Case Number: 2301156/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS A DONALDSON**
DR RP FERNANDO

BETWEEN:

Ms L Naraine

Claimant

AND

Smart Medical Clinics Ltd

Respondent

ON: **10, 11 and 12 April 2017**
Appearances:
For the Claimant: **Mr N Bidnell-Edwards, counsel**
For the Respondent: **Ms V von Wachter, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims succeed and proceed to a remedy hearing.

REASONS

1. By a claim form presented on 14 June 2016 the claimant Ms Lisa Nariane claims ordinary unfair dismissal, automatically unfair dismissal under section 99 Employment Rights Act and pregnancy/maternity discrimination.

2. Other claims were brought but these were dismissed on withdrawal by Employment Judge Baron on 22 September 2016 and those claims remaining are set out below.

3. The case has been the subject of two prior telephone preliminary hearings, the first on 23 August 2016 before Employment Judge Baron and the second on 11 November 2016 before Employment Judge Hall-Smith.

The issues

4. The outline issues were confirmed at the second preliminary hearing before employment Judge Hall-Smith on 11 November 2016 as follows:

    a. A claim of ordinary unfair dismissal under section 98 of the employment rights act 1996 (ERA).
    b. A claim of automatically unfair dismissal under section 99 ERA.
    c. A claim of unfavourable treatment under section 18 of the Equality Act 2010.

5. The parties were ordered to agree a list of issues no later than 9 December 2016 and to ensure that there were sufficient copies of the agreed list of issues available for use by the tribunal at this hearing. The agreed list of issues was sent to the tribunal on 20 December 2016 and we used this as our starting point to confirm the issues with the parties at the commencement of this hearing. The issues were:

6. On what basis did the claimant's employment terminate e.g. by mutual consent, the claimant's resignation or dismissal for gross misconduct or in the alternative some other substantial reason for breakdown in the relationship. The respondent admits dismissal. There is a dispute of fact as to the effective date of termination (EDT). The conduct relied upon is that the claimant had a conversation which was overheard that she had no intention of returning to work and this was said to be a betrayal of trust and she was no longer prepared to act in the best interests of the respondent.

7. On what date did the claimant's employment terminate? The claimant's pleaded case is that her employment terminated on 16 March 2016 on receipt of her P45 or 24 March 2016 when she received an explanation of the P45. The respondent's case is the termination was on 1 May 2015 during a telephone conversation between the claimant and Mr Parker in which he told her that her employment was terminated but he would continue to pay SMP until 31 January 2016. The respondent's case is that the EDT was 31 January 2016.

8. If the claimant was dismissed? Can the respondent demonstrate a potentially fair reason for the dismissal in accordance with section 98(1) ERA? Specifically (i) was the reason one of conduct? (ii) If the circumstances giving rise to the dismissal of the claimant did not amount to misconduct, did they amount to some other substantial reason of a kind to justify the dismissal of the claimant?

9. Was the dismissal of the claimant fair having regard to the reason shown by the respondent in accordance with section 98(4) ERA specifically - did the respondent act reasonably in the circumstances (including but not limited to the size and administrative resources of the respondent, in treating the reason as sufficient for dismissing the claimant or should an alternative sanction, if at all, have been imposed?

10. If the dismissal was unfair, did the claimant contribute to the dismissal by

culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

11. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

12. Under section 99 ERA, was the principal reason for the claimant's dismissal related to her pregnancy and/or maternity leave, specifically (i) was the claimant dismissed due to matters connected to her maternity leave? (ii) was the dismissal solely in consequence of the claimant's maternity leave?

13. Under section 18 of the Equality Act 2010 (EqA) was the claimant treated unfavourably because of pregnancy and/or maternity leave. The act of unfavourable treatment relied upon is her dismissal.

14. Are the claims within time? If not, does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time? Was any complaint presented within such other period as the employment Tribunal considers just and equitable? For the unfair dismissal claim was it reasonably practicable to present the claim within time and if not did the claimant present the claim within such further period as the tribunal considers reasonable?

15. In their agreed list of issues the parties had not identified the claimant's start date as an issue for the tribunal. It became clear at the end of day one of the hearing that this clearly was an issue for the tribunal as the parties were not in agreement as to the claimant's start date. There were implications for this as to whether, once we had made a finding as to the effective date of termination, the claimant had sufficient service to claim unfair dismissal. We therefore identified this as an issue and ordered disclosure of documents relevant to that issue, for the start of day two of the hearing.

16. Did the respondent unreasonably fail to comply with the ACAS Code on Disciplinary and Grievance Procedures 2015?

The claimant's application to amend the list of issues

17. The agreed list of issues had been sent to the tribunal on 20 December 2016 in compliance with the Order of Employment Judge Hall-Smith. It was at pages 43-45 of the bundle. There had been no application, subsequent to the list of issues, to amend it. The claimant has had legal representation throughout.

