THE EMPLOYMENT TRIBUNALS

Claimant **Michelle Parry**

Respondent **TradeRisks Limited**

HELD AT: **London Central**

ON: **21-23 November 2018**
19 December 2018, Chambers

EMPLOYMENT JUDGE: Mr J Tayler **Members: Ms O Stennet**
Mr S Ferns

Appearances

For Claimant: **Mr S Crawford, Counsel**
For Respondent: **Ms S McKie, Queen's Counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant's dismissal constituted discrimination because of pregnancy contrary to section 19 Equality Act 2010. Absent any discrimination the Claimant would have been dismissed on the same date.

2. The Claimants treatment in the meetings of 5 and 7 December 2017 constituted pregnancy discrimination and detriment contrary to section 47C Employment Rights Act 1996.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 12 April 2018 the Claimant brought complaints of sex discrimination, pregnancy discrimination and automatic unfair dismissal.

2. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Lewis on 9 August 2018. The parties agreed the issues as set out at page 53 of the bundle.

Evidence

3. The Claimant gave evidence.

4. The Respondents called:

   4.1 Dr Alex Pilato, Chairman and Joint Chief Executive

   4.2 Antoine Pesenti, Senior Managing Director

5. The witnesses gave evidence from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

6. We were provided with an agreed bundle of documents. References to page numbers in this judgment are to the page number in the agreed bundle of documents.

Findings of fact

7. The Respondent is a corporate finance regulated business providing financial services to the corporate, housing and infrastructure sectors. In particular, it works with housing associations, providing advice on financial products.

8. Dr Pilato is the current Chairman and Joint Chief Executive of the Respondent and was its founder. The Respondent prides itself on great attention to detail and aims to provide the kind of service that its clients might obtain from first tier financial services business, such as Goldman Sachs. The Respondent expects its senior employees to have a detailed and accurate understanding of finance and business planning and to provide work that is accurate and very well presented.

9. Many of the Respondent’s employees are mathematicians. Dr Pilato was concerned that the Respondent needed a person who could make complex advice and financial products accessible to their clients. For some years the Respondent had been looking for someone at director level to have a client relationship role.

10. The Respondent has a history of recruiting staff to roles and, if they decide that the person does not meets their standards, dismissing them very swiftly, sometimes avoiding having to pay a fee to head hunters.

11. On 30 August 2017 the Claimant's CV was sent to the Respondent by a head hunter. She was described as a top 5% candidate with a long and solid career at RBS. The Claimant was put forward as a bright person who would work well in an organisation where she was given a lot of responsibility.

12. The Claimant was interviewed by six members of the Respondent's staff, John Coleman, Director; James Courtney-Evans, Managing Director; Ben Fry, Managing Director; Antoine Pesenti, Senior Managing Director; Alex Pilato, Joint Chief Executive and Chairman and John Slater, Joint Chief Executive.

The interviews focused on the Claimant's abilities in client relationship management. They did not focus on her financial acumen or arithmetic ability.

13. There are a number of email exchanges at about the time of the interviews. On 8 September 2017 Mr Fry sent an email suggesting that the Claimant could be good on the advisory side, but noting that he had not tested the Claimant's technical skills. Mr Coleman stated that he thought the Claimant could be "quite good". Mr Slater stated that he felt the Claimant could be good at "comprehensive marketing". Mr Fry responded to the email from Mr Slater stating that he agreed, but that Mr Pesenti needed to understand the Claimant's "maths ability". There was no analysis of the Claimant's mathematical ability during the interview process. Mr Pesenti stated that it would be offensive to check the mathematical ability of people at such a senior level.

14. On 28 September 2017 Jane Mackinnon sent an email to the Claimant enclosing a copy of a proposed contract of employment. The Claimant responded on 29 September 2017 stating that she would check it through with her lawyers. On 4 October 2017 the Claimant sent an email to Dr Pilato enclosing a signed copy of the contract.

15. Initially, there was to be a delay in the Claimant's start date to cover her period of notice with RBS and because she was going on holiday. Subsequently, on 26 October 2017, the Claimant sent an email stating that she would be able to start earlier. This was because RBS did not require her to wait to the end of her notice period before joining the Respondent. However, the Claimant did want to wait until she had taken her holiday. It was agreed that the Claimant would commence work with the Respondent on 4 December 2017.

