EMPLOYMENT TRIBUNALS

Claimant: Ms R Martin

Respondents: (1) Beauty Tonic 64 Beach Rd Limited
(2) Mr Gregory William May

Heard at: Manchester **On:** 26 & 27 September 2018

In Chambers: 16 October 2018

Before: Employment Judge Porter
Mr M Firkin
Mr P C Northam

Representation

Claimant: Mr D Flood, of counsel

Respondent: Mr M Cameron, consultant

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. the claimant was automatically unfairly dismissed within the meaning of s99 Employment Rights Act 1996;

2. the first respondent breached the terms of the claimant's contract of employment by terminating the employment without notice;

3. the first respondent, on termination of employment, failed to pay to the claimant accrued 6 days holiday pay;

4. each of the respondents discriminated against the claimant by failing to conduct a pregnancy risk assessment;

5. a remedy hearing will take place on 11 December 2018.

REASONS

Issues to be determined

1. At the outset it was confirmed by the representatives that the issues had been clearly identified by REJ Parkin in the Case Management Order sent to the parties on 23 June 2018.

2. During submissions counsel for the claimant confirmed that:

   2.1. The claim under s104 Employment Rights Act 1996, automatically unfair dismissal for asserting a statutory right, was no longer pursued;

   2.2. The claim of discrimination under the Equality Act 2010 was solely a claim of discrimination for failure to conduct a pregnancy risk assessment. No claim of discrimination was pursued in relation to any other detrimental act, including dismissal.

3. The issues were:

   3.1. Whether the claimant was automatically unfairly dismissed within the meaning of s99 Employment Rights Act 1996;

   3.2. Whether the first respondent had breached the terms of the claimant's contract of employment by terminating the employment without notice;

   3.3. Whether the respondents had discriminated against the claimant by failing to carry out a pregnancy risk assessment;

   3.4. Whether the first respondent, on termination of employment, had failed to pay to the claimant accrued holiday pay.

Orders

4. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders we considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

5. After oral submissions on the second day it was noted that neither representative had addressed the tribunal in relation to the claim of discrimination. It was agreed and ordered that written submissions be exchanged and served on the tribunal in advance of the tribunal meeting in chambers on a reserved decision.

Submissions

6. Written submissions were exchanged and served on the tribunal in accordance with the Order. The tribunal has considered those written submissions with care but does not repeat them here.

7. Counsel for the claimant made a number of detailed oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that: -

   7.1. The respondents have been inconsistent in their evidence as to the reason for dismissal, providing a smorgasbord of reasons as a smokescreen for the real reason for dismissal – pregnancy;

   7.2. When the claimant announced her pregnancy, and began having a number of absences related to her pregnancy, Ms Moreton-Derain gave the claimant three options:

      7.2.1. Stay;

      7.2.2. Leave and get a job nearer to the claimant's home in North Wales;

      7.2.3. Leave and claim benefits;

   7.3. These options reflected the concern of the respondents as to the number of the claimant's absences from work and, as the absences increased, so did the respondent's concern. All the absences related to pregnancy;

   7.4. On 28 November 2017 Mr Campbell, on behalf of the claimant, asked for a number of things to which the claimant, as a pregnant employee, was entitled, and which the respondent did not have;

   7.5. On 30 November 2017 the claimant was requested to return her company mobile phone;

   7.6. On 2 December 2017 both Mr Gregory and Ms Moreton-Derain attended the salon unannounced. The only thing discussed was the involvement of Mr Campbell. Mr May said "I thought we were friends". Ms Moreton-

Derain, in evidence, stated that the letter from Mr Campbell made her feel like a criminal,that they were “at war”;

7.7. There was communication between the claimant and Ms Moreton-Derain on 8 December 2017. It was the claimant’s clear understanding that she did not have to worry about her absence the next day because of poor weather because Ms Moreton-Derain told her that her appointments had been moved;

7.8. On Saturday 9 December Ms Moreton-Derain asserts that she was uncertain as to whether the claimant would attend work but made no check on the weather conditions, did not contact the claimant;

7.9. By lunchtime on that day the respondent had sent an email to the claimant advising her that she was dismissed;

7.10. Dismissal was a draconian and inexplicable step to take in these circumstances;

7.11. Ms Moreton-Derain asserts that she was most concerned about the claimant’s level of absence and that her absence on 9 December 2017 was the straw that broke the camel’s back because the absences had such a detrimental effect on the claimant’s work colleagues and the business. However, Ms Moreton-Derain accepted that the claimant’s tiredness, her absences and lateness for work, related to the claimant’s pregnancy;

7.12. The claimant was told that she would not be paid for ante-natal appointments. It was the direction that she should take them as holiday if she wanted to be paid;

7.13. Mr May’s candid evidence is that he did the best he could to put together the document he has prepared to show the claimant’s absences from work. There is no satisfactory evidence to support that document (p136);

7.14. The claimant accepts that she took 7 days holiday in August 2017. She had accrued 13 days holiday at the termination date and therefore is due payment for 5 accrued days.

