EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Imbimbo	**v**	Lucky Media Limited

Heard at: Cambridge **On:** 27 and 28 August 2019

Before: Employment Judge Foxwell

Members: Ms S Morgan and Mr R Eyre

Appearances
For the Claimant: Mr J Davies, Counsel
For the Respondent: Mr C Strutt, Director

RESERVED JUDGMENT

1. The claimant's claims are not well-founded and are dismissed.

2. The provisional remedy hearing listed on 28 November 2019 is cancelled.

RESERVED REASONS

Introduction

1. The claimant, Ms Alessandra Imbimbo, has almost 10 years' experience in the gaming industry. She is of Italian heritage. In 2016, while working in Gibraltar, she met her partner, Jake Wilkins, who is a self-employed fitness instructor. Mr Wilkins is of dual English and Spanish heritage. He was not directly involved in the gaming industry in Gibraltar but many of his clients were as gaming is one of the principal economic activities there.

2. The couple decided to move to the United Kingdom in 2017 and in September 2017 the claimant began working for the respondent, Lucky Media Limited, which has an on-line gaming business. Christian Strutt is the principal shareholder and director of the respondent and he has represented it in this hearing.

3. Mr Strutt dismissed the claimant summarily, allegedly for gross misconduct (that is a repudiatory breach of contract), by email dated 8 May 2018. It is common ground that the claimant had informed Mr Strutt that she was pregnant on 2 May 2018 and that she was suspended on 3 May 2018 prior to her dismissal. The claimant's case is that the reason for her dismissal was her pregnancy or, at the very least, that it was a reason for her dismissal. Mr Strutt maintains that the claimant's pregnancy was coincidental and unrelated to his genuine and reasonable concerns that the claimant was in breach of non-compete covenants in her contract of employment.

Claims and issues

4. Having gone through early conciliation between 25 May 2018 and 1 June 2018, on 8 June 2018 the claimant presented claims of automatic unfair dismissal contrary to Section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave Regulations 1999 and of pregnancy or maternity discrimination contrary to Section 18 of the Equality Act 2010. These are the claims which have come before us.

5. Additionally, we have had to consider whether the respondent failed to comply with any relevant Acas Code of Practice in dismissing the claimant and whether the claimant is likely to have been dismissed in any event absent the alleged discrimination, or whether she contributed to her dismissal by blameworthy conduct.

The hearing

6. To resolve these issues, we heard evidence from the claimant and Mr Wilkins and from Mr Strutt. In addition, we considered the documents to which we were taken in an agreed bundle and references to page numbers in these reasons relate to that bundle.

7. Mr Strutt made closing submissions on behalf of the respondent, as did Mr Davies for the claimant. Mr Davies referred us to the following cases in closing, which we considered,

a) **Igen v Wong** [2005] IRLR 258; and
b) **Indigo Design and Build Management Ltd. v Martinez** [2014] UK/EAT/0021.

The Legal Framework

8. The claimant complains of automatic unfair dismissal because of pregnancy contrary to section 99 of the Employment Rights Act 1996 and that she was subjected to pregnancy and maternity discrimination. Pregnancy and maternity are protected characteristics under section 4 of the Equality Act 2010. It is unlawful to discriminate against employees under section 39 of that Act.

Automatically unfair dismissal

9. Employees ordinarily only acquire the statutory right not to be unfairly dismissed after they have completed 2 full years' service but there are exceptions to this service requirement in cases where the reason for dismissal is deemed to be automatically unfair. One of these exceptions is where the reason for dismissal (or the principal reason if more than one) is pregnancy or childbirth (sections 99 and 108(3)(b) of the Employment Rights Act 1996). The relevant parts of section 99 provide as follows:

> *"(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,"*

10. The "relevant regulations" are the Maternity and Parental Leave Regulations 1999.

11. In a case where an employee asserts an automatically unfair reason for dismissal but has sufficient qualifying service to bring a claim of "ordinary" unfair dismissal, she must adduce some evidence consistent with her claim to, as it were, get it off the ground but the burden of proving the reason for dismissal lies with the employer. If, however, the employee has insufficient service to claim ordinary unfair dismissal, as in this case, she must establish the Tribunal's jurisdiction and, therefore, the burden of proving the automatically unfair reason falls on her.

