EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102320/17

Held in Glasgow on 21 and 22 March 2018

Employment Judge: Lucy Wiseman
Members: Graham Noble
William Muir

Miss Shelbey Martin — **Claimant**
Represented by:
Mr A Macintosh - Solicitor

ASA Recruitment — **Respondent**
Represented by:
Mr A Pattie - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent discriminated against the claimant when they treated her unfavourably because of illness suffered by her as a result of her pregnancy (Section 18(2) Equality Act). The respondent is ordered to pay to the claimant compensation of £3,000 (Three Thousand Pounds) in respect of injury to feelings, and £566 (Five Hundred and Sixty Six Pounds) in respect of statutory sick pay.

REASONS

1. The claimant presented a claim to the Employment Tribunal alleging she had been treated unfavourably because of a pregnancy related illness.

2. The respondent entered a response accepting the claimant's assignment with East Renfrewshire Council was terminated, but denying this was because of a pregnancy related illness. The respondent's position was that they were entitled, in terms of the contract with the claimant, to terminate the assignment.

3. A case management Preliminary Hearing took place on 13 October 2017 at which the claimant's representative clarified that the claim was brought under Section 18(2)(b) Equality Act on the grounds that the claimant was treated unfavourably because of illness suffered as a result of pregnancy. The unfavourable treatment was said to be the termination of the claimant's assignment by the respondents with East Renfrewshire Council and non payment of SSP.

4. The claimant's representative was asked to provide the basis of the claim for payment of statutory sick pay, and did so on 1 November by providing the schedule of loss. The schedule of loss referred to statutory sick pay and stated as follows:-

> "*The claimant was unable to continue working from 23 March 2017 in her assignment due to a pregnancy related illness. The claimant was due to attend at work on 28 March 2017 however advised the respondent that she would be unable to work that week due to a pregnancy related illness. The claimant self certified her absence until 4 April 2017 following which period she submitted fit notes completed by her GP. As she was pregnant, she ought to have been treated as continuing in the assignment and therefore ought to have received SSP of £89.35 per week from 31 March 2017 until 6 August 2017 which is the date that Statutory Maternity Pay/Maternity Allowance would have commenced as the claimant was off sick 4 weeks prior to the date on which the baby was born".*

5. We heard evidence from the claimant and Ms Gail Stevenson, HR Manager. Ms Stevenson joined the respondent company in July 2017 after these events. She took over from Ms Christison, who was HR Manager. Ms Stevenson's evidence was based upon her perusal of available documentation and the standard practice of the company.

6. We were referred to a jointly produced bundle of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

7. The respondent is a recruitment agency.

8. The claimant attended for interview with the respondent on 14 July 2016 and signed a contract for services that day (page 76).

9. The contract provided, at Clause 9, that the respondent, the claimant or the Hirer may terminate the assignment at any time without prior notice or liability.

10. The claimant was offered an assignment in September 2016 with East Renfrewshire Council, and started work on 26 September as a Home Care Worker.

11. The claimant worked a shift rota of 4 days on and 4 days off, and worked a split shift from 8am to 2pm and 4pm to 11pm.

12. The claimant understood the local authority required to use an agency worker because cover was required for an employee who had broken her ankle and would not return to work before the end of December.

13. The employee did not in fact return to work and the claimant continued to work in the same role.

14. The claimant completed time sheets for the respondent, and attended weekly meetings at the Council to discuss the needs of the service users.

15. The claimant learned she was pregnant at the end of December 2016. The claimant notified the respondent of this on 17 January 2017.

16. The claimant also notified Ms Nicola Allen from East Renfrewshire Council, who agreed to the claimant's request to reduce her hours to 8am – 2pm.

17. Ms Allen confirmed to Ms Ashley Douglas, Corporate Account Controller for the respondent, in an email dated 8 February (page 67), that she had discussed the Council's policies and procedures with the claimant and confirmed she had adjusted the claimant's hours to 8am – 2pm only. Ms Allen further confirmed that she had informed the claimant that if she was not able to contact the office on a daily basis when off sick, this would have to be reported to the respondent because the service users required to be covered.

18. The claimant was absent for three days with flu in the middle of January. She thereafter returned to work in the same role with adjusted hours (8am to 2pm).

19. The claimant started to experience severe morning sickness and was, on occasion, sick whilst at work.

20. The claimant worked on 23 March, which was day 4 of her rota. She was due to commence the next rota on Tuesday 28 March. The claimant knew she was not fit to work and so on Monday 27 March, she contacted the respondent and Ms Allen to inform them she would not be at work for the rest of the week. The claimant was told by both to keep them updated.

