Case Number: 3200758/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Miss A Ludwiczak**

Respondent: **Your Square Limited**

Heard at: **East London Hearing Centre**

On: **8th – 11th January 2019**

Before: **Employment Judge McLaren**
Members: **Mrs M Long**
Mrs S Jeary

Representation

Claimant: In Person

Respondent: Mrs P Mayenin, Solicitor

JUDGMENT having been sent to the parties on 22 January 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1 The claimant was employed as a cleaner from 11 July 2017 until 26 January 2018. The respondent employs some 30 people and its business is that of a short-let management company specializing in generating short term rental income from sites such as Airbnb. Its staff includes cleaners.

2 We heard evidence from the claimant on her own behalf and from two witnesses in support of her case, Ms Monika Dekta, a former housekeeping manager of the respondent and Mr Radoslaw Miklaszewicz, former property manager of the respondent.

3 The respondent also called witness evidence from Ms Timea Ambrus, a letting agent, from the respondent's bookkeeper Mrs Aniko Kenyeres- Lysowksi and the Director Mr Emran Khantoumani. In addition, we were provided with a bundle numbering some 152 pages. We were also provided with a skeleton argument by the respondent and had the benefit of submissions by both parties. In reaching

our decision we considered this witness evidence and such parts of the documentary evidence to which we were referred.

4 We do want to comment at this point on one aspect raised by the respondent's representative in her written submissions. We were told in submissions that the respondent was not ready to proceed with the case on day one, through it says, the claimant's default and late service of statements.

5 We can see that both parties ignored the case management directions made by the employment tribunal and did not make any application to the tribunal for these to be varied, or for the date of the hearing to be postponed. The respondent's representative did not request an adjournment on day one. In fact, because the respondent had failed to provide enough copies of documents and because of late service by the respondent of documentary evidence on the claimant, the case did not in fact go ahead on day one but was adjourned for most of that day. Day two was similarly a short day to allow the claimant time to consider new evidence provided by the respondent. There was, therefore, time during the four days for the respondent to further prepare.

6 The proper course, if the respondent had considered it was prejudiced by its lack of preparation, was to apply for an adjournment any time from November when it became apparent that documents had not been exchanged. We also note that at one point during the hearing the employment panel offered the parties an adjournment as one possibility for dealing with the case, because of difficulties with attendance of various witnesses. The respondent rejected this option and chose to continue. We conclude that the respondent chose to continue the hearing raising this point only once the hearing had run its course. We find that no such prejudice existed.

The issues

7 At the outset of the hearing the issues of fact and law we must determine were agreed by the parties as follows:

> *Was the Claimant treated unfavourably by being dismissed during the protected period because of pregnancy? The respondent states that the dismissal was because the claimant's work was unsatisfactory.*

8 On the second day of the hearing, while the respondent's representative was cross-examining the claimant, it appeared that the respondent was introducing a further issue. I stopped the cross-examination and asked the respondent's representative if they were disputing that the claimant was pregnant at the time of her dismissal. I adjourned the case for 10 minutes to allow the respondent's representative to take instructions from her client. Having done so, she informed me that it had always been the position that the respondent did not believe that the claimant was pregnant. At the time they had given her the benefit of the doubt but there was no evidence of pregnancy and they did not accept that this was the case.

9 We adjourned the matter to consider the position. Having carefully read the ET3 we noted that reference is made to the fact the claimant did not provide any evidence of her pregnancy, but it does not raise any questions as to whether the claimant was pregnant. We also noted there was a preliminary hearing on

25th June 2018 at which the respondent was represented by counsel. The minutes of that preliminary hearing indicate that the parties discussed the issues between them, and the respondent confirmed that its case was that the claimant's work was unsatisfactory and that was the reason for her dismissal. No challenge to the fact of the pregnancy was raised.

10 At the outset of this hearing I discussed the issues of fact and law that the tribunal were being asked to determine with both parties and they were agreed as set out above. Again, no mention was made of any dispute as the facts of the claimant's pregnancy at the date of her dismissal.

11 I concluded therefore, and the respondent's representative confirmed, that she was in fact making an application to amend the defence. We adjourned to consider this application.

12 We considered Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT That provides that in determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.

13 In Selkent, the then President of the EAT, Mr Justice Mummery, explained that relevant factors would include:

(a) The nature of the amendment

applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations that change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

(b) Applicability of time limits

if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

(c) Timing and manner of the application

an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor.

14 In the context of the discretion whether to allow a proposed amendment, the first key factor identified was the nature of the proposed amendment. Selkent made it clear that this should be considered first, before any time limitation issues are brought into the equation, as it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from 'relabelling' the existing claim. If it is a purely relabelling exercise then it does not matter whether the amendment is brought within the timeframe for that particular claim or not.

15 Considering these factors our conclusion is that this is a substantial amendment to a defence introducing a new challenge of which the claimant has no notice. The amendment is of course made an extremely late stage in the proceedings, the tribunal panel being alerted to this through cross-examination of the claimant.

