EMPLOYMENT TRIBUNALS

BETWEEN

Miss Clara Jennings **(Claimant)**	**and**	**Ms Davinda Kaur** **t/a Adhara Hair and Beauty** **(Respondent)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Birmingham**

On: **4, 5 and 6 January and 10 April 2017**

Before: **Employment Judge Coghlin, Mrs D Hill and Mr M Khan**

Representation:

Claimant: **Andrew Bousfield, counsel**

Respondent: **Ian Pettifer, solicitor**

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was unfairly dismissed contrary to section 99 of the Employment Rights Act 1996, on the basis that the principal reason for her dismissal was a reason connected with her pregnancy.

2. The claimant's claim of pregnancy and maternity discrimination under section 18 of the Equality Act 2010 is well founded and succeeds.

3. The respondent failed to comply with its duty to provide a statement of employment particulars complying with section 1 of the Employment Rights Act 1996 and is ordered to pay the claimant a sum equivalent to two weeks' pay pursuant to section 38 of the Employment Act 2002.

4. The claims of indirect discrimination and for unpaid holiday pay, and for determinations under sections 11 or 12 of the Employment Rights Act 2010 in respect of alleged failures to provide a statement of employment particulars and an itemised pay statement, are dismissed on withdrawal by the claimant.

REASONS

Introduction

1. By a claim form dated 5 July 2016 the claimant presented claims of

    a. automatically unfair dismissal contrary to section 99 of the Employment Rights Act 1996 ("ERA");

    b. pregnancy maternity discrimination contrary to section 18(2) and/or (4) and 39 of the Equality Act 2010 ("EqA");

    c. indirect sex discrimination contrary to section 19 EqA;

    d. unauthorised deductions from wages contrary to section 13 ERA by way of a failure to pay holiday pay;

    e. failure to provide a statement of employment particulars contrary to sections 1, 2, 4 and 11 ERA; and

    f. failure to provide payslips in respect of December 2015 and April 2016 contrary to sections 8 and 11 ERA.

2. The claimant did not bring a complaint of "ordinary" unfair dismissal under s98 ERA.

3. A preliminary hearing took place on 9 September 2016 at which both parties were legally represented and EJ Findlay identified the issues and gave case management directions.

4. At the hearing before this tribunal Mr Bousfield, counsel for the claimant, made it clear that the claimant was not pursuing certain of her claims, namely those of indirect discrimination, for holiday pay, and for determinations under sections 11 or 12 of the ERA in respect of the alleged failure to provide a statement of employment particulars or an itemised pay statement. Accordingly those claims are dismissed on withdrawal by the claimant.

The hearing

5. The tribunal was provided with an agreed bundle of documents and certain further documents were produced as the hearing progressed.

6. The claimant gave evidence on her own behalf and called Ms Catherine Holford Myerscough, who gave oral evidence. She also produced witness statements of Yvette Stephens, Megan Hallisey, Andrew Malone and Martha

Downing but none of those individuals was called to give live evidence and none had signed their witness statements, and the tribunal attached no weight to their evidence. The respondent gave evidence and called Ms Tara Warner to give oral evidence.

7. The case was initially listed for 3 days. That proved to be insufficient and the matter was relisted for closing submissions to be delivered on 31 January 2017. Unfortunately that hearing had to be vacated due to a medical issue concerning a member of the tribunal and so submissions were eventually delivered on 10 April 2017. The tribunal was greatly assisted by the helpful and thorough written and oral closing submissions presented by both advocates.

The issues

8. It was agreed that the issues in the case relating to liability were as follows:

    a. Was the claimant unfairly dismissed contrary to s99(3)(a) or (d) ERA and regulation 20(3) of the Maternity and Parental Leave Regulations 1999 ("MPLR")? In particular, was the reason or principal reason for the claimant's dismissal was a reason connected with:

        i. her pregnancy, or

        ii. the fact that she took time off under s57A of the ERA on 16 and 17 February and 25 March 2016?

    b. Did the respondent, in a protected period of the claimant's, treat her unfavourably by dismissing her, because of her pregnancy or an illness suffered by her as a result of it (s18 EqA)?

    c. Should an award be made pursuant to section 38 of the Employment Act 2002 on the basis of a failure to provide written particulars of employment in breach of sections 1-4 of the ERA?

