EMPLOYMENT TRIBUNALS

Claimant: Miss Elaina Brown

Respondent: Bhatia Best Limited

Heard at: Nottingham

On: 2 and 3 January 2019
18 February 2019

Before: Employment Judge Ahmed

Members: Miss C D Munton
Mr C Goldson

Representation
Claimant: Mr Alexander Macmillan of Counsel
Respondent: Mr James Howlett of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The complaint of direct sex discrimination is dismissed.

2. The complaint of automatic unfair dismissal under section 99 of the Employment Rights Act 1996 is dismissed.

3. The complaint of pregnancy and maternity discrimination succeeds. The issue of remedy is adjourned.

REASONS

1. By a Claim Form presented to the Tribunal on 22 December 2017 Miss Elaina Brown brings complaints of automatic unfair dismissal, maternity and pregnancy discrimination and direct sex discrimination. The Claimant applied for an amendment at the hearing to include a claim for breach of contract, which was granted, but faced with an adjournment of the hearing to allow the Respondent to deal with the substantive issues that were raised as a consequence, the complaint was withdrawn without any evidence being offered. That complaint was therefore not proceeded with and we make no determination on it particularly as it may be the subject of proceedings elsewhere.

2. Mr Macmillan on behalf of the Claimant accepts that the direct sex discrimination complaint covers the same ground as the pregnancy and maternity claim and, having regard to the provisions of section 18(7) of the Equality Act 2010 (which it is unnecessary to set out here) that complaint must be dismissed. We are therefore left with the pregnancy and maternity discrimination and the automatic unfair dismissal complaints. The Claimant does not have the qualifying period of service for 'ordinary' unfair dismissal.

3. In coming to our decision we have taken into account the evidence of the witnesses (the Claimant on her behalf and Mr Ash Bhatia on behalf of the Respondent only), the contents of the witness statements, the documents in the agreed bundle and the submissions made by Counsel on both sides to whom we are grateful. This decision represents the views of all three members of the Tribunal.

4. Miss Brown was employed by the Respondent, a firm of solicitors, as a Paralegal in their Family Law department from 4 July 2016 to 9 August 2017 (the latter being the 'effective date of termination'). The Claimant had a previous period of employment with the same Respondent in 2015. It is agreed that there was a break in employment.

5. The Claimant discovered she was pregnant with her fifth child at the beginning of March 2017. She notified the Respondent of this in April. It was a difficult pregnancy. The Claimant's health deteriorated during the course of the pregnancy and she suffered from a number of pregnancy-related issues. Some of these entailed absences from work.

6. The Respondent is a well-known firm in the East Midlands. Mr Bhatia is one of the founding partners though the firm now trades via the medium of a limited company. Mr Bhatia is the Managing Director. Mr Best is a Director. Where we refer to 'the firm' we do of course mean the limited company.

7. Mr Bhatia is well established in the legal community as, amongst other roles, as a past President of the Nottinghamshire Law Society and a current member of the National Council of The Law Society as elected representative of Nottinghamshire. The firm is largely a legal aid practice with specialist departments in, amongst other areas, Criminal Law and Family Law. The firm is recognised by the Legal Aid Agency as a leading provider of legal aid services.

8. At the time that the Claimant gave notice to her employers of the pregnancy she had indicated her desire to enrol on the Legal Practice Course ('LPC') so that she could ultimately qualify as a Solicitor. There was some suggestion during the hearing that the Respondent may have offered or proposed to offer financial assistance to the Claimant in doing undertaking the LPC. We find that there was no such assistance and the Claimant was expecting to finance the LPC from her own means.

9. On 7 August 2017, the Claimant had a pre-arranged hospital appointment for a pregnancy check-up. The appointment was booked for 9:00 am so that she could return for an afternoon client appointment. Unfortunately, the appointment overran. As soon as it became apparent that the Claimant would not be able to return in time for the meeting she telephoned the office. Mr Best arranged to take the meeting in the Claimant's place. When the

Claimant returned to the office it is her account that Mr Best told the Claimant that the failure to return in time for the meeting was 'unacceptable'. He told her that he knew the Claimant was pregnant but the fact that there was so many things going wrong with her pregnancy was causing a burden on the department. We should add here that whilst the Claimant's account of the discussion is disputed, Mr Best was not called to give evidence and we accept the account given by the Claimant.