16 Having taken these three factors into account and considering the balance of justice and the comparative hardship to either party we concluded that the balance of hardship would fall more heavily on the claimant than it would on the respondent in refusing to allow this amendment and accordingly the amendment was refused.

17 We note at this point that while we had determined this amendment would not be permitted, on the third day of the hearing, the day following this debate, the claimant provided her MAT B1 form. This was included in the bundle and the respondent accepted that the claimant had been pregnant at the date of dismissal. We note that such a form cannot be produced prior to 6 months pregnancy and it was not therefore open to the claimant to have provided this prior to her dismissal.

Relevant law

18 There was no dispute on the relevant law. This claim arises under s18 Equality Act 2010 which creates a specific form of direct pregnancy and maternity discrimination.S.18 provides that an employer (A) discriminates against a woman if, in the 'protected period' in relation to a pregnancy of hers, A treats her unfavourably:

because of the pregnancy — S.18(2)(a), or

because of illness suffered by her as a result of it — S.18(2)(b).

19 The 'protected period', in relation to a woman's pregnancy, starts when the pregnancy begins and, if she has the right to ordinary and additional maternity leave, ends either at the end of additional maternity leave or when she returns to work, if earlier — S.18(6)(a). If the woman does not have the right to ordinary and additional maternity leave, then the protected period lasts until the end of the period of two weeks beginning with the end of the pregnancy.

20 S.18 does not require that a complainant compare the way she has been treated with the way a comparator has been or would have been treated. S.18 requires simply that the complainant show she has been treated 'unfavourably'.

Burden of proof

21 Igen v Wong Ltd [2005] EWCA Civ. 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove – again on the balance of probabilities – that the treatment in question was 'in no sense whatsoever' on the protected ground.

22 The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

Findings of Fact

23 It was not disputed that the claimant started working for the respondent as a housekeeper in July 2017. She was employed on a zero hours contract basis, working as and when needed. It was not disputed that she worked on average 40 hours a week. She would volunteer for shifts and be placed on a rota of cleaners who were then assigned rooms and flats to clean each day. She was paid a set amount for each room or flat that she did clean. It was agreed that she was not provided with a contract of employment or any written terms during her 7 months of employment. It was also accepted by the respondent that she was issued with payslips, at least until the November pay date (10th December), that did not contain a national insurance number. The claimant produced some copy pay slips which the respondent accepted were for her employment with them, which showed no NI number.

Credibility of the claimant's witnesses

24 We heard evidence from Mr Radoslaw Miklaszewic a former employee of the respondent. He confirmed that the claimant was friendly and ready to help, as indeed were other cleaners, with small maintenance issues to avoid having to send out a maintenance team. When she did these things, she always did it correctly. The respondent suggested that Mr Miklaszewic gave this evidence as part of a vendetta that he had against the company because he was dismissed. The bundle contained at page 126 a copy of the termination letter. This said that he was dismissed for blackmailing the management and sharing confidential information with third parties in a breach of contract and for violent behaviour.

25 The respondent also disputed the witness account that he had worked with the cleaners. It was the respondents' position that all maintenance jobs, however small, would require a maintenance person to be sent out. Mr Miklaszewic said he had all the cleaners phone numbers and if it was small task – like changing a bulb – he would ask the cleaner who was in the room anyway to do it. This seems to us to be entirely plausible and unlikely a company would incur cost and delay in sending a sperate person out to change a bulb when they had an employee on the site already.

26 It was put to Mr Miklaszewic that he was unhappy because he did not receive commission as his probationary period was extended, which was the respondent's right. It was then suggested to him that he said that he would tell other landlords and companies about the company's practices and client base which would damage the business and he did so in a very aggressive manner. Mr Khantoumani also gave evidence that he had been told by Ms Dekta that he had done this sort of thing before. It was respondent's position that Mr Miklaszewic had previously worked with Ms Dekta and had also been fired by that company. Mr Miklaszewic denied this. He accepted that he had worked with Miss Dekta at a previous company but not that he had been fired in these circumstances.

27 As far as his employment with the respondent was concerned, he accepted that he did ask why he was not receiving commission and explained that when he was told he was not getting any and that his probationary period had been extended without his knowledge. His response to that was to tell his employer that was illegal and that he would take legal advice or take legal action. The day following this he was called to the director's desk and Mr Khantoumani was very aggressive to him and said that "if he wanted to leave the f*****office he would punch his f**** face".

28 Mr Miklaszewic was scared and so decided to leave the office and take no further action. He had never been treated by any other employer like this. He also said that he had been asked to sign and create illegal documents such as faking tenancy agreements for property owned by the local authority to show that it has tenants when it had in fact been empty for a while and he had enough of this company.

29 As to the circumstances in which Mr Miklaszewic left the previous employer, Ms Dekta said that she had told Mr Khantoumani that they had worked together and that he left because he wrote to the HR Department and then did not have a job, but she did not know what he had written.

30 We found Mr Miklaszewic to be a plausible witness. His reference to the company requiring him to fake documents is supported by the daily reports reference to faking invoices for Airbnb. His account of his conversation with Mr Khantoumani was not disputed. On the balance of probabilities, we prefer his evidence to that of the respondent's director.

