Mr Abdelmoeti's witness statement asserted that he did not receive the letter. The Grounds of Resistance assert that the letter was found on Miss Serban's personnel file after she had left. In cross examination, after an adjournment at the judge's suggestion for Mr Wilson to take instructions from Mr Abdelmoeti as to what the respondent was saying about the letter of 27 March, it was put to Miss Serban that she had inserted the letter into her personnel file. She denied this, saying she was not at work when the letter was received. Mr Abdelmoeti gave no evidence about the finding of the letter on the personnel file. We find that the letter was received by the respondent by post, soon after it was posted. The respondent did not reply to the letter and no risk assessment was carried out prior to Miss Serban's dismissal.

61. Mr Abdelmoeti gave Miss Khajeh a letter of dismissal with immediate effect on 4 April 2019. He wrote:

“Unfortunately, because we have been unhappy with your standard of performance. We have regretfully decided to terminate your role with immediate effect. You will be paid a one-week’s pay in lieu-of-notice plus any accrued holiday pay owed to you.

“We would like to thank you for your contribution to the company and wish you all the best in your future endeavours.”

62. Neither claimant had been given any warnings about their performance. The holiday to Corfu in July 2018 was because Mr Abdelmoeti was very happy with the claimants’ work at that point.

63. After Miss Khajeh was dismissed, Mr Abdelmoeti offered Miss Serban some extra duties, previously done by Miss Khajeh. Miss Serban said she would think about it.

64. Ms Bakir was being paid and working from home from April 2019. Although Ms Bakir’s witness statement said she started work in June 2019, the respondent’s bank records show that she was paid from April and Mr Abdelmoeti gave evidence that she initially worked from home.

65. Miss Serban was on holiday from 5-11 April 2019. She was dismissed on the day of her return to work, 12 April 2019. She was upset, on returning to work, to find Mr Suheil sitting at her desk. Mr Suheil had started work on that day.

66. Whilst there are differences in the accounts given by Miss Serban and Mr Abdelmoeti of their conversation on her return to work, there is common ground that there was a conversation about Miss Serban doing different duties. Miss Serban says the conversation was about taking on Miss Khajeh’s duties but Miss Serban tried to explain she could not do these as well as her own. Mr Abdelmoeti says she was offered alternative duties because Mr Suheil was to do the duties previously done by Miss Serban. It is possible, given the language difficulties, that there was not a common understanding as to what was being offered, and why. We find that Mr Abdelmoeti understood that Miss Serban was refusing the duties he was suggesting. He then called one of his employees to write and hand Miss Serban a letter of dismissal. The letter dismissed Miss Serban with immediate effect on 12 April 2019. The wording of the letter was identical to the dismissal letter given to Miss Khajeh.

67. There are inconsistencies in the respondent’s account of when Mr Abdelmoeti had decided to dismiss Miss Serban. The Grounds of Resistance (paragraph 11) assert that the respondent had decided to dismiss Miss Serban long before Miss Serban told Mr Abdelmoeti she was pregnant. There was a dispute as to when Mr Abdelmoeti found out Miss Serban was pregnant. For the reasons given above, we

found that this was in January 2019. Even if this had been March 2019, it was before the meeting on 22 March 2019 (since pregnancy is referred to at that meeting as a known fact). Mr Abdelmoeti's witness statement asserts that he had decided, in or around February 2019, that he needed a fully qualified accountant (which Miss Serban was not) to deal with the financial requirements of the business, previously dealt with by Miss Serban. However, in paragraph 35 of his statement, Mr Abdelmoeti writes of offering Miss Serban an alternative role. The evidence in this paragraph is inconsistent as to whether Mr Abdelmoeti would have continued to employ her, had she accepted an alternative role, or whether she would have been dismissed because of poor attitude. Mr Abdelmoeti's witness statement states, at paragraph 36, that he did not decide to dismiss her until 12 April. At paragraph 37 he states that he dismissed Miss Serban "primarily because I required someone with accountancy qualifications to handle the finances of my business, her reaction to the appointment of Mr Suheil, her poor attitude and her consistent insubordination towards me." These reasons are not those given in the letter of dismissal.