21. The claimant attended at her GP and was prescribed medication. The claimant was admitted to hospital 24 hours later. The claimant's condition stabilised. The claimant was discharged and told to keep taking the

medication but to expect the sickness to continue (but at a much reduced level).

22. The claimant was aware her next rota of 4 days was due to start on 5 April. The claimant knew, by 3 April, that she would not be fit to work these days. The claimant attended at her GP on 4 April and obtained a Fit Note (page 50) for 4 April – 18 April because of Hyperemesis gravidarum (morning sickness).

23. The claimant contacted Ms Douglas to inform her she had a Fit Note and would not be returning to work because of severe morning sickness. The claimant queried the payment of Statutory Sick Pay (SSP). Ms Douglas informed the claimant that she did not think the claimant would be entitled to SSP because her "*contract*" had ended, but to come in and speak with Ms Vivienne Christison, HR Manager.

24. The claimant attended at the respondent's office on 4 April and gave her Fit Note to Ms Douglas. Ms Douglas left the meeting to speak to Ms Christison, and when she returned she told the claimant the respondent did not need her Fit Note because she was not eligible for SSP.

25. The claimant's assignment with East Renfrewshire Council terminated on 23 March 2017, being the date she last worked for the Council. The claimant's next assignment was due to commence on 28 March for 4 days: the claimant was not fit to accept this assignment, and the work was "*backfilled"* and offered to another agency worker.

26. The claimant remained on the respondent's books from 23 March 2017 until 4 April 2017 when she was made aware there may be work available at another local authority, but the respondent was reluctant to offer it to her because she was not reliable. The claimant`s contract with the respondent terminated on 4 April 2017.

27. The claimant queried the non payment of SSP with the respondent but did not receive a full explanation for the respondent's decision until Ms Christison's letter of 9 May (page 72). The letter explained the respondent could not pay SSP because the claimant's temporary placement came to an end when she worked her last assignment, and subsequent assignments were cancelled by the claimant and backfilled at the request of the client.

28. The claimant's P45 (page 103) noted the claimant's leaving date as 9 April 2017.

29. The claimant was signed off as unfit for work from 4 April until 9 September 2017.

30. There was a delay in the respondent providing the claimant with form SSP1. This meant the claimant could not claim Employment Support Allowance until the middle of May. The claimant had to apply for a crisis loan in the interim.

31. The claimant received Employment Support Allowance from 4 April 2017 – 6 August 2017 at the rate of £57.90 per week. The claimant then received Maternity Allowance.

Credibility and notes on the evidence

32. There were no real issues of credibility in this case. Ms Stevenson joined the respondent as HR Manager in July 2017(to replace Ms Christison, who retired) and accordingly her evidence was based on her perusal of the respondent's records and documents, and usual practice.

33. The respondent's position was that under the terms of the contract the respondent has with East Renfrewshire Council, they were required to provide a worker to provide services for vulnerable adults. It was for the Council to determine the shifts required to be worked, and they also had the right to terminate the assignment at any time. The Council requested the

respondent "*backfill*" the work the claimant had been doing – that is, send another worker to carry out the work – and this ended the claimant's assignment. The claimant remained on the respondent's books, but there was no obligation to offer further assignments. SSP was not paid because the claimant's assignment had ended on 23 March.

34. The contract for services produced at pages 76 – 81, contained a number of definitions on page 1, one of which was the term "assignment". This was defined as meaning "*assignment services to be performed by the agency worker for the Hirer for a period of time during which the agency worker is supplied by the Employment Business to work temporarily for and under the supervision and direction of the Hirer".*

35. The contract made clear (Clause 2) that no contract existed between the respondent and the claimant between assignments. Clause 3 set out the requirement of the respondent, at the same time as an assignment is offered, to provide the agency worker with an Assignment Details Form setting out the identity of the Hirer and the nature of their business, the date the assignment is to commence and the duration or likely duration of the assignment, the type and location of the work, the hourly rate and what experience or training was required.

36. The respondent did not provide a written Assignment Details Form to the claimant, but confirmed the information orally to the claimant, with the exception of the length of the assignment which was unknown.