8. Consultant for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

8.1. Dismissal was not linked to pregnancy. The claimant was in her probationary period. The contract of employment was very strict about notification of absences. The claimant failed to follow the absence procedure. She did not contact the respondent on 9 December 2017. That was the final straw and the decision was made to dismiss the claimant;

8.2. The email from Mr Campbell contained no business footer, no confirmation in writing of the claimant's authority to give him confidential information. The claimant had not told the respondents of his involvement. It was reasonable to refuse to give the requested information. There was no obligation to do so. Once the claimant confirmed that Mr Campbell was a family friend on 2 November 2017, that cleared matters up;

8.3. The email from Mr Campbell prompted the respondents to consider the steps they needed to take. A risk assessment was carried out. The claim of failure to carry out a risk assessment is ill-founded;

8.4. There were problems between the claimant and her work colleague and nagging doubts that some of the claimant's absences were not genuine, as suggested by the facebook entries on 1 and 21 November 2017. The meeting on 2 December 2017 aimed to resolve the problems between the claimant and her work colleague;

8.5. The messages between the claimant and Ms Moreton-Derain showed that they had a good, friendly relationship, that Ms Derain was supportive of the claimant;

8.6. The decision to dismiss was a culmination of nagging doubts about absences, the claimant's absenteeism, her failure to contact the respondent on 9 December being the final straw;

8.7. The first respondent accepts vicarious liability for the actions of Ms Derain;

8.8. Mr May has not taken part in any discriminatory behaviour. There can be no finding against him. Mr May has done nothing which makes him liable for the dismissal;

8.9. The claimant has contributed to her dismissal by her failure to notify absences, failure to follow procedure;

8.10. In determining remedy the tribunal should consider the principles in **Polkey**

Evidence

9. The claimant gave evidence. In addition, she called Mr Michael Campbell, family friend and advisor, to give evidence.

10. The second respondent gave evidence. In addition, the respondents called Mrs Charlotte Moreton-Derain to give evidence.

11. The witnesses, provided their evidence from written witness statements. They were subject to cross-examination, questioning from by the tribunal and, where appropriate, re-examination.

12. An agreed bundle of documents was presented. In addition, the respondent provided a Supplemental Bundle of documents at the commencement of the Hearing. After taking instructions counsel for the claimant agreed to the Supplemental bundle forming part of the evidence. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle and Supplemental bundle (which replicated and then continued the pagination of the agreed bundle).

Facts

13. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

14. The second respondent, Mr May, is the sole and managing director of the first respondent and a director in number of other limited companies, all of which operate in the business of beauty salons. In December 2017 Mr May was the director of various companies which operated 4 salons, which together employed 7 members of staff.

15. The claimant started working for the first respondent as a beauty therapist in January 2017. On 7 April 2017 the claimant resigned because a shared tenancy agreement in Manchester expired unexpectedly and she went to live at her family home in North Wales. Mr May was sad to see the claimant go and advised that she always had a position available with the company if she ever came back to reside in Manchester.

16. At the request of the second respondent the claimant provided holiday cover at a different salon in April, May and June 2017. On one day she worked at the 238 Burton Road salon to help Mrs Moreton-Derain, who was happy with her work. Mrs Moreton Derain describes how the claimant came across as a lovely and bubbly person, hard working, who did a good job with the clients

that day. Mrs Moreton-Derain comments that working with the claimant that day was a pleasure.

17. In June 2017 the second respondent asked the claimant to return to work on a permanent basis. She began her permanent role with the first respondent on 4 July 2017 with the base salary of £17,000 per annum. At that time there was a salon manager and the claimant was appointed as a beauty therapist.

18. The claimant was provided with the contract of employment (p19), which included the following:

Probationary Period ending on 03/01/2018

13. Sickness

13.1 the employee is required to report any sickness/absence.

THE BELOW PROCEDURE MUST BE FOLLOWED

13.1.1 **TELEPHONING** Greg May (managing director..)

AND

13.1.3 An **EMAIL** must be sent explaining the reason for absence. This email must be sent **AT LEAST 3 HOURS** prior to shift commencing

Failure to do so will result in disciplinary action/dismissal

18. Misconduct leading to summary dismissal without notice

….
18.13 FAILURE TO FOLLOW THE SICKNESS PROCEDURE (CLAUSE 13)

19. The salon manager left after a couple weeks and the second respondent discussed with the claimant training her up to be the next manager, the first step of which was to promote her to the position of Senior therapist. The claimant was promoted to the position of Senior beauty therapist with a base salary of £18,000 per annum. Someone else was recruited to replace the claimant as beauty therapist. The claimant was not provided with a new or an amended contract of employment to reflect her promotion and new terms and conditions.

20. As a beauty therapist the claimant is required to work with certain chemicals. Her duties include wax treatments, applying fake tan in a tanning booth.

21. In late August 2017 the claimant informed the second respondent that she was pregnant with her first child. Mr May said that he did not know what to do next because he had never had a pregnant employee before.

[On this the tribunal accepts the evidence of the claimant.]

22. In or around September 2017 the claimant asked Mr May for time off work to attend an antenatal appointment. Mr May told the claimant to book the day off as holiday or she would not be paid. The claimant did not feel comfortable about challenging Mr May. She then booked annual leave for all her antenatal appointments, including for scans and with her midwife. The claimant had a few days absence for those purposes. She was not told by either Mr May or Mrs Moreton-Derain that she would be paid for those antenatal appointments.

