Appeal No. UKEAT/0197/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 January 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

REALLY EASY CAR CREDIT LIMITED — APPELLANT

MISS A THOMPSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SUHAYLA BEWLEY (of Counsel) Instructed by: Lawgistics Ltd Vinpenta House 4 High Causeway Whittlesey Peterborough PE7 1RR
For the Respondent	Written submissions

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE - Unfair dismissal

SEX DISCRIMINATION - Pregnancy and discrimination

SEX DISCRIMINATION - Burden of proof

Automatic unfair dismissal by reason of pregnancy - section 99 ***Employment Rights Act 1996*** *and regulation 20* ***Maternity and Parental Leave etc Regulations 1999***

Pregnancy discrimination - section 18 ***Equality Act 2010***

Burden of proof - section 136(2) ***Equality Act 2010***

The Claimant had worked for the Respondent for a short period of time and was still within her probationary period when it was decided that she would be dismissed due to her "*emotional volatility*" and "*failure to fit in with the Respondent's work ethic*". The ET accepted that this decision was made on 3 August 2016, before the Respondent was aware that the Claimant was pregnant. On 4 August 2016, when arranging a meeting with the Claimant to tell her of this decision, the Respondent learned of the Claimant's pregnancy. The meeting went ahead on 5 August 2016, when the Claimant was informed of the decision reached two days earlier and provided with a letter confirming the reasons for it. The ET found, however, that delaying the communication of the Claimant's dismissal meant the Respondent had the opportunity to review its decision in the light of its knowledge of the Claimant's pregnancy, which "*clearly had a bearing on the behaviour that the Respondent considered was the last straw*". The ET found the Claimant had therefore "*proved facts sufficient to reverse the burden of proof*" and the Respondent had failed to show that the dismissal was in no sense whatsoever related to the Claimant's pregnancy; it upheld the Claimant's complaints of pregnancy discrimination and automatic unfair dismissal by reason of pregnancy. The Respondent appealed.

Held: *allowing the appeal*

The ET had failed to apply the correct legal test in this case; it had effectively found the Respondent liable by omission - the ET apparently considering that the Respondent ought to have re-visited its decision to dismiss the Claimant (taken on 3 August, without any knowledge of her pregnancy) once it learned she was pregnant. The ET took the view that once the Claimant had told the Respondent she was pregnant "*It must have been obvious … that the Claimant's attendance at hospital and her emotional state were pregnancy related*". That was not the correct legal test; the ET had been required to determine whether the Claimant's pregnancy itself had been the reason or principal reason for her dismissal or whether the decision to dismiss had been because of her pregnancy. The ET had also erred in concluding that the answer to this question was provided by the shifting burden of proof. It had made no finding of fact, further to its finding as to the decision taken on 3 August, such as would establish a *prima facie* case and shift the burden to the Respondent. Moreover, the ET had failed to consider any explanation provided by the Respondent; had it engaged with the Respondent's case, it would further have been apparent to the ET this was directed to the claim as put by the Claimant, which was not the case being considered by the ET itself.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns the approach to be taken on a claim of pregnancy discrimination and automatic unfair dismissal in circumstances in which the decision to dismiss was taken before the employer knew of the employee's pregnancy but the dismissal itself took place after the employer found out about that pregnancy.

2. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the Employment Tribunal sitting at North Shields (Employment Judge Hunter sitting with members, Dr Kay and Mrs Winter, over two days in February 2017; "the ET"), sent to the parties on 10 March 2017. The Claimant was represented by a CAB representative below, who has also lodged written representations on her behalf for the purposes of this hearing. The Respondent was then represented by a legally-trained lay representative, but today appears by Ms Bewley of counsel.

3. By its Judgment, the ET upheld the Claimant's claim of unlawful pregnancy discrimination contrary to sections 18 and 39 of the **Equality Act 2010** ("EqA") and of automatic unfair dismissal under section 99 of the **Employment Rights Act 1996** ("ERA") and regulation 20 of the **Maternity and Parental Leave Etc Regulations 1999** ("MAPLE").

