Case No: 2300319/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss D Howell**

Respondent: **Nannic UK Limited**

Heard at: **Teesside** **On: 8 & 9 June 2017**

Before: **Employment Judge Morris** **Members:** **Mrs C E Hunter**
Mr D Morgan

Representation:

Claimant: **In person**
Respondent: **Mr R Morton, Solicitor**

REASONS

Representation and evidence

1. The claimant appeared in person and gave evidence.

2. The respondent was represented by Mr R Morton, solicitor who called Mr Daniel Nazeriha, Chief Operations Officer of the respondent, to give evidence on its behalf.

3. The Tribunal had before it a number of documents in an agreed bundle. Unhelpfully, the bundle is in two parts with some of the pagination duplicated. The page numbers referred to below prefixed by the letter "A" are in the first part of the bundle, those prefixed by the letter "B" are in the second part of the bundle.

The claimant's claims

4. The claimant has presented two claims to the Employment Tribunal as follows:

4.1. She suffered discrimination because of her sex.

4.2. Her dismissal by the respondent was unfair.

The relevant law

5. The statutory provisions that are relevant to the claimant's claims had been helpfully set out in the Orders of the Tribunal following a Private Preliminary Hearing by telephone on 31 March 2017. These are as follows:

5.1 Section 99 of the Employment Rights Act 1996 ("the 1996 Act")

"(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, …."

5.2. Section 4 of the Equality Act 2010

"The following characteristics are protected characteristics—…. pregnancy and maternity; …."

5.3. Section 13 of the Equality Act 2010

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

5.4. Section 18 of the Equality Act 2010

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

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

(a) because of the pregnancy, or

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

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

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

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(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;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4)."

Consideration and findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

6.1. The respondent is a company providing beauty products and associated machines. It is a relatively new start-up company in the UK being a subsidiary of an investment company based in Sweden selling products of a company in Belgium.

6.2. The claimant was appointed to a post of Area Manager after two interviews and commenced her employment with the respondent on 15 August 2016. During the interview process she provided estimates of sales receipts on the basis of information provided to her by the respondent.

6.3. Following appointment, she was given more formal targets for revenue during the first 12 months of her employment. The claimant's employment was subject to a six months' probationary period albeit there would be a review at the mid-point of approximately three months.

6.4. Nothing untoward occurred in the initial period of the claimant's employment where her focus was understandably on establishing herself in her new role about which she was enthusiastic. The principal event in this period was a trade fair called Professional Beauty Manchester at which she and some nine others promoted the respondent's business and its products.

6.5. Sadly for the claimant, she suffered a miscarriage on 31 October 2016 necessitating a stay in hospital for two days at that time. She was discharged on 2 November. On 1 November, the claimant's partner, Mr Scott, sent a WhatsApp message to Ms Kim Chambers (the other Area

Manager of the respondent who had been appointed at approximately the same time as the claimant) asking if she would inform the respondent of what had occurred. She duly conveyed the message to Mr Nazeriha on 1 November 2016.

6.6. He wrote by text to the claimant on 2 November to say that he was sorry adding, "Please do not worry about work at this stage. All focus on health and recovery for now …" (page A1). The claimant replied thanking Mr Nazeriha and stating that it had been a shock as she "wasn't aware", that she had been "quite poorly" and was "starting to feel better now" (page A2). Mr Nazeriha responded that he was happy that the claimant was starting to feel better and, "If there is anything with work just pass on to me or Kim. You should only focus on recovering fully. Take the time that you need for that!" (page A3).

6.7. The claimant's evidence is that she was given a medical certificate regarding her absence from work due to her miscarriage and that her partner sent it to the respondent three days later. Mr Nazeriha says that such certificate was never received by the respondent. Given the evidence before us including the absence of a copy of the certificate, any proof of posting and the letter from the claimant's GP of 30 March 2017 (page B35) (which is equivocal at best in that it does not say categorically that a medical certificate was issued in October or November), we accept the respondent's evidence that it was never received.