16. The Claimant attended lunch with Dr Pilato and Mr Pesenti on her first day at work. They discussed the work that the Claimant would be undertaking; including Project Janus and Project P. The Claimant was told that she would also be introduced the Respondent's housing association clients as she was to take over as the relationship manager for them all. That was the main reason for her recruitment.

17. By this time the Claimant was aware that she was pregnant. She underwent a scan in the evening of 4 December 2017. This showed that pregnancy was progressing well.

18. On 5 December 2017 the Claimant met with Dr Pilato. She produced handwritten notes of this and a number of other meetings. We accept that they were written shortly after the meetings. Subsequently, the Claimant produced typed notes. There are differences between the handwritten and typed notes. A number of positive comments made by Dr Pilato are omitted from the typed notes. We accept that the handwritten notes are largely accurate. We accept them as a valid record of the meetings, save where we specifically set out what we do not accept. We reach this conclusion because the Claimant produced the hand written notes shortly after the meetings and they included comments that are positive about the Respondent, as well as the negative comments. It was only later when the Claimant produced the typed versions that she focused only on the negative comments. The Respondent accepts most of the

notes. Save where stated we accepts the handwritten notes are accurate. We do not accept the allegation that the Claimant has falsified the notes.

19. The discussion on 5 December 2017 was accurately recorded by the Claimant:

> "Michelle informed Alex she was expecting a baby. She recognised that she had not wanted to start her first week in this way but wanted to share the news as soon as possible. She had her scan last night confirming all was well and so wanted to inform Alex straight away, She understood the timing was not great.
>
> Alex asked if she wanted to return after the baby. Michelle confirmed although it had only been 2 days she was enjoying the role already and could see its potential. She remained committed to her decision to join the firm.
>
> Alex asked how many children Michelle was planning to have, to which Michelle responded she had no view this stage, as this was her first pregnancy.
>
> Alex asked how long Michelle intended to take off. Michelle explain her husband benefits from 3 months shared parental leave on full pay and so she would probably take remaining 9 months allowance. Alex said that 9 months was a long time, could her husband not take more. Michelle explained that this was not the package her husband's company offered with full pay. Alex reiterated 9 months was a long time. Michelle explained she was sharing the maximum time she expected but she would not want to commit to anything less as she had no idea how she would feel until the baby arrived.
>
> Michelle said she was happy to work with the firm to help find potential cover and training but Alex said this was not suitable as it would take anyone else at least six months to get up to speed.
>
> Michelle said that one benefit of the situation, although small, was that she did not qualify for any maternity pay and so would not be a cost during her time off. Alex said this was not a factor. He said he would reflect and come back to Michelle."

20. We accept that, contrary to his evidence, Dr Pilato did ask the Claimant how many children she planned to have and suggested that nine months was the long time to have off; with the inference that her maternity leave, and potential future maternity leaves, would cause problems for the Respondent and were unwelcome. Contrary to social norms Dr Pilato did not congratulate the Claimant. He was focused on the consequences of the announcement for the business.

21. The Claimant met again with Dr Pilato on 7 December 2017. We accept that the Claimant's handwritten note was accurate save as noted bellow:

> "Alex began saying firm could already see Michelle was going to bring what they had hoped and was the right hire.

However disappointed in the way Michelle had managed informing them about her pregnancy, felt disrespectful[1] to have not told Alex earlier. Relationship needed to be built on trust to be effective. However, he recognised people made mistakes and that Michelle should not do it again.

Michelle responded that she in turn felt disappointed at what Alex was saying. She disagreed that she had done anything wrong, felt it was inappropriate for Alex to be telling her off in this way. She had sought to be as transparent as possible telling them as soon as she had the results from her scan (the next morning in fact), that it was absolutely standard not tell an employer before this and that she had until March to inform them by law, but that was not the way she wanted to work and so had tried to be as open as possible.

Alex reiterated it was about transparency. If Michelle had called him in advance to tell him perhaps and offered to resign, he would have felt this to be a better approach to which he would have said no and asked her to join the firm still. Or she could have delayed her start date until after she was able to tell them.

Michelle responded again that she had sought to be as transparent as possible, she knew they wanted her to start as soon as possible and wanted to start herself without any delay. She was not aware of her scan date until recently … telling them as soon as possible. That she was not a conniving person, had not intended to put either of them in this position and had sought to act as morally as possible.

