# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs L Sylvester**

**Respondent:** **Barnes and Partners Solicitors**

**Heard at:** **East London Hearing Centre**

**On:** **6 – 8 November 2019**

**Before:** **Employment Judge Goodrich**

**Members:** **Ms H Edwards**
**Mr K Rose**

**Representation**

Claimant: In person

Respondent: Mr S Damania, Human Resources Co-Ordinator

**JUDGMENT** having been given to the parties orally, with reasons, on 8 November 2019; the judgment having sent to the parties on 20 November 2019; and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

# REASONS

***Background and the Issues***

1 The background to this hearing is as follows.

2 The Claimant presented her Employment Tribunal claim on 10 December 2018.

3 Prior to presenting her claim the Claimant, as is required, had obtained an early conciliation certificate from ACAS. This was received by ACAS on 22 October 2018; and issued on 14 November 2018.

4 In box 8.1 of her claim form the Claimant ticked that the claim that she was bringing was of discrimination on the grounds of sex. She also ticked that she was

making another type of claim which she described as “discrimination because I am the mother of a defect dependent child”.

5 In box 8.2 of her claim form the Claimant gave details of her claim. The main points made by her were as follows:

5.1 I applied for a job with Barnes and Partners as a legal secretary/legal assistant in their property department.

5.2 I was interviewed at their Chingford branch on 4 October by Ms Payne. Ms Payne told me her secretary/receptionist/assistant was going on maternity leave and she needed to fill in the vacancy urgently. Ms Payne made it clear to me that she has childcare responsibilities and needed someone reliable to open the office on time every morning because she has to drop off her child/children before work.

5.3 I was offered a permanent job with Barnes and Partners at their Chingford branch.

5.4 I was required to go through an induction at their Enfield branch on 15 October for two days and would commence work at the Chingford branch on 17 October.

5.5 However on 15 October the day of induction Olivia became unwell. She did not want to go to school and I was late for work by an hour.

5.6 On 16 October it was clear that Olivia had an eye infection and I informed my manager I had to leave the office at 4.30 in order to collect a prescription.

5.7 On 17 October I was due to start work at the Chingford branch but the manager informed me that I would have to work another day in the Enfield office. I was late for work again because Olivia was still unwell but she eventually went to school so I made my way to work. I was about 15 minutes late.

5.8 After work on 17 October the manager called me to a meeting with another member of staff present. He told me that he informed Ms Payne at the Chingford office of my lateness and Ms Payne together with the firm took the decision to dismiss me because of my lateness. I appealed to him at the meeting and told him my reason for being late was because my daughter was unwell with an eye infection and I had to care for her.

5.9 I appealed against the decision in writing but they decided to uphold their decision.

5.10 I strongly believe I have been discriminated against because I am the mother of a dependent child.

5.11 The actual job is located in Chingford which is a short distance from my home.

6 The Respondent entered a response disputing the Claimant's claim. Amongst the points made in the grounds of response were the following:

6.1 Laura Sylvester commenced work on 15 October 2018 however she did not arrive at 9.30am for her induction.

6.2 Reception then received a call to advise that she had got off at Silver Street station in error. Saj Damania consequently called Laura Sylvester who advised him that she had got off at the wrong station. At no point did Laura Sylvester mention that she was late due to her daughter being ill. Laura arrived at work at 10.18am on this day.

6.3 On Tuesday 16 October 2018 Laura Sylvester arrived at work 15 minutes late at 9.45am with no explanation as to why she was late.

6.4 Laura Sylvester then asked Saj Damania at 3.00pm that afternoon if she was able to leave work early at 4.30pm to collect a medical prescription from her local pharmacy. Saj Damania agreed. At no point in the conversation did Laura Sylvester mention who the prescription was for and that her daughter was ill.

6.5 The decision was taken to extend Laura Sylvester's induction for another day so that she could fully complete it as she was late on the first day and left early on the second day.

6.6 On Wednesday 17 October 2018 Laura Sylvester arrived to work an hour late at 10.30am and not 15 minutes late as stated in her claim. She sent an email at 10.01am stating "I missed my stop and I am waiting for a train at Turkey Street. Hoping to be in the office within 30 minutes". At no point did she mention that she was late due to her daughter being ill and her email in fact states she was late on the day due to missing her stop.