68. We find that, from the meeting on 22 March 2019, Mr Abdelmoeti, felt weakened and undermined by the claimants and decided that they had to go. Miss Khajeh was dismissed as soon as Mr Abdelmoeti had taken advice about this and had a letter drafted. There are a number of possible explanations as to why Miss Serban was not dismissed at the same time. It might be that Mr Abdelmoeti received advice that persuaded him it would be better not to dismiss her when she was pregnant. It might be that he needed her in post until Mr Suheil had started and/or Ms Bakir began employment. We cannot make a positive finding of fact as to the reason that Miss Serban was dismissed at a later date than Miss Khajeh.

69. Miss Khajeh appealed against her dismissal by letter dated 23 April 2019. Miss Serban appealed against her dismissal by letter dated 3 June 2019. The respondent received the letters but did not reply to them or arrange any form of appeal hearing.

70. Ms Bakir never experienced any problem with the respondent relating to her pregnancy and returned to work with the respondent after her maternity leave. We note that her pregnancy and maternity leave were some time after the claimants were dismissed and had presented their claims to this Tribunal. The respondent has also employed other women through their pregnancies who have then returned to work for the respondent.

71. Miss Serban notified ACAS of a potential claim on 13 June 2019 and the early conciliation certificate was issued on 13 July 2019. Miss Serban presented her claim to the Tribunal on 7 August 2019.

72. Miss Khajeh notified ACAS of a potential claim on 1 July 2019 and the early conciliation certificate was issued on 1 August 2019. Miss Khajeh presented her claim to the Tribunal on 19 August 2019.

Submissions

73. Both representatives made oral submissions.

74. Mr Wilson, for the respondent, made the following submissions. He referred to Mr Abdelmoeti using the word “conspiracy” but preferred the word opportunistic, suggesting that most of the allegations were that. He submitted that a lack of specific particulars was the hallmark of an opportunistic claim.

75. Mr Wilson conceded, on behalf of the respondent, that, if Ms Qadri had sufficient service to claim unfair dismissal, the dismissal would be unfair. There was little procedure. Unfair conduct did not mean there was discrimination.

76. In relation to Ms Khajeh’s start date, Mr Wilson submitted that the email from Ina proved that the start date was first of May 2017; Ina had no reason to lie.

77. In relation to the complaints of direct discrimination, Mr Wilson submitted:

77.1. There was no less favourable treatment and no prima facie case about being called “rubbish”;

77.2. The claimants were not required or forced to clean the toilets. They and other members of staff, including Mr Nitu, would clean the toilets when they found them in a state. Mr Wilson invited the tribunal to find that cleaners were employed certainly from January 2019.

77.3. There was no expectation female members of staff would clean the kitchens.

77.4. There were no examples in the particulars about men talking about women sexually and/or in a derogatory manner. Ms Khajehi clarified that this was the finger in the tea incident. This was clearly not a sexual gesture although it may be patronising and only directed at women. This could not be regarded as less favourable treatment at the respondent’s direction. In the transcript, this was in respect of Ana and Miss Serban only. It was not a complaint of Miss Khajeh’s at the time. In relation to the alleged giggling, Mr Nitu’s evidence was that it did not happen. In the transcript it came out as a complaint of Ana’s then Miss Serban said it happened to her as well. It was not registered as a complaint by Miss Khajeh. There is no evidence and examples of sexualised talk. The assumption has been made because they were talking Arabic.

77.5. In relation to cash deposits, male employees were not employed in the office administrative roles. This was done by Mr Abdelmoeti on occasions. It was difficult to see how this was less favourable treatment.

77.6. The drinks incident was dealt with previously.

77.7. Miss Khajeh puts her complaint of discrimination in relation to dismissal as being because of her raising issues in the meeting with Mr Abdelmoeti and related to her complaint of discrimination. This is of victimisation complaint but it was not pleaded as victimisation. The tribunal cannot find that the second claimant was treated less favourably than Mr Sudani. This was not the claim. He was also not in the same circumstances.