9. The following remedy issues were also identified:

    a. What loss has the claimant suffered?

    b. Has the claimant taken reasonable steps to mitigate her loss?

    c. Should any award be adjusted pursuant to s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") on the ground that either party unreasonably failed to comply with a provision of the ACAS Code of Practice on Discipline and Grievances at Work?

    d. Should an award of costs be made pursuant to r76(4) of the 2013 Employment Tribunal Rules in respect of tribunal fees paid by the claimant?

The law

10. **Section 57A ERA** provides, so far as relevant:

Time off for dependants.

(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—

(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,

(b) to make arrangements for the provision of care for a dependant who is ill or injured,

…

(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or

(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

(2) Subsection (1) does not apply unless the employee—

(a) tells his employer the reason for his absence as soon as reasonably practicable, and

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

(3) Subject to subsections (4) and (5), for the purposes of this section "dependant" means, in relation to an employee—

…

(b) a child, …

11. **Section 99 ERA** provides, so far as relevant:

Leave for family reasons.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

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

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,

…

(d) time off under section 57A;

and it may also relate to redundancy or other factors.
…

(5) Regulations under this section may—

(a) make different provision for different cases or circumstances;

(b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section.

12. **Regulation 20 of the MPLR** provides, so far as relevant:

Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if–

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3) ...

…

(3) The kinds of reason referred to in paragraph (1) … are reasons connected with–

(a) the pregnancy of the employee;

…

(e) the fact that she took or sought to take –

…

(iii) time off under section 57A of the 1996 Act; …

13. **Section 18 of the EqA** provides:

Pregnancy and maternity discrimination: work cases

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

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or

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

…

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; …

14. **Section 39 of the EqA** provides, in relevant part:

Employers and Applicants

…
(2) An employer (A) must not discriminate against an employee of A's (B) -
...
(c) by dismissing B;

(d) by subjecting B to any other detriment.

15. **Section 136 of the EqA** provides, in relevant part:

Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision,
…

(6) A reference to the court includes a reference to

(a) an employment tribunal;
…

16. We remind ourselves of the guidance set out by the Court of Appeal in **Igen v Wong** [2005] ICR 931. Although it was given in the context of a case brought under the provisions of the Sex Discrimination Act 1975, it applies equally to claims of pregnancy and maternity discrimination under s18 of the Equality Act 2010:

> "(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to

> prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

17. The parties initially agreed that the approach to the burden of proof for the purposes of a claim under s99 ERA should the same as is required in a case of automatically unfair dismissal by reason of whistleblowing brought under s103A ERA. Both advocates referred to the approach set out in **Kuzel v Roche Products** [2008] EWCA Civ 380 (CA). However Mr Bousfield went on to accept, rightly in our view, that given that the claimant lacked the necessary two year period of qualifying service so as to bring a complaint of "ordinary" unfair dismissal, it is for her to prove the relevant proscribed reason for dismissal, by application of the long-established principle set out in **Smith v Hayle Town Council** [1978] IRLR 413, which continues to apply to complaints of automatic unfair dismissal where the claimant lacks two years' qualifying service (see **Ross v Eddie Stobart Limited** UKEAT/0068/13).

The facts

18. We have not sought to set out every detail of the evidence which we heard nor to resolve every difference between the parties but only those which appear to us to be material.

19. The respondent runs a small hair and beauty salon. She bought the business in May 2015 and recruited the claimant that autumn. The claimant was ultimately dismissed on 14 April 2016. It is the lawfulness or unlawfulness of that dismissal which is at the heart of this case.

20. The claimant was initially employed as a senior stylist. In November 2015 she was also given what might be described as managerial or supervisory functions: in evidence the respondent described the claimant's role as "senior stylist / supervisor", and the claimant described herself as "manager and senior stylist", which was also the terminology used in an employment contract which was provided to her by the respondent in early 2016. Nothing of substance turns on the difference in terminology. She was treated from an early stage by the respondent as a trusted senior member of staff.

21. The claimant was not initially provided with a written contract. Although the respondent was later to refer to the claimant's employment being subject to a probation period, we find that there was no discussion between the parties of any probation period prior to the claimant's dismissal.

22. The claimant worked at the salon from 10 October 2015. She had also spent a day working at the salon on 26 September 2015, for which she was paid. The respondent's position is that this was a day spent as a working trial; the claimant says this was the first day of her employment. To the extent that there may be a dispute about the precise nature of the relationship between the parties on 26 September or during the period from then until 10 October 2015, it is not one that we have found it necessary to resolve.