12. In cases of automatically unfair dismissal the focus of the Tribunal's enquiry is on the reason for dismissal (or the principal reason if there is more than one). The reasonableness of the decision to dismiss is irrelevant as is the fairness (or unfairness) of any investigation or procedure adopted in dismissing the employee, although such factors may lead a Tribunal to draw adverse inferences as to the reason for dismissal.

Pregnancy and maternity discrimination

13. Pregnancy and maternity discrimination arises under section 18 of the Equality Act which provides as follows:

> *"(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 ….*
>
> *(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."*

14. This section makes it unlawful to treat a woman unfavourably because of pregnancy during her pregnancy and any period or ordinary or additional maternity leave. The consequences to an employer (particularly a small employer) of pregnancy related absence or of maternity leave are irrelevant but an employer will only be in breach once it knows of the woman's pregnancy.

15. Guidance has been issued on the interpretation of section 18 by the EHRC in its Code of Practice on Employment (2011) at Part 8 and we have had regard to this.

16. The determination of whether treatment is because of a protected characteristic requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that a protected characteristic formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see **Nagarajan v London Regional Transport** [1999] ICR 877). In cases where the less favourable treatment complained of is not inherently related to a protected characteristic it is necessary for the Tribunal to look in to the mental processes of the alleged discriminator to determine the reason for the conduct (see **Amnesty International v Ahmed** [2009] IRLR 884).

17. What amounts to unfavourable treatment is not defined in the 2010 Act. The Code of Practice suggests in the context of disability that treatment which puts an employee at a disadvantage is unfavourable and that this will often, but not always, be obvious (see paragraph 5.7). We consider that this guidance is equally valid to a claim under section 18 and regard summary dismissal as obvious unfavourable treatment in any event.

The burden of proof under the Equality Act

18. Section 136 of the 2010 Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(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".*

19. These provisions require a claimant to provide evidence of facts consistent with her claim: that is facts which, in the absence of an adequate explanation, could lead a Tribunal to conclude that the respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the claimant does this then the burden of proof falls on the respondent to prove that it did not commit the unlawful act in question (see **Igen v Wong** [2005] IRLR 258 and **Efobi v Royal Mail Group** [2017] IRLR 956). The respondent's explanation at this stage must be supported by cogent evidence showing that the claimant's treatment was in no sense whatsoever because of the protected characteristic.

20. Detailed consideration of the effect of the so-called shifting burden of proof is only necessary in finely balanced cases but we have borne this two-stage test in mind when deciding the claimant's claims. We have also had regard to the principles set out in the Annex to the judgment of Peter Gibson LJ in **Igen v Wong**.

The drawing of inferences

21. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts: discrimination may be unconscious and people rarely admit, even to themselves, that considerations of pregnancy have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if pregnancy played a part (see **Anya v University of Oxford** [2001] IRLR 377). We have considered the guidance given by Elias J (as he then was) on this in **Law Society v Bahl** [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a Tribunal may infer this from unexplained unreasonable behaviour (see **Madarassy v Nomura International plc** [2007] IRLR 246).

The scope of our findings

22. The Tribunal heard a substantial amount of evidence over 2 days. Issues were tested and explored by the parties through their questions. We have not attempted to set out our conclusions on every question or controversy raised in the evidence but we have considered all of that evidence in reaching the conclusions set out below. The findings we have recorded are limited to those we consider necessary to deal with each of the issues raised by the parties. We have made our findings unanimously and on the balance of probabilities.

Findings of Fact

23. At the times relevant to this case, the respondent operated an on-line bingo site and two on-line casinos. The claimant's role was to generate and

manage the respondent's relationships with "affiliates". Affiliates are third parties with whom the respondent places on-line advertising to attract customers to its gaming sites and those of others in the industry with which it had contracts.

24. The respondent is a small company. At the material times the only employees were the claimant, Mr Strutt and one other who was referred to in evidence simply as "James". The respondent also retained an accountant but he or she provided professional accounting services and was not an employee. The claimant's job title was 'Head of Marketing'. There was a second marketing person engaged by the respondent through an agency, but she left in November 2017.

25. The claimant worked part-time, 24 hours a week, which she could do flexibly.

26. Mr Strutt offered the claimant her position by email dated 7 September 2017 (pages 26a – 26b). One point he raised in this email was that the claimant was not to work for any direct competitors of the respondent on the days when she was not working for it. Mr Strutt also issued the claimant with a contract of employment which she signed on 28 September 2017 (pages 27 – 30). This contained the following clause (page 29):

> *"During the period that you render services to the employer, you agree not to engage in any employment, business, or activity that is in any way competitive with the business or proposed business of the employer. You will disclose to the employer in writing any other gainful employment, business, or activity that you are currently associated with or participate in that competes with the employer. You will not assist any other person or organisation in competing with the employer or in preparing to engage in competition with the business or proposed business of the employer."*

27. In or around December 2017, the claimant became pregnant with her first child. Her son, Georgie, was born on 18 September 2018.