18. The claimant sought on the morning of the first day of the hearing to add to the list of issues. She wished to add as acts of unfavourable treatment

under section 18 EqA a number of comments allegedly made by Mr Parker and his attitude towards her absences. The matters the claimant wished to add to the list of issues were that: (i) on 19 February 2015 she was told she would not receive payment for her antenatal appointment as it was just an opportunity for the claimant to go and see and get kisses from her boyfriend; (ii) a conversation on 1 May 2015 where Mr Parker told the claimant she would get no more money out of him and that calling him was annoying him; (iii) an email on 24 March 2016 explaining her dismissal; (iv) the respondent asking the claimant to pay to change the locks and (v) Mr Parker criticising the claimant for taking maternity related absences, the criticisms taking place on 19 February 2015, 1 May 2015 and 24 March 2016.

19. The claimant submitted that the list of issues is not very detailed and submitted that it was not very clear on both sides and there was no prejudice to the respondent. These matters were in the ET1 and are referred to in the claimant's witness statement and have been denied in the ET3 and in the respondent's witness statements.

20. The respondent said that looking at paragraph 8 of the Grounds of Complaint the claim was for "financial detriment and dismissal" (bundle page 14-15), at the telephone preliminary hearing before Employment Judge Baron on 23 August 2016, paragraph 6.3 relies upon "financial detriment and dismissal" (bundle page 30). The respondent submitted that there has been ample opportunity for the claimant to say what detriment (or unfavourable treatment) she relied upon and it was unacceptable on the first day of the trial to seek to change that.

21. The respondent accepted that most of the points had been dealt with in the witness statements but not as specific heads of claim and the respondent may need to consider whether they needed to expand on their witness evidence if this amendment was permitted. The allegation that there was criticism for taking maternity related absence was, on the respondent's submission, a new head of claim and it should not be allowed unless the respondent has chance to respond appropriately. What had been regarded as tangential was now said to be a head of claim.

22. In reply the claimant relied upon paragraph 15 of the ET1 Grounds of Complaint in support of the claimant's application which raises the factual matters relied upon. The claimant also said that any application for a postponement was disproportionate and no further evidence would be needed.

23. The respondent then pointed us to the heading on page 15 of the bundle, ET1 paragraphs 11-20 which was given the heading "Background".

24. We considered the nature of the amendment and the timing and manner in which it was made. We took the view that the amendment was not minor. It expands the issues for determination in a manner that had not been envisaged by the respondent prior to day 1 of the hearing. The parties,

who have been legally represented throughout, were ordered by Employment Judge Hall-Smith to agree a list of issues, which they did as at 20 December 2016. No subsequent application was made until today to amend that list of issues.

25. We considered that there was reference to these matters in the pleadings. It was notable that it was referred to in the ET1 under the heading "Background" which practitioners in discrimination law know, does not consist of the matters relied upon, but is there to paint the picture for the tribunal. The claimant had been clear in the ET1 and at a preliminary hearing, that the unfavourable treatment relied upon was financial detriment and dismissal and not comments and attitude.

26. We considered it highly relevant that these matters had not been included in the agreed list of issues drafted with the benefit of legal representation.

27. On the balance of injustice and hardship, we agreed with the respondent that if these matters were relied upon as distinct acts of unfavourable treatment upon which we were required to make findings of fact, that they may wish to revise their witness statement with more detail or precision on each specific matter now relied upon. The respondent may have wished to call other witnesses who may have overheard what was alleged to have been said by Mr Parker. We considered that it was disproportionate to grant a postponement in order that the statements could be revised and amended at this late stage.

28. The importance of an agreed list of issues is that it allows parties to know what case they have to prepare and in particular what they need to address in witness evidence. It has been open to the claimant since December 2016 to say that she wished to rely on these matters and she did not do so until the start of the hearing.

29. We therefore unanimously refused the application to add to the list of issues.

The applications to add additional documents

30. The claimant applied to introduce on day 1 a copy of her pregnancy risk assessment. The respondent opposed to the application. At point 10 of the risk assessment under the heading "stress at work", we noted an entry that the claimant said she had experienced stress associated with time off for her antenatal appointments and we therefore considered that this was a document that might assist us in our findings and we agreed to the introduction of this document, despite having had no satisfactory explanation as to why it had not previously been disclosed.

31. The claimant also sought to introduce a further email which was also opposed by the respondent. We were given no explanation as to why this document had not been disclosed earlier. We refused the introduction of this document.

32. The respondent applied on day 2 to introduce a letter from HRMC to the respondent dated 26 July 2015 regarding the claimant's SMP. It was not clear how this would assist us in deciding the issues before us and the claimant objected to its introduction. It was not a letter the claimant had previously seen. We refused the respondent's application.

Witnesses and documents

33. We heard from the claimant.

34. For the respondent we heard from (i) Mr Mike Parker, the Chairman and CEO, (ii) Ms Anjana Odedra, Practice Manager and claimant's line manager, (iii) Dr Katherine O'Brien, a GP and (iv) Dr Michael Spira, Medical Director.

35. We had a witness statement from Mr Gerard Barnes, Finance Director, who was not called. We could therefore only attach a limited amount of weight to this statement.