10. Later in the day the Claimant discovered that Mr Bhatia appeared to know of what had happened and was asking about the Claimant's personal circumstances. In particular the Claimant learned that Mr Bhatia wanted to know if she was living with her husband. The Claimant had in fact separated from her husband but had not divorced. Miss Brown's husband was friends with the partner of a colleague and Miss Brown was aware that her husband had been staying at the colleague's house.

11. Later that day the Claimant sent an e-mail to Mr Bhatia, the material part of which is as follows:

"Hi Ash

Please accept my sincere apologies for contacting you outside of office hours.

I have just spoken with [ ] who informed me that earlier today you contacted her to ask if my husband was living with her….

I just wondered if there was a reason you required this information. I am aware that I have had a considerable period of sickness due to a terrible pregnancy and wondered if you thought my personal circumstances had impacted on that and that I am in some kind of trouble.

Would you like me to come and speak with you tomorrow. I'm happy to answer any questions."

12. In what is a fairly lengthy e-mail reply of 7 August 2017, but one which is necessary to set out almost in full, Mr Bhatia wrote:

"You're right in deducing that I am concerned.

A number of issues have come to my attention which quite rightly have caused me to make more detailed enquiries about you, your health and general well-being, and your domestic situation.

The fact that you are pregnant, have had pregnancy related difficulties, and not least that you are the sole carer of 4 children (already) simply exacerbates my concerns.

A little while ago I heard that following your recent marriage you had decided to seek a divorce. I didn't know what came of that, but it's now clear that things are far from settled given that your husband and you currently live apart.

Unfortunately you were absent for much of today, and when I was told you'd returned you were seeing clients. I would like to talk to you in person and it's perhaps best if that can be arranged for tomorrow.

The fact that Matt [Best] has found it necessary to speak with you about your absences from work, and in particular the departmental burdens created by what appears to be your unreliable attendance record mean it's right that I look at everything in more detail, and in the round.

It's right that I'm open and transparent with you, so let me be blunt. Your situation seems far from ideal. Indeed far from ordinary or straightforward. I'm not at all clear about how this is going to play out. And I'm concerned about your 4 children. In your situation it can't be easy to address the various demands placed upon you. Although we've yet to receive a MAT1 Certificate, and your due date is some time away, it seems your pregnancy is causing some medical concern.

I don't know about the commencement of your LPC studies, or indeed if that is still on track, let alone how you might cope with the demands of such an intense course while heavily pregnant or as a new mother. All of this is framed in the context of you holding down a 3 day per week professional job, which requires you to contend with the woes of demanding clients.

These are not matters about which I can just turn a blind eye. I carry legal duties as your employer, and am also required to comply with my obligations under the solicitors code of conduct 2011, and our legal aid contracts, as well as ensuring adequate supervision, and a proper service to clients.

I hope this suffices to explain why I want to talk to you, what I want to talk about, and why that should be sooner than later."

13. The following day, on 8 August 2017, a meeting was arranged between the Claimant and Mr Bhatia. Miss Brown was told that it was to be an informal meeting. She was not told that she could have someone to accompany her.

14. There is considerable dispute as to what was discussed at this meeting. There are notes taken by Mr Bhatia which appear both in their original manuscript form and a typed version in the bundle. They consist of various headings such as 'LPC payment', 'pregnancy problems', 'unreliability of work', and 'conclusions'. Mr Bhatia prepared a broad agenda of headings which he then largely followed in the discussions. He then used the headings for the discussions.

15. Relevantly, Mr Bhatia's notes of the meeting on 8 August record the following:

LPC

Starts in Sept.

Mat leave 23.9.17

Pregnancy problems

Children

4 kids

Husband

He has left. No discussion

Maintenance?

No maintenance

No spousal maintenance

Is it benefit fraud? – No. I didn't know he was leaving

Unreliability at Work

Pregnancy related.

Conclusions

If any aspect of Benefit Fraud/wrongdoing emerges Elaina will be summarily dismissed.

- She understands it's her responsibility to report any change in circs.

- Firm cannot be associated with such behaviour.

True “capacity” issues are revealed. Albeit not “culpability”, nor even “capability”, she seems to have too many problems of a concurrent nature so lacks the capacity to hold down her job and properly discharge her duties.