31 The respondent equally challenged the credibility of Miss Dekta. Her employment was also terminated and the reasons for that are set out at page 125. Miss Dekta said that he had not been given any information about any of these issues before this meeting and they were all new issues to her. Nonetheless, she parted on good terms with the company and the company confirmed they had given her a favourable reference as set out in her supplemental statement which showed the WhatsApp reference. Mr Khantoumani did not dispute the authenticity of this WhatsApp from his employee to Miss Dekta, but simply stated he did not have records of the reference.

32 It was the respondent's case that she had a vendetta against the company and was seeking to harm them because of her dismissal. Mr Khantoumani's statement said he believed Miss Dekta had stolen property from the respondent. At page 129 there was a photograph of a dressing table that was minus a mirror which had been there at page 130. The photograph of the missing item is copied to "Enko", Miss Dekta said this is because she was on holiday on 20 February when the mirror apparently went missing. We accept that is the likely reason why she is not on this WhatsApp group, but her colleague is. Mr Khantoumani basis his belief on the fact that Miss Dekta sells a dressing table mirror that looks similar to the missing one. She explained that it could well have been similar. The properties the respondent manages are often furnished with furniture from IKEA and she has some of the same furniture. She also showed at page 127 that her partner had bought her a new dressing table with a mirror and for that reason she had sold the mirror that was her own property in February.

33 In cross-examination Mr Khantoumani confirmed that he had not checked whether Miss Dekta was on holiday on the day the property went missing. The mirror could have gone on the same day or on another day, but he had not investigated this. We find that he had accused an ex-employee of theft based on the similarity between a mirror in one of the respondent's properties and one owned by Miss Dekta with no evidence to support this.

34 We note that the alleged theft occurred prior to Miss Dekta's dismissal but despite the many reasons given for this at the time, this was not raised.

35 We find that Miss Dekta was a credible and honest witness who gave full and forthright answers to all questions asked of her. We accept her explanation without reservation in relation to the mirror and are very clear that there are no grounds to suggest that she had stolen this piece of property. Where there is a conflict in her evidence and that of Mr Khantoumani, we prefer her evidence.

36 For the reasons set out above we therefore find Mr Khantoumani is not a credible witness and where there is a dispute between his evidence and that of others, we prefer their accounts.

<u>The warning letter</u>

37 It was accepted by the claimant that in October 2017 she did receive a warning letter from the respondent. The claimant's evidence was that this written warning followed two verbal warnings. Both were given to her by Ms Dekta, one being given to when she was cleaning one of the rooms and the other being giving to her at the office. Ms Dekta could not recall the conversations prior to the warning letter but confirmed that she had some concerns before the letter was given to the claimant and that she would have raised these. Ms Dekta confirmed that as referred to in the document at p 153, she had many pictures of the claimant's work prior to the formal warning letter. The conversation at p 153 also confirms the claimant had pictures of work she had done well. The warning letter was included in the employment tribunal bundle at page 41 and headed "subject warning", was the only official warning that she ever received.

38 It states that it is a matter of serious concern that the claimant took many undocumented sicknesses despite repeated verbal warnings. She is told to treat the letter as a warning for her unacceptable behaviour. The letter goes on to say "would be left with no choice but to suspend or relieve you from work if this unethical behaviour continues".

39 The claimant characterises this as a warning given for lateness, absences and accepted there were some problems with her cleaning. The claimant was adamant that having had this warning she significantly improved her performance and that there was no genuine cause for concern over either her absence or the standard of her cleaning after this warning.

40 This warning letter is addressed to the claimant by her full given name and is signed by the claimant. The bundle also contained an extension of probation period dated 11 December 2017.It is not signed by the claimant and uses a different form of her name. The claimant tells us she did not see this letter at any time during her employment, it was provided to her one bundles were being prepared in December 2018. Ms Dekta also stated that she had not seen this

letter before and was not aware of it being on the claimant's file. She was the claimant's line manager and would expect to have given her any warnings that were required.

Extension of probation

41 Mrs Enrico Jonas Gall who signed the extension of probation letter did not attend the employment tribunal, nor did she provide a witness statement. The bundle did, however, contain at page 40 a letter from this lady who identifies herself as an assistant manager. Miss Gall said that she gave the claimant several verbal warnings about her attitude and bad cleaning, but nothing changed. It was because of this she said in this letter that the cleaning manager decided to send her a written warning letter which had been signed by the claimant. This evidence at page 40 therefore relates only to the period up to the warning in October. Ms Gall does not give any evidence as to the claimant's performance after that warning and whether it had in fact improved following this. Her letter to the tribunal also does not refer to this extension of probation letter.

42 The respondent could give no explanation for her absence and Mr Khantoumani acknowledged it was his mistake not to ask her to attend. In her absence we give little weight to her evidence. On balance, we prefer the evidence of the claimant and her line manager on this point and we find that this letter was not issued at the time. The claimant has been consistent in her evidence throughout, her evidence on this point is supported by another credible witness and we have no reason to doubt her.