6.7 At the end of the day Laura Sylvester was called into a meeting with Saj Damania and Alison Bray where Saj Damania advised her that we were not happy with her poor timekeeping and continued lateness (further details were given in the grounds of response).

6.8 Only after Saj Damania had advised Laura Sylvester that her employment with the firm had been terminated did Laura advise him that her daughter had an eye infection this morning and that was why she left home later today. Saj Damania stated to Laura Sylvester that she should have telephoned in to advise of this as opposed to just turning up late. Laura Sylvester agreed with this and stated she was sorry that her job had not worked out.

6.9 Laura did appeal against her termination via email on 18 October 2018 to

which Saj Damania responded to Laura Sylvester via letter on 23 October 2018 to advise the decision to terminate on the grounds of attendance, punctuality and reliability stood.

6.10 Laura Sylvester's employment with the firm was terminated on the grounds of her poor timekeeping and continued lateness not based on any other grounds.

7 The case was listed for a Preliminary Hearing which was conducted by Employment Judge Jones on 25 March 2019, where there was a discussion of the issues in the case; and the Judge made various Case Management Orders.

8 At paragraph 9 of the Preliminary Hearing document, Judge Jones referred to the claim which the Claimant makes at present being of direct sex discrimination that is, that that Respondent treated her less favourably and dismissed her because she has a dependent child. The Claimant considers this to be sex discrimination and she claims injury to feelings.

9 In paragraph 10 the Judge stated:

"We discussed whether the claim for this sex discrimination could actually be sex discrimination. The Claimant suggested in today's hearing, that if she had been a man, the Respondent would not have dismissed her for being late consistently for the first three days of his employment, if he had been caring for a dependent child."

10 A few hours before the Preliminary Hearing was conducted the Claimant had sent an email to the Employment Tribunal making an application to amend her claim. She applied to amend the claim in order to bring claims of:

10.1 Automatic unfair dismissal contrary to Section 57A and 99 Employment Rights Act 1996 the Respondent's decision in dismissing me from my job is unreasonable and unfair.

10.2 Direct sex discrimination – less favourable treatment because of having a dependent child.

10.3 Indirect sex discrimination namely that the Respondent requested that she attend their Enfield office for a third day of induction despite her training being completed when they knew she was more likely to be late for work in order to dismiss her from her job.

10.4 Injury to feelings (details of which were given).

11 Employment Judge Jones listed the case for a further Preliminary Hearing. This took place on 10 May 2019.

12 At the Preliminary Hearing on 10 May 2019 Employment Judge Jones considered

the Claimant's application to amend her claim. The application was refused and full written reasons were given for the refusal.

13 The case was listed for the case to be heard, for three days from 6 – 8 November 2019.

14 By email dated 24 October 2019 the Claimant made another application to amend her claim. She stated that she wanted to add the following claims arising from the same facts of the case namely:

14.1 Harassment contrary to s.40(1)(a) and s.26 of the Equality Act 2010 – I fall into the protected characteristic of sex and believe I was treated less favourably because of my sex.

14.2 Victimisation contrary to s.27 of the Equality Act 2010 – I fall into the protected characteristic of sex and I believe I was subjected to a detriment because of my protected status.

14.3 Race discrimination contrary to s.13(5) of the Equality Act 2010. I fall into the protected characteristic of race and I believe I was treated less favourably because of my race.

15 She gave her reason for delay as not being able to obtain legal advice.

16 The Respondent sent an email on 4 November 2019 objecting to the application to amend. The grounds of objection were:

16.1 The Claimant was seeking to expand or alter her version of events on her three days of employment with the Respondent.

16.2 The race discrimination claims were brand new and never mentioned by the Claimant before. They were denied and are without any basis whatsoever.

16.3 They were out of time. Her suggestion of harassment or victimisation due to gender were without merit.

16.4 Reiterating some of the basis of their defence to the merits of her claim.

17 At the outset of this hearing the Tribunal considered the Claimant's application to amend and heard submissions from both parties for and against the application.

