THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms A Thompson	Really Easy Car Credit Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 16th July 2018
EMPLOYMENT JUDGE GARNON MEMBERS Ms E Menton and Mr R Grieg

Appearances
For Claimant: no attendance

For Respondent: Mr A Crawford Director

JUDGMENT

Our unanimous judgment is the claims the respondent unlawfully discriminated against the claimant contrary to sections 18 and 39 Equality Act 2010 and unfairly dismissed her contrary to section 99 Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 are not well-founded and are dismissed.

REASONS (bold print is our emphasis)

1. Introduction and Issues

1.1. In February 2017, an Employment Tribunal (ET) chaired by Employment Judge Hunter (the first ET) gave unanimous judgment in favour of the claimant on both claims.

1.2. On 3 January 2018, Her Honour Judge Eady sitting alone in the Employment Appeal Tribunal (EAT) allowed the respondent's appeal, set aside the judgment of the first ET and remitted the case for reconsideration by a differently constituted ET, specifically on the question as to what took place **after the notification of the claimant's pregnancy on 4 August 2016.** Her Honour said
37. .. it is apparent that the ET in this case failed to apply the correct legal test. It misapplied the burden of proof and imposed a positive obligation on the Respondent to take a further decision once it had learned of the Claimant's pregnancy when (1) that was not the correct approach as a matter of law, (2) that was a case the Claimant had not herself suggested and of which the Respondent had no prior notice, and (3) was unsupported by the ET's own findings of fact. The appeal must therefore be allowed.
38. The question then arises as to the appropriate order on disposal. For the Respondent, it is said that, given the ET's clear findings as to the reason for the

Claimant's dismissal (as taken on 3 August), I am myself in a position to determine this claim and it would be disproportionate to remit this matter, in particular, given the clear rejection of the Claimant's case which had not been amended.

*39. My concern in adopting such a course is that it would be wrong for me to proceed to determine a claim where there is more than one possible outcome. Here it is apparent the ET rejected the Claimant's case that the Respondent had falsely backdated the dismissal letter and had made no decision to dismiss prior to learning of her pregnancy on 4 August. That said**, there is a way of reading the Claimant's particularised case more broadly, so as to include an argument that a decision was taken after she had notified the Respondent of her pregnancy on 4 August and the reason given for her dismissal had not been the genuine reason as at 5 August**. Although the ET rejected the Claimant's case at its highest, that more general case could still be seen as live. It is true, as the Respondent has argued, the ET made no specific finding that the Respondent went on to make a further decision after it had learned of the Claimant's pregnancy. That said, as the Respondent has also identified, the ET failed to make a number of findings of fact as to what took place in the two-day period, 4 and 5 August. In the circumstances, I do not consider it is right for me to seek to determine this case. The appropriate course, rather, is for this matter to be remitted for fresh consideration as to what was the reason for the dismissal, whether it was because of the Claimant's pregnancy, and whether that was the reason or primary reason as at 5 August.*

1.3. In deciding to remit to a differently constituted tribunal Her Honour set out the limited issues for us to decide, shown by us in bold below, saying we

will be bound by the existing findings of fact, up to and including the claimant's notification of her pregnancy on 4 August. It should otherwise consider the question ***whether there was any further decision (and not merely an omission to take a further decision) thereafter and, if so, whether that was because of the claimant's pregnancy and whether that was the reason or principal reason for the ultimate decision to dismiss.***

2. Findings of Fact by which we are bound (with some detail added shown in italics)

2.1. The respondent is a small company selling second-hand cars. The shareholders are Mr Tony Mate, his brother Brett ,Mr Anthony Crawford ,related by marriage and Mr Stephen Douglas. The company employed Mr Nick Fullerton whose duties included HR.

2.2. The claimant started employment on 20 June 2016. She had telesales experience and was engaged to work as a telesales operator alongside two others. Her employment was subject to a three-month probationary period, during which time her contract could be terminated by either side.

2.3. Although she was not told there were issues with her performance, it had been "average at the best", and she acknowledged a number of calls she made had been poor, especially compared to her colleagues. *The response says the claimant's performance was considerably substandard in that during the six weeks she worked she generated 15 appointments by comparison to two telesales operators who in the month of September achieved 35 and 28 and one who only joined on 5 September but achieved 20.* Certain issues had been raised with her during the early weeks of her employment which might be seen as conduct matters, specifically taking too many

cigarette breaks, not wearing uniform and her interactions with a colleague. *Of her volatile behaviour there is a clear example of an intense emotional outburst with the use of explicit language over what transpired to be suspicion of the infidelity of her boyfriend*

2.4. During the week commencing 25 July 2016, the claimant discovered she was pregnant. On Saturday 30 July, she began to experience pains which continued into the next week. She was next due to work on Tuesday 2 August but texted Tony Mate early that morning : "*Tony, I have had to go to RVI. I have had pains since Saturday night. Am here now but am not sure what is going on. Not sure how long I'm going to be. Am still in pain. Am not sure I'll be able to come in today. Can I take it as holiday. If not I gonna just to have it as sick. Sorry for the short notice.*" RVI is the Royal Victoria infirmary. She sent a picture of it saying "*Just in case you think I'm bullshitting. Ha ha*".