28. On 8 March 2018, the claimant and Mr Wilkins registered a company, 'The Game Changer Training Limited', at Companies House. Both were named as directors. The claimant and Mr Wilkins told us that 'The Game Changer' was the brand Mr Wilkins had established for his personal training business in Gibraltar. We accept that evidence.

29. On 13 March 2018, Mr Wilkins registered another company, 'Super Good Games Limited' ("SGG"), at Companies House. He was named as the sole director but the registered office was the home he shares with the claimant. This was the same registered office as that for The Game Changer Training.

30. Mr Wilkins told us that he established this company on the spur of the moment having seen a film called *'Runner Runner'* (which concerns the gambling industry); he said that he had a tendency to act spontaneously coupled with a strong entrepreneurial drive. He said that he did not discuss his decision to register this company with the claimant but that all he knew of the gambling industry was what he had seen of the lifestyles of his wealthy clients in Gibraltar.

Mr Wilkins explained that his plan had been to develop a gaming business in Italy where the claimant has relatives. This is not a market where the respondent operates.

31. In addition to registering SGG with Companies House, Mr Wilkins created a website and an email account for the company. He said that he did this at home on the laptop he shared with the claimant. The website is in English.

32. The day after registering the new company Mr Wilkins attended his local Metro Bank to open a business account for it.

33. The claimant said that she became aware of what Mr Wilkins had done soon after but that he had taken these steps without consulting her.

34. On 5 April 2018, the claimant asked Mr Strutt in a Skype conversation whether the respondent accepted *"Italy traffic"* (page 96i). Mr Strutt had commented that business in the UK was difficult and the claimant suggested that she might be able to get revenue from Italy. Mr Strutt replied that he was *"pretty sure"* that the respondent could not accept traffic from Italy because of strict licencing rules there. The claimant did not mention Mr Wilkins' embryonic plans to set up a gaming business in Italy but this passage of events is consistent with Mr Wilkins' evidence of a plan to set up a gaming business in Italy. We also infer that the claimant was aware of this plan and concerned about the possibility that it might place her in breach of covenant.

35. The website that Mr Wilkins had created for the new company was no more than what is called a 'landing page'; that is a single page with minimal information. Nevertheless, the text he had prepared read as follows (page 39) and there was a facility for potential affiliates to make contact:

> *"The owners behind Super Good Games Limited have been in the industry for over a decade!*
>
> *We are now working on delivering Super Good Games to the market using the best gaming providers and developers.*
>
> *All our brands have been designed to the highest quality for our players, us and our affiliates. We are looking forward to welcoming all affiliates to join our soon to be released Bingo and Casino sites.*
>
> *Watch this space!"*

36. It was put to Mr Wilkins that this description suggests that more than one person was involved in the enterprise and that the claim of long experience in the gaming industry could not apply to him. He said that this was simply legitimate marketing exaggeration and that the reference to a decade's experience was to his experience as a self-employed fitness instructor and not to the claimant's almost ten years' experience in the gaming industry. He and the claimant acknowledged that working with gaming providers and developers and dealing with affiliates are activities of the respondent.

37. On 17 April 2018, Mr Wilkins posted a question on a G-mail help forum about linking the SGG website with its email address (pages 35 and 36). Mr Strutt put to the claimant that she did this but she denied it and Mr Wilkins agreed with her. We accept their evidence on this point. Nevertheless, it demonstrates that Mr Wilkins was taking steps to establish SGG in April 2018 as well as in March 2018.

38. On 22 April 2018, Mr Strutt performed a Companies House search of The Game Changer Training Limited. He also searched against the claimant's and Mr Wilkins' names, probably because they were identified as directors of that company. His search history shows that he then looked at the records for SGG (page 38). The Companies House entry revealed that Mr Wilkins was a director this company too and that its registered office was his and the claimant's home address.

