EMPLOYMENT TRIBUNALS

Claimant: **Miss J Anstey**

Respondent: **Laporsa Ltd**

Heard at: **Cardiff** **On: 18 19 and 20 June 2018**

Before: **Employment Judge J Hargrove**
Members:
Mr R Mead
Ms T Williams

Representation:
Claimant: In person and with Ms Hurd
Respondent: Mr Paul Clarke (Legal Advocate)

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

(i) The Claimant was unfairly constructively dismissed.

(ii) The dismissal, but not any other event said to constitute a detriment other than the second warning on 24 July 2013 was materially influenced by the fact of the Claimant's pregnancy.

(iii) The Tribunal awards compensation as follows:-
The Respondent is ordered to pay the following amounts to the Claimant by way of compensation:-

(1) Unfair dismissal basic award £540 compensatory award to the date of hearing:-
Loss of earnings/statutory maternity pay to date of hearing £8,909.46
Future loss and loss of SMP to 16 September 2018 £1,634.26
Future loss of earnings from December 2018 18 weeks x £246.64 per week £4,439.52
Uplift under s.207(A) of the Trade Union and Labour Relations Consolidation Act 1992 15%:- £2,328.48.

(2) Discrimination
Injury to feelings £6,500

Interest thereon under the Employment Tribunals Interest on Awards in Discrimination Cases Regulations from 24 July 2017 to date at 8% per annum £476.63

(3) Unpaid holiday pay £295.64
(4) Unpaid wages and commission £219.59
(5) Failure to provide statement of terms and conditions in writing 2 week's pay @ £270 per week £540.

REASONS

1. The Claimant was employed by the Respondent from 18 August 2014 initially as an Administrative Assistant or Book Keeper, but from some time in 2015 as Accounts Manager when the previous Accounts Manager left. She worked 30 hours per week. In early May 2017 she notified the Respondents Managing Director Mr Osama Jamil (hereinafter called OJ) of her pregnancy. She planned to go on maternity leave in December 2017, although there is no evidence that she told OJ of that at that time. However, on 24 July 2017 she resigned with immediate effect and, having submitted a written grievance on 1 August 2017, she commenced Employment Tribunal proceedings on 2 October 2017.

2. Her claims are of unfair dismissal and of discrimination against her on the protected ground of maternity in respect of events from May to July 2017 up to and including her claimed constructive dismissal. There are also subsidiary claims for holiday pay and wages.

3. The relevant statutory provisions relating to dismissal and discrimination are s.95(1)(c), which defines constructive dismissal.

> "The purposes of this part an employee is dismissed by his employer if…..
> (c) the employee terminates the contract under which he is employed (with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct)".

For there to be such conduct, there must be conduct amounting to a serious breach of contract and justifying dismissal. The breach of contract relied upon in this case is the breach of the implied term which is contained in all contracts of employment that neither party to the contract will behave in such a way as to be calculated or likely to destroy or seriously damage trust and confidence. [Calculated??] first to conduct which is deliberate but the

conduct need not be deliberate if it is nonetheless likely to cause a breakdown in trust and confidence in the person to which it is directed.

The burden of establishing that the employer is guilty of such conduct, lies upon the employee in a constructive dismissal case. In addition, the employee has to prove on the balance of probabilities that he resigned in response at least in part to the conduct of the employer. The conduct of the employer need not however be the sole principal reason for the resignation. If the employee establishes that he was dismissed, the burden then lies upon the employer if he is to escape a finding of unfair dismissal to establish a reason for dismissal falling within s.98 of the Employment Rights Act. In the present case however, the employer does not rely upon any such reason, it merely disputes that the Respondent was guilty of any repudiatory conduct constituting a breach of the term of trust and confidence.

In relation to the claim of discrimination the relevant provisions are contained in the Equality Act 2010 the Claimant's case is that the Respondent was guilty of direct discrimination. S.13 of the Equality Act 2010 defines direct discrimination as follows

> "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."

The protected characteristic in question is pregnancy and maternity, one of a number of protected characteristics contained in s.4 of the Act. In relation to employment s.39 of the Act sets out the prohibited conduct in employment. S.39(2) states

> "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."

To constitute a detriment the actions of the employer must be such that a reasonable person would feel disadvantaged thereafter in the Respondents employment. An unjustified sense of grievance is not a detriment. Dismissal includes constructive dismissal – see s.39(7)(b)

> "the reference to dismissing B includes a reference to the termination of B's employment by an act of B's including giving notice in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

In relation to the discrimination claims, there are special provisions in s.136 of the Equality Act relating to the burden of proof providing as follows

> "(ii) 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 (or Tribunal) must hold that the contravention occurred
> (iii) but sub section (ii) does not apply if A shows that A did not contravene the provision".

