



EMPLOYMENT TRIBUNALS

Claimant: Mrs Chalmae El Mylousy Zougari

Respondent: Kidzrus Nursery Limited

Heard at: Manchester (by CVP)

On: 9 - 13 September 2024

Before: Employment Judge Slater
Ms L Heath
Mr R Cunningham

REPRESENTATION:

Claimant: Ms A Dannreuther, counsel

Respondent: Ms A O'Sullivan, Acting MD

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of ordinary unfair dismissal is well founded.
2. The complaint of automatic unfair dismissal relying on Section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave Regulations 1999 is not well founded.
3. The complaints of victimisation are well founded.
4. Remedy will be determined at a remedy final hearing on 20 January 2025.

REASONS

Introduction

1. The Tribunal gave oral judgment and reasons on 13 September 2024. The respondent asked for written reasons at the hearing so these reasons are provided together with the judgment.

2. There was insufficient time to deal with remedy at this final hearing so a further final hearing has been arranged on 20 January 2025 for the purposes of dealing with remedy. Separate case management orders have been sent to the parties for preparation for that hearing. Although a Spanish interpreter was provided, at the claimant's request, for her evidence during this liability hearing (more of which below), the claimant has said that she does not require an interpreter for the remedy hearing.

Claims and issues

3. The claimant presented two claims to the employment tribunal. The first contained complaints of ordinary unfair dismissal and automatic unfair dismissal for a reason related to pregnancy. The second contained complaints of victimisation under the Equality Act 2010. The complaints and issues were set out in the record of a private preliminary hearing held on 30 November 2021.

4. The claimant made an application at the start of this hearing to amend the part of the list of issues relating to the complaint of automatic unfair dismissal. However, the application was not pursued after the Tribunal pointed out that the amendment sought was based on law which was not in force at the relevant time.

5. The parties then agreed that the complaints and issues remained the same as recorded at the preliminary hearing.

6. After evidence and before oral closing submissions, the Tribunal raised with the parties whether the respondent wished to argue, as appeared might be the case from some of the respondent's cross examination and parts of their written submissions, that the allegations relied on as protected acts were false and made in bad faith, so were not protected acts. This was not an issue set out in the list of issues. Ms O'Sullivan said the respondent did want to run this argument. The claimant did not object to the list of complaints and issues being amended to include this issue. By agreement, the issues relevant to victimisation were amended. The updated amended list of complaints and issues is set out in the Annex to these reasons.

Evidence

7. We had a bundle of documents of 318 pages but, on the first day of the hearing, Ms O'Sullivan told us that she had not realised this bundle was different to the one agreed for a previously listed hearing and that some documents were missing. We, therefore, did not start hearing evidence until the second day so that Ms O'Sullivan could prepare for the hearing, using the new bundle, and supply missing documents. A number of documents were sent at different times through the hearing which were then collated

into a 22 page supplementary bundle. References to pages in the main bundle are referred to as B[page number] and in the Supplementary Bundle to SB[page number].

8. In addition, on day three, during Karly Grainger's evidence, the Judge asked the respondent to supply an unredacted copy of B207 since it appeared that the number of names redacted did not correspond to the number of people Karly Grainger gave evidence as having been selected for redundancy. The unredacted copy of this document was supplied on the morning of day four, while the Tribunal was reading written submissions from the parties. This showed that the numbers selected for redundancy was nine rather than the eight we had been told in Karly Grainger's evidence. The Tribunal then made an order that an unredacted copy of the list of eighty-five employees considered for redundancy and the document which appeared, amongst other places, at SB19 to 21, should be provided. This was provided shortly before the parties were due to make oral closing submissions. Time was allowed, before oral submissions, for the Tribunal and parties to read and consider the unredacted documents and for the parties to consider their arguments in relation to the amended victimisation issue.

9. We heard evidence from the claimant and for the respondent from Karly Grainger, Business and Finance Manager, Nicola Fleury, Founding Director and CEO of the respondent and Gemma Fletcher, who is now Group Area Manager but, at relevant times, was manager of the nursery at Media Centre where the claimant worked and the claimant's line manager. We had written statements for all of the witnesses.

10. The witness statements for Karly Grainger and Nicola Fleury were very lengthy but unfortunately, and perhaps surprisingly, omitted much of the basic information the Tribunal needed about the redundancy exercise. We obtained this information from the claimant's counsel's cross examination of the respondent's witnesses. However, there were then disparities between this oral evidence and the unredacted documents subsequently provided.

11. We were very concerned by the disparity between the evidence given to us by the respondent's witnesses in oral evidence about the redundancy process and the information that was revealed in the unredacted documents. We do not consider that we have had a satisfactory explanation for the disparities. It is possible that the respondent believed (as suggested in Ms O'Sullivan's closing submissions), albeit incorrectly, that GDPR required them to redact the documents at B207 SB19-21. There is an exemption for documents provided for the purposes of litigation. We have not been told that the claimant, in preparation for this hearing, sought production of unredacted versions of these documents. The lack of legal representation does not provide an explanation or excuse for the respondent providing evidence which is inconsistent with the unredacted documents which were in their possession. It does not require legal expertise to give an honest account of what the respondent did in relation to the selection of employees for redundancy, consistent with relevant documents in their possession.

12. Paul Fleury, joint owner of the business with Nicola Fleury, his wife, did not give evidence at this hearing although he had been involved in the relevant events and was the author of some of the correspondence. Ms Dannreuther invited us to draw adverse inferences from his non-attendance as a witness. Since she had not questioned the respondent's witnesses as to the reasons for his absence, and

because we consider that Nicola Fleury was likely to have been involved in any decisions made by Paul Fleury so was in a position to give evidence about these, we do not feel able to draw any adverse inferences from his absence as a witness.