The Relevant Background

4. The Respondent is a small family-owned company that sells second-hand cars. It was established in May 2015 and advertises heavily online, seeking to attract customers via its website. The Claimant started her employment with the Respondent on 20 June 2016. She had

previous telesales experience and was engaged to work as a telesales operator alongside two others. Her employment was subject to the completion of a three-month probationary period, during which time her contract could be terminated by either side on one week's notice.

5. Although the ET did not accept the Respondent's evidence that the Claimant had been told that there were issues with her performance, it allowed that her performance had been "*average at the best*", and the Claimant herself acknowledged that the number of calls she was making had been poor, especially compared to her colleagues. It was also apparent that certain issues had been raised with the Claimant during the early weeks of her employment that might be seen as conduct matters, specifically about taking too many cigarette breaks, about wearing the uniform and in relation to her interactions with another colleague.

6. During the week commencing 25 July 2016, the Claimant discovered she was pregnant. Over the weekend of 30 to 31 July, she began to experience pains which continued into the next week. She was next due to go into work on Tuesday 2 August but she texted early that morning to say that she needed to go to the hospital as she had been experiencing pain since the Saturday and needed to take the day off sick. Although the Respondent was unaware of this at the time, the Claimant in fact went to the hospital for a scan to find out whether she had miscarried. In any event, the immediate response from one of the owner-directors of the Respondent, Mr Anthony Mate, reassured the Claimant that this was not a problem, saying she should not "*worry about work. It will be still there when you are sorted*".

7. Although Mr Mate had responded positively, one of the other owners, Mr Anthony Crawford (who is related to Mr Mate by marriage), felt this was the last straw; the Claimant should have gone to the hospital earlier and not waited until she was due back at work. He had

wanted to terminate the Claimant's probationary period then and there, but was talked out of this by the other owners who argued that the Claimant should be given the benefit of the doubt.

8. On 3 August, the Claimant returned to work and an incident occurred between the Claimant and a customer which led to her being spoken to by the Respondent's manager with Human Resources responsibilities, Mr Nick Fullerton. The Claimant became upset over the words used by Mr Fullerton, although she acknowledged before the ET that she may have misunderstood what he had said as she was still in an emotional state following her hospital visit. The Claimant went to the restroom, where Mr Crawford spoke to her, after which she went home.

9. That afternoon, the Respondent's owners/directors had a further conversation about the Claimant and the decision was taken that she should be dismissed. It was the Respondent's case that the directors were tired of the Claimant's "*emotional volatility*", her conduct was not good enough and her performance "*average at best*". A letter was drafted by Mr Fullerton that day confirming the decision that had been reached, but it was felt it should not be posted out straight away and the Claimant should be asked when she could next come back into work so a meeting could be held when the letter would be handed over.

10. Mr Fullerton managed to speak to the Claimant on 4 August and she said she would come into work on Friday 5 August. It was during that conversation, however, that the Claimant told Mr Fullerton that she was pregnant and Mr Fullerton passed that information to Mr Mate who said he should contact the Respondent's lawyers. Although the ET does not record this, the Respondent's evidence at the hearing was that the advice given by the lawyers

was that the Claimant's pregnancy was irrelevant given that the reasons for her dismissal were unconnected to her pregnancy.

11. On 5 August, the Claimant duly returned to work and was seen by Mr Fullerton who handed her the prepared letter and explained the reasons for her dismissal, emphasising that it was nothing to do with her pregnancy. The letter itself explained the Respondent's decision to terminate the Claimant's employment as follows:

> **"It is vital to the efficient operation of the employer's business that employees abide by the principles and rules within operation alongside our impenetrable work ethic. As you are within a probation period and have not met the satisfactory level we regret to inform you that the said contract will be cancelled with immediate effect." (ET Judgment, paragraph 2.17)**

The ET's Decision and Reasoning

12. The Claimant brought claims against the Respondent for unfair dismissal and pregnancy discrimination. She alleged the reason given for her dismissal was false, the real reason being the fact that she was pregnant, something the Respondent had found out the day before she was dismissed. The Respondent denied those claims. It requested that the Claimant provide fuller particulars setting out her case on discrimination. In so doing, the Claimant confirmed that it was her case that the dismissal letter had been falsely backdated; she contended that the Respondent had not made the decision to terminate her employment before learning of her pregnancy.