18 Prior to making their oral submissions the Judge went through the guidance given to Tribunals in the case of *Selkent v Moore [1996] IRLR 661 EAT*, and asked the parties to address these points in their submissions, namely:

18.1 In deciding whether to exercise its discretion to grant leave for amendment of an Employment Tribunal application a Tribunal should take

into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances included the following.

18.2 The nature of the amendment, whether it is a minor matter or a substantial alteration, such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or a substantial alteration making entirely new factual allegations changing the basis of the existing claim.

18.3 The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the statutory provisions.

18.4 The timing and manner of the application- an application for amendment made close to the hearing date usually calls for an explanation for why it is made then and not earlier.

19 The Claimant's oral submissions included the following points:

19.1 She delayed the application because she was unemployed and trying to find work. She believed that she was discriminated against because of race and sex and there would be injustice if her application was not granted.

19.2 In response to a question from Judge Goodrich referring to the Tribunal having enclosed a list of places where the Claimant could get free legal advice about employment matters the Claimant stated that she had been asked for money to obtain legal advice. She stated that she had tried telephoning a Citizens Advice Bureau once but had not got through.

19.3 She had only recently been able to do some internet research (although she accepted that this had been available from her to the outset).

20 In response to the Claimant's oral submission, in addition to the grounds of opposition given in his email Mr Damania's submissions included the following:

20.1 He had come to the Tribunal to defend the claim that had been originally brought, not a new type of claim.

20.2 The Claimant had already made numerous attempts to amend her claim.

21 The Tribunal refused the application to amend because:

21.1 The application to bring a complaint of race discrimination was an entirely new allegation. In box 8.1 of the Claimant's claim form, the race discrimination box was not ticked. In the details of the claim there was not

the slightest suggestion that her dismissal was an act of race discrimination. The Claimant very clearly stated that she believed the reason was because she was the mother of a dependent child (as referred to earlier above).

21.2 As regards to the complaints of sex discrimination, harassment and sex discrimination victimisation, these were different types of claims to the claim of direct sex discrimination identified by Employment Judge Jones at the first of the two Preliminary Hearings conducted by her.

21.3 So far as time limits are concerned, the Claimant's race discrimination claim is many months out of time. Her sex discrimination claims are not out of time in the sense that she always intended to bring a sex discrimination claim, ticked the box for doing so, and her claim form was submitted within the statutory time limits. Her application is out of time in the sense that it is a new type of sex discrimination claim being brought many months after the two Preliminary Hearings conducted by Employment Judge Jones.

21.4 So far as the Claimant's reasons for applying to amend at this stage in the proceedings, the Tribunal has sympathy with the Claimant in having difficulty in obtaining paid legal advice, this being expensive, as legal aid is not available for her to obtain it.

21.5 The Tribunal has less sympathy with the Claimant having failed to obtain any free legal advice, as urged on her by Employment Judge Jones at the Preliminary Hearing conducted in March. We appreciate that Citizens Advice Bureaus are very hard pressed. Nevertheless, many Claimants before the members of this Tribunal have obtained advice from Citizens Advice Bureau and the Claimant does not appear to have been persistent in attempting to obtain it, having stated that she only telephoned them on one occasion.

21.6 The Claimant's explanation for a delay in conducting her own internet research was unconvincing. It was a year from the Claimant being dismissed to making this latest application to amend her claim.

21.7 If the Claimant believed that her dismissal was an act of race discrimination there is no good reason why she did not put this in her claim form. She was able to state clearly that she believed it was sex discrimination and why she believed this; and she could equally readily have claimed race discrimination and given her reasons for this.

21.8 As regards to the timing of the Claimant's application it is inexcusably late. There have already been two Preliminary Hearings in this case and the Claimant already made an application to amend. If she failed to satisfy Employment Judge Jones for her application to amend over five months ago, there is even less reason to convince us so close to the trial of the case.

21.9 So far as prejudice is concerned we considered the Claimant would suffer little or no prejudice if we were to refuse her claim. The sex discrimination victimisation complaint is misconceived. There is nothing in the Claimant's claim form, or in the letter of appeal she drafted after dismissal to suggest any protected act. Her complaint is based on a misunderstanding of the technical meaning of victimisation for the purposes of bringing an Employment Tribunal complaint.