What that means in laymen's terms is as follows. There is an initial burden upon the Claimant to establish that by her own evidence or by cross examination of the employer's witnesses or a reference to documentary or

other evidence facts from which a Tribunal could reasonably conclude that she had been discriminated against on the relevant protected ground by some act or omission of the employer. If that is established, the burden shifts to the employer to prove on the balance of probabilities that the protected characteristic was in no way a reason for the treatment in question or, in this case, that any treatment of the Claimant alleged constitute discrimination was not because of her pregnancy or maternity. The relevant prohibited protected characteristic does not have to be the sole or principal reason for the treatment provided that it is materially influenced by the protected characteristic and discrimination may be conscious or unconscious on the part of the discriminator.

4. With these provisions and principals in mind the Tribunal identified the following issues the consideration of the Tribunal:-
    (i) Had the Claimant proved on the balance of probabilities that she was dismissed in this case on the basis that the Respondent was guilty of a breach of the implied term of trust and confidence?
    (ii) Did the Claimant resign in consequence at least in part of that breach?
    The answer to those two questions is yes the Claimant was constructively dismissed.
    (iii) In relation to the claims of discrimination, had facts been proved from which the Tribunal could reasonably conclude that she had been subjected to a detriment in relation to the protected characteristic of pregnancy or maternity? If yes
    (iv) Had the Respondent proved that the Claimant's pregnancy or maternity had nothing whatsoever to do with the reasons for the treatment.

5. The Employment Tribunal heard evidence from the Claimant and Mr Babbage, a neighbour of the Claimant, who had accompanied her to a grievance hearing on 9 August 2017 following her resignation. OJ gave evidence for the Respondent. There was a bundle of 164 pages to which additions were made during the hearing. All the witnesses relied upon witness statements which the Tribunal read in advance of the start of the hearing.

6. The Claimant relied upon a series of actions or failures on the part of her employer in particular from March 2017 onwards. In relation to those the Employment Tribunal was set out its findings and conclusions in chronological order.

    (i) Disciplinary proceedings in March 2017. As part of her accounting duties the Claimant was responsible for sending out invoices to and processing payments from customers of

the Respondent. On or about 10 March 2017 the Claimant mistakenly took a payment of £9,271.81 on a card payment from a customer instead of £3,291.71. Having realised her mistake she immediately informed OJ and apologized. OJ apparently made up the excess payment from his own resources but he was entitled to recover it from the Respondents account. The customer was informed. He apparently spoke to the Claimant the next day. The customer had been informed and did not make any formal complaint. When told about it by the Claimant OJ did not mention anything about a warning or disciplinary action. The following day however apparently on the instruction of OJ another employee handed her what amounts to a written warning in a pro forma format accusing her of gross negligence she was required to sign. See page 41. Puzzlingly, there is no evidence from the Respondent explaining the source of this pro forma warning. There was no investigation; she was given no opportunity to explain and was not notified of any right of appeal or invited to a meeting to discuss the matter nor given the right to be accompanied. This was a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures of 2015. It was however not disputed that the Claimant had made an error. This is a relatively small employer with some 7 employees on the premises at the time although there are apparently other premises. On 12 March 2017 the Claimant wrote to OJ complaining of the circumstances and that there were no procedures in place, asking for a response. She did not get one. OJ claimed during the Tribunal hearing that he had not received the letter a copy of which is at pages 42 to 43 of the bundle. We are satisfied that the Claimant put it on his desk and we note that he admitted in his witness statement that he had received it – see paragraph 6. This allegation is relevant to the constructive unfair dismissal claim but could not be any act of discrimination related to the Claimant's pregnancy because even if she was pregnant at that time clearly the Respondent was unaware of it until two months later.

