# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms T Peart**

**Respondent:** **Care Preference Limited**

**Heard at:** **Middlesbrough** **On:** **16 – 17 January 2019**
**18 January 2019 (deliberations)**

**Before:**
Employment Judge JM Wade
Mr Brewer
Mr Stead

**Representation**
Claimant: Mr Turner (lay representative)
Respondent: Mr Anderson (consultant)

# RESERVED JUDGMENT

1 The following complaints of unfavourable treatment because of pregnancy fail:

1.1 that Miss Gamble (previously Metcalf) said she "had enough to deal with without my pregnancy on top";
1.2 that Miss Gamble announced the claimant's pregnancy to the staff team and service user without the claimant's permission;
1.3 that Mr James told her she would have to go on a service user's holiday;
1.4 that staff members insinuated her pregnancy was a hindrance and made her incapable of doing her job.

2 The claimant's complaint of unfair dismissal succeeds: the principal reason for her dismissal was her assertion of statutory rights conferred by the Working Time Regulations 1998.

3 The claimant's Equality Act complaint that her dismissal was unfavourable treatment because of her pregnancy also succeeds.

# REASONS

Introduction, issues and the law

1 The complaints above were clarified at a case management hearing on 1 August 2018 from the narrative in the claimant's lay claim form. The claimant had been employed as a personal care assistant ("PCA") by the respondent care provider to provide care to a particular disabled service user in her own home.

2 In relation to the allegations of unfavourable treatment prior to dismissal, the issues were largely factual. We made findings of fact about the matters in dispute and the context; we then had to ask whether any proven treatment amounted to subjecting the claimant to any other detriment within Section 39(2)(d)of the Equality Act 2010, and if so whether that unfavourable treatment was because of the claimant's pregnancy (Section 18(2)(a).

3 As to the dismissal complaints, the claimant commenced her claim form narrative in this way: "I was dismissed due to using dependency leave as I was unable to cover a shift that was not my original shift". She went on: "I had my two children…and was unable to find someone else to provide care for them 3.30pm on an afternoon at short notice …I had just finished a 49.5 hour shift…I have been home for three hours when they asked me to return to work. I also live a 90 minute drive from work and was due back at work for a 96 hour week (two 48 hour shifts) four days later…..I also politely emailed Mr James myself to further explain my sickness. I had a doctors note for my sickness. I was suspended however Mr James refused to state why until I returned to work. Despite revoking permission to give me 48 hours of work per week, Mr James continued to give me 96 [hour] work weeks knowing I was under immense stress and also pregnant."

4 The claimant did not have the required two years' service and therefore had to prove an impermissible principal reason for dismissal. She pursued three such reasons during the case management hearing and in this hearing: pregnancy/maternity leave (Section 99(3)(a) of the 1996 Employment Rights Act); in the alternative asserting a statutory right to time off (Section 104 of the 1996 Act); and further the claimant's proposal to forego or refusal to forego a right conferred by the Working Time Regulations (her withdrawal of her consent to work in excess of 48 hours per week). The respondent's case was that the principal reason for the claimant's dismissal was her conduct, in that she failed without good reason to be available when called upon for on call duties in accordance with its policy. The question for the Tribunal was, what was the principal reason for dismissal?

5 For the Equality Act dismissal case, applying Sections 39/18 we asked: was the respondent's decision to dismiss the claimant materially influenced by her pregnancy? Was her pregnancy an effective cause of the dismissal? These are different questions to the "principal reason for dismissal question".

Evidence

6 The parties had been directed to prepare and exchange written witness statements in advance and they had done so. The Tribunal heard the claimant's oral evidence first and then heard Ms Stuaffer, a former colleague who worked with the claimant looking after service user, "SU", Miss Gamble (formerly Metcalf), the team leader of SU's care team, Mr Brown, who met the claimant on 24 April, and Mr James, the founder, owner and managing director of the respondent. The Tribunal also had a short uncontroversial statement from Ms V,

a former colleague concerning the claimants' preparedness to help out with shifts before her pregnancy. Ms V did not attend the Tribunal.

7 The claimant had given particulars of the fourth allegation above (that staff members insinuated she was incapable of doing her job), in the case management summary as follows: that Ms V had complained about being called in to assist with a hair appointment for SU on 8 December, and Ms Stauffer had complained to SU on a weekly basis from December to March about the claimant's ability to manage when she became larger through pregnancy. In her written statement the claimant's only mention of the "insinuation" allegation was that Ms Stauffer had commented to the claimant on two occasions in March 2018 about her ability to manage later on in her pregnancy. The Tribunal did not give the claimant the opportunity to enlarge her evidence in this respect.

