EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Tansley**

Respondent: **Delamin Limited**

Heard at: **Nottingham** **On:** **20-24 February 2017**
8 March 2017 (Reserved)

Before: **Employment Judge Britton**

Members: **Mr J Akhtar**
Ms P Wilson

Representatives

Claimant: **Ms V Earp, Solicitor**
Respondent: **Mrs M Peckham, Solicitor**

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of automatic unfair dismissal by reason of the protected characteristic of pregnancy pursuant to Section 99 of the Employment Rights Act 1996 is dismissed.

2. The claim of harassment pursuant to s26 of the Equality Act 2010 in relation to the protected characteristic of pregnancy is dismissed.

3. The claim of disability discrimination by association pursuant to Section 13 of the Equality Act 2010 is dismissed.

4. The claim of harassment pursuant to s26 related to the protected characteristic of disability is also dismissed.

5. The claim of unfavourable treatment because of pregnancy pursuant to Section 18 of the Equality Act 2010 succeeds only to the limited extent of the claimant not being permitted to attend the appeal hearing the outcome of which was on 22 June 2016. For the avoidance of doubt the outcome would have been the same, and therefore any award for injury to feelings is limited solely to the refusal to permit her attendance. Thus there is therefore no award for loss of earnings.

6. There will now be a Remedy Hearing unless the parties are able to agree on the limited measure of injury to feelings as to which they are to inform the tribunal within 28 days of the issue of this judgment.

REASONS

Procedural History and issues

1. This has first been set out in the record of the attended Preliminary Hearing held by this presiding Judge on 2 November 2016. Thus it does not need rehearsing. Second, it was further rehearsed extensively in the judgment refusing an amendment to the claim given on 24 February and promulgated to the parties on 6 March 2017. In that respect all that needs to be rehearsed is that coming out of the attended Preliminary Hearing on the 2 November there was a finalised list of issues from the Claimant's solicitor setting out those matters for determination by the tribunal. This document in its revised format was before us at pages 38-42 in the agreed bundle. As to the agreed bundle page references thereto by the tribunal hereinafter have the prefix Bp followed by the page number.

2. What is important therefore for the reader to grasp at the onset is that there was no claim brought relating to the interface of absences to pregnancy-related discrimination including dismissal and we refused a very late amendment to add that as an issue. Thus, matters relating to the issue of the claimant's absences and its interface to the alleged pregnancy discrimination are not therefore before the tribunal, hence why they are not dealt with other than in brief passing for the purposes of the chronology of events.

3. Before exploring the law the fundamentals in this case are as follows. The claimant, Emma Tansley, applied for a post with the respondent as a Sales and Logistics Coordinator. She had two interviews on 15 and 17 February 2016. She was offered the post, which she accepted, and she commenced her employment on 23 February 2016. The contractual offer is at Bp54 and included a six month probationary period.

4. Cutting matters short at this stage, on 17 March 2016 the claimant announced at work her pregnancy. On 23 March 2016 she was made the subject of what we would describe as a performance review out of which came that she was issued with a verbal warning (Bp122). She worked on the 24 March 2016 and then took a pre-booked Easter fortnight holiday with her husband and two children.

5. On her return on 11 April 2016 she was dismissed. During the course of the dismissal meeting with Phil Coates (PC), sales and product development director, she raised that she believed that a reason for her dismissal was her pregnancy. The initial decision to dismiss her was then reviewed on that day by Mr Nick Dodes (ND) who is the Managing Director. He decided to confirm the dismissal having satisfied himself that it was not in anyway pregnancy-related, which of course is an issue we shall need to look at, and so the letter confirming her dismissal with pay in lieu of notice was reissued (Bp143).

6. The claimant straightway appealed that decision providing in writing detailed grounds of appeal on 13 April 2016 (Bp149-150). She had requested that she be allowed to be accompanied at the appeal. However, she did not wish to be accompanied by one of the other members of the workforce in this very small business and because they were all involved in one way or another, and she is not a member of a trade union. Therefore she wanted to bring along a friend from outside work. The respondent acting on the advice of its HR advisers refused her request telling her that she could however have "somebody wait outside the room in case that person was needed". This is because, as is now not in dispute and as to which see the medical evidence (Bp238-244 and 271-273) the claimant has always experienced complications in pregnancy including rising blood pressure and blackouts. Thus she wanted support at the appeal hearing. In that respect the decision to not permit her to have somebody present has been conceded during the course of this proceeding as being in itself unfavourable treatment pursuant to Section 18 of the Equality Act 2010 (the EqA).

7. The appeal itself was determined on the papers. The decision to dismiss was upheld and the detailed reasons for rejecting the appeal were issued following an investigation (Bp205-212) on 22 June 2016 (Bp215-220). Against that background the claim was then presented to the tribunal on 13 July 2016. In terms of what the tribunal is therefore to adjudicate upon, it will make findings of fact in relation to issues 1-12 in the revised schedule of particulars as produced by the claimant's solicitor. For the avoidance of doubt it is to be noted that the claim is no longer also brought against PC as a second respondent [1] and also there is no longer a claim of victimisation.

The Claims and the Law

8. As per the PH on 2 November and the revised Schedule of Particulars prepared by the Claimant's solicitors, the Claims are.

