

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100563/17

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Held in Glasgow on 23, 24 & 25 October 2017

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**Employment Judge: F Jane Garvie
Members: Mr J McElwee
Mr J Burnett**

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Ms Emma McCann

**Claimant
Represented by:
Mr C Robertson -
Solicitor**

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The Business & Property Bureau Limited

**Respondent
Represented by:
Mr I Burke -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous judgment of the Tribunal is that the claim should be dismissed.

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REASONS

Background

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1. In her claim presented on 6 April 2017 the claimant alleges that she was discriminated against on the grounds of pregnancy and/or maternity and

E.T. Z4 (WR)

that she was automatically unfairly dismissed. Reference was made to Section 94 of the Employment Rights Act 1996, (the 1996 Act) and to Section 18 of the Equality Act 2010, (the 2010 Act). She gave her dates of employment as 15 June 2015 to 13 January 2017. The respondent lodged a response in which they resist the claim. They maintain that they did not know the claimant was pregnant and therefore her dismissal could not have been related to her pregnancy. Agendas were issued and a Preliminary Hearing was held before Employment Judge Garvie on 8 June 2017 after which a Note was issued. At that Preliminary Hearing it had been agreed that there would be a Preliminary hearing to deal with the discreet issue of whether the respondent had knowledge of the claimant`s pregnancy and, if appropriate at a later date to move forward to a Final Hearing. Unfortunately, when the Notices for the Hearing were issued this was for 3 days for a Final Hearing. Neither representative contacted the Tribunal office to query this and it was not brought to the Judge`s attention until just before the hearing date. Meanwhile, there was then an application in early October 2017 to amend the claim by deleting the reference to *“the pregnancy became common knowledge within the small office”*.

2. There was no objection from the respondent provided the response could be amended at paragraph 3 by inserting after the third sentence ending, *“that she was pregnant”* the following:-

“Admitted that Lisa Corbett is a relation of Martin Smith, one of the Directors. Lisa Corbett did not disclose the claimant`s pregnancy to Martin Smith”.

3. Judge Garvie directed that the amendment of the claim, (the ET1) and the response, (the ET3) should be allowed. In an email of 3 October 2017 Mr Robertson requested there should not be a separate Preliminary Hearing but this was opposed by Mr Burke. When the matter was referred to the Judge on 18 October 2017 she directed that the case should proceed as listed as a Final Hearing but that the issue of remedy would not be

considered at that Final Hearing. Instead it would be reserved to a later date in the event that the claim succeeded.

The Final Hearing

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4. At the start of proceedings on 23 October 2017 it was confirmed that this would be the way that the case would proceed.

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5. The claimant gave evidence on her own behalf. No other witnesses were led for the claimant. Evidence was given on behalf of the respondent by Mrs Lisa Corbett who is a Property Manager, Mr Martin Smith, one of the respondent's Directors, Mr Alan Burke, another of the respondent's Directors, Mrs Debbie Thomas, another of the respondent's Property Managers, Mrs Lynsey Pacitti who is also one of the respondent's Property Managers, Ms Kayleigh Higgins, who also works in the Property Management Department and Mr Martin Turner, another of the respondent's Directors.

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6. A joint bundle of productions was provided. In addition, a copy of a document entitled, "*The Property Bureau – Employee Handbook*" was produced, Reference was made to a section of it under the heading, "*Disciplinary Policy*" and to a further part two pages later under the section which is entitled, "*Disciplinary Action*".

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7. Mr Robertson provided a copy of the claimant's P45 on 24 October 2017.

Findings of Fact

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8. The Tribunal found the following essential findings of fact to have been established or agreed.

9. The claimant commenced employment with the respondent on 15 June 2015. She worked in their Bearsden office. This is the respondent's head office. They also have an office in Helensburgh and another in Stirling where Mr Turner is principally based. The Bearsden office relocated in the summer of 2016 to its present address. The claimant commenced employment working in the administrative side of the business. This involved answering telephone calls, making bookings for viewings, email enquiries and was a general office/administrative role. She was employed through an apprenticeship programme with an organisation called Microcon. This was for a 12 months' module which the claimant duly completed. The claimant's desk was in the Negotiation team's room which is a shared office space.
10. The claimant continued working in her administrative role until another member of staff left. Then, with effect from 5 December 2016, she moved from her original role to another room in the office where she was still handling administrative matters but now this was in relation to the handling maintenance and calls from landlords. The claimant maintained this meant she had more responsibility and involved more difficult tasks than before. The respondent disagreed as the claimant was still handling administrative tasks, albeit this was now on the lettings side of the business. The claimant was now working with Property Management staff rather than the Negotiation team. She did not receive any specific training for her new role as the respondent's approach was that she should learn as she went along from her colleagues. This was an approach which has worked in the past with other employees, for example, Ms Higgins who like the claimant had started her employment through the same apprenticeship programme and had then progressed from an administrative role to her current one in Property Management.
11. The claimant disagreed that concerns had been raised with her about a lack of application to her work as well as criticism of the amount of time she spent on non-work related websites while at her desk and her continued use

of her mobile telephone during the working day. She maintained that she used the internet for non-work purposes and her mobile telephone no more or less than other staff.