39. On 23 April 2018, Mr Strutt contacted an HR Consultant, Angela Rhodes of Crispin Rhodes HR, by email asking for advice on making *"two full time members of staff redundant"*. The respondent only had one full time member of staff, apart from Mr Strutt, at the time and that was James. Given this context we accept Mr Strutt's evidence that the two members of staff he was referring to were James and the claimant; it appears to us that 'full-time' was a misnomer for 'permanent'. We find the fact that he was considering redundancy to be consistent with his comment to the claimant in the Skype conversation on 5 April 2018 (in which she referred to *"Italy traffic"*) that business in the UK was an *"absolute bloody nightmare"* (page 96i). Mr Strutt told Ms Rhodes in his email that the business had been close to insolvency in the last few months and that the decision to dismiss was *"strictly commercial".*

40. Mr Strutt told us that, following his initial approach to the HR Consultants, he changed his view and instead of pursuing redundancy decided to pursue a disciplinary route against the claimant based on the information he had obtained from the Companies House search. He said that this change of view was based on advice he received from the HR Consultants and informally from a friend who is a solicitor. There is no documentary evidence of this advice (advice from a solicitor is likely to be privileged in any event but this exemption from disclosure would not apply to advice from an HR consultant). Mr Strutt said that advice was given by telephone as he was cautious about it being committed to writing. Additionally, in answer to a question from the Tribunal, he said that the question of making James redundant was not pursued at the time, although James was made redundant later. We accept this evidence despite the lack of documentary evidence as it is consistent with the timing and sequence of other events.

41. The claimant was on pre-arranged leave between 25 and 29 April 2018. This leave had been booked at the end of March 2018 and approved by Mr Strutt on 5 April 2018. While she was away, Daxa Patel of Crispin Rhodes HR emailed a proposal to Mr Strutt for the provision of HR services (page 43). We have not been provided with a full copy of the attachment to this email but we find that it was Crispin Rhodes HR's terms and conditions of business as on 1 May 2018, Mr Strutt replied to Ms Patel attaching the completed signature page (pages 45 – 46). Mr Strutt has disclosed an edited version of this email only and we were not provided with the unedited one. His explanation is that the unedited version

contained confidential information concerning James. We are not convinced by this explanation. There may have been some reference to James, but the parts of the email we have seen suggest that this it contained Mr Strutt's full account of what he knew about James and the claimant at the time. It has been a matter of concern to us that he chose not to disclose the full email. We also found Mr Strutt's reluctance to disclose the attachment to Ms Patel's email baffling.

42. In the meantime, on 30 April 2018, the claimant emailed Mr Strutt to say that she had returned from a few days abroad and would be back at work on Wednesday 2 May 2018 (page 44).

43. The claimant exchanged a number of emails with Mr Strutt on the morning of 2 May 2018. At about 8.20am she emailed to say that she would be late in on 3 May 2018 as she had a doctor's appointment because of a cold (page 47). At 8.44am Mr Strutt sent a long email to the claimant setting out the work plan for May (pages 47a – 47c); this included an instruction to the claimant to begin work on compiling a list of potential new affiliates, but also said that she was not to contact these affiliates without discussing it with Mr Strutt first.

44. There is nothing in Mr Strutt's email of 2 May 2018 suggesting that he suspected the claimant of being in breach of the covenants in her contract. Nevertheless, Mr Strutt's evidence is that he did believe this because of the information he had uncovered at Companies House and on the internet. Mr Strutt's explanation for the style and contents of this email is that he wanted to create a 'business as usual' impression to avoid the risk of the claimant misappropriating his commercial information were he to give any hint that she was at risk of dismissal. The claimant's case is that this long email shows that Mr Strutt was unconcerned at that stage about anything he may have discovered on line about SGG because he knew that the claimant was not involved in a competitor business. We shall come back to this conflict in our conclusions.

45. At about 9.20am on 2 May 2018, the claimant emailed Mr Strutt saying as follows (page 48):

> *"Hey Chris, this may come to you as a bit of a shocker, but I am very pleased to announce that I am 21 weeks pregnant! I have kept this quiet from you until now as I wanted to make sure everything was ok with baby before I officially told you. I had my 20 weeks' scan last week and baby is healthy and well. I am due on 8 September 2018.*
>
> *As you have seen my work output has not changed, I have not yet decided of an intended date and length of maternity leave, but I will do so in due course, but I would like to work with you to devise a plan so there is coverage during my maternity leave.*
>
> *I would appreciate it very much if you could please provide me with a copy of the Company's New and Expectant Mother's Policy and also any other work related information and entitlements in relation to my condition. Find my paperwork Mat B1 for my maternity certificate. Happy to meet up face to face to discuss.*

Thanks Ale"

46. At about 10.00am that morning, Mr Strutt forwarded the email to Ms Patel saying as follows (page 50),

"Hi Daxa,

I received this email completely out of the blue this morning, please advise via email.