36. There was a bundle of documents of about 127 pages. On day 2 we had a supplemental witness statement from Mr Parker with a further 56 pages of documents pursuant to the Order for disclosure that we made on day 1, 10 April 2017. We also had from the claimant a 10 page contract of employment with Westover Medical Ltd.

37. We had written submissions from both parties to which they spoke. The submissions are not replicated here but were fully considered along with any authorities referred to, even if not expressly referred to below.

Findings of fact

<u>The claimant's start date in employment</u>

38. The claimant commenced work with Westover Medical Ltd, a private medical practice, on 21 February 2011. We saw her contract of employment which was introduced on day 2 of the hearing. Her commencement date was stated in that contract to be 21 February 2011. She was appointed as a receptionist at a clinic in Notting Hill.

39. The claimant subsequently moved to the clinic in Wandsworth which was her place of work until the termination of her employment with the respondent.

40. Westover Medical Ltd became insolvent. It was the subject of a winding up order made in the High Court on 27 February 2014. The claimant concedes that Regulation 8 of TUPE applies, such that there was no TUPE transfer of the claimant from Westover to the respondent.

41. From late 2013 Mr Parker and Mr Barnes of the respondent became aware of an investment opportunity with Westover Medical Ltd. A petition for the compulsory winding up of that company was presented on 6 December

2013. The company ceased trading with effect from that date. Mr Parker's evidence is that the employees of that company were made redundant from that date.

42. From 17 September 2013 a company owned by certain directors of the respondent, named PG London Trading Ltd, provided financial and accounting management services to Westover. PG London Trading Ltd provided payroll services and paid the claimant from September 2013 through to the termination of her employment with the respondent. The respondent was incorporated on 4 November 2013.

43. There was no break in the claimant's service between Westover being petitioned for winding up in December 2013 and the respondent running the business from the same premises.

44. The respondent, like Westover, is a private GP and healthcare company employing 35 people over two locations, Brompton Cross and Wandsworth. There are about 4 employees in Wandsworth where the claimant worked but at times, there could be only one doctor and the claimant working from those premises.

45. The respondent sought to argue that the claimant's period of continuous service did not commence until 1 March 2014. The respondent relies on the contract of employment at page 50 stating that no employment with a previous employer would count towards her period of continuous employment. Continuous employment is a creature of statute and not one of contractual agreement.

46. Mr Parker's evidence was that although PG London Trading Ltd continued to pay the claimant after Westover ceased trading (i.e. Friday 6 December 2013), somehow any payment she was receiving was categorised as a "loan" which it was "unlikely" she would have to repay. We can find no basis upon which to find that an employee is being lent money in order to provide their services. The claimant was entitled to be paid her contractual wages for providing her services as an employee and to receive at the very least the national minimum wage and not a loan. PG London Trading was the payroll provider. The claimant was providing her services to and for the benefit of the respondent. We therefore find that her period of continuous employment with the respondent commenced on Monday 9 December 2013.

Job title and job role

47. The claimant's contracted hours as set out in her contract of employment, were 8:30am to 5:45pm, five days per week. Her duties involved opening and closing the practice, booking appointments, invoicing, ordering, network/marketing, staff liaison and handling of complaints. Prior to announcing her pregnancy the claimant had a good working relationship with the respondent and enjoyed her role.

48. There was a dispute between the parties as to the claimant's job title. The

claimant said she was the practice manager; the respondent said that she was a receptionist and admin assistant. The respondent said that the claimant could not be the practice manager as she did not have the necessary qualifications for CQC purposes (Care Quality Commission). We saw examples in the bundle of the claimant's internal email for example at pages 58, 59 and 62 in which she signed herself off as the practice manager. The claimant held the title practice manager at the Westover clinic. She was told by Mr Parker that she could take this title over to the respondent.

49. The practice manager for CQC purposes was Ms Anjana Odedra, who is by profession a pharmacist and is based in Birmingham. She told the tribunal that her principal means of communication with the claimant was by email or telephone. We also noted from page 119 of the bundle, being a pregnancy risk assessment completed by Ms Odedra in her own handwriting, that she gave the claimant's job title as practice manager. We find for all practical and non-regulatory purposes, the claimant was the practice manager at Wandsworth.

The claimant's pregnancy

50. In September 2014 the claimant discovered that she was pregnant and she informed her line manager Ms Odedra.

51. On 1 December 2014 (page 60) Ms Odedra sent an email to a number of members of staff saying "*Dear All, For those of you that are unaware Lisa at Wandsworth is pregnant. Lisa wanted me to let everyone know. Lisa will be with us until June, when she will go on maternity leave*". Ms Odedra told the tribunal that she sent a separate email to the Directors informing them of the claimant's pregnancy. This email was not disclosed.

52. Mr Parker congratulated the claimant on her pregnancy. Mr Parker runs a number of businesses and he is accustomed to dealing with employees going on maternity leave. He and the claimant spoke from time to time and he occasionally asked her if she was intending to come back from maternity leave. His evidence (paragraph 32 of his witness statement) was that he is "*a reasonable person and was fully aware that the claimant might change her mind, but if she already knew at that point that she had no intention of coming back to work for the respondent, I would have started looking to permanently replace the claimant and would need a longer period to train a new employee on the operations and clients of the clinic. The claimant assured me……that she would definitely be returning to work. I trusted her completely and I knew she did need the money*."