13. We also say something on the subject of interpretation since the respondent has, in correspondence and at this hearing, sought to make much of this. The claimant's first language is Spanish, although the claimant speaks very good English and, indeed, does some translating and interpretation work herself. The claimant requested an interpreter for when she was giving evidence at this hearing. The respondent invited us to draw adverse inferences as to the claimant's credibility from the claimant requesting an interpreter. We declined to do so. It is generally understood that the level of English required in Tribunal proceedings is higher than that required in everyday life. Also, when under stress, such as when giving evidence in the Tribunal, people's ability to process, particularly when functioning in a language which is not their first language, is adversely affected. Consequently, it is not unusual for someone who speaks even what appears to be fluent English to request an interpreter for a hearing. The respondent was referred, in a letter from the Tribunal dated 2 August 2024, granting the claimant's application for an interpreter, to the Equal Treatment Bench Book, specifically chapter 8 on the use of interpreters in legal proceedings. Despite this, the respondent continued, up to and during closing submissions, to suggest to the Tribunal that there was something disingenuous in the claimant's request for an interpreter.

14. In accordance with the claimant's request, the claimant began to give her evidence with all the questions and answers being interpreted. Unfortunately, the quality of the interpretation was not as good as should have been the case and the respondent's representative said, fairly, after a short while, that she was confused by the answers given by interpretation. After a break to take instructions, the claimant decided that she would continue giving her evidence in English, without questions and answers being interpreted, but with the interpreter at hand to assist if needed.

Facts

15. The respondent is an early years childcare provider with a number of nurseries in the North West. These nurseries include a nursery at Media City in Salford.

16. The claimant began work with the respondent as a Lunch Time Cover Assistant on 20 March 2018. At relevant times, the claimant worked at the Media Centre nursery where Gemma Fletcher was manager although, just before the pandemic, there was a possibility that she would have moved nurseries on her return from sick leave.

17. On 16 January 2019, the claimant was given a twelve months' written warning for breach of policies and procedures resulting from accidentally dropping diabetes medicine on the pre-school floor. However, only shortly afterwards, on 25 January 2019, we note that the claimant was rated as outstanding in an appraisal given by Gemma Fletcher.

18. On 1 September 2019, the claimant changed her job with the respondent to become a Childcare Practitioner at Media City.

19. In the period 20 January to 23 March 2020, the claimant provided a series of sick notes giving stress related problems as the reason for her absence.

20. As we all now know, there was a global pandemic due to the Covid 19 virus and the first national lockdown was announced on 23 March 2020. The respondent's business closed shortly before or on 24 March 2020. All the respondent's employees, including the claimant, were put on furlough at that time.

21. On 2 May 2020, the respondent told its employees of their intention to re-open the business and that employees were needed to return to work on 1 June.

22. We accept that this was an extremely difficult time for businesses and particularly the type of business operated by the respondent. We accept that there were real and serious concerns about whether the business would survive.

23. On 3 May 2020, there was a management meeting about possible redundancies held by Nicola and Paul Fleury and Karly Grainger. They decided to get advice from Croner's, an employment consultancy, about the redundancy process. They decided to offer voluntary redundancy first. They decided on the following selection criteria: qualifications (if staff had no qualifications); length of service; and disciplinaries. We accept that the respondent meant, by saying unqualified, not having any of the qualifications recognised by the Department of Education for the purposes of qualified staff to child ratios in early years settings.

24. At the time the claimant began working for the respondent, she had a certificate of unit credit towards a level 2 award in support work in schools which she had obtained in November 2014. The claimant's qualification was not one which was recognised by the Department of Education for the purposes of the early years staff to children ratio. Whilst working with the respondent, the claimant did start working towards her level 2 early years foundation stage qualification, but she did not achieve this until after she had left the respondent in April 2021.

25. There was a further management meeting on 12 May 2020 with the same attendees. They decided to email staff notifying them of possible redundancies and asking whether anyone would like to take voluntary redundancy. They identified the same selection criteria as at the previous meeting. Karly Grainger was to produce a list of employees and their start dates with qualifications and any disciplinaries by 20 May.

26. A list of employees for the purposes of redundancy selection was duly produced listing eighty-five employees, ten of whom were said to be unqualified. The claimant was one of those designated as unqualified. By this time, the respondent had dropped the criteria of disciplinaries for their selection process since there was no column on this list for disciplinaries. This is the document which appeared at SB19-21 in a redacted form and was provided to the Tribunal and the claimant in an unredacted form on the fourth day of the hearing, in compliance with an order made by the Tribunal. The original list had blue highlighting showing some (but not all) of the employees with the shortest service. The original list also had pink highlighting for the employees classified as "unqualified". Four employees were highlighted in yellow. These were said to be the four employees who resigned before the redundancy selection process. During the course of preparation for this hearing, we were told by

Karly Grainger, that the red highlighting was adding to show which employees were pregnant at the time of the redundancy selection process. The claimant was the only employee designated as “unqualified” who was pregnant at the time. There were three other employees, who were pregnant at the time. These three employees all held relevant qualifications, unlike the claimant.

27. On 16 May 2020 the claimant wrote to Nicola Fleury saying she was concerned about returning to work. She said she was high risk with diabetes and that her son’s school would not be opening. She asked to return to work when it was a bit safer. Nicola Fleury responded, asking her to confirm her diabetes type. On 18 May 2020, the claimant sent an email to Nicola Fleury telling her that she had discovered that she was pregnant and saying that her diabetes type was type 2. The next day, on 19 May, the claimant sent an email to Matthew Dickinson, a trade union representative, saying she was scared of going back to work because of the Covid situation.