In such circumstances the firm is able to terminate her employment on notice. She doesn’t have security of employment anyway. And to be open, provided termination is not referable to pregnancy (so directly or indirectly sex discrimination) I am at liberty to sack her. Even the statute (unfair dismissal) provides that it is reasonable if there is “some other commercial/substantial reason”.

However. I am NOT minded to terminate employment today. Why?

a. To do so would be horrific for her.

b. She is due to take maternity leave shortly, so best to be permitted to do so and focus on pregnancy and baby.

c. Disproportionate response in all the circumstances.

Nevertheless Elaina must understand that the nature of capacity issues and her unreliability is not acceptable. Intrusive and burdensome on the others in the department, and the firm has to treat others properly also. So there is a balancing act to be weighed. For now I say the balance is in her favour. I hope her personal life issues will have improved. Accordingly I’ve drawn a line in terms of what is acceptable and what is expected.

I strongly recommend that she does NOT draw down the student finance loan. Although career progression will be deployed (sic), and that will be disappointing to her, in my honest view her chances of her passing the LPC in her current circumstances is very low. Pregnancy, health issues, 4 children, new baby, sleepless nights, abandoned by husband, negligible support structure, are all factors in context of a very demanding 1 year course.

She must not be beguiled by Trent University acknowledging her pregnancy. That means nothing. Universities are nowadays commercial entities and so focussed on receipt of course fees. The loan will be hers and hers alone. No indemnity or immunity exists and the work must still be done sufficient to pass. This could not come at a more difficult time for her.

An LPC, even if she passes, is of little value unless she secures a training contract. I have never offered one or indicated that I will. Also it would present as an obstacle for someone working 3 days/week as that could only give rise to a part time TC. Moreover extra issues would arise in relation to rotation of seats of training. Capacity and unreliability concerns do not help either.

Elaina enjoys a right to return to work following mat leave. She also has a right to request a contract variation under the flexible working regime. None of that is for now. Everything can be looked at, and afresh, when she returns to work or makes a request for variation. But I underscore the importance of being reliable and addressing capacity concerns. Hopefully when she returns things will improve.

From now until mat leave is taken, I understand that primacy must be given to the pregnancy and her health. Accordingly whatever time off is needed must be taken. No issue will arise, and I do not intend to revisit today’s conversation. However she is asked to organise herself and offer notice of warning to the firm whenever possible I don’t want to see a mix as currently seen, of pregnancy related absence, other absence, and also ex post facto (emergency) holiday requests. The next few weeks ca (sic) and should be managed more sensibly. A genuine pregnancy or health problem is quite different.

Given the number of plates spinning, the concurrent weighty responsibilities, and unfortunate domestic circumstances Elaina is encouraged to take advice, turn to others for help, and improve her coping mechanisms. Her various problems must be broken down into separate issues, and addressed one by one. Delaying the LPC is an

example. Marriage counselling another. Arranging medical appointments on Thursdays and Fridays (non-working days) another. In that way she may avoid; a) becoming overwhelmed, b) separating work from personal issues.

I am concerned that Elaina does not give sufficient importance to her job. It is noteworthy that income from employment is far less than value of welfare benefits received. Also that absences have arisen because of poor arrangements being made (Elaina giving priority to anything rather than job) manifest as emergency leave and ex post facto holiday requests. Also that LPC star date is prior to mat leave so job rendered unimportant. Elaina encouraged to grasp that her mindset must change. She must recognise that her job is important. She risks losing her job otherwise. Sympathy empathy and understanding of her life circumstances will shortly expire."

16. The Claimant does not recall Mr Bhatia making copious notes during the meeting as is suggested. Miss Brown did not take any notes of her own. It is agreed that there was no independent notetaker nor was the discussion audio recorded. We find that Mr Bhatia did take notes though he may well have completed passages after the meeting. Given his profession and experience it is unlikely that Mr Bhatia would not have made any notes at all or that he would be able to recall in detail afterwards all of these matters. We therefore find that he did make a note though he is likely to have added passages to them afterwards. We do not conclude that the notes are all contemporaneous.

