EMPLOYMENT TRIBUNALS

Claimant: Ms E J Russell Abbott

Respondent: Waterhouse Property Management Ltd trading as Sellet Estate Stables and Stud

Heard at: Manchester **On:** 5-7 December 2018

Before: Employment Judge Batten
Ms E Cadbury
Mr J Flynn

REPRESENTATION:

Claimant: Mr T Rigby, Counsel
Respondent: Mr P Clarke, Consultant

JUDGMENT having been sent to the parties on 13 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant claimed discrimination because of pregnancy and automatic unfair dismissal because of pregnancy. The Tribunal hearing took place over three days (5, 6 and 7 December 2018).

Evidence

2. The Tribunal was provided with an agreed bundle of relevant documents albeit that page 49 was changed so as to remove some of the redactions on the original page 49.

3. The Tribunal was given witness statements from the claimant and from Paula Smith, a client of the respondent. In addition, the Tribunal was provided with a witness statement and a supplemental statement from Abigail Leigh, whom the Tribunal were told was attending on the second hearing day but, unfortunately, it was learned that Ms Leigh's child had been admitted to

hospital and she was therefore unable to attend the hearing to give her evidence. For the respondent, the Tribunal was given witness statements from Hilary Waterhouse - the respondent's Director, Freddie Porter-Shaw - the former Yard Manager, and Joanna Waterhouse, the Office Manager. All witnesses were subject to cross examination, save for Ms Leigh.

4. At the beginning of the second hearing day, the Tribunal were also referred to a previous application by the respondent, on 20 November 2018, to postpone the hearing. There followed some consideration of that application but such does not affect this Judgment.

The Issues

5. The issues to be determined in this case were decided at a preliminary hearing on 9 May 2018, and are recorded in the case management Orders as follows:

Unfair dismissal – s99(1) Employment Rights Act 1996

5.1 Was the claimant dismissed? This is admitted.

5.2 What was the reason or principal reason for the dismissal? The respondent asserts that it was a reason related to capability namely that the claimant did not perform her work to appropriate standards. The claimant asserts that is was because she was pregnant.

5.3 It is likely that the resolution of the factual issue would determine the complaint of unfair dismissal.

Section 18 Equality Act 2010: Discrimination because of pregnancy.

5.4 Did the respondent subject the claimant to unfavourable treatment in dismissing her because of her pregnancy? The parties agreed that this was a factual issue.

Time/limitation issues

5.5 The claim form was presented on 18 March 2018. Bearing in mind the effect of section 207B of the Employment Rights Act 1995 it appears that the Tribunal has jurisdiction to consider both complaints.

Findings of Fact

6. The Tribunal made its findings of fact on the basis of the evidence before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Where conflicts of evidence arose, these were resolved on a balance of probabilities and, in doing so, the Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

7. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact.

The Tribunal has not simply considered each particular allegation, but has also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

8. The findings of fact relevant to the issues to be determined are as follows.

9. On 1 February 2017, the claimant started work for the respondent as the Show Groom. The respondent is a small business consisting mainly of livery stables. Mrs Hilary Waterhouse is the Director and owner. Her daughter, Joanna Waterhouse, is the Office Manager. Freddi Porter-Shaw was then the Yard Manager. Rachel Jackson was the Deputy Yard Manager and the claimant was the show groom. These 5 individuals were full-time employees. There were also 2 part-time employees, and some "juniors" who the Tribunal was told were aged between 14 and 16 years old, and there was Trevor, the 'Estate Manager' and handyman, who worked full-time but not in the yard.

10. The claimant was given a contract of employment which provided for a probationary period of 6 months. She was also given a job description which appears in the bundle at page 28 and states its purpose as:

"*You are required to maintain all aspects of the full and working liveries care, preparation for competition, as well as work on the yard mucking out stables and turning horses out and in. Riding to include schooling/hacking, lunging, working with young or problem horses and stallions*."