[On this the tribunal accepts the evidence of the claimant, in part supported by the contemporaneous documentary evidence. We refer in particular to the text message from the claimant to Mr Campbell (p26) questioning whether she should be paid for ante-natal appointments.]

23. During the course of 2017 Mrs Charlotte Moreton-Derain was appointed as Area Manager across some of the salons, including the salon where the claimant worked. The aim of this was to allow Mr May to concentrate on the businesses closer to home. As a result, Mr May delegated some of his responsibilities for the day to day running of the business to Mrs Moreton-Derain. By 1 November 2017 Mrs Moreton Derain was the claimant's line manager and was in charge of staff discipline. Mr May relied on Mrs Moreton Derain to bring disciplinary matters to his attention. Staff absences were dealt with by Mrs Moreton - Derain. The claimant's contract of employment was not amended to show that the first line of contact in times of absence should be Mrs Moreton – Derain.

24. The claimant was contracted to work until 9 pm on Friday nights, followed by a 9am start on Saturday morning. She drove to and from work from her home in North Wales every day. In October 2017 the claimant asked if she could leave at 8pm on Fridays because she rarely had appointments after that time and she was having problems with the long commute because her pregnancy made her feel tired. Mrs Moreton-Derain agreed to this request.

25. On 1 November 2017 the claimant's notified Mrs Moreton-Derain by text that she was unable to attend work that day because she had been up all night in pain. There was an exchange of text messages showing that the claimant's illness related to pregnancy. The claimant attended hospital and informed Mrs Moreton-Derain by text that everything was fine but she was going for a nap because she had been told she was overly tired, which was not healthy. The claimant promised that she would be in the next day.

26. Mrs Moreton Derain was a friend of the claimant on Facebook and at some time checked the claimant's public entries and noted that on the evening of 1 November 2017 the claimant went shopping with her partner and posed for a photograph in a Santa hat. Mrs Moreton Derain did not discuss this Facebook entry with the claimant at any time prior to the termination of her employment.

27. The claimant was not disciplined for failing to carry out the sickness absence policy on 1 November 2017, when the claimant failed to telephone Mr May. Mrs Moreton-Derain did not inform the claimant that she had breached procedure, did not tell her to comply with the written procedure in the future.

28. The claimant asked for unpaid leave for Tuesday, 21 November 2017 because she needed to attend hospital for blood tests relating to her pregnancy and she was tired. She made the request to Mrs Moreton Derain by text. She did not send an email explaining her absence. Mrs Moreton Derain at some time checked the claimant's Facebook entry and noted that on 20 November 2017 the claimant had notified her intention of visiting a friend's salon the following day. Mrs Moreton-Derain subsequently asked the claimant about the Facebook entry. The claimant told her that she did not go to visit her friend in the salon that day. Mrs Moreton-Derain did not accuse the claimant at the time of falsifying sickness absence, of defrauding the company, or of breach of procedure by failing to notify the respondent of the sickness absence by email.

29. When Mrs Moreton-Derain was told about the claimant's pregnancy she congratulated the claimant and they would exchange friendly text messages about the pregnancy and the claimant's illness arising from it.

30. Mrs Moreton-Derain asked the claimant on a number of occasions if she was planning to leave the salon because of her pregnancy. During the week commencing 13 November 2017 Mrs Moreton-Derain told the claimant that she was concerned that the claimant's commute to work from North Wales was not good for her or her child. Mrs Moreton-Derain told the claimant that when she was pregnant she had no job and claimed benefits, and suggested that the claimant should think about doing the same. She also suggested that the claimant look for a job nearer to home and said that she would help the claimant and give her a good reference. The claimant told Mrs Moreton-Derain that she had not thought about leaving and would not be making any decisions without discussing matter with her partner. Mrs Moreton-Derain told the claimant to have a chat with her mum and partner over the weekend and Mrs Moreton-Derain would visit the following week to see what the claimant was thinking.

    [On this the tribunal accepts the evidence of the claimant, in part supported by the documentary evidence, referred to in paragraph 34 below.]

31. During the week commencing 20 November 2017 Mrs Moreton-Derain asked the claimant if she had spoken with her partner. The claimant said she had spoken with her partner but had not decided to leave. Mrs Moreton Derain told the claimant that she was only trying to help her and not forcing her to leave, that it would be easier for her if the claimant stayed, but to let her know her decision.

32. The month of December is one of the busiest periods of business for the salon, in the run up to Christmas. It is Mrs Moreton-Derain's evidence that she did not want the claimant to leave the salon at this time because it was the busiest time of year and it would take time to find, and provide training for, a replacement

33. On Friday, 24 November 2017 Mrs Moreton-Derain sent the claimant a text message (p27) at the start of her shift stating:

    I was planning on coming to see you today but you're fully booked now! Have you had a thought about what we discussed the other day? If you're deciding to stay with us let me know so we can try to arrange a few things to make work easier for you."

34. The claimant replied by text "As far as I'm aware I'm staying. I'd be an idiot not to really. I'll let you know if circumstances change".

35. The claimant was upset by Mrs Moreton-Derain repeatedly asking about her future intentions. The claimant felt uncomfortable and threatened by Mrs Moreton-Derain and, despite Mrs Moreton-Derain saying that she did not want the claimant to leave, the claimant believed that the way that she spoke and questioned her meant that Mrs Moreton Derain wanted her to resign. As a result, the following weekend the claimant spoke to a family friend, Mike Campbell, who has HR experience, about her situation at work. Mr Campbell advised the claimant about her rights as a pregnant employee.