Best regards
Chris"

47. Angela Rhodes responded on Ms Patel's behalf at 9.30am the following morning saying as follows (page 51):

"Hi Christian

Daxa is away from the office with a client this morning and I am not sure whether or not she has seen your emails last night. I am currently on a conference call with a client so will call you as soon as this call has finished. Please do not take any action until I have spoken to you.

Kind regards
Angela"

48. It is clear from Ms Rhodes' second email of 3 May 2018 that she spoke to Mr Strutt some time that morning (page 54). She provided him with a template investigation report with the title 'Worked Example Investigation Report – Acas approved format'. In the interim, Mr Strutt had emailed the claimant asking her to come to a meeting in Milton Keynes later that day and she agreed to do this after her doctor's appointment (page 53). Mr Strutt did not tell the claimant what the meeting was about; she probably believed it was about her pregnancy. The claimant told us that she was anxious about disclosing this as she did not know how Mr Strutt would react and had left it as late as possible before doing so.

49. Neither the claimant, nor Mr Strutt, provide a detailed account of their meeting of 3 May 2018 in their witness statements but it is common ground that Mr Strutt suspended the claimant during the meeting.

50. The claimant said in evidence that Mr Strutt began the meeting by congratulating her on her pregnancy and that he then produced two pieces of paper relating to SGG and asked if she was involved in it; she denied this. Mr Strutt put to her in cross-examination that she had apologised for her involvement with SGG in this meeting, but she said that this was untrue.

51. Mr Strutt claimed in his witness statement that the claimant had confirmed that SGG had been tendering for business and that she had been working for it in direct competition with the respondent and that it was in this context that she apologised. He also referred to keeping minutes of this meeting in his witness

statement and gave page 59 as the relevant reference point in the bundle. The minutes themselves were not in the bundle originally put before us: at page 59 is Mr Strutt's email of 4 May 2018 to Daxa Patel which reads as follows,

> *"Hi Daxa*
>
> *Please find attached Acas template from yesterday's interview. If you could please get the process completed asap to your earliest convenience, that would be superb. Thank you.*
>
> *Best regards, Chris"*

52. The attachment to this email was entitled, 'Worked Example Investigation Report – Acas approved format'. A copy of what was said to be this attachment was produced on the afternoon of the first day of the Hearing and added to the bundle at pages 118 – 122.

53. There was a dispute about whether the claimant had disclosed this report previously: as recently as August 2019, the claimant's current solicitors made an application to the Tribunal for specific disclosure and an 'Unless Order' in respect of this document. Mr Strutt told us that he had disclosed the document more than once previously. In any event, the claimant's solicitors were able to confirm and it became an agreed fact that the report was created on 4 May 2018. We find it probable that this document is the one referred to in Mr Strutt's statement which was sent by email to the HR Consultants shortly before 9am on 4 May 2018 (page 59).

54. The report states that an investigation had begun on Friday, 27 April 2018 and that Mr Strutt was the investigator. His terms of reference were to carry out an investigation into the allegation that the claimant was involved in a new company, Super Good Games Limited, that appeared to be a direct competitor of the respondent. The purpose of the investigation was to report on findings and make recommendations. The investigation was described as involving a review of information from Companies House, the SGG website and an interview with the claimant on 3 May 2018.

55. The investigation meeting notes are at pages 119 and 120 (internal pages 2 and 3 of the report). Mr Strutt recorded the claimant as stating initially that she did not know anything about SGG other than that her partner owned it and that she had not discussed the company with him. this is broadly consistent with the account the claimant has given us in evidence. The notes say that Mr Strutt put to the claimant that SGG's web site referred to 'owners' in the plural and that this was inconsistent with it simply belonging to Mr Wilkins. The notes also say that he put to her that the reference on the SGG website to a 'decade's industry experience' was consistent with her experience in the gaming industry and not Mr Wilkins'. The notes say that the claimant then confirmed that she knew the company was operating from her home address, that she had actively discussed the company with Mr Wilkins and that he was seeking business from elsewhere in a sector where the respondent operated. Mr Strutt put this sequence of events to the claimant in cross examination but she denied it.