21.10 As regards sex discrimination harassment, there are differences between this and a direct sex discrimination complaint. Nonetheless, it is difficult to envisage that a sex discrimination harassment complaint in this case would be successful if a direct sex discrimination complaint would not be. The issues in the case are relatively clear and straightforward. The Claimant's case is that she was late for work because her child was ill and that a man would not have been dismissed in similar circumstances. The Respondent's case is that she was persistently late for work, she did not inform them of the child's illness until after she had been told that she was dismissed and that her dismissal had nothing to do with her protected characteristic- their case was that it not because of her sex and would, likewise, have been that the reason for her dismissal was not related to her sex. Nor do the Claimant's details of complaint suggest sex discrimination harassment but rather direct sex discrimination- she stated that she firmly believed she was discriminated against because she is the mother of a dependent child (as set out in paragraph 5.10 above).

22 The Claimant's application was, therefore, refused.

***The relevant law***

23 In respect of direct sex discrimination, the Tribunal is concerned with s.13 Equality Act 2010 ("EqA") when read with s.39. It is recognised that it is unusual for there to be clear, overt evidence of discrimination and that the Tribunal should expect to have to consider matters in accordance with s.136 EqA and the guidance in respect thereof set out in the case of *Igen Ltd v Wong & Others [2005] IRLR 258 (CA)* concerning when and how the burden of proof may shift to the Respondent and what the Respondent must prove when it does. The burden of proof provisions have also been considered in numerous subsequent cases. The burden of proof is usefully considered through a staged process.

24 At the first stage the Tribunal has to make findings of primary fact and determine whether these show, in respect of the Claimant and a real or hypothetical comparator, less favourable treatment and the difference in sex. In respect of a real, named comparator, the Claimant looks for a difference in treatment which a reasonable person would considered it to be less favourable and which this Claimant also felt was less favourable treatment. The test is: is the Tribunal satisfied, on the balance of probabilities and with the burden of proof resting on the Claimant, that this Respondent treated this Claimant less favourably than they treated a comparable employee of a different sex?

25 When considering whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the

same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the Claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is made will be a fair and proper comparison. Often, but not always, these will be matters which have been in the mind of the person doing the treatment when relevant decisions are made.

26 If the Tribunal is satisfied that there was less favourable treatment and a difference of sex in comparable circumstances, we proceed to the next stage. We direct ourselves in accordance with s.136 EqA and asked, in respect of each item of less favourable treatment which has been proved, whether the Claimant has proved facts from which the Tribunal could reasonably conclude, in the absence of an adequate explanation, that the less favourable treatment was on grounds of sex. Findings of fact which affect whether we could so conclude vary from case to case. Unreasonable treatment on the part of an employer is not necessarily a matter from which we will ultimately conclude that there was unlawful discrimination, merely because the person adversely affected of it is of a particular gender, but if it constitutes less favourable treatment than a comparator has received, that will be a matter from which an inference could be drawn at this stage, leaving the employer to prove that it had or would have treated a person of another gender unreasonably too. The Tribunal should take into account, where it considers it relevant, the provisions of the ECHR Code of Practice on employment.

27 If the Tribunal could reasonably conclude, absent a non discriminatory explanation, that there was unlawful discrimination, we move to the next stage. In the absence of an adequate explanation, the Tribunal will uphold the complaint that there has been discrimination on grounds of sex in respect of the proven act/s of less favourable treatment. So, we now look at the employer to see whether it provides and proves a credible, non discriminatory explanation or reason for the difference in treatment. In the absence of such an explanation, or the absence of such an explanation which we accept as proven on the balance of probabilities, we will infer or presume that the less favourable treatment occurred because of the Claimant's gender.

28 When the Tribunal is considering a hypothetical comparator, the stages tend to merge or become indistinguishable. If the Tribunal concludes that a female employee has been treated less favourably than a hypothetical male employee in comparable circumstances would have been treated, this would almost certainly contain an inference, express or implicit, to the effect that but for her gender she would not have been so treated.

***The evidence***

29 On behalf of the Claimant, the Tribunal heard evidence from the Claimant herself.

30 On behalf of the Respondent, the Tribunal heard evidence from Mr Damania, HR Co-ordinator for the Respondent. In addition, the Tribunal was provided with a witness statement from Ms Alison Bray on behalf of the Respondent but she did not attend this Tribunal.