Alex said this was clearly an emotive issue, but he felt he had to share how he was feeling to make the relationship work. Michelle agreed an honest relationship was best and hence why she was sharing her feelings with him now. She understood this had come as a shock and had expected some reaction, but she felt differently to Alex on the matter and they would perhaps just have to disagree on this.

Alex said Michelle could quote his words back at him, that he was not afraid of a tribunal, but he had to be transparent. He referred to Michelle's earlier mention of the law. Michelle explained that had purely been to illustrate the approach she could have taken but did not want to, i.e. wanted to tell them much earlier.

Alex said his main point had been to share his feelings but reiterated that he thought Michelle was a great hire to the firm and he wanted her to continue. He did need to know from her, albeit not today, but in a few months, a decision as to whether she would be returning after her maternity leave. Michelle understood he would want to plan as much as possible.

[1] – We hold that the word disrespectful was used. The word conniving was added to the note at a later stage. We consider that this was the Claimant's interpretation of what was said, rather than the word that was actually used.

Michelle and Alex shook hands.

Alex said this ended the matter from his perspective and wanted Michelle to speak up if she had more to discuss, which she said she did not."

22. In this meeting Dr Pilato told the Claimant off about the way in which she had announced her pregnancy. He suggested that she should have informed the Respondent before starting. We conclude that his thinking was that would have given the Respondent the opportunity to decide whether to take her on or not. He suggested he would nonetheless have taken her on. Dr Pilato considered that the Claimant was in the wrong by not telling the Respondent that she was pregnant before she started. The Claimant was told that this should not happen again. We accept that Dr Pilato was, for then, prepared to draw a line under his views about the Claimant's failure to inform the Respondent about her pregnancy earlier. However, a decision was taken that the Claimant should only work on at Project Janus and Project P rather than being introduced to all of the Respondent's housing association clients as it was felt that there had been a lack of continuity in the staff responsible for relations with the majority of them. Dr Pilato felt that the Claimant's maternity leave would cause a further lack of continuity if she started working with them. Accordingly, she would work on short to medium-term project work prior to her pregnancy. This had the consequence that the Respondent had not, for the time being, obtained the relationship manager for all of their housing association clients that they wanted.

23. On 11 December 2017 the Claimant met with Mr Pesenti to discuss the division of work on Project Janus. She said that she was not confident about putting together a business plan. Project Janus involved the proposed merger of two housing associations. As an initial step the financial assumptions on matters such as CPI and RPI inflation rates in the business plans of the two organisations were to be compared together with the Respondent's recommendation as to the best methodology to apply. It was agreed that James Clegg, a senior associate and qualified accountant, recently employed by the Respondent, would do the underlying financial work, putting together a spreadsheet with the various parameters. It was Mr Pesenti's intention that the Claimant should then put together a brief report to be sent to the clients.

24. On 7 December 2017 the Claimant attended a meeting with one of the Project Janus clients. During the meeting Claimant gave a detailed description of a situation when she was at RBS. Dr Pilato did not feel that the example really dealt with the question that was being asked. In particular, he thought the Claimant failed to take into account the particular approach that banks take when dealing with housing associations, because of their social purpose. We accept that Dr Pilato was concerned about the Claimant's intervention during that meeting, although he did not say so at the time.

25. On 12 December 2018 the Claimant sent a presentation that she was proposing to send to the client on project P to Mr Pesenti. He responded, pointing out that there were problems with a number of slides, including that on slide 14 figures in a table did not make sense. The Claimant included in the slide under the heading gearing the figures for interest cover and gave the figure oasf 140% when it should have been 190%. Mr Pesenti was very

concerned that this showed that the Claimant did not have the attention to detail that the Respondent requires of its senior staff.

26. On 13 December 2017, at 16.25, Mr Clegg sent the Claimant an Excel spreadsheet with assumptions from the business plans of the two Project Janus clients, together with the recommended methodology of the Respondent. The spreadsheet had numerous serious errors. The Claimant either did not look at it at all, or only glanced at it, before sending it to the client at 17.58. In so doing, the Claimant entered the spreadsheet into another Excel book and accidently included two further pages including confidential financial information about another of the Respondent's clients. In the spreadsheet there was a hidden column which included commentary from some other spreadsheet and made no sense. There were various comparisons that were incorrectly titled and for which the figures were incorrect. The document was a spreadsheet not a professional-looking report such as the Respondent produces for clients. It was an extremely poor piece of work that was well below the expectations of the Respondent, both in terms of its presentation at and the fact that the document included significant errors that should have been obvious to a person a the Claimant's level.