9. Pregnancy related unfavourable treatment. Thus s18 (2) of the EqA:

> *"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."*

This claim includes refusal to allow attendance at an ante-natal appointment. We reiterate that 18(2) (b) is only relied upon in the revised schedule in relation to the appeal hearing.

10. Harassment pursuant to s26 of the EQA to include by association in relation to comments as to the Claimant's disabled daughter. Thus:

> *"(1) A person (A) harasses another (B) if*

[1] Dismissed upon withdrawal at the PH on 2 November 2016.

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

11. Pregnancy related unfair dismissal pursuant to s99 of the Employment rights Act 1996 (the ERA).[2] Thus:

"(1) An employee who is dismissed shall be regarded for this Part as unfairly dismissed if-

(a) the reason or principal reason for the dismissal is of a prescribed kind…

…

(3) A reason or set of circumstances prescribed under this section must relate to- (a) pregnancy …

12. Direct discrimination pursuant to s13 of the EQA by association namely her daughter's disability, thus:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Evidence received and first observations

13. The tribunal heard the following witnesses in this order. In each case the evidence in chief was by way of a witness statement, thus first the claimant, Emma Tansley; then for the respondents, first, Sarah Johnson (SJ). She is the Senior Sales and Production Coordinator. She has been employed since February 2011. Then we heard from Phil Coates (PC), followed by Nick Dodes (ND). Then Bryony Martin (BM) who is the Financial Controller with the respondent and who has been employed for about 3 years. Finally, we heard from Samantha Smith (Sam) who works under the wing of BM as Finance

[2] The usual 2 years qualifying service is not required to bring such a claim.

Assistant and Office Administrator, she has been employed since November 2014.

14. As to the witnesses there are conflicts on the evidence to be resolved between the claimant and respondent witnesses. Furthermore assertions have been made on behalf of the claimant that there is a conspiracy in this matter and whereby the witnesses for the respondent have in effect lied on various issues. In this particular case there clearly is an inference to be drawn, given the circumstances of in particular the dismissal and the potential relationship to the pregnancy. Therefore the burden of proof has in reality, reversed particularly on that issue. Thus we have looked to the respondent to satisfy us on a balance of probabilities that in particular no part of the reason for dismissing the claimant was by reason of her pregnancy. However in dealing with these issues we have not found that any of the respondent's witnesses have lied. Indeed we have found that witnesses such as in particular the three female workers, have been very persuasive of issues to do with the workplace and have satisfied us that there was no change of attitude to the claimant post her announcing her pregnancy. And although there may be some shortcomings about PC and his unfortunate turn of phrase from time to time, and from which he will doubtless learn, nevertheless we are very persuaded by the far more urbane ND. And thus we do not find overall that PC even if he did make the remarks we shall address, did so in the context of events by reason of the claimant being pregnant. There were shortcomings in the way that the dismissal in particular was handled, but we have to factor in that this is a business which is very small indeed, although it has a substantial turnover with only 6 employees including the two directors and a part timer who is the disabled son of ND. It follows that we do not find there was a conspiracy.

Setting the scene and further observations

15. What the business does, having been set up by ND and PC approximately 25 years ago, is to develop and then sell to in particular international companies in the manufacturing world, green chemicals which are advanced and protected by patents. Thus the formulas and the manufacturing processes are closely guarded commercial secrets. Furthermore the commercial activity is very price sensitive. The directors are the go getters and very hands on. ND is more customer relations and finance focussed. PC complements by being in charge of sales and also product development. The manufacturing is outsourced under confidential arrangements. What the team led by SJ and BM does is to deal with the paperwork, invoicing etc to ensure that the correct chemical gets to the right customer at the correct sensitive price and such as organising the deliveries which go worldwide. Goods outwards in all respects is the role of particularly SJ and was also that of the claimant once she was recruited. As to getting the money in, paying such as the invoices, monitoring cash flow and banking, that is the primary role of BM supported by Sam. The only other person employed by the business is ND's disabled son who works one day a week. BM and Sam do not work a full week. Both are mothers of young children. Also important for our purposes is that one of BM's children is disabled. That is important because a factor in this case is as to whether the respondent, and in particular through remarks made by SJ, had an antipathy to the claimant in terms of her responsibilities for her disabled child, Emily, and as alleged by the claimant thus seeing her as unable to fully commit herself to the job.

16. In passing we can deal with this issue by saying that we have no doubt whatsoever from the evidence of the female witnesses for the respondent that they were not in the least bit hostile to the claimant because she had a disabled child. The opposite is the truth. The Respondent employs ND's son one day a week and that BM has a disabled child was never a problem: indeed her colleagues took a keen and supportive interest as to how her child was fairing. And in that context we do not find that her colleagues, in particular SJ or the two directors, made matters difficult for the Claimant when she had to take leave as an emergency on 21 March 2016 because Emily, whose disability is partial sightedness, had had an accident at school and thus had to go to hospital. In fact they were very supportive making plain that she should drop everything at work and go to Emily and not worry if that meant some time off.

17. The other point to make is that the respondent has accommodated the child caring needs of BM and Sam and in terms of the days of the week on which they work. Furthermore historically there have been employees who following pregnancy had satisfactorily been able to return to the workforce. So again the picture is not one of a business which has a problem accommodating pregnant female workers.

18. We now otherwise come to our findings of fact as per the issues set out in the Claimant's revised schedule of particulars[3].