31 In addition, the Tribunal considered the documents to which it was referred in a bundle of documents.

***Findings of Fact***

32 The Tribunal sets out below the findings of fact we consider relevant and necessary to make our judgment on the issues that we are required to decide. We do not seek to set out every detail provided to us. Nor do we seek to make findings of fact on every detail that is in dispute between the parties. We have however considered all the evidence provided to us, it is fresh in our minds and we have borne it all in mind.

33 The Claimant, Mrs Laura Sylvester, has worked for many years carrying out property work in legal departments.

34 In the Claimant's CV to which the Tribunal was referred, she described herself as a highly experienced legal secretary. She set out her employment history of having worked in about 25 solicitor's offices, often in temporary positions. Mr Damania pointed out (correctly) that one of the positions referred to in the Claimant's CV was one for which she was dismissed for lateness.

35 The Respondent, Barnes and Partners, are a solicitor's practice with numerous branches. In their ET3 response form, at box 2.7, they described themselves as employing 74 individuals.

36 In his witness statement, Mr Damania, HR Co-Ordinator for the Respondent, described the workforce as being 77 percent comprised of female members, of which about 30 percent have young dependents; and that a number of these members of staff have children. In cross-examination he stated, and we have no reason to doubt, that five out of six of the female partners have dependent children.

37 The Claimant was interviewed for a position with the Respondent at their Chingford office. She lives near to that office. She was interviewed by Mrs Nichola Payne, one of the partners of the Respondent.

38 The Chingford office of the Respondent is a small office in terms of those that work there. In addition to Mrs Payne, they have working there an assistant and an administrative member of staff.

39 The vacant position was for an assistant to Mrs Payne, who specialises in property law transactions.

40 There is a dispute between the parties as to whether or not a vacancy arose because the position was to cover maternity leave, but it is unnecessary for our judgment in this case to make a finding of fact on this. We observe, however, that the contract of employment provided to the Claimant was for a permanent position, not maternity cover.

41 In the course of the interview with the Claimant, Mrs Payne made it clear to the Claimant that she has (i.e. Mrs Payne has) childcare responsibilities and needed someone reliable to open the office every morning because she has to drop off her child/children before work.

42 The Claimant herself has a dependent daughter who at the time of her employment with the Respondent was aged 11.

43 The Claimant was successful in her interview and she was offered the position of a conveyancing assistant to work at the Respondent's Chingford office.

44 By letter dated 8 October 2018, Mr Damania confirmed the offer of employment made to the Claimant. In the course of the letter he notified her that her employment would commence with initial induction training at their offices in Silver Street, Enfield and thereafter would commence in her role at her office in Chingford.

45 The Claimant sent an email asking Mr Damania for how long the induction at Enfield would be and Mr Damania responded that it would be for two days and that thereafter she would work at Chingford.

46 On 12 October 2018, before the Claimant's employment with the Respondent started Mr Damania met the Claimant and signed her contract of employment.

47 The Claimant, in the course of this hearing, complained both about being required to carry out her induction training in Enfield and also in not having her contract returned to her until Tuesday 16 October. Be that as it may, plainly the Claimant was not being singled out for either of these reasons. Starting an induction training at the same time as the Claimant was another new starter, referred to as "HN". She, like the Claimant, was required to have an induction course at the Respondent's Enfield office. She, like the Claimant, had her contract of employment returned to her on Tuesday 16 October. Mr Damania's explanation for these matters was that the induction training was carried out at Enfield because it was the Respondent's head office; and that he took one or two working days to return the document because he needed to obtain the Respondent's signatures on the documents and complete other formalities.

48 The Tribunal was referred to the Claimant's contract of employment and we refer to some of the provisions in that contract. Amongst the provisions in the contract were the following:

48.1 The Claimant's usual place of work was described as being Chingford; but there was a discretion on the employer on reasonable notice to require the employee to work at another of the employer's offices on a temporary or permanent basis.