36. On 28 November 2017 Mr Campbell sent an email (p30) to Mrs Moreton-Derain in the following terms:

    I'm an independent HR consultant and have been engaged by your employee Robyn Martin, to advise her on employment matters in respect of her pregnancy. To this end I can advise you of the following in respect of Robyn.

    - Her EWC date is 15 April 2018. This will be formally confirmed to you by way of her MAT IB form when this is received from her midwife, in advance of the 15 week deadline date of 31 December 2017

    - We will confirm the commencement date of her maternity leave in due course, within the statutory time limits.

    From the information Robyn has told me, I understand she will be entitled to her full statutory entitlements in respect of maternity leave, pay and the other statutory

provisions. You will be aware of her right to paid time off to attend relevant antenatal appointments.

I would be grateful if you could furnish me with the following documents/information to enable me to assist Robyn further

- Copy of her Employment Contract/Written Statement of Employment particulars
- Copy of your company Maternity Policy
- Findings from your workplace Risk Assessment and in particular those relevant to the Pregnant Workers Directive 92/85/EEC

I'd respectfully ask that any communications to Robin in respect of her pregnancy and her entitlement to maternity leave/pay be copied into myself. I would also request that should any meetings take place with Robyn in connection with her pregnancy, that I be afforded the opportunity to attend as her representative

37. Mrs Moreton Derain replied (p29) as follows:

I will gather all the informations required and get back to you as soon as possible

38. Mr Campbell did not, in his email, set out any "business footer" explaining his status as employment adviser, did not provide written authority from claimant to act as her representative. The claimant did not, prior to Mr Campbell sending that email, tell the respondents or Mrs Moreton-Derain that Mr Campbell would be contacting them on her behalf.

39. The first respondent did not have a maternity policy or a workplace risk assessment.

40. Mrs Moreton Derain informed Mr May, the second respondent, of the email from Mr Campbell. A decision was made not to reply to Mr Campbell, not to provide him with the requested information. The respondents' explanation for that decision has been unsatisfactory and inconsistent.

41. Mrs Moreton Derain was upset by the contact from Mr Campbell. She accepts in her evidence to the tribunal that "I almost felt like I was treated as a criminal". Mrs Moreton Derain visited the salon on 29 November 2017, for the stated purpose of carrying out a risk assessment. Her evidence before the tribunal is that she felt that she and the claimant were "at war". Mrs Moreton Derain has provided no satisfactory evidence as to the conduct of the claimant on that day which made her feel like this. The tribunal rejects Mrs Moreton-Derain's evidence that the claimant was "quite unpleasant". No satisfactory examples have been given of the claimant's behaviour to support this description.

42. On 29 November 2017 Mrs Moreton-Derain walked around the salon remarking on certain hazards which she said that she had not noticed before. She did not work from a laptop computer, she did not complete the risk assessment form which is at pages 133 – 135 of the bundle. She did not discuss with the claimant any concerns the claimant had about working at the salon and/or with the chemicals. The claimant told her that that there was a problem with extraction in the tanning room. Mrs Moreton-Derain said she would look at that later. She then prepared a hand written note stating that the risk assessment had been completed and asked the claimant to sign it. The claimant refused to sign it because she had not seen Mrs Moreton-Derain complete any risk assessment. The claimant was not given a copy of the risk assessment which appears at pages 133-135 of the bundle during the course of her employment. The respondent did not carry out that risk assessment during the claimant's employment.

43. The salon did not have a fixed telephone. Appointments were generally made either online or by email. The claimant used her own personal mobile phone to contact clients. The claimant's phone stopped working and the second respondent provided the claimant with an iPhone confirming that she could use it for personal use. The claimant offered to buy a cheap mobile phone to replace hers but Mr May said that he wanted the claimant to have a phone with email access so that she could check appointments. The claimant used the company mobile phone as a personal phone, taking it to and from work.

44. Neither Mrs Moreton-Derain nor Mr May raised any complaint about the claimant's personal use of the company mobile phone prior to 30 November 2017, when Mrs Moreton Derain informed the claimant that she must return the phone immediately. Mrs Moreton Derain did not provide any explanation for this.

    [On this the tribunal accepts the evidence of the claimant, in part supported by the documentary evidence. We refer in particular to the text messages at page 28 which confirms the request to bring the phone back that day.]

45. On Friday, 1 December 2017 Mr Campbell sent a further email to Mrs Moreton Derain (p29), raising general safety concerns and asking her for the findings of the pregnancy risk assessment and the fire risk assessment.

46. On Saturday 2 December 2017, at the end of the claimant's shift, Mr May and Mrs Moreton-Derain arrived at the salon. No notice had been given of this meeting. Both Mr May and Mrs Moreton Derain were hostile towards the claimant, who became upset. They asked her who was Mike Campbell commenting "why are you doing this to us" "You know we're a small business we don't have these policies and stuff in place". Mrs Moreton-Derain told the claimant "you're wasting your time". Mr May said "I thought we were like mates." The claimant explained whom Mr Campbell was and why she had

contacted him. She told them that Mr Campbell was not trying to catch them out and neither was the claimant. She simply wanted to check that everything was right and fair. Mrs Moreton-Derain and Mr May did not during this meeting discuss with the claimant any problems relating to the claimant's absences, and/or lateness, and/or allegations that she had been failing to tidy or complete her work satisfactorily, and/or allegations that she been making inappropriate comments to clients and/or any problems between the claimant and her work colleague. The only topic of conversation was the involvement of Mr Campbell.