28. The claimant obtained two letters from her GP on 19 and 27 May 2020. The first letter said that the claimant was at moderate risk due to diabetes, anaemia, stress and pregnancy. The second letter said that the claimant was in a high risk vulnerable group for Covid infection so was unable to go to her workplace in childcare because of pregnancy, diabetes, stress and some Arabic Middle Eastern heritage. We do not know exactly when those letters were sent to Nicola Fleury but we find, because of subsequent events, that it must have been shortly after 27 May 2020, the date of the second letter.

29. On 1 June 2020, the claimant was placed on unpaid leave. The claimant was no longer on furlough because the respondent understood that she was not eligible for furlough payments. The claimant had no sick note so the respondent did not pay the claimant any sick pay.

30. When the nursery at Media Centre re-opened at the beginning of June 2020, only about fourteen children attended out of the normal number of around eighty. The respondent did not need the normal full complement of staff because of the low number of children attending. The respondent operated a rota system with some staff coming into work and others being called in when some staff got sick. They operated a bubble system for each nursery so staff could not be moved around sites and supply staff could not cover for absent employees on any site in the way that they could have done pre-pandemic.

31. Four nursery workers resigned after the announcement of the reopening of the business and left the respondent’s employment. We find this was most likely before the announcement of the redundancies since the notice of 8 June does not invite voluntary redundancies as had previously been indicated, at the management meetings, would be the case.

32. On 5 June 2020 there was a further management meeting with the same attendees. It is recorded that they had taken advice from Croners and letters were to be sent to all employees on 8 June informing them that redundancies would take place. They did not refer to inviting employees to apply for voluntary redundancy.

33. On 8 June 2020 an announcement of redundancies was sent to all employees telling them that they were intending to make between ten and fifteen nursery workers redundant.

34. On 10 June 2020 there was a further management meeting with the same attendees. This set out the names of nine employees selected for redundancy. In Karly Grainger's evidence, the respondent had asserted that eight employees were selected for redundancy. However, the unredacted copy of the document, obtained after evidence had finished, shows that it was, in fact, nine employees who were selected for redundancy. The minutes still refer to disciplinary issues amongst the selection criteria but we find that this criterion had, by this time, been dropped since it was not shown on the list of employees. The minutes record, and Karly Grainger gave oral evidence, that all those selected for redundancy had under two years' service and were unqualified, except the claimant who had more than two years' service. However, the unredacted documents show us that one unqualified employee with less than two years' service was not selected for redundancy and that one employee with a Level 3 qualification but under two years' service was selected for redundancy. This was inconsistent with the evidence which had been given by Karly Grainger on behalf of the respondent. The information given by Ms O'Sullivan about those two employees in submissions is not evidence and we cannot take it into account in making our findings of fact.

35. There were other unqualified employees who were not selected for redundancy but these had more service than the claimant. One of them only had one more month's service than the claimant.

36. The minutes record that the respondent was to arrange a first consultation meeting with the claimant. We find, based on the evidence of Karly Grainger, that they were not having consultation meetings with those who were selected but had under two years' service. Nicola Fleury could not explain in evidence why they had decided to make eight (although when we saw the unredacted documents, it turned out to be nine) people redundant at that time rather than seven or ten. The claimant was the only unqualified nursery worker made redundant who had more than two years' service. The claimant was the only one of those made redundant who was pregnant at the time. There were other pregnant employees but they were not unqualified and they were not selected for redundancy.

37. By a letter dated 11 June but which was sent on 12 June 2020, the claimant was invited to a consultation meeting on 15 June. The respondent had, at this point, already selected the claimant for redundancy. Any consultation with her would not be including consultation about the criteria to be used for selection.

38. On 12 June 2020 the employees with under two years' service who had been selected for redundancy left the respondent's employment.

39. On 12 June 2020 the claimant replied to the respondent to say that she was not well and could they share the meeting in writing. She did not ask for a postponement of the meeting.

40. On 15 June 2020, a consultation meeting took place with Nicola Fleury, Paul Fleury and Carly Granger. The claimant did not attend as she had said she could not attend.

The minutes of this meeting state that the claimant had been selected for not holding a full or relevant qualification. It said there was no alternative work available for her. It recorded that they would arrange a second consultation meeting on 22 June to discuss the minutes and provide a response and raise any questions. We accept that there were no alternative roles available at this time which could have been offered to the claimant. There were few children attending the nursery at this time. Any other roles were already filled or not needed because of the low number of children and number of nursery staff, in the case of lunchtime cover. Supply staff were not needed because of the number of staff who could be called in and the bubble system which meant staff could not work in different nurseries.

41. Gemma Fletcher emailed Paul Fleury, asking what had happened at the consultation meeting. Paul Fleury replied on 15 June to Gemma Fletcher saying that the respondent was making the claimant redundant on the basis that she was unqualified.

42. Nicola Fleury wrote to the claimant on 15 June informing the claimant that she was selected for redundancy due to being in an unqualified position. It is clear from Nicola Fleury's second email of 15 June that there must have been an intervening email from the claimant but we have not been shown this. From the contents of Nicola Fleury's second email of 15 June, it appears that the claimant's email which is missing took issue with being categorised as unqualified.

43. On 15 June 2020 Nicola Fleury emailed the claimant saying that her selection was due to being in an unqualified position. She referred to making arrangements for another meeting on 29 June. The email also refers to comments by the claimant in an email which we have not seen and refers to the claimant challenging that she was unqualified.

44. On or around 16 June 2020, Matthew Dickinson, the claimant's trade union representative, sent to the respondent a grievance on the claimant's behalf. This grievance was about alleged underpayment of wages; pregnancy discrimination in relation to redundancy; and alleged bullying by Gemma Fletcher. The claimant also took issue with being described as "unqualified". The grievance did not include any allegation of race discrimination.

45. A grievance hearing was then held by zoom on 24 June 2020. The claimant attended with Matthew Dickinson, her trade union representative, and the respondent was represented by Nicola Fleury and Karly Grainger. If there were minutes of this meeting, as Karly Grainger told us that there were, we have not been shown them.