8 Mr James wished to add to his oral evidence to the Tribunal concerning matters which could and should have been included in his witness statement; we did not permit him to do so, but explained that in all likelihood the information would be provided in the course of questions from either the claimant's representative or the Tribunal. We also asked him before he was released if he felt all relevant matters had been covered, and he considered that they had been.

9 The Tribunal also had a bundle of relevant documents to which there were three relevant additions: call records from Mr James' mobile telephone; an expectant mother risk assessment conducted on 10 January 2018; and a letter of 19 March inviting the claimant to a meeting.

Findings of Fact

10 The claimant joined the respondent business in November 2016; she had two children under the age of five. Her post was as PCA in a team providing round the clock care in her own home to SU, a wheelchair user with insulin dependency. SU had lifting equipment, but there was a need to assist her manually when transferring between seats or locations outside her home. The claimant was trained on the relevant techniques to minimise risk.

11 As to working hours, the claimant's contract of employment provided: "no more than 48 hours per week averaged over a 17 week period". The job specification included a requirement on the claimant "to activate and participate as necessary, in contingency arrangements and emergency cover arrangements should a team member be unable to fulfil his duties as or when required". The relevant "on call policy", with which the claimant was familiar, provided:

"*The person "On Call" is expected to maintain their ability to do the work and be responsive at extremely short notice. To do this they should not be under the influence of any alcohol or substances, be a distance further than 90 minutes travelling time away from attending the workplace and have adequate mobility to reach the place of work. As the work with the client covers 24 hours so the need for someone to be "On Call" also covers this time frame. It is important that the person "On Call" is contactable and as such must keep their mobile phone on and within earshot/touching distance at all times…..Failure to adhere to this policy cannot be tolerated as it would put the safety of the client at risk. Should an employee find themselves unfit for their "On Call" duties or be unable to take on the responsibilities that week, they should contact Care Preference*

*management immediately by phone and alternative arrangements should be made and confirmed. If management discovers that an employee who is "On Call" turns out to be uncontactable or unable to carry out their duties, a formal meeting will be arranged to ascertain reason, though any disciplinary actions to be taken will remain at the managers discretion".*

12 In the past the respondent had taken a firm line in four cases where PCAs had not fulfilled their on call obligations. Dismissal without notice had followed in the following circumstances including: lack of childcare aggravated by allegations of psychological abuse of a service user, swearing, gesturing and poor care (1); failing to attend a shift, being uncontactable and failing to attend a disciplinary meeting (2); refusing to undertake on call duties because of a second job commitment (3); taking four hours to hear back from an on call staff member, whose reason was that they were unwell (4). This last employee had worked for the respondent for three years; the others were all of much shorter service. Mr James took all these dismissal decisions and within a very short time of an incident arising and there had been no need for suspensions of the employees concerned.

13 There had been occasions in 2017 (August and November for example) where the claimant had been unable to cover shifts (either on call or a regular shift) and she had alerted the respondent in advance and Miss Gamble had covered for her. Equally the claimant had assisted to cover others in the team when she could.

14 There was also a secondary on call system, but for SU, with a team of four regular PCAs and Miss Gamble, the use of other employees to provide on call cover was not in accordance with her wishes: she liked her regular team to attend and Mr James encountered resistance from SU if he tried to introduce a wider pool of PCAs. The respondent's contract to provide care to SU and her brother was worth over £260,000 per year. The team of four PCAs at the material times were: Ms V, Ms K, the claimant and Ms Stauffer.

15 The PCAs earned a salary paid monthly, rather than an hourly rate. When the claimant started her employment this was £18, 000, and by her dismissal this had risen to £19,000. Attendances on call and overtime were not remunerated, which meant that if 48 hours' were worked every week (or treated as paid holiday), then the equivalent hourly rate was less than the minimum wage. The respondent's hours and rota "portal" therefore had to manage things very carefully and it was, as Mr James' described, subject to imperfections. Recording of hours worked involved reliance on the rotas, but also manual adjustments for sickness, holiday and so forth.

16 The parties were in dispute about the hours worked by the claimant in the 17 week period prior to a request by the claimant to limit her hours. Mr James included a table of her hours worked in his witness statement (there was no electronic clocking in or out, or other reliable record, before the Tribunal). Mr James did not accept the claimant's claim that she had worked in excess of the average (because she had relied solely on the rotas to arrive at a calculation, he said). The claimant did not accept Mr James' table. For example, it did not account for a period when the claimant's hours extended while she waited for a colleague delayed by snow; nor did the claimant accept his record of February hours because in that period a colleague resigned causing disruption. There

were also clear errors which could not be explained. In the event the Tribunal did not need to make a finding as to the average in the relevant period and was unable to do so reliably.