47. There is no satisfactory evidence to support the respondents' evidence that the claimant had been failing to tidy or complete her work satisfactorily, and/or that she been making inappropriate comments to clients and/or there were problems between the claimant and her work colleague.

48. The claimant had genuine concerns about the possible effect on her unborn child of the chemical treatments she was using with clients during the course of carrying out her duties.

49. On Thursday, 7 December 2017, the claimant showed Mrs Moreton-Derain the weather forecast on her phone app, which was for heavy snow. The claimant reminded Mrs Moreton-Derain that she had always made every effort to get into work, including driving during storm Doris and storm Brian. The claimant told Mrs Moreton-Derain that she would continue to make every effort to be at work as scheduled, but that she had little experience of driving through snow and was concerned because she was around 20 weeks pregnant. Mrs Moreton- Derain told the claimant not to worry, that it was not worth the risk. She asked the claimant to let her know with as much notice as possible if she was unable to get to work. Later that day, with weather conditions deteriorating sharply, the claimant rang Mrs Moreton-Derain from the salon. The claimant agreed to stay that evening until 8pm, completing her booked treatments, and then leave an hour early. Mrs Moreton-Derain agreed with this. The claimant also told Mrs Moreton-Derain that she would let her know if she was able to get in the next day.

50. On Friday, 8 December 2017 the claimant awoke to heavy lying snow. She sent a text to Mrs Moreton Derain, as she did not want to wake her at 6:53am, explaining that the weather had got worse overnight and that she would not be able to make it in that day. Mrs Moreton Derain replied "it's okay Robin thanks for letting me know I've sorted today out". She then sent a text to the claimant asking if the claimant thought she would be in the next day, Saturday 9 December 2017. The text reads(p32):

> Do you think you will be able to come tmr? I might as well reschedule your appts for tomorrow too just in case?

51. The claimant responded (p32) that unless the weather improved, it was highly doubtful that she would be able to get in and it was still snowing heavily. The claimant then sent Mrs Moreton-Derain further texts containing weather forecasts showing low temperatures and snow forecast for the next few days.

52. Mrs Moreton Derain sent a further text (p33) to the claimant as follows:

> I might just reschedule tomorrow appts to be honest so it's organized

53. The claimant replied:

> No that's ok I understand. It will be harder for you to do tomorrow as well as it's an early start.

54. Mrs Moreton-Derain accepts in evidence that the exchange of texts was an agreement that she would reschedule all of the treatments the claimant was booked to do on Saturday, 9 December 2017. Mrs Moreton-Derain did then move all the appointments she could and blocked the claimant's diary for the rest of the day on 9 December 2017 to avoid clients booking appointments with the claimant on line. The tribunal rejects Mrs Moreton-Derain's evidence that she kept some appointments in the claimant's diary for later in the day on 9 December 2017 in case the claimant did attend later in the day.

55. On Saturday 9 December 2017 the snow had worsened across North Wales and the North West Police were advising motorists to avoid all but essential travel. The claimant did not travel to work because of the weather and the police advice, and because she understood that Mrs Moreton-Derain had said that she was rescheduling all her appointments for that day. The claimant did not telephone or email or text either Mrs Moreton-Derain or Mr May to confirm her non-attendance that day, on 9 December 2017.

56. At 12:15 on 9 December 2017 Mrs Moreton Derain sent an email to the claimant terminating her employment with immediate effect. The letter includes the following:

> Having discussed the issue with you last week we feel that our warnings regarding your absenteeism were not taken seriously, forcing us into a situation where we have no choice but to take these drastic measures per company policy.
>
> You are well aware of the stance that Beauty Tonic Ltd takes on absenteeism and despite warnings in the past few weeks you have failed to alter your actions. Due to your absenteeism, we have had to reschedule and refund treatments. This has resulted in a considerable financial loss.

57. The claimant did not prior to receipt of this letter receive any warnings from the respondents, formal or informal, relating to unacceptable absenteeism,

lateness, failure to undertake her tasks correctly, making inappropriate comments to clients.

58. Before sending the email on 9 December 2017 Mrs Moreton Derain discussed the claimant with Mr May. A decision was made to dismiss the claimant. The evidence as to the reason that dismissal has been unsatisfactory and inconsistent.

59. Prior to sending the notice of termination of employment neither Mrs Moreton-Derain nor Mr May contacted the claimant to establish if she was attending work that day, 9 December 2017 and, if not, the reason why not, and did not check any weather forecast to confirm the position with snow in North Wales, from where the claimant was driving.