53. Mr Parker's oral evidence to the tribunal was that he would not have minded if the claimant had told him either that she was not planning to return to work or that she was unsure. He accepts that pregnant employees may change their mind about their intentions once the baby has been born.

54. We saw the claimant's MAT B1 showing her expected week of childbirth as the week of 6 June 2015 (page 73). The claimant wished to take annual

leave during May 2015 prior to commencing her maternity leave. The respondent's leave year runs from April to March each year. The claimant was allowed to carry over some remaining annual leave from the 2014/2015 leave year into the 2015/16 leave year so she commenced a period of annual leave on Monday 27 April 2015. This leave ran to the commencement of her maternity leave in the week commencing Monday, 1 June 2015. Potentially therefore the claimant's period of maternity leave could run until the start of June 2016. It is not in dispute that the claimant's maternity leave commenced on 1 June 2015.

55. The respondent engaged Ms Louise Wright as maternity cover for the claimant. Ms Wright joined the respondent's employment before the claimant went on maternity leave in order to shadow her for a period of time. In addition, the claimant's pregnancy was complex and we saw the risk assessment at page 119 completed on 13 February 2015. It was clear in the light of this risk assessment that there was the potential for the claimant to be off sick and the respondent was therefore acting prudently in ensuring that Ms Wright was in place and able to cover if the claimant was absent from work earlier than anticipated. The claimant and Ms Wright got on well, they had previously worked together for the Westover clinic.

The overheard conversation

56. In about the middle of April 2015 one of the GPs at the Wandsworth clinic, Dr Katherine O'Brien, overheard a conversation between the claimant and Ms Wright. She heard the claimant talking about the commencement of her leave. As the claimant was taking annual leave prior to the commencement of her maternity leave she was due to be absent from Monday, 27 April 2015. This is a very small medical practice. Dr O'Brien works there part-time three days per week. Dr O'Brien realised from overhearing this conversation that the claimant was going on leave sooner than she expected. We find that this is because managers at the respondent had not informed Dr O'Brien that the claimant would be taking her annual leave prior to starting maternity leave on 1 June.

57. Dr O'Brien's oral evidence to the tribunal was as follows: *"What I realised from overhearing, that the time the claimant was going on maternity leave was sooner than I had anticipated and I remember standing there and thinking gosh that's not very long away and asking Louise if she was covering the maternity and Louise looking at me and saying no and I turned to Lisa and said when are you coming back and she shook her head and said I am not coming back and I thought, then I have no receptionist".*

58. Dr O'Brien reported this conversation initially to Ms Odedra and subsequently Mr Parker. Dr O'Brien told the tribunal that her priority was to ensure the running of the clinic. We find that her primary concern was a practical one, that there would be no receptionist in about 2 weeks' time; not that there was some sort of conspiracy going on. This primary concern was an entirely understandable one.

59. Ms Odedra in any event reported the conversation to Mr Parker. Mr Parker's evidence was that Ms Odedra told him that Dr O'Brien had overheard a conversation about the claimant intending not to return to work following her maternity leave and "*plotting to leave the respondent in the lurch*". Mr Parker contacted Dr O'Brien who informed him that she had heard the claimant saying that she was not planning to return to work after her maternity leave. Mr Parker said that this directly contradicted what the claimant had told him.

60. In her oral evidence to the tribunal Dr O'Brien said that when she overheard the conversation she had a "*feeling*" that the claimant and Ms Wright were intending to "*leave the respondent in the lurch*" as a way of getting back at Mr Parker. Dr O'Brien confirmed that those actual words were not used and that this was simply "*a feeling*" which we find can only have been her own feeling.

61. Having received the report of this conversation Mr Parker decided to review the respondent's CCTV footage to observe the conversation for himself. As a GP clinic, the respondent has CCTV footage (with sound) for security reasons. There is signage advising of this. He viewed the CCTV footage at some point between 26 April and 1 May 2015 after work one evening.

62. The CCTV footage was not disclosed either to the tribunal or to anyone else other than Mr Parker. He is the only person who has viewed the CCTV footage. He is able to view this footage over his mobile phone and play back recordings within the last 160 days.

Mr Parker's concerns about the claimant

63. From early 2015 Mr Parker had growing concerns about the claimant's performance and conduct. He thought she was constantly seeking to change her working times and that she was "playing off" Ms Odedra and himself against each other. There was a dispute as to whether Ms Odedra had agreed with the claimant that from September 2014 the claimant could leave work at 5:15pm in order to collect her daughter from school. The after-school club hours had changed and the claimant was notified of this in July 2014 and had shown the letter to Ms Odedra explaining that she would need to leave early. Ms Odedra said she gave occasional permission for the claimant to leave early. There was nothing in writing, such as an email, to show any such agreement.