17. Immediately following the meeting on 8 August 2017, Mr Bhatia says he handed the file to his PA who drew his attention to the discrepancy in the names being used by the Claimant as to 'Brown' or 'Shaw'. Mr Bhatia then made a telephone call to the Department of Work and Pensions (DWP) using the telephone number on one of the letters that his firm had received in relation to tax credits. Mr Bhatia made a note of the call. He appears to have spoken to a junior clerk. Mr Bhatia wanted to clarify the issue regarding the Claimant's name. The letter he had in his possession referred to her as *Miss* Elaina Brown. Mr Bhatia knew that her married name was Shaw. He therefore felt there was an inconsistency. The clerk informed him that their records showed the Claimant as *Miss* Elaina Brown, not Mrs Shaw. The clerk spoke to a team leader and then gave Mr Bhatia a telephone number for the Benefit Fraud Hotline.

18. Mr Bhatia telephoned the Fraud Hotline and again he appears to have spoken to a fairly junior officer. The clerk said that the person under discussion was not known as 'Shaw' to them and all their records were under the name of Elaina Brown. Mr Bhatia asked what information the Claimant had given about her name but the clerk refused to supply the information but did add it was "fraud after all". The clerk said that a full fraud investigation would now be opened.

19. From those two conversations it is the Respondent's case that Mr Bhatia formed a clear view that the Claimant had not notified the DWP of her change in circumstances and accordingly in Mr Bhatia's view, benefit fraud had been committed. Mr Bhatia's evidence is that through his criminal law practice he was acutely aware of the importance of reporting all change of circumstances to the DWP.

20. It is not disputed that a change through marriage or cohabitation must be reported and it is agreed that this need not be in writing. Mr Bhatia formed the view that the Claimant had failed to notify the DWP of her marriage and change of circumstances and as a result he decided to reconvene the disciplinary hearing on 9 August 2017.

21. Unfortunately there is no note of the 9 August meeting. The Claimant accepts that she was given the right to be accompanied though that was only a few minutes before she was summoned to the meeting with Mr Bhatia.

22. There is a dispute as to what was discussed at the 9 August meeting though the crucial point, which is that the Claimant was dismissed, is not in question. The dismissal decision was confirmed in a subsequent letter which is referred to in more detail below.

23. Mr Bhatia showed the Claimant two Attachment of Earnings letters from the Claimant's file both of which referred to her as Miss Elaina Brown. Mr Bhatia asked the Claimant for an explanation as to why the surname was not 'Shaw' on those records. The Claimant explained that she was sometimes known as Elaina Shaw and sometimes as Elaina Brown, but that she was generally known as Miss Elaina Brown. She explained that she had informed the DWP of her change in circumstances orally and therefore had done nothing wrong. In what was clearly a very brief discussion the Claimant was told that her employment was being terminated for gross misconduct because Mr Bhatia was satisfied that she had engaged in welfare benefit fraud.

24. The decision to dismiss was confirmed in a letter of 15 August 2017, the relevant part of which says:

"Reason for dismissal: I was satisfied that you have engaged in a welfare benefits fraud. That amounts to dishonesty and is a criminal offence. Accordingly that is gross misconduct. I had before me 3 letters from DWP regarding attachment of earnings orders spanning 13 months from March 2016 until April 2017 which described you as "Miss Elaina Brown". Of course you were married in 2014 and hence 3 letters which post-dated your marriage are prima facie evidence that you have made a false declaration and/or failed to report a change in your circumstances. In terms you have caused the benefit agency to believe you are a single mother of 4 children. Further, during telephone calls which I made to DWP it was confirmed to me that all of their records recite you as Miss Elaina Brown, that this is a fraud and because of the fraud they declined to disclose anything further to me. The standard of proof in such employment matters is a civil standard, meaning a balance of probabilities. In fact I am satisfied to the higher criminal standard ie beyond reasonable doubt. Especially as you were unable to offer an explanation beyond a self-serving assertion that you have notified "tax credits by telephone"."

25. It is agreed that the Claimant's employment terminated on 9 August 2017. The Claimant was dismissed without notice. Her contractual notice period was 3 months on either side.

THE LAW

26. Section 99 of the Employment Rights Act 1996 ("ERA 1996") ("leave for family reasons") states:

> "(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.
>
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
>
> (3) A reason or set of circumstances prescribed under this section must relate to:-
>
> (a) pregnancy, childbirth or maternity."

27. Section 18 of the Equality Act 2010 ("EA 2010"), so far as is material, states:

> "(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (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."

28. Section 136(2) and (3) of the EA 2010 deals with the important issue of burden of proof and states:

> "(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."