60. In the Grounds of Resistance (p46) Mr May stated that the claimant was dismissed for the reasons listed as follows:

> Miss Martin on 2 separate occasions (01/11/17 & 21/11/17) did not attend work and advised the reason for this was that she was sick. I attach evidence …to show she was indeed fit for work by way of her 'post' on the social media platform Facebook clearly showing her visiting friends on one of the occasions (21/11/17) and shopping at Asda in Fancy Dress on another (01/11/17). This is a breach of her Employment Contract clause 18.11 Falsely claiming to be sick in order to defraud the Employer
>
> Miss Martin also failed to follow procedure set out in her contract on two separate occasions (08/12/17 and 09/12/17) by failing to follow clause 13.1…[set out}
>
> Miss Martin was also late for work numerous times…

61. The document at page 136 is not an accurate record of the claimant's attendance at work, sickness absence and annual leave. Mr May prepared that document after the termination of the claimant's employment and has no documentary or other satisfactory evidence to support its accuracy. Neither is the document an accurate record of the claimant's pay during the course of her employment. The document does reflect Mr May's stated understanding that the claimant would not be paid for sickness absence and for part of the days when she attended the midwife. However, the pay slips, prepared by a accountancy service, show that the claimant was paid the same rate of pay throughout: no deductions were made for sickness or other absence.

62. The claimant took 7 days paid annual leave during the course of her employment.

[On this the tribunal accepts the evidence of the claimant.]

The Law

63. Section 18 Equality Act 2010 provides :

> (2) A person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably:
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered as a result of the pregnancy.
>
> (4) A person discriminates against a woman if he 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.

There is no requirement for the claimant to identify a comparator in a claim under section 18.

64. Any unfavourable treatment of a woman because of her pregnancy will amount to pregnancy discrimination under S.18 of the Equality Act 2010 (EqA). This would extend to any unfavourable treatment of a pregnant employee based on any health and safety concerns of the employee for herself or her unborn child.

65. Regulation 3(1) Management of Health and Safety at Work Regulations 1999/3242 (the1999 Regulations) sets out the general duty of employers to safeguard the health and safety of their employees and any other persons who may be affected by the employer's work or business. It states that an employer must make a suitable and sufficient assessment of:

- the risks to the health and safety of its employees to which they are exposed while they are at work, and
- the risks to the health and safety of persons not in its employment arising out of or in connection with the conduct by it of its undertaking

for the purpose of identifying the measures it needs to take to comply with the requirements imposed upon it by the relevant statutory provisions.

66. By virtue of Reg 16(1) the employer must include in the assessment under Reg 3(1) an assessment of particular risks to new or expectant mothers and their babies where:

- the persons working in an undertaking include women of childbearing age — Reg 16(1)(a), and
- the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II to the EU Pregnant Workers Directive (No.92/85)

67. In **Page v Gala Leisure and ors EAT 1398/99** the EAT pointed out that there are two types of risk assessment or consideration that may be material when an undertaking employs women of childbearing age. The first is the general duty to assess risk under Reg 3(1), taken together with Reg 16(1). The need for this general type of assessment arises not by reason of any particular pregnancy being notified to the employer, but simply because the employer employs one or more women of childbearing age in the undertaking and an employer should not wait until an employee is pregnant before making such an assessment — see **Home Farm Trust Ltd v Nnachi EAT 0400/07.**

68. The second type of assessment identified by the EAT in **Page** arises when an employee gives notice under Reg 18 to the employer in writing of being pregnant, of having given birth within the last six months or of breastfeeding. This second kind of assessment requires the employer to consider, in relation to the particular individual who has given the notice, whether, even if the relevant statutory provisions were complied with, risk of the kind described in Reg 16(1)(b) would not be avoided. If such risks cannot be avoided, the employer must then comply with the other duties under Reg 16.

69. An employer's failure to carry out a risk assessment can, in the case of a pregnant worker, entitle her to bring a complaint of pregnancy and maternity discrimination under S.18 EqA. In **Day v T Pickles Farms Ltd 1999 IRLR 217, EAT,** it was held that a failure to carry out a risk assessment could amount to a detriment under the Sex Discrimination Act 1975 (SDA) (now repealed and replaced by the EqA), entitling the worker to bring a sex discrimination claim. The EAT in **Hardman v Mallon t/a Orchard Lodge Nursing Home 2002 IRLR 516, EAT,** held that a failure to carry out a risk assessment resulted in a detriment to a pregnant employee and constituted sex discrimination. The **Hardman** case was decided prior to amendments made to the SDA by the Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467, which introduced new provisions explicitly prohibiting discrimination on grounds of pregnancy and maternity leave —. However, the EAT confirmed in **Stevenson v JM Skinner and Co EAT 0584/07** that the principle in **Hardman** — that a failure to carry out a risk assessment under Regs 3(1)(a) and 16 1999 Regulations amounted to discrimination — remained good law in light of the amendments.

70. The position remains unchanged under the EqA. The relevant provisions are now contained in S.18 EqA, which — like S.3A SDA before it — makes specific provision prohibiting discrimination on the grounds of pregnancy or maternity leave. As under the SDA, a failure to carry out a risk assessment for a pregnant employee will amount to discrimination for these purposes.

71. However, a claim of pregnancy discrimination does require the claimant to establish that she has experienced unfavourable treatment 'because of' her pregnancy or an illness related to it — **S.18(2) EqA.** It is not sufficient that pregnancy merely be the 'background' to the unfavourable treatment; it must be the 'reason why' she was treated in that way.

