Case Number: 2301094/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mrs J Forecast
Mr M Walton

BETWEEN:

Mrs A Twumasi **Claimant**

AND

Epsom and St Helier University Hospitals Trust **Respondent**

ON: **21 – 24 August 2017**

Appearances:

For the Claimant: **Mr R Sukul (Representative)**

For the Respondent: **Mr L Harris (Counsel)**

JUDGMENT

1. The unanimous judgment of the Tribunal is that:

    a. The Claimant was fairly dismissed.
    b. The Tribunal does not have jurisdiction to determine the Claimant's claim of pregnancy discrimination.

2. The Claimant's claims are therefore dismissed.

WRITTEN REASONS PROVIDED PURSUANT TO A REQUEST FROM THE CLAIMANT AT THE HEARING

1. By a claim form presented on 9 June 2016 the Claimant brought claims of unfair dismissal and pregnancy discrimination. A claim for 'other payments' was not pursued at the hearing.

2. The issues in the case were identified at a case management hearing by telephone presided over by Judge Martin on 19 August 2016. These were set out at page 33 of the bundle of documents referred to below. The Claimant did not claim that she had been wrongfully dismissed or make any complaint about the procedure leading to her dismissal.

3. It was agreed that the Respondent's case would be presented first and we heard evidence from five witnesses: Sarah Vaughan, Labour Ward Manager who was on duty on 7 March 2013, Nicola Shepherd, at the time of the events in question the lead labour ward midwife at St Helier Hospital who remains employed by the Respondent at Epsom Hospital, Sally Sivas, head of nursing who took the decision to suspend the Claimant on 8 March 2013, Amanda-Jane Lavender, Head of Nursing for Medicine based at Epsom Hospital, who was the dismissing officer and Sue Winter, at the time the Associate Director of Workforce, who dealt with the Claimant's appeal. The Claimant gave evidence on her own behalf and had no other witnesses. All the witnesses had provided written statements.

4. There was a two volume bundle of documents amounting to 1004 pages. References to page numbers in this judgment are to page numbers in that bundle.

Relevant law

5. The relevant law is set out in Section 98 Employment Rights Act 1996 ("ERA"). It is for the Respondent to show that there was a potentially fair reason to dismiss an employee. Misconduct is a potentially fair reason to dismiss under section 98(2)(b) ERA. The question of whether the Respondent is entitled to rely on the alleged misconduct to dismiss the Claimant fairly involves consideration of the test in *British Home Stores v Burchell [1980] ICR 303* namely whether the Respondent at the time of the dismissal had a reasonable belief in the employee's guilt based on reasonable grounds after conducting such investigation as was reasonable in the circumstances.

6. Further issues then arise under section 98(4) ERA which provides that the question of whether the dismissal was fair or unfair involves the consideration of whether, having regard to the reasons shown by the Respondent, in all the circumstances of the case, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating the reason relied on as a sufficient reason for dismissing the Claimant. The question must be determined in accordance with equity and the substantial merits of the case. The case of *Iceland Frozen Foods v Jones [1982] IRLR 439* states that the Tribunal must not, in reaching a decision on the reasonableness of the Respondent's decision to dismiss, substitute its own view as to what it would

have done in the circumstances. Instead it must consider whether the Respondent's response fell within a band of responses which a reasonable employer could adopt in such a case.

7. Although the list of issues referred both to s13 Equality and s18, the parties agreed that the Claimant's claim was brought under s18.

8. Equality Act 2010 section 18 provides:

> (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….
> (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.

9. Equality Act section 39 provides:

> (2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment….

10. The Tribunal also had regard to the law on the burden of proof set out in section 136 Equality Act. This section provides that if there are facts from which the Tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against and the Tribunal must find that discrimination has occurred unless the Respondent shows the contrary. As it is generally recognised that it is unusual for there to be clear evidence of discrimination, the Tribunal is expected to consider the facts of the case in accordance with the burden of proof of provisions in section 136 and the guidance set out in the cases of *Igen v Wong and Others [2005] IRLR 258* and subsequently confirmed by the Court of Appeal in *Madarassy v Nomura International Plc [2007] IRLR 246,* although in this case these authorities are applied to a claim brought under section 18 in respect of which no comparator is needed. The case of *Madarassy* provides that it is insufficient for a Claimant to point to less favourable, (or in a pregnancy discrimination case unfavourable) treatment for the burden of proof to shift to the Respondent; some additional factor is needed.

