EMPLOYMENT TRIBUNALS

Claimant: **Miss L Greef**

Respondent: **Mrs D Young t/a Made by Millie Moo**

Heard at: **Hull** **On: 26 and 27 September 2018**

Before: **Employment Judge Maidment**
Members: **Mrs C Sanders**
Mr DW Fields

Representation
Claimant: **Mr D Vulliamy, CAB volunteer**
Respondent: **Miss S Murphy, Solicitor**

JUDGMENT having been sent to the parties on 16 October 2018 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The Claimant was dismissed a few weeks before she was due to finish work to begin a brief period of annual leave following which she would commence her maternity leave. She maintains that she was automatically unfairly dismissed, the reason or principal reason for her dismissal relating to her pregnancy or maternity, pursuant to Section 99 of the Employment Rights Act 1996. In addition, the Claimant maintains that her dismissal was an act of unfavourable treatment because of her pregnancy/maternity pursuant to Section 18 of the Equality Act 2010. There is no dispute that the Claimant was dismissed during the protected period.

2. The Tribunal having identified these issues, as indeed had already been determined at a Preliminary Hearing on 22 June 2018, Mr Vulliamy made an application to amend the Claimant's complaint to add to the pregnancy/maternity discrimination complaint, a further act of alleged

unfavourable treatment in the Respondent's failure to conduct a pregnancy risk assessment. The Respondent opposed such application. The Tribunal retired to consider its decision and then confirmed to the parties that the application was refused. The Tribunal had been referred by Mr Vulliamy to the case of Hart v English Heritage, which was a case where a point could have been made earlier but wasn't. In this case, however, the Claimant had consciously chosen to limit her claims to her dismissal and said that that was always what was intended. This is clear from the case management summary sent by Employment Judge Knowles to the parties on 28 June after the aforementioned Preliminary Hearing. He recognised that the Claimant had raised other matters in a claim form which may have formed other complaints, but that the Claimant's position was that these issues were raised as context and background to her dismissal and that the only claim she wish to be considered was that directly relating to her dismissal. Dismissal indeed is her primary complaint and the Respondent has prepared its case on that basis. There was prejudice if the Respondent now had to deal with the risk assessment as a claim rather than a matter of mere background evidence. Whilst not a determinative factor, the application to amend is brought very late in the day in circumstances where it could have been brought significantly earlier. It was not in the interests of justice to allow the amendment and the balance of prejudice, was in the Respondent's favour.

Evidence

3. The Tribunal then took some time to privately read the witness statements exchanged between the parties and the agreed bundle of documents. As a result, each witness was able to simply confirm their witness statement and then, subject to brief supplementary questions, be open to be cross-examined. The Tribunal heard firstly from the Claimant. The Respondent then gave her evidence which was concluded by the end of the first day of hearing. At that point the Tribunal noted that there had been extensive WhatsApp messaging between the Claimant and Respondent but there appeared to be a gap in the printouts of such messages placed before the Tribunal, in particular relating to the final few days before the Claimant's employment was terminated. At the commencement of the second day of hearing it was confirmed that additional WhatsApp messages relating to that period had been discovered and disclosed by the Respondent to the Claimant. Mr Vulliamy certainly considered some messages of 21 November 2017 to be relevant ones which should be before the Tribunal. Copies were provided to the Tribunal. The Respondent was then recalled to give evidence on and be questioned by Mr Vulliamy on those additional messages. Mr Jamie Young, the Respondent's husband, then gave evidence on behalf of the Respondent followed by Ms Alannah Paige Hyde, a former colleague of the Claimant and the Respondent's sister and finally Ms Laura Burnett, another former colleague of the Claimant. The Tribunal then heard brief submissions on behalf of the Respondent and then on behalf of the Claimant.

4. Having considered all the relevant evidence, the Tribunal makes the findings of fact set out below.

Facts

5. The Respondent is in business in the manufacture and sale of children's clothing. The Claimant commenced her employment with the Respondent on 22 February 2017 as an office assistant. Her duties included administration but also vinyl cutting and the packing and postage of the Respondent's goods. She worked 16 hours each week across 4 weekdays.