64. We find that the agreements were verbal and the lack of documentation from the respondent gave rise to uncertainty. Leaving early was not a matter raised with the claimant from September 2014 onwards. Dr Spira's evidence was that he knew about the claimant leaving work early, but did nothing about it because he "*did not want to get the claimant into trouble*". He was unaware of any conversations the claimant had with Ms Odedra regarding her finish time.

65. We find that the claimant was frequently leaving at 5:15pm and had done so since September 2014 because she understood, rightly or wrongly, that she

had Ms Odedra's agreement. There was nothing documented by Ms Odedra to record any discussions with the claimant about her hours of work or leaving early. Ms Odedra is based in Birmingham and therefore did not have first-hand knowledge of the claimant's comings and goings.

66. Mr Parker said that a client had complained to him in April 2015 that they had tried to telephone the clinic during clinic hours but had no answer.

67. He was also concerned about the number of medical appointments the claimant was attending. It is not in dispute that the claimant had a very difficult pregnancy. This gave rise, inevitably, to a high number of antenatal appointments. The claimant had a yellow appointment book which set out antenatal appointments. She kept it with her at all times in case something happened to her whilst pregnant so that this information could be checked. Regrettably, this was not disclosed within these proceedings. There was no evidence that the respondent had at any time asked to see written confirmation of the antenatal appointments as they are entitled to do under section 55 of the Employment Rights Act. Had Mr Parker or Ms Odedra asked to see these appointment records, their concerns might have been allayed. Instead, Mr Parker thought she was, to use his words "*swinging the lead*".

68. Mr Parker's evidence was that he was suspicious that the claimant was not working her contractual hours and he felt that the claimant and Ms Wright were "*thick as thieves because they would plot to cover for each other".* He also took the view that the claimant was being "inconsistent" about her state of health when pregnant because she took a trip to New York. This is despite the New York trip taking place before the claimant became pregnant.

69. Mr Parker said that when he viewed the CCTV footage he was "devastated" to discover that the claimant had expressed to a colleague an intention not to return to work. He said at paragraph 48 of his witness statement "*to lie directly to my face, claiming she would be coming back to work when she had no intention to, made me feel hurt and betrayed. I felt the claimant was dishonest with me because, if she had been truthful, the respondent would have been less inclined to allow her to take advantage of the situation*". He said he completely lost confidence in her.

<u>The events leading to the termination of the claimant's employment</u>

70. On the last day of the month, Thursday, 30 April 2015 the claimant noticed that she had not been paid, her pay had been delayed and she therefore telephoned the receptionist at the Brompton Cross clinic who told her that they had been paid. The claimant therefore asked to speak to Mr Parker.

71. As a result of the claimant's conversation with Mr Parker on 1 May 2015 she wrote to him, the letter was at pages 75-76. The entirety of the letter is not replicated here. The claimant said:

> *I'm officially writing to you following a disturbing telephone conversation with you today concerning my wages. I'm usually paid on the last day of each month but as I stated to you today (30/04/2015) it was noted*

that I was not paid. In discussion with you as to why my payment had not been made at the usual time/date, your response was that I will not be receiving my usual payment as my payments will now change due to my maternity leave starting. I would like to take this opportunity again to remind you that you had verbally agreed to me taking my holidays prior to my maternity leave. This was in the form of five days (holiday) owed to me from 2014 and 20 days (holiday) due to me for 2015. Collectively my holidays taken in bulk was to begin from 27/04/2015 and end on 28/05/2015, whereby my maternity would start on 01/06/2015. Therefore I should have been paid as usual at the end of this month and also at the end of the following month (May 2015) as these are deemed holidays and are NOT maternity.
I had sent you an email, with Gerard Barnes and Anjana Odedra on 8 April 2015 at 16:33pm to confirm this is how I would like to move forward. I had also sent you another email on 15 April 2015 with Gerard Barnes and Anjana Odedra at 12:14pm stating that I had still not had an official response, however we managed to speak briefly whereby you confirmed that these dates were acceptable. However it was during our telephone conversation at 6pm today, that you informed me that this will not be the case as you had accused me of "conspiring" with my colleague Louise Wright and that I had no intention of "coming back" and furthermore that you had been listening to my conversation over the last few weeks (without my knowledge) via the security camera installed in the clinic.
…….
You had asked me if I wanted to return previously, I had told you yes, but you have now made me feel anxious, hurt and uncertain about my job at the clinic and utterly disappointed with the way I've been unfairly treated. I feel you have pushed me out and as you said today on the phone, you do not care what I do. So where does this leave me? I have worked consistently hard for your company and have tried my hardest to continue to push the company in a direction of growth. I have always had a good relationship with all my colleagues and have shown respect to everyone I work with.