11. There is a paragraph in the job description which says that:

"*As part of your role you will be required to stay away competing, this is often on weekends. Whilst there, you will be required to undertake all aspects of the horse's care, preparing them for the ring, as well as grooming in the ring, warming up/working in prior to classes."*

12. There is also a list of duties and responsibilities which include:

"*to maintain all aspects of the horses' daily care; muck out horses daily; turn out/bring in horses; fill hay nets; groom horses; prepare horses' feeds; fill water buckets; and fill field waters*".

13. The claimant came to work for the respondent with previous experience of working with horses, including yard work, grooming and mucking out, and she had worked as part of a team which won an international horse-riding competition. The claimant also kept horses of her own, and in the year prior to working for the respondent, she had worked full-time as a groom in charge of 16 horses.

14. At the beginning of April 2017, the claimant told the respondent that she was pregnant. The respondent sought advice and, on 6 April 2017, they sent her a letter of congratulations which appears in the bundle at page 36. Unfortunately, on 18 April 2017, the claimant was admitted to hospital and suffered a miscarriage. There were complications which resulted in surgery, and the claimant was therefore signed off work, sick, until 8 May 2017.

15. On 8 May 2017, the claimant returned to work, on agreed light duties, and the respondent increased the number of employees on its rota shifts to ensure that all the work at the stables could still be covered.

16. On 2 June 2017, Joanne Waterhouse heard a report of bird flu, either at the claimant's farm or very nearby. Joanne Waterhouse therefore asked the claimant not to bring her dogs to the farm but the claimant did so over that weekend, having checked with the Defra vets about the risks of doing so.

17. On Monday 5 June, 2017 Ms Waterhouse met the claimant to talk to her about her lateness over the weekend, of 25 minutes, to which the claimant explained that she had been caught up at a shop, and also to speak to the claimant about bringing her dogs to the farm when she had been asked not to do so.

18. On 7 June 2017, Ms Waterhouse sent the claimant a letter which is headed "Letter of Concern" about her lateness on 1 June, 4 June and a late return from lunch. In the letter, Ms Waterhouse said that she had decided there would be no formal action taken but that "*Although in this occasion this is an informal warning, this letter is also a forewarning that should there be any repeat of this conduct, or indeed any misconduct in general in the future you may be subject to formal disciplinary action ...*"

19. On 29 June 2017, the claimant attended a probationary meeting with Ms Porter-Shaw. Ms Joanne Waterhouse took minutes, which appear in the bundle at page 47 onwards. The meeting covered areas that the claimant excelled in, but the overall tone of the meeting was negative. Issues were raised about the time taken by the claimant to complete tasks to "industry standards", the claimant's appearance, the claimant's skills for her role as show groom, for which the claimant was told to use her initiative and practice in her own time, issues between the claimant and Ms Jackson and the claimant's lateness, which was said to have occurred a further 8 times since the letter of concern had been issued.

20. The action taken by the respondent then was to monitor the claimant.

21. On 5 July 2017, Rachel Jackson was called to a meeting with Ms Hilary Waterhouse and Ms Porter-Shaw. The minutes record that Ms Jackson had become upset when she was taken to task because she had not completed her jobs. Ms Jackson said that the claimant was also not pulling her weight and was reminded that the claimant was being monitored.

22. The following day, 6 July 2017, the claimant was called to a meeting with Ms Porter-Shaw and Ms Joanne Waterhouse. The meeting was arranged as a result of Ms Jackson's concerns, and Ms Porter-Shaw said that they would monitor the claimant's speed and workload over the next 2 weeks.

23. On 11 July 2017, a letter was sent by Ms Porter-Shaw referring to the probationary review meeting on 29 June 2017 but without referring to the meeting on 6 July 2017. The letter said that the respondent had decided it was appropriate to extend the claimant's probation for a further 3 months from

the end of her 6 months' probationary period, so from 1 August 2017, and that the respondent expected to see an immediate and sustained improvement in standards including: the claimant's ability to complete tasks to industry time and quality standards; her ability to lead a team in a productive manner; her timekeeping; improved skills to undertake the show groom job role; and to work as part of a productive team. The letter advised the claimant that if an improvement was not shown, the respondent reserved the right to terminate the claimant's employment either during or at the end of the extended probationary period.