(ii) The Claimant made a series of allegations of mistreatment by the Respondent following the notification of the pregnancy which she relies upon as acts of detriment because of her pregnancy. These included acts of increasing her work load, giving her tasks which were not part of her duties, failing to invite her to business meetings in particular with the sales team, and repeatedly questioning whether she had completed tasks given to her. We considered examples of these allegations in some detail during our deliberations which took

place between 12.30pm and 3.20pm on day 2 of the hearing. Examples of extra tasks included, finding a childminder for OJ; paying his brother's motoring fines; being required to participate in telephone sales marketing; and asking her to cover the shop floor when the Sales Manager, AG was unavailable for example during a lunch break. The Claimant's complaint is essentially that they were not part of her normal duties as Accounts Manager, and that there was no job description to which she could refer. It is also a fact that the Claimant was never given a statement of terms and conditions. We accept that she was on occasions requested or required to perform at least some of these tasks including those relating to motoring fines and the childminder. She was asked by AG, the Sales Manager to participate in a telephone sales drive which consisted of a trawl of the lists of the Respondents existing and former customers. This coincided with two other employees being taken on and added to the sales team. It was extra work for the Claimant we do not accept that it consisted of as many as 50 calls which she had to make per day partially consisting of answering questions from customers. We do not accept that she was as a matter of deliberate policy excluded from business meetings. We accept that there was some addition to her workload and that she was put under some pressure by enquiries from OJ. She complains that she was also required to place advertisements for new staff and to arrange interviews. This was a task not required to be done with any frequency. Fundamentally we do not accept that these actions were in any way causally connected to her pregnancy. She also complains that she was called into OJ's office on one occasion and spoken to about her smoking. She claims that she was told that members of staff had complained about it which she does not accept as being true. OJ says he spoke to her about it because he was concerned about her smoking when she was pregnant. The picture which she presented was of some campaign deliberate or otherwise to subject her to detriment because of her pregnancy. Although we have some doubts about the credibility of some aspects of OJ's evidence we accepted that his denial that there was any such intention or motivation conscious or otherwise.

(iii) Another complaint which she raises is that having been advised by her GP, she took a week off sick from the 4 July with stress. On her return she asked OJ if she should self-certificate for her absence but that he told her not to bother as it was to be taken as holiday that she did not get statutory sick pay to which she was entitled but which would have been a

lesser sum than the holiday pay to which she was entitled. We accept that she thereby lost the opportunity to take those days as holiday at a time of her and her family's chosing but we accept that it was not again any decision in any way connected to her pregnancy.

7. We now turn to the circumstances of her second warning and the events of June/July 2017 leading up to her resignation on 24 July. In late June there was a failure to include a £14,000 order for bathroom furniture on an invoice or invoices to an established customer of the Respondent. It is common ground that the Claimant was responsible in the office for invoicing. The Claimant was however unaware that the invoicing of this sum had not taken place. Around 30 June OJ called her into his office and handed her a print out, a copy of which we understand is contained at page 45 of the bundle. He pointed out that the customer had not been invoiced for the bathroom furniture amount. She apologised and was told to correct the mistake email it to OJ to check and then send to the customer when he had confirmed its accuracy. No investigation took place into how the omission had occurred either then or at any other time up to the Claimant's resignation. Nothing else was said about it to the Claimant until over 3 weeks later at around midday on 24 July shortly after which she resigned. What happened in the meantime is in our view of considerable significance although surprisingly, the Claimant did not mention it at all during the course of her evidence or in her witness statement. It did not come to light until cross examination of OJ. Sometime in early July 2017, after the invoicing failure she was instructed by OJ to advertise the Account Manager's job. When we learned of this, we directed the Respondent to produce the advertisement by researching their account at the Indeed Agency but we were told that there was no record going back to 2017. There is an issue as to whether the advertisement was for a permanent job as opposed to merely cover for the Claimant's maternity leave the matter is complicated by the fact that the Claimant appears to accept that the job was not only to perform her own duties and there is no evidence as to when it was to become available. The fact that the Claimant did not mention it during the course of her evidence indicates that she did not consider what she was being asked to do in advertising the job was in any way sinister. In any event, someone referred to during the evidence as Ephraim emailed his CV to the Claimant at the office on the 10 July. It appears that Ephraim had found out about the opportunity not from any advertising but having been notified of it by the Respondents Warehouse Manager. He and others who did answer the advertisement were interviewed by OJ and he was offered the job we conclude that it was offered on the basis of permanent employment and, as the Claimant accepts, Ephraim had accountancy qualifications and was to be useful to OJ because he was able to perform other functions such as assisting OJ with his self-assessment tax return. It is also not in dispute that it was arranged for Ephraim to come in for one to two hours a day on several