6.8. The claimant's evidence is that she then participated in a Skype video call with Mr Nazeriha, which she initiated on 4 November fairly early in the morning (she thought 9:30-10:00am) for about 15 minutes. Although the claimant has produced evidence of such a Skype contact on 7 November she has not produced the equivalent for 4 November.

6.9. Mr Nazeriha's evidence was that he could not recall the Skype call on 4 November at all but he did not expressly deny that it had taken place. Nevertheless he did deny the suggestion from the claimant that, during any call, he pressurised the claimant to return to work. Although there is a clear conflict of evidence on this point, given the context of Mr Nazeriha telling the claimant only two days earlier on 2 November not to worry about work and focus on recovery and reassuring her that she should take the time she needed for her recovery, we prefer the evidence of Mr Nazeriha on this point that he did not pressurise the claimant to return. That is not to say, of course, that the claimant did not herself feel under pressure to return to work given that she had a new job and targets to meet.

6.10. We interject at this point that Mr Nazeriha's approach to the claimant is likely to have been influenced by the fact that his own wife had miscarried in February 2016 although she then became pregnant and gave birth in November of that year.

6.11. The claimant returned to work on Monday, 7 November, albeit working from home on her laptop as she was unable to drive. As mentioned above, the claimant then participated in a Skype conference call that day with Mr Nazeriha and Ms Chambers and possibly others for some 36 minutes (page B43). This conference call was work-related and there is no evidence before us that it was anything other than an ordinary

business meeting. Specifically, there is no evidence that the claimant suggested that she was not well enough to be working.

6.12. On 23 November 2016 Mr Nazeriha conducted a performance review meeting with the claimant via Skype along with someone whom we only know as Fredrik, the respondent's Chief Executive Officer. Such a meeting was also held with Ms Chambers. The respondent's letter of 24 November 2016 records the outcome, which was not disputed by the claimant (page B36).

6.13. The outcome of the review meeting with the claimant was broadly satisfactory. There were negative points, however, in that sales were below expectation considering the number of leads that the claimant had obtained from the Professional Beauty Manchester event in 2016, and she was urged to improve this. Regarding machine and product knowledge some elements varied between "Excellent" at one extreme and at the other "Need improvement" or "Not yet competent" with "Satisfactory" in between. A particular issue was that the claimant's use of the CRM (Customer and Relationships Management) and diary sharing needed improvement. The claimant was asked to improve in updating the system so that the respondent could see more accuracy in business forecasting.

6.14. In oral evidence Mr Nazeriha explained that he had explored with the claimant the viable business opportunities that she had coming through. She had told him that there were such opportunities, it was just that she had not logged them onto the CRM system. Mr Nazeriha had the feeling that she was not telling the truth and asked her to input the required information as soon as possible. The claimant did update the system with some information but not showing sales to be generated, which was what was required. Mr Nazeriha did not consider these to be valid business opportunities.

6.15. He decided he needed to have a further discussion with the claimant to see what level of opportunity actually existed because if it were missing it could be that there would be no valid sales generated by the claimant for the business in the next few months. He therefore invited the claimant to a meeting in London on 1 December 2016 to discuss such matters. He said she should bring her laptop and other equipment so that it could be established what actual leads she had. At the meeting Mr Nazeriha discussed with the claimant her forecasts for new business, which were crucial to the respondent; particularly what might be realised before Christmas. At their meeting, the claimant explained that her performance was due to factors such as inferior publicity brochures and her continuing to be unwell after her miscarriage. Mr Nazeriha was not satisfied that the information the claimant had now input onto the CRM system provided an accurate forecast and, importantly, he considered that she was unlikely to be able to perform as required in regard to the targets she needed to meet.

6.16. In this respect the claimant relies on the fact that she had identified potential business from a customer, City Retreat, but that the terms of that business proposed by the customer had to be approved by the respondent, which Mr Nazeriha did not do. At the risk of over-simplification, the claimant's position at the hearing seemed to be that she

had performed her role to secure the custom of City Retreat and the fact that such business was not secured was attributable to Mr Nazeriha rather than to her.

6.17. The Tribunal accepts that it was the respondent's option whether or not to accept the terms of business put forward by the customer and that that business would have been secured had it been in the respondent's interest to do so. That notwithstanding, even had that business been realised the claimant would have been some remove from her target income.