48.2 The normal hours of work were described as being from 9.30am to 5.30pm Monday to Friday inclusive.

48.3 There was a section on sickness absence. In clause 11.1 it was stated that if an employee was absent from work due to sickness or injury the Employee (or someone on the Employee's behalf) must inform their manager of the absence, the reason for and likely duration of the absence as soon as possible and no later than 10.00am on the first working day of absence.

48.4 There was a section on termination of employment which provided that termination of employment could be carried out by giving payment in lieu of notice.

48.5 There was a section on discipline and grievance rules, although they were stated to be statements of policy, not terms and conditions of employment.

48.6 There was a section on the Respondent's disciplinary procedures. As regards gross misconduct, it was stated that the employee would normally be dismissed but only after consideration of other possible disciplinary action. In paragraph 3 it was stated that at a disciplinary hearing the employee would be given the opportunity to state their case and may be accompanied by a work colleague or friend of their choice.

48.7 In the disciplinary policy were examples of general misconduct, which included, at paragraph 6.1, poor timekeeping. Under the list of examples of gross misconduct, at paragraph 7.16 was persistent lateness or absenteeism.

49 The hours of work for the Claimant's induction course were 9.30am to 5.30pm, as they were for when she was to work at the Respondent's Chingford office.

50 The Claimant was due, therefore to start work at 9.30am on Monday 15 October 2018, her first day of work.

51 The Claimant was late for work.

52 At 10.01am a record was made by the Respondent of the Claimant having telephoned the Respondent's Enfield office to notify them that she had got out at the wrong station and hoped to be in the office in about 30 minutes. The Claimant getting off at that stop was an understandable mistake, as the station she got out at was called Silver Street and the Enfield office of the Respondent was in Silver Street, although this was not the nearest station.

53 The file note taken by the Respondent stated that the Claimant had called reception to advise that she would be late for her induction as she got off at Silver Station by mistake and will be catching a cab to Enfield town. She apologised for the delay and she in fact arrived at 1018am, approximately ¾ of an hour late.

54 There is another dispute of fact as to whether, later that day, the Claimant notified Mr Damania that the reason for her lateness was that her child was unwell (as the Claimant says and Mr Damania denies). We deal with these disputes of fact later in our findings of fact.

55 On Tuesday 16 October 2018 the Claimant again arrived late for work. She arrived about 15 minutes late and did not warn the Respondent that she would be late.

56 There is another dispute of fact as to whether the Claimant apologised to Mr Damani after arrival and told him that her daughter was still unwell (as she says); or gave

no explanation (as Mr Damania says).

57 Later that day, the Claimant asked Mr Damania whether she could leave work early to pick up a prescription. Mr Damania agreed for her to leave work early at 4.30pm. In dispute is whether or not the Claimant told Mr Damania that the prescription was for her daughter. The Tribunal makes a finding on this dispute later in our findings of fact.

58 Mr Damania asked the Claimant to come back to the Enfield office for a further day's induction. Although the parties dispute whether he told her this at the office, or later by mobile telephone, this dispute is unnecessary to resolve.

59 The Respondent's explanation for requiring the Claimant to undertake a third day's induction training was that he wanted both the Claimant and HN to complete their induction. He was advised by the department concerned that neither of them had completed their archive training and needed to return the next day to complete it. Whatever the merits of this decision, it is clear that the Claimant was not singled out if being asked to undertake the extra days induction training as both she and HM were required to do so.

60 In the Claimant's witness evidence (in her witness statement and clarified in answers to questions) she stated that on Tuesday 16 October her husband took her daughter for an appointment to the doctor and that this caused him to be dismissed from his job.

61 On Wednesday 17 October 2018 the Claimant again arrived late for work. Again, she failed to notify the Respondent in advance that she was running late.

62 The first notification she gave to the Respondent that she would be late was an email she sent to Mr Damania at 10.01am. She stated "I missed my stop and I'm waiting for a train at Turkey Street. Hoping to be in the office within 40 minutes".

63 The Claimant's explanation for being late and not notifying Mr Damania sooner was as follows.

64 The Claimant explained that her daughter was still unwell with an eye infection. She had conjunctivitis and a stye. She was reluctant to go to school but did so.

65 The Claimant had an exchange of text messages between her and her daughter between 9 and 9.12am that morning.

66 The Claimant's explanation for failing to get off at the correct stop and for not contacting her employer was that she was stressed and waiting to see if her daughter's school would contact her.