78. In relation to Miss Serban's complaints of unfavourable treatment because of pregnancy, Mr Wilson submitted that the negative reaction was never described and Miss Serban admitted it was not her role to load or unload lorries. The respondent did not undertake a risk assessment. Mr Wilson submitted that there was no description of being fobbed off. The proof of posting related to 2 different documents; nothing identified it as relation to the letter of 27 March. The "think" allegation was meaningless; where was the evidence? The comment about naming the child was not made. The instruction about working alone was that she should not work with customers. The relationship with customers was being damaged.

79. Mr Wilson submitted that no connection had been shown between the dismissal and the pregnancy.

80. Mr O'Callaghan made the following submissions in behalf of the claimants.

81. The Tribunal should accept that Ms Carr J was offered a job on the day of the interview and given an induction and opportunity to start work on that date, 1 April 2017. The explanation about purchasing the coat lacked plausibility. A more plausible explanation was that Miss Khajeh was paid in cash during the first month. She was not paid the correct amount and the £210 was a top up. It was clear that the respondent employed more employees than we see on the payroll. The logical explanation is that he pays in cash when it suits him. He made an express denial on page 83 that he paid cash at any time but in cross-examination admitted that he had started paying some members of staff in cash. Mr Abdul accepted that it was rare for employees to work on bank holidays.

82. The email on page 110 was not sent by Mr Abdelmoeti. If he told Ina that the claimant had started on 1 May, Ina would communicate that. It may be that Mr Abdelmoeti had been mistaken.

83. There was an absence of contemporaneous documents. Mr Abdelmoeti often said "I have it" but did not provide the evidence. The respondent's professional solicitors would ask whether documents existed. There was no adequate explanation why they were not put to the tribunal. There were inconsistencies in Mr Abdelmoeti's evidence.

84. Miss Serban still does not know why she was dismissed. She has been given varying reasons. Miss Serban says it is pregnancy. There is a dispute as to when Mr

Abdelmoeti knew the claimant was pregnant, but it was clear that he knew she was pregnant when he decided to dismiss. Miss Serban no longer want to undertake some tasks and Mr Abdelmoeti dismissed her.

85. In the meeting on 22 March, the claimants explained why they were unhappy. Mr Abdelmoeti did not address their concerns and took the easy route out to dismiss them.

86. There was clearly a prima facie case of discrimination and pregnancy discrimination. The respondent has not rebutted the prima facie case. There has been no explanation for the decision to dismiss the employees.

Law

87. This was not a case where the interpretation of the applicable law was in dispute. Neither representative referred the Tribunal to any case law.

88. We summarise the applicable law as follows.

“Automatic” unfair dismissal – section 99 Employment Rights Act 1996

89. Section 99 Employment Rights Act 1996 (the 1996 Act) read with the Maternity and Parental Leave etc Regulations 1999 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 a reason connected with the pregnancy of the employee. The normal two year qualifying period for unfair dismissal does not apply (section 108(3) 1996 Act). However, where an employee does not have the two years' continuous service necessary to claim ordinary unfair dismissal, the burden of proof is on the employee to prove that the reason for dismissal was a prescribed reason within section 99 1996 Act: **Smith v Hayle Town Council** [1978] ICR 996 CA.

“Ordinary” unfair dismissal – section 98 Employment Rights Act 1996

90. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

91. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

Unfavourable treatment because of pregnancy – section 18 Equality Act 2010

92. 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, or

(b) because of illness suffered by her as a result of it”.

93. 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.

Direct sex and race discrimination – section 13 Equality Act 2010

94. Section 13(1) of the Equality Act 2010 (EqA) provides: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”. Section 4 lists protected characteristics which include sex and race.

95. Section 23(1) EqA provides that “on a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.”

Other relevant provisions of the Equality Act 2010

96. The Equality Act 2010 identifies certain situations in which discrimination will be unlawful. Not all discrimination is made unlawful by the EqA. Discrimination in employment is one of the areas where discrimination is unlawful. Section 39(2) EqA provides, amongst other things, that an employer must not discriminate against an employee by dismissing the employee or subjecting that employee to a detriment.

97. An employer is made vicariously liable for the discriminatory acts of its employees acting in the course of their employment: section 109(1) EqA. An employer will also be liable for discrimination to its employees committed by someone who is acting as an agent for that employer, with the employer's authority: section 109(2) EqA.