72. In **O'Neill v Buckinghamshire County Council 2010 IRLR 384, EAT.** the Appeal Tribunal ruled that, in the absence of evidence that the work of a pregnant teacher would involve a risk to her health and safety, there had been no obligation on the employer to carry out a risk assessment under **Reg 16 1999 Regulations.** The EAT also affirmed the absence of any automatic right to a specific risk assessment for pregnant workers. The obligation to carry out a risk assessment of a pregnant worker arose only where (a) the employee notified the employer in writing that she was pregnant, (b) the work was of a kind that could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby, and (c) the risk arose from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of the Pregnant Workers Directive. In the instant case there had been no material before the tribunal from which it could have concluded that the kind of work carried out by the claimant involved a risk of harm or danger to her as a pregnant worker as defined by the Directive and the 1999 Regulations.

73. Section 136 Equality Act 2010 provides:

Burden of Proof

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

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

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

74. An employee who is dismissed is entitled under section 99 of the Employment Rights Act 1996 to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is of a kind specified in the Maternity and Parental Leave Regulations 1999 (as amended). Regulation 20(3) lists the kind of reasons to include reasons connected with the pregnancy of the employee.

75. The question of whether the reason for which the claimant was dismissed was connected with her pregnancy is not to be answered by having regard to the subjective motives of the alleged discriminator but by an objective test of casual connection, involving consideration of the surrounding circumstances. **O'Neil -v- Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and Another [1997] ICR 33**.

76. The tribunal has considered and applied as appropriate the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within our findings above but made in the same manner after considering all the evidence)

Unfair dismissal under s 99 Employment Rights Act 1996

77. The claimant was dismissed and the effective date of termination was 9 December 2017.

78. The tribunal has considered with care all the circumstances to determine what was the reason for dismissal. The tribunal notes in particular the following:

78.1. The respondent's witnesses have been inconsistent in their evidence as to the real reason for dismissal. The email notifying the claimant of the decision to terminate employment (35) referred to the claimant's absenteeism. The Response (48) refers to absenteeism, lateness for work, failing to follow procedure for reporting absenteeism, and asserts that on two separate occasions the claimant falsely claimed to be sick in order to defraud the respondent;

78.2. In the evidence before the tribunal the respondent has failed to provide any satisfactory evidence to support the allegation that the claimant had falsely claimed to be sick in order to defraud the respondent;

78.3. In the evidence before the tribunal the respondent has raised numerous different allegations against the claimant including allegations that she was lazy, that she did not clean up or tidy after her procedures, that she had told clients that she hated working for the respondent. There is no satisfactory evidence that these were genuine concerns or that the respondent had ever raised these matters with the claimant prior to her dismissal;

78.4. The respondent's evidence has been inconsistent and unsatisfactory as to the timing and manner of dismissal. On the one hand Ms Moreton-Derain denies that she was encouraging the claimant to leave employment, asserting that it would not be in her interest for the claimant to leave as December was the busiest month and she would have to find and train any replacement. The claimant was dismissed without notice on 9 December 2017, during the salon's busiest period. Ms Moreton-Derain asserts that the claimant was dismissed by email on 9 December 2017 because of the claimant's unauthorised absenteeism that day. However, the evidence is clear that the claimant and Ms Moreton-Derain had discussed via text messaging the problem with the snow and

the claimant's inability to travel from North Wales to work. The evidence is clear that Ms Moreton-Derain knew that it was highly unlikely that the claimant would be attending work on the Saturday and had taken steps to re-arrange the claimant's client appointments in anticipation of the claimant not attending. Ms Moreton-Derain's evidence that she was expecting the claimant to attend that day and/or to call in to explain her non-attendance is wholly unsatisfactory;

78.5. The respondent's evidence as to the reason for deciding to dismiss the claimant by email on 9 December 2017 is unsatisfactory;

78.6. The written contract may have been strict about the procedure for reporting absences, and the consequences of failure to comply with the procedure, but the procedure was not enforced strictly prior to 9 December 2017. The claimant breached the procedure before then but was never taken to task about it, never warned that a repeat of the failure to follow procedure may lead to dismissal. Mrs Moreton-Derain did not, in the exchange of text messages between herself and the claimant about the cancellation of appointments for 9 December 2017, tell the claimant to contact her the next day, or advise the claimant that she would wait to her from her before cancelling appointments in the afternoon of 9 December 2017;

78.7. Both Mr May and Ms Moreton-Derain reacted badly to the involvement of Mr Campbell and his request for documentation and, in particular, a risk assessment relating to the claimant's pregnancy. When Ms Moreton-Derain attended the work premises on 29 November 2017, with the stated aim of completing the risk assessment, Ms Moreton-Derain's evidence is that she felt that she and the claimant were "at war", and that, because of the involvement of Mr Campbell she "almost felt like [she] was treated as a criminal". Ms Moreton-Derain has provided no satisfactory explanation for those expressed feelings, has provided no satisfactory evidence of any behaviour of the claimant that day which led to any such feelings. Mr May and Ms Moreton-Derain arrived at the work premises on 2 December 2017 and questioned the claimant about the involvement of Mr Campbell. Mr May commented to the claimant "I thought we were mates". Ms Moreton-Derain commented to the claimant "You're wasting your time";