23. The respondent soon came to rely heavily on the claimant for her experience and skill. The claimant is a qualified hairdresser whereas the respondent is not, and the respondent also drew on the know-how which the claimant had gained from working in salons.

24. The claimant and respondent had a positive and friendly relationship. We were provided with extensive extracts from their text message communications which were friendly in tone, and which showed them confiding in each other about both work-related and other issues.

25. The respondent's case, and her explanation for her decision ultimately to dismiss the claimant, was that during her employment the claimant displayed a pattern of unreliable behaviour, including unauthorised absences and occasions when she brought her children to work. While reference was made in evidence to a number of incidents, the relevance of which was not in every case clear, the tribunal was provided in closing submissions with a list of the 12 matters which the respondent says she took into account in deciding to dismiss the claimant: specifically matters occurring on 22, 23, 27, 28 and 29 October, 17 and 27 November and 10 December 2015; 6 and 14 January, 19 February, and 1, 17 and 26 March 2016. The tribunal's overall view was that the respondent's evidence in relation to these matters was largely unsatisfactory and unreliable.

26. The first set of matters relied on by the respondent were instances on 22, 23, 26, 27 and 28 October 2015 when the claimant did not work. The respondent's position was that the claimant had been absent from work without permission on these occasions. However on balance we accept the claimant's evidence that on 26 September, when she had spent her first day working at the salon, she had told the respondent that she would not be able to work on these dates, and the respondent had agreed to this.

27. 22 October 2015 was the claimant's birthday. The salon's appointments diary for that day does not show the claimant as due to be working; we attach only limited weight to this however since it would be possible for the diary to be amended, for example by erasing one stylist's name and replacing it with another, and this might legitimately happen were a stylist to be absent at short notice. It is difficult to have any confidence as to when any of the various things found in this diary were written. What is clear however is that the claimant, though not working, did attend the salon that day. This was to have her hair styled by Andrew Malone, another of the staff working there, in the presence of the respondent. We accept the claimant's evidence that this

was a gift from the respondent who had invited her to attend for this purpose. The respondent made no suggestion at the time, whether by text message or otherwise, that she was in any way displeased with the situation.

28. The respondent placed particular reliance on the claimant being away from work on 26, 27 and 28 October 2015. This was a time when the respondent herself was away from the country: she had left the country on 24 October to travel to India with her mother's ashes. As we have said, we accept the claimant's evidence that the respondent had previously agreed that the claimant would work on these days. The claimant's partner had booked time off as a birthday gift prior to her starting work. The respondent's evidence was that on her return to England, the date of which was unclear but was probably on or soon after 8 November 2015, she found out that while she was away her husband had tried to call the claimant on her mobile telephone and heard an overseas ring tone; he then spoke to Andrew Malone who said he had the keys to the salon. The respondent's evidence was that she was "gobsmacked" when she heard that the claimant had travelled overseas when supposedly in charge of the salon, and that she seriously considered dismissing the claimant at this point.

29. This account sat uneasily with the documentary record. There is no text message or other contemporaneous correspondence suggesting displeasure or even concern on the part of the respondent. The absence of any such correspondence is particularly striking given that the respondent had long experience managing a post office and so was by no means a novice as a manager. In fact, the text messages that we were shown, which post-date this incident, were wholly positive in tone and point to the relationship between the parties being positive and trusting. In the course of a lengthy exchange of text messages on 11 November, very shortly after on her case the respondent learned about the claimant's unauthorised overseas trip, there was no suggestion of any annoyance or concern on the part of the respondent and her only comment about the claimant was positive: "I'm really pleased with your organisation".

30. The next incident of alleged unreliable behaviour on the part of the claimant on which the respondent relies occurred on 17 November 2015. On this occasion the claimant attended at the salon from 9.30 (her usual start time) but left at 11.30am. The tribunal finds that the claimant left early in circumstances where the day was quiet and there was no further booking in the diary for her; the respondent was in the salon at the time and was aware that the claimant was leaving early. There was a discussion between them about whether the claimant should stay or whether the junior stylist, Yvette, should stay. The claimant decided that she would go home, both to work on a pricing structure which the respondent wanted her to complete and also to sort out childcare for herself since the respondent wanted her to increase her hours. Although the respondent's preference had been that Yvette rather than the claimant should go home, this does not seem to have been a particular concern for the respondent: she did not instruct the claimant to stay, and there was no trace of displeasure in text messages which they exchanged that evening.