98. There are no provisions in the EqA which make it unlawful for a customer to subject an employee of the business providing the service to that customer to less favourable treatment because of sex or race or to make the employer business liable for its customer's acts of discrimination towards the employer business's employee. An employer would be liable to an employee for their own act of direct discrimination if they were shown to have treated that employee less favourably because of sex, for example, by not preventing harassment by a third party.

99. Section 136 EqA 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.”

100. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 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. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

101. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

Failure to provide written statement of employment particulars – complaint under section 38 Employment Act 2002

102. Section 38 of the Employment Act 2002 has the effect that where an employment tribunal finds in favour of a claimant on a claim under a jurisdiction listed in Schedule 5 (which includes unfair dismissal and discrimination cases) and, when the proceedings were begun the employer was in breach of his duty to provide the claimant with a written statement of terms of employment or to notify changes to this, the tribunal must either award (if no other award is made) or increase the award by two weeks' pay or, if it considers it just and equitable in all the circumstances, by four weeks' pay. The tribunal does not have to make such an award if there are exceptional circumstances which would make such an award or increase unjust or inequitable.

Conclusions

Complaints about Miss Serban's dismissal

103. Miss Serban claims that her dismissal was unfair, on the basis that the reason or principal reason for dismissal was pregnancy or pregnancy-related illness, and that her dismissal was unfavourable treatment because of pregnancy.

104. We consider what factors might point to pregnancy or pregnancy-related illness being a material factor in the decision to dismiss Miss Serban. Miss Serban was pregnant at the time of her dismissal. The respondent had failed to carry out a risk assessment, despite Miss Serban having raised this orally and then in writing. Mr Abdelmoeti, on his own evidence, consulted solicitors after the meeting on 22 March 2019 on a matter relating to Miss Serban's pregnancy. We have rejected his evidence that this was about how to accommodate her pregnancy. However, we have found it likely that he was taking advice on dismissing her, despite her being pregnant.

105. We do not consider that these factors are sufficient, by themselves, to satisfy the initial burden of proof on Miss Serban to prove facts from which we could conclude that pregnancy or pregnancy related illness was a material factor in the decision to dismiss her.

106. Other factors point away from pregnancy being a material factor in the decision to dismiss. These include the dismissal of Miss Khajeh, who was not pregnant. We have found it more likely than not that Mr Abdelmoeti decided to dismiss both of the claimants, following the meeting on 22 March 2019, because he perceived them as not giving him sufficient respect. If he had decided, after getting advice about the possible pitfalls of dismissing a pregnant employee, not to dismiss Miss Serban, we consider it likely that her refusal to accept her replacement by Mr Suleil, expressed upset about this on 12 April 2019, and his understanding that she had refused to do alternative duties prompted Mr Abdelmoeti to dismiss her.

107. We conclude that the complaint of pregnancy discrimination is not well founded.

108. We conclude that Miss Serban has not satisfied us that the reason or principal reason for her dismissal was her pregnancy. We conclude that the complaint of automatic unfair dismissal is not well founded.

Other complaints of unfavourable treatment because of pregnancy or because of illness suffered as a result of pregnancy

109. In relation to the alleged negative reaction of Mr Abdelmoeti dealt with at paragraph 48 above, we conclude that Miss Serban has not proved facts from which we could conclude that there was unfavourable treatment because of pregnancy or pregnancy-related illness. We conclude these complaints are not well founded.

110. In relation to the allegation of unfavourable treatment because of failing to carry out a risk assessment and “fobbing off” Miss Serban, we have found that no risk assessment was carried out and Mr Abdelmoeti did “fob her off” when Miss Serban attempted to raise this orally. He failed to respond when she then put her request in writing. We conclude that Miss Serban has proved facts from which we could conclude that there was unfavourable treatment because of pregnancy in relation to not carrying out a risk assessment and “fobbing her off”. Miss Serban was asking for a risk assessment because she was pregnant. Mr Abdelmoeti denied getting the letter of 27 March 2019, which we find he did receive. He did not respond to this letter. No assessment was held. Failing to carry out a risk assessment could be unfavourable treatment because, if risks are not identified and appropriate action taken, Miss Serban and/or her child could suffer harm. The respondent had expertise available to it to deal with health and safety matters (Mr Bond) and used Mr Bond’s services on other matters to do with health and safety but there is no evidence that the respondent called on Mr Bond to carry out an assessment.