46. The consultation process in the redundancy was put on hold because of the grievance and, on 29 June 2020, Karly Grainger emailed the claimant to say that, due to the ongoing grievance, they would reschedule the second consultation meeting and confirm a new date that week. No further consultation meeting was, in fact, ever arranged.

47. On 7 July 2020, the respondent provided the claimant with a grievance outcome letter. On the basis of the evidence of Karly Grainger, the decision to dismiss the grievance was taken by Karly Grainger but endorsed by Nicola Fleury. The outcome

letter said that the claimant was not level 2 qualified so the reason for redundancy was valid. It said they found no evidence of discrimination because of pregnancy.

48. The claimant appealed against the outcome of the grievance. She said, in this appeal, that she was qualified with a level 2 award. She asserted that she was being discriminated against because she was pregnant and shielding and had to stay off work.

49. A grievance appeal hearing was held on 23 July 2020 with Lydia Fitzpatrick, a manager of one of the respondent's other nurseries, and the claimant and Matthew Dickinson. In this hearing, Lydia Fitzpatrick commented that the claimant's qualification was not an approved one and that the claimant was not a qualified practitioner. She said she found no evidence of discrimination because of pregnancy.

50. The outcome of the grievance appeal hearing was confirmed in a letter dated 4 August 2020. This included the dismissal of the assertion that the claimant had been dismissed because of pregnancy. The letter confirmed that the claimant was not level 2 qualified and that the qualification she had was not one recognised by the Department of Education as being full and relevant in the early years.

51. On 9 September 2020, Matthew Dickinson wrote to Paul Fleury asserting that the respondent had forced the claimant onto unpaid leave and that the respondent had discriminated against the claimant because she needed to follow strict social distancing. He urged the respondent to compensate the claimant for some of the time she had had off because of following government guidance.

52. On 30 September 2020, Paul Fleury sent an email to Matthew Dickinson, copied to the claimant, replying to Matthew Dickinson's email of 9 September. He asserted that Matthew Dickinson had been saying that they should pay the claimant off and Paul Fleury wrote that the claimant's finish day was that day, 30 September 2020.

53. The claimant engaged in early conciliation with ACAS in the period 7 – 8 October 2020.

54. On 14 October 2020, Mr Dickinson wrote to Paul Fleury in reply to Paul Fleury's email of 9 September. He denied that he had suggested paying the claimant off but suggested the claimant should receive what he thought the claimant was entitled to. He also asked Mr Fleury how they came to the decision about the claimant's final day and was it redundancy. He wrote that, if so, the claimant was entitled to redundancy pay. If there was a reply from Paul Fleury to this letter, we have not seen it.

55. On 5 November 2020, the claimant emailed Paul Fleury saying she had received her payslip but no pay and asked when it would be received. On 25 November 2020 Paul Fleury emailed the claimant saying that the amount had only just been calculated so they hadn't been able to pay it but he needed to know whether she accepted that the figure was correct. He wrote that redundancy pay would be paid in full and final settlement of all her claims. The claimant replied the same day to say that she accepted her redundancy payment.

56. On 26 November 2020 Paul Fleury sent a further email to the claimant saying that he required her acceptance that £959.20 was in full and final settlement of her

employment at the respondent and that no further claims would be made. He wrote that, once he received this, he would make payment.

57. The claimant presented her first claim to the Employment Tribunal on 24 December 2020. The claimant was not represented at the time. She does not name a representative on her claim form. We do not know whether Matthew Dickinson assisted the claimant at all in her drafting, although her statement in box 8.2 of the form that she was seeking advice from her trade union and saying she would provide further details of her claim in 21 days would suggest that she had not had advice from him. The complaints included in this claim were unfair dismissal, pregnancy/maternity discrimination, race discrimination, entitlement to a statutory redundancy payment which has still not been paid at this point and other money claims. Subsequently the pregnancy/maternity discrimination was identified for the claimant as being a complaint of unfair dismissal under Section 99 of the Employment Rights Act and not an Equality Act complaint but this was not clear from the claim form. The only reference to race discrimination in the particulars of claim was in the statement: "I believe that I have been subject to bullying, harassment and racial discrimination during my employment at KidsRUs." No details of the alleged harassment related to race were given. The contents of the claim are not a public document, they are seen only by the parties and the Tribunal.

58. When the claimant was asked in cross examination why she thought she had been discriminated against because of her race, the claimant referred to being Muslim and to some things which had happened which she thought were for this reason. We find that the claimant thought that she was the only Muslim member of staff at Media City nursery at the time. We find that the claimant was genuine in believing that what she considered to be discrimination against her as a Muslim was race discrimination, although case law (of which neither the claimant, nor Ms O'Sullivan, who was cross examining her, were aware) is against her in finding that Muslims are not a racial group. Because the claimant withdrew her complaints of race discrimination long before this hearing, the Tribunal has not had to decide whether there was, or was not, any race discrimination against the claimant. It is possible that whatever treatment the claimant had in mind as being because of or related to race when she presented her claim was, in fact, nothing to do with race. However, the respondent has not satisfied us that the claimant knew, when she presented the claim, that she was making false allegations of race discrimination (if, in fact, the allegations were false).

59. We find that the claimant was genuine when she first presented her grievance and in her first claim to the Tribunal in believing that her selection for redundancy was related to her pregnancy. She disputed her categorisation as unqualified. The sequence of events, with notification of redundancy following her announcing her pregnancy and saying she could not return to work because of pregnancy and other conditions, made her think that her selection was related to pregnancy. The claimant was not aware, not being a member of the management team, of the management decisions about making redundancies, before the claimant informed the respondent of her pregnancy.