31. The next incident relied on by the respondent was on 27 November 2015. The claimant attended at the salon that day and her three children were with her for a couple of hours. The claimant had explained to the respondent in a text message that morning that she had an unexpected problem with her

childcare and that she had had to bring her children in to work with her temporarily. The respondent replied “do what you feel comfortable with”. There was no indication of concern either in that text or other communications from around that time.

32. On 10 December 2015 the claimant was absent from work for most of the day because her son had a hospital appointment. The claimant opened the salon for Andrew, who was covering for her, and then left at 10am. It is common ground that this absence was authorised and that there was a good reason for it. There was however a dispute as to when the claimant told the respondent of this: the respondent said that this happened the night before, the claimant said that she told the respondent a month earlier. There was no direct contemporaneous evidence to support either view. What is clear however is there was again nothing in the contemporaneous correspondence to suggest any great concern on the part of the respondent about the late notice given by the claimant. The claimant and respondent had extensive text messages exchanges during the course of the day, and the tone of this was entirely warm and friendly.

33. The respondent says that the claimant was absent from work on 6 January 2016. The evidence on this point was patchy. The respondent wrote a note in the salon diary saying “Clara absent”, but we do not know when this was added. In her statement the respondent said that she believed that the claimant’s absence was for personal reasons and may have related to issues concerning the theft of her car registration. In oral evidence the respondent was unable to recall anything about this particular day. The claimant was not cross-examined about the matter. We therefore find it difficult to make positive findings about it. However once again, there was a text message exchange between the two that evening which once again contained no hint of any annoyance on the part of the respondent.

34. The respondent’s evidence was that on 14 January 2016 the claimant left work early, at 2pm, due to personal issues. A note written by the respondent in the salon diary for that day suggested that the claimant was sorting out housing issues. Andrew Malone worked during the afternoon and the respondent wrote a further note saying that Mr Malone was “moaning” about being asked to cover for the claimant. While there was little clear evidence as to the reason for the claimant not working that afternoon – there was no contemporaneous correspondence about it, and the claimant was not cross-examined about taking time off to sort out housing issues – we find that an informal practice had arisen whereby Mr Malone and the claimant agreed to share and swap hours between them. The respondent was aware of this arrangement and did not discourage it. On the contrary, in a text message exchange on 26 February 2016 (page 234) she referred to the arrangement with apparent approval.

35. On 19 January 2016 one of the claimant’s children was unwell and the claimant had to work a short day in order to look after her. The respondent said in evidence that she did not hold this against the claimant or rely on it in deciding to dismiss.

36. That evening, the respondent texted the claimant to ask if she would be able to come to work the next day, 20 January. The claimant relied that the childminder still would not take her sick child. The respondent then suggested to the claimant that she could come in late and bring the child to work with

her. She added "I will nurse my little friend if that's ok with you?" The claimant agreed and on 20 January attended work in the early afternoon and brought her child to work with her.

37. The respondent's pleaded case was that the claimant on occasion "imposed her children on the workplace, bringing them into the salon on days when she had clients booked in, and obliging the respondent to either accept this or cancel the lists thereby losing custom and goodwill." In the letter of dismissal dated 8 April 2016 the respondent wrote that bringing children into work was "entirely unacceptable" conduct and that "we cannot consider allowing you to bring your children into work". This position was hard to reconcile with the fact that on 19 January 2016 the respondent had actively persuaded the claimant to attend work the next day with her child.

38. By its list of 12 relevant incidents provided to the tribunal in closing, the respondent indicated that the 20 January incident was not a matter on which she relied in deciding to dismiss the claimant. However this was in conflict with paragraph 60 of the respondent's witness statement, in which she pointedly referred both to the claimant's lateness on 20 January and to the fact that she had brought her child with her that day, and, in contrast with other occasions such as 19 January, did not suggest that this was something which she decided not to hold against the claimant. Further, given the text message exchange the previous evening, which the respondent omitted to mention in her statement, the manifestly unfair criticism of the claimant in relation to this particular incident raises serious questions about the reliability of the respondent's account.

