Case No: 3329420/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Sinnamon	v	Care XL Limited

Heard at: Bury St Edmunds **On:** 15 & 16 April 2019

Before: Employment Judge M Warren

Members: Miss L Feavearyear and Mrs S Allen.

Appearances:
For the Claimant: Mr R Aston, Solicitor.
For the Respondent: Mr P Hanson, Managing Director.

JUDGMENT having been sent to the parties on 12 July 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Delay in producing these reasons

1. This case was heard on 15 and 16 April 2019. An oral decision was given to the parties on 16 April. The Respondent requested written reasons on 17 April, the Claimant on 30 April. The Administration took no action with regard to those requests. The Claimant chased on 6 September 2019. The matter was referred to me on 7 September and the referral seen by me on 11 September. I gave instructions for the recording of our oral reasons to be typed on 11 September. The typed reasons were sent to me on 19 September; I have corrected the typing and sent the Reasons for promulgation as quickly as I could.

Issues

2. Ms Sinnamon brings this claim for unfair dismissal, pregnancy related discrimination, for holiday pay and for notice pay. The issues in the case are set out in an agreed list of issues which is at pages 31-32 of the bundle and which is cut and pasted below:

Automatic and ordinary unfair dismissal

1) Did the Respondent dismiss the Claimant? The Claimant alleges on 26 October 2017 she was told during a telephone conversation between the Claimant and Kate James (of the Respondent) that she was no longer employed by the Respondent. The Claimant alleges she was dismissed in this telephone conversation. The Respondent denies that it dismissed the Claimant in this telephone conversation. The Respondent denies the Claimant was dismissed in the telephone conversation and alleges the Claimants employment is ongoing.

2) If the Claimant was dismissed by the respondent in the telephone conversation on 26 October 2017, was the Claimant dismissed for a reason connected with her pregnancy/maternity contrary to section 99 Employment Rights Act 1996?

3) If the Claimant was not dismissed for a reason connected with the pregnancy/maternity, was the Claimant dismissed for a potentially fair reason pursuant to s.98 (2)(a) of the Employment Rights Act 1996 (**ERA**)? The Respondent asserts the potentially fair reason as being conduct and refers to paragraph 8 of its Grounds of Resistance.

4) If yes, was the Claimant's dismissal fair for the purposes of section 98 (4) ERA?

5) If the Claimant was unfairly dismissed on procedural grounds would she have been fairly dismissed in any event and should there therefore be a reduction in any award of compensation on account of Polkey.

6) Should any award be increased on account of any failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7) Should any award be reduced on account of any failure by the Claimant to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures in failing to raise an appeal?

Pregnancy and maternity discrimination (section 18 Equality Act 2010)

8) Did the Respondent, during the protected period of her pregnancy, treat the Claimant unfavourably because of her pregnancy or because she was exercising or seeking to exercise, or had exercised or sought to exercise the right to ordinary or additional maternity leave.

   [The Claimant relies on her dismissal as the unfavourable treatment during her additional maternity leave]

9) If so, was the unfavourable treatment (dismissal) because of/on the grounds of the Claimant's pregnancy contrary to section 18 of the Equality Act 2010?

Wrongful dismissal

10) Was the Claimant dismissed without notice in circumstances where she should have received notice or pay in lieu?

    [The Claimant seeks to rely on statutory notice and therefore, 3 weeks]

Holiday pay

11) Is the Claimant owed holiday pay by the Respondent?

[The Claimant requires disclosure from the Respondent of holiday pay paid to be able to determine this]

For the avoidance of doubt the Claimant's claim in connection with her lost NVQ at the cost of £5000 is a claim for compensation arising out of discrimination and is not a separate head of claim.

Evidence

3. We have had before us:-

3.1 A witness statement from Ms Sinnamon;

3.2 Witness statements from Mr Hanson and Mrs Kate James;

3.3 We also had a properly paginated and indexed bundle of documents running to 203 pages. We added at the outset without objection, further better copies of the documents at pages 190-203. We also had from Mr Hanson, Managing Director for the respondent, a letter he had written to HMRC regarding a debt of £54,000 and a suggestion for a voluntary arrangement.

3.4 We had written submissions from Mr Aston for the claimant, for which we are grateful. He handed this up to us and to Mr Hanson at the outset of the case and then referred to them in his closing oral submissions.