24. On 6 August 2017, Ms Jackson emailed the respondent's office raising further concerns about the claimant. She listed lateness on 31 July (by 1 minute) and on 1 August (2 minutes), the claimant taking what Ms Jackson considered to be an extra 20 minutes on a task on 1 August, and on 3 August being late by 2 minutes. Ms Jackson ended the email by saying that she felt "*further steps needed to be taken for any progress to be made*".

25. On 17 August 2017, following an "investigation meeting", which is mentioned in a letter which appears in the bundle at page 55, but about which no evidence was provided to the Tribunal, Ms Porter-Shaw gave the claimant a verbal warning for lateness. The letter does not state what lateness is the subject of the warning.

26. On 29 September 2017, the claimant told the respondent that she was pregnant.

27. On 2 October 2017, the respondent sent a letter to the claimant congratulating her. The letter also said that the claimant was to "*study the enclosed risk assessment carefully and ensure you are fully aware of what you can and cannot do. .... you are not allowed to lift anything over 25lbs in weight, move things from a height, deal with hazardous substances or do anything we deem as unsafe practices given your job role*". There was no mention of another meeting or any impending meeting regarding the claimant in that letter.

28. Nevertheless, on 5 October 2017, the claimant was called to a meeting. Ms Porter-Shaw conducted the meeting and Ms Whittaker took notes. The minutes appear in the bundle at pages 58-60 and are headed "Extended Probation Meeting". The meeting covered previously identified areas for improvement and Ms Porter-Shaw acknowledged on several occasions that the claimant had improved. However, Ms Porter-Shaw said that she wanted to see further improvement. In respect of lateness, Ms Porter-Shaw said that the claimant's timekeeping had been better since the letter of concern, although there had been a relapse for a short period. Ms Porter-Shaw asked the claimant if she felt she "*would be able to improve to excel in [her] role in the next show season*". The claimant's response was that would be dependent on how soon she came back to work following the birth of her child. The meeting concluded with Ms Porter-Shaw saying that she would still like to see more improvement in the claimant's performance and that the claimant should use her own initiative. The notes do not give any indication that this was a meeting about termination of employment nor do they suggest

any intention by the respondent to terminate the claimant’s employment either as a result of the meeting, or in the near future or at all.

29. After the meeting, Ms Porter-Shaw and Ms Joanna Waterhouse had a discussion with Ms Hilary Waterhouse, the respondent’s Director, about the meeting. The discussion resulted in the decision to dismiss the claimant. That decision was made by Ms Hilary Waterhouse - it was her evidence that she had the ultimate authority to dismiss.

30. As a result of that discussion, a letter dated 10 October 2017 was sent to the claimant (page 64 in the bundle) terminating the claimant’s employment. The letter is from Ms Porter-Shaw and says that she is writing, further to the probationary review meeting on 5 October 2017, to confirm her decision to terminate the claimant's employment with immediate effect because the claimant had “not achieved the standards required”.

31. The letter gave the claimant a right of appeal, but the claimant did not appeal. The claimant considered that an appeal was unrealistic because Ms Hilary Waterhouse, Ms Porter-Shaw and Ms Joanna Waterhouse had all been involved in the discussion which led to the decision to terminate the claimant’s employment and the claimant therefore believed that they were unlikely to change their decision.

The Law

32. A concise statement of the applicable law is as follows.

Pregnancy and maternity discrimination

33. Section 18(2) of the Equality Act 2010 (EqA) provides:

A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

34. Section 18(4) EqA provides:

A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

35. The protected period begins when the pregnancy begins and ends, if the woman has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy or if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

36. Section 39(2) EqA provides, amongst other things, that an employer must not discriminate against an employee by dismissing the employee or subjecting that employee to a detriment.