60. The respondent presented a response to the first claim on 12 February 2021. Croners were named as the respondent's representative and it appears likely, from the legal way the grounds of resistance were drafted, that Croners prepared these. The response included generalised denials of the claims brought. It gave no details

of the numbers which had been dismissed by way of redundancy or the selection criteria used in the redundancy exercise. The response accepted that redundancy pay had not been paid at the material time but asserted that all sums due had now been paid. Indeed, on the same day that the response was presented, the redundancy payment was made to the claimant.

61. In April 2021 the claimant received her Level 2 award in early years childcare.

62. On 10 June 2021, Nicola Fleury wrote to the claimant with what was stated to be a notice of intention to issue legal proceedings against the claimant. According to the evidence of Nicola Fleury, this was sent on the basis of legal advice received. Whether this was, in fact, the case is not something we need to decide. The letter contains allegations that the claimant sought to mislead and/or defraud the respondent in relation to presenting herself as a trade union member and Matthew Dickinson as a trade union representative and having him accompany her to meetings. The letter says nothing about the claimant's allegations of discrimination. The letter does not threaten legal action for defamation in relation to allegations including race discrimination as is suggested by Nicola Fleury's witness statement at paragraphs 40 to 41. Nicola Fleury's evidence makes it clear that at least part of the motivation for sending the letter was, however, because the claimant had made allegations of race discrimination as well as unlawful deduction from wages. Nicola Fleury wrote in her witness statement that the claims of race discrimination and unlawful deduction of wages "essentially labels me & my Organisation as Racists & Thieves by default, when we are neither".

63. On 23 June 2021 Nicola Fleury sent a complaint to UNISON, asserting that Matthew Dickinson was not a qualified trade union representative and had been acting for individuals who were not even members of UNISON. By an undated letter from the UNISON Branch Secretary in response to this letter, they informed the respondent that Matthew Dickinson was employed by UNISON as a Local Organiser and was entitled to represent members.

64. On 1 July 2021 the respondent made an application to the Tribunal to strike out the claimant's complaints. In that letter the respondent said they were no longer represented by Croners and that any correspondence in future should be sent to Nicola Fleury.

65. On 20 July 2021, UNISON sent a further letter to the respondent in response to an email of 6 July from the respondent, which we do not appear to have seen, confirming that Matthew Dickinson was entitled to represent members and a trade union official when he represented the claimant.

66. Gemma Fletcher, on behalf of the respondent, refused to supply a reference for the claimant to Supply Desk, an employment agency, possibly multiple times. The respondent says there were no requests from other employers or agencies. The claimant gave generalised evidence about other requests for references without specifying the employers or agencies. The claimant has not satisfied us that the respondent received requests and refused to give references to anyone other than Supply Desk.

67. Gemma Fletcher's witness statement did not address why she did not give the reference. However, Karly Grainger did give evidence about this, although it is not clear whether she knew about the reference request at the time it was made and refused. Karly Grainger's witness statement, at paragraph 76, is clear that the allegation of discrimination was a reason for refusing a reference. Gemma Fletcher's oral evidence was consistent with Karly Grainger's evidence in this respect. The part of the explanation later provided in the respondent's response to the second Tribunal claim which referred to data protection being the reason for not providing the reference, was not a reason given in evidence by the respondent for not providing a reference.

68. The claimant's second claim was presented to the Tribunal on 8 October 2021. By this time the claimant was represented by Thompsons, solicitors. The claimant alleged post-employment victimisation in relation to the refusal of references and the threat of civil legal action. The protected acts relied upon were the grievance and the first Tribunal claim.

69. On 10 November 2021, the respondent presented a response to the second claim. This was signed by Paul Fleury. This response fails to address why the respondent made the threat of civil action. The response accepted that the respondent had refrained from completing or responding to any employment reference requests in respect of the claimant from prospective future employers. It asserted that this was so as not to breach any data protection legislation. As previously noted, this is not an explanation which was given in evidence by the respondent's witnesses. The response asserts that the claimant has made "various baseless, fabricated & fictitious claims to the ET, which were not only recklessly vicious, vexatious & retaliatory, but that were crucially, allegations made by the Claimant without absolutely no supporting evidence whatsoever." The respondent also wrote:

"It is highly likely & probable that the Claimant & her very own conduct & behaviour to date as an Employee that may have indeed rendered her being in the position of experiencing difficulties acquiring alternative employment & not due to the actions, and/or inactions of the Respondent."

70. On 30 November 2021 there was a Preliminary Hearing for the purposes of case management in both cases. At this the claimant withdrew her race discrimination complaint, the complaint about entitlement to a statutory redundancy payment, since it had by then been paid, albeit late, her claim for notice pay, holiday pay and unauthorised deduction from wages.

71. At the private preliminary hearing, the respondent's various strike out applications, including the one dated 1 July 2021 were considered by Employment Judge Slater. As noted at paragraph (17) of the record of that hearing, some of the applications related to complaints which had, by that hearing, been withdrawn. After clarification of the complaints and issues which remained, the judge decided that evidence needed to be heard to determine the merits of the complaints and this was not, therefore, a suitable case to list a public preliminary hearing to decide whether the complaints had no reasonable prospect of success and, therefore, whether they should be struck out, or whether they had little reasonable prospect of success and a deposit ordered to be paid as a condition of continuing with any particular complaint. The judge wrote that the evidence needed to be heard and the merits considered at a final hearing.

Submissions

72. Both parties prepared written submissions. We do not seek to summarise these since they can be read, if required. The parties read each other's submissions and the Tribunal took time to read the written submissions before hearing oral submissions.

73. The parties supplied their written submissions to the Tribunal and each other by 9.30 a.m. on the fourth day of hearing. We had intended to hear oral submissions in the morning of the fourth day of hearing. However, after a discussion about the amendment to the issues relating to victimisation, and the production of the unredacted B207 and SB19-21, we adjourned at 11.35 until 1.30 p.m. to allow the parties time to consider their oral submissions in relation to these matters.

