mf

EMPLOYMENT TRIBUNALS

Claimant: **Miss G Dowokpor**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre**

On: **7-9 & 13 November 2018**

Before: **Employment Judge Ross**
Members: **Mr T Burrows**
Mrs B K Saund

Representation

Claimant: Ms S Robertson (Counsel)

Respondent: Mr S Keen (Counsel)

JUDGMENT ON LIABILITY

The unanimous judgment of the Employment Tribunal is that the complaint of pregnancy discrimination contrary to section 18 Equality Act 2010, by termination of her engagement as a worker, is upheld.

REASONS

1 The Claimant was engaged by the Respondent as a Sponsorship Officer through an agency. The engagement commenced on 27 March 2017 and terminated on 30 November 2017.

2 After a period of Early Conciliation, a Claim was presented on 20 April18.

Complaints and issues

3 The complaints and issues, and certain relevant factual matters, were identified by Employment Judge Jones at the Preliminary Hearing on 30 July 2018.

4 Before us, the Claimant confirmed that the breach of contract complaint was withdrawn, and it was dismissed.

5 The single complaint remaining was that the Claimant had been subjected to pregnancy discrimination contrary to section 18 of the Equality Act 2010.

6 The issues are set out in the Preliminary Hearing Minutes. It was not the Claimant's case that ERG was her agency. She was engaged through ERG as an agency worker via her company.

Relevant Law

7 Section 18(2) Equality Act 2010 provides that a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy, A treats her unfavourably because of the pregnancy.

Fact Finding

8 Ms. Robertson directed the Tribunal to the well-known authority of *Anya v University of Oxford* [2001] IRLR 377. We considered the passages cited at paras 23 – 25.

9 We were directed to the summary of the principles in *Talbot v Costain Oil, Gas & Process Ltd* [2017] ICR Digest D11. It was accepted by Mr. Keene that these were the correct principles, and he pointed to the need to consider the totality of the evidence.

10 We reminded ourselves that the Tribunal had to have regard to the totality of the relevant circumstances, and give proper consideration to factors which pointed to discrimination in deciding what inference to draw in relation to the unfavourable treatment in this case. It was also necessary for us to consider the inherent probabilities of what a witness was saying and how it fitted with "objective facts".

Burden of proof in discrimination cases

11 We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

12 Section 136 concerns the burden of proof in discrimination cases, and provides where relevant:

"136 Burden of proof

(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."

13 In *Igen & Others v Wong* [2005] EWCA Civ. 142, at para 76, the Court of Appeal gave guidance as to the proper approach to the burden of proof in direct discrimination cases after section 63A Sex Discrimination Act created a reversal of the burden of proof. These guidelines include that:

- To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of pregnancy, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

- Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.

14 The guidance in *Igen v Wong* was approved and explained in *Madarassy v Nomura* [2007] ICR 867:

14.1. The burden of proof does not pass to the employer simply because the claimant establishes a difference in status and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination: paragraph 56.

14.2. "Could ... conclude" in section 136(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it: paragraph 57.

14.3. Section 136(2) does not expressly or impliedly prevent the tribunal at the first stage (i.e. when considering whether the tribunal "could conclude"), from hearing, accepting or drawing inferences from evidence adduced by the employer disputing and rebutting the claimant's evidence of discrimination. For example, the Tribunal would need to consider whether the acts complained of occurred at all; or, if they did, whether they were less favourable treatment; or even that if there was less favourable treatment it was not on the grounds of a protected characteristic: paras 71 - 72.

15 We considered *Veolia Environmental Services UK v Gumbs [2014] EqLR 364*. We directed ourselves to and accepted the guidance at paragraphs 56-57 of this judgment:

> "56 Mr Ditchburn submitted that not very much may need to be added to a difference in status and a difference in treatment in order to shift the burden of proof. We think that is the right approach. The "industrial jury" analogy might appear to be a little threadbare in modern times but we think Employment Tribunals should be wary of treating the burden of proof provisions (and the judicial decisions explaining them) as such a rigid template that the forensic approach of an Employment Tribunal to evidence becomes different to that of other fact finding first instance tribunals. Mr Clarke submits that the Employment Tribunal, having directed itself that it was to take no account of any explanations then fell into error by taking them into account.
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> 57 But the fact of inconsistent accounts as to why something has happened have for many years, if not centuries, been regarded as a basis from which inferences can be drawn by tribunals of first instance. The statutory provisions as to the reversal of the burden of proof and the jurisprudence, which has grown up around them, exclude actual consideration of the substance of the explanation but if the fact that there have been a number of inconsistent explanations or reasons put forward is to be excluded from consideration as to whether the burden of providing a non-discriminatory explanation should pass to the Employer (and the Claimant's case, therefore, fail at that stage) then the Employment Tribunal has been put into a strange position in contrast to other courts and tribunals that have to make factual findings. We can see no basis for excluding from consideration the fact that there have been a number of differing and inconsistent reasons advanced for particular behaviour. Therefore, in this appeal we do not accept that the Employment Tribunal erred by taking into account that there had been differing and inconsistent explanations advanced by the Employer when deciding that the burden of proof had been reversed. It is the fact of the inconsistency that is being included not the explanations themselves.

The Evidence

16 There was an agreed bundle of documents (p.1-273).

17 The Respondent also produced a spreadsheet, "R1", after the evidence of the Claimant had commenced. To avoid unfairness, at the end of cross-examination, the Claimant was released from her oath so that Counsel could take instructions on this. Some further examination-in-chief and then cross-examination followed, although the Claimant had never seen the document before and although it was later confirmed by Ms. Lee that this was prepared at the end of the financial year 2017 to 2018. We heard no explanation as to why this document was not disclosed in accordance with the Case Management Order, but as no objection was taken, it was allowed into evidence.

18 The Claimant had closed her case at the end of 7 November 2018. Mr Andrews gave evidence on the morning of 8 November 2018. After his evidence had concluded, after lunch, the Respondent applied to re-call Mr Andrews to give evidence and adduce the diaries of Mr Andrews and Ms Lee from material dates. (Mr Andrews' was hard copy diary; Ms Lee's an electronic diary). No mention of their existence or relevance had been made prior to this. We refused the application for reasons given at the time; and written reasons were requested.

19 In the event, any potential unfairness to the Respondent from our case management decision evaporated during the evidence of Ms Lee. By way of examination-in-chief, Ms Lee explained the following:

19.1 Mr Andrews had been on holiday from 18 September 2017;

19.2 Ms Lee had met Rohan Robinson on 14 September 2017;

19.3 Ms Lee and Mr Andrews had had one-to-one meetings on 4 and 5 October 2017. Her evidence was that the decision to terminate the Claimant's engagement had been made at one of those meetings.

20 We give our findings of fact on this evidence below.

21 We were informed in the application that the diary entries only showed dates and times of meetings. From the submissions of Counsel during the application, it was accepted by the Respondent that these diaries did not contain any minutes or other relevant evidence.

22 Indeed, it was a striking feature of the evidence in this case that there were no minutes at all to show how or when the decision to terminate was made. This was particularly striking because in cross-examination, Ms Lee, whom we found to be the decision-maker in this case, stated: "*I can't think without a pen in my hand*", as she was looking to make a note before answering a question. The absence of such minutes or a recorded decision was striking also because this Respondent is a local authority and, from experience, apart from any general requirement to evidence decisions reached in a reasonable way, the Employment Tribunal would expect such a witness to have recorded the rationale for the decision in minutes or in writing.

23 We read witness statements and heard oral evidence from the following witnesses:

23.1 The Claimant;

23.2 Paul Andrews, Head of Commercial Operations and Sponsorship at the material times (2 statements);

23.3 Lorna Lee, Head of Culture and Heritage Services at the material times.

24 We found the Claimant to be an honest and reliable witness. Her evidence was corroborated by the relevant documentary evidence. We accepted her evidence of fact where she was able to give direct evidence of events. The Claimant was candid in her evidence which added to weight it carried. For example, she stated that it was very unrealistic to enter a sponsorship role where one would never have to worry about targets; and she accepted that she was made aware at or about the commencement of her role that the sponsorship target was £180,000 over the financial year.

25 We found Mr. Andrews to be an unreliable witness in key areas. Further, he answered certain questions by saying that something "would" have happened; but when asked if he could recall it happening, he could not. Some of his evidence suggested a degree of evasion: for example, his witness statement referred to p.245A (an email from a HR officer sent in August 2018) rather than the contemporaneous documents (167A-B); the contemporaneous documents pointed to an inconsistency in the Respondent's case in terms of delay.