11. We also considered the case of *Robertson v Bexley Community Centre 2003 IRLR 434* on the issue of the extension of time in discrimination cases.

Findings of fact

12. The Claimant was a Band 5 midwife and she was appointed to work at the

Respondent with effect from 12 September 2011 by a letter of appointment dated 27 June 20111(page 341). Her employment was terminated with immediate effect on 10 February 2016. The reason for dismissal was set out in a letter dated 9 February 2016 (page 856). In summary the Respondent dismissed the Claimant because of the substandard care she had given to a patient on 7 March 2013. The detailed reasons were set out by the dismissing officer, Amanda Lavender, at page 870. She found that the Claimant's failings on that date amounted to gross misconduct. At the time of the dismissal the Claimant had a live final written warning on her file relating to three previous and unrelated incidents. This disciplinary record was taken into account by Ms Lavender in reaching the decision to dismiss.

13. The background the dismissal is as follows. On 7 March 2013 the Claimant was on duty on the labour ward. On 13 February she had returned to work after a period of pregnancy related sickness absence. The Claimant notified the Respondent of her pregnancy in writing on 15 February 2013 (page 384). The Claimant asserted that the completion of the First Care record at page 385 represented notification to the Respondent that she was pregnant, but the Respondent's policy at page 278 (B2) required formal written notification to the manager by the employee as the first step of the risk assessment process. A risk assessment was carried by Ms Shepherd on 8 March. The Respondent asserted that there had been an earlier return to work interview between the Claimant and Ms Miniter (who has since left the Respondent's employment) and that the Claimant's pregnancy had been discussed at that meeting, but the Claimant disputed that. The Respondent was unable to show that the discussion had covered the Claimant's pregnancy. However Ms Shepherd had been aware of the Claimant's pregnancy by 7 February when she wrote to the Claimant regarding a review of her sickness absence (page 383). She intended to discuss the Claimant's pregnancy and the support she might need at a meeting on 25 February (which did not in fact take place). The policy required the Respondent to carry out risk assessments within two weeks of formal notification. In this instance the Claimant's risk assessment was therefore one week late.

14. The matters leading to the Claimant's eventual dismissal occurred on 7 March 2013 when the Claimant was on duty on the labour ward during a busy shift. Sarah Vaughan was the ward co-ordinator. She allocated the Claimant responsibility for a particular patient, CJ, who was deemed to be a high risk because of a number of factors including a previous Caesarian section and diabetes. After CJ gave birth and was in the sole charge of the Claimant in a separate room, Ms Vaughan entered the room and considered that an emergency had arisen as a result of CJ seeming to have lost a lot of blood. She had other concerns about the care of CJ which she recorded in a contemporaneous note at page 454. She summoned help, CJ was stabilised and remained in the Claimant's care until the end of the Claimant's shift.

15. The following day the Claimant was suspended by letter written by Ms Sivas at page 447A. Ms Sivas set out seven matters in respect of which the Respondent considered that the Claimant had failed to carry out her duties properly. She had written this letter after having conversations with Sarah Vaughan who approached her to set her concerns about the Claimant's care of CJ and with

Miss Johnson, the Consultant on duty at the shift who had also mentioned her concerns to Ms Sivas. Ms Sivas had the drawn up her list of concerns by reference to CJ's contemporaneous medical notes and to the Code of Conduct of Nurses and Midwives. The listed concerns were as follows:

a. The Claimant failed to recognise the deteriorating condition of a mother following a forceps delivery (Midwives rules and standards 2012);
b. The Claimant failed to escalate concerns of mother's changing condition (ie post-partum haemorrhage);
c. The Claimant failed to adequately document observations following post-partum haemorrhage (The Code- standards of conduct, performance and ethics for nurses and midwives);
d. The Claimant failed to work with others to protect and promote the health and wellbeing of mother (The Code- standards of conduct, performance and ethics for nurses and midwives);
e. The Claimant failed to provide a high standard of practice and care at all times (The Code- standards of conduct, performance and ethics for nurses and midwives);
f. The Claimant failed to consult and take advice from colleagues when the deviation of mother's condition and to take appropriate action when equipment failed (The Code- standards of conduct, performance and ethics for nurses and midwives);
g. The Claimant failed to make a referral to another practitioner when it was in the best interests of someone in her care (The Code- standards of conduct, performance and ethics for nurses and midwives);

16. Initially Charlotte Pawsey was appointed to investigate the allegations but the actual investigation was carried out initially by Stephen Pamphilon and latterly by Andreja Ivancic, who produced the investigation report at page 593. Ms Vaughan, Miss Johnson and Dr Alaa Ali Abdalla, who had also been on duty during the shift and involved in the care of CJ, were interviewed for the purposes of the investigation as was the Claimant. The Claimant made no complaint about the adequacy of the investigation.