5 12. The respondent's Directors held informal discussions with the claimant and while this had some effect they found, increasingly, that she reverted to, in their view, continuing over-use of the internet for non-work related websites and of her personal mobile phone during working hours. Some of the staff in the Negotiation team had raised concerns with the Directors about these
10 issues. Mr Burke, as the resident Director in the Bearsden office, was also directly aware of these issues as he would regularly go into the room where the Negotiation team is based. After the claimant's move into the Property Management team he would still be in and out of that room on a regular basis. While Mr Turner visits the Bearsden office on average twice a week
15 he too could observe the claimant and all her colleagues and so he was aware that the criticism of her was well founded in that he would see from her screen that she would quite often be viewing non work-related websites. Some members of staff complained to the Directors about these issues. They did not discuss them directly with the claimant. One of the staff who
20 took issue with the claimant's approach to work was Ms Higgins.

13. Unfortunately, the claimant suffered a miscarriage in October 2015. She was absent from work for approximately 2 weeks as a result. The respondent's Directors were aware of the circumstances. The claimant
25 received full pay while she was off work rather than statutory sick pay. There was no objection to her taking time to recover before she returned to work.

14. Towards the end of November 2016 the claimant realised that she was
30 pregnant.

15. The respondent held a Christmas night out for their staff on 16 December 2016. It was held at a local restaurant. The claimant attended. At one point the claimant asked Mrs Corbett to go outside with her and, while they were alone, the claimant informed Mrs Corbett that she was pregnant. She asked Mrs Corbett not to tell anyone else as she was only a few weeks into her pregnancy and she wanted to wait until she had her first scan at 12 weeks. Mrs Corbett was sensitive to the fact that the claimant might be anxious about this pregnancy given her previous experience. Mrs Corbett tried to reassure the claimant as she seemed to be upset. The claimant had further discussions with Mrs Corbett when they were back in the office but this was only when they were alone. Mrs Corbett did not think their conversation was overheard by anyone else. The only way they could have been overheard would have been if someone was standing outside the door and listening in. She did not think there was any more than a “*slight possibility*” of this having happened.
16. Mrs Corbett is Mr Smith`s niece and while Mr Smith thought they may have met over the Christmas period at a family event Mrs Corbett did not seem to think that they had done so. They are part of a large extended family. Mrs Corbett denied having told Mr Smith about the claimant`s pregnancy. Equally, Mr Smith was not aware of her having told him about the claimant`s news.
17. At some point in the office later in December, the claimant and Mrs Thomas were alone together. The claimant said that she had a doctor`s appointment. Mrs Thomas asked if she was ok. The claimant “*smirked*”. Mrs Thomas then asked the claimant if she was pregnant. The claimant confirmed she was pregnant.
18. The claimant thought Mrs Thomas might have asked her this because she may have noticed that the claimant was not drinking at the Christmas night out. The claimant had not been drinking that evening as she was going to

collect her mother later on as she too was attending her office night out which was being held elsewhere.

- 5 19. Mrs Thomas had noticed that the claimant had put on a “*bit of weight*” and she looked a “bit peely” and was drinking vitamin drinks which made her suspect that she might be pregnant.
- 10 20. Mrs Thomas understood that the claimant did not want to tell anyone else about her pregnancy. Mrs Thomas did not tell any of the directors that she knew the claimant was pregnant. Mrs Thomas also denied that she had been informed by Mrs Corbett of the claimant’s pregnancy.
- 15 21. The respondent’s office reopened after Christmas in the period between that holiday and New Year. On one of those days the claimant was working with Mrs Pacitti. There were only the two of them in the room. The claimant told Mrs Pacitti that she was pregnant. Mrs Pacitti was shocked by the news. Later on, she realised that she had failed to congratulate the claimant. Mrs Pacitti asked the claimant if anyone else knew and was told by the claimant that Mrs Thomas did. The claimant did not mention to Mrs
20 Pacitti that Mrs Corbett knew of her pregnancy.
- 25 22. The claimant maintained that, when she was speaking to Mrs Pacitti on a one to one basis, Mr Burke came into the room. She also maintained that after he left Mrs Pacitti asked her if he might have overheard their conversation. Mrs Pacitti did not remember doing so nor did she recall Mr Burke coming into the room as was suggested by the claimant.
- 30 23. Mrs Pacitti subsequently saw Mrs Thomas. She said that the claimant had told her of her pregnancy. There was no one else present at the time. The claimant thought that Mrs Pacitti may have told Mr Burke about the claimant’s pregnancy. However, Mrs Pacitti was very clear that she did not do so.

24. The respondent's office again reopened after the New Year holiday. The claimant returned to work. On Monday, 9 January 2017 the claimant did not attend work as she had morning sickness. She sent a text to Mr Burke, explaining that she would not be in because she was feeling unwell. She did not mention this was morning sickness. She returned to work on the Tuesday morning, 10 January and started work. She did not go to see Mr Burke to discuss her absence the previous day as there were telephone calls and emails to deal with when she arrived in the office. She intended to speak to him later on in the day.

25. Around lunchtime that day Mr Burke asked the claimant to his office which is situated at the end of the corridor. Mr Turner was also present. Mr Burke told the claimant that they wanted to have a discussion with her. He asked her why she had been absent the previous day. She explained that the reason was that she had been sick. She did not mention her pregnancy.

26. The two Directors then explained to the claimant that they did not think her performance was up to standard and so they were treating this discussion with her as a performance review.

27. Mr Burke gave the claimant a letter dated 10 January 2017, (page 49) which explained it was being given to record the details of their meeting. The letter reads:-

"Further to our meeting of 10th January 2017 I am writing to record the details of the meeting.