2.5. Although the respondent was unaware at the time, the claimant went to the RVI for a scan to find out whether she had miscarried. Mr Mate, replied *"Not a problem, Just get yourself sorted. Don't worry about work. It will be still there when you are sorted*".

2.6. Mr Crawford felt the claimant should have sought medical help earlier if she had been ill since Saturday and did not work on Mondays ,rather than wait until she was due back at work. He wanted to terminate her probationary period, but was talked out of this by the other directors.

2.7. On 3 August, the claimant returned to work . An incident occurred between her and a customer which led to her being spoken to by Mr Fullerton . She became upset over words used by Mr Fullerton, although she acknowledged she may have misunderstood what he had said as she was still in an emotional state following her hospital visit. She went to the restroom, where Mr Crawford spoke to her, after which she said she wanted to go home and left .

2.8. That afternoon, the owners had a conversation about her and the decision was taken she should be dismissed because the directors were tired of her "emotional volatility", her conduct was not good enough and her performance "average at best". A letter was drafted by Mr Fullerton that day confirming the decision but Mr Mate said it should not be posted and the claimant should be asked when she could next come into work so a meeting could be held when the letter would be handed over.

2.9. Mr Fullerton spoke to the claimant by telephone on 4 August who said she would come to work on Friday 5 August. It was during that conversation, she told Mr Fullerton she was pregnant. Mr Fullerton passed that information to Mr Mate who said he would contact the respondent's lawyers. The respondent's evidence is the advice given was the pregnancy was irrelevant given the reasons for dismissal were unconnected to it.

2.10. On 5 August, the claimant came to work and was seen by Mr Fullerton who handed her the prepared letter and explained the reasons for her dismissal, emphasising it was nothing to do with her pregnancy. The letter itself explained the decision:
"*It is vital to the efficient operation of the employer's business that employees abide by the principles and rules within operation alongside our impenetrable work ethic. As you are within a probation period and have not met the satisfactory level we regret to inform you that the said contract will be cancelled with immediate effect."*

2.11. At the first ET,the claimant alleged the reason given was false, the real one being she was pregnant, something the respondent had found out the day before she was dismissed. She said the dismissal letter had been falsely backdated and the respondent had not made the decision to dismiss before learning of her pregnancy. Bearing in mind the timing of events we can see why she thought this looking at it purely from her own point of view. The first ET did not accept her case. It was satisfied the respondent took the decision on 3 August 2016, but did not communicate it to her until 5 August. It further accepted the reason for dismissal on 3 August was indeed her emotional volatility, her conduct and performance. Also Mr Crawford believed she should have gone to hospital earlier and for all directors, her outburst on 3 August was a factor.

3. The Relevant Law

3.1. The Equality Act 2010 (the EqA) in s39 includes

(2) An employer (A) must not discriminate against an employee of A's (B)—

(c) by dismissing B;

(d) by subjecting B to any other detriment.

3.2. Section 4 provides both "sex" and " pregnancy and maternity" are a "protected characteristic" and section 13 says

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

3.3. Section 18 includes

(2) 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.

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she 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;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

Section 13 was , rightly, not argued in this case.

3.4. In King v The Great Britain-China Centre [1991] IRLR 513) it was said to be "*unnecessary and unhelpful to introduce the concept of a shifting burden of proof*". The law then was where a claimant proved facts from which conclusions could be drawn the respondent has treated the claimant on a particular ground , inferences properly drawn

from primary fact, would enable, but not compel, a Tribunal to establish on balance of probabilities the ground for the treatment in question. However, section 136 now says

(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.