26 We found Ms. Lee to be more experienced than Mr. Andrews and the senior manager. However, we did not find her evidence to be reliable in key respects.

Findings of Fact

27 The parties had agreed a helpful chronology, subject to two minor points (concerning the entry for April 2017 and the entry at October 2016).

28 The Tribunal took into account all evidence heard and all documentary evidence considered. From the totality of the evidence, Employment Tribunal made the following findings of fact.

29 The Post of Sponsorship Officer was created at some point in 2016, but only filled from October 2016. It was previously filled by a male worker who did not bring in any new sponsorship over the course of approximately 6 months in the role. His engagement was not terminated for this reason. He left voluntarily to take another role.

30 Following this departure, the Respondent was seeking to recruit a new Sponsorship Officer in February 2017. An advert was placed on Matrix, an online Portal. At the time, according to the message to Matrix from Mr. Andrews, it was intended to be a one year contract: see the message of 22 February 2017 p.44.

31 On 27 March 2018, the Claimant's engagement by the Respondent as Sponsorship Officer commenced. This engagement was via her company initially on a 3 month contract, which provided that it was terminable on one week notice: see clause 2.4, p.50. This contract was extended on the following dates:

31.1 14 June 2017 (p.115a-c) for the period from 20 June to 28 July 2017;

31.2 25 July 2017 (p.115h) for the period 29 July to 29 September 2017;

31.3 29 September 2017 (p.147a) for period to 31 October 2017;

31.4 The last extension: 27 October 2017 to 30 November 2017 (p.169a).

32 Shortly after starting work, the Claimant received an email, which is at p.60, from Corinne Hurn, Events Manager. This included:

> "*Just wanted to check in and see how your first week is going? I hope it's not too daunting? I think we just need to be realistic and take things bit by bit, don't worry too much about the targets for now – we have never made any money so anything is a bonus!*"

33 This corroborated the Claimant's evidence that the previous role holder had not made any sponsorship money.

34 The Claimant started work at the end of March 2017, just before the summer programme of events commenced. The events programme ran from May to November.

35 The Respondent's managers accepted that the Claimant had little time to generate relationships and sponsorship. They told the Claimant not to worry about targets because the summer programme was due to start; and it would be a big ask to bring in sponsorship in that time.

36 The Claimant knew at or about the time she started work that the sponsorship target was £180,000 in the year.

37 It was never mentioned to the Claimant that her progress to this target was to be assessed without the "Love Your Borough" ("LYB") sponsorship money being considered, much of which would be repeat sponsorship from contractors. We find as a fact, preferring the Claimant's evidence having evaluated all the evidence, that it was not part of her contract or her job description that the LYB sponsorship money was to be excluded when considering her target. This is evidenced by a range of documents such as the email at p.112 from the Claimant (referring to a sponsorship target as £180K and sponsorship achieved as £75,747), which, in his reply, Mr. Andrews does not object to as inaccurate; and the email from Mr. Andrews at p.142 (referring to a sponsorship target as £180K and sponsorship achieved as £75,747).

38 It was inconsistent for the Respondent's witnesses to argue that the Claimant's target was £180,000 and yet argue that the LYB income did not count as sponsorship money. This part of the sponsorship money can be described as the more "low-hanging fruit".

39 The Claimant was not challenged on the following evidence, which we found accurate:

39.1 Paragraphs 5-13 of her statement (setting out her experience and work).

39.2 When the Claimant joined the Respondent, key assets, such as social media platforms and online advertising, which are needed to entice brands to provide sponsorship did not exist at the Respondent; if the Respondent had few "followers" there was nothing to sell to the brands and the Respondent had nowhere to advertise the brands.

40 During the initial term, the Claimant was informed that she was performing well. Indeed, a feature of the case is that there was no complaint at any time about her performance. She was not told that her role was at risk at any time.