67 The Tribunal finds this explanation unconvincing. The Tribunal can see no good reason why the Claimant could not at least have sent the Respondent an email before 9.30am to say that she would be late. Even if she was anticipating a telephone call, sending an email would not have prevented her receiving a telephone call while she was writing the email.

68 The Claimant arrived for work on Wednesday 17 October approximately one hour late.

69 Mr Damania was concerned about the Claimant's persistent lateness. He spoke to the managing partner of the Respondent. The managing partner is a woman with a dependent child. The managing partner was concerned about the Claimant having been late on all three occasions, asked her why she had been late and Mr Damania explained the reasons he had been given. She asked Mr Damania to speak with Mrs Payne.

70 Mr Damania telephoned Mrs Payne, explained the Claimant's lateness and reasons given. Mrs Payne informed Mr Damania that she had advised the Claimant in her interview that she needed someone reliable and dependable and that if she was late on all three days that was a cause for concern.

71 Mr Damania spoke again with the Respondent's managing partner and with Mrs Payne and was advised that her employment should be terminated because of persistent lateness.

72 Upon the Claimant finishing work Mr Damania called the Claimant to a meeting.

73 Present at the meeting were Mr Damania, the Claimant and Ms Alison Bray. Ms Bray was present in order to take the minutes of the meeting.

74 In the course of the meeting Mr Damania informed the Claimant that she had been late on all three days of the induction and that Ms Payne together with the managing partner took the decision to dismiss her and that she would be paid one week's pay in view of notice.

75 The Claimant then said that she was late because her daughter was unwell with an eye infection and she had to care for her before she made her way to work.

76 By a letter dated 18 October 2018 Mr Damania confirmed the decision to dismiss the Claimant on grounds of persistent lateness. There was no reference to a right of appeal against the decision in that letter.

77 By email dated 18 October 2018 the Claimant wrote to Mr Damania and Mrs Payne to appeal against the decision to dismiss her.

78 In her grounds of appeal, she stated "further to the dismissal meeting yesterday I confirm my main reason for arriving at work late at the Enfield office between Monday and Wednesday is because my daughter has a serious eye infection". She also stated that on Tuesday afternoon her daughter needed urgent medical attention and she told Saj (Damania) that she had to leave the office at 4.30 in order to collect a prescription from the doctor.

79 On 19 October, when Mr Damania was on leave, a colleague spoke to the Claimant stating that the matter would be looked into and at this stage the termination would continue.

80 By email on 22 October the Claimant wrote to the Respondent stating that she had explained to Saj that the main reason for her lateness was because her daughter has an eye infection and he still proceeded to dismiss her.

81 By a letter dated 23 October Mr Damania wrote to the Claimant dismissing her appeal. He set out that on each of the three occasions she had been late she had not advised the Respondent that she was delayed due to her child being ill; and that he regretted to advise her that the decision to terminate her employment stood.

82 When cross examining Mr Damania, the Claimant asked about whether others had been dismissed for persistent lateness. His response was that an employee of about two months service had been dismissed for persistent lateness and that she did not have a dependent child.

83 Did the Claimant tell the Respondent (Mr Damania) at any point before the meeting on 17 October at which she was dismissed that the reason, or a reason for her lateness was that her child was unwell?

84 From all the evidence provided to the Tribunal, we find that the first time the Claimant told Mr Damania of her daughter sickness was after Mr Damania had notified the Claimant of the decision to dismiss her. We so find because we found the Respondent's evidence far more credible on these issues than the Claimant's, particularly because the contemporaneous written evidence is overwhelmingly more consistent with the Respondent's version than the Claimant's. We give the following examples:

84.1 The first file note made by the Respondent on 15 October, recording the Claimant's telephone call was that she had stated that she got off at the wrong stop by mistake. No mention was made that she was late because her daughter was sick nor does the Claimant herself suggest that she said so when telephoning the Respondent's Enfield office.

84.2 There are file notes made by the Respondent on the 16 and 17 October which referred to the Claimant's lateness and reasons given and neither of them make any reference to the Claimant having stated that her daughter was unwell.