3.5. This reversal of the burden of proof was explained in Igen-v- Wong and Madarassy –v- Nomura International but Ladele-v-London Borough of Islington gives the best guidance in paragraph 40 . We need only quote a small part of it

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport *[1999] ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen *test: see the decision of the Court of Appeal in* Brown v Croydon LBC *[2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.*

3.6. When one is looking for the reason of a respondent which is a company, one has to ask whose mind one is trying to read. This has been the subject of three Court of Appeal decisions in cases where the question was complex. Orr-v-Milton Keynes Council CLFIS-v-Reynolds and Royal Mail-v Jhuti. In this case it is not. Where a decision is jointly taken one looks at the minds of all the decision-makers. If any one of them could in some part have been influenced to take an unfavourable decision by pregnancy or pregnancy -related illness that would permit a finding under the EqA in the claimant's favour, unless the respondent has a non discriminatory explanation which is accepted.

3.7. A different burden of proof exists in the unfair dismissal claim . Section 108 of the Employment Rights Act 1996 (ERA) says an employee who has not two year's continuous employment does not have the right not to be unfairly dismissed unless the reason for dismissal is one listed in sub-section 3, commonly called " inadmissible reasons" . In Smith-v- Hayle Town Council and Ross-v-Eddie Stobart it was held the burden of proving an inadmissible reason rests with the claimant where the employee lacks that continuous employment. How can the claimant prove what was in someone else's mind? As explained in Kuzel -v-Roche Products by legitimate inference drawing similar to the old King -v- Great Britain-China Centre process .

3.8. Inadmissible reasons include those in s 99 ERA which says:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

*(3) A reason or set of circumstances prescribed under this section must **relate to**—*

*(a) **pregnancy,** childbirth or maternity,*

The Maternity and Parental Leave Regulations (MAPLE) add detail in Reg 20 saying an employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the as unfairly dismissed if the reason or principal reason for the dismissal is **connected with her pregnancy**

3.9. The reason for dismissal is a set of facts known to the employer or may be beliefs held by it which cause it to dismiss the employee, Abernethy v Mott, Hay and Anderson. For section 99 purposes, it has been held the employer must have known of or believed in the existence of the employee's pregnancy; see Ramdoolar v Bycity Ltd [2005] ICR 368, following Del Monte Foods Ltd v Mundon [1980] ICR 694. These authorities are unsurprising. What a person does not know cannot be his reason for doing anything.

3.10. All these points require a principal finding of fact—why did the respondent act as it did? If the reason is clearly not pregnancy or related illness, both claims will fail . That is in essence the respondent's case. The primary facts the claimant alleged at the first ET may have sustained a contrary inference The respondent's explanations , which were accepted , would have discharged even the reversed burden of proof, if there had been no further decision to do or to omit to do something taken after 3 August.

3.11. H H Judge Eady discussed in her judgment what appeared to her, and us, to be an indication the first ETl considered this case as if it were brought under section 15 which relates only to the protected characteristic of disability. Section 15 talks of "**something** arising in consequence of disability" . It has recently been held by the Court of appeal in City of York Council-v-Grossett the employer need not know the "something" did arise in consequence of a disability. It has long been held there are similarities between disability and maternity/pregnancy discrimination, in that both talk of unfavourable ,rather than less favourable, treatment and in both cases the law makes specific allowance for people with that protected characteristic. However, under sections 15 and 20/21 (duty to make reasonable adjustments) there is an explicit defence for an employer who shows he did not know in the first case the person was disabled, and in the second did not also know the person would be affected in the way he or she was. In pregnancy cases, we do not believe it was the intention of Parliament that an employer should be found to have discriminated because of a connection between pregnancy and some behaviour or illness of the claimant which it did not, and could not be expected to, know existed.

3.12. However, in case we are wrong about that, we will make some findings on a point made at paragraph 34 of the EAT judgment :
*the ET took the view that, once the Claimant had told the Respondent she was pregnant, "It **must have been obvious** … that the claimant's attendance at hospital and her emotional state were pregnancy related" (paragraph 4.4). Even if those were reasonable assumptions in the circumstances (although I do not suggest that they were (1) because the ET made no finding of fact the Claimant had actually told anyone that her hospital visit had been related to her pregnancy and (2) I am not at all certain it would be reasonable to assume an emotional outburst must be related to pregnancy), that was not the correct question for the ET. This was not a case where the Respondent's liability would be established if it had treated the Claimant unfavourably because of something arising from her pregnancy, .e. akin to s15 EqA claim in a disability discrimination case.*

3.13. Another point accepted by HH Judge Eady was the first ET decided the case on a basis other than that which the claimant primarily put, Chapman v Simon [1994] IRLR 124 and Ladbrokes Racing Ltd v Traynor UKEATS/0067/06. This point need not trouble us today because she made clear we are to look at the case on the broader basis we emboldened in our quotation from paragraph 39 of her judgment at paragraph 1.2 above.