The meeting was instigated as a result of a lack of confidence on behalf of the company Directors in your work performance and your apparent lack of motivation to engage with work, to undertake and complete on tasks and that you frequently pass time on non work related internet websites. It is further noted that your attitude can be

disrespectful to colleagues within the same office and towards more senior members of staff.

5 *As you are well aware we have in the past had occasion to discuss your work, your performance and your attitude. We are not prepared to constantly re-visit these issues with you and have given you a clear indication that unless there is immediate improvement then the company will have no alternative but to terminate your employment.*

10 *We strive to have a relaxed atmosphere within the company. We are concerned that you have interpreted this as if we don't care how our staff behave. Nothing could be further from the truth. We have said to you today and previously that we consider that you have ability and strengths. Regrettably you have not responded positively to*
15 *feedback and have not developed in the way we had hoped for.*

We intend to meet with you again at the end of the week. This will allow you time to reflect on your performance and behaviour and will allow us to carry out a further assessment of you (sic) overall
20 *performance."*

28. The claimant did not read the letter immediately on receipt of it but did so shortly before she left work that evening.

25 29. The claimant did not accept the various allegations which were made about her work, performance and attitude. The claimant returned to work on the Wednesday 11 January. She also attended work on Thursday 12 January.

30. At the end of the working day at about 5pm on the Friday, 13 January 2017
30 the claimant was called into Mr Burke's office. Mr Burke explained to the claimant that the respondent was "letting" her go. The claimant burst into tears as she was shocked to be told this. The claimant offered to return to work the following week so as to help out in a handover of her work but she

was told this was not required and she would be paid pay in lieu of notice. It was explained this would be paid in the monthly salary payment which was due at the end of the month. The claimant was given a letter from Mr Burke which reads:-

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“Further to our meeting and letter of Tuesday 10 January 2017, I am confirming that the company is terminating your employment as of today.

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You will be paid your notice period per your employment contract at the end of this month.

We did not take this decision lightly and it is regrettable that your employment has ended in this way. “

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31. The claimant was paid her notice pay at the end of January 2017 and, as indicated above, she received a P45 which gives shows a termination dated of 20 January, not 13 January 2017.

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32. The following week the claimant took advice from the Citizens Advice Bureau. She sent a letter to the respondent on 17 January 2017, (page 51). In it, the claimant referred to the meeting on 13 January 2017. She continued as follows:-

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“My contract of employment mentions the company disciplinary policy. At no time during my employment have I ever been shown or given a copy of that policy and I believe it should have been given to me at any disciplinary hearing. My representative has requested that we would like to see that policy and would be pleased if you can send it to me by return.

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Having taken independent advice, I am writing to appeal against the decision that has been made, on the basis that

- 5 • *You are discriminating against me and using trumped up and false allegations as you are aware of my pregnancy.*

- *No evidence was produced to back up the allegations made against me.*

- 10 • *The penalty applied is too harsh.*

15 *There has been no mention of any performance issues leading up to the disclosure of my pregnancy, nor before our meeting on 10 January to discussed (sic) perceived performance and attitude issues.*

20 *I was moved into the new role in property management, on 12th December 2017, was given no training in this role, and after 20 working days, in your letter of 10th January, was informed that my performance was unsatisfactory. I was then given time to improve this, **of 2 working days** before a dismissal was issued. At no point was I told the nature of my non-performance or offered any help or training to address the perceived issues.*

25 *In your letter of 10th January you also mention issues with my attitude, again prior to this meeting, and my pregnancy being disclosed, no issues with my attitude had been brought to my attention. “*

33. By letter dated 19 January 2017 Mr Burke replied to the claimant in the following terms:-

5 *“In response to your letter of 17 January I can answer the points you are appealing as follows:*

Firstly your dismissal was not a disciplinary decision therefore the disciplinary policy is not relevant.

10 *I have consulted with the other directors and confirmed that you had not informed them or me that you are pregnant. In any event your dismissal is due to issues with work performance, behaviour and attitude.*

15 *The allegations of your work not being at the required level and issues with attitude are from our own observations and these were discussed with you at a review meeting and also when you had to be spoken to by Martin Turner, with myself present, over an issue with an email that you had sent.*

20 *We do not agree that the penalty was too harsh, and feel that you left us with no other option. On numerous occasions we have had informal discussion with you on work performance, personal use of the internet and mobile phone and attitude towards work. Despite this*
25 *we did not see any marked improvement in these areas.*

Should you require any further correspondence on this matter these will be referred to our solicitors.”

- 30 34. The reference to an email was in relation to an email which had been sent by Mr Turner to all staff some time earlier. Apparently, the claimant had replied to it as a group email i.e. she sent the reply not only to Mr Turner but also to all the other staff whose names had appeared on the group email.

For the avoidance of doubt, a copy of this email was not provided as part of the documentation to the Tribunal.