6.18. At the conclusion of their meeting, Mr Nazeriha decided, there and then, to terminate the claimant's employment.

6.19. On the basis of the evidence before us the Tribunal is satisfied that Mr Nazeriha had actually decided before the meeting that the claimant's dismissal was probable: ie the claimant could have provided information to dissuade him from such a course of action but, if not, she would be dismissed. In that respect Mr Nazeriha had a letter of dismissal prepared, which he gave to the claimant (page B14) and organised a train ticket for her return journey home.

6.20. Having considered all of the evidence before us as summarised above, the Tribunal is satisfied that the reason for the claimant's dismissal was her performance in two principal respects: first, her not meeting her targets for income that had been set for her; secondly, her not putting into the CRM system required information to enable Mr Nazeriha to assess the accuracy of future business income. Indeed from the information that was input it is reasonable that it seemed to him that such income would be significantly lacking.

Submissions

7. The respondent's representative and the claimant made submissions including those summarised below. The Tribunal fully considered and took into account all the submissions made and if, for reasons of brevity, certain aspects of those submissions have not been summarised below, the parties can nevertheless be assured that they were fully taken into account.

8. On behalf of the respondent, Mr Morton made submissions including the following.

8.1. The claimant's position appeared to be that she had been dismissed by the respondent either because of her miscarriage or because the respondent perceived that she would have other children and require maternity leave. She had explained, however, that the order of events was that she had suffered the miscarriage, then she had had a fairly good review and at the subsequent meeting she had been dismissed. That sequence of events was contrary to the claimant's argument. Had the respondent wanted to dismiss the claimant because of the miscarriage or future maternity the opportunity to do so could have been taken at the review on 23 November.

8.2. The Respondent's witness had explained what had happened between 23 November and 1 December. The position changed with the issues of the claimant failing to log prospects, contacts and opportunities on the CMR: particularly that it had been agreed with the claim that she would undertake that exercise. As to the information the claimant had logged onto the system, the respondent had issues with the substance and content: for example, she said that a client was a prospect but the logged information did not support that.

8.3. This was a performance/short service dismissal and there was not enough evidence to meet the legal requirements. As to section 13 of the Equality Act the claimant had not provided any evidence as to a comparator, male or hypothetical. As to section 18, the keyword is "unfavourably". The claimant has provided no evidence, apart from her dismissal, of unfavourable treatment. She had said that she had had difficulty achieving targets but did not relate that directly to her miscarriage or ill-health. To the extent that there was any pressure on the claimant regarding her sales figures after the miscarriage, the same level of management was applied to her as was applied to any Area Manager and did not constitute unfavourable treatment either at all or in comparison with someone else.

8.4. As to the claimant's illness after her miscarriage, the respondent did not know that she ought not to be working: the sick note had not been received; the circumstances were that the claimant was a homeworker without day-to-day contact with her line manager; the claimant said that she was fit and presented for work. The respondent's position is clearly set out in the text messages to the effect that she should take as much time as she wanted to recover.

8.5. After the claimant had returned saying that she was fit, the respondent holding her to same targets as her colleague Area Manager cannot be unfavourable treatment at all or because of the miscarriage or because of her illness as a result.

8.6. As to section 99, claimant had not set out a case to enable a finding that her dismissal related to pregnancy. The burden of proof was on her to establish a prima facie case. Mere timing is not sufficient to shift the burden onto the respondent: Igen. The claimant is unwilling to accept that her performance was not what the respondent required but that does not mean that that was not the reason for the dismissal. Areas for improvement were noted during the performance meeting on 23 November 2016 and set out in the letter to her the following day.

8.7. The claimant had suggested that the sale to City Retreat had been held off by the respondent to enable it to dismiss her. That was unsustainable. The respondent is a relatively new start-up business and would not delay or defer new business for the purpose of dismissing an employee either because she had had a miscarriage or because of the prospect of her having future children and requiring paid maternity leave. The rationale was given by the respondent's witness that the discount proposed by the potential customer was not considered to be profitable or economic. That is far more believable.