39. The next matter on which the respondent said she relied in deciding to dismiss the claimant was on 19 February 2016. Her evidence was that the claimant had asked Andrew Malone to cover the start and end of the day, and she knew of no good reason why the claimant would need to do this. The respondent's evidence in this regard was unsatisfactory. As we have found, she was aware of the arrangement between the claimant and Mr Malone about swapping hours. Further, the claimant was paid for the whole of this day, on the basis that she had worked from 9.30am to 5pm (page 352), and we regard it as unlikely that the respondent would have done this if she had been unhappy about the claimant swapping hours on this particular day.

40. In February 2016 the claimant discovered she was pregnant with her fourth child. She told the respondent about this on 26 February.

41. On 1 March 2016 the claimant missed part of the working day due to a hospital appointment (which was not connected with her pregnancy). The respondent's evidence was that the claimant had not given sufficient notice of this appointment, that she had asked Andrew Malone to cover for the claimant, and that this caused Mr Malone to voice his displeasure. While we accept that the respondent may have considered that the claimant had not given her enough notice of the appointment, we note that once again there is no contemporaneous correspondence by which any concern was expressed by the respondent.

42. On 5 March 2016 the respondent texted the claimant "Thank you for everything today. It is a real pleasure to have you at our salon" followed by three "kiss" emojis.

43. The respondent asserted in her witness statement that the claimant was late for work on 9 March 2016 because her mother, who was coming with her to the salon to model, wanted to stop off at McDonald's. This allegation was shown to be untrue, and the respondent was forced to abandon it, in light of evidence in the form of a text message timed at 9.16am, a quarter of an hour before the time when the claimant was due to start work, in which the claimant made it clear to the respondent that she was already at the salon. That text was followed very soon after by a text from the respondent consisting of two kisses.

44. In March 2016 the respondent provided the claimant with a copy of a contract of employment. We accept that it was substantially in the form of the version found at page 1 of the tribunal bundle.

45. The respondent gave evidence that she spoke to the claimant on 16 March to raise her concerns about "the issues" including in particular the claimant's absences from work. There is no record of any such discussion. The claimant's evidence was that the respondent did not raise any concerns about her absences at any stage during her employment and that the first time the respondent raised any concerns with her was on 26 March when, as we shall describe, the claimant had her children at work. We prefer the claimant's evidence in on this point.

46. 17 March 2016 was St Patrick's Day. The claimant took the day off. There was again a dispute about how much notice the claimant had given to the respondent of her intention not to work: the claimant said that she had booked the time off since January; the respondent said that the claimant only told her the night before. The respondent's evidence is that she was upset and frustrated by being told, on the evening of 16 March, that the claimant intended to take the next day off. That is not borne out by the tone and content of the text messages which she sent to the claimant at that time: on 16 March she wrote "Have a great day tomorrow xx" and "Say hi to Kids give [your daughter] a kiss xx". On 17 March she wrote "Happy St Patrick's Day". On 18 March the claimant apologised for not having been able to reply to that text and the respondent replied "you are excused xx just this once".

47. On 26 March 2016 the claimant attended work but brought her children with her. It seems that the individual who had been due to look after the children could not do so, having drunk too much and fallen asleep. The working day did not go well. The respondent considered that the children disruptive and spoke to the claimant about it, and the claimant apologised.

48. On 28 March 2016 the claimant began to suffer from pregnancy-related sickness and began a period of absence the next day, from which she was not to return before her dismissal. She initially self-certified and then obtained a "fit" note from her GP.

49. On 30 March 2016 the respondent contacted Tara Warner, her external HR consultant, with regard to the claimant's situation. The potential dismissal of the claimant was discussed during this conversation, as was the fact that the claimant was pregnant. The respondent gave Mrs Warner the impression that, at the time of their initial discussions on 30 March and the following day, her preference was to extend the claimant's probation.

50. Further discussions took place between the respondent and Mrs Warner, but there are no records of them and neither could recall the number or dates of these discussions. However it appears that there were various discussions between them on 30 and 31 March and then there was a gap of some days without any further discussions, while the respondent considered what to do.

51. Mrs Warner emailed the respondent on the morning of 31 March attaching three draft letters to consider: one extending the claimant's probationary period, the second ending the claimant's employment and the third inviting the claimant to a potential dismissal meeting.

52. No notes were provided to the tribunal of Mrs Warner's discussions with the respondent on 30 March or subsequently. Mrs Warner's evidence was that she took no notes. The tribunal was surprised to hear this, given that, as an experienced HR professional, she was advising an employer on a case involving the possible dismissal of a pregnant employee.