111. The burden of proof passes to the respondent to satisfy us that there is a non-discriminatory explanation for not carrying out the assessment and for “fobbing off” Miss Serban. We conclude that the respondent has failed to discharge this burden. The respondent has given no explanation for not carrying out an assessment. Subject to the time limit point, we conclude that the complaint is well founded.

112. A complaint in respect of anything done prior to 14 March 2019 was presented out of time, unless it formed part of a continuing act of discrimination, where the complaint in respect of the last act was presented in time. It appears that Miss Serban first asked about a risk assessment and was “fobbed off” prior to 14 March 2019. However, she asked again in writing on 27 March 2019. We conclude that this was a continuing act of discrimination and the complaint in respect of the series of requests and failures to act was all presented in time. Alternatively, we would have concluded that it was just and equitable to extend time in respect of the earlier acts, since Miss Serban had been attempting to deal with this matter internally, by writing to the respondent on 27 March 2019.

113. We conclude that the complaint in relation to the failure to carry out a risk assessment and “fobbing off” Miss Serban is well founded.

114. In relation to the allegation about Mr Abdelmoeti telling Miss Serban to “think”, we conclude that Miss Serban has not proved facts from which we conclude this was unfavourable treatment because of pregnancy or pregnancy-related illness. As we noted in paragraph 50, if Mr Abdelmoeti did say this, we are unable to make any finding as to what was meant by this comment, given the lack of surrounding information.

115. In relation to the allegation that Mr Abdelmoeti told Miss Serban she should name her child “Ahmed” and said “otherwise what was the point of working there”,

we did not find that Miss Serban had proved the facts as alleged (see paragraph 51). We conclude that Miss Serban has not proved facts from which we could conclude there was unfavourable treatment because of pregnancy or pregnancy-related illness in respect of this matter.

116. In relation to the allegation about being required to work alone, we have found that a direction was given to the claimant to this effect, but the meaning was that Miss Serban should not deal directly with customers and this was because Mr Abdelmoeti believed she had been rude to customers. We conclude that Miss Serban has not proved facts from which we could conclude there was unfavourable treatment because of pregnancy or pregnancy-related illness in respect of this matter. If the burden of proof had passed to the respondent, we would have concluded that the respondent had discharged the burden of proving that Mr Abdelmoeti's direction had nothing to do with Miss Serban's pregnancy; it was because he thought she had been rude to customers and did not want her dealing directly with customers.

Complaints of direct sex discrimination about cleaning

117. We have found that the claimants were not told that they had to clean the toilets and kitchen, although we found that they felt compelled by circumstances to do so.

118. We conclude that they were not subjected to less favourable treatment by the respondent because they were not required to do the cleaning.

119. We conclude that the complaints are not well founded.

Miss Khajeh's complaints of direct race discrimination about cleaning

120. For the same reasons as in relation to the complaint of direct sex discrimination, we conclude that Miss Khajeh was not subjected to less favourable treatment by the respondent because she was not required to do the cleaning and we conclude that the complaint is not well founded.

121. There was no evidence to support any link between Miss Khajeh's race and her carrying out cleaning.

Miss Khajeh's complaints of direct sex and race discrimination about being called "rubbish" by Mr Abdelmoeti

122. Miss Khajeh did not satisfy us that Mr Abdelmoeti called her "rubbish" as opposed to commenting that something she did or said was "rubbish". There are no grounds on which we could infer that his comments were made because of Miss Khajeh's sex or race. Miss Khajeh's evidence was that Mr Abdelmoeti said this to everyone. We conclude that these complaints are not well founded.

Miss Khajeh's complaint of direct sex discrimination about being required to transport large amounts of cash

123. We found that Miss Khajeh was not required to carry cash of up to £50,000 or £60,000. However, she did carry substantial amounts of cash to be deposited at the bank or post office. We were not satisfied that she was unhappy about it at the time.