9. The Tribunal clarified with the claimant when the treatment had occurred of which she was complaining. She answered that that was the dismissal and what happened after that. She then made submissions including the following.

> 9.1. She had worked hard and loyally. She had had a good review only a week before her employment had been terminated and there had been no suggestion of termination.
>
> 9.2. Mr Nazeriha had lied about the reasons for the meeting on 1 December. He dismissed her because of her miscarriage that meant that she would not be able to hit targets. He had discriminated against her compared with the other three members of the team because they completed their probationary periods. Hers had been stopped mid-way through without any explanation.
>
> 9.3. She had been asked to take all her goods to the meeting on 1 December when she had been dismissed. The letter was clearly on Mr Nazeriha's desk.
>
> 9.4. It had been crass for Mr Nazeriha to introduce his wife's medical records. The claimant was different as she had to be in hospital. She had returned to work when she should not have done because she felt under duress to bring in sales otherwise she would lose her job; which she did.
>
> 9.5. Mr Nazeriha says he did not receive the sick note but he did. His treatment of her had been unfair and unfavourable. She had lost her job due to her miscarriage.

Application of the facts and the law to the issues

10. The above are the salient facts and submissions relevant to and upon which the Tribunal based its judgment. The Tribunal considered those facts and submissions in the light of the relevant law being primarily the statutory law detailed at paragraph 5 above and relevant precedents in these areas of law.

11. First, there is the question of whether the claimant suffered discrimination on grounds of sex. This has two principal elements: direct discrimination under section 13 of the Equality Act 2010, and pregnancy discrimination under section 18 of that Act. Section 13 provides, with some editing:

> A person discriminates against another if because of the protected characteristic of sex that person treats the claimant less favourably than it treats or would treat others.

12. Having found that the reason for the claimant's dismissal was her performance, it follows that the Tribunal is not satisfied on the evidence before it that the respondent discriminated against the claimant by treating her less favourably than others because of the protected characteristic of sex.

13. So far as is relevant to this claim, section 18 of the Equality At 2010 provides, again with some editing:

> A person discriminates against a woman if in the protected period in relation to a pregnancy of hers the person treats her unfavourably

> because of the pregnancy or because of illness suffered by her as a result of it.

14. The protected period is defined in section 18(6), which is set out above.

15. As indicated above, the claimant clarified that the discrimination that she alleged had occurred was her dismissal and events thereafter. Thus, the earliest act of alleged discrimination took place on 1 December 2016. That being so, the Tribunal finds that any discrimination that there might have been was outwith the protected period and therefore any such claim must fail.

16. Even had the dismissal and therefore the discrimination been within the protected period, given that the Tribunal has found that the reason for the claimant's dismissal was her performance, it again follows that it is not satisfied that the respondent discriminated against the claimant by treating her unfavourably because of her pregnancy or because of illness suffered as a result of it.

17. The claimant's claim of sex discrimination under section 39(2) of the Equality Act 2010, whether by reference to section 13 or section 18 of that Act, is therefore not well-founded.

18. The second question is whether the claimant was dismissed unfairly. The claimant was not continuously employed by the respondent for two years and, therefore, in accordance with section 108 the 1996 Act, does not have the necessary period of continuous employment to bring what might be termed a claim of 'ordinary' unfair dismissal. The Tribunal would note in passing that that is perhaps fortunate for the respondent as, in its experience, the manner of the claimant's dismissal and the process (or lack of it) surrounding it did not come up to expected standards of industrial relations practice including as contained in the ACAS Code of Practice.

19. Notwithstanding not having two years' continuous employment required by section 108 of the 1996 Act, the claimant relied on section 99 of that Act, which provides so far as is relevant to this case that:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or principal reason for the dismissal is pregnancy.

20. As indicated above the claimant has failed to satisfy the Tribunal that the reason or principal reason for her dismissal was pregnancy. As such her claim on this ground is also not well-founded.

Employment Judge Morris

Date: 2 August 2017

JUDGMENT SENT TO THE PARTIES ON

4 August 2017

P Trewick
FOR THE TRIBUNAL