- 5 35. The claimant`s position appeared to be that she was “*scared to let the employer know*”, that is the respondent`s directors that she was pregnant although she accepted that, following her miscarriage in the autumn of 2015, the respondent had been sympathetic and she had received full pay for the two weeks she was absent on sickness leave rather than being paid statutory sick pay.
- 10 36. The claimant seemed to think that because Mrs Corbett was pregnant the Directors would not want to have more than one employee on maternity leave at the same time. The Directors disagreed. Mr Burke and his fellow directors confirmed that a number of staff, probably 6, have taken maternity leave over several years. A number of their staff have had more than one pregnancy and have taken maternity leave and then returned to work either 15 on a part time basis or by working more flexible hours to fit in with childcare commitments.
- 20 37. So far as the respondent was concerned, Mr Burke would have had no difficulty with making arrangements for the claimant to be on maternity leave given the respondent had previous experience of making arrangements for maternity leave cover when staff were absent for this reason.
- 25 38. The crux of this case was whether the claimant`s pregnancy was, as she thought, discussed amongst her fellow employees and whether one of them had either intentionally or inadvertently informed any of the Directors of the claimant`s pregnancy. All three employees, Mrs Corbett, Mrs Thomas and Mrs Pacitti denied having said anything to the Directors to the effect that the 30 claimant had told them about her pregnancy. The claimant accepted that the first occasion on which she had directly notified the Directors of her pregnancy was in terms of her appeal against dismissal as set out in the letter dated 17 January 2017, (page 51). While the letter suggests that they

5 knew of her pregnancy the claimant did not seek to say that she had informed either Mr Burke or Mr Turner that she was pregnant, either at the meeting on the Tuesday, 10 January 2017 when they were both present or on the Friday, 13 January 2017 when she saw Mr Burke on his own at the end of the working day and when she was informed that she was being dismissed with pay in lieu of notice.

10 39. The respondent's Directors accepted that they did not use their disciplinary procedure when dealing with the claimant and her performance, attitude, overuse of the internet on non work-related sites and her use of her mobile phone during working hours.

15 40. They also accepted that they did not use the procedures set out in their employee handbook despite the fact that this was available to them. It seemed that their approach was driven by the fact that the claimant had less than two years' qualifying service and so in their view she could not bring a complaint of unfair dismissal.

20 41. All three Directors, Mr Smith, Mr Burke and Mr Turner denied having any knowledge of the claimant's pregnancy.

Closing Submissions

25 42. It was agreed that closing submissions would be heard on 25 October 2017. Mr Robertson provided a written submission and the Tribunal considered this with him and clarified some points. Mr Burke addressed the Tribunal orally.

Claimant's Submission

30 43. In relation to the written submission Mr Robertson set out that the termination date was 20 January 2017 as the claimant was dismissed with notice but given payment in lieu of working that notice. In his submission,

the effective date is the date on which notice expired which, he submitted, was 20 January 2017 as supported by the P45 form. The issue of what was the effective date of termination had been raised by the Judge during the course of the hearing, (see below).

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44. In relation to the evidence of the witnesses, it was submitted the claimant provided her evidence in a straightforward and credible manner. She answered the questions put to her in cross-examination and from the panel consistently and in a straightforward manner. It was submitted that, where the respondent's evidence was inconsistent with hers, the claimant's should be preferred as she was credible, reliable and consistent in her evidence. It was submitted that there was no effective cross-examination of the claimant. She did not change her position under cross-examination and did not waiver from the evidence already provided.

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45. Mr Robertson submitted that the respondent's evidence should be discounted on the basis that the Tribunal had heard only from current Directors of the respondent and current employees.

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46. It was submitted that two of the Directors would be directly financially affected if the claimant were to succeed in her claim. All the remaining witnesses are currently employed by the respondent. The Tribunal was asked to reject any assertion that these employees would not be detrimentally affected by providing damaging evidence against the claimant.

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47. In relation to the claimant's position it was submitted that her dismissal had nothing to do with her performance. There was no documentary evidence to support the position that there were long term performance concerns about the claimant.

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48. The respondent had led evidence about an email, purportedly demonstrating the claimant's poor attitude but this was not supplied to the Tribunal. Reference was made to improper use of the internet but the internet history was never provided. Allegations were made about the claimant's alleged improper use of the email system but no supporting documentation was ever provided.

49. No credible explanation was given for the lack of documentation and it was submitted that this was because the allegations were fabricated in order to justify the claimant's dismissal.

50. In relation to the meeting on 10 January 2017, the claimant was called into a meeting to discuss the respondent's concerns about her performance. She was effectively given an ultimatum to improve her performance or face dismissal. It was submitted this was an empty offer demonstrated by the fact that the respondent effectively gave the claimant 1 working day (as stated in their response "*on the evening of 11 January 2017*") or, at most 2 working days, as stated by Mr Burke in his evidence in order for the claimant to improve.

51. It was submitted that 2 days was an insufficient amount of time to allow an employee to improve. It was submitted the reason the respondent only gave the claimant 2 days was an indication that they were not interested in her performance and that they did not want it to improve. Furthermore, it was submitted that it was rushed because of their concern that the claimant might disclose her pregnancy to them.

52. These alleged performance concerns were fabricated, it was submitted, in order to justify the claimant's dismissal on the basis that the respondent had become aware of her pregnancy. They did not wish to deal with the burden of having two employees on maternity leave at the same time.

53. In relation to the policy, it was submitted the respondent failed to abide by their own policy by refusing the claimant the right to appeal, despite being informed of the pregnancy. It was submitted that this was a further indication that the pregnancy was not new information to the respondent.
5 They failed to provide a credible explanation as to why they did not allow an appeal to be heard.