29. As to how the burden of proof provisions of section 136 EA 2010 should be applied, the leading authority is **Madarassy v Nomura International Plc** [2007] IRLR 246. Although that case pre-dates the EA 2010, there is clear subsequent authority that it sets out the correct test to apply.

30. In **Madarassy**, the Court of Appeal made it clear that the burden of proving the absence of discrimination does not shift to the employer simply on the Claimant establishing differences in status or a difference in treatment. Such differences only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *"could conclude" (or "could decide")* that on a balance of probabilities the Respondent had committed an unlawful act of discrimination. "*Could conclude*" must mean that a reasonable Tribunal "could properly conclude" from all the evidence before it. That is the first stage of the two-stage process set out in section 136 EA 2010.

31. At the second stage, the Respondent must provide an explanation for its treatment of the Claimant. That explanation may mean that the treatment was not because of a protected characteristic. If however, on a balance of probabilities, the Respondent is not able to show that the treatment was because of reasons other than the protected characteristic, then the Claimant must succeed.

32. We recognise that there is an alternative approach to the two-stage approach as identified in **Laing v Manchester City Council** [2006] ICR 1519, which is to move straight to the 'reason why' question,

that is to ask why the alleged discriminator acted as he did. Ultimately, it matters not as both approaches usually lead to the same result.

33. In this case it has been necessary to consider the question of unreasonable conduct (as opposed to discriminatory conduct) and we have asked ourselves whether, even if Mr Bhatia was being unreasonable in his belief, whether his belief was nevertheless an honest and genuine belief as to benefit fraud. In coming to our conclusions we have considered the very helpful guidance in **Bahl v The Law Society** ([2003] UKEAT 1056/01/3107). In that case, Elias J (as he then was) sitting in the Employment Appeal Tribunal said (at paragraphs 100 and 101):

> "By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn…...
>
> The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination but it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct."

THE ISSUES

34. The issue in relation to the pregnancy and maternity complaint under the EA 2010 is relatively straightforward – whether the unfavourable treatment (that is the treatment at the meeting on 8 August 2017 and the subsequent dismissal) was in any way because of the Claimant's pregnancy and/or pregnancy-related illnesses.

35. In relation to unfair dismissal the issue is simply whether the reason or principal reason for the dismissal was the Claimant's pregnancy.

CONCLUSIONS

36. The anti-discrimination provisions in the EA 2010 give domestic effect to the provisions of the Burden of Proof Directive and the Framework Employment Equality Directive which require that there should be "no discrimination whatsoever" based on sex or on any of the prescribed grounds. One of the proscribed grounds is maternity and pregnancy. It is therefore clear that the language of the Equality Act 2010 must be read in the light of the obligation that there must be "no discrimination whatsoever", that is to say that any discriminatory influence need not be the only influence so long as it is more than trivial.

37. Applying the two-stage process, we have considered firstly whether the burden passes to the Respondent for a non-discriminatory explanation for the treatment of the Claimant. We are satisfied that it does for the following reasons:-

37.1 The Claimant was called to the meeting on 8 August 2017 for several reasons. One of them was her perceived "unreliability". In his

notes as preparation for the meeting Mr Bhatia under the word 'unreliability' expressly refers to her pregnancy. It is clear that Mr Bhatia was drawing a link between the Claimant's perceived unreliability and her pregnancy.

37.2 We are satisfied that what triggered the meeting on 8 August was the Claimant's failure to attend a client meeting the previous day. The reason was related to the Claimant's pregnancy. Both Mr Bhatia and Mr Best were aware that this hospital appointment was for a pregnancy check-up. Therefore there was a direct link between the Claimant's pregnancy and her inability to attend the client meeting which in turn led to being reprimanded and in part being called to the meeting on 8 August.

37.3 We accept that Mr Bhatia mentioned the Claimant's pregnancy when he said that the Claimant's failure to return in time was unacceptable. That was clearly unfavourable treatment because of pregnancy. Whether it was justified or not is irrelevant.

37.4 In his e-mail of 7 August 2017 Mr Bhatia specifically relates pregnancy to his concerns when he says:

"The fact that you are pregnant, have had pregnancy related difficulties, and not least that you are the sole carer of 4 children (already) simply exacerbates my concerns."

37.5 Mr Bhatia goes on to mention the Claimant's absence when she was expected to be seeing clients. The first part of his e-mail establishes a link between that and the reason for Mr Bhatia wanting to see the Claimant.