Performance after the warning

43 In support of her position that her performance did in fact improve after the October warning, the claimant referred to documents at pages 114 to 119. These reflect the points system operated by the respondent, ranking its cleaners' comparative performance to incentivise them to work well. The respondent confirmed that this was how the scheme worked and that the scheme was retrospective. Points are awarded for an entire calendar month but that these were calculated and processed in time to be paid on the 10th of the following month. A document dated November therefore reflects performance in the calendar month of October and would be finalised prior to 10 November and published showing a November date.

44 These documents show that the claimant is variously 7th out of 11, 11th out of 13, bottom (in November), 9th out of 12 in December and 6th out of 12 (just missing a bonus) in January. She was at the bottom of the points table only on one occasion. We accept the claimant's position that this is for the October calendar month period, that is the month in which she received the warning. Mr Khantoumani's evidence was that she was not a top performer because she was not in the top five and she was not the best cleaner. The claimant accepts she was not best cleaner, but we find that this evidence shows she was somewhere near the middle, other than in the month for which she received the performance warning. Mr Khantoumani confirmed that nobody else who was not in the top five was dismissed for performance. Being outside the top five did not mean that you are eligible for performance dismissal.

45 The bundle contained several screenshots. Those at pages 73 to 77 are in English and appear to be from Miss Dekta to the claimant and to other cleaners. A number of these refer to issues after the October warning.

5 November	claimant not at work
10 November	claimant needs to go back and check toilet paper in a property.
15th November	The claimant takes over another individual shift as requested because of his absence and does not notice that the colleague she is covering for has not taken the necessary equipment
4 January	claimant doesn't sign in
21st of January	claimant can't come to work
22nd of January	claimant off sick

46 The respondent's representative acknowledged in submissions that she had not cross-examined on these documents. This was an error she put down to her being startled by Miss Dekta's reaction to being accused of theft. We have nonetheless considered this evidence as it was in the bundle before us.

47 There are also a series of screenshots at pages 83 to 85 which are in Polish. They are between the claimant and Ms Dekta. These have been translated. They appear to refer to events in January and they do contain some complaints. Screenshot 11 is the claimant saying that she works as she should and that she has had only had three complaints. Screenshot 15 refers to complaint made on 13th January which the claimant disputes. Screenshot 16 refers to an incident on 12th January when the claimant seems to accept that she forgot to tell the office that a guest will stay until a particular date.

48 Screenshot 17 shows the claimant leaving early. Screenshot 18 shows the claimant will be late. This seems to be Monday, 8th January. Screenshot 19 is 25 January when the claimant is going to be late. Screenshot 20 again the claimant is going to be late. It's not clear what this date is. This screenshot goes on to reflect a conversation about the claimant's performance and states "I treat you like any regular employee was responsible for his/her failures to perform his/her duties not just covering your ass when you're not doing what you should be."

49 Screenshot 23 the claimant is taking a sick day. Screenshot 24 is 29th of January when she tells Ms Dekta that she will not be in tomorrow. The respondent's representative did not cross-examine on these documents either, but again we have included these in our considerations as they were in the bundle before us. We find that Ms Dekta did not consider these issues justified dismissal and accept her evidence on the point.

50 There are also 20 daily reports in the bundle, from pages 93 to 113. Mr Khantoumani confirmed that these reports were in fact produced every day as the name suggests so there would be at least 100 such reports for the period of the claimant's employment. They were emailed to the assistant manager and copied to him as the director every day. In order to produce the documents in the

bundle Mr Khantoumani searched his computer for the claimant's name. He provided all the daily reports that had her name in them. The ones that mention the claimant are from various dates from 5th September through to 23rd January. Prior to the end of October, they do reflect some issues with her cleaning and her sickness absence. That is, however accepted by the claimant and not an issue in dispute.

51 The disputed fact is whether the complaints raised about the claimant after the warning are sufficient to justify her dismissal and/or whether other cleaners against whom similar or more serious complaints were raised were not dismissed.

52 The claimant, Ms Dekta and Mr Khantoumani were all taken through the daily reports and the incidents which mention the claimant. These documents record the following.

53 On 10th November at page 104 the claimant's work is inspected, everything was fine except she did not leave any toilet paper, but she went back. This is the incident that is also reflected in the WhatsApp messages referred to above. All three witnesses confirmed that this was a trivial error. Mr Khantoumani confirmed that this was not dismissible.

54 On 15th November at page 105 it is reported that the claimant keeps forgetting to send updates and has to be reminded every single day. Mr Khantoumani felt that this was serious because only the claimant was mentioned on this date. He did accept it was human nature to forget to send updates.

55 Page 106 on 20th November shows the claimant has not wiped a worktop, there is an issue with the windowsill in the toilet and an area around a wardrobe was left dirty. Mr Khantoumani confirmed that this was not serious enough for dismissal. It would be more serious if the guest had made a complaint. This rota also shows two other cleaners off sick and the rotas having to be shared out. It also shows another individual has made one small mistake. That is Timi.