4. I should make it clear that whilst the respondent company was not represented by lawyers today, but by its Managing Director Mr Hanson, they had been represented up until last Wednesday, 9 April 2019 when those solicitors wrote to the tribunal, enclosing copies of the bundles and the witness statements and explaining they were no longer instructed.

5. On the first day of the hearing, Mrs James was not here. Mr Hanson invited us to take evidence from her by video link or telephone, as she was no longer employed by the respondent company and he could not afford to pay for her to come here. We declined to do that, as there was no particular reason it seemed to us, why she could not attend a court hearing as a witness. As it turned out, Mrs James attended the second day of the hearing and gave oral evidence. When we heard from Mrs James, it transpired that she is in fact employed by another company owned by Mr Hanson.

6. I should mention that central to this case is a transcript of a recorded telephone conversation between Mrs James and Ms Sinnamon. It is central to the question of whether or not she was dismissed. That transcript was here in the bundle provided by the respondent's solicitors

without objection and without any suggestion that it is inaccurate. A number of times during the hearing, Mr Hanson referred to this transcript as being "inadmissible because of Mrs James' Human Rights". For the avoidance of doubt, as I explained to Mr Hanson, these days such recordings are usually found to be admissible in evidence because of course, as is often the case with Human Rights issues, there is a tension between two different Human Rights: that is the Article 8 right to privacy and the Article 6 right to a fair trial. In any event, as I have said, the transcript was included in the bundle by the respondent without objection.

The Law

Ambiguous dismissal

7. Where there is ambiguity as to whether or not there has been a dismissal, the burden of proof, (the balance of probabilities) lies with the employee. The test is objective. The tribunal should take into account all the surrounding circumstances, (which will includes events before and after the potential dismissal and the nature of the workplace) and how the reasonable employer and reasonable employee would understand the words used or the events in question. Any ambiguity is to be interpreted against the party relying upon it.

8. Dismissal can be inferred from an employer's actions, see for example Kirklees Metropolitan Council v Radecki [2009] ICR 1244 CA.

Unfair Dismissal.

9. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

Dismissal for Pregnancy

10. If an employer is able to show that an employee was dismissed for a potentially fair reason, then the test of fairness which must then be applied

is set out at section 98 (4). However, there are certain reasons for dismissal which are to be regarded as automatically unfair and one such provided for at section 99 is pregnancy. Section 99 reads:

> *(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.*

11. Subsection (2) explains that what is prescribed may be prescribed by Regulations made by the Secretary of State and subsection 3(a) states that a reason or set of circumstances prescribed under this section must relate to pregnancy, childbirth or maternity.

12. The Maternity and Parental Leave etc Regulations 1999 at Regulation 20 provide:

> *"(1)An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of part X of the Act as unfairly dismissed if (a) the reason or principal reason for the dismissal is of a kind specified in paragraph 3…"*

13. The reasons specified at paragraph 3 include: at (a) the pregnancy of the employee, at (b) the fact that the employee has given birth to a child and at (d) that the employee had taken maternity leave.

14. In an ordinary case of unfair dismissal, the burden of proof as to showing a potentially fair reason for dismissal lies with the employer. If the employer is able to show that potentially fair reason, then the burden of proof as to the test of fairness is neutral. The situation is slightly different where the reason for dismissal asserted by the employee is one which is automatically unfair. The authority on this, is Kuzel v Roche Products Ltd [2008] IRLR 530: when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case. That does not mean however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason, it is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason. It will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence. The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant, on the basis that it was for the employer to show what the reason was. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it.

15. The difference with that approach from discrimination cases was explained in Nunn v Royal Mail Group Ltd [2011] ICR 162. In discrimination cases it

is necessary to carefully establish primary facts and carefully look at what inferences can be drawn from those facts, particularly as the basic information will be in the hands of the employer, whereas in automatic unfair dismissal cases, the burden is on the employer, there is no need for the employee to set up sufficient facts for that burden to exist. A tribunal in assessing the employer's asserted reason for dismissal will have in mind what the employee says and will test the employer's witnesses in relation to whatever points toward a reason other than that advanced by the employee, *"But, at the end of the day, it is a matter of the tribunal to come to a view as to whether, on the balance of probabilities, the employee has satisfied them as to the reason."*

Maternity and Pregnancy Discrimination

16. The relevant law on discrimination in respect of pregnancy and maternity is to be found in the Equality Act 2010.

17. Section 39(2) provides that an employer must not discriminate against an employee by dismissing or subjecting that employee to detriment