6. The Claimant had a very good relationship with the Respondent which involved them communicating with each other extremely regularly through WhatsApp messaging outside normal working hours.

7. The Claimant informed the Respondent that she was pregnant in June 2017. The Claimant provided confirmation of her due date of 2 February 2018 and her intention to commence maternity leave at the end of 2017 by email sent to the Respondent on 7 August 2017. Ultimately, the Claimant determined that she would take a period of holiday from 18 to 31 December and then commence her maternity leave.

8. Some of the Claimant's work was of a heavy nature. This included carrying large postal sacks to the local post office containing the Respondent's products. The Claimant continued to carry this duty out whenever necessary and without complaint. The Claimant also from time to time operated a heavy heat press.

9. Shortly after informing the Respondent of her pregnancy the Claimant raised the issue of the need for a risk assessment. The Respondent spoke to ACAS and came away with the understanding that, since a general risk assessment was already in place, there was no requirement for any additional specific risk assessment to be carried out in respect of Claimant. The Respondent did not relay this information back to the Claimant. The risk assessment in place did not in fact address the issues involved in employing women of childbearing age.

10. In the meantime, the Claimant continued to operate the heavier press. On the morning of 4 August 2017, the Claimant experienced significant bleeding which required her to attend the hospital for a further scan. The Claimant's baby was still well but the Claimant attributed the bleeding to her having operated the heavy press at work the previous. The Respondent, in reaction to this, ensured that from that point onwards the Claimant only operated an alternative small heat press. The Claimant accepted that this press did not involve her in any heavy lifting, albeit she did on one occasion raise with the Respondent that she had felt hot and dizzy and had to leave

work early. In the final weeks of the Claimant's employment she did not operate either heat press.

11. The Claimant did have some absences from work, but the majority of these were due either to the ill-health of her existing infant daughter or her mother who suffered a heart attack and was hospitalised for a period impacting in turn on the Claimant's childcare arrangements.

12. The extensive WhatsApp messages show the Claimant keeping the Respondent informed at all stages of any difficulties she might have in attending work. They also illustrate the Respondent being very supportive of the Claimant's difficulties and understanding of the reasons for her absences. The Claimant is at times told not to worry and to take her time in terms of a return to work.

13. The Respondent had a policy regarding the reporting of absence, which required employees to notify the Respondent personally - her mobile phone number given as the method of contact. The Claimant, however, was accustomed to communicating with the Respondent by social media messaging which was, between them, a quick and effective method of communication. At no stage did the Respondent express any concern that the Claimant was not directly telephoning her. The messages indicate the Claimant caring about her potentially letting down the Respondent and at times offering to come back to work as soon as she could and to make up any lost hours.

14. Again, the nature of the messages exchanged between the Claimant and Respondent are of a very friendly nature. The Respondent was herself also pregnant, around 2 months behind the Claimant, and much of their conversation was around their respective pregnancies and the prospect of giving of birth.

15. The Respondent had operated a manual system for employees to sign when they arrived and left work. That, however, changed to an electronic system. The Tribunal has been referred to clocking records for the period from 25 August to 20 November 2017. The Tribunal concludes that the timeclock was in fact 3 minutes slow. The Claimant in her evidence stated that it was fast by that margin, but that was clearly an error in circumstances where she was maintaining that some of the times shown did not in fact indicate that she left the workplace earlier than the designated finish time because allowance had to be made for the fact that the recordings were 3 minutes behind real time. The Respondent accepted that the clock was 'out', albeit she could not remember whether it was fast or slow.

16. The records do not indicate an issue of concern regarding the Claimant's timekeeping and indeed show her, in the majority of cases, working her contracted hours. In evidence before the Tribunal, the Respondent said that

her issue with regard to the clocking timings was rather that on occasions the Claimant had taken a longer lunch break, yet still left work at her normal finish time. Within the period described there are a couple of occasions where that might have been the case, but the discrepancy relates to a relatively small number of minutes and it is undisputed that the Respondent never raised the issue with the Claimant or to took her to task in this regard.