37. Clause 9 set out provisions for Termination. Clause 9.1 provided the respondent, claimant or Hirer may terminate the agency worker's assignment at any time without prior notice or liability. Clause 9.4 provided that if the agency worker was absent during the course of an assignment and the assignment has not been otherwise terminated under Clause 9.1 (or 9.2), the respondent will be entitled to terminate the assignment in accordance with

Clause 9.1 if the work to which the agency worker was assigned is no longer available.

38. There was one issue which caused confusion in this case, and it was the fact the parties and representatives used the terms "*contract*", "***assignment"*** and "*engagement*" interchangeably. The terms are not interchangeable: a "contract" existed between the claimant and the respondent (page 76); the term "*assignment*" means assignment services performed by the claimant for the Hirer for the period of time when she was supplied by the respondent to the Hirer to work temporarily for the Hirer; and the term "engagement" means the use of the worker by the Hirer.

39. Mr Macintosh referred in his submissions to the Agency Worker Regulations. The Employment Judge noted there had been no previous reference to these Regulations either in the claim form, at the Preliminary Hearing or when further information was provided specifying the basis of the claim for payment of SSP. We deal with this in more detail (below) when we consider the merits of the complaint regarding SSP.

Claimant's submissions

40. Mr Macintosh referred to the terms of Section 18(2)(b) Equality Act, and submitted the respondent had treated the claimant unfavourably because of a pregnancy related illness, when, on 4 April, she had been told her contract had been terminated and she was not to be paid SSP. The claimant's illness had impacted on Ms Christison's mind in circumstances where she knew of the claimant's pregnancy.

41. The respondent relied on the contract terms to explain what had happened and why, however the operation of the contract was subject to the terms of the Equality Act. Further, any ambiguity in the contract should be interpreted against the respondent. The respondent had failed to provide an Assignment Details form to the claimant and had breached the terms of the contract.

42. The clear evidence was that the assignment was to be of at least three months duration with the expectation that it would last longer. In any event the assignment was still ongoing on 4 April.

43. Mr Macintosh submitted that even if Ms Christison did not terminate the assignment on 4 April, she decided the claimant was not to be offered any more work because she was not reliable. This was unfavourable treatment.

44. Further, the decision not to pay the claimant SSP was taken because the contract ended, but the contract only ended because of the claimant's pregnancy related illness.

45. Mr Macintosh referred to the Agency Worker Regulations and submitted the claimant had, in terms of Regulation 5, acquired the same rights (in terms of pay and payments) as an employee of the Hirer carrying out the same work. He submitted employees of East Renfrewshire Council would have been paid SSP for absence, and accordingly the claimant had an entitlement to the same payment.

Respondent's submissions

46. Mr Pattie noted there was no dispute regarding the fact the claimant signed the contract for services on 14 July 2016, and commenced an assignment with East Renfrewshire Council on 26 September 2016. The contract produced at page 76 was the only contract between the claimant and the respondent. The claimant continued carrying out work for East Renfrewshire Council until late March when the role ended.

47. Mr Pattie submitted the contract governed the contractual relationship between the parties and the fact the claimant not read the contract did not alter that fact. The terms of Clause 2 and Clause 9 were clear, and there was nothing in Clause 3 which qualified the respondent's right to terminate the assignment.

48. Mr Pattie referred to the terms of Section 18(2)(b) Equality Act and submitted the claimant could not show unfavourable treatment occurred "*because of*" a pregnancy related illness. Mr Pattie referred to the cases of ***Indigo Design Build and Management Ltd v Martinez [2014] WL 4423177*** and ***Interserve FM Ltd v Tuleikyte [2017] WL 0339104***.

49. Mr Pattie submitted Clause 9 was a neutral clause and not inherently discriminatory. There was no intention to discriminate against pregnant women or for the clause to have that effect. The clause applied to all workers who could not attend for an assignment because of absence regardless of the reason for the absence.

50. Mr Pattie referred to the requirement of East Renfrewshire Council to have someone carry out the available work. The ability to terminate the assignment if a person cannot attend and to "*backfill*" with someone who can, ensured the work was covered. It was submitted that it could not be said the claimant's pregnancy related illness was the reason for the termination.

51. Mr Pattie submitted the Agency Worker Regulations did not include SSP (Regulation 6). The claimant's assignment had ended and therefore the relevant comparator would be an employee whose employment had ended. The comparator would not, in those circumstances, be entitled to SSP and accordingly the claimant was not entitled to SSP.

52. Mr Pattie invited the tribunal to dismiss the claim. However, if the Tribunal was not with him, he submitted the amount sought by the claimant for injury to feelings was too high. This had been a one off incident, there had not been any malicious intent and the claimant had not, in any event, been fit to work from 26 March onwards.