54. If the Tribunal found that there were legitimate performance concerns, then it was submitted that these were as a direct result of her pregnancy. There
10 was documentary evidence supporting that the respondent had concerns and discussed these with the claimant on 10 January 2017. She stated in her evidence that she became aware of her pregnancy towards the end of November 2016. Mr Robertson submitted that any issues which the respondent had were connected to the claimant becoming aware of her
15 pregnancy. In his submission, the respondent dismissed her because of the claimant's failure to improve her performance between the meeting of 10 January and the decision taken to dismiss her made either on the evening of 11 January or at a meeting on 12 January 2017 between the Directors.

20 55. It was submitted that any performance concerns or issues with the claimant's attitude could be explained by the fact that she was pregnant. She was a young woman dealing with an unexpected pregnancy, a stressful enough situation which was added to by the fact that she had unfortunately suffered a miscarriage previously.

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56. In relation to unfair dismissal, based on the accepted knowledge of the three colleagues, the respondent's failure to follow their own policy, the insufficient amount of time given to improve her performance and the lack of a credible reasons supported by documentation, it was submitted the
30 Tribunal should find that the reason was connected to the claimant's pregnancy and therefore was automatically unfair.

57. If the Tribunal did not find that the respondent knew of the pregnancy prior to the original decision to dismiss, then Mr Robertson submitted that they categorically became aware of the claimant's pregnancy while she was still employed yet they chose to ignore this and refused to hear an appeal. He submitted that this new information materially changed the reason for dismissal; any alleged performance concerns could be directly as a result of the pregnancy and so renders the dismissal unfair.
58. The primary submission for the claimant is that the respondent found out about her pregnancy and dismissed her because of the burden of having two employees on maternity leave would have had on their business.
59. If the Tribunal was not with him that the respondent knew prior to dismissal then it was submitted that they categorically were aware in terms of the letter of 17 January 2017. They based their decision on a failure to improve between 10 and either the evening of 11 January or at the meeting on 12 January 2017. It was submitted that any perceived performance and attitude issues were as a direct result of the claimant's pregnancy. Therefore, the dismissal was unfavourable treatment based on her pregnancy.
60. If the Tribunal was not with the claimant on the two previous submissions, Mr Robertson wished to refer to the two stage burden of proof in relation to discrimination contained in section 136(2) and (3) of the Equality Act 2010.
61. It was submitted on behalf of the claimant that the initial burden of proof on the claimant had been satisfied and that, on the balance of probabilities, sufficient evidence had been presented from the claimant which would entitle the Tribunal to find that discrimination had taken place.
62. That then shifted the burden of proof to the respondent who, he submitted, failed to provide satisfactory evidence that the discrimination did not take place. There was no credible explanation supported by documentation.

63. The Tribunal was asked to find, given the absence of an adequate explanation from the respondent, supported by documentation that the decision to dismiss was unfavourable treatment based on the claimant`s pregnancy, an act of direct discrimination contrary to Section 18 of the Equality Act 2010.

64. Mr Robertson submitted that the Tribunal should find in favour of the claimant in relation to both claims raised.

Respondent`s Submission

65. As indicated above, Mr Burke addressed the Tribunal orally.

66. Mr Burke accepted that he was not expected to provide findings of fact and that the Tribunal had before it all the evidence on which to make relevant findings.

67. The only basis on which the Tribunal could make an order in favour of the claimant would if the Tribunal was satisfied that her dismissal was because of her pregnancy but, if not, the Tribunal has no jurisdiction and the claim should be dismissed.

68. Before moving to that, the Tribunal would have to be satisfied that the respondent knew and the burden of proof rests initially with the claimant.

69. The only evidence to suggest knowledge was the claimant`s suspicion and unlikely coincidence. For the Tribunal to believe, on the balance of probabilities, it would have to accept that one or all of the employees to whom the claimant disclosed her pregnancy was deliberately lying to the Tribunal. All three had given evidence on oath and they clearly understood how serious that was and it was put to them whether they might suffer detrimental treatment at work if they gave evidence in support of the

claimant. The two to whom this was put were both quite clear that that was not the case, these individuals being Mrs Pacitti and Mrs Thomas.

5 70. For the respondent, their position was that it was very straightforward in that they had no difficulty in answering Mr Robertson`s questions and there was no attempt to prevaricate. Three Directors had given evidence. Mr Burke reminded the Tribunal that they now fully accept that there would be justified criticism by the Tribunal of a lax/casual procedure adopted but that was not enough to mean that the Tribunal would have to find in favour of the
10 claimant.

71. There was no single piece of evidence that gives support to the claimant`s position that any of these individual Directors were aware of her pregnancy. In Mr Burke`s submission, it was a huge leap to move to there being a
15 suspicion by the claimant and a coincidence, as she saw it, in light of the claimant speaking to some of the employees. It would therefore be a huge leap for the claimant to conclude that all the witnesses had deliberately lied, in particular, the Directors.

20 72. Mr Burke asked the Tribunal to find that the respondent was not aware of the claimant`s pregnancy and that they took the decision to dismiss her for performance related issues. Accordingly, the case must fail at that first hurdle.

25 73. Mr Burke`s second position was that if the Tribunal were to decide that the respondent knew of the pregnancy then it has to look at the reason given for the claimant`s dismissal. Considerable time had been spent at the Tribunal in exploring the reasons for the dismissal. Again, as indicated, Mr Burke accepted that there would be justified criticism of the respondent and this is
30 accepted by them as was very clear from both Mr Turner and Mr Burke as to how they handled the dismissal process. In Mr Burke`s submission that, on one view was as a result of the casual approach taken by the respondent but it also supports the contention that the respondent did not know of the

claimant`s pregnancy. Mr Burke submitted that the respondent clearly understood that they would not be liable for an unfair dismissal complaint where an employee had less than 2 years` service. It was his submission that many employers will do likewise. It is not a good thing but it is a practice that occurs.