17. The Claimant worked with the Respondent's sister, Alannah Hyde, and they had had a conversation along the lines that, with the new clocking system in place, they could cover for each other by one clocking the other in if she was ever late. Ms Hyde, the Tribunal concludes, had the Claimant's pin code necessary to operate the clocking system. On 29 August, Ms Hyde clocked the Claimant in, thinking she was going to be late, but quickly clocked her out again on realising she would not be attending work at all.

18. On discovering this, the Respondent invited the Claimant and Ms Hyde to separate disciplinary hearings. Ms Hyde chose to resign from her employment before her hearing. The Claimant, however, attended a meeting with the Respondent on 21 September. The Claimant accepted that what had occurred was wrong, but said that Ms Hyde had taken it upon herself to clock the Claimant in and out and that the Claimant had had nothing to do with this. The Respondent accepted this to be the case. Whilst, from the meeting, it was clear to the Claimant that clocking other employees in and out was not regarded as acceptable, she was given no form of disciplinary sanction or warning. The Respondent does not suggest that there was any further instance of misuse of the clocking system.

19. On 9 November, the Respondent emailed one of the office staff with a message to be passed on to the Claimant stressing that the Claimant needed to ensure that there was as least wastage of vinyl as possible and that on small jobs the Claimant should utilise scraps rather than use the large vinyl roll. The email communication was direct and businesslike in tone, but did not suggest any serious performance issue or potential disciplinary matter. The Tribunal accepts that the Respondent did have an issue regarding vinyl wastage of which the Claimant was aware. It also accepts the Claimant's evidence that she had herself taken the initiative to ensure that there was a storage container for scrap vinyl to be placed in and subsequently used for smaller jobs.

20. Also in November the Respondent advertised for a number potential vacancies for permanent employment including ones which would involve work of the type the Claimant carried out. The Respondent did so against a background of her business growing month by month and anticipating the need for additional staff regardless of the Claimant's impending maternity leave and in circumstances where it was anticipated that there would still be plenty of work available for the Claimant whenever she returned from her maternity leave.

21. On 21 November the Claimant sent a message at 0847 to the Respondent saying that her daughter had a high temperature and that she probably wouldn't be in that day if her young daughter wasn't feeling better. At 0923 it is clear from a telephone record that the Respondent telephoned ACAS. This was to seek advice about terminating the Claimant's employment. The Tribunal accepts that the Respondent was left, after the ACAS conversation, with the understanding that, in the case of a pregnant employee, employment could be terminated without the employee being able to claim unfair dismissal provided the employee had less than two years' service and pregnancy was not the reason for dismissal. At 1044 the Claimant sent a further message to the Respondent saying that she definitely wouldn't be in work that day as she couldn't get her daughters temperature down and was going to get a doctor's appointment for her.

22. The Respondent then wrote to the Claimant terminating her employment with effect from 5 December. The reason was stated as being: *"due to various tasks being given on a daily basis that are being failed to be completed, we feel that performance has been poorly executed recently with excuses as to why things are not done, lack of effort when it comes to tasks and all-round performance. When things have been asked to be done they are not done as asked. In addition to poor performance we currently have issues with the employee telling the employer when they will be having time off or arriving late to her place of work for various reasons (excluding pregnancy related appointments and reasonable time of emergency dependent leave) without requesting time off in a timely manner and it being approved."*

23. The Respondent told the Tribunal, on her being recalled to give evidence, that the Claimant's message regarding her being unable to attend work on 21 November stressed her out, tipped her over the edge and tipped her to write a dismissal letter that day. It was the Respondent business' busiest time of the year, the Respondent herself was pregnant and sick and there was pressure on to get the orders out. She was extremely stressed that the work was not going to get done. She felt that she already had concerns with the Claimant not getting things done and that everything the Claimant was doing was causing her nothing but trouble. On receiving the first message, the Respondent had it in her mind that the Claimant was not going to be in. This placed stress on the Respondent with her husband away and a child at home and in circumstances where the Respondent was already working "*ridiculous*" hours. She said that she cracked and that enough was enough. She therefore called ACAS to make sure she was doing everything right. The Respondent's evidence of her reaction was convincing and unrehearsed – it is accepted as an accurate account.