18. Pregnancy and maternity are protected characteristics identified at s.4.

19. Section 18 defines the circumstances in which discrimination on the ground of pregnancy and maternity will have taken place as follows:

> **"18 Pregnancy and maternity discrimination: work cases**
>
> *(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.*
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
> *(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*
> *(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*
> *(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.*

20. One should note the reference is to, "unfavourable" treatment. There is no requirement for a comparator.
21. How does one determine whether any particular unfavourable treatment

was, "because of" pregnancy or maternity leave? Under the previous legislation, the term used to proscribe pregnancy and maternity discrimination, as it was for direct discrimination was, "on the ground of" the particular protected characteristic. It was not the intention of Parliament to change the legal meaning of direct discrimination, as explained in the Explanatory Notes published with the Act at the time. Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014]IRLR 448 at paragraph 40 that there was no difference in meaning between, "because of" and "on the grounds of".

22. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> *"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…*
>
> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

23. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as*

possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

24. Although these authorities involve cases concerning other protected characteristics, such as race, the approach we should take is no different in cases involving allegations of discrimination on the grounds of pregnancy or maternity leave; see Johal v Commissioner for Equality and Human Rights [2010] UKEAT/0541/09, (a case involving a complaint of pregnancy discrimination when the claimant had not been informed of an internal job vacancy whilst she was on maternity leave) at paragraph 23:

" In simple terms, where an act is inherently discriminatory, for example, the difference in ages between men and women pensioners entitled to free swimming in Eastleigh Council's pools, the detriment suffered by the Claimant will be on the prohibited ground without more. The discriminator's motive for that discrimination, whether benign or malicious, is immaterial. However, where the act complained of is not in itself discriminatory, as we accept Ms Stone's submission applies in the present case, it may become so by discriminatory motivation, whether conscious or subconscious; the Nagarajan *type of case."*

25. Pregnancy or maternity leave may be a background circumstance, or the context, of the events complained of, but to amount to discrimination, the act complained of must still be, "because of" those protected characteristics established by the approach explained in the preceding paragraphs; see for example Idigo Design Build and management Ltd v Martinez UKEAT/0020/14.

26. See also The Commissioner of Police of the Metropolis v Keohane UKEAT/0463/12/RN, the case involving the police dog handler whose dog, Nunki Pippin, was taken away from her when she told the respondent that she was pregnant. There, the tribunal was upheld in finding that there had been discrimination when it had found that although there were other aspects to the decision, (a need to keep the dog operational) but nevertheless, there were factors relating to the claimant's pregnancy operating in the mind of the decision maker.

27. S.136 of the Equality Act deals with the burden of proof:

"(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."

28. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005[IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case to which we have had careful regard in reaching our decision in this case.

29. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation. That case also confirms that a mere difference in treatment is not enough.

Findings of fact

30. The respondent provides care to people in their homes. It had at the time, 10 employees including Mr Hanson, (the Managing Director) and its Operations Manager Mrs James.

31. Ms Sinnamon's employment with the respondent commenced on 27 July 2014 as a care assistant. She was in due course promoted to care co-ordinator and in that role, she was responsible for preparing the rotas of the staff as well providing care to clients herself.

32. In March 2016, Ms Sinnamon was made a director of the company and promised a transfer of 5% of the company's shares. That this is so is confirmed by page 68 and what appears to be an email from Mr Hanson to the company accountant, asking the company accountant to transfer 5% of the company's stock to Ms Sinnamon. Her rate of pay was at that point changed to a flat rate of £15,000 per annum, on the expectation of a dividend on those shares. That this is the case is reflected in payslips that we have seen in the bundle. Mr Hanson suggests that the reduction in monthly pay we see at that time in the pay slips, was because Ms Sinnamon reduced her hours because she was pregnant. That cannot be the case, because Ms Sinnamon was not pregnant and did not inform the respondent of that until the end of July.

33. There was a contract in the bundle unsigned by the parties, produced by Ms Sinnamon, at page 40. This refers to her as, "Registered Manager pending successful application", which is a reference to what Mr Hanson told, that he had done a deal with Ms Sinnamon that she would seek to qualify so that she could become registered as a manager with the CQC. The terms of the contract record her hours as being 20 hours per week and on a salary of £15,000 per annum payable monthly.