Findings of fact

Holidays

19. When the claimant went for her first interview with PC he had present with him SJ who obviously would be in the interview because the claimant would be the person who would be working with her. Stopping there, this is a very pressurised business; the staff are paid over the going rate for work of this type in Derby and because it requires speed, given such a small team, but also very high degree of attention to detail and thus ability to concentrate and not be distracted. It is perhaps self evident, but if the wrong order went out to the wrong customer with the wrong chemical for the wrong process the consequences could be catastrophic as was made plain to us by in particular ND. So, they were looking for somebody who had a history in logistics and administration; was computer literate; already trained up other than in the modus operandi of the Respondent; finally in the words of ND who could "hit the ground running". This business does not have the resources to allocate SJ on a whole time basis over a relatively long timescale to devote herself entirely to the training of the claimant. That is why we have no doubt that it was essential that the person appointed would not only have the requisite experience but a very quick learning curve, and thus could be trained on the job over a short period of time. We have no doubt that is what the respondent wanted and the claimant sold herself well; she had been put forward by Hayes the recruitment agency as being ideally suited with the required skills set. In the course of the interview and, in our experience it is quite usual, PC asked the claimant as to what holidays she might already have booked. The claimant said something about school holidays but we are not

[3] The revision had annotated in red issues withdrawn.

satisfied on the evidence as to what thereafter happened, that the claimant made clear that she had already got herself committed to 27 days of holiday. We bear in mind that the respondent's holiday year runs from 1 January and that the staff have an allocation of 20 days holiday per annum plus bank holidays. Therefore pro rata as at 17 March she would be entitled for the rest of the holiday year to 17.5 days plus bank holidays. Thus if she had clearly raised her leave intentions this would have flagged up immediate concerns for the respondent in terms of fairness to other staff and from SJ's point of view also the impact on the running of such a very small team. Thus on this first conflict on the evidence we prefer the evidence of PC and SJ.

20. It fits with the paper trail before us i.e. starting at Bp98[4]. Thus the Claimant did not say she had 27 days booked but that she had some holidays planned and that following starting the employment she would provide details of the dates in the first instance to SJ. It may well be that SJ and PC should have asked for specifics. However as it is it was left, certainly in the mind of SJ, that they would discuss the leave dates following the start of the employment and provided the leave could be accommodated, and the intention was that it hopefully would be, then the dates would be passed through to PC to approve as this is part of his remit, and in turn the dates would then be registered on the holiday leave system by BM.

21. What happened is that on 7 March at the start or thereabouts of the working day, the claimant told SJ what the details of her holidays were. SJ immediately sent an email to BM copied to PC, ND and the claimant. It is not the one that is before us and to which we shall refer in due course (Bp98) and because of the following piece of evidence which to us has the ring of truth about it. Thus when Sarah learnt the full extent of the holidays that the claimant planned to take, she immediately realised that this was not something that she thought that the business would be able to agree to. At that stage the claimant planned to take a fortnight's leave at Easter, the Spring Bank Holiday week, 2 weeks in the summer and the Christmas week. As a consequence of her relaying what the claimant intended, there was a meeting that morning between ND, SJ and the claimant. What then occurred fits with the next email that we do have at 10.26 on 7 March (Bp98). It fits because at that meeting ND made plain that he could not agree to the extent of the holidays that the claimant wanted to take. SJ who came across to us in this case as kind and caring, if anything an appeaser, charitably agreed to forego her own holiday already booked and with a deposit paid for between 31 May and 2 June, in order that the claimant could keep her Spring Bank Holiday. This is reflected in that email. What was still on the agenda, however, was the remainder of the Claimant's holidays. The only one that might not be problematic would be the Christmas break as the business was shut but of course she would still therefore be using her leave allocation which was over that to which she was entitled unlike the other members of the staff who would have saved it up.

22. So at that stage it was left that the claimant would think about her position. The leave she wanted had not been agreed to.

23. On 17 March the claimant announced her pregnancy. She told SJ that in the circumstances as she would therefore need to take maternity leave commencing at around the end of October, she would forego the Spring Bank

[4] Bp is a reference to a bundle page in the joint bundle before us.

Holiday week. That of course would mean that the remaining leave entitlement up to when she took her maternity leave would therefore no longer clash with the respondent's Leave Policy. Thus we get the revision to the leave as per the scribblings out on the email at Bp98.

24. So given matters were now in fact resolved, why would there need to be any meeting on the 17th on the leave issue as alleged by the Claimant and thus meaning she can assert that changes to her already allegedly honoured leave was reneged upon because she had informed the respondent of her pregnancy that morning? This is allegation 2 in the revised Schedule of Particulars. ND is adamant that he had no meeting with her to discuss leave on 17 March. He was preoccupied that day first with something which was unexpected and deeply worrying to him which is BM had handed in her notice; and second, he needed to be out of the office by 10.30am because he had a meeting with the business's bankers; and third, in the afternoon he had an out of office a meeting in relation to selling his house. He is supported that there was no meeting by SJ. And there is no email traffic on that day to indicate that there was any such meeting. The handwriting at the top of Bp99 is in SJ's hand. It shows that by now the 4 days spring bank holiday leave had been cancelled leaving the two 2 week spells, constituting 18 working days to which we have now referred[5]. Thus there was no need for any meeting on the 17th. So it is again the weight of the evidence which decides this second conflict in favour of the respondent. What it means is that we do not find that there was any meeting about holidays post 7 March. All that happened on 17 March is that the claimant having informed SJ as we have now set it out to be, all therefore SJ needed to do was to notify ND and BM and which she did.