Discussion and Decision

53. We had regard firstly to the terms of Section 18(2)(b) Equality Act which provide that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, the person treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it. The protected period begins when the pregnancy begins.

54. We next had regard to the fact there was no dispute in this case that the claimant had informed the respondent, and East Renfrewshire Council, of her pregnancy on or about 17 January 2017. Further, there was no dispute regarding the fact the alleged unfavourable treatment occurred during the protected period. We noted there was no direct evidence to suggest Ms Christison knew of the claimant's pregnancy, but she was the respondent's HR Manager at that time, and given the respondent generally knew of the claimant's pregnancy, we inferred Ms Christison also knew of this fact.

55. We also had regard to the case law to which we were referred, and which set out helpful guidance regarding the approach to be taken when considering whether unfavourable treatment occurred "*because of*" pregnancy/ pregnancy related illness.

56. The Employment Appeal Tribunal in ***Indigo Design Build and Management Ltd*** (above) noted the Tribunal was required by section 18(2) Equality Act to consider whether the alleged treatment of the claimant was "*because of*" pregnancy. His Honour Judge David Richardson noted the term "*because of"* was a change in the term used in the previous legislation, but that it was now well established that no change of legal approach was required (**Onu v Akwiwu**). The law required consideration of the "*grounds*" for the treatment. In **Onu** a concise statement of the law concerning what will constitute the "*grounds*" for a directly discriminatory act was given:-

> *"42. What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion*

> *which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in Nagarajan called his "mental processes" – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had a significant influence. Nor need it be conscious: a subconscious motivation, if proved, will suffice.*

57. His Honour Judge David Richardson noted it was not in dispute before him that this approach was appropriate in a direct discrimination claim under Section 18 just as under Section 13.

58. The Employment Appeal Tribunal, in the case of ***Interserve FM Ltd*** (above) noted the fundamental question in a direct discrimination case is: what were the reasons or grounds for the impugned treatment? That question is fact and context sensitive and gives rise in broad terms to two types of cases that have been identified in the authorities. There are on the one hand "*criterion cases*" and on the other "*reasons why*" cases. The difference between the two was explained by Lady Hale in **R(E) v Governing Body of JFS [2010] 2 AC 728** at paragraph 64:-

> "*The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of enquiry into what caused the treatment in question is also plain. … There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was*

> *based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else … But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing…"*

59. We next turned to consider whether the claimant was treated unfavourably by the respondent and, if so, whether that unfavourable treatment occurred "*because of*" the claimant's pregnancy related illness. Mr Macintosh, in his submissions, asserted there had been three instances of unfavourable treatment: (i) on 4 April when the respondent ended the claimant's assignment with East Renfrewshire Council; (ii) on 4 April when the respondent ended the claimant's contract and (iii) on 4 April when the claimant was informed she would not be paid SSP. We considered each of these in turn.

60. There was no dispute regarding the fact the respondent offered an assignment to the claimant, with East Renfrewshire Council, which she accepted and commenced on 26 September 2016. The likely duration of the assignment was unknown, but the need for an agency worker had arisen because an employee of the Council was absent due to a broken ankle, and was likely to be unable to return to work before the end of December. The claimant worked a 4 day on/4 day off shift pattern and continued to do so until January 2017, when her hours of work were reduced. She thereafter continued to work on reduced hours until she became unfit for work due to morning sickness.

61. The claimant last worked for East Renfrewshire Council on 23 March. She thereafter had 4 days off and was due to commence the next shift on 28 March. The claimant was unfit to work on 28 – 31st March and on 4 – 7 April.

62. Mr Macintosh invited the Tribunal to find the claimant's assignment with East Renfrewshire Council continued until 4 April, and that the assignment was

terminated by the respondent on 4 April. Mr Macintosh, in support of his position, invited us to have regard to the claimant's work pattern being regular, no assignment details form having been provided and the evidence suggesting the work continued.

63. We considered there was no evidence to suggest the claimant's assignment was unusual. Ms Stevenson's evidence was to the effect assignments may be from one shift/one day or longer. We acknowledged, and there was no dispute regarding the fact, that there was an ongoing requirement for East Renfrewshire Council to have an agency worker undertake home care work. We also acknowledged the respondent did not provide the claimant with a written assignment details form (although they did provide her with the information orally). However, we did not consider these facts demonstrated the claimant had a continuing assignment with East Renfrewshire Council.