72. Mr Parker did not agree entirely with the record of the call as set out in the claimant's 1 May letter but he did agree that it reflects some of the points they discussed. He does not agree for example that he was rude, aggressive or hostile. During the conversation he told the claimant about the CCTV evidence and said that it disclosed that she had been lying about returning to work and that she was not working her contracted hours and that she was "*conspiring with Ms Wright to desert the respondent and leave it in the lurch".*

73. Mr Parker's evidence was that he told the claimant there was enough evidence against her to dismiss her for gross misconduct. He said at paragraph 54 of his witness statement that he told the claimant he would not put her through disciplinary proceedings which would "*likely result in the termination of her employment for gross misconduct".* We find that Mr Parker did not dismiss the claimant during that telephone conversation. He raised with her matters which he considered could result in the termination of her employment.

74. The respondent conceded in submissions (paragraph 63) that no procedure was followed as outlined in the ACAS Code. Both Ms Odedra and Mr Parker were aware of the existence of the ACAS Code but they did not know what it said.

75. The respondent submitted that the process followed was "unconventional" and that Mr Parker did carry out an investigation. He did his own investigation, he made up his mind without any input from the claimant, there was no hearing, there was no advance notice of the charges, there was no opportunity for her to state her case or respond to the charges against her. The respondent says that this was because they did not wish to put the claimant as a pregnant employee through a disciplinary hearing.

76. Mr Parker replied to the claimant's 1 May letter on 7 May 2015 with a letter headed without prejudice, save as to costs. Privilege was clearly waived in relation to this letter. Mr Parker said as follows (pages 77-78):

Dear Ms Narine
Following your departure on Maternity 26 April 2015, matters of come to my attention as to your inappropriate behaviour.
You have always been aware that both of the clinics are protected by CCTV which records sound and vision. It has infra-red night vision for hours of darkness and data is automatically stored and held for up to 4 months electronically. This facility is for the benefit of staff well-being/security, patient protection and for insurance purposes. We only access the system in the event of an issue of concern.
You and your colleague gave rise to concern following conversations overheard by a company GP. You were clearly heard to be talking to a colleague about leaving the company and the manner in which they intended to walk out without giving notice. You also were guilty of comments that you had no intention of coming back to working at the Smart Clinics, after your maternity leave is completed. Since that information came to light, the electronic recordings have been examined. We now clearly have in our possession evidence confirming your complete and utter lack of integrity. You and your colleague of clearly been abusing your position to the extent that you have been covering for each other for periods of unauthorised absence. You have clearly not been carrying out the work you have been paid for and generally abusing the trust and position you were given.
However, my personal disappointment is something I intend to put to one side. I am disappointed in your ultimate behaviour and comments you have made subsequently. I intend to move on, on the basis that you accept that your employment with Smart Medical ended on 26 April 2015. Your maternity pay should be something you can receive from the Government. I will check whether or not your employment termination the benefit of Maternity pay can apply at the end of what you were originally entitled to.
This will be done on a without prejudice basis and subject to legal confirmation. Your total lack of respect for the trust and support of the company has given you, is a matter for your own conscience. It is clear to the directors of the company that you have been using the company for your own benefit to ensure you receive maternity pay.
Should you agree to it, please come back to me in writing if you want to end matters at this point. If you do not I will hand the matter over to our specialist employment lawyers to let them deal with the matter moving forward.
You have refused to give back your keys, which has resulted in the need to have the locks changed and new alarm codes set up during the bank holiday weekend. I reserve the right to recover these costs should matters not conclude to both of our mutual satisfaction.
I look forward to hearing from you.
Mike Parker
Chairman

77. We find based on the final paragraph of Mr Parker's letter that the respondent had access to specialist employment law advice.

78. The claimant was concerned about the content of this letter. She therefore took advice from the Citizens' Advice Bureau. They told her to make it clear that she had not resigned and that she was still employed. The claimant replied to Mr Parker and copied Ms Odedra on 12 June 2015 as follows (page 79):

Dear Mr Parker
This is to confirm I have not handed in my resignation and I am still employed by The Smart Clinics. I have been asked by HMRC Revenue to provide them with my P60 for the end of year tax for 2014 – 2015, which I have not received from the Smart Clinic as yet, they have also requested for my maternity payment breakdown for the ongoing future to go on their system. I have received my first maternity pay from the smart clinics in May.
Regards
Lisa Narine

79. We find that the claimant did not agree to the terms set out in Mr Parker's 7 May letter. It clearly stated that should she agree, she was to come back to him in writing. She responded in writing but not with an agreement to Mr Parker's proposals.

80. Mr Parker did not reply to the claimant's 12 June email. He did not remember seeing it but did not deny that it was sent to him because he receives a very high volume of emails. We find that it was sent to him by the claimant.

81. On 23 July 2015 the claimant again complained to Mr Parker about a

deduction of £150 from her wages. She said she was notified by a white sticky note attached to her wage slips saying it was taken as payment for a replacement lock at the clinic. And this does not form part of any issue in relation to these proceedings. The claimant went on to say (page 80) *"Because of the continuous acts of victimization towards me, I have been given no choice but to seek legal advice during a time when I should be focused on the birth of my baby."*

82. The claimant gave birth on 22 June 2015. The claimant informed the following individuals at the respondent of the birth: Ms Margaret Davies, a member of the admin team, Dr David Smart and Dr Moushumi Barruah. The claimant also informed Dr Katherine O'Brien by Whatsapp message but said that Dr O'Brien did not pick up the message as she could tell from the blue ticks that appear when a message on that system has been read.