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74. Mention had also been made of the fact that there was a lack of documentation and that was a fair point to be made. Reference had been made to performance concerns about the claimant which were spoken to by both Mr Turner and Mr Burke. They have an informal style of management and this was clear from all the respondent`s witnesses and also especially clear from the two Directors. Their position was that they tried to improve the claimant`s performance as they wanted to make her an effective member of their staff. They had not documented everything. It was borne out by Ms Higgins` evidence that she had spoken to Mr Burke about difficulties she faced with the claimant not doing her own work. The respondent had hoped that, by moving the claimant from one office to another, the claimant would successfully transfer and become a valid member of their staff.

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75. Mr Burke submitted that Ms Higgins` evidence was particularly compelling and very clear evidence as to the claimant`s failures to do what she was being asked in that Ms Higgins` complaints were about her use of the internet and not doing her work.

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76. In Mr Burke`s submission, it was quite clear that the reason for the claimant`s dismissal was, in colloquial terms, because she was not "*coming up to scratch*". The Tribunal had heard Mr Turner`s views and also Mr Burke`s attempts to encourage the claimant to improve her behaviour and the opportunities given to her to do so.

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77. There was clear evidence to the Tribunal from Ms Higgins that the claimant had not changed her attitude.

5 78. In relation to the letter of dismissal, (page 50) the claimant was clearly told her employment was being terminated on 13 January 2017.

79. Mr Burke said he had given consideration to a judgment of the Supreme Court, ***Gis Cyf v Barratt [2010] UK SC 41*** and ***Societe Generale London Branch v Geys [2011] UK SC 63***, another judgment of the Supreme Court.

10 In his submission, these were not directly in point but, it was his submission that it was made clear to the claimant on 13 January 2017 that her employment was ending with immediate effect. He accepted that the P45 showed a termination date of 20 January 2017 but this was because the claimant was paid her notice pay which took her up to that date. In his
15 submission, the position was that the effective date of termination was when termination of her employment was notified to the claimant and that was on 13 January 2017.

20 80. It was further his submission that the decision to terminate the claimant's employment had been made without any knowledge of the claimant's pregnancy and therefore it had no impact on the decision to dismiss.

25 81. Whilst Mr Burke accepted, as he had already indicated, that there might be reason to criticise the respondent for the manner in which they had carried out the dismissal, the Tribunal could be clear that Mr Turner had concerns about the claimant's performance in the period before the claimant became pregnant and there was no association in his mind with the claimant being pregnant and the reason for dismissal. No association was made between the two. There was no legal basis on which it could be suggested that the
30 decision to dismiss her could be made retrospectively, amending the decision once the respondent knew that the claimant was pregnant.

82. With reference to paragraph 17 of Mr Robertson`s submission there was no evidence before the Tribunal that the respondent thought there would have been a burden on them on having two employees currently on maternity leave at the same time. The respondent`s position was that there had been at least 6 occasions when maternity leave had been taken by employees. It was suggested the claimant was fearful of what she saw as a perceived risk if she informed them of her pregnancy. This did not “*stack up*” with the claimant having been pregnant previously within 4 months of her employment starting when the respondent went through a process and dealt with her in a very fair way in relation to a very unfortunate loss for the claimant.

83. The evidence of the employer`s witnesses all show a picture of an employer handling maternity leave properly and doing all it could to allow for changes in working patterns for working mothers. There was no basis for any fear from the claimant that the disclosure by her of her pregnancy to the respondent would have had any basis. Again, Mr Burke reiterated that the respondent accepted there could be justified criticism of their procedures. The evidence of all the witnesses from the company was that they had a good ethos and good working relationship amongst their staff. There was no culture of fear by employees as the employer was very able to deal with issues that arose.

84. In Mr Burke`s submission, the claimant had not discharged the burden of proof as there had not been sufficient evidence led to satisfy the Tribunal that the burden should shift to the respondent in terms of their knowledge and standing the fact of their lack of knowledge of the claimant`s pregnancy the claim should be dismissed on that basis.

85. In the alternative, if the Tribunal concluded there was knowledge on the part of the respondent, then the reason for the claimant`s dismissal was capability and had nothing to do with her pregnancy and therefore the claim could not succeed.

Effective Date of Termination of the claimant's employment

86. This issue arose during the course of the Hearing. The Judge directed attention to the Section on Termination with Notice set out in the IDS Handbook on Contracts of Employment at page 593 to 599. Copies were given to the representatives. A copy of *Adams v GKN Sankey [1980] 416* which is referred to at page 596 of the Handbook. It explains the position of the EDT of pay in lieu of notice (with reference to Sankey) thus:-

“Either:-

- the employee can be regarded as having been dismissed with notice but given a payment in lieu of working out that notice (this is the colloquial usage of the phrase ‘payment in lieu’), or
- the employee can be regarded as being dismissed immediately with payment in lieu of the notice of which he or she has been deprived. (This is the legal usage of the phrase, and the payment in lieu when used in this sense represents the equivalent of the damages that a court would award for wrongful dismissal.”