74. We reconvened at 1.30 p.m. but adjourned again, at Ms O'Sullivan's request, to give her additional reading time, before reconvening to hear oral submissions at 2.15 p.m.

75. Both parties were limited to a maximum of 30 minutes each for their oral submissions. After the claimant's oral submissions, we gave Ms O'Sullivan a 10 minute break before she made her oral submissions on behalf of the respondent. During Ms O'Sullivan's oral submissions, the judge informed Ms O'Sullivan that the Tribunal could not take account of new information provided in submissions, which had not been given in evidence. We added on time to Ms O'Sullivan's time allocation, to take account of the time spent in relation to this intervention.

The claimant's submissions

76. We summarise the oral submissions made by Ms Dannreuther on behalf of the claimant as follows.

77. The contents of the unredacted documents were shocking. The respondent had said there were two selection criteria: qualifications and length of service. By cross checking the documents, it was apparent that of those made compulsorily redundant, one was a level 3 qualified person (AT). One unqualified (NT) with less than 2 years' service was not made redundant. This made no sense on the respondent's case and it raises a question as to whether the respondent has given honest evidence. The fact that the unqualified employee with less service than the claimant was kept on shows the claimant's selection for redundancy was not based solely on qualifications and length of service. If it had been, the claimant would have been kept on and NT dismissed. The process was entirely arbitrary. The claimant says her selection can only have been based on likes or dislikes or because of her inability to work at the time, due to pregnancy/diabetes and that she would be taking maternity leave in the future. Mr Fleury's failure to attend to give evidence was suspicious. There was no evidence why the claimant was selected and two unqualified employees with longer service were not. It would have made commercial sense if the group selected all had less than 2 years' service. In circumstances where the only person selected with more than 2 years' service was the claimant and a level 3 qualified person was also selected, there was no evidence of appropriate selection criteria being properly applied.

78. In relation to victimisation, the claimant had not waived from the time of her grievance until today in maintaining her allegation that her selection for redundancy

was related to pregnancy. Clearly, from her oral evidence, she believed this. There was also convincing evidence that she thought she had been discriminated against on grounds of her race. She brought her claims initially as a litigant in person. Nothing should be taken from framing her race claims on the basis of being a Muslim. She was not required to understand the nuanced legal differences between race and religion. For there to be a protected act, it is irrelevant whether the alleged discrimination happened or not. If the allegations turn out to be false, the Tribunal has to consider whether the allegations were made in bad faith. In **SAAD v Southampton University Hospitals NHS Trust** UKEAT/0276/17, HHJ Eady QC said that the bad faith requirement, absent other context, had a core meaning of dishonesty. There was no evidence that the claimant made the allegations dishonestly. The claimant said she felt discriminated against because she was Muslim. There was nothing to suggest she was not genuine in her belief. The claimant dropped the complaint of race discrimination. This was not indicative of dishonesty. The Tribunal was not in a position to make a finding that the allegations of race discrimination were false.

The respondent's submissions

79. We summarise the oral submissions of Ms O'Sullivan as follows. We do not record new information, not heard in evidence, which Ms O'Sullivan introduced in an attempt to explain the information revealed by the unredacted documents. As was explained by the judge during Ms O'Sullivan's submissions, the Tribunal cannot take account of new factual information provided during submissions; the Tribunal must base its findings of fact on the witness and documentary evidence.

80. The respondent submitted that the claimant had acted in bad faith throughout; her grievance was made in bad faith with a vexatious and retaliatory mindset. The claimant was absent from work January to April 2020. She was proficient at obtaining fit notes from her GP. She was aware these were required to get SSP. When employees were put on furlough, the claimant calculated it was more beneficial to her to go on furlough than sick leave. This was in bad faith and disingenuous. The claimant resisted submitting more fit notes for financial gain.

81. Ms O'Sullivan said it was nonsensical to suggest that, if it had not been for the redundancy process, the claimant would still have been employed. The redundancy process happened because of the pandemic. If the claimant had been a fully qualified level 2, she would not have been selected for redundancy.

82. All the allegations against the respondent were made in bad faith. They were vexatious and retaliatory, because the respondent would not continue with furlough. It was abhorrent to the respondent, as an equal opportunities employer, to be unfairly and wrongly labelled perpetrators of race discrimination, religious discrimination and pregnancy/maternity discrimination. This contributed to the pre-action notification. It was sent by Nicola Fleury to protect her business and professional reputation. The claimant has been master of her own disaster in being in receipt of the pre-action protocol. If she had not made her allegations, the respondent would not have needed to instigate this.

83. The claimant's grievance, immediately after she was told her role was redundant, was a further example of bad faith. This was to garner more holiday pay or service. The respondent acted reasonably and fairly in its process. They temporarily

suspended the redundancy process to exhaust the grievance process. This resulted in the claimant being in employment for an extra 15 weeks. All the others left on 12 June 2020.

84. The claimant made it known throughout her employment that she did interpretation/translation work. She is proficient in the English language. She made a disingenuous application for an interpreter.

85. The claim form was vague. The claimant was given multiple bites of the cherry. She casually withdrew her complaint of race discrimination. This was done in bad faith.

86. The information had been redacted because of GDPR. There was no sinister reason for this.

Law

87. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) of the 1996 Act provides that an employee has the right not to be unfairly dismissed by his employer.

88. Fairness or unfairness of the dismissal is determined by application of section 98 of the 1996 Act. Section 98(1) of the 1996 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. Redundancy is one of the potentially fair reasons for dismissal.

89. 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 dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of a dismissal, the tribunal must consider whether the decision to dismiss was within the band or range of reasonable responses.