37. Unfavourable treatment will be because of the protected characteristic if the characteristic is an "effective cause" of the treatment; it does not need to be the only or even the main cause.

38. Section 136 EqA provides:

    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
    (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

39. The Court of Appeal in **Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913** reaffirmed that there is an initial burden of proof on the claimant; - the claimant must show that there is a prima facie case of discrimination which needs to be answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as **Igen Ltd v Wong [2005] IRLR 258** remained good law and should continue to be followed by courts and tribunals. The interpretation placed on section 136 EqA by the EAT in **Efobi v Royal Mail Group Limited (UKEAT/0203/16)** was wrong and should not be followed.

Unfair dismissal

40. Section 99 of the Employment Rights Act 1996, read with Regulation 20 of the Maternity and Parental Leave etc Regulations 1999, provides, amongst other things, that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee is pregnant or that she sought to take statutory maternity leave.

Conclusions (including where appropriate any additional findings of fact)

41. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

42. Dealing firstly with the reason for the claimant's dismissal, Mrs Hilary Waterhouse's evidence was that it was her decision to dismiss the claimant and that the decision was based on the following matters:

    (1) A lack of improvement in the claimant's lateness record;

    (2) The verbal warning in August;

    (3) A failure to improve productivity; and

    (4) The fact that the claimant had brought her dog on site, in early June.

    There was no mention in that evidence of the claimant's show groom skills.

43. The Tribunal considered the reasons given by Ms Waterhouse for dismissal, in conjunction with the surrounding events and contemporaneous evidence, to determine whether such reasons were credible. In respect of lateness, the notes of the meeting of 5 October 2017 record that the claimant's lateness had improved and had been better since the letter of concern was sent. There was a suggestion of a short relapse but there was no evidence put before the Tribunal, and no evidence at the meeting either, of any further lateness since the letter of concern. In those circumstances, the Tribunal did not find that the claimant was dismissed because of there being no improvement in her lateness record. Ms Hilary Waterhouse's statement about a lack of improvement in lateness was simply not substantiated.

44. The suggestion that the claimant was dismissed following a verbal warning in August 2017 was not understood by the Tribunal. The warning had been given for lateness. However, in the absence of further or repeated misconduct or lateness, the Tribunal did not consider that the respondent was entitled to dismiss the claimant for having a verbal warning; there would need to be something more, and therefore that reason was not accepted by the Tribunal.

45. The allegation of a "failure to increase productivity" was considered by the Tribunal. Although "productivity" had been mentioned by the respondent's witnesses, in the course of their evidence, it remained unclear what the respondent actually meant by "productivity" – there were no specifics given as to what activity this related, nor any particulars that could be understood as to how any "productivity" was measured. The Tribunal heard a lot of evidence about "mucking out", including evidence of this taking 10-15 minutes, and/or 15-20 minutes. There was mention of "industry standards" and reference was made to the British Horse Society, but nobody was able to explain or direct the Tribunal to precisely what the industry standards were or to explain how they would be measured, nor how the claimant would be, or was being measured against such standards.

46. At the meeting on 5 October 2017, the claimant was told that her speed of work had improved, although she was then asked if her improved speed had affected the quality of her work. Ms Porter-Shaw said that sometimes the claimant's mucking out was "now not of the quality that is expected" but the claimant was never given any specifics as to what quality of mucking out had to be attained or what more was required of her. Given the various references by the respondent during the meeting to the claimant's improvement in a number of areas of her work, the Tribunal gained an overall impression from the meeting notes that the claimant had, in fact, improved.

47. The matter of the claimant bringing her dog on site at the beginning of June 2017 was given as a further reason to dismiss the claimant. The Tribunal was troubled by this suggestion. The issue had been followed up informally with the claimant on 5 June 2017, immediately after the weekend in question but it was not mentioned in the 'letter of concern' sent 2 days later, on 7 June 2017. On that basis, the Tribunal concluded that the respondent did not feel it warranted raising as an issue then, nor in the warning given in August 2017,

and it was not raised as a concern in the meetings of 29 June or 5 October 2017.