17 The respondent also had a "Time off for Family and Dependents Policy", which provided that staff were allowed time off to attend to an emergency situation involving a dependent. The procedure provided that "staff must inform Care Preference management at their earliest convenience as it will require cover", and then set out the right people to inform, and in which order.

18 The claimant had an unblemished record throughout her training and work with SU. There were regular reviews and contact notes recorded by Miss Gamble and others. Miss Gamble last recorded on 19 December 2017 that she "was more than happy with TP's performance and feels she is performing well against her job description at all levels"…"Communication is fantastic with [the claimant]". She went on to record that the claimant had a [child being diagnosed with a health condition] who might require short notice hospital admission and Miss Gamble recorded that she understood this completely. They clearly had a good working relationship.

The claimant's pregnancy

19 On or around 20 December 2018 the claimant saw SU had an external hair appointment and would therefore need lifting support to transfer to the hairdresser's chair. She had not yet reached the twelve week point in her pregnancy, but because of previous complications considered she needed to tell Miss Gamble. She also said wanted to tell people herself (be that SU or other colleagues), although she accepted Mr James would have to know. We accept the claimant's evidence that the gist of Miss Gamble's response was that she had enough on her plate without the claimant's pregnancy on top.

20 Miss Gamble could not recall the response. She did not make a note of this news from the claimant in her contact record (whereas she had regularly recorded contact with the claimant in the past). There was also no attempt by Miss Gamble to organise a risk assessment for the claimant as an expectant mother. She simply arranged for another colleague to cover the hair appointment lifting. This suggests to us that Miss Gamble was busier than she would have liked at this time for a number of reasons, including managing the care of SU and other service users. A negative response to the pregnancy news was inherently likely. We bear in mind that on 8 January the claimant referred in correspondence to a "poor response" from the respondent to the news and the Tribunal considered this a reference to Miss Gamble's reaction at the time. These are reasons we accepted the claimant's evidence about Miss Gamble's reaction.

21 The claimant also told Ms V (another team member) of her pregnancy herself at around this time. SU had become aware of the news because she had asked the claimant if she knew the gender of the baby, or words to that effect. We accept Miss Gamble's evidence that she did not "announce the pregnancy to the staff team or to SU but waited for the claimant to convey this information". The source of the claimant's belief that Miss Gamble had told SU, was SU. Miss Gamble was clear in her evidence that the only person she had told was Mr James, who clearly needed to know. We accept that evidence. SU may well have been mistaken. Given a discussion within the team about rotas, which was to

follow in the short period around Christmas and the New Year, and the communications between the team and SU generally, it would be unfair to consider Miss Gamble the source of any "announcement" in these circumstances. The news was known, it was as simple as that; and that included because the Claimant had told at least two people.

22 Pausing at this point in the chronology, the Tribunal does not consider Miss Gamble's single unfortunate remark, which was a comment born of her own workload, sufficient to amount to a contravention of the Equality Act by "detriment" or unfavourable treatment because of pregnancy. Deploying our industrial knowledge to the context of this remark, in a workplace when pregnancy news is relayed, reactions can be neutral and cautious if the communicator's feelings are unknown, or they can be positive or congratulatory, or indifferent, or negative. The fact that Miss Gamble reacted in a negative way was undesirable, ill advised and unwelcome to the claimant, but it was also a human reaction to Miss Gamble's own circumstances. And it was an exception to her undoubted support for the claimant and their good relationship. All of us have a responsibility to have some tolerance for, and resilience to, less than welcome reactions to news we might share, and in our judgment, the claimant has an unjustified sense of grievance about this single remark: it does not amount to a contravention of the Act in context and of itself. That is not to say that it does not inform and provide background to subsequent events.

23 As to that background, the claimant had felt that her relationship with Mr James was "fantastic" until this point, and she had frequently covered shifts on call, or to assist generally. Mr James' wife is a midwife, he has a family and the respondent business has employed women on maternity leave, either directly or through TUPE transfer, to whom it has paid statutory maternity pay. These are not circumstances where one would foresee unfavourable treatment of the claimant.

24 During January, February and the first two weeks of March, the claimant had short interactions with SU's other regular PCAs on shift changes. Ms Stauffer, in particular, questioned in March on two occasions how the claimant would manage when she was more heavily pregnant. She did not do so unkindly; she considered herself and the claimant to be friends and she was expressing her concern, albeit the claimant found this upsetting because at the time she was also feeling less resilient than usual for the reasons which appear below.