25. Thus as there was no meeting over holidays post the announcement of the pregnancy and no detrimental/unfavourable treatment of the Claimant on the issue on that day or thereafter, it follows that this cannot therefore be a pregnancy-related issue. This therefore dispenses with item 2 on the revised Schedule.

Training

26. We have already set out the modus operandi of this business and its expectations of the claimant. It is not disputed that she would have been given training but what was not said is that she would be trained intensely over three weeks. The expectation was that with training she would be up to speed by the end of three weeks. The business uses a training manual which was before us. A lot of this is what we might describe as 'teach yourself' because its all in there for the purposes of undertaking such as a sale or order processing and which is via the IT system. The claimant is highly computer literate. Also there are templates for use in the documentation. But if the documentation known as a Wos is inaccurate, hence the need for close scrutiny for the reasons we have given, it is not sent unless of course it was not spotted, and instead the pile of discarded rejected documentation gets shredded. It has to be shredded quickly in accordance with part of the criteria of the respondent's ISO qualification. The claimant says that she was not provided with the training manual and she only found a handwritten one on top of a filing cabinet shortly before she was

[5] Obviously 18 days as opposed to a 17.5 allocation was neither hear nor there and would not be a problem as SJ made plain.

dismissed i.e. in about the third week of her employment.

27. We have a third conflict on this issue. SJ, PC ND and to an extent BM and Sam, are all clear that the training manual as before us has been in existence for some years. Furthermore, PC supported by SJ is clear that a copy of it was placed on the claimant's desk for her to be able to use at the commencement of her employment. Furthermore, SJ took the claimant through the essentials of that manual, and for the first two weeks of the claimant's employment sat side by side to her watching over her closely to make sure that she was undertaking the work in a way that complied with the respondent's requirements. But we have no doubts from all the evidence that we have heard that despite what the claimant may say, she was not getting up to speed. She herself told us that she knew she had made some mistakes but she says that was due to a lack of training. The evidence as we find it to be is that both BM and Sam noticed that SJ was having to devote far more time, than certainly had needed to be expended on her predecessor, to train up of the claimant. Indeed they told us that the same applies to the Claimant's successor who did not need nearly as much training input from SJ. The net result was that SJ was having to stay late to undertake her own work and we have no doubt that this was all tiring her out. Therefore, we do not find that the claimant was not being trained within the limitations of the respondent or its expectations of her but that the claimant was not proceeding as quickly as was expected despite the efforts of SJ.

Phones

28. Part of the concerns of the respondent which led to first of all the performance review meeting on 23 March and then the dismissal on 11 April, was that not only was the claimant failing in what they had expected of her, but she was also, and which in turn might explain the shortcomings, spending an inordinate amount of time at her work either on or looking at her mobile phone. This came to a head in the email that she was sent by SJ on 24 March expressing this concern. The latter had got consent from PC to issue it (Bp124-125).

29.The tribunal spent some time on this issue having had put before it by the claimant her limited mobile phone records. An analysis of these records would show that the claimant was not spending an inordinate amount of time either sending texts or emails. The traffic was in fact confined by and large to her lunch break or very shortly before she was leaving work, in order to liaise with her childminders or in terms of having to deal with Emily's accident on 21/22 March. And for the last two weeks of the employment it seems that because she had not paid the bill the mobile phone could not be used other than for presumably emergency 111 calls. So the large number of what looked to be text signals in the records are in fact auto replies so to speak from EE[6] to the effect that the phone is non-usable. What the EE records we have been shown do not show is the number of incoming calls because EE will not provide that. But what then came out before us is that this not the full picture. The respondent has Wi-Fi and it is a perk of the job that all the staff are able to use it as long as they do not abuse it and confine themselves to in their lunch breaks or such things as emergencies or, for example, the end of the day liaising with such as a childminder. And we have seen Facebook traffic. Our learning curve has

[6] Her network provider.

perhaps been extended in that we have learnt that access for instance to Facebook and thus the ability to send via it, for example text messages, can be done via Wi-Fi but would not show up on the EE record if the Claimant was using the respondent Wi-Fi. That says the respondent explains why all the observed spending of the time on the mobile by the claimant. The claimant denies that she ever knew about the Wi-Fi thus she never used it. But the Respondent's evidence is: (a) first via PC and SJ that she was told about the Wi-Fi facility when she started and of course that it was connected; (b) that it was obvious to SJ BM and Sam that she was using it as, for example, she would show SJ pictures on her mobile. So do we accept the claimant's evidence when she says "I didn't know about the Wi-Fi" and the "I didn't use it"? It is back to the weight of the evidence. The preponderance is not in her favour. Thus we do not find that she is correct. She was using her mobile particularly via the Wi-Fi far more than she has accepted. Thus this would be a legitimate issue of concern for the respondent. It means so far that the concerns about her performance both in terms of ability to learn and be accurate, and second to concentrate rather than be distracted hold up and cannot be pregnancy-related.