34. On 31 July 2016, Ms Sinnamon informed the respondent that she was pregnant.

35. On 18 August 2016, there was a problem with the rota and there was a suggestion that Ms Sinnamon did not turn up for work where and when she should have done. We do not need to know the detail, the point is, there was a palaver as a consequence of which on 19 August 2016, Mr Hanson sent to her a text message (page 92) in which he referred to her conduct the previous night and that morning as having been poor. He called her into the office after she had finished her shifts and advised her that the outcome of that meeting could result in disciplinary action.

36. Mr Hanson says that on this date, the 19 August 2016, he met with Ms Sinnamon to discuss complaints of bullying he had received against her. He refers to his handwritten notes, which are replicated at page 96. They are brief, but in them he refers to a discussion about her suitability for her role, complaints from staff regarding bullying, that he would take over the on-call phone, that Dione would do the rotas. The note records Ms Sinnamon walking out of meeting at 14:45. The meeting started at 14.25 and Mrs James is recorded as being present to begin with but leaving at 14.35. Mr Hanson says that additionally, he spoke to the claimant about removing her as a director of the company, but that he has forgotten to note that on the record.

37. Ms Sinnamon says that none of this was discussed, the discussions were all about the rota and the events of the previous day. We note that Mr Hanson's text message at page 92 supports that.

38. Mrs James told us that she had no recollection of what was discussed at this meeting. She also told us that she had no recollection of any complaints from staff about bullying.

39. We note that Mr Hanson did not in fact remove Ms Sinnamon as a director for a further year.

40. We note Ms Sinnamon's email at page 100 dated 21 August 2016, (after the event) asking for an agenda or confirmation of the purpose of the meeting and we note Mr Hanson's reply was that it was to discuss her, "performance and suitability for the role as there had been complaints from staff" and speaks of the need for an, "efficient and forward rota" being needed.

41. Our conclusion, weighing this evidence, is that the document at page 96 is not a genuine record of what was discussed. We find that what was discussed is as Ms Sinnamon has said; the incident of the previous day and the trouble with the rota in that regard.

42. As I have noted, Ms Sinnamon walked out of the meeting on 19 August. She immediately absented herself from work due to illness and was certified subsequently by her doctor as not being fit to work due to work related stress. She did not again return to work with the respondent, other than for some 'Keeping In Touch Days' (KIT Days) which we will come to in a minute.

43. On 23 August 2016, Mr Hanson wrote a letter to Ms Sinnamon in which he said that any information requested by her would be put on hold until her return to work when she is deemed fit.

44. On 25 August 2016, (page 101) Mr Hanson wrote a letter stating that items of company property in Ms Sinnamon's possession,

> "should be returned to the office by return, for example fuel cards, client keys and care plan sheets that several clients informed us you have removed".

The tone of that letter is surprisingly hostile.

45. On 30 August 2016, Ms Sinnamon posted her MAT1B – maternity leave form in the respondent's letter box with a letter confirming that she intended to start her maternity leave on 1 November 2016 and intended to take the full 56 weeks leave.

46. On 20 September 2016, (page 104), Mrs James wrote a letter to Ms Sinnamon acknowledging receipt of the MAT1B form, but noting that she had yet to confirm the date that she wanted the maternity leave to start, (the first signs of some breakdown in communication). This might suggest that whilst we accept a letter was enclosed with that form, it has not come to the attention of Mrs James.

47. On 28 September 2016, there was a meeting between Mrs James and Ms Sinnamon, copy notes of which are at page 107. We can see in those notes that Mrs James has recorded that Ms Sinnamon's maternity leave will start in November and take her through to when the baby is born and that Ms Sinnamon is going to confirm the actual dates by email.

48. During October 2016, Ms Sinnamon took 29 days accrued annual leave with a promise for payment, this is evidenced by a series of emails in the bundle:

    48.1 We start at page 111 where reference is made to the planned annual leave and also to Ms Sinnamon starting her maternity leave on 1 November 2016. Ms Sinnamon uses the expression "this has not been altered" which seems to confirm that insofar as Ms Sinnamon is concerned, she has told the respondent that she is starting her leave on 1 November.

    48.2 At page 117, Mrs James I think, (the author is not entirely clear) emails to confirm that the claimant has a total of 29 days accrued holiday and that this will be paid in due course.