13. The ET did not accept the Claimant's case in that regard; it was satisfied that the Respondent took the decision to dismiss the Claimant on 3 August 2016, but did not communicate that to her until 5 August. It further accepted that the reason for the Claimant's dismissal on 3 August was indeed her emotional volatility and her failure to fit in with the Respondent's work ethic; the events of 2 and 3 August 2016 had been the last straw: Mr

Crawford had believed that the Claimant should have gone to the hospital in her own time and for the other directors, it was her emotional outburst on 3 August. Although the Claimant's performance had been average, that was not the primary reason for her dismissal. On 4 August, however, the Claimant had informed the Respondent that she was pregnant. The ET considered that it must then have been obvious to the Respondent that the Claimant's attendance at hospital and her emotional state were both matters that were "*pregnancy related*". The Respondent had nonetheless gone ahead with the dismissal. On that basis, the ET was satisfied that the Claimant had proved facts sufficient to reverse the burden of proof. The Respondent, for its part, failed to satisfy the ET that the dismissal was in no sense whatsoever related to the Claimant's pregnancy. On that basis, the ET concluded that the claims of automatic unfair dismissal and pregnancy discrimination were made out.

The Relevant Legal Principles

14. The ET was concerned with complaints of automatic unfair dismissal and of pregnancy discrimination. By section 99 of the **ERA**, it is relevantly provided that:

> **"(1) An employee who is dismissed shall be regarded … 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,**
>
> **…"**

15. By regulation 20 **MAPLE**, it is provided:

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

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

(a) the pregnancy of the employee;

…"

16. In determining the reason for dismissal for these purposes, the approach is that laid down for unfair dismissal cases generally, per Cairns LJ in **Abernethy v Mott, Hay & Anderson** [1974] ICR 323 CA: "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which cause him to dismiss the employee*". For section 99 purposes, it has been held that the employer must have known or believed in the existence of the employee's pregnancy; see **Ramdoolar v Bycity Ltd** [2005] ICR 368 EAT, following **Del Monte Foods Ltd v Mundon** [1980] ICR 694 EAT.

17. The Claimant's complaint of pregnancy discrimination was brought under section 18 of the **EqA 2010** which relevantly provides:

"18. *Pregnancy and maternity discrimination: work cases*

(1) …

(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."

18. By section 136(2) of the **EqA**, it is provided that:

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

19. The question for the ET was thus: whether the Claimant's pregnancy had been the reason or primary reason for her dismissal (automatic unfair dismissal) or whether her dismissal had been because of her pregnancy (section 18(2) **EqA**). In the latter case, applying section 136(2) **EqA**, the ET would need to be satisfied that facts had been established from which it

could, absent any other explanation, conclude that the Respondent had treated the Claimant unfavourably because of her pregnancy and, if so satisfied, it would then need to consider the Respondent's explanation and determine whether that had met the burden of demonstrating the decision in issue was in no way related to the Claimant's pregnancy, the protected characteristic in play in this case.

20. The shifting burden of proof is plainly of particular importance in cases where there is an absence of evidence but it does not absolve the ET from the responsibility of making findings of fact where there is evidence before it; see the observations made by Lord Hope in **Hewage v Grampian Health Board** [2012] UKSC 37 at paragraph 32.

21. Finally, in considering the case before it, the ET was bound to determine the case as put and not some other; see **Chapman v Simon** [1994] IRLR 124 CA per Gibson LJ at paragraph 42. Specifically, the Respondent was entitled to have fair notice that a matter was being relied on, such that it needed to address that point; see **Ladbrokes Racing Ltd v Traynor** UKEATS/0067/06 at paragraph 19 per Lady Smith.

The Appeal and the Parties' Submissions

22. The Respondent's grounds of appeal can be summarised as follows.

(i) The ET had failed to apply the correct legal tests and had misapplied the law in finding that the Respondent had unlawfully discriminated against the Claimant and dismissed her for an automatically unfair reason when it had found the decision to dismiss taken on 3 August was not because, or by reason, of the Claimant's pregnancy (see grounds 1 and 2).