53. During these discussions the account given by respondent to Mrs Warner was in some important respects consistent with the account given by the respondent in these proceedings: that the claimant was unreliable, in particular by frequently being absent from work for personal reasons, failing to comply with absence reporting procedures and bringing her children to work.

54. The respondent also told Mrs Warner that the claimant had frequently been late for work. This was inaccurate, and the respondent later told Mrs Warner by email that she was removing this allegation from a letter which Mrs Warner had drafted for her. She told Mrs Warner in this email that the claimant had been "punctual but unreliable".

55. It was the evidence of Mrs Warner and the respondent that the respondent emailed a list of relevant dates of absence to Mrs Warner. However, despite being given time to search their email records, neither of them was able to produce any evidence that such a list was indeed sent. We are not persuaded that any such list was sent.

56. It is not entirely clear exactly when the respondent first became aware that the claimant's period of sickness absence was pregnancy-related. Her evidence was that "I was well aware that [the claimant's] illness was pregnancy related" and that she discussed this with Mrs Warner, seemingly during the initial discussions which they had on 30 and 31 March.

57. During the next few days the respondent texted the claimant while she was away, asking whether she could come in and asking for an update on a doctor's appointment which the claimant attended on 6 April 2016. On 7 April the claimant texted the respondent in the following terms:

"Hello, been feeling really bad again and sleeping excessively. Dr Hoffman signed me off until the 19th April. Also had a scan today to check everything, all seems fine. I think what she has done is signed me off until I'm 12 weeks to see if things subside, if not, I'll probably need more tests to see if it's anything else. I haven't had my blood results yet though, so it still may be that the part of the thyroid I have left isn't doing what it's meant to."

58. On 8 April 2016 Catherine Holford Myerscough visited the salon. Ms Holford Myerscough is a Principal Officer in Equality and Training at NASUWT. She had previously been a trade union caseworker. The claimant had done Ms Holford Myerscough's hair since around October 2015. In the claimant's absence, the appointment on 8 April was with Andrew Malone. There had been various changes to this appointment due in part to another stylist having time off for reasons related to childcare. The respondent was conscious that Ms Holford Myerscough might feel that she had been messed around, and sat talking to her during the appointment on 8 April.

59. What occurred during their discussion is disputed, and the tribunal was required to determine a stark question of credibility as to what was said. The tribunal found Ms Holford Myerscough to be an entirely honest, reliable and credible witness. She gave evidence with care and with frankness. Mr Pettifer skilfully sought to highlight inconsistencies in her account, but we were satisfied that Ms Holford Myerscough's overall account of the discussion, albeit not verbatim, was reliable. We were not persuaded that Ms Holford Myerscough's recall or account had been consciously or subconsciously influenced by the claimant telling her, as she did by text message some days later, that she had been dismissed because she was pregnant.

60. We find that during this discussion on 8 April the respondent told Ms Holford Myerscough that it was difficult to find reliable staff and that it was hard to run a business when people had time off due to their children being ill. In saying this, Ms Holford Myerscough understood that the respondent was referring to another stylist and not the claimant. The respondent then said words to the effect that she only wanted to employ people with whom this would not be an issue, in other words people who have no family or no children. Ms Holford Myerscough replied that however difficult or inconvenient that might be, it was against the law to discriminate against women with child-caring responsibilities.

61. One of the letters which Mrs Warner had drafted for the respondent following their initial discussions, based on the respondent's instructions, was a dismissal letter. This was printed on the respondent's headed paper, dated 8 April 2016 and signed by the respondent. We were not clear when exactly it was printed, but it was certainly not sent on 8 April 2016. The respondent vacillated as to whether to dismiss or to follow another path, before eventually deciding to dismiss. She posted the dismissal letter on or around 12 April 2016.

62. The dismissal letter read as follows:

"Termination of Employment

You will be aware that your employment with us was initially on a six month probationary period.