24. The Claimant appealed against the termination of her employment by letter of 28 November suggesting that her dismissal was related to her *"maternity condition*". The Respondent's husband, who was now to become involved

in the business from a staffing point of view, decided to hear the appeal and the Claimant was invited to a meeting. The Claimant was unable to attend due to illness and Mr Young sought to rearrange the meeting. The Claimant could still not attend and Mr Young then considered his appeal decision in the Claimant's absence. He wrote to her by letter of 22 January 2018 rejecting the appeal and listing a number of reasons for dismissal, including lateneness, absence, distracting other staff, wasting vinyl and lack of performance.

Applicable law

25. The Claimant complains of automatic unfair dismissal. It is accepted that the Respondent dismissed the Claimant. It is then for the Claimant (given her lack of two years' continuous service) to show that such dismissal was for a reason falling within Section 99 of the Employment Rights Act 1996 Act – pregnancy or maternity. The actions of the Respondent must have been motivated by her pregnancy or proposed maternity leave. That must be the reason or principal reason for dismissal. If so, her claim of unfair dismissal will succeed. The (un)reasonableness of the Respondent's actions is not the issue.

26. In the Equality Act 2010 "pregnancy and maternity" is one of the protected characteristics listed in Section 4. A claim of direct discrimination under Section 13 relating to sex discrimination does not apply to a woman in so far as the treatment complained of falls within the protected period (from the start of pregnancy to the end of a period of maternity leave) and is because of her pregnancy (Section 18(7)). In such cases a claim will lie instead of unfavourable treatment because of pregnancy or of illness suffered by her as a result pursuant to Section 18(2) where no comparator is required.

27. The Equality Act deals with the burden of proof at Section 136(2) as follows:-
    a. *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
    b. *(3) But subsection (2) does not apply if A shows that A did not contravene the provisions".*

28. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation and in particular the guidance set out as follows, albeit, with the caveat that this is not a substitute for the statutory language.

29. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**. There it was recorded that Mr Allen of Counsel had put forward that the correct approach was that as Ms Madarassy had established two fundamental facts, namely, a difference in

status (e.g. sex) and a difference in treatment, the Act required the Tribunal to draw an inference of unlawful discrimination. The burden effectively shifted to the Respondent to prove that it had not committed an act of discrimination which was unlawful. Mummery LJ stated:-

"I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in treatment of her. …….. The Court in Igen Ltd v Wong [2005] ICR 139 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent committed an unlawful act of discrimination. …

57 "Could….conclude" …. must mean "a reasonable Tribunal could properly conclude" from all evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the complaint. Subject only the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like …..; and available evidence of the reasons for the differential treatment

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the Respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the Respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

30. It is then permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in Birmingham CC v Millwood 2012 EqLR 910) commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities

that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

31. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. There it was recognised that in practice Tribunals in their decisions normally consider firstly whether the Claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds (termed as the "reason why" issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in the favour of the Claimant. The less favourable treatment issue therefore is treated as a threshold which the Claimant must cross before the Tribunal is required to decide why the Claimant was afforded the treatment of which he/she is complaining. Lord Nichols went on to say:-

"No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question; did the Claimant on the prescribed ground receive less favourable treatment than others? But, especially where the identify of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

Later, he said:-

"This analysis seems to me to point to the conclusion that employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former there will be usually no difficulty in deciding whether the treatment afforded to the Claimant on the proscribed, ground, was less favourable than was or would have been afforded to others."

32. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. The Tribunal's task is not straightforward in this case of starkly disputed facts such that the

application of a two stage test may remain helpful and appropriate in providing the necessary illumination.

33. Applying the legal principles to the facts as found the Tribunal reaches the following conclusions.

Conclusions

34. Leaving aside the 21 November message from the Claimant, the Tribunal was struggling significantly to determine the Respondent's motivation for terminating the Claimant's employment. The reasons put forward by the Respondent were unconvincing and the timing of the Claimant's dismissal together with a lack of obvious reason for dismissal were and still are sufficient to shift the burden of proof requiring the Respondent to provide an explanation for the Claimant's dismissal untainted by discrimination.

