EMPLOYMENT TRIBUNALS

Claimant: Miss J Spencer

Respondent: The Rejuvenation Salon Limited

HELD AT: Liverpool **ON:** 16 March 2017
4 May 2017
(in Chambers)

BEFORE: Employment Judge Whittaker
Mr G Pennie
Mrs J C Fletcher

REPRESENTATION:

Claimant: In person
Respondent: In person (Julie Daley and Ann Malone)

JUDGMENT

The judgment of the Tribunal is that the claim of the claimant that she was treated unfavourably, namely dismissed, because of her pregnancy is dismissed.

REASONS

1. The claimant brought a single claim against the respondent, The Rejuvenation Salon Limited. That was a claim pursuant to section 18 of the Equality Act 2010. A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy. It was agreed between the parties that the claimant was pregnant at the material time. The claimant alleged that she had been treated unfavourably by being dismissed. At the time of dismissal there was no dispute that the claimant was pregnant or that the respondent knew that the claimant was pregnant.

2. The respondent denied that pregnancy was any part of the reasoning of the respondent company for the dismissal of the claimant. The claimant alleged that at least part of the reasoning for her dismissal was the fact that she was pregnant.

3. The single issue for the Tribunal therefore to determine was what was the "reason why" the claimant was dismissed from her employment with the respondent company? The Tribunal reminded itself that pregnancy did not have to be the sole or even the main reason for the dismissal of the claimant by the respondent company. It was only necessary for the claimant to substantiate that at least part of the reasoning of the respondent company was the fact that the claimant was pregnant at the date of her dismissal. Furthermore, it was not disputed by the respondent that the claimant was dismissed.

4. The Tribunal received from the claimant a bundle of documents comprising documents and a witness statement. Those documents were self contained. There was no joint bundle prepared or presented by the respondent and the claimant. The witness statement of the claimant was comprised in a bundle which had sections marked A-L. Her witness statement was contained at section A.

5. The respondent company was represented by Julie Daley and Ann Malone. The respondent presented witness statements and documents comprised of 13 pages in eight separate sections and presented those to the Tribunal as effectively the witness statements for the respondent in connection with the case of the claimant.

6. There was also presented to the Tribunal a bundle of documents. This was not a joint bundle. The Tribunal accepted and acknowledged that neither the claimant nor the respondent were legally represented. The bundle had not been prepared or presented in the format which the Tribunal would usually expect. However, it had an index with nine separate sections and it purported to suggest that within those sections the pages were numbered from one to 74 onwards. This was not strictly true. For example, there did not appear to be any pages which would bear the numbers of pages 72 or 73. The Tribunal therefore has ensured that it has numbered the pages that it refers to in this judgment, and to assist the parties in understanding which pages it has referred to it has also done its best to describe the documents even though they were not paginated or presented to the Tribunal as paginated by either the claimant or the respondent.

7. The claimant and the two witnesses, Julie Daley and Ann Malone, gave evidence on oath to the Employment Tribunal. Furthermore they answered questions from the claimant/respondent where appropriate and answered questions which were put to them by the Tribunal.

Findings of Fact

8. After considering the witness statements, the documents presented by the parties in support of their witness statements and considering the bundle of nine sections purporting to comprise pages 1-74 onwards, the Tribunal made the following findings of fact:-

(1) The claimant commenced her employment with the respondent company 1 October 2014. She was contracted to work 16 hours a week and would spread those hours equally over Thursdays and Fridays. At that time the claimant was a single parent with one young child who was under school age. The child started pre-school on Monday to Friday during the hours of 9.00am to 11.45am in September 2015. By December 2015 it was clear to the claimant that her child was not settling at pre-school and she approached the respondent to see if her hours could be changed. However, as the request was made in December the request was refused because the salon was particularly busy due to the time of year. The problems for the child, however, continued to present themselves and at the end of January 2016 the claimant resigned giving the respondent company four weeks' notice.