(ii) The ET had specifically erred in its approach to the burden of proof given that it had made no further findings of fact such that it was appropriate to shift the burden to the Respondent and had further failed to make any findings as to any explanation that the Respondent had provided (ground 4).

(iii) Moreover, the ET had further erred in apparently deciding the case on a basis not claimed by the Claimant and of which the Respondent had not been given prior notice (ground 3).

(iv) More generally, the ET had failed to adequately explain its reasoning or approach (ground 5).

23. The Claimant for her part resists the appeal, essentially relying on the ET's reasoning and her written submissions in response.

The Respondent's Submissions

24. On the first ground, the Respondent contended that the ET misapplied the law in finding that the decision to dismiss was not discriminatory on 3 August 2016 and then finding that a failure to reverse that decision on 4 or 5 August 2016 amounted to an unfair dismissal and/or a discriminatory dismissal. That approach was not in accordance with the case law - see **Del Monte** and **Ramdoolar**, both of which had been relied on by the Respondent before the ET - and further failed to determine the Respondent's reason for dismissing the Claimant as required in **Abernethy v Mott, Hay & Anderson**. The ET had been solely concerned with the decision to dismiss and it had found that had been made on 3 August without any knowledge of the Claimant's pregnancy; therefore, the reason why it was made could not have been consciously or unconsciously motivated by that pregnancy. There was no further decision made and no further discussion evidenced between the directors after 3 August and, as the Respondent had

highlighted by ground 3, it was never alleged by the Claimant that there was an act of discrimination by omission which was because of her pregnancy nor that the act was because of a pregnancy-related illness. Moreover, even if there was an argument, albeit not pleaded in this case, as to whether the Respondent should have altered a decision it had already made, that was something that could only go to ordinary reasonableness (see **Del Monte** at page 697) - not in issue in this case, given the Claimant's very short length of service - it could not go to the reason why the dismissal itself occurred.

25. For completeness, there was additionally no finding that the Claimant even told the Respondent that her absence on 2 August and/or her emotional outburst on 3 August were connected to pregnancy and no finding that the Respondent knew or believed the same to be true, nor that Mr Fullerton - if he knew or believed such things - informed the Respondent's directors and decision takers.

26. Similarly, by ground 2, the Respondent contended the ET erred in law in failing to apply the correct legal test. It amalgamated the legal tests (and burdens of proof) for discrimination and unfair dismissal and made no clear finding that the principal reason for the Claimant's dismissal was connected with her pregnancy.

27. By ground 3 the Respondent objected that the ET erred in law in finding for the Claimant on a case not pleaded by her. Her case had been that she was dismissed because she had informed the Respondent of her pregnancy on 4 August 2016, the decision to dismiss had only been taken at that stage and the dismissal letter was falsely backdated. The ET, however, found for the Claimant on a different case, where the decision to dismiss her on 3 August was not discriminatory but a new/different decision was then not made on 4 or 5 August, following

A disclosure of her pregnancy. The Respondent had not been given notice of that case and there had been no application to amend. The Respondent's evidence and submissions had been directed at the Claimant's pleaded case as clarified by her further particulars. In the circumstances, it had not been open to the ET to make the finding it did on an alternative case; see **Chapman v Simon** and **Ladbrokes Racing v Traynor**.

28. By the fourth ground, the Respondent complained that the ET erred in its application of section 136 of the **EqA** in that it failed to make further findings of fact such as would give rise to a *prima facie* case when it had already found the decision to dismiss, taken on 3 August, was not because of the Claimant's pregnancy. It further erred in failing to make any findings as to the Respondent's explanation (that in making the decision to dismiss and/or throughout, they never knew nor believed it to be connected to/because of the Claimant's pregnancy). More generally and by ground 5, the Respondent contended the ET had failed to make sufficient findings of fact or provide adequate reasons for its decision.

The Claimant's Case

29. On behalf of the Claimant, it is submitted that the response to the Claimant's text (saying she was visiting the hospital on 2 August) had not suggested there was any intention to terminate her employment for unsatisfactory performance. The ET had been entitled to find that the two issues that led to the decision to dismiss were, therefore, her absence on 2 August (which was related to her pregnancy), and her emotional response to the incident on 3 August (which the ET was entitled to find was also connected to her pregnancy). In fact, the actual dismissal did not take place until Friday 5 August, by which time the Respondent knew of the Claimant's pregnancy and thus the ET was entitled to find that it must, by then, have been obvious that the two matters that had informed the decision to dismiss were pregnancy-related.