27. On 14 December 2017, after a discussion. Mr Pesenti, Dr Palacio sent an email to the Claimant stating:

> "Antoine has been to see me about the work you have done on Project Janus. He is extremely concerned at the very low quality of the work you have produced and the fact that it was sent directly to the client without checking with Antoine or John first. This is a very embarrassing situation for us.
>
> As such you should not have any further external communications with any third parties until further notice. I want a chance to analyse the Project Janus work myself and I hope to do this in the next few days. In the meantime Antoine will find other work for you to do.
>
> Please acknowledge that you understand that there should be no third party communication until I let you know further."

28. The Claimant responded "acknowledged".

29. The Claimant produced a draft email that was not eventually sent in which she contended that Mr Clegg was responsible for the failings, without accepting her responsibility to check the work.

30. On 15 December 2018 Mr Pesenti sent the finalised report which was set out in a clear and professional manner. The comparison between this report and the spreadsheet that the Claimant sent is marked. The spreadsheet was of an extremely poor quality. What is more, the Claimant was intending to speak to the clients the next day which would have brought to the fore the fact that there were a series of errors in the spreadsheet and would have been embarrassing and damaging to the Respondent's business. The inclusion of confidential information from another client was an extremely serious mistake for which the Claimant alone was responsible.

31. The Respondent states that about this time they took legal advice. The Respondent was concerned that they might face a claim if they took action against the Claimant. They created a paper trail designed to be presented in any claim brought by the Claimant. Dr Pilato accepted it was designed to make it look like he was considering whether the Claimant's performance failings could be remedied when he had already made up his mind to dismiss her.

32. On 16 December at Mr Pesenti sent an email stating that he felt that the Claimant was not fit to work at the Respondent as she could not work on business planning and could not run projects. He went into a considerable amount of detail. Mr Pilato responded on 17 December 2017 stating:

> "Why can she not be trained? I can see that this would be very difficult if she does not have a feel for numbers or if she does not dare to touch a business plan, but quality standards and confidentiality are things that she could be taught.
>
> Also, she is good at marketing, so why could we not focus her on this?"

33. Dr Pilato told us that he did not genuinely believe that there was a possibility of the Claimant being retained, but that this email exchange was designed to make it appear as if there had been a debate. Mr Pesenti responded stating that he believed that the Claimant could not learn the standards and eventually Dr Pilato sent an email stating that he and Mr Slater agreed.

34. On 18 December 2017, the Claimant was called into a meeting by Dr Pilato. He stated he had serious concerns about the Claimant's ability, particularly technical skill. There was a discussion about the above examples. At the end of the meeting it is recorded:

> "In summary Alex felt that the recruitment situation was not going to work due to the low quality of Michelle's technical abilities. He asked her to reflect on the discussion and come back to him in writing or in person. He was available to meet pre-11am the next morning. In the meantime he wanted her to go home to reflect and prepare a response."

35. We conclude that Dr Pilato was hoping that the Claimant would at resign next morning.

36. The Claimant attended a meeting the next morning. There was a discussion about the quality of her work. Dr Pilato again set out his concerns about the quality of her analysis and the fact that she had sent confidential information from another client to the Project Janus clients. The Claimant suggested training, although in cross-examination, she accepted that the errors made in sending the spreadsheet to the Project Janus clients was not something about which she required training.

37. On 19 December 2017 the Claimant was sent a letter in which she was dismissed:

"**TERMINATION OF EMPLOYMENT**

As we discussed this morning, the company has serious concerns about your ability to perform the job we hired you to do given the significant performance issues which have arisen in the last week. We have carefully considered whether it is reasonable to expect us to train someone at your level in order to overcome these serious issues, given that they relate to relatively basic skills. We have also considered whether it would in fact make the necessary difference should we try to do so.

We have reached the conclusion that your skill set is such that training is not an option. We have also concluded that giving you further time to perform is unlikely to make any difference to the views we hold as to your abilities.