64. We had regard to the evidence before us, and we accepted that (a) East Renfrewshire Council required a worker to attend to cover the work to be done on 28 – 31 March and thereafter; (b) the claimant was not fit to undertake this work and (c) the work was offered to another agency worker, who accepted it.

65. We found as a matter of fact the claimant's assignment with East Renfrewshire Council came to an end on 23 March: this was the last day the claimant worked for the Council. We acknowledged the claimant expected, and would have been offered, a further 4 day assignment to commence on 28 March, but she informed the respondent and the Council she would not be fit to accept the assignment. The work was accordingly offered to another agency worker.

66. We decided we could not accept Mr Macintosh's submission that the respondent terminated the claimant's assignment on 4 April. We reached that decision because (i) the evidence did not support Mr Macintosh's submission that the assignment continued until 4 April and (ii) there was no termination

of the assignment by the respondent on 4 April because the assignment had already ended on 23 March.

67. We next considered the second alleged instance of unfavourable treatment which was said to have occurred on 4 April when the claimant was told her contract had ended. We noted there was no dispute regarding the fact the claimant visited the respondent's office on 4 April to hand in her Fit Note and to speak with Ms Douglas. The respondent did not challenge the claimant's evidence that she was told there may be work at another Council, but the respondent was reluctant to put her forward for this because of her unreliability.

68. We found as a matter of fact the claimant remained on the respondent's books during the period 23 March to 4 April. The claimant was not offered work during this period. The claimant's contract with the respondent ended on 4 April. The reason it ended was because the respondent was reluctant to put the claimant forward for other work because she was unreliable.

69. We decided the termination of the contract by the respondent was unfavourable treatment. We asked ourselves what was the reason for the treatment: did it occur because of the claimant's pregnancy related illness? The claimant's uncontested evidence was that the contract ended because the respondent was reluctant to offer her further work because she was not reliable. We noted the claimant had not, prior to her pregnancy, had a day's absence: she had been a reliable worker. We concluded the reference to the claimant being unreliable, was a reference to her absence/unavailability for work because of morning sickness, which is a pregnancy related illness. We concluded the reason why the respondent was reluctant to put the claimant forward for other work was because of her pregnancy related illness. The reason for the end of the claimant's contract was because of her pregnancy related illness which caused her to be unreliable.

70. The respondent argued, in relation to both alleged instances of unfavourable treatment, that if there was unfavourable treatment it was not because of the claimant's pregnancy related illness, but because of the operation of the contract. Mr Pattie described Clause 9 as a "*neutral*" criterion which covered the absence of all workers regardless of the reason.

71. We acknowledged Clause 9 was, on the face of it, a neutral criterion (not inherently based on or linked to pregnancy or maternity) and we accepted it applied to all absence regardless of the reason. However, the submission made by Mr Pattie invited the Tribunal to make a comparison between the way in which the claimant was treated and the way in which say, a male worker with a sore back would have been treated. This is not the correct approach for the Tribunal to adopt, because no comparison is required in pregnancy cases.

72. We did accept Mr Pattie's submission that the Tribunal had to consider the mental processes of the alleged discriminator in circumstances where there is no blanket policy or criterion inherently based on or linked to pregnancy and/or maternity. We, for the reasons set out above, concluded Ms Christison was influenced by the fact of the claimant's pregnancy related illness when she decided the claimant was unreliable and for that reason would not be put forward for any more work.

73. We next considered whether the decision not to pay SSP was unfavourable treatment and if so, whether the decision was made because of the claimant's pregnancy/pregnancy related illness. There was no dispute regarding the fact the respondent did not pay the claimant SSP. They did not do so because the claimant's assignment ended on 23 March and the claimant was not offered any further work.

74. We found the submissions regarding the issue of SSP to be confused and confusing. The claimant's representative at the Preliminary Hearing was asked to provide information specifying the basis upon which the claim for SSP was brought. The representative provided that further information and

stated the basis for the claim was that as the claimant was pregnant she should have been treated as continuing in the assignment with East Renfrewshire Council.

75. Mr Macintosh did not rely on this as the basis for the claim in his submissions. He introduced the Agency Worker Regulations and also argued there had been no payment of SSP because the contract had come to an end but as that happened because of pregnancy it was discriminatory.

76. We were not addressed regarding the entitlement of the claimant to be paid SSP in circumstances where an assignment had ended.