A This case was distinguishable from the facts of **Del Monte v Mundon** as the Respondent here had known of the Claimant's pregnancy before it communicated the decision to dismiss.

B 30. Although the way in which the ET had made its finding at paragraphs 4.4 to 4.7 of the Judgment did not follow from the case specifically pleaded by the Claimant, given its findings of fact, that had been a conclusion open to it.

C **Discussion and Conclusions**

31. The ET in this case had to determine the following question: what was the operative reason (or principal reason) that had caused the Respondent to dismiss the Claimant (the D unfavourable treatment of which she complained)? The Claimant's primary case had been put on the basis that the decision had been made only once the Respondent had learned of her pregnancy on 4 August and the letter purporting to record a decision taken on 3 August, for other reasons, was false. More generally, the Claimant contended that the reason for dismissal E given by the Respondent was not the genuine reason.

32. The ET did not accept that case. On the contrary, having heard from the relevant F decision takers within the Respondent - specifically the directors and owners, Mr Crawford and Mr Mate - the ET accepted that a decision to dismiss had been taken on 3 August, before the Respondent knew of the Claimant's pregnancy and for reasons that could thus not be related to G that condition. Indeed, the ET's conclusion in that regard was such that it made clear that, if the Respondent had posted the letter of 3 August out to the Claimant on the same day as it was written (so, prior to learning of her pregnancy on 4 August), it would have succeeded in its H defence of the claim.

33. On that basis, the ET's ultimate decision adverse to the Respondent is hard to understand. Although it recorded the fact that the Respondent had learned of the Claimant's pregnancy on 4 August, the ET made no finding that any further decision was then taken. On the ET's findings of fact, Mr Fullerton informed one of the directors, Mr Mate, of what the Claimant had said and was told to check the position with the Respondent's lawyers, but no further decision was then taken. Indeed, receiving no contrary advice from the lawyers, Mr Fullerton simply went ahead and communicated the decision of 3 August to the Claimant as he had previously been told to do. Had the ET considered that, in fact, the Respondent had gone on to take a further decision in the light of its knowledge of the Claimant's pregnancy (for example, that it should definitely proceed to dismiss the Claimant because of her condition), the ET would have been bound to set out that finding. It did not. On the findings of fact, there simply was no further decision after 3 August and that, as the ET had found, was untainted by any knowledge or belief in the Claimant's pregnancy. As the Respondent has pointed out, in its fifth ground of appeal, one of the difficulties in the ET's reasoning is the absence of findings of fact, specifically at the crucial part of the chronology, between 3 and 5 August. In any event, from the findings made, there is nothing that can be inferred as to a positive decision or additional set of beliefs on the part of any relevant decision taker within the Respondent.

34. What the ET appears to have done instead is to have found the Respondent liable by omission. When it found out about the Claimant's pregnancy, it seems the ET considered the Respondent was in a different position than it had been on 3 August. It appears that the ET considered that the Respondent ought then to have taken positive steps in revisiting its decision. More than that, the ET took the view that, once the Claimant had told the Respondent she was pregnant, "*It must have been obvious … that the claimant's attendance at hospital and her emotional state were pregnancy related*" (paragraph 4.4). Even if those were reasonable

assumptions in the circumstances (although I do not suggest that they were (1) because the ET made no finding of fact that the Claimant had actually told anyone that her hospital visit had been related to her pregnancy and (2) I am not at all certain it would be reasonable to assume that an emotional outburst must be related to pregnancy), that was not the correct question for the ET. This was not a case where the Respondent's liability would be established if it had treated the Claimant unfavourably because of something arising from her pregnancy, i.e. akin to a section 15 **EqA** claim in a disability discrimination case. Rather, the legal test the ET had to apply was to ask whether the Claimant's pregnancy itself had been the reason or principal reason for her dismissal or whether the decision to dismiss had been because of her pregnancy. That required the Respondent to know of the Claimant's pregnancy when it took the relevant decision; it imposed no positive obligation on the Respondent to then revisit its decision after it learned of her pregnancy; see the case of **Del Monte**, which, on the facts, is indistinguishable from the present case in terms of chronology (and the Claimant's written submissions are wrong to suggest otherwise).