25 As to the "insinuation" allegation, a concerned remark in March on two occasions by Ms Stauffer in the context we describe is not a contravention of the Equality Act. We repeat our earlier comments as to resilience. This complaint also fails, but again the fact that the remarks were made is important context because it indicated the interdependence of team members where SU was reluctant to have cover from outside the team.

<u>The requirement to go on holiday with SU</u>

26 The claimant had looked at the January rotas in December and planned childcare and an antenatal appointment around this. She then asked Mr James to publish rotas going further forward in order that she could plan further. When he did so, she discovered things had changed and she was expected to work some part of every weekend in the coming months. This was a change from the

previous rota structure, where she had typically worked one weekend in four, and there was a negative effect on her planned childcare. She wrote a short email protesting about the new rotas on Friday 5 January to Miss Gamble, which was a typically friendly and informal exchange between them, to which Mr James replied straight away because he had created the new rotas. He referred in that email to the claimant's "desires" in relation to the working pattern.

27 The claimant then wrote a much longer email on 8 January explaining in detail her concerns, including that "finding childcare to suit these hours is impossible", that she felt the change in rota allocation was influenced by the inconvenience of her pregnancy, asking, "why change something that was not broken", indicating the impact on all the team members by the changes, and that when she started she was told she would work one weekend a month, whereas the new rotas allocated to her weekend working every week for eight weeks. She also pointed out the need for an expectant mother risk assessment for tasks she was required to do while on shift, and referred to the right to time off for antenatal appointments and that she would be speaking to ACAS. Mr James considered her approach slightly abrasive and arranged to meet with her.

28 They met on 10 January at SU's home. Mr James carried out an expectant mother's risk assessment. The risk assessment did not identify fatigue or other risk from long hours, but referred the claimant to the usual manual handling policies and procedures – there were no adjustments recorded other than the claimant must not do standing support of SU. As to travelling and flights (because the claimant had previously accompanied SU on holiday), this was to be reviewed in February. The claimant mentioned in earshot of SU that she had a doctor's appointment in February, due to previous complications in pregnancy and may not be able to fly; Mr James responded that she would need medical evidence, otherwise she would need to accompany SU on holiday. Ms Stauffer had already presented medical evidence that she could not fly and Mr James' options for providing holiday support to SU were therefore narrowing.

29 Addressing the Claimant's distinct complaint that Mr James told her she would have to go on SU's holiday, the facts we have found are more subtle than the Claimant's interpretation. There was a plan to review matters and medical evidence in February: this was not a simple instruction that she must accompany the holiday, come what may. The context includes that the claimant had accompanied SU on previous holidays, and that she and Mr James knew from that experience that the physical strain could be considerable. The claimant also knew she had previously arranged for her partner to join the holiday party (albeit that had not been known to Mr James at the time and was arranged with SU direct). The context includes the respondent's obligation to provide care to SU during travel and holidays. In our judgment it is not detrimental treatment, or unfavourable treatment, to convey to the claimant that as with other employees, medical evidence would be needed to excuse particular duties, such as travel, not least because it would assist Mr James in managing SU's and family's expectations. Weighing all these matters, as a single complaint of unfavourable treatment, it does not succeed because the claimant's sense of grievance is unjustified. We accept that the information or instruction from Mr James was unwelcome to her, because it suggested that she would not be taken at her word and appeared to give little credit to her concern about pregnancy complications experienced previously. It was not the most supportive of instructions, but it was a reasonable position for him to take.

30 After that meeting Mr James communicated a new rota pattern, which appeared to suit everyone. He agreed to pay mileage expenses to the claimant in respect of additional travel caused by the new shift pattern. He did not review the claimant's ability to fly in February.

31 When SU's father was in touch about SU's holiday plans that month, Mr James replied that the claimant would be okay to travel but would need another PCA to do moving and handling duties. Mr James' statement to SU's father was at best, optimistic, given he knew the claimant considered she may well not be fit to fly. We heard from the claimant that she did not, in fact, see the consultant about her pregnancy until later on (which we understood to be after February), but had kept attending scans to check for a low lying placenta. It may well be that Mr James considered that it was fair to say she was "okay to travel", in the absence of medical information that she would not be. His approach was indicative of the priority to be given to SU's family and SU that she would have the PCAs she wanted for her holiday and that he would resolve any issues that arose.