Pregnancy

30. The claimant has a history of first difficulty conceiving; second if successful carrying the foetus; third health problems during a pregnancy. She has two young daughters both conceived by IVF. We have already referred to Emily. As at 9 March 2016 the claimant was at least thinking she might be pregnant, albeit she was not undergoing IVF; and so this would of course be of great fortune to her and her husband: but she also had concerns as to whether or not this might cause a recurrence of the cardio problems that she had suffered from in relation to previous pregnancies including such as dramatic blood pressure changes and repeated blackouts; and it may well be that she had already arranged via her doctors to see a specialist for a check up but events overtook. On 9 March the claimant began to feel unwell. Her work colleagues including PC were supportive that she should leave early. This she did, but felt sufficiently poorly to check herself in to the local hospital. There she was kept in for a day while tests were undertaken as to which see the medical library which is in the bundle before us. In the context of all of that the claimant decided to pay on that day for a private ultrasound at the hospital. It confirmed that she was pregnant. Of course that would mean that she would need to be closely monitored by the specialists in terms of any complications and particularly on the cardio/respiratory front.

31. She also has a hereditary liver ailment and there was also a concern that she might be diabetic although she is not. So a raft of medical problems and centring around the fact that she was now pregnant. She was given a follow-up appointment for 16 March. On her return to work on 14 March she did not tell anybody that she was pregnant which is understandable, because with her history of some eleven miscarriages she was fearful that the baby would survive. On 16 March she went back to the hospital where it was confirmed that the foetus had survived and in fact she was by now about 12 weeks pregnant. Further cardio tests were undertaken and suffice it to say that as a result of all that she was going to have an examination at first stage via her GP (the midwife) on 22 April and a follow-up consultation with the cardio on 25 April. She told SJ that night, the 16th, and there is a very friendly exchange of texts. As to whether or not the claimant should inform PC or ND, SJ's view was that this was a matter

for the claimant but that she was sure there would not be a problem.

32. The following morning when the claimant came into work she dealt first of all with the holiday issue and which we have already dealt with. Then she went upstairs to see PC and tell him she was pregnant. It is not in dispute that PC said to her "I need to speak to Nick but it doesn't look good". That of course is a remark which at best is an insensitive and unfortunate turn of phrase, which at first bush appears to indicate that her pregnancy is likely to be unfavourably viewed by Nick: And so of course Ms Earp has understandably seized upon it both in the particulars of claim and the Schedule of Particulars at item 1. Does the remark on the evidence justify the inference, and in particular because does it trigger the onset of a series of events intended by the respondent to get rid of the Claimant and because she is pregnant?

33. The claimant says that when she came downstairs from that meeting she was distraught and very tearful; but SJ and Sam say that she was smiling and happy as if the meeting had gone well. Why does that matter? It is because PC said that having used the phrase we have just referred to, he followed it up by reassuring the claimant that she was however not to worry and because what he was trying to convey was that it was because of the holidays and the clash in that respect that Nick might be unhappy. We do not know, because he was never asked, if PC knew at that time that the claimant had in fact given up her Spring Bank Holiday.

34. Now we come to the next sub topic – change of attitude. This is item 3 in the Schedule. The claimant says that once she announced her pregnancy she was cold shouldered particularly by PC and ND, but also to some extent by the other members of the team and in particular by SJ. That, furthermore, SJ made various remarks which would be indicative of not being supportive at all of the claimant now being pregnant.

35. So taking these issues in the sequence as set out at item 3 to the Schedule first was it that after she announced her pregnancy that NC "*ignored and blanked the claimant completely for approximately one week".* The picture we have of ND is that he is very proactive and spends a lot of time coming back and forth into the downstairs office where the team work. His office is upstairs as is PC's. The staff noticed no change of attitude from him, indeed for that matter they also did not notice any change of attitude from PC. Both ND and PC say there was no change of attitude and indeed PC says that he congratulated the claimant on her pregnancy. As to whether ND did or did not, we do not know because he was never asked. What he did get asked was whether he ignored her and he was adamant that he did not.

36. So put into the forensic equation the rest of the team and so far the evidence is that the claimant was not ignored. Then the claimant says that on 21 March, which is circa the time that the claimant had to go off and deal with her daughter's accident at school, that "*Sarah J questioned the claimant's ability to work as well as being a mother with two children… SJ went on to say that it was unfair on the employer referring to the claimant's pregnancy and also commented as to the claimant's ability to work whilst also having a disabled child".*[7] In her evidence before us she says that BM must have overheard that remark because

[7] This therefore brings in item 4 and 5 on the Schedule.

BM straightaway came over and said "Did I hear what I think I just heard" as if expressing disproval. However, and this comes back into the issue of the notification of the pregnancy because it is circa about that time obviously; after the announcement of the pregnancy we have the following contrasting evidence. First, BM has her own disabled child and was quite adamant that if she had heard anything along the lines of what the claimant alleges she would have straightaway voiced her disapproval to SJ. However, she also said that SJ is not at all that way inclined and caring and supportive. That is echoed by Sam who equally never saw or heard any such remark if it happened when she was at work. The claimant has brought into the equation the following. It has lead to some intrusive deeply personal questioning of SJ by Ms Earp, doubtless on instructions, and which perturbed the tribunal. It was along the lines that as SJ had been unable to conceive in the past but was attending a private clinic, she would have been embittered when learning the claimant was pregnant. Second that in the course of the discussion that Sam had offered SJ a pregnancy testing kit. The implication presumably is that this would only further have wounded SJ. The alternative approach presumably intended by the questioning, and which was the inference, was that as the two of them could be facing maternity leave at the same time, and given how SJ is so very committed to the business, that therefore she would be about getting rid of the claimant as soon as possible.