During that time, we have carefully monitored your performance and conduct and we are now writing to advise that, unfortunately, the Company [*sic – there was in fact no company*] has taken the decision to terminate your employment for the following reasons:

- **Due to your frequent, unplanned absences since you commenced employment with us, you have become unreliable and now hold an unacceptable attendance record.**

- **You also fail to follow proper absence reporting procedures which were discussed in detail with you – in summary if you are ill or unable to attend work, you are to personally contact me directly no later than your normal start time. You have failed to do this on a number of occasions.**

The above are the main reasons for us ending your employment. I cannot run a business effectively with unreliable employees. I would also point out the following conduct which is also entirely unacceptable:

- **On more than one occasion, you have arrived at work and brought your children with you. Your workplace is just that; we cannot consider allowing you to bring your children to work. We are not insured to do so, nor do we wish to portray this to our customers. Childcare issues are a personal matter and need to be arranged by you so that you are able to work."**

63. The letter concluded by informing the claimant that she was not required to work her notice and that other outstanding monies would be sent with her P45.

64. The letter did not inform the claimant that she had a right of appeal.

65. The tribunal was not impressed by the respondent's evidence in relation to the matters which she says she did and did not take into account in deciding to dismiss. Her evidence was that in deciding to dismiss the claimant she left out of account any absences which were "anything to do with children" or pregnancy-related. The tribunal did not accept that evidence. The respondent's list of 12 incidents includes at least one absence which related to the claimant's children, namely the claimant's absence on 10 December 2015 when the claimant took her son to a hospital appointment. Further there was a notable lack of clarity and consistency in the respondent's position as to what she did and did not take into account: in her witness statement the respondent referred critically to a number of other incidents which were not referred to in the list of 12 incidents produced in closing. When asked in oral evidence to identify how many childcare-related absences she had discounted, the claimant said she could not do so without seeing the list - a reference to the list of absences which it was said was sent to Mrs Warner, but which we have found was not in fact sent.

66. The claimant replied to the respondent by letter dated 14 April 2016, taking issue with the stated reasons for dismissal and complaining that various sums including notice pay were owed to her.

67. Further correspondence passed between the parties in which it was agreed that the claimant's termination date would be treated as 14 April and that she would be paid up to this point.

Analysis and conclusions

Direct pregnancy and maternity discrimination

68. The tribunal first considered whether the claimant had proved facts from which, in the absence of an adequate explanation, the tribunal could properly decide that the respondent committed an act of discrimination.

69. In our judgment the claimant has discharged this burden, for a number of reasons, as follow.

    a. The claimant was dismissed a matter of weeks after telling the respondent that she was pregnant and while on what the respondent knew to be a pregnancy-related sickness absence.

    b. Having initially given the impression to Mrs Warner that dismissal was not her preferred option, the respondent ultimately decided to dismiss the claimant very soon after being told by the claimant that she had been signed off, for what the respondent understood was a pregnancy-related illness, until 19 April with no guarantee of a return even at that point.

    c. On 8 April 2016, at the same time when she was considering dismissing the claimant, the respondent expressed frustration to Ms Holford Myerscough about the disruption that could be caused by employees' child-care arrangements and said words to the effect that she only wanted to employ people without children.

    d. The respondent was asked in oral evidence why no meeting was held with the claimant before deciding to dismiss her. She accepted that the reason why she did not have such a meeting was that the claimant was absent, an absence which she knew was pregnancy-related. It is difficult to avoid the conclusion that this approach was itself an act of direct pregnancy discrimination. However that is not how the case was pleaded or put on behalf of the claimant, and there was no application to amend the claim in light of this evidence. Nevertheless Mr Bousfield submitted that the respondent's discriminatory treatment of the claimant in this procedural respect is a matter which is capable of supporting an inference as to the reason for the actual dismissal itself. We accept that submission. The denial of a proper process to the claimant because of a pregnancy-related absence is a matter which raises a significant issue as to the respondent's regard for the claimant's rights and interests as a pregnant woman.

70. We therefore conclude that the burden passed to the respondent to show that the claimant's pregnancy formed no material part of the reason for dismissal. Having considered the evidence in detail, and having also stood back to consider it as a whole, we conclude that the respondent has not discharged that burden.

71. We accept that the respondent did have some concerns of the sort which she offered as explanations for the claimant's dismissal, and that these formed part of her reason for dismissing the claimant. For example, the respondent was not happy that the claimant's children had caused disruption when they

attended the salon on 26 March 2016. But we also found, having regard to the totality of the evidence and the findings we have made, that the respondent significantly overstated her concerns. The tribunal found the respondent's evidence in this regard to be unconvincing and unreliable. The concerns which she expressed in her letter dismissing the claimant had not been raised with the claimant other than on 26 March as we have described above, and on the contrary the text message record reflected a consistently positive and trusting relationship between the two. We did not consider that the respondent ever satisfactorily explained that tension.