87. The representatives were given an opportunity during an adjournment to consider this issue. As can be seen this is then dealt with by Mr Burke in his closing submission.

Observation on the Witnesses

88. In relation to the employees in whom the claimant confided, namely Mrs Corbett, Mrs Thomas and Mrs Pacitti the Tribunal concluded that they gave their evidence clearly and fairly. None of them accepted that they had then gone and spoken to any of the Directors to let them know of the claimant's pregnancy. Mr Smith was also clear that he had had no discussion with his

niece, Mrs Corbett during the Christmas/New Year period about the claimant. He had no knowledge of her being pregnant. Mrs Corbett also denied doing so. The Tribunal could not see any basis on which to disbelieve Mrs Corbett and Mr Smith.

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89. While the Tribunal could perhaps understand that the claimant might be concerned about disclosing her pregnancy, this did not fit easily, as Mr Burke pointed out, with the fact that she had previously been pregnant and while sadly that pregnancy did not proceed the claimant, was given time off work on full pay to recover. It may that the claimant perhaps thought that someone had spoken to the Directors but there was no indication before the Tribunal that this was, in fact, what had happened.

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90. In relation to Mr Robertson`s submission that the respondent had found out about her pregnancy and dismissed her because there would then be two employees on maternity leave, the Tribunal was not persuaded by this argument. Mr Burke was very clear in his evidence that, as an employer, he and his fellow directors were used to having individuals on maternity leave and had been able to cover this perfectly adequately. Their employees had returned to work afterwards, not necessarily on a full-time basis but very often on a flexible and/or part time basis.

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Relevant Law

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91. This is found at Section 99 of the 1996 Act, Regulation 20 of the Maternity and Parental Leave Regulations 1999 and Section 18 of the Equality Act 2010.

92. Section 99 of the 1996 Act states:-

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“Leave for family reasons

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

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

(b) *the dismissal takes place in prescribed circumstances.*

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(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 –*

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(a) *pregnancy, childbirth or maternity*

(b) *.....”*

93. Regulation 20 of the MPL states:

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“20 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 –*

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

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(b) *.....*

(2) *.....*

(3) *The kinds of reasons referred to in paragraphs (1) and (2) are reasons connected with –*

(a) *the pregnancy of the employee”*

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94. Section 18 of the Equality Act states:

“18 *Pregnancy and maternity discrimination: work cases*

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

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(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*

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(b) *.....”*

Deliberation & Determination

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95. While the employees to whom the claimant spoke were aware of her pregnancy which was at a very early stage, the Tribunal was not persuaded that any of them informed the Directors. The Tribunal concluded that all three individuals, namely Mrs Corbett, Mrs Thomas and Mrs Pacitti respected what they had been told by the claimant. All three were very clear on this aspect of their evidence. They are all mothers themselves and they were also aware the claimant was at an early stage in her pregnancy. While Mrs Thomas and Mrs Pacitti did later discuss it, there was no one else present and they were both adamant that they did not tell the Directors.

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96. In relation to Mr Robertson`s submission that, if the Tribunal accepted that the respondent did not know of the claimant`s pregnancy prior to dismissal, then they must have been aware of it given the terms of the claimant`s letter of 17 January 2017 where this is specifically set out, the Tribunal gave careful consideration to all that was said. It noted that Mr Burke had written to the claimant rather than allowing her to have the opportunity of attending an appeal hearing. Clearly, it would have been better to have held an appeal hearing at which the claimant would have had an opportunity to set out her position directly rather than as she did only in writing.

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97. The Tribunal was not persuaded that the respondent did have knowledge of the claimant`s pregnancy prior to her dismissal but, accepting Mr Robertson`s contention that they must have known as at the date when the letter of 17 January 2017 was received whether this was on 18 or 19 January 2017, the Tribunal then required to consider what impact, if any, this had on the respondent`s decision to reject the appeal against dismissal.

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98. The Tribunal gave careful consideration to all that was said in support of why the letter of 19 January 2017 rejecting the appeal was written. It noted that the respondent said in the letter that the decision was "*not a disciplinary decision and therefore the disciplinary policy is not relevant*". That is incorrect. The claimant`s dismissal on capability was a disciplinary decision and the claimant should have been afforded the opportunity to go through a formal disciplinary process. Similarly, in relation to capability and allegations about the claimant not performing at the required level and alleged issues with her attitude as observed by Mr Burke and Mr Turner, the Tribunal noted that the respondent failed to go through a proper disciplinary process. It did however, note that the dismissal was said to be for issues to do with work performance, behaviour and attitude.

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99. As has been accepted by the respondent`s Directors they failed to recognise that an employee is entitled to go through a proper process and that the purpose of a disciplinary procedure is to enable an employee to

5 have an opportunity to improve their performance and to correct that which is criticised. Whilst there is no doubt that the respondent's Directors spoke to having had discussions with the claimant earlier in her employment and the Tribunal had no reason to doubt that these discussions had taken place, the fact that they were never documented did not assist the respondent when it comes to their position that they had given enough warnings to the claimant. That is the purpose of a disciplinary process and it is extremely regrettable that the respondent failed to pursue this as they should have done, particularly in light of the existence of the employee handbook which presumably is intended to be used when dealing with issues such as capability and performance in the workplace.