83. The claimant did not hear any further from the respondent until 16 March 2016 when she received her P45. The P45 was at page 97 of the bundle, showing the claimant's leaving date is 31 January 2016 and the date of having been completed by the respondent as 17 February 2016. It was put to the claimant that she received it in February 2016. She was adamant that she did not and that her email of 16 March 2016 was sent on the day that she received her P45 in the post. There was no covering letter.

84. The claimant sent an email to Mr Parker at 17:15 hours on 16 March (page 81) as follows:

> *Dear Mr Parker*
> *I've received my P45 in the post. Could you please send an explanation in writing as to why I have been sent this. If I do not hear back from you in the next couple of weeks I will assume i have been formally dismissed.*
> *Lisa Narine*

85. We find based on the claimant's evidence, both orally and based on the email above, that she received it on 16 March 2016. We find that it was a surprise to receive it and that is why she emailed on the same day to ask why it had been sent. It showed a termination date of 31 January 2016. We find it was understandable that she wished to query why it had been sent.

86. Mr Parker replied on 24 March 2016, page 82:

> *Dear Lisa*
> *You have received your P45 in the post as you have made no attempts to contact me regarding a potential date to come back to work. Furthermore, during your maternity leave you have not expressed any interest in coming back to work following the situation which took place prior to you going on maternity leave.*
> *For the avoidance of doubt your conduct and behaviour prior to your maternity leave was totally inappropriate and unacceptable behaviour which would have resulted in instant dismissal. Because of your health situation I chose not to cause you any further stress at that time. Instead I allowed you to go on maternity leave which has now come to an end in terms of what the government scheme permits. In the light of previous events and your total lack of expressions to return to work, your employment is deemed terminated.*
> *In my submission, you have been treated more than fairly and if you wish to challenge that, that is your prerogative.*
> *As one final gesture I am prepared to give you a reference to any new employer, should it be required, something which in the light of your behaviour before your maternity leave, I would not ordinarily do. This matter is as far as I am concerned, closed, other than potentially, your reference.*
> *Kind regards*
> *Mike Parker*
> *Chairman*

87. The claimant commenced Early Conciliation on 28 April 2016.

The relevant law

88. Section 97 of the Employment Rights Act 1996 provides that:

> *(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—*
>
> *(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,*
>
> *(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect*

89. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) 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 (b) shall be determined in accordance with equity and the substantial merits of the case.

90. The leading case of ***British Home Stores Ltd v Burchell 1978 IRLR 379*** sets out three elements for a fair conduct dismissal. First, there must be established by the employer the fact of the belief by the employer in the guilt of the employee in relation to that misconduct. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

91. Under section 99 of the Employment Rights Act 1996 an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is pregnancy, childbirth or maternity. If we find that this was the reason, it is an automatically unfair dismissal.

92. In ***Gisda Cyf v Barratt 2010 ICR 1475 (SC)*** Lord Kerr said at paragraph 41 of the judgment *"it is not difficult to conclude that the well established rule that an employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him is firmly anchored to the overall objective of the legislation".*

93. Section 18 of the Equality Act 2010 deals with pregnancy and maternity discrimination:

> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*

(2) 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.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

94. A pregnant employee has an automatic right to return to work following maternity leave and it is to be assumed that she will do so unless she says so otherwise. A woman returning from work at the end of her statutory maternity leave does not need to give notice of her intention to return. She can exercise the right by attending work at the end of the 52-week period. Notice provisions apply if she wishes to return earlier than the end of the maternity leave period.

Conclusions

The effective date of termination

95. We deal firstly with the matter of the effective date of termination. The respondent submitted that it was at least arguable that the dismissal took place on or around 27 April 2015, some 14 months before the claim was lodged. We have found above that Mr Parker did not dismiss the claimant during the telephone conversation on 1 May 2015 retrospectively or otherwise. Thereafter, he wrote to her on 7 May 2015. That letter did not operate so as to terminate the claimant's contract of employment. He put a proposal to her that her employment could terminate at the end of the period of her maternity pay and he said he would check whether this could apply. He also said that this would be done "subject to legal confirmation". He also asked the claimant to come back to him in writing if she agreed. She did not do so. The claimant was not dismissed via the letter of 7 May 2015.

96. There was no agreement from the claimant that her employment would terminate at the end of her maternity pay on 31 January 2016. On the contrary in her email of 12 June 2015 she made it clear that she was still employed by the respondent. We find that the claimant's employment did not terminate on 31 January 2016.

97. The claimant received her P45 on 16 March 2016. We find that she received it on that date and understandably she was surprised to receive it and wished to query it. It could have been sent in error. The sending of the P45 did not in these circumstances make it clear to the claimant that her employment had been terminated.