41 In cross-examination, it was put to the Claimant that although she had raised some sponsorship money herself, by 21 August 2017, she had no active leads. The Claimant admitted this, but explained that:

> *"Sponsorship [is] about relationship building, with people they trust.*
> *So [they] need to trust before spend.*
> *Need to know you before get [sponsorship].*
> *Need to get through for cold call."*

42 We accepted that evidence. We did not agree that the Claimant's "added value" was only £15,803 as at 21 August 2017 for at least three reasons:

42.1 The Claimant had done work which could not be valued in a purely financial way, such as by creating a generic "deck" for the Respondent to pitch with and by creating tailored "decks" for pitching, amongst other parts of her work.

42.2 The Claimant worked with Ms. Hurn on LYB sponsorship so as to secure it. There was no evidence that it was inevitable that the previous sponsors would sponsor again in 2018. We found that LYB income money was sponsorship income.

42.3 The Claimant gained sponsorship in kind from Taylor's Coffee, who donated 50,000 bags of coffee ahead of 2 exhibitions. These were branded with a William Morris theme, and they were given away at VIP events at the exhibitions, then sold in the gallery shop. The Respondent admitted that the coffee had some retail value, because over £700 had been raised in sales, but that there was so much coffee that it could not be sold due to the "best before" date. The Claimant argued that the retail value was greater contending it was the retail price multiplied by the number of units. We found that the value of this sponsorship was more valuable than the dismissive way in which it was treated by the Respondent in evidence, albeit not worth the £150,000 plus contended for by the Claimant.

43 Almost in an aside, Ms. Lee stated that £55,000 had been raised in LYB income by March 2017. This figure was not in any witness statement, nor in any document, nor was it put to the Claimant. We found that it was not reliable evidence, although we do accept some money may have been gathered already by the time she started work.

Was there funding for the Sponsorship Officer role for the 12 month period?

44 The Respondent's case before us was that the role was unfunded. We found that the Respondent's evidence was inconsistent between its two witnesses.

45 Mr. Andrews in cross-examination gave evidence that it would be extended at the end of year if it had self-funded; he accepted that the Claimant was told her job was safe until end of March 2018, subject to performance review.

46 Ms. Lee gave evidence that the role had to be self-funding in the twelve month period to the end of March 2018. We found that this evidence was not reliable because it was inconsistent with the plain meaning of her email at p.84, sent on 5 May 2017.

47 Taking into account this inconsistency, when weighed alongside the other evidence, we found that, although funding for the post was not part of the core salary budget (demonstrated by R1), the Respondent did have some method of funding it, or else the Claimant could not have been engaged at all. It would not be possible for either the Claimant or the Employment Tribunal to specify precisely what this source of funding was. R1 was only one part of the financial picture; it did not show the income picture, nor did it show other budgets such as the Leader's budget, which was referred to in evidence by Ms Lee.

48 Moreover, events in early May 2017, demonstrated there must have been some budget or income to fund the post until the end of March 2018.

49 In April 2017, the Claimant was offered another role with the Hip Hop Shakespeare Company, for a two year fixed term contract.

50 The Claimant was told by Mr. Andrews that the Respondent wanted her to stay.

51 The Claimant told Mr. Andrews she wanted job security and needed to know the job was secure for a year at least.

52 We have considered the emails at p.84 sent on 5 May 2017 between Mr. Andrews and Ms. Lee. These read 4 May 2017 11:19 from Mr. Andrews:

> "*Please can you confirm we have the budget to keep the Sponsorship Officer Post until the end of the financial year, 30th March 2018?*"

The response from Ms. Lee dated 5 May 2017 14:55 is as follows:

> *"I can confirm that we will retain the Sponsorship Officer post until end March 2018. The aim is for the post to self-fund, and if this approach is successful we will be able to retain for a further extended period*."

53 In oral evidence, there was no real disagreement that what the email from Ms. Lee represented was that there was a longer term "aim" for the post to self-fund not that it had to do so in the 2017-18 financial year.

54 The use of the smiley emoji – in the email at 15:47 on 5 May 2017 – confirms the understanding of Mr. Andrews that some form of funding was available to the end of March 2018.

55 The other evidence supports our finding that this was in fact the position. The Department would have had to have had expenditure approved for the post before going to Matrix, especially as a job description had been created (see the evidence of Mr. Andrews in cross-examination).

56 Also, on 10 May 2017 by email Mr. Andrews confirms to the Claimant that she is to stay in post to end 30 March 2018 (p.87).

57 At p.88, by email, Mr. Andrews makes clear the extension to the end of the year is subject to performance reviews. In fact, there were no performance reviews.