37. From the evidence we find thus: SJ at 41 years old had in effect given up the likelihood of having children. What she did have is problems with erratic and, when they came, extremely painful indeed disabling periods. Therefore not having got enough help from the NHS she was about to go to a private clinic. And we had the evidence corroborated by BM and Sam that SJ had said to the others when they were having "girl talk" about the claimant having now announced her pregnancy, that how wonderful it would be that they would have a baby to look at, or words to that effect. Such an expression of support would in the tribunal's experience as an industrial jury not be unusual at all. As to the pregnancy testing kit, SJ says that she was not offered a pregnancy testing kit. Sam when questioned said that there was an occasion when she had offered, and it had been taken by SJ, a pregnancy kit to do a test which was negative. But Sam was never asked as to when this was. Although the judge did his best, as is as obvious from the first judgment in this case, to assist in term of questioning and because of the apparent limitations of the advocates abilities, nevertheless of course the judge cannot be expected to undertake full questioning and remember to ask everything of relevance. The advocates are there for that purpose. Therefore, how can we be sure that the discussion about the pregnancy testing kit was on this occasion? And even if it was, it does not undermine the totality of the evidence and indeed our observations. In all other respects the evidence of the respondent witnesses in the team is totally consistent and they were all compelling witnesses. It follows that we are not persuaded that this discussion about the pregnancy testing kit took place at that time. And if it did, take the rest of the evidence and we are not persuaded that it so undermines its weight which is that SJ, and it fits with our observations of her, was very pleased for the Claimant; not resentful being caring and generous of nature; and that the attitude of the team did not become hostile to the claimant.

38. That then brings back in as to a further part of Item 3 as to whether the claimant was not provided with further training from 17 March and because of her pregnancy. We have covered most of this. But to belt and braces, the claimant was still getting intensive support from SJ, certainly until the 24th when matters

started to come to a head. She was also covering up for the claimant to a large extent. This of course fits with her kind and caring nature. The knock on effect was that she was staying late in terms of the backlog of work. Finally, and for the sake of completeness on this issue the claimant's work did not change as she alleges. It was not now "mundane" such as making the tea. This business is too small to be able to afford that luxury. And she was not excluded from conversations with her colleagues at work. On an aside on this issue however, and when it comes to dealing with the matter of failing, the claimant did make a telling remark in answer to a question from the judge. Without leading he was seeking to see if the claimant was going to proffer that a reason for her failings certainly after 10 March was because she was preoccupied with the concerns that began to mount i.e. on the pregnancy front, and also having to cope with Emily's accident. Thus, could that also not mean that the claimant was preoccupied also in terms of looking at her mobile? But the claimant made plain in her answer that this was not the case save for needing to watch the phone for messages a day or so after Emily's accident. In fact she found being at work "a distraction". That therefore eliminates item 3 on the schedule and also deals with item 4 in terms of the remarks attributed to SJ on 21 March. Finally we also add in terms of dealing with item 4 that the emails during this period i.e. the exchange at Bp111-118 simply do not square with an unsupportive and uncaring SJ in relation to her dialogue with the claimant, in fact it is the reverse. It also eliminates item 5.

Last part of item 5 and Item 6.

39. On 23 March the respondent's concerns led to a meeting with the claimant to discuss them. It is minuted at Bp122. Present apart from the claimant and PC was SJ. There are issues in there which do trouble the tribunal relating to the linking of the absences which are clearly pregnancy or disability by association related to the Respondent's concerns. But it is not an issue before us. It was not in the final list of issues and we have not permitted an amendment for the reasons we have already given. Otherwise what was being focused upon was the performance concerns. Well for the reasons we have already given we find as a fact that there were legitimate concerns. It thus follows that we do not find that dealing with those concerns and the issuing on that occasion of what is described by PC before us as being a verbal warning, although that phrase is not actually used in the minutes, would have been justified.

40. The claimant's concerns about her lack of training we have already addressed, and although she says that minute is inaccurate and because she says she raised the issue of a link to her pregnancy[8], this is not what SJ or PC say. We believe them given our findings so far and their corroborative effect. Pregnancy was not raised on that occasion by the Claimant.

41. What is important is that the following day SJ was deeply concerned. One of the issues that had been raised with the claimant was the excessive use of her mobile and not concentrating on her work with the consequent effect of an additional burden on SJ. The evidence of SJ is backed by Sam to the effect that nevertheless the following day, and when SJ went out for the purposes of her lunch as they take them at different times, that the claimant did not get on with the work and in fact was noticeably staring at her mobile phone. Thus when SJ

[8] Not the absence issue.

got back and found work had not been done she expressed her concern to PC to the effect that could she therefore issue the claimant with an email expressing her concern and because this mobile phone usage had not changed at all and that the claimant was "spending a lot of time on the mobile phone today". She got the go ahead to issue it and it was at 13:42 (Bp125).