(2) At this stage in their evidence there was a significant disagreement between the claimant and the respondent. The claimant alleged that it had been agreed between the claimant and the respondent, as represented by Julie Daley and Ann Malone, that there would be a temporary change to her working hours and working pattern which would operate between the beginning of March and the end of August only and that as from the beginning of September when her child was then going to school full-time that the respondent had agreed that her working pattern would then "return to my normal working hours". The claimant, at the top of page two of her witness statement, confirms that her new working hours were to start from 1 March 2016. However, the claimant presented no evidence to the Tribunal at all of any such arrangement on the part of the respondent company. The Tribunal finds that the claimant may well have understood that that was what was going to happen, but the Tribunal does not find that there was any agreement to that arrangement on the part of the respondent. There was, therefore, no contractual agreement reached between the claimant and the respondent about any working pattern beyond 31 August 2016.

(3) By contrast to what the claimant said about what she understood would be her working pattern and arrangements beyond the end of August 2016, the respondents were very clear that they reached an agreement with the claimant which covered nothing more than the period from the beginning of March 2016 to the end of August 2016. The Tribunal accepted that that was in fact what happened. The respondent company did not discuss with the claimant or reach any agreement with her about what would happen beyond 31 August 2016. Consistent with that situation, Ann Malone prepared a new statement of main terms and conditions of employment which appeared at page five in the bundle. The signature at the foot of that page was confirmed by the claimant to be her signature. Although there are certain legal irregularities in the statement, such as the statement relating to the period of continuous service, nevertheless the contract is very clear in indicating that it was for a fixed term terminating on 31 August 2016. The contract confirms that at that time the contract "will automatically expire" unless it is otherwise agreed in writing between the claimant and the respondent company. No evidence was presented to the

Tribunal by the claimant of even a verbal agreement between the respondent company and herself about what happened beyond the end of August 2016.

(4) The Tribunal therefore finds as a fact that the claimant had resigned her employment and had agreed to work four weeks' notice. But for her acceptance of the fixed term contract at page five, the employment of the claimant by the respondent would therefore have ended by virtue of the claimant's resignation in February 2016. Her employment with the respondent company only continued beyond that date as a result of the contract at page five, and it only therefore continued on the basis of a fixed term period between 1 March and the end of August 2016 at which point the employment of the claimant would terminate unless there was any subsequent agreement. It was agreed between the parties that no such subsequent agreement was ever reached. The Tribunal unanimously therefore found as a fact that as at the date of her dismissal the claimant was employed under an extension to her contract of employment, but it was an extension which represented a fixed term period which would expire on 31 August 2016. Finally insofar as this finding of fact is concerned the Tribunal took into account the content of a text message reflected at page 45 in the bundle. The text message at the top of that page is from the claimant to the respondent. It indicates in the language of the claimant that she "would like" to return to work after nine months if the option to return to work after new baby is there. In the opinion of the Tribunal this reflects that there was no agreement between the respondent and the claimant about any working arrangement beyond 31 August 2016, and that if no agreement was reached the employment of the claimant would end at the end of August 2016.

(5) Prior to agreeing with the claimant that her employment would not end as a result of her resignation but would in fact be extended on a fixed term basis until 31 August 2016, there was a considerable exchange between the claimant and the directors of the respondent company about the terms on which her employment might be extended. There was no significant disagreement between the claimant and the respondent about the terms of and the conclusions which were reached as a result of those discussions and negotiations. The content and tone of those negotiations is reflected in an exchange of text messages which were presented to the Tribunal in the bundle at pages 47-50 inclusive. The claimant made it very clear that if an arrangement was to be reached which would meet with her approval that it would need to be on the basis that she was being paid for 16 hours of work per week in order to protect her existing entitlement to various state benefits. At page 47 there is evidence to demonstrate that what was discussed and ultimately agreed between the claimant and the respondent was that she would work for 13 hours a week but would nevertheless be paid for 16 hours a week and would effectively "bank" the remaining three hours which would then be worked as and when those hours suited the business of the respondent.