78.8. When the claimant informed Mr May that she was pregnant, Mr May commented that he did not know what to do next because he had never had a pregnant employee before;

78.9. When the claimant asked for time off to attend an ante-natal appointment Mr May told the claimant to book the day off as holiday or she would not be paid;

78.10. When Ms Moreton-Derain became aware that the claimant was pregnant, Ms Moreton-Derain asked the claimant repeatedly if the claimant was planning to leave. Ms Moreton-Derain suggested to the claimant that the claimant should either get a job nearer home or should become unemployed and claim benefits, as Ms Moreton-Derain herself had done when she was pregnant;

78.11. The respondent became concerned about the number of absences of the claimant, which absences were linked to her pregnancy;

78.12. On 30 November 2017 Ms Moreton-Derain told the claimant that she was required to return her company mobile phone. No explanation was given for the request at the time;

In all the circumstances the tribunal finds that the reason for the claimant's dismissal was pregnancy. The respondent clearly objected to the amount of time the claimant was having off work because of ante-natal appointments and pregnancy related illness. Ms Moreton-Derain was clearly encouraging the claimant to seek work elsewhere. Prior to the announcement of her pregnancy the claimant was clearly a highly valued employee. She had been promoted and promised training towards management. After the announcement of the pregnancy and in particular, the involvement of Mr Campbell, the respondent's attitude changed. The respondent has raised unsubstantiated allegations of misconduct against the claimant.

79. The claim of automatically unfair dismissal under s 99 Employment Rights Act 1996 is well-founded.

Breach of Contract

80. The claimant was dismissed without notice. The claimant was not guilty of gross misconduct justifying summary dismissal. The claimant made it clear that she would be unable to attend work on Saturday 9 December 2017 and there was an agreement that her appointments would be re-arranged. The respondent had never previously enforced the written policy that any absence should be notified to Mr May and confirmed by email. Ms Moreton-Derain was fully aware that it was highly unlikely that the claimant would be attending work, for good reason. There was a severe weather warning in place, which the claimant had copied to Mrs Moreton-Derain. The claimant's failure to attend work and comply with the terms of the written policy was not the reason for dismissal.

81. The claim of breach of contract, failure to provide appropriate notice of dismissal is well-founded.

Holiday pay

82. On termination of employment the claimant was entitled to payment of accrued holiday pay. The tribunal accepts the calculation of the respondents and claimant that the accrued entitlement was 13 days. The tribunal accepts the claimant's evidence that she took 7 days paid holiday during the final holiday year. The claimant was therefore entitled to 6 days accrued holiday pay.

Discrimination under s18 Equality Act 2010

83. The claimant pursues this claim solely in relation to the failure to carry out a pregnancy risk assessment.

84. The respondent did fail to carry out a pregnancy risk assessment. Ms Moreton-Derain did attend the salon on 29 November 2017 with the stated aim of carrying out a risk assessment but it is clear that Ms Moreton-Derain did not carry out any proper risk assessment on the day, did not carry out an adequate assessment of the risks arising from the use of chemicals.

85. The claimant suffered a detriment by the failure of the respondent to carry out a risk assessment relating to the claimant's pregnancy. She was clearly worried about the possible effect on her unborn child of the chemical treatments she was using with clients. Applying the principles set out in **O'Neill v Buckinghamshire County Council 2010 IRLR 384, EAT,** the tribunal notes and finds that:

    85.1. the claimant, through Mr Campbell, did notify the respondent in writing that she was pregnant. The email (30) clearly set out the expected week of confinement and the intention to formally confirm by way of provision of the MAT1B when that document was received. The **O'Neill** case does not specify that the written notification can only be by way of Form MAT1B;

    85.2. the work was of a kind that could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby. The claimant was working with chemicals, in a tanning booth with clients, was required to walk up and down stairs in small premises, and

    85.3. the risk did arise from the processes undertaken at work, from working conditions, and chemical agents

86. As for the reason for failure to carry out the risk assessment, there are facts from which the tribunal could infer that the reason was the claimant's pregnancy. It is clear that both Mrs Moreton-Derain and Mr May reacted badly to the involvement of Mr Campbell and his request for documentary evidence

relating to the pregnancy, documents which the first respondent did not have. Mrs Moreton-Derain's own evidence is that following the involvement of Mr Campbell she "felt like a criminal" and that she and the claimant "were at war". The respondents have failed to provide a satisfactory explanation for their failure to provide a risk assessment. The claim under s18 Equality Act 2010 is well-founded.

87. The first and second respondent are jointly and severally liable for this act of discrimination. The respondents have failed to provide a satisfactory explanation as to the reason why Ms Moreton-Derain did not proceed with the risk assessment as planned on 29 November 2017. It is clear that Ms Moreton-Derain did initially plan to reply to Mr Campbell with the information requested, clear that she subsequently discussed Mr Campbell's communication with Mr May, clear that she took instruction from him on employee related matters, clear that Mr May reacted badly to Mr Campbell's involvement and his request for information which they did not have (as demonstrated by Mr May's comment "I thought we were mates"). On balance the tribunal finds that Mr May either took, or took part in, the decision not to undertake the risk assessment. He is personally liable for the discriminatory act.

Employment Judge Porter

Date: 12 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 November 2018

FOR THE TRIBUNAL OFFICE