98. It was only upon receiving Mr Parker's reply of 24 March 2016 that it became clear to the claimant with the words "*in the light of previous events and your total lack or expressions to return to work, your employment is deemed terminated*" that her employment was terminated. We find that the effective date of termination was 24 March 2016. The claim is within time, the ET1 having been presented on 14 June 2016. The claimant had 2.5 years service at the effective date of termination.

Ordinary unfair dismissal – section 98 ERA

99. It is not in dispute that the respondent followed no process prior to dismissing the claimant. We have found above that Mr Parker had made up his mind in advance without any input from the claimant, there was no hearing, there was no advance notice of the charges, there was no opportunity for her to state her case or respond to the charges against her. The respondent says that this was because they did not wish to put the claimant as a pregnant employee through a disciplinary hearing. There is absolutely no reason why, had the respondent wished to take disciplinary action against the claimant, that this could not have waited until her return from maternity leave and given her a proper opportunity to answer the disciplinary case against her.

100. Due to the lack of any fair procedure, it is our inevitable conclusion that the claim for ordinary unfair dismissal succeeds.

The reason for dismissal

101. There were a variety of reasons given by Mr Parker for dismissing the claimant. We have considered whether the reason was related to her pregnancy or her maternity leave.

102. It is not in dispute that the claimant had a difficult pregnancy and she needed more than a standard amount of time off for antenatal appointments. Mr Parker took the view that the claimant was swinging the lead. No-one at the respondent had checked or asked for confirmation of the antenatal appointments.

103. The matter of the claimant's alleged dishonesty related entirely to her representations about her intention to return to work from maternity leave. In the 24 March 2016 email which we have found was operative to terminate the claimant's employment Mr Parker said that the claimant had received her P45 because she had made no attempt to contact him regarding a return to work date. There was no obligation upon her to do so. He also said that during her maternity leave she had not expressed any interest in coming back to work following the situation which took place prior to her going on maternity leave.

104. The claimant was not obliged during her maternity leave to express interest in coming back to work. This was her statutory right.

105. In submissions the respondent said that Mr Parker relies on the reason

for dismissal being that the claimant was lying to him and he had discovered her in her lie; she had betrayed the respondent's trust. This alleged lie was about her return to work from maternity leave.

106. We have no hesitation in finding that the reason for dismissal was related to the claimant's pregnancy and maternity leave. Mr Parker thought the claimant was swinging the lead when she took time off and he considered that the claimant was a dishonest liar because she had indicated to him that she intended to exercise her right return to work from maternity leave but in other conversations had said that she might not. These conversations took place in April 2015 some 14 months before she could have exercised her right to return to work at the latest opportunity. A person's circumstances can change dramatically in a period of 14 months and Mr Parker himself acknowledged that women can change their mind following the birth about whether they wish to return to work or not. He chose to alight upon a conversation that the claimant had with a close colleague with whom she was friendly, a personal conversation, and deem this an act of dishonesty amounting to gross misconduct. It was not. A conversation with a close colleague and friend is not the same as giving formal notice to her employer of her intentions. The claimant was entitled to keep her options open in her dealings with the respondent.

107. Mr Parker also said in his 7 May letter that the claimant was "guilty of comments that [she] had no intention of coming back to working at the Smart Clinics" (our underlining).

108. The reason for dismissal was entirely connected with the claimant's representations about her plans to return to work following maternity leave. The claim for automatically unfair dismissal therefore succeeds.

Pregnancy/maternity discrimination

109. Dismissal is an act of unfavourable treatment. We have considered whether that unfavourable treatment was because of the claimant's pregnancy or because of a pregnancy-related illness or that she was exercising or seeking to exercise her right to maternity leave.

110. We find that the dismissal was for all three of these reasons. We have set out above our findings as to the reason for dismissal. Given our findings of fact there is no question in our minds that the burden of proof passed to the respondent to explain that the reason for dismissal and we have found that it was an unlawful under section 18. We have also found that Mr Parker was unhappy about the amount of time off the claimant was taking and at his view that she was swinging the lead. No proper investigation had ever been carried out in relation to the amount of or reasons for her time off.

111. The claim for pregnancy/maternity discrimination also succeeds.

112. We appreciate that small employers cannot be experts in every field. Mr Parker runs a number of businesses so his experience is wider than just the

respondent. Mr Parker said that he thought he had treated the claimant well but we find that he and the respondent had failed to check the basics of the claimant's employment rights in relation to fair dismissal procedures or her automatic right to return from maternity leave.

Listing a provisional remedies hearing

113. At the conclusion of the hearing, the parties having checked their availability, we listed a provisional date for a remedies hearing for **Thursday 31 August 2017**. As a result of our findings above, this hearing is effective.

114. We ordered that on or before **3 August 2017** the claimant shall send to the respondent an updated schedule of loss and there shall be updated disclosure of documents from either party as applicable. It is the claimant's responsibility to ensure that sufficient copies of any additional documents are available to the tribunal for the remedy hearing.

115. The parties are encouraged to seek to explore areas of agreement for the remedies hearing such as the amount of the claimant's net and gross pay and the amount of the basic award.

_____

Employment Judge Elliott
Date: 12 April 2017