4. Additional Findings of Fact

4.1. It is well established dismissal takes effect when it is communicated. It is therefore possible reasons were **added** after the initial decision was taken on 3 August and those reasons were discriminatory. Today the claimant did not attend and she was not represented as she had been in the past by Mr Owen of the CAB. The only person who attended was Mr Crawford for the respondent. We asked him if he had any knowledge of why the claimant was not here, and he said his legal advisers Lawgistics had spoken with Mr Owen who said he was not attending because he had been attempting to contact the claimant with no response and assumed she had lost interest in pursuing the claim. We took evidence from Mr Crawford, and although there was no one here on behalf of the claimant challenge it, we did not accept it without question.

4.2. The first ET having heard from the relevant decision takers accepted a decision to dismiss had been taken on 3 August, before the respondent knew of the pregnancy and for reasons that could thus not be related to that condition. It made clear, if the respondent had posted the letter of 3 August on the day it was written the respondent would have succeeded in its defence.

4.3. On 4 August, the claimant informed the respondent she was pregnant. The first ET considered it **must then have been obvious to the respondent** her attendance at hospital and her emotional state were both "pregnancy related". The respondent had nonetheless gone ahead with the dismissal. On that basis, the first ET was satisfied the claimant had proved facts sufficient to reverse the burden of proof under the EqA. The respondent failed to satisfy it the dismissal was in no sense whatsoever pregnancy or illness related to pregnancy. In this instance, the ERA claim adds nothing to the case. It is a more difficult test in that pregnancy or circumstances related to it would have to go from being no part of the reason on 3rd August to the principal reason on 5th August, If the claimant fails under the EqA she will certainly fail under the ERA . If the claimant succeeds in the EqA claim she will have all the remedy she asks for. So we focus from here on the EqA claim only.

4.4. Upon hearing Mr Crawford today, we accepted the following.
(a) the claimant did not tell anyone at the respondent at any time before 5 August her attendance at the RVI was related to her pregnancy. The respondent first discovered this only as part of the case before the first ET.
(b) the claimant never alleged, and there was no reason to think, her performance or the other behaviour of which there were concerns were in any way related to her pregnancy even with the benefit of hindsight. In any event, in the mind of Mr Crawford it was not her illness on 2nd August, or absence from work as a result of it, which counted against her , but the fact she had said she had been experiencing pain for a full 2 1/2 days during which she had sought no medical help but rather waited to do so until her next working day . He saw this as typical of her poor work ethic .
(c) for all the decision makers , her outburst on 3rd August was not untypical and apart from her assertion at the first ET she was "*still in an emotional state following her*

hospital visit" there is no evidence to support an inference that her behaviour on that day was in any way related to her pregnancy
(d) the telephone call to Lawgistics was made by Mr Mate in Mr Crawford's presence. He heard the question put to them that a decision had been taken to dismiss the claimant on the previous day and a letter had been drafted, so did her pregnancy mean that decision should no longer be implemented?. The advice Mr Mate reported to Mr Crawford was that provided the pregnancy itself or any illness related to it had nothing to do with the decision to dismiss, it could be implemented. Mr Crawford said the respondent , like most employers, is cautious about dismissing a pregnant employee, but the decision to dismiss her for entirely non-pregnancy related reasons was implemented **in spite of** her having announced her pregnancy, not **because of** it. In otherwords the respondent's only decision after 3rd August was that her pregnancy should not insulate her from a dismissal for reasons entirely related to her conduct and capability.

5. Conclusions

5.1. On 4 August, the first ET made no finding any further decision was taken after 3 August. HH Judge Eady said had the first ET considered the respondent had taken a further decision in the light of its knowledge of the claimant's pregnancy (for example, that it should definitely proceed to dismiss the Claimant **because of** her condition), it should have set out that finding. It did not. The Employment Judge and both lady members of the first ET are among the most experienced and knowledgeable in the country and must have tried hundreds of discrimination claims. Something they heard made them think it " ***must then have been obvious*** *to the respondent her attendance at hospital and her emotional state were both "pregnancy related*". There is no primary fact visible in their reasons to support that. The reason HH Judge Eady remitted the case was to permit for the possibility the claimant could, by evidence and cross examination, build a raft of primary fact which would support that inference. She has not attended.

5.2. Even if we take the shortcut authorised by paragraph 40(5) of Ladele (see our paragraph 3.5 above), Mr Crawford today has convinced us there was only one further decision after 3rd August and it was definitely not because of the claimant's pregnancy or any illness resulting from it . The ultimate decision to dismiss on 5 August was for the same reasons as had been the reason for deciding to do so on 3rd , no more and no less

T M Garnon EMPLOYMENT JUDGE
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 18th JULY 2018