(6) It was important to the claimant that the records of the respondent company demonstrated that she was being paid for and on the books as being contracted to work 16 hours and was paid for 16 hours even though, week by week, she was only going to be working 13 hours and "banking" three hours each week. The mathematical calculation which is demonstrated in the text message on page 49 indicates that that is the case. The mathematical calculation of being paid for 13 hours at £8 per hour is exactly the same calculation as 16 hours at £6.50 per hour. This is what was ultimately agreed. At page 50 the proposed working hours to make up the 13 hours per week are discussed. The Tribunal found this exchange and the evidence of the respondent's witnesses to be particularly persuasive. It was the claimant who resigned her employment and she had resigned her employment due to childcare difficulties which the claimant acknowledged were interfering with her ability to perform her working responsibilities for the respondent. Clearly the claimant had acknowledged that those difficulties were sufficiently significant to persuade her that she should resign her employment, albeit with notice.

(7) Of the two directors, Julie Daley and Ann Malone, Julie Daley was quite prepared to accept the resignation of the claimant when it was submitted. However, Ann Malone persuaded Ms Daley that the claimant should be given a short extension to her contract of employment, ultimately from 1 March to 31 August 2016, in order to reflect the fact that in February Ann Malone was not as connected with the business as she had been previously due to personal responsibilities associated with caring for her mother. It was also felt that the claimant could provide cover for the holidays which staff members would be expected to take in the summer months of July and August when those months coincided with school holidays. The Tribunal found it significant that of the two directors who were involved in the decision to extend the contract of the claimant, albeit on a fixed term basis, that one was reluctant to do so and one expressed interest in doing so albeit for a mixture of both personal and business reasons.

(8) The text messages which appeared in the bundle at pages 51 and 52 were also significant in the opinion of the Tribunal. These text messages indicated that the ability of the claimant to work the hours which she was "banking" each week was to a large extent dictated not by the claimant, and certainly not by the respondent or by the needs of the respondent's business, but were dictated and influenced significantly by the decisions of the boss of the claimant's former partner who was the father of her child. The Tribunal accepted the evidence of Ann Malone which she gave in her witness statement at the top of page 11 when she said that the shortfall in hours "would be made up in hours on Saturdays beneficial to the salon". The Tribunal found that this was the basis of the agreement and that it was a significant point from the perspective of the respondent company. The respondent company had agreed a significant degree of flexibility with the claimant about her working arrangements, not only in respect of her working hours but also in connection with the manner in which the claimant would be paid "up front" for hours which she was then going to

"bank". The Tribunal accepted that an obvious example of when the claimant would be expected to use those hours which she had "banked" would be when staff took holidays or when the salon was particularly busy. The Tribunal found that this degree of flexibility was important to the respondent company. It had demonstrated a significant degree of flexibility to the claimant and it expected a similar degree of flexibility to be offered by the claimant to the business as and when the business needs of the respondent company dictated that the claimant should use the hours which she had been paid for but which she had not worked.

(9) The Tribunal also found that following 1 March 2016 there was an attempt by the claimant effectively to dictate, in some measure, to the respondent company the hours and days of the week on which the claimant was able to work in order to cover holidays or to cover busy periods. This is reflected in the text messages which appeared in the bundle at pages 51 and 52. Here it was clear that the claimant was only going to be able to work on Saturdays when her former partner was free, and that when he was going to be free was dictated by his boss. This was not the flexibility which the respondent company had expected. The ability of the claimant, therefore, to work the hours which she was "banking" week by week began to be determined by the availability of the claimant's former partner to provide childcare, thereby releasing the claimant to be able to work. That is what the respondent company had in mind. The respondent had expected the claimant to be able to cover for holidays and busy periods which were dictated by the business needs of the respondent company and not by the business needs of the boss of the claimant's former partner.

(10) The new fixed term contract operated from 1 March 2016. On 17 March 2016, however, only just over two weeks later, the claimant was unable to fulfil her working arrangements because her childcare arrangements broke down. Her mother, for reasons which were not explained to the Tribunal, was unable to provide childcare on 17 March which was a day that the claimant was due to work. Furthermore, the claimant did not contact the respondent company until almost the very time that she was supposed to start work to say that her childcare arrangements had broken down and that she would now not be able to work. The Tribunal was satisfied, from questions which it asked of the claimant, that the claimant had a proper and reasonable opportunity to tell the directors of the company well before the time that she was due to start work that her arrangements had broken down and that she would not be able to come into work. By 17 March 2016, therefore, there was a volume of evidence developing which indicated that it would be the childcare arrangements of the claimant, in whatever form, which would have a significant influence on the ability of the claimant to perform her working hours, and indeed to fulfil her agreement under the terms of her new contract to work the "banked" hours which were a significant feature of the flexible working arrangements which had been agreed between the claimant and the respondent.