I am hereby confirming that your employment will terminate with immediate effect as at today's date, and we will make payment in lieu of notice on or before 12 January 2018.

I reach this decision with some sadness and wish you well for the future."

The Law

38. Sex is a protected characteristic for the purposes of the Equality Act 2010 ("EqA").

39. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

40. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

41. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

42. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances

in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

43. Since exact comparators within the meaning of section 23 EQA are rare, it is may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

44. Section 18 EqA provides EqA:

> *18 Pregnancy and maternity discrimination: work cases*
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (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
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
>
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
>
> (*a*) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
>
> (*b*) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
>
> (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
>
> (*a*) it is in the protected period in relation to her and is for a reason mentioned in paragraph (*a*) or (*b*) of subsection (2), or

(*b*) it is for a reason mentioned in subsection (3) or (4).

45. The liability inquiry for s18 cases "unfavourable treatment because of" involves the same liability inquiry as for direct discrimination i.e. what is the ground on which the act was taken: see **Indigo Design Build and Management Ltd v Martinez** UKEAT 0020/14.

46. Section 39 EQA makes it unlawful to discriminate against an employee as set out in section 13 or 18 EQA by subjecting the employee to detriment or dismissal.

47. In **St Helens BC v Derbyshire** [2007] ICR 841 Lord Neuberger summarised the authorities on the meaning of the term detriment at paragraph 67:

> "67 In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah [1980] ICR 13*, 31a that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". That observation was cited with apparent approval by Lord Hoffmann in *Khan [2001] ICR 1065*, para 53. More recently it has been cited with approval in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment' ". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice."

48. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision is now made by Section 136 EQA:

> 136 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.
>
> But subsection (2) does not apply if A shows that A did not contravene the provision.

49. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must established on the totality of

the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever beca.

50. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576:

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

51. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on section 136 EqA: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment. If the burden of proof has shifted it is for the Respondent to establish that the treatment was not in any sense whatsoever because of the protected characteristic.

52. In **Cooperative Centrale Raiffeisen Boerenleenbank Ba v MR A R Docker** UKEAT/0088/10/CEA His Honour Judge Peter Clarke emphasised that the introduction of the burden of proof provision was designed to make it easier for Claimants to succeed:

> "18. To state the obvious, s54A (and its equivalents) changed our domestic law of unlawful discrimination. It was designed to and did have the effect of making it easier for claimants to succeed in such cases. The historical context is important. It is referred to in the judgment of Peter Gibson LJ, paras 6-7, in **Igen v Wong** [2005] ICR 931. In short, s54A represents a return to the position taken by Browne-Wilkinson P in **Khanna** [1981] ICR 653 and **Chattopadhyay** [1982] ICR 132, from which his Lordship resiled in **Zafar** [1998] ICR 120, in the light of the approach of Neill LJ in **King v Great Britain China Centre** [1992] ICR 516, 528-9, namely that where a claimant establishes a prima facie case of discrimination and the respondent

> fails to establish an explanation for the treatment complained of which has nothing whatsoever to do with his race, then the tribunal must, not may uphold the complaint.
> …
> 23. That said, we should emphasise that the permissible approach to be taken by an Employment Tribunal to the direct discrimination question is as stated by Lord Nicholls in **Shamoon**, para 12, as Mummery LJ reminds us in **Madarassy** (para 83):
>
> > **"The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."**

53. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer… discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.

54. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.

55. If the principal reason for the dismissal of the Claimant relates to pregnancy the dismissal is automatically unfair: section 99 Employment Rights Act 1996 ("ERA") and regulation 20 Maternity and Parental Leave Regulations 1999.

56. Subjecting a woman to a detriment for the reason of her pregnancy is unlawful pursuant to section 47C ERA and regulation 19 Maternity and Parental Leave Regulations 1999.