90. **Williams v Compair Maxam Ltd** [1982] IRLR 83 EAT set out various factors to be considered in determining whether a dismissal for reason of redundancy was fair or unfair. These factors included establishing criteria for selection which, so far as possible, can be objectively checked against such things as attendance records, efficiency at the job, experience, or length of service; and the fair selection in accordance with these criteria. The Court of Appeal in **British Aerospace v Green** [1995] IRLR 433 said that, for a respondent to be held to have acted reasonably, it was sufficient for the employer to show that he had set up a good system of selection, that it was fairly administered and that ordinarily there was no need for the employer to justify all the assessments on which the selection for redundancy was based.

91. Section 99 Employment Rights Act 1996 (the 1996 Act) read with regulation 20(2)-(3) of the Maternity and Parental Leave etc Regulations 1999, as they applied at the relevant time for this case provide:

“(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if –

(a) The reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) It is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) It is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

(3) The kinds of reasons referred to in paragraphs (1) and (2) are reasons connected with –

(a) the pregnancy of the employee.

.....”

92. The provisions relating to victimisation are contained in section 27 of the Equality Act 2010. This provides:

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.”

93. As noted in Ms Dannreuther's oral submissions, In **SAAD v Southampton University Hospitals NHS Trust** UKEAT/0276/17, HHJ Eady QC said that the bad faith requirement in a victimisation complaint, absent other context, had a core meaning of dishonesty.

94. Burden of proof provisions relating to complaints brought under the Equality Act 2010 are set out in section 136 of that Act. This 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.”

Conclusions

“Ordinary” unfair dismissal

95. It was accepted by the claimant that the reason for dismissal was the potentially fair reason of redundancy. This was, we conclude, a correct concession based on the information before us. As we have recognised in our findings of fact, the business was in a very difficult position during the pandemic. Their need for nursery workers was reduced. Even when the nurseries reopened, the number of children attending was much lower than pre-pandemic. There was no certainty as to when the business would get back to full operation or even whether it would survive.

96. We must consider whether the decision to dismiss the claimant was fair in all the circumstances, which include the extraordinary circumstances of the time.

97. We conclude that there were serious flaws in the consultation process. Fair consultation includes consultation when the proposals are still at a formative stage. The decision as to the selection criteria to apply and the selection of the claimant for redundancy had been made before the claimant was invited to the first consultation meeting. The only possible thing left to consult about was alternative employment although, as we have found, there were, in fact, no alternative jobs available given the circumstances. The claimant should have been invited for consultation before the respondent took its final decision on the criteria to be used and her selection in accordance with those criteria. The promised second consultation meeting, put on hold whilst the respondent dealt with the claimant's grievance and appeal, was never rearranged. Instead, Paul Fleury informed the claimant, via an email to her trade union representative on 30 September 2020, which was copied to the claimant, that the claimant's employment was ending that day.

98. We do not criticise the respondent for proceeding with the meeting on 15 June where the claimant had asked them to do so in writing when she said she was unable to attend due to illness. The claimant had not asked for a postponement of the meeting. We consider it was reasonable in the circumstances for the respondent to comply with the claimant's wishes by going ahead.

99. We consider that the respondent acted reasonably in considering a pool of nursery workers from which to select those to be made redundant.

100. The chosen criteria were whether the employee was unqualified, which we have accepted meant not holding a qualification recognised by the Department of Education for the purposes of the staff/child ratio, and also length of service. The designation of “unqualified” caused confusion for the claimant who held some qualification, although not of the type required. A better explanation from the start might have avoided some of the confusion and suspicion of the process which followed. We were told and accept that the criterion of disciplinary record was not used, although this had been referred to in the earlier discussions. We conclude that the criteria of unqualified and length of service were reasonable criteria to adopt.

101. The application of the criteria could have been reasonable if, as we were told in evidence by the respondent’s witnesses, the respondent had selected the number of employees they considered they needed to make redundant from the unqualified employees taking those with less than two years’ service, and then those with more than two years’ service but the shorter service. However, the production of the unredacted versions B207 and SB19-21 show that the selection was not done entirely in accordance with this method. One unqualified employee with less than two years’ service was not dismissed whereas the claimant, with more than two years’ service, was dismissed. The respondent gave no evidence which could satisfy us that the criteria were reasonably applied, given this anomaly. The new information given by Ms O’Sullivan in closing submissions, seeking to explain this anomaly, is not evidence which we can take account of.

102. Nicola Fleury’s inability to explain why they had decided on the particular number of redundancies which they did caused us some concern. The respondent had initially said they were looking to make between ten and fifteen nursery workers redundant. The lower end of that range could have been achieved without dismissing the claimant after four people resigned and they dismissed unqualified people with less than two years’ service. However, an employer has a broad discretion in making business decisions, including the number of people to make redundant, so we do not rely on this failure of explanation as a factor in concluding that the process was unfair.

103. We do not consider that there was alternative employment which could have been offered to the claimant.

104. Because of the flaws we have identified in the consultation process and the application of the selection criteria, we conclude that the claimant’s dismissal was not within the band of reasonable responses. The claimant’s complaint of ordinary unfair dismissal succeeds for these reasons.

“Automatic” unfair dismissal – section 99 Employment Rights Act 1996 and regulation 20 Maternity and Parental Leave Regulations 1999

105. The claimant accepts, and we conclude, that the reason for dismissal was redundancy. The question for us to decide is whether the reason or principal reason for selection for redundancy was a reason connected with the claimant’s pregnancy.

106. There are factors which could suggest an inference should be drawn that the claimant's selection was related to her pregnancy. These are as follows.

106.1. The claimant was advised by her GP not to attend work because of her vulnerability due to the pandemic due to a combination of her pregnancy and other factors. This meant that she was not available to work in the same way as other nursery workers as and when required.

106.2. The failure to explain in evidence why the claimant was selected for redundancy over an unqualified employee with less than two years' service.