(11) At the time that Ann Malone had persuaded her fellow director, Julie Daley, that an extension to the claimant's contract should be negotiated,

Ann Malone had personal responsibilities relating to her mother's ill health which were impacting significantly on her ability to participate fully in the business of the respondent company. However, Ann Malone's mother passed away on 28 March 2017, only four weeks after the new contract of employment had begun. The Tribunal accepted the content of the statement of Ann Malone which appears in the final paragraph of page 10 of her witness statement. Here Ms Malone confirms the date that her mother passed away. She also confirms the way in which her mother's ill health had impacted on her ability to participate fully in the business, but it equally describes the way in which Ms Malone was then able to once again take up the reins of the business in a way which was not possible prior to her mother's death. Ms Malone explains, and the Tribunal accepted this evidence from her, that she was then able to review the business figures and that she was indeed "genuinely surprised" at the sales performance of the claimant. She said in her witness statement that this was a long-term problem and the Tribunal accepted that that was the case. The Tribunal was presented with a significant number of pages of financial information, in particular pages 55-71. The Tribunal found, however, that these figures were in some ways unreliable and indeed inaccurate. For example the figures, prepared for the respondent company and not by the directors of the respondent company, prepared various averages and then compared the claimant to those averages even though she was only contracted to work 13/16 hours a week, when she was being compared to other full-time employees. Clearly it was never possible for the claimant to perform to the level of a full-time employee when contracted to work 13/16 hours a week. The directors of the respondent company in cross examination from the Tribunal accepted those inaccuracies in the figures. However the Tribunal accepted that those figures, as presented by documents 55-71, were then accurately summarised at page 75.

(12) The cost of the claimant's wage was £555 per month to the respondent company. This was agreed and not disputed by the claimant. The Tribunal was told by the respondent company, and this was not disputed by the claimant, that all the employees were expected to earn the equivalent of their wage plus 25% as a contribution towards the profits of the respondent company. On that basis the claimant would have been expected, as a minimum, to earn £693.75 per month, this being the calculation of her wage of £555 per month plus 25%. The Tribunal accepted the summary of figures at page 75 on the basis that it was an accurate summary of the detailed pages which were submitted to the Tribunal at pages 55 onwards. Furthermore, the claimant did not raise any criticism of this summary to the Tribunal.

(13) The respondent company told the Tribunal, and the Tribunal accepted this evidence, that December in the beauty business is particularly busy and the claimant's earnings for the respondent company at £869.89 in that month were to be expected. However, the months of January and February were disappointing and barely covered the wage of the claimant. There was an increase in March but there was a decrease in April. The

monies earned by the claimant in November again had barely covered her wages and certainly had fallen well short of the financial target, as a minimum, of £693.75 per month.

(14) The Tribunal finds that it was these figures which genuinely concerned Ms Malone following the death of her mother when she had the opportunity to consider in more detail the performance of the claimant and equally to consider the performance of the claimant over a number of months and was not taking, for example, a one month snapshot which would obviously have been unfair and unreasonable. The Tribunal accepted what Ms Malone said in her witness statement that when she looked at these figures that she "was genuinely surprised at just how poorly Jenna was performing and that it had been a long-term problem perhaps overlooked by [me] due to being distracted by my mum".