56 On 28 November, at page 107, it is recorded that some keys are missing, and the claimant is asked because she was there that day, but she did not reply. Mr Khantoumani said this could be very serious. If keys go missing, they would have to get them recut after some 24 hours and it could be a cost of £500 or £1,000 to the business. The claimant's evidence was that this note simply records that she did not reply when asked about keys. It does not say that she took the keys, or that the keys remained missing. It was the claimant's contention that had the keys remained missing the next day there would be a further daily report showing this and this had not been disclosed. The same document at page 107 also refers to having to create a fake invoice for bedding and towels for Airbnb.

57 On 13th December at page 108 it appears that the claimant has cleaned properly. There is a complaint about not wiping the room door and many fingerprints, but those appear to be issues from another cleaner. This daily report also shows issues with three other cleaners. Mr Khantoumani stated that these individuals were no longer employed but he could not recall whether they had resigned or been dismissed. One, Timi, whose allocated room is noted as shockingly badly cleaned, is still with the company.

58 On 27th December at page 109 there is a comment that some guests have complained about a light not working and the heater is not working either. The log

says that the claimant was going there, and the light was working fine, and the room was very warm. It was the claimant's evidence that she went to the guest's room after the fault had been reported in order to check and that in fact everything had already been sorted. The lightbulb had already been replaced. Mr Khantoumani said that he read this that the claimant had failed to report these issues and therefore this is a potentially serious issue.

59 The next complaint raised about the claimant is at page 110, that is the 24th January, almost a month later. This shows that all was good, but she left water in a bucket. Mr Khantoumani accepted that if this bucket was in a locked cupboard that the guests did not see it, then it was a minor issue and was not dismissible. He did not know where the bucket was, and we accept the claimant's evidence that it was out of sight. In relation to the missing fridge information it was Mr Khantoumani's assumption that this was due to the claimant's failure. The claimant disputed that it was her job as this is a communal area and the missing info could have happened at any time. At page 111 on 22nd January the claimant is shown as off sick. Mr Khantoumani confirmed that this absence would not be dismissible.

60 On Mr Khantoumani's evidence there were 8 occasions post the warning in October in which the claimant's name was raised, one of these, at page 108, was a positive comment about the claimant. Of the remaining 7 references, Mr Khantoumani agreed that 4 of these, the incidents noted at pages 104,106, 110 and the absence at 111, were not enough to lead to dismissal. The remaining 3 incidents, which Mr Khantoumani characterised as serious, are the failure to provide updates page 105, the key issue at page 107 and the bulb issue at 109.

61 We accept the claimant's evidence that had she been held responsible for the missing key there would have been a further report saying this and we therefore conclude that the only issue is that, as the report notes, the claimant did not answer a telephone call as to its whereabouts.

62 We find that the chronology of the events described at page 109 is that the fault is reported, and the claimant goes there. In our view that is the more natural reading of those sentences. We do not accept Mr Khantoumani's position that it means the claimant went there and then there was a fault reported. If it meant that, it would be in that order. We therefore find that this was not an error that the claimant had made. Of the eight instances Mr Khantoumani says contributed to the claimant's dismissal that leaves one possibly being an issue and that relates to a failure to update. That incident is noted on 15th December.

63 Miss Detka's evidence was that having given the claimant the warning in October, this resulted in the quality of the claimant's work improving. She acknowledged that this did not mean the claimant's work was perfect but felt that she showed great improvement. This lady was sufficiently confident in the claimant's work and abilities that she issued an employee verification letter on 20 December 2017 on the respondent's headed notepaper, in which she states that she is currently happy with the claimant and does not see any problems with her future employment. Miss Dekta told us that she was authorised to write this letter by the general manager, Albert. Mr Khantoumani in his first statement dated 5 January said that when the claimant approached us (he's not clear who that means) in mid-December we did provide a reference to help. In his supplemental statement

dated 7 January he then says that he did not authorise this reference. We find this evidence to be contradictory and find that the reference was authorised by the respondent.

64 The claimant explained that she asked for this because her partner had advised her that because she had no contract, she therefore had no paperwork reflecting her employment status and she should get this so that she had some record of her employment.

65 We find that this letter reflects the views of the writer, the claimant's line manager and that there was no reason to conclude that the claimant's employment was in jeopardy as at 20th December 2017. We conclude therefore that in Miss Dekta's mind the incidents she has noted in the daily log before the 20th December are not sufficiently serious to jeopardise the claimant's continuing employment. On that basis the 15th November failure to update – the only incident we have found could have been characterised as serious, is not treated as so by Miss Dekta. Mr Khantoumani's evidence was that Miss Dekta was the decision maker so on the respondent's account it is what is in her mind that is relevant.

The claimant's pregnancy

66 The claimant said that she told her line manager that she was pregnant before Christmas, she thinks it was about two days after she was given the letter of 20 December. The claimant said that because she had lost her national insurance number – and we accept that she did not have such a number as it would have been on her payslips had it been provided to the company- she was unable to get medical appointments in the UK. She had to return to Poland towards the end of December for her scan and check-ups. We accept that was the case.