<u>The on call issue</u>

32 In the week commencing Monday 5 March 2018, the claimant was rostered to work 8.30am Tuesday to 8.30am Thursday, (6 to 8 March), and was then primary on call responder over the weekend. Ms Stauffer was the on call responder for the claimant when the claimant was scheduled for 96 hours (two forty eight hour shifts) the following week. A member of the team then resigned and called in sick; the claimant was contacted by Mr James on the evening of 7 March so that he could speak to SU and let her know of the need to change care arrangements. The claimant indicated at that point that she could not work beyond 8.30am the next day because of her own children and Mr James contacted an alternative PCA from another team, Ms A. He then rang the claimant and SU to say so. Ms A was delayed by snow, but would be there, Mr James said, and the claimant waited until she arrived at around 9.30am.

33 Mr James then called to the claimant to ask her to attend for 6pm on Friday 9 March, under her on call obligation, for the weekend shift (there was a dispute about when, precisely, this call took place, but it was unnecessary to resolve because the content was not in dispute). The claimant said she could not do so because of her children, and asked about the secondary on call responder. The claimant also said she wished to be removed from her on call duties as she could not fulfill them and was unhappy with the number of hours she was currently being asked to work.

34 Mr James organised different cover over that weekend and the claimant then worked her next scheduled shifts from 12 to 14 March 2018, and was then due to work the weekend commencing 6pm on Saturday 17 March to 8.30am on Monday 19 March 2018. Mr James did not seek to relieve her of that second 48 hour shift, even though she had informed him of being unable to work longer weekly hours.

35 On 16 March the claimant notified Miss Gamble and Mr James that she was unable to attend the weekend shift on the advice of her GP due to ill health giving more than 24 hours' notice, and that she was due to see her GP on 25

March. She also told Mr James by email that ACAS had advised her it was illegal for a pregnant woman to work over 48 hours within a week. She said "if I previously signed to state that I am happy to work over 48 hours within the same week this no longer stands due to my change in circumstances and I request this be withdrawn immediately as I will not be working over 48 hours after I return from sickness leave".

36 Mr James then wrote to the claimant on 19 March notifying a meeting regarding "issues": "you did refuse to attend your On Call duties"; "you did fail to follow procedure for enacting sickness". The meeting on 22 March was not described as a disciplinary hearing in terms, but the matters were framed as disciplinary charges and Mr James had used the same template letter as he had used to invite previous PCAs dismissed in connection with on call attendance. Some time between 19 March and 25 March he removed the claimant's remote access to the portal for her to be able to see her shifts. He did so when he was having to reorganise shifts to cover her absence going forward.

37 The claimant, on receipt of the meeting invite, replied by email saying she could not attend, but explained that her on call failure was "an issue with my children and I placed dependency leave in" (which she said she was well within her rights to do). She also explained she had notified Miss Gamble of the sickness absence and she was concerned about the lack of support for her own mental health and that the respondent's attitude had changed since announcing pregnancy.

38 Mr James indicated he would move the meeting date, but would insist on it taking place on her return. In the event, the claimant was in touch by telephone on 25 March to ask how to provide her fit note (email or post etc), and in conversation with Mr James she asked why she could not view the portal to see her upcoming shifts. Mr James told her she was suspended, or words to that effect. She then emailed her fit note, and indicated how stressed she was by these events, saying she was in no state to talk about matters over the telephone.

39 Mr James then organised a meeting on 24 April and asked Mr Brown, one of a handful of managers employed by the respondent, to conduct that meeting and ask the Claimant for her explanation of the two "charges". Conducting that meeting was part of Mr Brown's management qualification. He called the meeting a "fact find", and was clear that the claimant would be on full pay for the duration of her suspension and that no decision would be made that day by him. A note taker was present.

40 Mr Brown heard the claimant's explanations and recorded them; and he recorded all the points she made. In relation to the on call issue, her explanation was lack of childcare particularly in relation to unplanned overnight working, the cost of that, the unpredictability. In relation to the sickness reporting, she said she had contacted management in good time, rather than the emergency line. Mr Brown was satisfied with that explanation. The claimant also made other points including that she was concerned she had worked excessive hours and that ACAS had asked her for the start and finish dates of the 17 week average period; how, on the portal, the first and second on call person was identified; the claimant's childcare difficulties, and childcare costs; whether she could work with a different service user because she was concerned she could not accompany

SU on overseas travel; her unavailability for a short period in May; and concern that pay for her additional mileage expenses had been less than expected.