37.6 Mr Bhatia goes on to refer to the "Claimant's unreliable attendance". The only absences which Mr Bhatia could recall from memory were the ones when the Claimant was absent for pregnancy-related reasons.

37.7 Whilst the meeting on 8 August 2017 concerned a number of issues other than pregnancy, there was a discussion as to the Claimant's ability to cope with her work with pregnancy as one of the issues. Mr Bhatia refers to "problems of a concurrent nature". One of those problems was her absences, which were pregnancy-related. In his notes, Mr Bhatia writes:

"I don't want to see a mix as currently seen, of pregnancy related absence, other absence, and also ex post facto (emergency) holiday requests… A genuine pregnancy or health problem is quite different."

37.8 Mr Bhatia referred to 'a number of plates spinning'. There can be no doubt that one of the spinning plates was the Claimant's pregnancy and coping with the demands of pregnancy and work.

37.9 The Claimant as a pregnant employee clearly needed to attend medical appointments. Mr Bhatia was seeking to persuade the Claimant to arrange medical appointments on her non-working days. That was clearly unfavourable treatment which was pregnancy-specific.

38. Before we deal with the question of whether the Respondent has discharged its obligation to show a non-discriminatory reason for the

treatment of the Claimant, we would wish to make a few observations on the evidence generally.

38.1 Firstly, we did not find Mr Bhatia's evidence as to his belief of a criminal offence having been committed to be credible. Mr Bhatia is a solicitor with many years of experience in private practice particularly in the field of criminal law and in benefit fraud cases. He would be well aware that tax credits are not dealt with by the DWP but by HMRC. He must therefore have realised that he was speaking to the wrong administrative body. In submissions Mr Howlett says that there is nothing in this point because DWP investigators are empowered to investigate tax credit matters. For these purposes tax credit is a benefit and offences in relation benefit offences are dealt with the DWP. That may well be the legal position but anyone wishing to find out whether notification of a change of circumstances had been made would naturally contact HMRC and not the DWP.

38.2 Mr Bhatia said in evidence that the Claimant was given a right of appeal against his decision and the appeal hearing was deliberately delayed as he was willing to reconsider his decision if the Claimant was able to provide evidence she had complied with her notification obligations. Why, asks Mr Howlett, would Mr Bhatia leave the door open to the Claimant if he was dismissing for pregnancy-related reasons? That argument may have had some substance if Mr Bhatia had indeed left the door open but it is clear that he did not. When the Claimant later provided clear exculpatory evidence, her appeal was still dismissed. Admittedly Mr Bhatia was not on the appeal panel but if he genuinely wished to reverse his decision he would no doubt have informed the appeal panel that they should allow the appeal if the Claimant demonstrated that no offence had been committed. The Claimant provided clear evidence in the form of an email from the DWP on 5 October to the effect that there was no ongoing investigation some two weeks before the appeal hearing yet the appeal was still dismissed.

38.3 The 'evidence' to support Mr Bhatia's belief of criminal activity was flimsy to say the least. Mr Bhatia places reliance on conversations with two junior clerks, neither of whom incidentally have been called to give evidence as to the nature of the discussions, and neither of whom had the full facts before them. There is no evidence of any finding of fraud by either the HMRC or DWP and Mr Bhatia's reliance on their words is unconvincing. The only evidence as to the position is in fact provided by the Claimant and that fully exonerates her. In an email from DWP Fraud Service of 5 October 2017, a Compliance Officer wrote:

"Following your interview on 5 October 2017 regarding the case of your living together with Darren Shaw. We are satisfied following our discussions and with evidence provided and we have therefore close (sic) this case."

38.4 We are satisfied that Mr Bhatia was well aware that the Claimant used the name Brown within his firm. The Claimant's job application referred to her as *Miss* Elaina Brown. The accompanying CV and job application also referred to her as Elaina Brown. The P45 issued by the Respondent on 27 May 2016 (at a time when the Claimant was understood to be married to Mr Shaw) was in the name of 'Brown'. All of these would be on her file or easily found. The only document which gives records her name as Shaw (apart from any internal documents over which the Claimant had no control) was the Claimant's contract of

employment when she re-joined on 27 June 2016 which is not relied on as conclusive. Letters from the hospital which the Claimant showed to the Respondent were all in the name of Brown. There can be no doubt that Mr Bhatia would have known that the Claimant used the name 'Brown' rather her married name, as she was perfectly entitled to do. He would also have known that she preferred to use the title 'Miss' instead of 'Mrs' and again there was no reason why she could not do so. To imply that using the term Miss somehow suggested she was trying to keep her marriage a secret from the authorities is plainly absurd.