58 Mr Andrews also explained to the Claimant in May that he could only extend the Claimant's contract by one month at a time due to restrictions of the Matrix system.

59 There was no criticism of the Claimant's performance at any time. On 6 July 2017, objectives were set for the Claimant, agreed between her and Mr. Andrews. There was no performance management around these objectives.

60 By 21 August 2017, there were no new "bites" or leads for the Claimant. Having considered the table at p.142, showing the position in respect of income from sponsorship, and given our findings of fact above, we found that the sponsorship income did exceed the sponsorship target at that point in time (taking a pro rata approach and given the month reached); but we also find that current income in areas other than LYB (Get Together, Lorrie Cunningham Galleries) was lower than the target figures, on a pro rata basis taking into account the month in the year reached.

61 On 29 August 2017, by email to Mr. Andrews, Ms. Lee explained that she would review progress with sponsorship, that the post was not funded, and that "*we need to be making at least the costs to make it break even (a big ask I know)*". This email recognises that it would be difficult for the Claimant to raise sufficient money from entirely new sponsors to cover the cost of the agency fees. But neither this email, nor any other, suggested that the Claimant's role was not required nor that it would be likely to be terminated before end March 2018.

62 On 8 September 2017, Ms. Lee emailed Rohan Robinson, Group Accountant. This email (p.146) asked if there was salary in the "core budget" for a Sponsorship Officer, asks for current costs and asks what the level of overspend would be on salary if the post continued to the end of the financial year.

63 The response is that the post is not funded, and it is projected to cost £65.5K to the end of March 2018. He explained that he will have the rest of the answer the following week. There is no document from the following week to answer this query.

Termination of agency worker assignment

64 At a meeting on 9 October 2017 the Claimant informed Ms. Lee that she was pregnant. We accepted the Claimant's evidence at paragraph 44 of her witness statement which was not challenged.

65 The emails at p.148 record what was discussed at the meeting, including congratulations from Ms. Lee. It is apparent from the email of Ms. Lee that the Claimant had two priority projects. One of these – Walthamstow Wetlands Project – was a new assignment for the Claimant, albeit Ms. Lee considered that it could be completed within one week.

66 It was also agreed at this meeting that the Claimant would work from home to ensure sufficient rest to promote the safety of the Claimant and her baby.

67 Mr. Andrews was informed of the Claimant's pregnancy on 10 October 2017. Prior to the meeting on 9 October 2017, the Claimant had had a day or so of sickness which Mr. Andrews was aware of this.

68 The Claimant became concerned about rumours that the Respondent was not happy about her being pregnant. There is some documentary evidence to corroborate the existence of rumours in the form of the four question marks in the message from another staff member on 13 October 2017 at p.150.

69 Mr. Andrews sought advice from Human Resources on 26 October 2017 about the termination of the Claimant's assignment, evidenced by the emails at p.167A-B. The Human Resources adviser, Ms. Murray, records her recollection of what she was asked in an email of 7 August 2018 (p.245A).

70 On 1st November, Mr. Andrews invited the Claimant to a catch-up meeting on 3 November 2017: see email p.181. The Claimant called Mr. Andrews and asked him if everything was fine. He replied that it was. The Claimant put to him the rumours that she had heard, that he and Ms. Lee were not happy that she was pregnant. He denied it as being "rubbish", and stated that the meeting was just a "catch up".

71 On 3 November 2017, the Claimant met with Mr. Andrews. Initially, he was waiting for Ms. Lee, but then decided to start the meeting. He informed the Claimant that due to budget cuts the role would be frozen and her contract would terminate. He said that the Claimant had worked really hard and was amazing. The Claimant was asked to stay to end of November to tie up certain things. The Respondent could have had the agency contract terminated on one week's notice.

72 The Claimant had a further meeting with Mr. Andrews on 14 November 2017. Notes of this meeting are at p.213 and following pages. Matters discussed at this meeting included the letter of termination that the Claimant had received (p.204), which upset her because she did not know what it was saying, because it suggested that her performance may be in issue.

73 From her evidence, the Claimant was upset because of how the termination was handled, with her invited in for catch up, then being misled over the phone on 1 November 2017 as to the purpose of meeting on 3 November 2017, and upset further by the letter prepared for the DWP.