41 Mr Brown considered the matters without any access to the claimant's employment history, her good record, the previous emails between her and Mr James, her fit notes, or that she had informed the respondent of the stress placed upon her by excessive working hours in light of her pregnancy. He spoke to Mr James by telephone, who was robust in rejecting any idea that the claimant was unclear about being on call at the relevant time. Mr Brown recommended the claimant's dismissal for the on call issue, but recommended that she had followed the sickness absence reporting policy by reporting to Miss Gamble and that charge could not be upheld.

42 Mr James agreed with that decision and worked with Mr Brown to produce a letter the next day dismissing the claimant summarily and without notice pay. That letter was dated 25 April 2018. The letter addressed all of the claimant's points, setting out an average working hours from 20 November to 18 March of 42.8 hours. The letter confirmed the outcome was dismissal, with the only explanation of the decision appearing to be: "..There is an element of childcare where Care Preference recognises that its employees will need time off for their dependents; This should be communicated to Care Preference at the earliest opportunity so that alternative arrangements can be put in place….where Care Preference can support staff it will, but it relies upon clear communication and timeliness. As soon as any issue arose in the ability to deliver the "On Call" duties, they should have been communicated to Care Preference as per the policy."

43 The claimant appealed her dismissal on 4 May, explaining she considered she was unfairly dismissed, and discriminated against, including because of her clean record, that she had covered colleagues in the past, that she had done overseas trips with SU, and that her April pay was wrong. Mr James held a meeting to hear her appeal on Friday 11 May, which discussed a number of points, the last being that she was let down on 8 March because her partner was unable to return to do childcare that weekend (which was a dependency situation, she said). The claimant's partner was in the forces and there was discussion of his inability to return home on 8/9 March because he had been deployed, also at short notice. Mr James asked that evidence of that situation be provided by 14 May. When it was not provided by that date he confirmed the claimant's dismissal in a letter dated 17 May 2018, saying that there was no further evidence to overturn the original decision.

Discussion and conclusions

What was the principal reason for the claimant's dismissal?

44 The principal reason for a dismissal comprises the facts known and beliefs held which cause dismissal. It is the employer's reason, and the decision maker on behalf of the respondent company was Mr James, rather than Mr Brown. Mr Brown's role was to conduct a fact finding meeting with the claimant and to make a recommendation. His recommendation was dismissal for the failure to perform on call duties. He knew there had been dismissals for that in the past, and he well understood the respondent's on call policy. In short, he did not consider the lack of childcare at the point of the claimant being asked to perform on call to be

an acceptable reason, because of the lack of notice, and he considered, having spoken to Mr James after the meeting, that the claimant knew she was "on call". He also knew that childcare difficulties could be a good reason, or an acceptable excuse, not to attend on call in some circumstances, but he did not consider the claimant's circumstances to be those. In his mind she had simply not put sufficient arrangements in place for her on call obligation. She did not tell him about the possibility of her partner covering the childcare, but letting her down at the last minute, in the fact finding meeting. Had Mr Brown known of that, he might have taken a different view, he said.

45 Mr Brown's belief that the claimant's lack of childcare was not a good reason to fail to provide on call cover, was certainly part then, of the respondent's beliefs, but did that belief cause the dismissal? In our judgment it did not. Mr James was the decision maker (that was not disputed by Mr Brown). In all senses Mr James was responsible for the dismissal: he was the controlling mind of the respondent; he had taken all previous dismissal decisions; this exercise was a training exercise for Mr Brown; Mr James controlled the information that was before Mr Brown (he did not provide the earlier mail exchanges concerning working hours); he had the ability to endorse or disagree with Mr Brown's recommendation, and he had the ability to overturn the decision on appeal, when cover by the claimant's partner was raised. The recommendation which Mr Brown gave accorded with Mr James' wishes, but it did not cause the dismissal.

46 It was submitted on behalf of the respondent, relying on the Equality and Human Rights Commission Code on Employment, paragraph 8.19, that although there is no need for a comparator in Section 18 cases, the treatment of the four other dismissed employees was instructive and supportive of the respondent's case that its reason for dismissal was singular and straightforward: the claimant had not fulfilled her on call duties, and without good reason.

47 That was certainly Mr James' oral evidence to the Tribunal; he said her request to withdraw from working more than 48 hours in a week, and her pregnancy, and an alleged exercise of a statutory right to dependency leave played no part in his thinking. His was a singular reason for dismissal arising out of the failure on 8 March to confirm attendance for an on call shift commencing on the Friday.