67 It is Miss Dekta's evidence that the claimant told her that she was pregnant before Christmas and that she passed this information on to the then general manager Albert and by copying the daily report to Mr Khantoumani also to him. At page 112 on 2 January there is a note that before Christmas the claimant informed her that she was pregnant, and it appears to say that she would bring papers from her doctor after her first visit. Miss Dekta confirmed that is what happened and that she received those papers. We find that the claimant had provided evidence of her pregnancy at a very early stage, well before an employee is required to do so, in the form of Polish documents. Both her line manager and the director, who confirmed he is a public speaker, would have been able to read such documents.

68 The bookkeeper Ms Aniko Lysowoski Kenyeres stated in her evidence that the claimant had informed us verbally that she is pregnant at the beginning of December. In cross examination she stated that this was just chat amongst the women in the office and was not an official notice.

69 Mr Khantoumani disputes that he was aware of the pregnancy before 9th January. As evidence of her lack of credibility, the respondent states that Miss Dekta did not tell the director that the claimant was pregnant in December as she said in her evidence. When she was cross examined on this Miss Dekta confirmed that she had been mistaken when she said that she had told Marta. She had not recalled, when making a statement one year after the events, the exact date on which Albert left and Marta joined. She remained confident that she had told Albert and

had copied in the director. We were not provided with all daily reports to which the respondent has access to show the absence of any such reporting. We accept Miss Dekta's evidence.

70 In any event Mr Khantoumani accepts that he had been told of the pregnancy prior to the dismissal. He also now accepts that the claimant was pregnant, as she has always said, in December 2017.

The dismissal

71 The daily report of 2nd January refers to the fact that the respondent has not issued contracts to cleaners and needs to do so when they have been working for longer than three months. Mr Khantoumani's evidence was he did not understand this as contracts are issued. The respondent did not include in the bundle any example contracts or copies of contracts issued to other staff. We find on balance that contracts are not issued generally, and the claimant was not provided with one. The document comments "only problem might be with the claimant – she was once better once worst for the job, but before Christmas she informed me she… Me papers from Dr after her first visit".

72 On 9th January there is a WhatsApp exchange between Mr Khantoumani and Miss Dekta. That is translated by the respondent at page 151 and by the claimant at page 89. The translations are subtly different, and both parties dispute the accuracy of the other's translation. The conversation starts off by saying we now have a problem only with the claimant. Miss Dekta clarified that she meant that this was because she was the only cleaner where a contract had not yet been issued. We accept that is what this comment meant as she does go on to refer immediately afterwards to the issue of contracts for the cleaners. The meaning of the first sentence is clarified by the second. Mr Khantoumani replies either "beautiful" or "great" depending upon which translation is correct. He confirmed that he meant this sarcastically because he knew that there were issues with the claimant in December and January so that once Miss Dekta told him that the client was pregnant this is going to be a difficult situation because one could not dismiss an individual because they were pregnant.

73 This conversation Mr Khantoumani says is him telling Miss Dekta that she needs to take advice from the accountant if she, that is Miss Dekta, wants to dismiss the claimant. That is the respondent's translated version. The claimant's translated version says it needs to be found out from the accountant how to sack her. Mr Khantoumani says that it is incorrect that he wanted to sack the claimant, he was instructing Miss Dekta to find out how to do so without discriminating because that is what she (Miss Dekta) wanted to do as this was her decision. We enquired whether there had been any follow-up to this request that she take advice. Mr Khantoumani said that he knew advice had been taken but no copy of it had been included in the bundle.

74 In both translated versions the messages go on to show Miss Dekta saying that the claimant's performance varies. It refers to her messing up the key box update the day before, but on the day of the exchange the flats were cleaned really well very thoroughly, and the beds were perfectly made. That concludes again with the note that she is three months pregnant. In the claimant's version the WhatsApp continue by stating Anna is not that terrible she can make money to she is willing

to work on holidays and New Year so she will be useful. Miss Dekta says that this was her putting the facts up to Mr Khantoumani saying that the claimant was mixed in her performance. We accept Miss Dekta's version of events. She is making a balanced case for the Claimant and it is Mr Khantoumani who straight away suggests seeking advice on sacking her. We have already found that in Miss Dekta's view there were no serious performance issues by the 20th December. As at the 9th January we have found that no other issues that were blameworthy had occurred. There would be no reason for Miss Dekta to suggest the claimant be fired. We find that this is a conversation in the context of should a contract be offered or not as the claimant had not been given one.

75 This is followed by daily report at page 113 on the 30th January which states "Dealing with the claimant she's making some problems" and then. "Checking information government website about dismissal pregnancy women on probation period. We can fire claimant if we can improve it because of fail all… I can easily improve this one". It would appear from this that Miss Dekta had taken advice and had been told that she could dismiss if she could prove poor performance. We accept her evidence given to us during this hearing, which Mr Khantoumani also accepted in cross examination that there were insufficient incidents to justify dismissal.