42. The claimant having received it went and saw PC to complain that she thought this was unfair. There is a minute of that discussion as made by PC at Bp127. She explained that she had been checking her phone regularly to see how her daughter was following a head injury she received at school the previous day. This would relate in fact to having to go off because of the child having injured herself on the 22nd and needing to make contact presumably with home thereafter. The claimant explained her father was at home minding her daughter. The claimant then asserted that everybody else uses their phone and Google's at work. SJ could not see how much she was actually using it; and that she was being persecuted and "being nit picked" about and that "her background was in logistics: it's taking time to understand the work". She made various other remarks including that her "confidence had gone to pot". What she does not do in that minute is to refer to pregnancy but she says this minute is not accurate and that she did. The problem there is that PC says she did not. So again we have the same problem which is that we have no corroboration either way other than this minute, so what do we make of it? It is again back to the cumulative weight of our findings so far. We conclude that pregnancy was not mentioned[9]. That therefore deals with the remainder of Item 5 and also Items 6 and 8.

The dismissal: items 10 and 11

43. This brings us on to what next happened. There is no doubt that by the end of that day the respondent was concerned with the way things were unfolding and in particular as to whether the Claimant was heeding the need to improve and take ownership for her failings. That explains why SJ sent another email (Bp128) to PC, which in fact was before he saw the claimant, relating to *"not completing the paperwork (Wos's) in a timely manner, lots of errors on basic sales documents, not checking files to see what work needs doing, not asking for work. I'm not sure what else you need !!!"* So it appears to us that the respondent was beginning to have second thoughts about whether it had done sufficient the day before in terms of just giving a verbal non-documented warning, or whether it was actually mentally beginning to think about up to whether or not this employment should be ended.

44. Of course the claimant would not have qualifying service for the purposes of an unfair dismissal.

45. That night the Clamant went on her planned Easter fortnight holiday. Thus, whilst the claimant was on her fortnight's leave the higher level of the team began to discuss matters i.e. PC ND BM and SJ. In the context of that PC had looked at her work when he was using her computer and in his words "felt physically sick" at the sheer number of mistakes that had been made. He told ND who also went and had a look and expressed the same view to us. Both told us that these kind of mistakes if the work got out, would be the end of the business; its

[9] Also Disability discrimination by association is not pleaded issue under items 5-6 save for alleged harassment by SJ in terms of disability related remarks and which of course we have dealt with.

reputation would be destroyed. SJ, we think having now realised that she could not go on covering for the claimant, although she was sympathetic to her, was not disagreeing and neither was BM who also had a look at the documentation. Thus, they had concluded before the claimant returned to work on 11 April that she should be dismissed.

The letter issue: see Issue 11

46. Circa 8 April PC was asking BM to look at the dismissal letter that he had drafted. This is because BM provides the HR function[10]. On the morning of 11th which was the claimant's return to work date, BM and PC met early at the nearby Starbucks to look at the amendment referring to the probation period that BM had already proposed be inserted in the draft letter (Bp133) that PC had prepared. The upshot was the insertion of the clause that the BM had suggested on 10 April (Bp134); and so the final letter that we have in the bundle is the revised letter (Bp143) which is what the Respondent says was issued twice to the Claimant on the 11 April and was not altered on the second occasion.

47. The claimant says the following much of which is not in dispute. She was called up to a meeting at 9.30. The minutes of that meeting commence at Bp136. It was chaired by PC and present was BM. She was told that she was dismissed for unsatisfactory performance. She answered *"my pregnancy has changed the situation in the office"* and went on to then talk about lack of support and training and change in attitude to her from inter alia SJ and that therefore she saw the dismissal as pregnancy related. She was given however the letter of dismissal. She took it downstairs and saw SJ and began to blame SJ for her misfortune at which stage BM came downstairs took the claimant to one side in the corridor and asked for and got the letter back. So far essentially not in dispute.

48. The claimant thought at that stage that the decision to dismiss her had "been retracted". But the reason the letter had been retrieved is that PC having heard the words "related to my pregnancy" had immediately following the claimant's departure gone and seen ND who had used the words "*oh my goodness*" and ordered the recovery of the letter. ND then held what he describes as a robust investigation. In fact what we have is that he must have delegated at least some of it to PC because at Bp139 is an interview shortly thereafter where PC saw BM and SJ. The latter was asked about matters and made plain that she considered the claimant was given sufficient training; denied that she had bullied her and explained why. She was upset that Emma had said that she had got her sacked because it was not her: but they all agreed "*lets be honest do we collectively feel that with Emma's progress so far she could meet the demands of the company...no".*

49. Thus, at 16:29 PC sent the claimant an email (Bp143) confirming that the dismissal stood and hence the letter was issued to the claimant as per Bp143. As per item 11 on the Schedule the Claimant says that the letter which was taken back from her had stated, having raised poor performance: *"already been given a verbal and written warning."* But the second letter posted to her on the night of the 11th post the e-mail at Bp143 only referred to performance issues. *"There was no mention of verbal or a written warning in the new letter of dismissal…"*

[10] By now she had been persuaded not to resign. She remains in the employ.

50. An analysis of the documentation before shows as follows. The original unamended letter at Bp133 does refer as to the meeting on 23 March 2016 that:

> *"This meeting constituted a verbal warning following concerns regarding your performance."*

Otherwise the letter refers to subsequently concluding that performance has not reached the required standard: hence the dismissal. The letter makes no reference to a right of appeal.