48. In the circumstances, the Tribunal accepted that it was Mrs Hilary Waterhouse's decision ultimately to dismiss the claimant, but the Tribunal did not accept her evidence as to the reasons for dismissal. On a balance of probabilities, the Tribunal did not consider that the respondent had substantiated the reasons advanced and that they were not valid reasons for dismissal, in the circumstances of this case.

49. In determining the reason for dismissal, the Tribunal preferred the submissions of Counsel for the claimant, to the effect that timing was all important in this matter. The Tribunal looked at the matter as a whole, and drew appropriate inferences from the conduct of the parties and the consistency of their evidence with surrounding events. The fact is that, on 29 September 2017, the claimant told the respondent that she was pregnant. There was nothing thereafter that had happened, and no evidence before the Tribunal, of any instances that the respondent sought to rely on since early August 2017 against the claimant. There was a warning given to the claimant in mid-August 2017, but that was a warning about unspecified lateness possibly in early August or even before then. . On that basis, the Tribunal considered that the claimant has discharged the burden of proof by showing facts which could, in the absence of an explanation from the respondent, lead the Tribunal to conclude that the claimant was dismissed because of her pregnancy and had therefore suffered unlawful discrimination.

50. The claimant had no notice of the meeting on 5 October 2017, and did not appreciate that one outcome could be her dismissal. However, the points discussed at the meeting and the manner in which they were put to the claimant suggest that the respondent conducted the meeting with at the very least an underlying intention to terminate the claimant's employment – calling it a probationary review meeting even though such was not required until the end of October 2017 and repeatedly suggesting that, while the claimant had improved, in the respondent's view the improvement was not somehow sufficient.

51. Within a few hours of the meeting, Mrs Hilary Waterhouse, who had not been present at the meeting, had decided that the claimant must go. The Tribunal rejected Mrs Waterhouse's explanation for that decision and so rejected the respondent's propounded reasons for dismissal which the Tribunal considered were not credible.

52. The Tribunal also took note of the respondent's comments and questions about the claimant's availability in the next year's show season, in the meeting of 5 October 2017. The respondent will have known that, given the claimant's expected date of confinement, she would not likely be available in the summer months due to maternity leave. In this regard, the Tribunal was mindful of Ms Waterhouse's evidence, in particular about the requirements of the job of Show Groom. The Tribunal considered that Ms Waterhouse had emphasised working away in the summer months, and the Tribunal considered that this aspect operated on the respondent's mind, and that of Ms Waterhouse, when

she decided to dismiss the claimant. Dismissal came so soon after the claimant had announced her pregnancy. On the evidence, the Tribunal concluded that the respondent took a view, looking ahead, that the claimant would not be able to fulfil the duties of Show Groom for much of the following year. It is significant that this aspect was specifically referred to in discussion with the claimant at the 'probationary review meeting'.

53. In relation to procedure and the claimant's understanding of the nature and potential outcome of the meeting on 5 October 2017, the respondent relied on the contents of the letter of 11 June (page 52 in the bundle). This letter does warn of the potential termination of the claimant's employment if an improvement is not shown. However, the Tribunal has found that the claimant did improve, whilst it was and remains unclear exactly how much improvement was required and in respect of what aspects of her work.

54. The respondent's case was that the claimant should have known that the meeting on 5 October 2017 was going to be a dismissal meeting. The Tribunal did not find that the meeting was expressly conducted as such nor that it was reasonable to expect the claimant to work this out. Nothing excuses the respondent calling the claimant to a meeting and then proceeding to conduct that meeting as a probationary review, or indeed as a disciplinary or capability meeting, with a view to dismissal. The claimant was not warned of such when invited to the meeting, she was unprepared and unaware of the seriousness of the situation she found herself in.