76 In her witness evidence Miss Dekta says that there was then a meeting between her, Mr Khantoumani and the general manager at which she again put forward the good and bad points for the claimant. It is her evidence that she was told by Mr Khantoumani and the general manager that she was to dismiss the claimant. Her witness evidence was that she did not feel there were any grounds to do so, the performance, while variable, did not justify dismissal. However, she carried out the instruction she was given and met the claimant and duly dismissed her. She sent Mr Khantoumani a text, which was at page 147, which she says were the reasons she gave the claimant for her dismissal. This was not put in writing to the claimant.

77 Miss Dekta explained that this was her first managerial position and she had not been advised that she needed to provide formal paperwork. She was very clear that she was instructed to carry out the dismissal, but she did not believe that it was justified on the grounds of performance.

78 We accept she was not the decision maker. Apart from our general preference for her evidence over that of Mr Khantoumani for reasons explained above, it seems unlikely that a junior manager would be tasked with making decision about firing a pregnant woman when the director has so quickly identified that this is a legal risk.

79 Mr Khantoumani disputed this account. It was his evidence that he was involved in the 9th January WhatsApp exchange he did not attend any meeting with Miss Dekta and the general manager to discuss the claimant's possible dismissal. He did not make the decision to dismiss and could not recall if he was even aware that the dismissal had been carried out until he received the message at page 147. This is not dated. The text itself would suggest that he was aware at that point because it starts by asking a question about the method used to fire the claimant. As stated above we do not accept his evidence and concludes that he decided on dismissal and instructed Miss Dekta to carry it out.

The respondent's general treatment of women on maternity leave

80 The respondent's other two witnesses, the bookkeeper and Timea Sallaine Ambrus both confirmed that they had had periods of maternity leave had never suffered any discrimination. The claimant considered that Mr Khantoumani treated people well when he was loyal to them if they had been long serving but there were other women in the organisation who had not felt they were treated fairly when pregnant.

Conclusion

81 Based on our findings of fact we are satisfied that the claimant has proved facts from which we could infer discrimination has taken place. The burden of proof has shifted to the respondent. It is for it to show on the balance of probabilities that the dismissal was in no sense whatsoever because of the claimant's pregnancy. We have found that there were insufficient performance grounds to dismiss the claimant. We also find that Mr Khantoumani was the one who took the decision.

82 Looking at the chain of exchanges the issue of the claimant's pregnancy is clearly in his mind. He asks how many months the claimant is pregnant and suggest that advice would be needed. On the balance of probabilities, as we have found there was no justification for dismissing the claimant for performance, we conclude that the claimant's pregnancy played some part in the thought processes and did therefore contribute to her dismissal.

83 As this is a claim under section 18 no comparators are required. We have nonetheless considered the comparative evidence the respondent has sought to bring and find that it is simply not relevant as to the circumstances of the claimant's dismissal. The fact that other individuals may have been able to enjoy maternity leave without being fired does not mean that the claimant was not treated unfairly because of her pregnancy.

84 For these reasons we find the claimant was dismissed because of her pregnancy.

Remedy –

Relevant Law

85 We then went on to consider whether to make an award of compensation for financial loss and injured feelings and, if so, how much.

86 The claimant had produced a schedule of loss for the hearing and had submitted that she should be awarded financial losses for the period up to the start her maternity leave. and for 12 weeks after it was due to end. She also submitted that she should be compensated for her injured feelings the sum of £12,000, at the midway point of the middle Vento band.

87 The amount of compensation corresponds to that which could be awarded by the County Court. Section 119 EqA provides that it may grant any remedy which could be granted by the High Court in proceedings in tort. This includes compensation for financial loss. Section 119(4) EqA provides that an award of damages can include compensation for injury to feelings.

88 Discrimination is a statutory tort. The compensation awarded should therefore put the claimant, so far as is possible, in the position she would have been in had the discrimination not occurred.

89 The claimant is under a duty to mitigate her losses. Recoupment does not apply but benefits received in consequence of the dismissal must where relevant, be deducted.

90 Awards for injury to feelings are to compensate for non-pecuniary loss and the sum is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she has received. The purpose of an injury to feelings award is not to punish the respondent. The assessment will depend on our findings as to the particular injury suffered by the Claimant in any given case.

91 The EAT set out principles for assessing awards for injury to feelings in Armitage and others v Johnson [1997] IRLR 162, summarised as follows:

(a) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation should not be allowed to inflate the award.

(b) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

(c) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

(d) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind.

(e) Finally, tribunals should bear in mind the need for public respect for the level of awards made.

92 As Mummery LJ said in the leading case of Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ. 1871, [2003] IRLR 102, [2003] ICR 318:

> "Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury … Striking the right balance between awarding too much and too little is obviously not easy."

93 In Vento the Court of Appeal in England & Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury he boundaries of the bands have been

revised in several subsequent cases, culminating in the decision in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ. 879, which held that the 10% uplift in Simmons v Castle[2012] EWCA Civ. 1288 should apply to awards for injury to feelings.

94 Following this, the Presidents of the Employment Tribunals in England & Wales and Scotland issued Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd. This Guidance updated the bands and provided a formula for updating them for claims presented before 11 September 2017. This was itself updated by an Addendum issued on 23 March 2018.The bands are now:

Upper Band: £25,700 to £42,900;

Middle Band: £8,600 to £25,700; and

Lower Band: £900 to £8,500.