(15) By early April, therefore, the Tribunal found that there was genuine concern on the part of Ms Malone about the financial performance of the claimant and the fact that she was in some months being paid almost the equivalent of the fees which she was generating from customers that she provided services to for and on behalf of the respondent company. The Tribunal accepts that there was a pattern which substantiated genuine concern on the part of Ms Malone. The Tribunal reminded itself that there had never been any significant change of heart on the part of Julie Delaney who, when the claimant had submitted her resignation, had been very much in favour of accepting it. She had only changed her mind as a result of representations which had been made to her by her fellow director, Ms Malone who, by early April, had herself genuine concerns about the performance of the claimant. Those concerns centred around the financial performance of the claimant, but equally were very much focussed on the ability of the claimant to perform the arrangement of working hours which had been agreed with her as a result of ongoing challenges which the claimant had in arranging and sticking to childcare arrangements.

(16) At page 3 of the respondent's witness statements the respondents set out the reasons why the claimant was dismissed. At page 10 of the bundle the respondents had prepared a written note of the outcome of the appeal hearing which had rejected the claimant's appeal against her dismissal. In that document the respondents had described the reasons for dismissal which were:-

- Not growing a client base month on month
- Unsatisfactory sales figures when examined over the last year
- Sales figures staying consistently below an amount to cover wages
- Complaints by clients
- Not taking enough with treatments

- Arriving for work without warning
- Inappropriate gossip with clients
- Specific reference to the basis on which a six month fixed term contract had been agreed, relying on the ability of the claimant to provide reliable childcare.

(17) The respondents confirm at page 10 that they had done their best to fit the working hours around the needs of the claimant, but they point out that within the first month, as set out above in these Reasons, that the claimant had been absent on one day (17 March) and had already used leave that she had not accrued for on Good Friday. Of course the position with regard to accrual was inaccurately stated by the respondent company, but nevertheless that was their honest if mistaken and inaccurate belief. The respondent company indicates that by the date of dismissal the "banking" of working hours had worked in a way which the respondent company had never anticipated, namely that the claimant had worked 39 hours from a total of 64 hours which she had been paid for. There was an ongoing reference to the findings of fact made above by the Tribunal relating to the fees generated by the claimant by contrast to monthly wage of £555 which she was being paid.

(18) The Tribunal discussed and challenged the respondents about the reasons for dismissal which they had set out at page 10 of the bundle and which they had confirmed at page 3 of the witness statements of the respondents, specifically in the witness statement of Julie Daley. The respondent's witnesses accepted that there was no written evidence, no written record, no notes of any meetings, and indeed no evidence at all other than the verbal evidence of Ms Daley and Ms Malone, to justify the allegations relating to not taking enough time with treatments, arriving late for work without warning, inappropriate gossip with clients and complaints from clients of substandard treatment relating to refunds and treatments. When asked by the Tribunal to provide dates on which these incidents of alleged inadequate performance on the part of the claimant had occurred, Ann Malone alleged that there had been two incidents which had occurred in March 2016. One was allegedly a complaint about waxing a claimant's eyebrows in a way which had not met with the approval of the client, and as a result of which Ms Delaney had allegedly offered free treatment to compensate the claimant. No name for that patient was provided. The allegation of "bad mouthing" in which the claimant had allegedly been involved had again allegedly occurred in March. However, there were no notes whatsoever relating to either of these incidents. There was no disciplinary hearing. There were no records of any meeting. There were no records of the claimant even being called to any meeting.

(19) When Ms Daley gave evidence she gave specific examples of an incident which occurred in connection with a named client "Frances Scanlon". This was presented to the Tribunal as an example where the claimant had not been busy and at no real cost to the respondent company that client could

have been given a “Rolls Royce” extended service. Ms Daley suggested that the claimant had in fact curtailed the length of the booking and instead of fulfilling an appointment which had been booked for an hour had actually completed the treatment in 45 minutes. The claimant disagreed with Ms Daley’s version of this incident. The Tribunal was unable to determine the circumstances of this incident at all. It had the verbal evidence of one of the directors of the respondent company and the verbal evidence of the claimant. Both gave evidence on oath. Both seemed equally persuasive. The Tribunal was therefore unable to accept this as an incident which justified criticism of the claimant by the respondent company.