    48.3 At page 118, Ms Sinnamon replies to confirm that she wishes to take all of her holiday.

    48.4 At page 123 dated 18 October 2016, a long email, the first paragraph of which deals with maternity leave. Mrs James is said to be the author, although her evidence was that she did not in fact write the letter. It refers to Ms Sinnamon having confirmed her maternity leave would start on 1 November. It says, "you are legally entitled to 52 weeks leave and must give us 8 weeks' notice in writing when you intend to return to work". Pausing there, that shows a misunderstanding on the part of the respondent and Mrs James as to the maternity leave regulations, because of course no such notice is required if the individual's intention is to return at the end of the maternity leave period. 8 weeks' notice is only required if the individual wishes to return early.

    48.5 On the subject of holiday pay, the email then goes on to confirm that Ms Sinnamon will be paid 29 days holiday for the month of October.

48.6 The email also deals with issues between Ms Sinnamon and the respondent regarding an insurance claim in respect of a motor accident and her mobile phone, which she had returned with the lock on. These are not matters which have any bearing on the issues before us in this case.

49. On 10 October 2016, Mr Hanson wrote a letter which points out to Ms Sinnamon that her sick note has run out and another one has not been received. He writes, "If you do not contact us in writing with your intentions within the next 7 days we will have no alternative but to presume that you have left the company". Again, a surprisingly hostile tone to this letter, particularly given that it is written to somebody who is away from work certified with stress.

50. On 11 October 2016, Mrs James had written (page 110) pressing Ms Sinnamon for confirmation of the start date of her maternity leave. What she says there is, "that you've stated you've already informed us but we haven't received anything so please give us this information as soon as possible". Ms Sinnamon replied the next day (page 111) which I have already quoted, stating that the start date would be 1 November 2016.

51. Ms Sinnamon's maternity leave started on 1 November 2016.

52. On 14 March 2017 Mrs James met with Ms Sinnamon. Page 126 confirms this and Mrs James told us today in her oral evidence that she had a number of KIT Days with Ms Sinnamon when she came into work and that she knew from her talks with Ms Sinnamon on those KIT Days that she intended to return to work.

53. The respondent says that on 16 August 2017, (page 136) Mrs James, wrote to Ms Sinnamon enquiring whether she intended to return to work and if so when. We note on the wording of that letter, what she writes this time is, "legally you are required to inform us of your expected return to work or continue with unpaid leave until the legal return date", a more accurate description of the legal position. The respondent says that Ms Sinnamon never replied to this email. Ms Sinnamon says that she never received it. The respondent refers to the copy of the email in the bundle at page 136 as evidence of the fact that Ms Sinnamon received it. However, we note that in the email itself as copied, there is no named recipient. The read receipt provision that appears above the email itself, printed out by Mrs James just 9 minutes after the email was sent, shows that the email was delivered to Mr Hanson, but with regard to Ms Sinnamon, as to delivery, it is blank and as to read, it is also blank. It seems to us that actually, the copy at page 136 shows that the respondent knew that Ms Sinnamon had not received this email.

54. On 3 October 2017 at the instigation of Mr Hanson, Ms Sinnamon was removed as a director from the company, see page 160.

55. On 10 October 2017 an NVQ provider, a Rosie Dyson, told Ms Sinnamon in a telephone conversation that she had been told by an employee of the respondent called Dione Durling that Ms Sinnamon was no longer employed by the respondent. Ms Sinnamon asked for written confirmation

and Ms Dyson then wrote an email which is in the bundle at page 138 in which she says, "I had to cancel the appointment booked for today due to the employer advising me that you no longer work for them". That was received on 10 October at 11:34.

56. On 13 October 2017 at 17:15, Ms Sinnamon forwarded Ms Dyson's email to Mr Hanson and asked him whether this was correct. Not having received a reply, (page 137) on 19 October Ms Sinnamon forwarded both emails to Mrs James saying that she had not received a reply and asking for confirmation whether the email she had received from Ms Dyson was correct.

57. On 17 October 2017, Ms Sinnamon wrote a chasing email to Mr Hanson (page 140) asking if she could please hear from him.

58. On 19 October 2017, (at page 141) Ms Sinnamon wrote a chase email to both Mrs James and Mr Hanson.

59. On 23 October 2017, (page 143) Ms Sinnamon sent a chasing email to Mrs James and Mr Hanson again, asking could she hear from them please?

60. Having received no correspondence in reply from the respondent, Ms Sinnamon embarked upon a series of attempts to get through to them by telephone.

61. On 25 October 2017, Ms Sinnamon telephoned Mr Hanson; he picked up the phone and then put it down when he heard her voice on the other end (page 145). She then called Mrs James. Her call went to voicemail. She left a message referring to her emails and asking for a call back (page 146).