Analysis

57. We consider that, taken as whole, the Claimant's treatment during the meetings with Dr Pilato on 5 and 7 December 2017 involved detrimental treatment related to the Claimant's pregnancy so as to constitute pregnancy discrimination for the purposes of section 19 Equality Act 2010 and section 47C Employment Rights Act 1996. While we do not consider there was anything wrong in the Claimant being asked whether she intended to return to work after having her baby and, if so, when, the Claimant was asked how many children she intended having and Dr Pilato suggested that nine months maternity leave was a long period of time. He was suggesting that the Claimant's pregnancy and maternity leave(s) were unwelcome and would be damaging to the business. More importantly, at the meeting on 7 December 2017 the Claimant was told off for not having informed the Respondent of her pregnancy before she commenced employment. The clear inference was that she should have done so and/or offered to resign prior to commencing work with the Respondent or delayed her commencement of work with the Respondent until she had her first scan. Dr Pilato was suggesting that the Claimant should have given him the opportunity to decide whether she would be taken on after she had announced her pregnancy. We consider that a reasonable employee would consider that an obvious detriment. The Claimant had informed Dr Pilato of her pregnancy far before she was required to do so. She was seeking to be straightforward about the matter, but instead was told

off by Dr Pilato in a manner that we consider was clearly detrimental and related to her pregnancy.

58. In respect of the dismissal, we accept that the Respondent genuinely formed the view that the quality of the work that the Claimant had produced, particularly on Project Janus, was way below that they would expect of someone of her level of seniority. The Respondent had a history of dismissing people shortly after they had been employed if the quality of their work was not up to their high standards. We accept that the principle reason for the Claimant's dismissal was the quality of work that she produced on Project Janus, which was of a remarkably low standard and involved the disclosure of confidential information from another of the Respondent's clients. Accordingly, the claim under section 99 ERA and regulation 20 Maternity and Parental Leave Regulations 1999 is not made out.

59. However, we note that there are often a number of reasons for a decision to dismiss. To establish discrimination the protected characteristic must only be a significant factor in the decision to dismiss. We consider one can contrast two types of situation: there may be a situation in which there is a principle reason for a decision and a subsidiary issue which did form part of the decision-making process but is seen to be fortunate by-product of the decision. In such circumstances the subsidiary issues had no effect on the decision making process. Alternatively, there may be a situation where is a principle reason and one or more subsidiary reasons for the dismissal; all of which were taken into account in the decision making process. The fact that absent the subsidiary reason the dismissal would have taken pace in any event would not prevent the subsidiary reason having been a material part of the decision making process; although that analysis will have significant consequences for remedy.

60. The Respondent accepted that there was evidence from which the tribunal could conclude that the dismissal of the Claimant involved pregnancy discrimination. It would be hard to argue otherwise. The detrimental treatment in the meetings in the meetings on 5 and 7 December 2017 showed unhappiness on the part of Dr Pilato that the Claimant was pregnant and annoyance at the fact that the Claimant did not inform the Respondent of her pregnancy before commencing work. Thereafter, the Respondent assigned the Claimant to relatively short-term project work rather than introducing her to their housing association clients as a relationship manager as they had planned. While we accept that Dr Pilato was initially prepared to put the fact that he thought the Claimant should have told the Respondent of her pregnancy before joining the Respondent, behind him, the issue remained that the Claimant was not going to be used as a relationship manager in the short to medium term in the way that the Respondent wanted. We also note that the underlying spreadsheet was produced by Mr Clegg against whom the Respondent took no action, not even discussing the matter with him until these proceedings have been commenced. While we do not consider him to be a comparator, in that he was a considerably more junior employee, he was a qualified accountant. It seems hard to understand why the matter was not even raised with him. In addition, the Respondent created a chain of email exchanges to make it appear that they were considering the pros and cons of training the Claimant when they had already decided that she should be dismissed.

61. Overall, we do not consider that the Respondent has established to our satisfaction that the Claimant's pregnancy was not a factor, in the sense of being a significant factor, in the decision to dismiss her, even though we accept that it was not the principle reason. We consider the claim of discrimination under section 19 Equality Act is made out.

62. We do, however. consider that had pregnancy not been a factor in the decision to dismiss the Claimant the Respondent would still have made the same decision at the same time. The quality of the work she had done on Project Janus was so low that they would inevitably have dismissed the Claimant in any event.

63. We have considered carefully whether in such circumstances pregnancy can be a significant factor in the decision to dismiss. We consider as pregnancy does not need to be the main reason for the decision to dismiss there is nothing illogical in finding that it was a factor, even if the same decision would have been taken even if it had not been taken into account. The burden of proof having shifted, the Respondent had to establish that pregnancy was not to any extent a significant factor in the decision to dismiss. They failed to do so.

Employment Judge Tayler

23 January 2019

Sent to the parties
25 January 2019