77. The Tribunal raised with Mr Macintosh the fact the Agency Worker Regulations had not been referred to at any point previously in these proceedings. Mr Macintosh did not consider that to be an impediment to introducing the Regulations in submissions. We acknowledge the respondent did not take issue with this, and we also acknowledged the less formal approach to matters adopted in tribunal proceedings. However, we consider that notice of this should have been given in the interest of fairness to both parties, and for that reason we did not consider the claimant's submission regarding the application of the Agency Workers Regulations further.

78. We should state that if we had allowed Mr Macintosh's submissions regarding the application of the Agency Workers Regulations, we would not have accepted Mr Pattie's submission that Regulation 6(2), which sets out the meaning of "*pay*", did not include SSP. We considered the phrase "*other emoluments referable to the employment, whether payable under contract or otherwise*" sufficiently wide to include SSP.

79. We considered whether the respondent's refusal to pay the claimant SSP was unfavourable treatment. We considered that in determining that question we had to have regard to whether the claimant had an entitlement to be paid SSP. We firstly noted that agency workers are entitled to SSP if they satisfy the other conditions of eligibility (relating to qualifying days and the

requirement to have average gross weekly earnings over the previous eight weeks at or above the lower earnings limit for the payment of national insurance contributions).

80. The claimant met the requirement regarding earnings because she had average gross weekly earnings over the previous eight weeks of above the lower earnings limit for the payment of national insurance contributions.

81. SSP is only payable for "*qualifying days*", as defined by Regulation 5(2) of the SSP regulations. There was no evidence before the tribunal regarding this matter, and it was not addressed in submissions. We, therefore, could not properly consider this matter.

82. We had regard to the letter dated 9 May (page 72) from Ms Christison to the claimant, which set out the reason why SSP could not be paid. The letter explained the reason for being unable to pay SSP was because the temporary assignment had come to an end (on the last day the claimant worked) and subsequent assignments had been cancelled by the claimant and had to be backfilled at the request of the Council.

83. We decided the fact the claimant was not paid SSP was unfavourable treatment. We further decided, based on the letter from Ms Christison, that the reason for not paying the claimant SSP, was because the assignment came to an end. The assignment came to an end because of the claimant's pregnancy related illness.

84. We considered that in the particular circumstances of this case, and in the absence of any evidence from the respondent to explain their actions, all of their actions and decisions flowed from the claimant's pregnancy related illness. This was a factor in the respondent's mind (Ms Christison).

85. We decided there was unfavourable treatment of the claimant when (a) the respondent ended their contract with the claimant on 4 April and (b) the

respondent decided not to pay the claimant SSP. We further decided the unfavourable treatment happened because of the claimant's pregnancy related illness. We concluded the respondent had discriminated against the claimant contrary to the terms of Section 18(2) Equality Act.

86. We next considered an award of compensation for injury to feelings. We noted the onus is on the claimant to establish the nature and extent of the injury to feelings. We had regard to the case of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318*** where the Court of Appeal gave guidance regarding how employment tribunals should approach the issue. The three broad bands of compensation set out in that case were revised and increased in ***Da'bell v National Society for Prevention of Cruelty to Children [2010] IRLR 19***.

87. The original guidance described the lower band of compensation as being appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. There is considerable flexibility within each band to allow tribunals to fix what they consider to be fair, reasonable and just compensation in the particular circumstances of each case.

88. We accepted the claimant's evidence that she lived from week to week on her earnings and when, following 23 March, she was placed in a situation with no income, it caused her great stress and she had had to apply for crisis loans to survive. We also had regard to the fact this occurred during the early stages of a difficult pregnancy.

89. We balanced this with the fact this was a one-off incident. The respondent had not intended to discriminate against the claimant or cause her hardship: they understood the terms of the contract could operate in the circumstances to end the contract without recourse. We also had regard to the fact the claimant was not fit to work from 4 April onwards and therefore her "*loss*" was limited to what she may have received in SSP (which is the subject of a separate head of claim).

90. We decided that it would be appropriate to make an award for injury to feelings. We further decided, having balanced the above factors, to make an award of £3,000 because we considered this to be fair and reasonable in the circumstances of this case.

91. We accepted Mr Macintosh's calculation of the difference between the Employment Support Allowance received by the claimant and the amount of SSP she would have received for the same period, and we decided to make an award of £566 in respect of SSP.

Employment Judge: L Wiseman
Date of Judgment: 28 March 2018
Entered in register: 03 April 2018
and copied to parties

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