35. The Respondent is thus correct in its objection to the ET's approach in terms of the legal test it was to apply and that is so even if regard is had to the shifting burden of proof. The ET still had to make findings sufficient to support a *prima facie* case that would serve to shift the burden. Here it did not. The only finding it had made was that a decision had been taken on 3 August, which was untainted by any knowledge of or belief in the Claimant's pregnancy. There were no further findings made such as to permit the ET to conclude that the burden had shifted to the Respondent.

36. Even if it had made such findings, however, the ET would still have been required to engage with the Respondent's explanation. In so doing, it would have been apparent that the

A Respondent's account of events was directed at a different case - the case as pleaded and further particularised by the Claimant. The two main decision takers within the Respondent, Mr Crawford and Mr Mate, were, moreover, present at the hearing and gave evidence to the ET, yet it was never suggested to either of them that they had made any further decision once they had learned of the Claimant's pregnancy. The Respondent had explained its decision, as taken on 3 August, and there was nothing further to suggest that this was in any sense related to the Claimant's pregnancy.

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37. As I have already stated, it is apparent that the ET in this case failed to apply the correct legal test. It misapplied the burden of proof and imposed a positive obligation on the Respondent to take a further decision once it had learned of the Claimant's pregnancy when (1) that was not the correct approach as a matter of law, (2) that was a case the Claimant had not herself suggested and of which the Respondent had no prior notice, and (3) was unsupported by the ET's own findings of fact. The appeal must therefore be allowed.

D

E

38. The question then arises as to the appropriate order on disposal. For the Respondent, it is said that, given the ET's clear findings as to the reason for the Claimant's dismissal (as taken on 3 August), I am myself in a position to determine this claim and it would be disproportionate to remit this matter, in particular, given the clear rejection of the Claimant's case which had not been amended.

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39. My concern in adopting such a course is that it would be wrong for me to proceed to determine a claim where there is more than one possible outcome. Here it is apparent that the ET rejected the Claimant's case that the Respondent had falsely backdated the dismissal letter and had made no decision to dismiss prior to learning of her pregnancy on 4 August. That said,

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there is a way of reading the Claimant's particularised case more broadly, so as to include an argument that a decision was taken after she had notified the Respondent of her pregnancy on 4 August and that the reason given for her dismissal had not been the genuine reason as at 5 August. Although the ET rejected the Claimant's case at it highest, that more general case could still be seen as live. It is true, as the Respondent has argued, that the ET made no specific finding that the Respondent went on to make a further decision after it had learned of the Claimant's pregnancy. That said, as the Respondent has also identified, the ET failed to make a number of findings of fact as to what took place in the two-day period, 4 and 5 August. In the circumstances, I do not consider that it is right for me to seek to determine this case. The appropriate course, rather, is for this matter to be remitted for fresh consideration as to what was the reason for the dismissal, whether it was because of the Claimant's pregnancy, and whether that was the reason or primary reason as at 5 August.

40. The question then arises as to whether I should remit this matter to the same, or a different, ET? I have had regard to the time that has now passed and also to the cost and inconvenience involved in remitting this matter to a different ET. Claims of discrimination and pregnancy dismissal are, however, important and I would not simply be swayed by factors such as cost. Moreover, given the errors made by this particular ET, and having regard to the guidance laid down in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763 EAT, I am satisfied that the remission should be to a different ET. That ET will be bound by the existing findings of fact, up to and including the Claimant's notification of her pregnancy on 4 August. It should otherwise consider the question whether there was any further decision (and not merely an omission to take a further decision) thereafter and, if so, whether that was because of the Claimant's pregnancy and whether that was the reason or principal reason for the ultimate decision to dismiss.

41. On that basis, I allow the appeal, set aside the existing finding of the ET and remit this matter for reconsideration by a differently constituted ET, specifically on the question as to what took place after the notification of the Claimant's pregnancy on 4 August 2016.