56. We have had to consider whether this report is reliable. We are satisfied that it is contemporaneous given that the parties agree it was created on 4 May 2018 but, clearly, this was after the claimant had disclosed her pregnancy and it is possible that it was created as a smokescreen for a pregnancy-related dismissal. We shall return to this question in our conclusions.

57. Mr Strutt confirmed the claimant's suspension by letter dated 4 May 2018, a Friday (page 57). The claimant replied by email that evening denying involvement in her partner's business. She said that she had had a *"bad feeling"* that Mr Strutt would *"do something like this"* when she announced her pregnancy. She told us that she had been extremely upset after the meeting on 3 May 2018. Mr Wilkins confirmed this and added that the claimant's initial reaction had been to blame him for her 'dismissal' (she was suspended at this point and not dismissed).

58. Because of an intervening bank holiday, the next working day was Tuesday, 8 May 2018. That afternoon Mr Strutt emailed the claimant dismissing her summarily. He said as follows (page 62):

> *"Subject to Lucky Media Limited investigations beginning in April 2018, I can confirm that unfortunately your employment with Lucky Media Limited must end with immediate effect today Tuesday 8 May 2018.*
>
> *Further to an internal investigation I started in late April, I have reason to believe that you have direct involvement with the company Super Good Games Limited, which is an active new company recently set up from your home address, in direct competition to Lucky Media Limited, owned by your partner who also lives at your home address, whom you already have shared business interests with. I believe this breaks the trust between yourself and Lucky Media, it is against your contract of employment, and essentially constitutes gross misconduct."*

59. In a later paragraph in this email he continued as follows:

> *"I can of course organise provision of company maternity policy for the record if required. I can also of course provide notes from our meeting last week …. if required. I can also provide you with information about the appeal processes etc. We could also potentially go through a hearing process but frankly I thought this is just going to be stressful for you. Hence I thought it best to perhaps focus on wishing you all the very best for the future."*

60. The claimant replied on 14 May 2018, disputing the grounds for and fairness of her dismissal and asserting that it was because of her pregnancy. She did not say in terms that she was appealing against the decision but in our judgment this was the obvious implication of her email (pages 63 – 64). Mr Strutt replied almost by return saying that his decision was because of the claimant's involvement with SGG and to suggest anything to the contrary was libellous or slander (page 63). This was a disproportionate response.

61. Both parties have made complaints about the other's compliance with case management orders made in these proceedings and the obligation to provide full and frank disclosure. Mr Strutt was very critical of the claimant's compliance with orders and the claimant agreed that her former solicitors had not complied with the dates set out in the case management orders issued by the Tribunal and this was her reason for leaving them and finding new representatives. While this Tribunal does not condone non-compliance with orders, we try cases on their substantive merits and not simply by the quality of compliance with procedural steps (although this may be relevant to the drawing of inferences), we were therefore unimpressed by Mr Strutt's suggestion that the claim should be 'thrown out' because of this.

62. Turning to Mr Strutt's conduct of this litigation, it was clear to us that he had redacted at least one document inappropriately (see paragraph [ ] above). He questioned the relevance of other documents inconsistent with his case but potentially helpful to the claimant's, such as his long email of 2 May 2018. We could not get to the bottom of the question whether he had, or had not, provided disclosure of the 4 May 2018 report to the claimant's previous solicitors. Overall we found Mr Strutt's judgment in his conduct of this case to be clouded by a strong emotional response to the claimant's allegations.

Conclusions

63. We considered the Acas Code of Practice on Discipline and Grievance 2015 in reaching our conclusions in this case. Had this been a claim of ordinary unfair dismissal (for which the claimant would have required a minimum of two years' service) we would have had no hesitation in finding that the dismissal process was unfair and in breach of the Code: the claimant was deliberately not informed of any disciplinary charge before the meeting of 3 May 2018; she was not notified of the risk of dismissal or of a right to be accompanied; she was not given an effective right of appeal.

64. We have had regard to these manifest failings in the process in applying the burden of proof to the facts of this case. We have also had regard to the coincidence between the claimant announcing her pregnancy and her suspension and subsequent dismissal. We have taken account too, of the lack of documentary evidence of the advice received by the respondent following its appointment of HR advisors and its failure to give complete and frank disclosure. In our judgment these factors are sufficient to infer pregnancy related discrimination such that the burden of proof under the Equality Act 2010 passes to the respondent. While the burden of proof does not shift in the same way under the Employment Rights Act 1996, there is sufficient in our judgment to allow us to look to the respondent for cogent evidence displacing the inference that the principal reason for dismissal was pregnancy. We have therefore scrutinised the respondent's explanation with care.