48 The difficulty with that position was that the dismissal cases did not, on closer examination, bear out comparability with the claimant's situation. In all the comparator cases Mr James had acted promptly to convene a meeting and dismiss the individual concerned, permitting them no further contact with the service user in question. That may have been because in each case there were aggravating circumstances. For example, in the only childcare related case, the employee told Mr James that they had made a call to try and source childcare immediately, but in fact that turned out not to be the case and Mr James considered he had been lied to, and that there had been an attempt to manipulate the service user in that lie, characterising that as psychological abuse.

49 In the claimant's case, there were no aggravating circumstances; she had not lied; she had simply said she could not cover the shift for lack of childcare. Mr James did not convene a meeting immediately after the failure, and the claimant was permitted to attend her next shift with SU from Monday to Wednesday as

usual, in contrast to the dismissed employees. As far as she was concerned her explanation of childcare difficulties had been accepted, and cover had been arranged, and she had no need to address it further by email or otherwise. Mr James' explanation for the delay in inviting her to a meeting was pressure of work. In our judgment, he may well have been busy, but had there been aggravating circumstances which would have resulted in dismissal or if there had been concern on his part that a service user might be prejudiced, he would have acted straight away as he had done in other cases.

50 The idea of a meeting was not communicated in the calls on 8 March. The invitation came after the claimant sent her email notifying sickness absence and putting in writing that she could no longer work in excess of 48 hour shifts due to her changed circumstances. The claimant had already indicated by telephone to Mr James that she was unhappy with her hours and sought to be removed from on call duties as she could not fulfill them. Her email confirmed that position in stark terms, and included having had advice from ACAS that it was illegal for a pregnant woman to work in excess of 48 hours. It was at this stage that Mr James documented disciplinary charges or "issues" against her, removed her from the portal, and invited her to a meeting.

51 We note that Mr James considered the claimant's objections to shift pattern changes in January to be "slightly abrasive" in tone, and he considered her objections were about her "desires" (rather than taking her practical difficulties in securing childcare at face value), and that her approaches to ACAS revealed some kind of sinister motive: that was the gist of his evidence to the Tribunal. That was surprising when the respondent knew enough of the claimant's circumstances to appreciate that she had a number of matters to plan to be available to work, and pregnancy and pregnancy appointments simply added to that burden. The claimant's care of SU and communication had also previously had been highly praised and she had enjoyed good working relationships. The respondent was equipped to manage maternity leave and maternity pay in the workplace. Why then did matters escalate to disciplinary charges after the claimant's email, when it was plain on the face of it that the claimant had given as much notice as she could about illness, and contacted Miss Gamble, and there was no disciplinary case to answer in that respect?

52 The gist of Mr James' evidence when this was suggested to him was that the principle of on call attendance was such that the respondent adopted a zero tolerance approach: if it did not the consequences for service users could be very serious. He also said that in all the circumstances it would have been much easier for him to have kept the claimant, rather than dismiss her. This evidence was compelling. On the other hand, he could not recall when he had removed the claimant's portal access (other than when he was in the system adjusting rotas), and when asked about his action to convene a meeting following the claimant's email, he said that the request to limit hours had passed him by (and was therefore no part of his thinking) in dismissing the claimant: "I did n't even pick that up in the email" and he was only focused on the need to meet concerning the "issues" he said.

53 We regard this evidence as inherently unlikely and incredible in the circumstances: the claimant had already expressed her thoughts and her concern for her own welfare by telephone; the respondent's operating, financial and service user care model depended upon preparedness to work in excess of

48 hours and to respond to on call cover without further pay; the team of four in which the claimant worked, had lost or was losing two of its number and long hours working was required; SU's family had been in touch to say how upset she was at the loss of two PCAs; SU had objected when the claimant had complained about her 96 hour week, albiet SU had then apologised. This last detail may not have been known to Mr James, but he held the same view about the burden of forty eight hour shifts as SU (and hence arranged 96 hours in one week for the claimant): he considered that as the PCAs slept at SUs premises, many of their working hours were spent sleeping and long hours working had to be seen in that context and were inherently less of a burden.

54 In these circumstances, rather than a withdrawal of preparedness to work longer hours passing him by, we consider that when the claimant first mentioned it by telephone, much like the claimant's notification of likely difficulties with flying, Mr James considered he could ignore it and carry on in an attempt to deliver the wishes of SU and her family. However, when the claimant documented that she was no longer prepared to work in excess of forty eight hours, and had contacted her GP to exempt her from work that weekend, matters were brought to a head. It was after that email that Mr James enacted a suspension and in our judgment decided that the claimant would not be coming back to work. By analogy with the other cases, this was the aggravating factor, the matter which caused dismissal. The fact that the claimant's dismissal took place more than a month later arose because of the claimant's ill health and inability to attend a meeting. In Mr James' mind, in our judgment, the decision was made much earlier.