When did the Respondent make the decision to terminate the agency assignment?

74 A key factual dispute in this case is when the Respondent made the decision to terminate the agency agreement.

75 We have carefully considered the Respondent's evidence about events leading up to the Claimant's termination. We found that they did not discover that the Claimant was pregnant until the Claimant informed them on 9 October 2017. The Claimant had not mentioned it to her managers before, only to other colleagues.

76 In the context of this case, where the chronology is important (which is apparent from the Preliminary Hearing summary), it is striking that there is no date given in either of the Respondent's witness statements nor in the ET3 as to when the decision to dismiss was made. Moreover, it is striking that there are no minutes or documentary records of this decision or the process by which it was reached. Given that Respondent is a local authority, and as such is required to act reasonably and may be required to give reasons for its decisions, we found this so unusual as to require a cogent explanation.

77 Moreover, the ET 3, para 10, was inconsistent with the evidence as a whole. There was never any "*expression of concern*" to the Claimant. Both Ms. Lee and Mr. Andrews had provided information for the ET3 to be compiled. Again, this required explanation.

78 Mr. Andrews and Ms. Lee gave inconsistent accounts of events surrounding the decision to terminate the Claimant's engagement.

79 The inference from paragraph 3 of the supplemental witness statement of Mr. Andrews is that the decision to end the role was made in mid-September. This paragraph stated:

> "*Following clarification of budget from finance in Sept, Lorna and I had agreed that the …role was untenable due to lack of income generated. We were planning to implement decision shortly afterwards*"

80 In cross-examination, Mr. Andrews stated the decision to suspend the assignment was made in mid-September, in the week after the email of 8 September 2017 from Mr. Robinson p.146. His evidence was that he attended a budget meeting with Mr. Robinson; he alleged that the decision was made between himself and Ms. Lee at that meeting. There were no documents from or minutes of that meeting nor any evidence from Mr. Robinson.

81 Ms. Lee said that she attended the budget meeting with Mr. Robinson alone, because Mr. Andrews was on holiday.

82 We accepted her evidence that Mr. Andrews went on holiday from 18 September 2017. We found that the meeting with Rohan Robinson took place on 14 September 2017, and that she attended it alone.

83 Mr. Andrews must have been back by 29 September 2017, because his evidence was that he arranged contract extensions for the Claimant on Matrix, one of which was on that date.

84 Ms. Lee's oral evidence was that she had one to one meetings with Mr. Andrews on 4 and 5 October after his return from holiday, and that the decision to terminate the Claimant's engagement was made on either 4 or 5 October.

85 Although we found that Ms. Lee met Mr. Andrews on those dates, and that she met him regularly for meetings thereafter, we found that the decision to terminate was not made on 4 or 5 October. This was for the following reasons:

85.1 As explained, there is no record of when the decision to terminate was made, which we would have expected, given this is a local authority, and given this worker was promised her job was safe to the end of March 2018.

85.2 It is striking that the Respondent's witness statements do not identify the date on which the decision was reached – although the Supplemental witness statement of Mr. Andrews suggests it is in September 2017.

85.3 There is inconsistency in the oral evidence of Mr. Andrews and Ms. Lee as to when the decision was made, which we have set out. We have concluded that their evidence as to when the decision was made to terminate was unreliable and unlikely to be correct.

85.4 If there was an ongoing conversation with Mr. Andrews after the 14 September 2017 budget meeting, as Ms. Lee contended, and budgetary pressure requiring termination of the role, it is unlikely that the Claimant's contract would have been extended again on 29 September 2017 (p.147a) for the period to 31 October 2017, without any discussion as to whether there should be an extension at all. There is no record of such a discussion, which is inconceivable, had one taken place.

86 Having considered the totality of the evidence, although the Employment Tribunal is unable to specify precisely when the decision to terminate was made, the Employment Tribunal concluded that the Respondent's managers knew the Claimant was pregnant before the decision to terminate was made. In other words, the decision to terminate was likely to have been made after 9 October 2017 and before the email to Human Resources on 26 October 2017. This is for the following reasons:

86.1 This is an inference drawn from the above four points in paragraph 85.

86.2 If the decision to dismiss was made in mid-September, or on 4 or 5 October, there is a striking delay until Mr. Andrews took Human

Resources advice. Advice was sought by email on 26 October 2017 (p.167A). Mr. Andrews's evidence was that the delay was due to him checking what he needed to do by consulting Matrix; but he conceded that this would have taken around five minutes.