62. On 26 October 2017, Ms Sinnamon called Mr Hanson (page 147). The call went to voicemail. She left a message that she was following up on her emails and asked for a phone call. She tried again that day, (page 148) this time to Mrs James and again leaving a similar voicemail message.

63. In a subsequent telephone call on 26 October 2017, Ms Sinnamon established that Mrs James was at a different geographical location in a different office. By research on the internet, she found out the phone number of that office. She called Mrs James on that number and this time got through to her. The transcript of this conversation is at pages 150-151. Here we can see that after initial pleasantries, Ms Sinnamon asked for clarification of where she stood in light of the email from Ms Rosie Dyson. Mrs James' responses include:-

> "as far as I am aware, yeah, you're unemployed, yeah";

She said that she believed that Ms Sinnamon was unemployed, and

> "I sent you the email in August, I asked you to confirm if you were coming back and you didn't come back to me so I assumed from that that you weren't engaging with us anymore. I emailed you to let you know that there was no

> longer, … your maternity leave payments would finished…";

Asked by Ms Sinnamon for confirmation that she was no longer employed, Ms James does say,

> "I don't think so, no I mean I will check with Paul but I think that's from that decision you made when you didn't come back to us";

She then says when asked directly "So I am no longer employed then?", she replies:

> "Not by Care XL no because you didn't confirm that you were coming back or let us know because legally you should let us know if you are coming back so we can actually keep that place open for you but you didn't so we assumed rightly or wrongly that you weren't coming back".

64. As a result of that telephone conversation, Ms Sinnamon took legal advice. Her solicitors wrote by email on 30 October 2017. They refer to the above quoted telephone conversation and say that their client had been told that she was no longer employed as a result of failing to respond to an email.

65. The reply those solicitors received, just over an hour later, (page 155/6) simply says that information had been passed onto their solicitors who would be in touch. They heard nothing further.

66. Then the next item in the chronology is that on 14 December 2017 Ms Sinnamon issued her claim.

Conclusions

67. The first question for us was, "Was Ms Sinnamon dismissed?". The information provided to Ms Sinnamon by Ms Rosie Dyson followed by confirmation by Mrs James at the conclusion of their telephone conversation at the time when she was still on maternity leave, conveyed to her that her employment had been terminated. That is how the reasonable employee would interpret the words and events.

68. When we take into account that Mr Hanson and Mrs James ignored a number of telephone calls and a number of emails, did not contradict Ms Sinnamon when she spoke to Mrs James, did not contradict the solicitors when they wrote, and we take into account the remarkable coincidence that she was removed as a director earlier that month, we conclude that as a result of a conscious decision by Mr Hanson, (not Mrs James) Ms Sinnamon's employment had been terminated by the respondent. She was dismissed.

69. The absence of a P45 and a letter of dismissal is no answer. It is clear the respondent's administration was shambolic; there were files missing, there were intermittent payslips, there were promises of payment of holiday pay which were not honoured. Indeed, that the respondent is indebted to HMRC to the tune of £54,000 in respect of PAYE, evidenced by a letter copied to the tribunal by Mr Hanson, it is no surprise that there was no

P45.

70. Ms Sinnamon was clearly dismissed and the decision to dismiss was unfair, for Mr Hanson did not advance in his evidence that the reason for dismissal was conduct, as suggested in the list of issues, (but not, we note, in the grounds of resistance) in the alternative to denying dismissal at all. The respondent does not establish a potentially fair reason for dismissal and so it must be unfair. If the respondent had established a fair reason, such as conduct, no process was followed at all and so the dismissal would still not have passed the test in s.98(4) of the Employment Rights Act 1996. Ms Sinnamon's case or claim for unfair dismissal therefore succeeds.

71. Because the claim of unfair dismissal has succeeded, we do not in fact have to find whether the reason for dismissal was the automatically unfair reason of pregnancy or maternity per s.99 of the Employment Rights Act 1996. But in any event, these are our observations. For the purposes of the unfair dismissal jurisdiction it is for the respondent to show the reason for dismissal, it proffers misunderstanding. We considered:

    71.1 The respondent's witnesses ignoring the claimant's emails;

    71.2 What Mrs James said in the recorded conversation;

    71.3 The respondent's failure to respond to the solicitor's letter, by for example assuring the claimant that she was not dismissed and that it was all a misunderstanding, and

    71.4 Further, the fact that I am afraid, we did not find Mr Hanson a credible witness. L

    These factors lead us to the conclusion that there was no misunderstanding and that the principle reason for dismissal was that the claimant was on or had taken maternity leave. In the context of unfair dismissal, we do have to make a finding as to whether or not there was discrimination; that is a separate question.