72. Overall the tribunal concluded that the respondent regarded the claimant's pregnancy, the absence which it had brought about from late March and the absences which it might bring about in future both before and after the birth of the claimant's child, was a source of further potential disruption to the running of the salon. The claimant would not have been dismissed had she not been pregnant.

73. We reach this conclusion by the application of the two-stage test which we have set out above, and we would have reached the same conclusion had we moved straight to consideration of the "reason why" the claimant was dismissed.

74. Accordingly the claim of direct pregnancy discrimination under s18 of the EqA succeeds.

Unfair dismissal

75. We next considered whether the reason, or if more than one the principal reason, for dismissal was a reason connected with pregnancy or with the claimant taking time off under s57A of the ERA. The test here is slightly different from that which applies to the claim under s18 of the EqA: it is not enough here for the claimant to show that the relevant factor materially influenced the dismissal. Rather she must show that it was the reason or principal reason for dismissal.

76. We are satisfied that the respondent took some non-pregnancy-related matters into account, such as the disruption which was caused on 26 March 2016. However we have concluded that the principal reason for dismissal was the claimant's pregnancy and the disruption which the respondent felt it was causing and was likely to continue to cause to the respondent's business.

77. On this basis the s99 ERA claim succeeds.

78. It follows that the alternative basis for the s99 ERA claim cannot succeed, because given our finding as to the principal reason for dismissal there is no room to find that the principal reason was that the claimant had taken time off under s57A ERA. For completeness we record that even had we not found that the principal reason for dismissal was a reason connected with pregnancy, we would not have found that the absences on 16 and 17 February and 25 March 2016 were the principal reason for dismissal. We did not in any event consider that the absences on 16 February and 25 March 2016 met the requirements of s57A ERA, for the following reasons.

a. The claimant was absent on 16 February 2016 due to a sickness bug affecting her children, but there is no evidence that the claimant told the respondent how long she expected to be absent until after the end of that working day. The requirements of s57A were therefore not met.

b. As for 25 March 2016, this was not a s57A absence either. 25 March was Good Friday. The claimant had not obtained child care for her children for that day. Relying on s57A(1)(d), Mr Bousfield submitted that the reason for the absence was to take action which was necessary "because of the unexpected disruption or termination of arrangements for the care of a dependant". The circumstances were that the claimant had, some days earlier, asked to take holiday that day in order to deal with a situation arising in relation to her home. That situation had resolved itself, at least for the immediate future, by 23 March, and that evening the respondent asked the claimant if she would be able to work again on Friday 25th. The claimant found that it was too expensive for her to arrange childcare for that day since it was a bank holiday. It was for this reason – the cost of childcare – that the claimant needed to take time off that day. It did not arise from any "unexpected disruption or termination of arrangements" which had previously been in place.

Section 38 of the Employment Act 2002

79. By s38(3) of the Employment Act 2002 we are required to increase any award to the claimant by two weeks' pay (or, if we consider it just and equitable, four weeks' pay) if we conclude that at the time when proceedings were begun the respondent was in breach of her obligation to provide a statement of employment particulars as required by sections 1(1) and 4(1) of the ERA.

80. We have found that the claimant was provided with a copy of a contract in March 2016, in the form found at page 1 of the bundle. However this did not mean that the respondent complied with the requirements of s1 of the ERA to provide a statement of particulars of employment. What was missing from the contract was the name of the claimant, which is required by s1(3)(a) of the ERA to be included. In the scheme of things this is a relatively venial omission, but we are obliged to increase an award unless there are exceptional circumstances which make such an increase unjust or inequitable. We do not consider that there are such exceptional circumstances here. However given the limited nature of the respondent's failing in this regard and the fact that she is a small employer we do not consider it just and equitable to increase the award by more than two weeks' pay.

Conclusion

81. The claims of direct pregnancy and maternity discrimination and of automatically unfair dismissal succeed.

82. The matter will now be listed for a remedy hearing. The issues to be determined at that hearing have been identified at paragraph 9 above. The parties are directed to write to the tribunal within 14 days of the date of this judgment with proposed directions, agreed if possible, for the listing of a

remedy hearing, together with a list of their dates of unavailability for the next 4 months.

Employment Judge Coghlin

30 May 2017

Judgment sent to Parties on

5 June 2017