occasions during the week preceding the 24 July. He was in effect shadowing the Claimant. An unsigned witness statement allegedly from Ephraim was submitted to the Tribunal by the Respondent on the second day of the hearing. In his email Ephraim referred to accountancy rather than an accounting position the statement he claims that on the 24 July he was destined to start working for four hours as were agreed by OJ. What occurred on that day is in our view significant. OJ instructed AG to resurrect with the Claimant the issues surrounding the £14,000 invoice failure which the Claimant believed had been put to bed over 3 weeks before. There had however been and was then no investigation into the circumstances which had occurred. Around midday on 24 July the Claimant was summoned into OJ's office by AG who was informed that OJ had instructed him to give her a disciplinary warning. A document had been prepared which is in a similar format as the document produced at the time of the first disciplinary incident in March 2017. There are however two different versions of that document one originally placed in the bundle at page 47 which bears the date 7 July 2017 and names as the witness someone called Alex Thomas. The second version is dated the 24 July 2017 with the witness named as "Andy Groucutt" the other contents of these two documents are almost but not exactly identical. They state

> "the purpose of this written warning is to again bring to your attention recent deficiencies in your conduct and or performance. The intent is to define for you the seriousness of the situation so that you may take immediate corrective action. This written warning will be placed in your personnel file for future reference. Written action required after verbal and written performance warnings in the past.
> Reason for warning
> During July you did fail to invoice £14,000 worth of goods supplied to GIA London. During investigation you were given the opportunity to respond and as discussed with Osama (OJ) you then failed to realise and acknowledge the error. This is classed as gross misconduct and is the second occurrence of gross misconduct so far this year. You are under performance and misconduct are serious enough to cause serious harm to the company
> Corrective action required
> <u>This issue is to be discussed with Osama and the option of dismissal is open to the company after this discussion.</u> We accept that the meeting lasted some 20 minutes the Claimant attempted to explain the circumstances which are set out in her witness statement at paragraph 31 she claimed that the order for the bathroom furniture had not been placed through the Respondents ordering system and had not been ordered by herself consequently she had no idea that the customer had received them accordingly she was required to invoice him. We find that AG who has not been called to give evidence refused to listen to any explanation and indeed tried to force the Claimant to sign for the receipt of the warning. It was in

response to that that the Claimant some ¾ hour later went to speak to OJ in his office and raised a series of issues including those which she had raised during the course of this hearing and in particular that she considered that the circumstances of the disciplinary warning that day was the last straw and that she was intending to leave immediately. There is a dispute as to how OJ responded according to the Claimant he said words to the effect I think that would be best that he would pay her something according to OJ he merely told her to go home rest intending that she should return to work. As he claimed in the Tribunal she was a valued employee in whom he placed reliance for a number of reasons we are minded to accept the Claimant's account of that conversation. She never returned to work after that day although on the 28 July he telephoned her and asked her to come in to assist the new Accounts Manager to prepare statements and end of month accounts but said nothing about her returning to work, an offer which she refused. This would have been a reference to Ephraim who was by that stage in place albeit as an independent contractor and not an employee. In addition, there is contemporaneous evidence or nearly contemporaneous evidence produced by the Claimant in the form of the grievance letter which she raised and is at pages 78 to 79 of the bundle. In the penultimate paragraph on page 79 she repeated that OJ had agreed when she had informed him of her intention to terminate her employment that it would be "best for us both and offered to pay me a settlement fee" in addition, during the course of the grievance hearing attended by Mr Babbage on 9 August there is no suggestion that OJ was seeking to persuade the Claimant to return to work and used the expression see you in Court. It maybe however that that response was a response to the detailed criticisms which Mr Babbage was making in relation to the disciplinary warnings.

In summary we conclude that circumstances of the giving of the second disciplinary warning the accusation of gross misconduct, the further threat of a subsequent dismissal by OJ, the failure to invite the Claimant to a disciplinary hearing or to countenance the explanation which the Claimant had of itself constituted a serious breach of the term of trust and confidence which played a very significant part in her decision to resign which she did promptly. It is true that she also resigned for other acts about which she has complained which took place after the notification of her pregnancy which we have rejected as acts of discrimination but in our view the final disciplinary warning and the circumstances of it was an act of discrimination on the protected characteristic of pregnancy. We do not regard it as mere coincidence that Ephraim had been interviewed and recruited and was due to begin on the same day as the resurrected warning. We reject OJ's contention that by that stage she remained a valued employee. We find that his actions at that time

were materially influenced by the fact that she was pregnant and was going on maternity leave. Her job was in effect being usurped albeit that Ephraim was also to perform other tasks which she had not herself performed. Accordingly, this part of her claim together with her claim of ordinary unfair dismissal succeeds.

Employment Judge J Hargrove
Dated: 21 June 2018

JUDGMENT SENT TO THE PARTIES ON

26 June 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.