(20) The claimant was, however, able to remember an incident where she was accused of “bad mouthing” Julie Daley. She was alleged to have discussed the private life of Julie Daley to a client. Again the claimant denied this. Furthermore Ms Daley confirmed that she did not speak to the claimant about it and when she was asked why not she told the Tribunal that she had “no idea why not”. The claimant denied any occasion on which she had spoken about the private life or the business of the respondent to any of the clients. Again in the absence of any recordkeeping or any minutes of meetings or any letters or emails, or indeed any written documentation at all, and in the absence of any independent witnesses, the Tribunal was unable to find that there was evidence to criticise the performance of the claimant in this way sufficient to justify or influence the decision ultimately to dismiss the claimant.

(21) In summary, therefore, looking at the list which appears at page 3, the Tribunal was not able to conclude that there was persuasive evidence from which it could make any findings of fact against the claimant relating to her performance in connection with the allegation about not taking enough time with treatments, inappropriate gossip with clients and complaints from clients of substandard treatment resulting in refunds and free treatments.

(22) Insofar as the second allegation on page 3 is concerned, arriving late for work without warning and absenteeism, there was a single yet significant incident on 17 March 2016 which the Tribunal has already described.

(23) Insofar as the allegation of other general lateness is concerned, the witnesses for the respondent were challenged by the Tribunal to provide evidence. The witnesses acknowledged that they were unable to do so. The respondents had provided comprehensive diary records from their appointment list covering the period from 10 September 2015 all the way through to 15 April 2016. None of those records bore any mention of lateness or absenteeism. Again, therefore, the Tribunal was unable to be persuaded that there was evidence on which it could make findings of fact about alleged arriving for work late without warning and absenteeism. In short there were simply no records available or indeed maintained at any time by the respondent company.

(24) The sixth allegation listed on page 3 related to clients not wanting to re-book. Again the witnesses for the respondent company indicated that they had one or two isolated incidents when in their opinion this had occurred, but there was no documentary evidence to indicate that that was the case and there was no evidence to indicate that this had ever been discussed properly or responsibly or indeed reasonably at any time with the claimant. These were simply vague and general assertions made by the witnesses for the respondent company. The only evidence that the respondent company gave was of one named individual but that was, on the admission of the respondent's witnesses, prior to September 2015. There was no evidence that that had been discussed with the claimant or that it was of significant concern, and it had certainly not operated on the mind of the respondent company when considering rejecting the resignation of the claimant and offering her a further period of employment for six months. Furthermore, as the Tribunal has set out above, in the absence of any documentary evidence at all, the claimant was asked whether or not she accepted the allegations which were now being made against her in the course of the respondent's witnesses giving evidence. The claimant rejected the allegations very clearly. In the absence of any independent evidence other than the verbal testimony of the witnesses, which was in complete disagreement, the Tribunal was unable to find any satisfactory evidence to substantiate an allegation that there had been a sufficient number of clients not wanting to re-book the services of the claimant to significantly influence the decision of the respondent company to terminate the employment of the claimant.

(25) From the list on page 3, therefore, the Tribunal was left with the final allegation of "poor sales". However, returning to page 10 in the bundle which was the list set out by the respondents at the time of dismissal of the appeal of the claimant, other issues were listed. In particular, the respondents listed issues relating to childcare and the fact that at the time of issue of the six month fixed term contract that the respondents had done their best to fit the hours which the claimant wanted to work around the childcare and personal arrangements of the claimant and indeed others, including the claimant's former partner and his own employer. As already indicated in this Judgment, the respondents had by the time of dismissal noted that the claimant had worked 39 of the hours for which she had been paid, effectively "banking" 25 hours. However, by the time of dismissal the claimant had indicated that she was only able to work one Saturday and this was not in accordance with the expectations of the respondent company at the time that the six month contract was entered into. At that stage it was expected that the claimant herself would be flexible. The respondent witnesses were not expecting them to be flexible around the arrangements of the claimant. They had demonstrated significant flexibility in finding a working relationship and method of payment of wages which met the needs of the claimant, but in return the claimant was expected to meet the reasonable business needs of the respondent company to cover staff holidays, for example, and in particular, and perhaps most importantly, to provide her services on Saturdays and other busy periods when the respondent company could expect to earn