51. The proposed revision of BM on 10 April at Bp134 only contains the reference to probation, essentially to justify why the Respondent cannot continue the employment to the end of that period because of the extent of the poor performance.

52. The second letter at Bp143 is identical to that at Bp133 save for the insertion of the reference to probation as per Bp134.

53. PC and BM are clear these were the only two letters.

54. The Claimant has no evidence to support her assertion save for her recollection which has been undermined in the main by our conclusions on the issues so far. BM and to a large extent PC, were consistent and credible witnesses. Therefore we reject the Claimant's contention that there was a third letter.

Item 9: 11 April – remarks by SJ as to antenatal and cardiac appointments

55. The claimant says that when she arrived at work on the morning of 11 April she told SJ that she had got lined up the antenatal first appointment and a follow-up cardio appointment. We know from the medical library before us that those would have been on 22 and 25 April. She claims that:

> *"SJ advised that she would need to attend these appointments outside of work time. The claimant offered to attend appointments during her lunch hour but this was refused. SJ again told the claimant she would need to attend the appointments outside of work time".*

56. Again we have a straight conflict. SJ says that she did not say any such thing. Indeed she would not have done because she knew that the claimant had already been for the first cardio visit and of course now knew that she was pregnant, and was aware that these kind of appointments only took place in working hours. Therefore she would not have stood in her way. There was no such discussion. The claimant says SJ is lying. It is again a simple point for us to address: it goes again on the corroborative state of play so far. There is no third party evidence; but the picture that we have of SJ from the rest of the evidence supports what she tells us and therefore we do not conclude that the claimant was told what she alleges by SJ. This finding dispenses with item 9.

Back to item s 10 and 11: was a reason for the dismissal because of the claimant's pregnancy?

57. PC and in particular ND in relation to the pregnancy allegation ruled out

the allegation on the 11 April. Albeit this was not a formal investigation, bearing in mind this is a very small business and that the players were so intimately acquainted with events, and that BM and SJ were seen, the conclusions are not perverse. Take our findings and the evidence and the answer is clear, no part of this dismissal was pregnancy related as pleaded in the revised Schedule of Particulars. It was solely for performance reasons. Thus shortcomings in the procedure are irrelevant as the Claimant has not got qualifying service for an unfair dismissal claim per se pursuant to s98 of the ERA.

Item 12: the Appeal

58. The claimant fully set out the grounds of her appeal and supplemented it (Bp183-4 and 202-4). By now ND had enlisted the professional support of Citation an HR and legal consultancy. The HR side undertook advice internally and the legal side in the form of Ms Percival has undertaken the legal representation. It is no criticism of Ms Percival if we observe that the HR side of the business could have served the respondent far better than it did. There are two reasons why. The first one of course is that ND played a considerable role in the decision to dismiss the claimant which we have now covered. He was now hearing the appeal. Now of course this is a very small business and it is not fatal that the same person should hear the appeal as was involved in the decision to dismiss, but it is not best practice and should be avoided because of course it flies in the face of natural justice and perception. But what else was he to do when Citation explained to him that it normally only gave advice on the telephone. In this instance although it would assist in such things as the investigation for the purpose of the appeal and supporting ND within it, it did not undertake the role of actually chairing the appeal. Ms Percival added before us that it could not do so because it could not bind any employer who used it to the decision it made. We find that odd because in our experience it is not infrequent for small businesses to bring in an external consultant to hear an appeal and commit themselves to be bound by the decision of that consultant.

59. So it meant that ND had no choice, because that is the advice he got, but to hear the appeal. We cannot fault the investigative side of the process. Full statements were taken from all those involved other than of course the claimant who had made her position very clear in the very detailed submissions that she made.

60. That brings us to the second concern. The Claimant was refused permission to attend the appeal hearing with a friend and for the reasons we have given. The net result is the appeal was done by way of written submissions. We do not find any fault in the detailed reasons for rejecting the appeal by ND (Bp215-220) and because the findings are consistent with the facts as we have found them to be. Of course the ACAS CP on grievance and disciplinary matters, mirroring as it does s10 of the Employment Relations Act 1999, only provides for the right to be accompanied by a work colleague or trade union official. But given the Claimant's pregnancy-related health issues which she had disclosed to the respondent, to not allow her to have present her friend was unfavourable treatment because of her pregnancy. It was not nearly sufficient to say that she could have a friend attend but only to wait outside in case the Claimant was suddenly taken ill. Given the Claimant's anxieties about her health and the stressful nature of an appeal hearing, it was wrong and unfavourable treatment of her as to not allow a friend. We gather Citation so advised as NC had said he

would have had objection. This is regrettable.

61. So, on that final issue we find that the claimant was treated unfavourably. There is mention in item 12 of a failure to undertake a risk assessment, it has been abandoned by the claimant and because she never asked for a written risk assessment, which would be a requirement.

Conclusion

62. The shortcoming does not affect the dismissal. Given our findings it would have happened when it did.

63. Therefore any injury to feelings award, limited as it must be only to the shortcoming at the appeal, will inevitably be well down within the lowest band of Vento in its uplifted state. The parties will therefore be expected to see if they can agree remedy without the need to return to the tribunal.

Employment Judge Britton

Date: 4 April 2017

JUDGMENT SENT TO THE PARTIES ON

11 April 2017

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FOR THE TRIBUNAL OFFICE