72. However, Ms Sinnamon's case is that her dismissal was also discrimination; unfavourable treatment because of a pregnancy related matter. We have cautioned ourselves against simply saying, but for the fact that she was on maternity leave, she would not have been dismissed, for that is plainly the case, but is not the test. The test is, "was the reason or a reason, conscious or sub-conscious on the part of the decision maker Mr Hanson, that Ms Sinnamon had taken maternity leave?". Applying the burden of proof provisions in the Equality Act 2010, are there facts from which we could conclude that was the reason or a reason? We focus on the following:-

    72.1 There was Mrs James' evidence that from the KIT Days she was very clear that she knew Ms Sinnamon intended to return to work at the end of her maternity leave period. If she started her maternity leave on 1 November 2016, then clearly she would be intending to return to work on 31 October or the 1 November 2017.

72.2 The email at page 196 was not the evidence the respondent said that it was and in fact, seemed to us evidence they knew or ought to have known that Ms Sinnamon had not received the email.

72.3 The document at page 96 was not in our judgment a genuine contemporaneous record of what was discussed at the time, which gives rise to suggestions of bad faith.

72.4 Then there is the removal of Ms Sinnamon as a director, which is corroborative evidence that Mr Hanson was the decision maker and that he made the decision in October 2017 that he was not going to have Ms Sinnamon back.

72.5 The respondent told Ms Dyson that it did not employ Ms Sinnamon anymore. Clearly a decision had been made, but the respondent pretends not.

72.6 There is the fact that the respondent ignored Ms Sinnamon's numerous emails and telephone calls. A decision had clearly been taken to terminate Ms Sinnamon's employment and ignore her communications before the end of the maternity period.

72.7 Finally, there is the failure to respond to the solicitor's letter.

73. Applying the burden of proof, these are in our view, facts from which inferences could be raised and on which we could conclude absent an explanation, that the reason for dismissal was that Ms Sinnamon had taken and was on maternity leave. We look then to the respondent for its explanation. As I have mentioned, Mr Hanson was not in our view a credible witness. His explanation is that Ms Sinnamon was not dismissed, but she clearly was. His evidence is that it was all a misunderstanding, but that in our view is not plausible when one bears in mind the respondent ignoring her emails, what Mrs James had said and the failure of the respondent to respond to the solicitor's email saying that it was all a mistake and a misunderstanding and that she had not been dismissed.

74. We find therefore that a reason in the mind of Mr Hanson was that the claimant had taken maternity leave and her claim of pregnancy related discrimination therefore also succeeds.

75. With regard to the holiday pay claim for 29 days for the period 3 October to 1 November 2016, there was a period of agreed leave during this time for which Ms Sinnamon was not paid. The claimant's difficulties here are the provisions of s.23(2), 3(a) and (4) of the Employment Rights Act 1996, which provide that such a claim for unpaid wages must be made within 3 months of the date upon which payment should have been made, unless it was part of a series of deductions. There is no series of deductions in this case. The claim for holiday pay is made a year after the date payment would have been due. We were not offered any reasons as to why it was not reasonably practicable for that claim to have been brought in time. We therefore find that it is out of time. Nevertheless of course, it has to be said on the facts, the respondent agreed to pay the

holiday pay and failed to do so; this is a matter Ms Sinnamon can pursue in the County Court.

76. Ms Sinnamon is entitled to accrued holiday pay for the current holiday year as at the date of dismissal, which was the 26 October 2017, when the dismissal was communicated to her. She is also entitled to notice pay.

Remedy

77. Having given judgment on liability, we proceeded to hold a hearing as to remedy. Ms Sinnamon's evidence as to remedy is in the latter paragraphs of her witness statement, combined with her updated schedule of loss, which Mr Aston took us through. We gave Mr Hanson the opportunity of challenging any of Ms Sinnamon's evidence on remedy, but he declined to do.

Law

78. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged more than 21 and less than 41, the Basic Award shall be a multiple of the number of years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case).

79. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

> "*The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to any action taken by the employer.*"

80. Section 123 (4) provides that a Claimant has the same duty to mitigate his or her loss as would a Claimant under the common law. The burden of proof lies with the employer to show that the Claimant has failed to mitigate loss.