124. We conclude that Miss Khajeh has not proved facts from which we could conclude that carrying such sums for deposit was less favourable treatment because of sex. There is no actual comparator. There is no evidence of any men working in a comparable position in the office. This was a task which would fall to someone working in the office. There are no facts from which we could conclude that, had there been a man working in a comparable position to Miss Khajeh, he would not have been required to carry cash for deposit in the same way.

125. We do not place any weight on Mr Abdelmoeti's oral evidence that he sometimes made deposits himself, evidence which was not in his witness statement. As the owner and director of the business, he was not in a comparable position to an employee working in the office so whether he made deposits or not does not assist us in concluding whether a male office worker in a comparable role to Miss Khajeh would not have been required to carry large amounts of cash for deposit.

Complaints of direct sex discrimination and (Miss Khajeh only) direct race discrimination relating to the comments by a customer about putting their finger in the drink

126. The complaint is about an act of a customer of the respondent's business. The respondent is not liable, under the Equality Act, for the acts of a customer in the same way that it would be liable for the acts of an employee. The customer was not acting as an agent of the respondent. There is no basis, therefore, for the respondent to be liable to the claimants for the acts of the customer. We conclude, therefore, that these complaints are not well founded.

127. The complaint was not put on the basis that the respondent acted less favourably towards the claimants by not stopping the customer acting as alleged than the respondent would have acted had the claimants been of a different sex, or race. If it had been put on that basis, we would have concluded that the claimants had not proved facts from which we could have concluded that that was the case and the complaints would have failed.

Complaints of direct sex discrimination and (Miss Khajeh only) direct race discrimination about male employees giggling and staring when the claimants were bending over to take photos

128. We have found that the conduct alleged occurred and that Miss Serban was subjected to this treatment until around February 2019 and Miss Khajeh until around March 2019. We found that men would not have been treated in this way.

129. Unless these acts form part of a continuing act of discrimination with later acts of discrimination in relation to which a complaint was presented in time, the complaints were presented out of time. However, we conclude that it would be just and equitable to consider the complaints out of time since the claimants had been attempting to deal with the matter internally, raising it in the meeting on 22 March 2019.

130. We conclude that the claimants have proved facts from which we could conclude that this treatment was less favourable treatment because of sex. The respondent has not satisfied us that there was a non-discriminatory reason for the conduct. We, therefore, conclude that the complaint of direct sex discrimination is well founded.

131. We conclude that Miss Khajeh has not proved facts from which we could conclude that this treatment was less favourable treatment because of race. We conclude that the complaint of direct race discrimination is not well founded.

Miss Khajeh's complaint of unfair dismissal

132. We found that Miss Khajeh started her employment on 1 April 2017. She, therefore, had more than two years' service at the effective date of termination and the Tribunal has jurisdiction to consider her complaint of unfair dismissal.

133. It is for the respondent to show the reason for dismissal and that this was a potentially fair reason. The respondent has not satisfied us that dismissal was because of conduct. The respondent gave varying explanations for Miss Khajeh's dismissal. There was insufficient evidence as to what the alleged misconduct was and to satisfy the Tribunal that the respondent genuinely believed Miss Khajeh to be guilty of that misconduct.

134. Since the respondent has not shown a potentially fair reason for dismissal, we conclude that the complaint of unfair dismissal is well founded.

135. If we had decided that the respondent had shown that dismissal was because of misconduct and the respondent had a genuine belief in that misconduct, we would have found that the respondent did not act reasonably in dismissing for that reason. Mr Wilson conceded, on behalf of the respondent, that, if the Tribunal had jurisdiction

to consider the claim, the dismissal was unfair because of lack of any proper procedure.

136. It is for the respondent to persuade us that there was a chance that Miss Khajeh would have been fairly dismissed had the respondent approached matters in a fair way (the “Polkey” issue). The respondent has not persuaded us that there was such a chance. Miss Khajeh had been a valued employee and there had been a close working and a good personal relationship between her and Mr Abdelmoeti. However, challenging Mr Abdelmoeti about matters such as cleaning the toilets (which was a reasonable issue to be raised by an employee) appears to have changed Mr Abdelmoeti’s view of Miss Khajeh; considering that she was not according him sufficient respect. Had Mr Abdelmoeti tackled matters such as arranging for the cleaning of the toilets, we think the relationship would not have broken down and Miss Khajeh would not have been dismissed.