86.3 Moreover, the email states that the "*matter is quiet urgent*". It is clearly meant to say that "*the matter is quite urgent*". This is inconsistent with the Respondent's case, because their case (from Ms. Lee's evidence) is that the decision was made at least three weeks earlier or (from Mr. Andrews's evidence) six weeks earlier. In any event, it is difficult to understand how it was "quite urgent" given the time that had elapsed. Mr. Andrews could give no cogent explanation for the delay, stating that he "*would want a bit of time to speak with HR and digest, wanted to get their advice*".

86.4 In evidence, Ms. Lee stated that she wanted "*to think with her pen in her hand*". It is odd that there is no written evidence of such a decision in this context, if it was taken before 9 October 2017. We inferred from this and the lack of any minutes recording the decision that the Respondent's witnesses deliberately decided not to record the reasons for the decision in writing because they wished to conceal when the decision to terminate was made. The inference is that this was because the full reasons included a pregnancy-related reason.

87 The Claimant asked for written reasons for termination, as requested by the DWP. Mr. Andrews prepared a letter p.204 which included:

> "*the Sponsorship Officer position will be suspended and re-evaluated as the role* is *not fully meeting service requirements for the department*".

88 In the meeting between the Claimant and Mr. Andrews on 14 November 2017, Mr. Andrews informed the Claimant that Ms. Lee had "*decided to get rid of the post*". In evidence, Mr. Andrews said it was a joint decision to end the assignment.

89 In the absence of any minutes or documentary record, as to when the decision was made by the Respondent or by whom, the Employment Tribunal considered that it was unrealistic for the Claimant to pinpoint how the decision to dismiss was made or by whom exactly out of the two managers in this case. The Claimant's evidence was that it was a decision made by Mr. Andrews or his manager, Ms. Lee.

90 We found that Ms. Lee made the decision to dismiss, albeit that she did this after consultation with Mr. Andrews. It was not a joint decision. Having seen the Respondent's witnesses give evidence, the Employment Tribunal concluded that Ms. Lee was a strong personality, she was the more senior manager and she was the more experienced local authority manager; and given these points, we found it was unlikely that this would have been a joint decision.

Submissions

91 The Employment Tribunal read submissions prepared by both Counsel. These were amplified in oral submissions. Neither party requested more time; each had roughly 35 minutes, with Mr. Keen making some further submissions in reply.

92 It is not necessary, nor would it be proportionate, to refer to all the submissions made, particularly when they were set out at length. Suffice to say that each submission was taken into account.

93 Mr. Keen argued that this was a "reason why" case, and that there was no inherently discriminatory factor. It had not been put to the Respondent's witnesses that they were prejudiced against pregnant women.

94 Furthermore, Mr. Keen argued that if there had been a "U turn" there had been a reason for it, shown by the emails of 24 August 2017, 29 August 2017 and 8 September 2017. He contended this showed that the viability of the role was being considered, and that the explanations of the Respondent's witnesses should be accepted.

95 Ms. Robertson referred to the Pregnant Workers Directive. She relied on Article 10(2), which provided that the Respondent must cite substantiated grounds for dismissal in writing.

96 In addition, Ms. Robertson relied on *Anya and Talbot* to argue that part of the inherent probabilities is what would be expected of a local authority in this case, namely documentary evidence of date and reasons for termination.

Conclusions:

97 Applying our findings of fact and the law to the issues before us, we have reached the following conclusions.

Stage 1: Has "something more" been proved so as to shift the burden of proof?

98 Through the drawing of inferences, we have made findings of fact on the central factual issues in this case.

99 Adopting the approach in *Madarassy*, the "something more" in this case arises from a number of features of the evidence:

99.1 The lack of documentary evidence, which we expected to see, as to the date that the decision to terminate was made and a contemporaneous note or record (however brief) of the reasons for termination.

99.2 The rejection of the Respondent's inconsistent evidence as to when the decision to terminate was made. First, there was the lack of the date of the decision to terminate the assignment in either the ET3 or the witness statement evidence. Second, the evidence of the Respondent's

witnesses around when the decision to terminate was made, which is a fundamental question in the case, was inconsistent and unreliable.