100. The most difficult aspect for the Tribunal was whether as at 17 or 18 January 2017 given the respondent was now on notice that the claimant was pregnant did this have any impact on their decision to reject her appeal against dismissal. The Tribunal concluded that it could not say that this was the case because both Mr Turner and Mr Burke spoke to the fact that their issues with the claimant were to do with her work performance, attitude and her overuse of the internet and mobile telephone during working hours. There was no evidence before the Tribunal to support the contention that the respondent knew before she was dismissed that the claimant was pregnant or that, having discovered this from her letter of 17 January 2017 that they then treated her unfavourably on the basis of now knowing that she was pregnant and so taking a decision not to allow her appeal against dismissal on the basis of her disclosure to them following her dismissal of her pregnancy.

101. While the respondent gave the claimant very little time to improve her performance it seems that they had reached the conclusion that her performance was so unsatisfactory that they were only prepared to give her a very limited period of time in which to improve her performance. As has already been indicated, however, this is not a complaint of unfair dismissal since the claimant does not have the requisite qualifying service. It is rather

a complaint in relation to automatic unfair dismissal and that complaint can only succeed if the Tribunal is satisfied that dismissal was in some way connected to the claimant's pregnancy. The Tribunal could not be satisfied that this was the case.

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102. The Tribunal gave careful consideration to Mr Robertson's submission that the initial burden of proof had passed to the respondent but the Tribunal was not satisfied that this was the case as it was not persuaded that the respondent's Directors were aware of the claimant's pregnancy prior to the decision being taken to dismiss her.

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103. As indicated above, the Tribunal has reason to be extremely critical of the respondent and the way they handled the claimant's dismissal in relation to lack of capability and performance issues and their admitted failure to adhere to good practice and ACAS Codes of Practice in relation to such issues. However, the issue before the Tribunal is whether the claimant had satisfied it that the burden of proof transferred to the respondent. The primary submission was that the respondent dismissed the claimant because they knew of her pregnancy and that having two employees on maternity leave would have had an adverse impact on the business. The Tribunal could find no evidence to support this contention.

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104. In relation to the submission that the respondent then categorically knew of the pregnancy as at 17 January 2017 their decision to dismiss the claimant had already been taken and whilst their refusal to allow the claimant to have a formal appeal hearing against dismissal is regrettable, the Tribunal could not conflate this with there being unfavourable treatment on the basis of the claimant's pregnancy. The Tribunal was not persuaded that there was anything before it to support a contention that the respondent did so on the basis that, now knowing the claimant was pregnant they used this in some way so as to prevent her going forward with such an appeal.

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105. Next, the Tribunal considered the issue of the Effective Date of Termination, (see above). The letter dated 13 January 2017 makes it clear in unequivocal terms that the claimant's employment was being terminated with immediate effect. Mr Burke wrote, "*I am confirming that the company is terminating your employment as of today*"., (Tribunal's emphasis). That was written confirmation of what he told the claimant on 13 January 2017.

106. The Tribunal did not understand the claimant to have been in any doubt that she had been informed of her dismissal on the 13 January 2017. The Tribunal concluded that Mr Burke's submission that the dismissal took effect on that date as it was an immediate one with pay being paid in lieu was correct. That being so it follows that the claimant had already been dismissed when she wrote her letter dated 17 January 2017. The Tribunal was not persuaded that the claimant was, in effect, placed on "*gardening leave*" for one week which was her entitlement to notice given her length of service. The notification of dismissal was with immediate effect as of 13 January 2017. While the P45 does show the date of 20 January this would accord with the claimant being paid in lieu rather than being allowed to work out her notice.

107. The Tribunal had difficulty in understanding why the claimant referred in her letter to having disclosed her pregnancy to the Directors as there was no evidence before the Tribunal that she had done so earlier before her employment was terminated. While the claim form, (the ET1) does refer to the appeal letter and the claimant's assertion that she believed the respondent had discriminated against her on the grounds of her pregnancy the claimant did not, in her evidence, indicate satisfactorily how this came to be known except by surmise on her part that one of her colleagues may have done so or the suggestion that Mr Burke came into the room and may have overheard a discussion between her and Mrs Pacitti. This was denied by Mrs Pacitti. The Tribunal preferred Mrs Pacitti's explanation that she had no recollection of this having happened.

108. In all the circumstances, the Tribunal was not satisfied that the Directors had any knowledge of the claimant's pregnancy when they took the decision to dismiss her for what was, based on their view, a lack of motivation by the claimant about her work, over-use she was making of the internet for non
5 work-related websites as well as the reference to her attitude towards some of her colleagues.

109. The Tribunal was satisfied that the claimant's dismissal was unrelated to her pregnancy and was instead for performance related reasons. In relation to
10 knowledge of the respondent on receipt of the claimant's appeal letter the Tribunal was not persuaded that the claimant was still in the respondent's employment since her employment had been terminated with immediate effect on the preceding Friday 13 January 2017 for the reason set out above. That being so, the issue of whether the refusal to allow an appeal
15 was in some way connected to her pregnancy did not sit well with the explanation set out in the reply of 19 January 2017. Mr Burke made it clear that he had consulted his fellow Directors who confirmed that the claimant had not informed them of her pregnancy and, in any event, her dismissal was to do with work performance, behavior and attitude.

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110. It therefore follows applying the law to the above findings of fact that this claim cannot succeed and it is therefore dismissed.

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30 Employment Judge: F Jane Garvie
Date of Judgment: 14 November 2017
Entered in Register: 15 November 2017
and Copied to Parties

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