137. It is also for the respondent to persuade us that a reduction in compensation would be appropriate because of culpable and blameworthy conduct on the part of the employee. The respondent has not satisfied us that Miss Khajeh was guilty of any culpable and blameworthy conduct contributing to her dismissal. Miss Khajeh was challenging Mr Abdelmoeti in the meeting about valid points, such as the cleaning of the toilets. Whilst she was vociferous in making her points, her behaviour was not such as to constitute culpable and blameworthy conduct.

ACAS uplift

138. The respondent failed to comply with the ACAS Code of Practice on Discipline and Grievance before dismissing Miss Khajeh. We are minded to increase any compensatory award for unfair dismissal to Miss Khajeh because of this failure. We did not invite the representatives to address us on this issue at the same time as making submissions on liability and the Polkey and contributory conduct issues. We, therefore, invite submissions at the remedy hearing on what, if any, uplift to the compensatory award should be made because of failure to comply with the ACAS Code.

Section 38 Employment Act 2002 – failure to provide claimants with a written statement of employment particulars

139. The respondent has accepted that neither claimant was provided with a written statement of employment particulars as required by section 1 Employment Rights Act 1996.

Employment Judge Slater

Date: 4 February 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

9 February 2022

FOR THE TRIBUNAL OFFICE

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ANNEX

Claims and issues

FIRST CLAIMANT – MISS G SERBAN

Failure to Provide Written Particulars of Employment - s.38 Employment Act 2002

1. The Respondent concedes that it did not provide the First Claimant with written Particulars of Employment in accordance with section 1 Employment Rights Act 1996 ('ERA')?
2. If the First Claimant succeeds in another claim, should 2 or 4 weeks' pay be awarded?

Automatic Unfair Dismissal – Pregnancy - section 99 Employment Rights Act 1996

3. Was the reason or principal reason for the First Claimant's dismissal her pregnancy?

Pregnancy Discrimination - section 18 Equality Act 2010

4. Was the First Claimant treated unfavourably because of her pregnancy and/or because of illness suffered because of her pregnancy (s18 Equality Act 2010 ('EA'))? The unfavourable treatment alleged by the First Claimant is that:
 - a. In the period between end January and end of March Mr Abdelmoeti was clearly agitated in respect of the First Claimant's pregnancy, exhibited by his negative reaction to her refusal to attend the bank and her inability to drive.

- b. The First Claimant had been ill because of her pregnancy and Mr Abdelmoeti's attitude to the First Claimant altered, creating a negative environment in which to work, experienced throughout the pregnancy from February (approximately one month after the announcement of the pregnancy) to the date of dismissal.
- c. The First Claimant was unable to unload/load lorries from end January to the date of dismissal, which had been part of the duties she undertook and this appeared to cause a negative reaction from Mr Abdelmoeti.
- d. Mr Abdelmoeti failed to undertake a risk assessment and "fobbed her off" when she raised it.
- e. Mr Abdelmoeti told the First Claimant (she suspects in respect to the risk assessment) to "think" (exerting pressure upon her) and she responded that she was concerned about health and safety because of her pregnancy.
- f. After the announcement of the pregnancy and before the dismissal, Mr Abdelmoeti told the First Claimant that she should name her child "Ahmed" and said "otherwise what was the point of working there". She found this highly offensive.
- g. Mr Abdelmoeti told the First Claimant that she had to work alone (this occurred after the end of January (date unknown) and again at the grievance meeting on 22 March).
- h. Mr Abdelmoeti dismissed the First Claimant.

Direct Sex Discrimination – section 13 Equality Act 2010

- 5. The First Claimant relies on a hypothetical comparator for her claim of direct discrimination.
- 6. Did the Respondent treat the First Claimant less favourably than it treated, or would treat, the relevant comparator? The less favourable treatment relied upon by the First Claimant is:
 - a. Female staff, including the First and Second Claimants, cleaned the toilets, men did not have to undertake this menial work. Men would urinate on the floor and the female staff would have to clean the urine up.
 - b. Female members of staff, including the First and Second Claimants, cleaned the kitchen, while the male staff did not.