99.3 The Respondent's witnesses both denied knowing of the pregnancy when the decision to dismiss was made. We have concluded that account is incorrect. Taken with the other matters to which we have referred at this stage, or taken alone, this is "something more".

99.4 The Claimant was assured in May 2017 that she would remain in post until the end of March 2018. The emails of 5 May 2017 from both Mr. Andrews and Ms. Lee represented that there was funding for the role until end March 2018.

99.5 The only proviso to the role continuing was that it was subject to performance reviews. The Claimant's performance throughout her assignment was not complained of, and she had brought in new sponsorship when her male predecessor had not (but his role had not been terminated). She was encouraged to stay on after the expiry of the first three months and told in November 2017 that the termination was not to do with her performance and that she performed well. This suggested a hypothetical male comparator, insofar as one could be constructed, would not have been terminated prior to the end of the financial year.

99.6 The ET3, para 10, was incorrect and inconsistent with the evidence as a whole. There was no explanation for this which was inconsistent given that both Respondent witnesses had contributed to the pleading.

99.7 The shifting reasons for the decision to terminate explained below.

100 We find that in these circumstances, the burden of proof did shift to the Respondent to provide a cogent explanation for the termination of the assignment.

Stage 2: Has the burden of proof been discharged? Why was the decision to terminate the Claimant's engagement made?

101 We rejected the explanation that budgetary pressure was the sole reason for the termination. The evidence in support of the Respondent's case was far from cogent: it involved inconsistent and unreliable evidence and a striking lack of documentation, particularly given that this is a local authority.

102 On a balance of probabilities, whilst we accept that there were pressures on Ms. Lee's staffing budget, we find that the fact that the Claimant was pregnant was a factor in the decision to terminate her assignment. We found this fact by drawing inferences from the following primary facts and matters:

102.1 The Respondent's witnesses knew that the Claimant was pregnant when they made the decision to terminate, as explained above, despite their protestations that they did not know this.

102.2 There was no reliable evidence the role was to be self-funding in 2017-18. Apart from our findings above, a requirement for the role to be self-funding in 2017-18 would not be a rational approach, given that there was no challenge to the Claimant's evidence that the Respondent lacked assets to gain sponsorship and that there was a need to build relationships and trust over time, and given the point of the annual cycle reached (towards the end of the summer programme).

102.3 The Claimant had raised new sponsorship in cash and in kind, as well as performing other valuable work (such as the creation of 'decks'), as explained above. The Claimant had been told at the outset not to worry about the targets and that the sponsorship role had never made any money in the past.

102.4 Mr. Keen argued that if there was a U-turn, there was a reason for it, namely budgetary pressures because the amount raised in sponsorship would not cover the cost of the role. The difficulty with this argument is that:

102.4.1 If there was such pressure, it is unlikely that the Claimant would not have been warned of the risks to her role prior to announcing her pregnancy, particularly because she was given the assurances in May 2017 that the role would continue to end March 2018;

102.4.2 If there was such budgetary pressure, the decision to extend the contract again on 27 September 2017 is inexplicable.

102.4.3 If there was such budgetary pressure, there was no cogent explanation for the delay in getting HR advice about termination.

102.4.4 The Claimant had brought in new sponsorship when her male predecessor had not (but his role had not been terminated).

102.4.5 We accepted Ms. Robertson's submissions that the reason for the termination changed. The various interpretations given of the reasons were not consistent. In particular:

102.4.5.1 The ET3 p.29, para 26, states that the Respondent had to terminate the Claimant's assignment due to budget constraints and suspend the role.

102.4.5.2 In the discussion between Mr. Andrews and Carmel Murray HR, of 26 October 2017, he stated that the role was going to be changed and that they did not want to extend the assignment. He did not refer to the role being suspended.

102.4.5.3 At the meeting on 3 November 2017, the Claimant was informed that due to budget cuts the role would be frozen.

102.4.5.4 The written reasons for termination, in the letter at p.204 state that:

"*the Sponsorship Officer position will be suspended and re-evaluated as the role* is *not fully meeting service requirements for the department*".

Conclusion

103 The complaint of pregnancy discrimination under section 18 Equality Act 2010 is upheld.

Employment Judge Ross

18 January 2019