81. By an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A, where in a case of unfair dismissal, (or discrimination) it appears that a relevant code of practice applies, the employer has failed to comply with that code and that failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award by up to 25%. The only ACAS code of practice to which that provision relates is the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2009) which sets out recommendations as to how an employer should handle cases involving disciplinary issues and how to handle a grievance which has been raised by an employee.

82. Where a claim has succeeded before an Employment Tribunal under the Equality Act 2010, section 124 provides that the Tribunal may order the Respondent to pay to the complainant compensation of an amount corresponding to the damages the Respondent might have been ordered to pay by a county court. Section 119(1) sets out what a County Court may order, which is to grant any remedy which could be granted in the High Court in proceedings for tort or judicial review, which includes compensation for financial loss and personal injury. Such compensation can include damages for injury to feelings, (s119 (4)).

83. The Judicial Studies Board publishes an annual guide on General Damages for Personal Injury. We have had regard, in broad terms, to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, so as to have in mind the levels of awards made in personal injury cases.

84. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

84.1 Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

84.2 Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

84.3 Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

84.4 In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

84.5 Tribunals should bear in mind the need for public respect for the level of awards made.

85. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were as follows:

85.1 The top band should normally be from £15,000 to £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory

harassment on the ground of sex or race.

85.2 The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

85.3 Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

86. Those bands were subsequently amended to take into account inflation, see the case of Da'Bell v NSPCC [2010] IRLR 19. In the case of AA Solicitors v Majid UKEAT/0217/15/JOJ (paragraph 22) Mr Justice Kerr said that it was not necessary for Employment Tribunals to await guidance from the appellate courts before raising the thresholds of those bands to take into account inflation.

87. In a personal injury case known as Simons v Castle [2012] All E R 90 the Court of Appeal held that General Damages awards for personal injury should be increased by 10% in all cases where Judgment is given after 1 April 2013. The Court of Appeal in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 confirmed that injury to feelings awards should similarly be uplifted. The Court of Appeal invited the Presidents of the Employment Tribunals in England & Wales and Scotland to issue fresh guidance, adjusting the Vento figures for inflation and the Simmons 10% uplift. On 5 September 2017 the Presidents of the employment tribunal's for England & Wales and Scotland issued such guidance in respect of cases on which proceedings were issued on or after 11 September 2017, this case was issued on 14 December 2017 and that guidance therefore applies. On that basis, the Vento bands should be for the purposes of this case:

Top:	£25,200 to £42,000
Mid:	£8,400 to £25,200
Bottom:	£800 to £8,400

Discussion and conclusions

88. I gave our decision by running through the schedule of loss and explaining things as went go along.

Basic Award

89. The basic award is as claimed in the sum of £865.38.

Compensatory Award

90. We accept Ms Sinnamon's evidence with regard to her ongoing financial losses. We also accept that she has taken reasonable steps to mitigate her loss. The compensatory award is £7,478.30 as claimed.

Injury to feelings

91. As for injury to feelings, we think that this case involving a single act of discrimination, it is a case that belongs in the lower of the Vento bands. We say that acknowledging that the assessment of injury to feelings is about the effect on the victim of the discrimination, not how many acts of discrimination she was subjected to. Whilst Ms Sinnamon was clearly very upset by everything that went on, some of the matters she told us about which caused her upset, were not the subject matter of the discrimination, such the hours she put in and that there problems with payment of her wages, her holiday pay and so on. The discrimination complaint is about the dismissal. In that respect, for injury to feelings, having regard to the law as recited above and the every day value of the sum of money involved, our assessment of the damages for injured feelings should be assessed at £6,000.

ACAS Uplift

92. The ACAS Disciplinary and Grievance Procedures does not apply in this case because it was not a conduct dismissal; conduct did not form part of the factual matrix and no grievance was raised. There is no uplift for the ACAS Code breach.

Holiday Pay

93. Holiday pay in respect of the amount claimed for accrued holiday in the current holiday year as at the date of dismissal is awarded in the sum of £616.51 as claimed.

Notice Pay

94. Notice pay in respect of 3 weeks statutory notice in the sum of £865.38 is awarded as claimed.

Total Awarded

95. The total of those figures is £15,825.57.

_____
Employment Judge M Warren

Date: 02.10.2019

Judgment sent to the parties on

.....26.10.2019.....

.....
For the Tribunal office