- c. Men would talk about women sexually and/or in a derogatory manner, including the First and Second Claimant. Men would not talk about men sexually or in a derogatory manner.
 - d. Specific comments when the women made drinks (including to the First Claimant) were “put your finger in sweet”/“your finger is sweet enough” (gesturing with middle finger, which the Claimants interpreted as sexual).
7. If so, was the less favourable treatment because of/on the grounds of the First Claimant’s sex?
8. Was the complaint presented in time and, if not, is it just and equitable in all the circumstances to consider it out of time?

Remedy

9. If successful what, if any, compensation should be awarded to the First Claimant?

SECOND CLAIMANT – MISS R KHAJEH**Failure to Provide Written Particulars of Employment - s.38 Employment Act 2002**

10. The Respondent concedes that it did not provide the Second Claimant with written Particulars of Employment in accordance with section 1 Employment Rights Act 1996 ('ERA')?
11. If the Second Claimant succeeds in another claim, should 2 or 4 weeks' pay be awarded?

Direct Sex and Race Discrimination – section 13 Equality Act 2010

12. The Second Claimant relies on a hypothetical comparator for her claims of direct discrimination.
13. Did the Respondent treat the Second Claimant less favourably than it treated or would treat the relevant comparator? The less favourable treatment relied upon by the Second Claimant is:
 - a. Second Claimant was called “rubbish” by Mr Abdelmoeti. (Sex and race discrimination).
 - b. Female staff, who were white Europeans, including the First and Second Claimants, cleaned the toilets, whereas men did not have to undertake this menial work. Men would urinate on the floor and the

female staff would have to clean the urine up. (Sex and race discrimination).

- c. Female members of staff, who were white Europeans, including the First and Second Claimants, cleaned the kitchen, while the male staff did not. (Sex and race discrimination).
 - d. Men would talk about women, who were white Europeans, sexually and/or in a derogatory manner, including the First and Second Claimant. Men would not talk about men sexually or in a derogatory manner. (Sex and race discrimination).
 - e. The Second Claimant had to transport cash to the bank or post office, on one occasion taking £60,000, but the male employees did not have to do this. (Sex discrimination).
 - f. Specific comments when the women, who were White European, made drinks (including to the Second Claimant) were “put your finger in sweet”/“your finger is sweet enough” (gesturing with middle finger, which the claimants interpreted as sexual). (Sex and race discrimination).
 - g. The Second Claimant contends that her dismissal was because of her raising issues in the meeting with Mr Abdelmoeti and related to her complaint of discrimination. (Sex and race discrimination).
14. If so, was the less favourable treatment because of/on the grounds of the Claimant’s sex and/or race?
 15. Was the complaint presented in time and, if not, is it just and equitable in all the circumstances to consider it out of time?

“Ordinary” Unfair Dismissal – section 98 Employment Rights Act 1996

16. Does the Second Claimant have the requisite length of service (2 years) to pursue a claim of ordinary unfair dismissal?
17. If so, was the Second Claimant dismissed for a potentially fair reason pursuant to s.98(2)(b) of the Employment Rights Act 1996 (“ERA”), namely conduct?
18. Did the Respondent act reasonably in treating the Second Claimant’s conduct and/or capability as a sufficient reason for dismissing the Second Claimant, in that:
 - (a) Did the Respondent form a genuine belief that the Second Claimant was guilty of that misconduct?
 - (b) Did the Respondent have reasonable grounds for that belief?

- (c) Did the Respondent form that belief based on a reasonable investigation in all the circumstances?
19. Was the dismissal of the Second Claimant fair in all the circumstances? In particular, was the dismissal within section 98(4) ERA and the band of reasonable responses available to the Respondent?
 20. Did the Respondent follow a fair procedure when dismissing the Second Claimant?
 21. If the Second Claimant's dismissal is found to be unfair, did the Second Claimant's conduct cause or substantially contribute to her dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?
 22. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?
 23. If the Respondent failed to comply with the ACAS Code, was its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Second Claimant?
 24. Has the Second Claimant complied with the ACAS Code? If not, should any compensatory award made to the Second Claimant be reduced by to take into account the Second Claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?
 25. To what extent, if any, has the Second Claimant mitigated her losses?