95 Under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, SI 1996/2803 as amended, the Tribunal must consider whether to award interest on past loss of earnings and injury to feelings, regardless of whether or not either party has asked for interest to be awarded (which neither did). Under the Regulations, for past financial loss the interest period begins on the mid-point date (from the act of discrimination to the date of calculation) and ends on the day of calculation. For injury to feelings the interest period begins on the date of the act of discrimination and ends on the day the amount of interest is calculated, reg. 6(1).

96 An award for compensation can be increased or reduced, by up to 25%, if the employer/employee has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULRC(A).

97 Employees have the right to be given written particulars of their terms of employment within 2 months of starting their employment ss1 to 7B ERA 1996), An employee may bring a claim to a tribunal alleging that his or her employer has not complied with these obligations (s11(1)), and either party may bring a reference to a tribunal to determine what particulars ought to have been supplied (s11(2)).

98 The tribunal has the power to determine the particulars of employment between the parties (s12(1) and (2)). There is an additional right to a remedy from a tribunal where a claim has been brought within the list of jurisdictions in Sch 5 to EA 2002.Where under such a claim the tribunal finds for the employee, the tribunal will make an award of 2 weeks' pay unless it would be unjust and inequitable to do so, and may, if it considers it just and equitable in all the circumstances, make an award of 4 weeks.

Findings of Fact

99 There were several agreed facts in this matter. The parties accepted that it was a period of 27 weeks from the date of dismissal to the start of the employee's maternity leave. It was agreed that the claimant's weekly net pay is £300.

100 It was not disputed that the respondent had failed to follow the ACAS code of practice for disciplinary meetings. They had not provided the claimant was sufficient warnings that her employment could be terminated for performance. She had had only one previous written warning and it did not make it clear that any repetition would result in dismissal as it also refers to suspension as an outcome. The claimant was not given any advance notice of the meeting and therefore had no opportunity to challenge the points respondent put to her. Indeed, it is unclear whether the claimant was given any opportunity to comment on the reasons given to her for her dismissal. She certainly was not told that she had the right to be accompanied to such a meeting and she was given no right of appeal.

101 The claimant had produced evidence, which we accepted, showing that the loss of her job in these circumstances had had serious consequences on her personal life. She was of course in the early stages of pregnancy at the time of her dismissal. As a result, she was unable to obtain any other work and had to move to a flat which was in a poor condition because she could no longer afford the rent. She was unable to keep the family dog and also had to sell a number of her possessions. We accept her evidence that the dismissal turned her life upside down and had a major impact on it. She was unable to enjoy her pregnancy as she had hoped, as a result of the dismissal. It was not just the economic consequences of that dismissal which affected her but the fact of being dismissed because of pregnancy. We have found her to be a credible witness throughout these proceedings and accept her evidence of significant impact and distress because of the reason for dismissal.

102 The respondent agreed the claimant's submissions that she had been unable to obtain work because of her pregnancy they also accepted that it would take her at least three months after maternity leave ended for her to obtain other employment.

103 In submissions the respondent's representative said that this was a small employer. It was accepted that things had not been done as they should be and there was insufficient HR support, but it was the respondent's submission that the failure to provide a contract of employment and the failure to follow the ACAS disciplinary code were not deliberate or badly motivated, but due to lack of resource and lack of knowledge.

104 The respondent also asked that any award for injury to feelings be small because this is a small employer. They did not challenge the Claimant's evidence of its impact on her and the distress caused.

Conclusion on remedy

105 We concluded that we should award a compensatory award of 27 weeks' pay from the date of dismissal to the date on which the claimant's maternity leave would have started and 12 weeks future loss from the end of her maternity period. We calculated that as £8,100 for the first period and £3,600 for the second. We applied interest at the rate of 8% from the midpoint to the £8,100 being a sum of £324. The parties agreed these figures.

106 We considered the appropriate ACAS uplift percentage that we should award for the respondent's failure to follow the ACAS code and disciplinary matters. The maximum is 25%. We decided to award 10% uplift to the compensatory award

because we accepted that the respondent was unaware of UK law rather than deliberately flouting it.

107 We considered the appropriate amount for injury to feelings and we awarded £13,200. The Claimant had asked for £12,000 based on out of date figures and not considering the impact of inflation and the 10% uplift arising from Simmons v Castle as she was unaware of this. We therefore applied the 10% uplift to her figure so that her adjusted request was therefore £13,200 and could be considered against the current Vento bands. We then compared this with the current figures set as a range in the March 2018 addendum to the Presidential Guidance. As set out above we accepted the claimant's evidence of its impact on her and the distress caused at a vulnerable point in her life and accordingly awarded the revised sum she requested, which is within the middle Vento band but below the mid-point. This reflects the comparative shortness of her employment and balances that against the injury she suffered.

108 We decided to award three weeks' pay for failure to provide a written statement of particulars. This reflected the fact that the respondent has few resources and is not clear on what UK law requires. We did not feel it was just and equitable to award four weeks in those circumstances.

Employment Judge McLaren

28 January 2019