55. In all the circumstances, the Tribunal considered that the meeting of 5 October 2017 could not reasonably be described as a fair meeting and did not accept the respondent's argument that it amounted to a meeting to consider the termination of the claimant's employment for performance or conduct. The Tribunal unanimously concluded that the argument raised by the respondent, to the effect that the claimant must have known that she was liable to be dismissed, was an attempt at post-event justification for what the respondent had done, which was to dismiss the claimant because she was pregnant.

Remedy

56. Following judgment on liability, there was a short adjournment during which the parties considered and prepared for remedy.

57. The Tribunal was referred to a Schedule of Loss prepared by the claimant's solicitor, which appears in the bundle at page 124. Mr Clarke for the respondent confirmed that the figure for a week's net pay, £273, was agreed. The claimant had worked for the respondent for less than a year and so no basic award was made.

58. The claimant's losses of earnings had been calculated by the claimant's representative from the effective date of termination of the claimant's employment, to the expected week of confinement (31 weeks) as totalling £8,468.00, and the respondent agreed that figure. Future losses of earnings had been calculated for 12 weeks following the claimant's maternity leave, giving the sum of £3,276.00 and that figure was also agreed.

59. It was confirmed that the claimant had gained part-time and temporary employment in a job at Carrs Billington Horse Supplies, from 14 November 2017 to 15 April 2018, ending shortly before the claimant gave birth. The claimant had been employed for 4 hours per week on a rate of £7.50 per hour. Therefore, she had earned a total of £660.00 during that period. The respondent agreed that figure. With the £660 earnings deducted from the figures for immediate and future losses, the claimant's net loss of earnings was £11,084.00, a figure which the parties agreed.

60. The claimant's representative pointed out that the respondent had raised the issue of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in their contentions that there should be a reduction in compensation of up to 25% because of the claimant's failure to appeal and thereby her failure to comply with the ACAS Code of Practice. The claimant in turn contended for a 25% uplift. However, the Tribunal pointed out that the reason for dismissal, being found to be pregnancy, was not a reason which brought the dismissal within the ACAS Code of Practice. The parties accepted that matter and withdrew their claims for a reduction/uplift.

61. The parties then asked the Tribunal to determine the level of an award for injury to feelings payable in this case and made submissions as follows.

62. For the respondent, Mr Clarke submitted that this was a matter for the Tribunal and pointed to the claimant's short service, the lack of medical evidence produced by the claimant and the fact that the claimant had in evidence said that she did not enjoy working for the respondent's organisation. In those circumstances, the respondent contended that the claimant could not have suffered much by way of injury to her feelings and that little or no award was justified.

63. For the claimant, Counsel's submission was that this was a case which merited an award for injury to feelings and that the award ought to be in the mid bracket of **Vento v Constable of West Yorkshire Police (No. 2) (2002) EWCA Civ 1871** and subsequent Presidential guidance. Counsel asked the Tribunal to take into account what the claimant had been through during her time with the respondent: namely a miscarriage, psychological and emotional difficulties, a second pregnancy which he said had been ruined by the respondent's behaviour and its dishonesty in its dealings with her, together with the fact that all 3 senior officers of the respondent had been fully involved in the claimant's dismissal and were set against her.

64. The Tribunal adjourned to consider the question of an appropriate level of award for injury to feelings, if any. The Tribunal decided that, in the circumstances of this case, an award for injury to feelings should be made and shall be set at £9,000.00, which is a figure just within the mid band of **Vento.** The Tribunal decided that this figure was appropriate to reflect the seriousness of the claimant's dismissal which was in all the circumstances unfair and an act of unlawful discrimination.

65. Therefore, the remedy judgment of the Tribunal is for a total of £20,084.00 comprising compensation for losses of earnings in the agreed sum of £11,084.00 together with an award of £9,000.00 for injury to feelings.

Employment Judge Batten

Dated: 19 March 2019

REASONS SENT TO THE PARTIES ON

25 March 2019

FOR THE TRIBUNAL OFFICE

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