17. Following the investigation report there was a long delay in bringing the matter to a disciplinary hearing. This was in part attributable to the Claimant having taken two periods of maternity leave. The Claimant did not complain however that the process leading to her dismissal was unfair.

18. The disciplinary hearing itself took place over 6 separate days on 16 September, 1 and 15 October, 5 November and 17 December 2015 and 6 January 2016. The hearing was conducted by a panel chaired Ms Lavender who was at the time unaware of the background to the Claimant's case as she was working at a different hospital. She was accompanied by Donna Harris, People Business Manager and Marion Louki. Samosn DeAlyn was present as the Investigating Manager and Maggie Boeteng as Investigations Case Officer. The Tribunal was referred to the minutes from page 602 onwards, which were not verbatim but summarised the discussion at what was plainly a long and thorough hearing. The management witnesses were Nicola Shepherd, Sarah Vaughan, Antoinette Johnson and Dr Alaa Ali Abdalla. The Claimant had no witnesses and was

accompanied by friends.

19. The minutes and the detailed and comprehensive outcome letter make it clear that the Respondent gave careful consideration to each of the seven allegations against the Claimant. The documents and materials considered by the panel are documented at page 888, Ms Lavender's submission to the appeal panel. It was clear from the documents that there were no material differences of view amongst the four senior professionals who gave evidence to the panel about what had occurred and all were in agreement that CJ had suffered a post-partum haemorrhage. It was evident from CJ's notes and from the Claimant's own evidence that she had failed to take regular observations in a critical period between 12.50 pm and 2.05 pm during which the witnesses agreed that the haemorrhage must have occurred. The Claimant herself agreed that she had left CJ in the lithotomy position throughout this time. Although there was a dispute of fact about the extent of actual blood loss during the haemorrhage, the notes made by the Claimant herself in CJ's patient records, indication a blood loss of more than 1000 mls which represents a moderate haemorrhage according the Respondent's own guidelines for the management of obstetric haemorrhage at page 50. The Claimant's case to the tribunal was that there had in fact been no post-partum haemorrhage at all. We consider that this assertion is wholly at odds with the contemporaneous documents and witness observations and the Claimant's own position at the time.

20. The outcome letter summarily dismissing the Claimant for gross misconduct was sent to the Claimant on 9 February 2016. The letter found all seven of the allegations against the Claimant proven. The decision that dismissal was the appropriate outcome was based on the matters set out at page 870. In summary the Respondent found on the basis of the evidence accumulated during the investigation and what it had itself heard at the protracted disciplinary hearing that the Claimant's care was seriously negligent and compromising of a patient's health, that the Claimant failed to recognise her own personal responsibility as a midwife to raise concerns, document observations or protect the dignity of her patient; that the Claimant had not learned from the incident and the Respondent could not be confident that she would not repeat the same conduct in similar circumstances; that there was already a live written warning on her file relating to serious concerns about her clinical competence and that as a result of all those matters the Respondent had lost confidence in the Claimant's ability to provide safe care to patients in the future.

21. The Respondent also dealt specifically with the Claimant's suggestion that matters might have been different had she been provided with the support that she had asserted that would have been appropriate in light of her pregnancy. The letter says, "However you fail to state what you would have done differently if you had not been pregnant, stating that you had done nothing wrong in your provision of care". In other words, the Respondent found the Claimant's refusal to accept that her care of CJ had not been adequate to be inconsistent with her assertion that had she been provided with more support, she would have dealt with the situation differently.

22. The Claimant appealed against her dismissal and the appeal was heard on 12

August 2016. The appeal outcome letter dismissing the appeal was sent to her 30 August 2016. The appeal hearing was conducted as a review rather than a rehearing, but the Claimant raised no issue about the appeal procedure. The Tribunal notes that the appeal outcome letter refers to the Claimant's propensity to contradict herself in her evidence to the appeal. It stated "The panel were concerned that the evidence you gave was confused and contradictory, you showed a lack of insight into any lessons to be learned from your management of this patient….Had the shift co-ordinator not entered the room at the time they did the outcome for the patient could have been catastrophic".