fees in order to justify the wages which it was paying to the claimant. The evidence available to the respondent company as at the date of dismissal, 20 April 2016, was that of 64 hours the claimant had been paid for she had only worked 39 and she had "banked" 25 hours. In the opinion of the Tribunal the directors of the respondent company, Ms Malone and Ms Daley, were entitled to express significant concern about this working relationship. They had expected it to work in a particular way but by the time of dismissal it was clear that it was operating in a very different way to that which they had expected and which, in the opinion of the Employment Tribunal, they were entitled to expect it to operate. The respondent company had demonstrated significant flexibility towards the claimant and the claimant was, in the opinion of the Tribunal, reasonably entitled to expect a proper degree of flexibility on the part of the claimant to meet the needs of the respondent company. The fact that she had "banked" 25 hours in just over 1½ months was a proper and genuine concern to the respondent company in the opinion of the Tribunal.

(26) Furthermore, at page 10 the respondents raise concern about the wages being paid to the claimant by reference to the fees which she was generating. The Tribunal has commented on that above. The Tribunal finds that that was a genuine, reasonable and proper concern. There was a pattern as described by Ann Malone in her witness statement to which the Tribunal has referred above.

(27) At page 10 the respondents also used the phrase "arriving late for work without warning". This allegation was justified in the opinion of the Tribunal, as it specifically related to the events of 17 March when the claimant's childcare arrangements through her mother completely broke down, and yet the claimant made no proper or reasonable efforts to tell anyone at the respondent company that she was going to be unable to perform her responsibilities almost up until the time that she was due to arrive for work. The Tribunal finds that that is conduct which the respondent company was entitled to be upset about and critical of.

(28) The Tribunal wishes to record very clearly that it has considered and reflected in detail on the absence of recordkeeping of the directors of the respondent company and indeed their failure to follow any reasonable disciplinary process. Of course the Tribunal has equally been required to take into account the fact that the claimant did not, as at the date of dismissal, have two years' service which would have entitled her to claim unfair dismissal, and it is the experience of the Tribunal that many employers do not fully or indeed in any way on occasions comply with the provisions of the relevant Code of Practice where employees have less than two years' service. That was a factor which the Tribunal felt it was proper to take into account. However when the respondent company, through its director witnesses at page 3 in the statement of Ms Daley and at page 10 of the bundle, describe a number of reasons for dismissal which the Tribunal could find no evidence of during the course of the hearing, the Tribunal paused and reflected on the absence of any

recordkeeping and absence of any evidence other than the oral testimony of the individual directors.

(29) As already indicated, in relation to many of the reasons for dismissal specified by the Respondents, the Tribunal has been unable to prefer the evidence of the directors to the evidence of the claimant, and indeed been unable to prefer the evidence of the claimant to the evidence of the directors. It has, therefore, been unable to satisfy itself what happened, who was involved and when it happened with any degree of sufficient satisfaction. Nevertheless the Tribunal accepts the evidence of the respondent director witnesses to the extent that there were incidents which were of concern and which they could recall in general terms. The Tribunal did not believe that either of the two directors had deliberately invented the client incidents and client expressions of dissatisfaction. It was simply that there was a degree of paucity of evidence which did not enable the Tribunal to prefer the evidence of the claimant or the evidence of the respondent or vice versa. The Tribunal was able to accept, however, from the directors of the respondent company that there was concern, from time to time, about the performance of the claimant as described in the headings relating to not taking enough time with treatment, inappropriate gossip, complaints from clients of substandard treatment and clients not wanting to re-book.

(30) However, in the absence of the detailed particulars which the Tribunal requested the Tribunal finds that the directors were and would have been unable to provide that detail at the time of the disciplinary hearing. Of course no such information was prepared or given to the claimant in advance of the disciplinary hearing (such as it was), or indeed in advance of the appeal hearing. The concerns of the respondent directors, therefore, at the time of dismissal and at the time of the dismissal of the appeal were of a generalised nature and not of a specific or detailed nature.