38.5. We find Mr Bhatia's suggestion that the issue of the name only really came to light when he handed the file to his PA is far from credible. Mr Bhatia gave evidence to the effect that this was the trigger for his suspicions but there is no reference to this important event in his witness statement nor has his PA been called to give evidence. The point is significant because it is suggested that without this trigger Mr Bhatia had no reason for suspicion but the issue of benefit fraud had been discussed at the meeting on 8 August and Mr Bhatia had decided at that point not to dismiss.

38.6 We do not accept that Mr Bhatia could reasonably have believed, based on the nature of the conversations he had with a junior member of staff at the DWP and on the Hotline, that there had been fraud on the part of the Claimant. The fact that the word 'fraud' was mentioned is not surprising nor could it possibly have been viewed as conclusive. The DWP or Hotline staff could not possibly have made a conclusive finding of fraud without knowing all the facts and Mr Bhatia could not possibly have placed reliance on their views. At its very highest Mr Bhatia could only have entertained a suspicion but his case is that he did not have merely a suspicion but a firm and unshakeable belief which in the words of the dismissal letter was "beyond all reasonable doubt".

38.7 Mr Bhatia's belief could not amount to a reasonable belief. It was not reasonable to conclude that there was fraud in all of the circumstances. We recognise that an unreasonable belief is not the same as a discriminatory belief but an unreasonable belief, if not satisfactorily explained can (as is clear from the passage in **Bahl**) go to the question of whether it is an honestly held belief. We are satisfied the belief in benefit fraud was neither a reasonable belief nor an honest belief.

39. We are satisfied that the Claimant's pregnancy was a relevant factor in Mr Bhatia's decision to call her to what was effectively a dressing down meeting on 8 August and the decision dismiss. The reason why the Claimant was being called to a meeting was for matters related to her pregnancy and in part for her dismissal.

40. Mr Bhatia's perception (wrongly as it turned out) was that the Claimant was frequently absent for all sorts of reasons including pregnancy-related reasons. On closer analysis, the number of days the Claimant was absent was far less than those Mr Bhatia had assumed. Her pregnancy was in his view a factor in her "unreliability".

41. We conclude that Mr Bhatia's belief that the Claimant's dishonesty gave rise to a regulatory business and reputational risk (which could potentially amount to a non-discriminatory reason for dismissal) is without substance. In cross-examination Mr Bhatia was asked whether he had

reported the matter to the Solicitors' Regulation Authority. He said he had not but perhaps on reflection ought to do so. When the matter returned after going part-heard his position was that it was unnecessary. We infer that Mr Bhatia had no genuine concern as to regulatory issues. The reasons why he did not submit a report to the SRA because he did not think that there was anything of a criminal nature to report. That accurately reflects his true thinking.

42. The meeting on 8 August was clearly detrimental because it was of a punitive nature, the Claimant coming close to being dismissed. We do not accept that it was 'pastoral' in nature, as suggested. The Claimant's relationship with Mr Bhatia was not of that nature.

43. So far as Mr Bhatia's notes are concerned, clearly some of these are clearly self-serving but many of them are express evidence against the Respondent of a link between pregnancy and the unfavourable treatment. Mr Bhatia appears to have believed he was insulated by the Claimant's lack of qualifying service and his self-direction as to the legal position on employment law is certainly open to question.

44. For the reasons given we are satisfied that the Respondent has failed to provide a non-discriminatory explanation for the treatment and accordingly the Claimant's complaint of pregnancy and maternity discrimination succeeds.

45. In relation to the complaint of automatic unfair dismissal the pregnancy must be the reason or *principal* reason for the dismissal. We accept that whilst pregnancy was a factor it was not the only factor or the principal factor. Mr Bhatia refers to spinning plates. Pregnancy and associated issues were one of those spinning plates. The complaint of automatic unfair dismissal is therefore dismissed.

46. The issue of remedy is adjourned.

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Employment Judge Ahmed

Date: 17 April 2019