23. The appeal panel also dealt with the Claimant's submission that she had been fatigued and unwell on the day in question due to her pregnancy and that the pregnancy risk assessment had not been completed on the day in question. It concluded "However as a Band 5 registered midwife and a professional the panel were extremely concerned that you did not inform anyone that you could not manage this patient, and that you did not take responsibility, for the patient, the baby and yourself".

Conclusions

Unfair dismissal

24. The Tribunal reminds itself that its task in a misconduct unfair dismissal case is not to determine whether or not the allegations were in fact proven or whether it would have dismissed in the circumstances, but whether the Respondent held a reasonable belief based on reasonable grounds after a reasonable investigation into the allegations against the Claimant and whether it reached a decision that was open to a reasonable employer. The Claimant did not put her case on the basis that the investigation was inadequate or that the Respondent's decision maker did not genuinely hold a belief that the Claimant was culpable. It was accepted by both representatives that the issue between the parties was whether or not the belief was reasonably held.

25. In the Tribunal's view there was an abundance of evidence before the dismissing panel to support its belief that the Claimant had failed in her duties as set out in the disciplinary documentation. There is simply no basis in the witness evidence of the contemporaneous documentation for a finding that the Respondent reached a decision that was not reasonable in all the circumstances. As to the separate question of whether dismissal was a sanction that was in the band of responses open to a reasonable employer, it cannot be said that no reasonable employer would have dismissed in this case. Appropriate weight was given to all the mitigating factors raised by the Claimant and it was appropriate for Ms Lavender to take into account the existence of a live final warning in reaching her decision.

26. In the circumstances of this case therefore the Tribunal had no hesitation in deciding that the dismissal was fair.

Equality Act

27. We will deal next with the Claimant's complaint under the Equality Act. The acts complained of were the decision to suspend her on 8 March 2013 and the failure to carry out a risk assessment on her return to work from sick leave on 13 February 2013.

28. Dealing first with the suspension, the Tribunal finds that the reason the Claimant was suspended was her conduct during the shift on 7 March 2013.We find that the Claimant's pregnancy played no part whatsoever in the decision to suspend. The Claimant put forward no evidence on the basis of which the burden shifted to the Respondent to explain why it had suspended her, but even if it had we would have been satisfied with the explanation provided by the Respondent. Any argument the Claimant might make that the suspension was indirectly linked to her pregnancy because her pregnancy accounted for the manner in which she carried out her duties on 7 March 2013, is wholly undermined by her contention at the disciplinary hearing that she would not have done anything different on that shift had she not been pregnant and that she had in fact done nothing wrong.

29. As to the risk assessment, a risk assessment was in fact carried out on 8 March 2013 (page 437-447). The Claimant's claim therefore crystallised at that point. Her complaint amounts to a complaint that the risk assessment was carried out one week later than prescribed by the Respondent's own procedures. The Claimant did not explain to the Tribunal how that amounted to a detriment, save as to say that had she had an earlier risk assessment she would have a requested a second midwife be present at the shift on 7 March. However we find that impossible to reconcile with her assertion to the disciplinary hearing that she had done nothing wrong on that shift and that her pregnancy had made no difference to her conduct of it.

30. In any event we doubt that we have jurisdiction to deal with the Claimant's discrimination claims. As we have found that both acts were discrete acts that occurred or crystallised on 8 March 2013 and the notification to ACAS for the purposes of early conciliation was on 13 April 2016, her claim of pregnancy discrimination is very substantially out of time. The starting point in an application for an extension of time is the proposition in *Robertson v Bexley Community Centre* that a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of the discretion is the exception and not the rule. Mr Sukul's explanation for this claim not having been brought earlier was that there were incomplete internal proceeding that themselves became prolonged as a result of the Claimant's periods of illness and maternity leave. We were not persuaded by this submission, which failed to explain why the disciplinary proceedings needed to be resolved before the claim could be submitted.

31. We have also considered the checklist of factors in s33 Limitation Act 1980 in so far as they apply to the facts of this case. There is clear prejudice to the Respondent in having to deal with matters that occurred over four years ago particularly as one of the Respondent's key witnesses on the matter of whether risk matters were dealt with on the Claimant's return from sick leave, Ms Miniter, has left its employment. Weighing the relevant factors, including the Claimant's lack of a clear explanation for the delay, in our view the balance of prejudice falls

in favour of refusing any extension of time and therefore irrespective of the merits of the discrimination claim, we consider that we have no jurisdiction to determine it.

Employment Judge Morton

Date: 5 September 2017