65. Despite the defects identified above, we find that the respondent's case is true: Mr Strutt's treatment of the claimant by suspending and then dismissing her was wholly unrelated to pregnancy. It follows that pregnancy cannot be the sole or principal reason for dismissal.

66. We find that Mr Strutt genuinely and reasonably believed that the claimant and her partner were in the process of setting up in competition with him. The terms of the SGG website were consistent with this: it referred to 'owners' in the plural, to a 'decade's experience', which the claimant had but not Mr Wilkins, and it encouraged potential affiliates to make contact. The claimant's job was to identify and make contact with affiliates on behalf of the respondent. There was no reference to this new venture being confined to the Italian market; the website was in English not Italian.

67. The documentary evidence shows that Mr Strutt was aware of this information on or shortly after 22 April 2018, well before the claimant announced her pregnancy. Furthermore, he had evidence of recent activity on a G-mail forum concerning SGG, which reinforced his view that preparatory steps were being taken to set up in competition with him.

68. It is not clear to us whether Mr Strutt contacted HR Consultants before his concerns about the claimant's plans were fully-formed and that he was therefore genuinely raising questions about potential redundancy or whether he is simply an unsophisticated employer for whom the concept of 'redundancy' is no more than a simple way of resolving an employment problem. It is unnecessary for us to resolve this however as in either case Mr Strutt contacted the HR consultants on 23 April 2018 and entered into a contract with them by 1 May 2018, all before the claimant announced her pregnancy. Whatever Mr Strutt's initial motivation for contacting the consultants was, we find that the claimant's potential breach of contract was the reason he retained them on 1 May 2018. We reach this view because no redundancy action was taken against James at that time and because of what the information from Companies House and the SGG website appeared to show.

69. It is clear from the contemporaneous emails that the claimant's announcement of her pregnancy on 2 May 2018 was unexpected; she described it as likely to be a shock in her email to Mr Strutt. The claimant is a slight woman and it has not been part of her case that her pregnancy was obvious. Mr Strutt's immediate response was to turn to the consultants for advice and the fact and tone of his email convinces us that he was taken by surprise. We infer from Ms Rhodes' reply of 3 May 2018 that there had been planned action, dismissal, but she advised Mr Strutt not to act without first discussing it with her. If anything, therefore, the claimant's announcement of her pregnancy delayed her dismissal rather than hastened it, albeit only for a short while.

70. Given the sequence of events and the fact that Mr Strutt was taking advice on how to conduct a procedure of sorts we accept that his report of 4 May 2018 is genuine and broadly accurate. We accept Mr Strutt's evidence that he had intended to dismiss the claimant because of her potential involvement in a competitor business before he knew of the claimant's pregnancy. We are sure that pregnancy was not the reason why he dismissed the claimant or even a reason because of the way in which he acted once the pregnancy was announced; he immediately referred the matter to his consultants with an urgent request for advice and was told to do nothing until they had spoken.

71. We do not find that Mr Strutt's long email of 2 May 2018 shows that he was unconcerned about the claimant's association with SGG. We find that he wanted to create the appearance of 'business as usual' because of a fear that the claimant may take confidential information were she to be told that she was at risk of dismissal. This approach is consistent with his overall view that the claimant was planning to set up in competition with him and the timing and sequence of other events leads us to reject the claimant's case on this document.

72. It is possible that Mr Strutt misunderstood the claimant's level of involvement in SGG and Mr Wilkins' intentions in setting it up (about which we find it unnecessary to make findings). It is also possible, albeit unlikely in our judgment, that this could have been cleared up had a fairer process been followed but that is not the issue in this case. The question here is simply whether pregnancy was a part of the decision and, having assessed the evidence as a whole and despite the burden of proof having passed to the respondent, in our judgment it was not. For these reasons the claims are dismissed and the remedy hearing provisionally listed on 28 November 2019 is cancelled.

73. Given our findings, we have not gone on to decide whether the claimant would have been dismissed in any event or whether she contributed to her dismissal by blameworthy conduct.

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Employment Judge Foxwell

Date: ……06.09.19……………….

Sent to the parties on: ....19.09.19.....

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For the Tribunal Office