106.3. The respondent providing evidence which is inconsistent with the unredacted documents which were in their possession.

107. We do not consider that any inferences of selection because of pregnancy related reasons can be drawn from the failure of Paul Fleury to give evidence for the reasons given previously, from failures in consultation or the failure to offer alternative employment. By analogy with the approach taken in discrimination cases, unreasonable treatment by itself, which could include failures in consultation, is not enough to prove facts from which an inference of pregnancy related discrimination can be drawn.

108. Against the factors which could point towards selection being because of pregnancy related reasons are the following.

108.1. Other nursery workers who were pregnant at the time were not selected for redundancy.

108.2. The respondent, with a predominantly female work force, has an established record of employees taking maternity leave and then returning to work.

108.3. Given the low number of children attending nursery at the time, the respondent did not need to have every nursery worker available to work all the time so there was not a compelling need for the claimant to return to work.

108.4. The respondent had moved the claimant onto unpaid leave so had no substantial costs associated with her ongoing employment. The issue about whether not paying the claimant was correct was not raised on the claimant's behalf by her trade union representative until after the claimant's selection for redundancy.

109. Weighing up these factors, we conclude that the reason or principal reason for the claimant's selection for redundancy was not because of pregnancy related reasons. The complaint of automatic unfair dismissal, therefore, fails.

Victimisation

110. We found that the claimant was genuine when she first presented her grievance and in her first claim to the Tribunal in believing that her selection for redundancy was related to her pregnancy (see paragraph 59).

111. We found that the claimant was genuine in believing that discrimination against her as a Muslim was race discrimination (see paragraph 58). We cannot reach a conclusion that her generalised allegations of race discrimination in her first claim were false, because the claims were withdrawn before they were clarified and this Tribunal has not had to decide any complaints of race discrimination. Whether or not the allegations of race discrimination were, in fact, not true, the respondent has not satisfied us that the claimant knew, when she presented the claim, that she was making false allegations of race discrimination. We are not satisfied that the claimant acted dishonestly in making her allegations of race discrimination.

112. We conclude that the claimant did not make her allegations of pregnancy discrimination and race discrimination in bad faith. We conclude that she did protected acts when raising her grievance, which included an allegation of unlawful pregnancy maternity discrimination, and presenting her first claim to the Tribunal, which included an allegation of race discrimination.

113. The respondent's witnesses gave evidence, and we found, that they refused to respond to requests for references for the claimant from Supply Desk. On the basis of the respondent's own evidence, we found that the reason they did so was, at least in part, because of the claimant making allegations of race discrimination. We conclude that the protected act of making an allegation of race discrimination was of sufficient weight in the reasons for the respondent refusing the reference for the refusal to be because the claimant had done a protected act. We conclude that the refusal was subjecting the claimant to a detriment because, without a reference, she was less able to obtain work in the childcare sector. We conclude, for these reasons, that the complaint of victimisation in relation to the refusal of a reference to Supply Desk is well founded.

114. Nicola Fleury's evidence proves that the claimant's protected act of making an allegation of race discrimination in her first Tribunal claim was of sufficient weight in the respondent's reasons for making the threat of civil action, for us to conclude that the action was because of the claimant doing that protected act. Whilst the claimant has not given any specific evidence as to the effect on her of this threat, we use our own judicial knowledge to conclude that it was more likely than not to have caused her at least some worry and distress and, therefore, to have subjected her to a detriment. We conclude that the complaint of victimisation in relation to the threat of civil action is well founded.

Employment Judge Slater

Date: 23 September 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 September 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

Annex Complaints and Issues

1. “Ordinary” unfair dismissal (section 98 Employment Rights Act 1996)

Reason

- 1.1 The claimant accepts that the reason for dismissal was the potentially fair reason of redundancy.

Fairness

- 1.2 Applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
- 1.3 The Tribunal will usually decide, in particular, whether:
- 1.3.1 The respondent adequately warned and consulted the claimant;
 - 1.3.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;
 - 1.3.3 The respondent took reasonable steps to find the claimant suitable alternative employment;
 - 1.3.4 Dismissal was within the range of reasonable responses.

2. “Automatic” unfair dismissal (section 99 Employment Rights Act 1996 and regulation 20 Maternity and Parental Leave Regulations 1999)

- 2.1 The claimant accepts that the reason for dismissal was redundancy.
- 2.2 Was the reason or principal reason for selection for dismissal a reason connected with the claimant’s pregnancy?

3. Remedy for unfair dismissal

- 3.1 What basic award is payable to the claimant, if any?
- 3.2 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 3.2.1 What financial losses has the dismissal caused the claimant?

- 3.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 3.2.3 If not, for what period of loss should the claimant be compensated?
- 3.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 3.2.5 If so, should the claimant's compensation be reduced? By how much?
- 3.2.6 Does the statutory cap of fifty-two weeks' pay apply?

4. **Victimisation (Equality Act 2010 section 27)**

- 4.1 The protected acts relied upon are:
 - 4.1.1 Presenting a grievance which included an allegation of unlawful pregnancy/maternity discrimination.
 - 4.1.2 Presenting a claim to the employment tribunal including a complaint of unlawful race discrimination.
- 4.2 Were the allegations made false and made in bad faith? If so, they will not be protected acts. If they were not both false and made in bad faith, they will be protected acts.
- 4.3 Did the respondent subject the claimant to detriment by:
 - 4.3.1 Not responding to requests for references?
 - 4.3.2 Threatening the claimant with civil action?
- 4.4 Was the treatment because the claimant had done a protected act?

5. **Remedy for discrimination or victimisation**

- 5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 5.2 What financial losses has the discrimination caused the claimant?
- 5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 5.4 If not, for what period of loss should the claimant be compensated?
- 5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 5.6 Should interest be awarded? How much?