35. The Claimant was not dismissed because of the clocking issue given that this had already been dealt with and without indeed a disciplinary sanction. Whilst the Respondent might (and the Tribunal on balance concludes did) have had a concern about the wasting of vinyl, again that was not going to be treated as a significant disciplinary issue and certainly was not a matter the Respondent considered ought to result in the Claimant's immediate dismissal.

36. There was no significant issue in the Respondent's mind regarding timekeeping and some occasions of possible lateness in the Claimant attending work.

37. The Claimant had been absent from work on a number of occasions, but the Respondent understood the reasons for that absence and was tolerant and, indeed to a significant extent, supportive of it.

38. The absence of explanation might then have led the Tribunal on the application of the burden of proof to having to conclude there to be a discriminatory reason (pregnancy/maternity) for dismissal. Reliance on the burden of proof provisions is always something of a last resort when on relatively rare occasions a Tribunal is unable to make a positive finding as to the reason for dismissal.

39. In this case any finding of discrimination would have been also in circumstances where there was in fact no indication that the Respondent was ill disposed towards the Claimant by reason of her pregnancy. The Respondent herself was also pregnant and clearly enjoyed discussing her and the Claimant's common circumstances. The Respondent had exhibited significant sympathy in respect of the Claimant's difficulties during pregnancy. Whilst no risk assessment had taken place, the Claimant was

removed from working on the heavier heat press and then from working on any heat press. There were no significant adverse financial implications of the Claimant's maternity leave – the issue of accrual of holiday pay was minor and played no part in the Respondent's considerations. The timing of the dismissal was shortly before the Claimant was in any event due to be absent on maternity leave and in circumstances where it was foreseen that there would be plenty of work for the Claimant to return to and no difficulty in finding cover for her work in the context of an expanding business.

40. The 21 November message from the Claimant, however, and the Respondent's wholly convincing evidence of her reaction to it reveals the reason why the Claimant's employment was terminated on that date. Whilst the Respondent did not think to include reference to this message in her primary witness statement evidence (and when pressed by the Tribunal to disclose any issue which had arisen which had caused her to write the dismissal letter did not do so) the Tribunal finally had before it evidence explanatory of the Claimant's dismissal.

41. The Claimant was dismissed as an instant, spontaneous, somewhat panicked, reaction to the Respondent being informed that she would not be in work on that day. The Claimant's absence related to her daughter's sickness and not her pregnancy.

42. The Respondent was significantly stressed at a point where she was emotionally vulnerable herself and, whilst she might have overreacted, she did so with genuine concern and panic regarding how the Respondent would fulfil its orders. Whilst she did not consider this to be the first issue of concern relating to the Claimant, none of the previous concerns certainly would have resulted in the Claimant's employment being terminated prior to the commencement of her maternity leave. Further and in any event, those concerns were not related to the Claimant's pregnancy or impending maternity leave. The Respondent had been and would have been content to continue with the Claimant's employment with some limitations on what she could have done in the last few weeks before she went on maternity leave. The Respondent considered that this absence on 21 Novemebr was not an isolated absence, but she did not have in her mind that other absences had been maternity related. Certainly, when the Claimant was absent following her bleeding there was complete understanding on the Respondent's part and that absence was not considered problematical. The majority of absences in fact related to the Claimant's young daughter and her mother's illness. On balance the Tribunal considers that these did cause a degree of concern and irritation in the Respondent's mind, albeit she did not express this because of her reluctance to become embroiled in any form of confrontation or difficult discussion particularly in the context of her having developed and pursued a relationship of friendship with the Claimant which can perhaps be problematical in the context of an individual employer and employee.

43. In conclusion the Respondent has ultimately shown that the Claimant's dismissal was in no way related to her pregnancy or impending maternity leave and her complaint of discrimination must fail and is dismissed. It must follow that the Claimant has not shown that the reason or principal reason for her dismissal was her pregnancy or maternity leave. The claim of unfair dismissal must also fail.

44. The Tribunal has significant sympathy for the Claimant in that, had she had 2 years' service, she would have been found to have been unfairly dismissed both in terms of the reason not being sufficient to justify dismissal and the lack of process. The Tribunal also found much of the evidence called in support of the Respondent's assertions about the Claimant's allegedly poor performance to be wholly unconvincing.

Employment Judge Maidment

Dated: 18 December 2018