55 The reason for a dismissal is not necessarily a question of chronology and context; it is the facts and matters which at the time caused dismissal. Mr James may well be genuine in recalling the on call issue as his reason for dismissal and maintaining the dismissal on appeal: memory is a reconstructive process. Clearly the on call issue was part of the context, but we do not consider his recollection of it as the real cause of the dismissal to be reliable, and we reject it.

56 Section 101A(1) of the Employment Rights Act 1996 relevantly provides: "*An employee who is dismissed shall be regarded …as unfairly dismissed if the reason (or if more than one, the principal reason)..is that the employee (b) refused (or proposed to refuse) to forgo a right conferred on him by [the Working Time Regulations].*

57 In our judgment, the principal reason for Mr James' dismissal of the claimant and maintaining that dismissal on appeal was her proposal that she would no longer work in excess of the Working Time Regulations limit on average working hours, which was communicated in writing in her 16 March email. The fact that she also alleged that it was illegal for her as a pregnant woman to be required to work more than forty eight hours in a week, simply rendered her communication all the more intollerable: Mr James' had previously been critical of the claimant taking advice and communicating practical difficulties. The context of his decision included the needs and wishes of this particular client SU, the value of the contract, and the model and shift patterns operated by the respondent.

58 Whether in fact the claimant had worked in excess of the seventeen week average in the previous period, or would have done so had she complied with the on call requirement and 96 hour week, is not a matter we need to determine. The

calculation in Regulation 4 is not straightforward, (for example holidays extend the reference period), and as we indicated above, we did not have reliable data concerning the claimant's working hours to make the necessary findings. It could well have been the case that she would have exceeded the limit had she not become ill, and her belief was genuine. In our judgment, had the on call issue been the principal reason for dismissal, as Mr James recalled, the disciplinary charge and dismissal would have been laid promptly, and the claimant would not have been permitted back to work for SU the following week.

59 The 1996 Act requires us to identify the principal reason for dismissal and we have done so above. The claimant also relied on Section 99 reasons (as prescribed by the Maternity and Parental Leave etc Regulations 1999). These relevantly provide: *An employee who is dismissed is entitled under Section 99 of the 1996 Act to be regarded …as unfairly dismissed.. if the reason (or principal reason) for the dismissal is of a kind…. connected with [the pregnancy of the employee][the fact that she took or sought to take time off under Section 57A of the 1996 Act].*

60 The result of our determination of the principal reason is that the claimant's unfair dismissal is well founded.

61 It is unnecessary to consider the further 96 Act reasons advanced, but in light of our findings of fact, the Section 57A reason does not succeed - it was not the real reason for dismissal.

62 As to whether the dismissal for withdrawal of longer hours working was also a reason connected with pregnancy for Section 99 purposes, it is unnecessary to determine the issue, but it seems likely, given our conclusions on the Equality Act case below.

<u>Was the claimant's pregnancy an effective cause of her dismissal? Was it a material influence on Mr James' decision to dismiss her?</u>

63 We have found that the claimant's refusal to work in excess of the Working Time limit in her 16 March email to Mr James was the principal reason for her dismissal. That refusal was expressed in writing in these terms: "She also told Mr James by email that ACAS had advised her it was illegal for a pregnant woman to work over 48 hours within a week. She said "if I previously signed to state that I am happy to work over 48 hours within the same week this no longer stands due to my change in circumstances and I request this be withdrawn immediately as I will not be working over 48 hours after I return from sickness leave."

64 Was the claimant's pregnancy then, a material influence, or effective cause of her dismissal by Mr James? The claimant had developed concerns about the risk for her pregnancy from long hours in a setting where long hours were being required. Mr James dismissed her because she had clearly communicated a refusal to work those longer hours going forward. Mr James' objective and vocation was the delivery of care in accordance with the respondent's contracts, and in this case, SU's wishes for care structure and continuity. Reconciling the claimant's concerns for her pregnancy and the wishes of SU presented a considerable challenge. In all the circumstances of this case the pregnancy and the refusal are indivisible and the pregnancy cannot be anything other than a material influence or effective cause of the dismissal. The

claimant's complaint that her dismissal was unfavourable treatment because of pregnancy also succeeds. A separate order addresses the management of remedy in this case.

Employment Judge JM Wade

Date 21 February 2019

Note
Judgments and reasons are published online soon after they are sent to the parties.