Conclusions

9. Having made the above findings of fact the Tribunal returned to the statutory language of section 18 of the Equality Act 2010. The claim of the claimant was that she had been treated unfairly “because of her pregnancy”. The act of unfavourable treatment was the dismissal on 20 April 2016. The claimant alleged that that decision that had been taken, either entirely or in part, because she was pregnant. It was in that way that her claim fitted within the statutory framework of section 18.

10. The Tribunal therefore reminded itself that the issue it had to determine was the “reason why” the respondent directors took the decision to dismiss the claimant in April 2016. Was it in any way influenced by the fact that the claimant had told the respondents on 29 February that she was pregnant and that she remained pregnant as at the date of dismissal on 20 April? The decision of the Tribunal is that the decision to dismiss the claimant was not in any way influenced by the fact that the claimant was pregnant. The decision of the Tribunal is that the principal reasons for the dismissal of the claimant were:-

(a) The financial performance of the claimant over a number of months and the fact that Ms Malone was specifically able to focus in on that financial performance following 28 March, the date on which her mother passed away. The Tribunal accepted that evidence from Ms Malone. There was, in the opinion of the Tribunal, a clear pattern of unsatisfactory performance. The claimant was clearly not meeting the threshold of performance, namely the value of a monthly wage plus 25% as a contribution towards the profits of the respondent company. There was no pattern of increase on the part of the claimant in connection with her monthly fees which the respondents could see. There was no pattern of increase in the number of clients whom the claimant was introducing to the respondent company.

(b) An equally significant reason for the dismissal of the claimant, however, was the inability of the claimant to meet the reasonable expectations of the respondent company in connection with her working hours. The respondent company was properly entitled to expect the claimant herself to be flexible in completing and working her “banked hours”. The judgment of the Tribunal is that in fact the arrangement was largely governed by the availability of childcare for the child of the claimant and in particular governed by the decisions which were being made relating to the availability of her former to provide childcare on Saturdays. It was, in the opinion of the Tribunal, perfectly reasonable for the company to expect the claimant to have provided flexibility and to have worked her “banked hours” on a regular and proven basis. However, by the time of dismissal she had barely worked 60% of the hours for which she had been paid. The company was carrying the financial obligation to meet the wages of the claimant month by month, but there was no indication on the part of the claimant that she was meeting her equally important obligation to provide services to the respondent company for the wages which she was being paid. The incident on 17 March was, in the opinion of the Tribunal, a significant incident as it demonstrated not only the difficulty associated with the claimant's childcare arrangements but also her priorities in not contacting the respondent company to inform them promptly of the breakdown of those arrangements and to allow the respondent company to mitigate the obvious impact of the claimant not coming into work.

11. In summary, therefore, the Tribunal concludes that the two principal reasons for the dismissal of the claimant were the breakdown of the claimant’s childcare arrangements and the obvious effect which that had on the business of the respondent company, and the financial performance of the claimant over a sustained period of time as demonstrated by the summary which appeared at page 75 of the bundle.

12. Insofar as the other reasons expressed at page 3 of Ms Malone’s witness statement and at page 10 in the bundle are concerned, the Tribunal finds that these were minor irritations to the directors of the respondent company. They undoubtedly had some, if minor, influence on the decision making process which led to the dismissal of the claimant, but in the unanimous decision of the Tribunal the principal and overwhelming reasons for dismissal of the claimant were the breakdown of her childcare arrangements and the level of her financial performance.

13. The claim of the claimant therefore that she was treated unfavourably, namely dismissed, because of her pregnancy is dismissed. The Tribunal does not find that her dismissal was in any way influenced or affected by the fact that the claimant was pregnant at the date of her dismissal.

14. The Tribunal sat to reach this judgment on 4 May 2017. The respondent witness, Ms Daley, had submitted a letter to the Tribunal dated 2 May 2017 in which she purported to send to the Tribunal "updated witness statements". The Tribunal wishes to place on record that it did not read or consider any of the documents which accompanied that letter. Indeed the Tribunal did not even look below the face of the letter which was presented to it dated 2 May 2017. Whatever documents were below that letter were not considered by the Tribunal and played no part in the decision making process of the Tribunal.

Employment Judge Whittaker

Date 15 May 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

16 May 2017

FOR THE TRIBUNAL OFFICE