84.3 The file notes to which we have referred are consistent with the Claimant's own email to Mr Damania on 17 August. As referred to earlier above in our findings of fact, the reason she gave for her lateness on 17 October was that she had missed her stop. No mention was made by the Claimant of being late because her child was reluctant to go to school that morning. No mention was made of her already having mentioned to Mr Damania about her daughter's illness.

84.4 The Claimant's appeal against dismissal refers to her confirming what she said at the dismissal meeting about her daughter being ill. Notably, what it does not say is that Mr Damania was already aware of her daughter's sickness absence.

84.5 The Respondent's attendance note (page 53) for 17 October is also consistent with this, as are the notes made of the dismissal meeting.

84.6 In the Claimant's email on 22 October regarding her appeal, again the Claimant made no suggestion that Mr Damania was already aware of the Claimant's circumstances with her daughter before the dismissal.

84.7 The letter of Mr Damania dismissing the Claimant's appeal, dated 23 October 2018, a contemporaneous letter clearly makes the point that he and the partners were unaware of the Claimant's circumstances with her daughter until after the decision had been made to dismiss her. Although the Claimant has stated that he believes that this letter was fabricated and she never received it. We do not accept that any such letter was fabricated. All Mr Damania was doing was giving to the Claimant in writing a slightly expanded version of the reasons he had already given her verbally for the partners decision to dismiss her.

85 Additionally, the Claimant's ET1 claim form was another opportunity for the Claimant to have set out clearly that on 15, 16 and 17 October morning she had told Mr Damania that she was late because her daughter was ill. It is notable that she did not do so. The Claimant's explanation for this glaring omission was that she completed the claim form in a hurry. This was unconvincing, particularly when coupled with all the previous omissions to which we have referred. The first occasion, so far as the Tribunal is aware, that the Claimant explicitly referred to having told Mr Damania on all three days of her daughter's sickness was the record made at the Preliminary Hearing on 25 March 2019, conducted by Employment Judge Jones.

86 Additionally, in paragraph 2 of her record of the Preliminary Hearing, Employment Judge Jones recorded that it was the Claimant's case that she telephoned the firm on each day in the morning to inform them that she would be late because of the need to care for her dependent child. She has a daughter who was ill at that time. Her case is that she spoke to Mr Damania at the Respondent and was told by him that it was fine and that she could make up her time once she started working. It is worthy of note that this record of the Claimant's case is at odds with the evidence she gave to the Tribunal at this hearing. Her evidence was that when she first telephoned the office she made no mention of her child's sickness. She did not suggest that she telephoned the office at all on the second day of her employment. On the third day she did not suggest that she telephoned the office. Instead she sent in an email, which made no mention of her child.

***Closing Submissions***

87 Both parties gave oral closing submissions.

88 On behalf of the Respondent Mr Damania's closing submissions included the following points:

88.1 The Claimant only advised the Respondent that her daughter was sick after she was told of her dismissal.

88.2 As the parties were unaware of the Claimant's daughter sickness at the time they took the decision to dismiss her. The dismissal would not have been because the Claimant had a dependent child.

88.3 The Claimant was dismissed because she was persistently late on all three days of her induction and she failed to inform the Respondent in advance that she would be late. It was not unreasonable of the Respondent to expect her to do so.

88.4 Mrs Payne had made clear at the Claimant's interview that she needed someone reliable.

88.5 Further submissions as to the facts the Tribunal was invited to find.

88.6 The Claimant had made a false accusation of stalking with no evidence to prove it (referring to page 78 of the bundle of documents).

88.7 The decision to dismiss the Claimant was taken by two women both of whom are mothers.

89 The Claimant's closing submissions included the following:

89.1 She had the protected characteristic of being a woman, she had relevant experience and was urgently needed.

89.2 She did not dispute that she was late on all three occasions but she had very good reasons for being late, namely that her daughter was unwell.

89.3 Contrary to Mr Damania's evidence she told him on all three days that her daughter was unwell and he "gave me the green light".

89.4 Omitting the reference in her claim form to telling Mr Damania of her daughter sickness before being dismissed was because she was rushed in order to put the claim in on time.

89.5 She made other submissions as to the facts the Tribunal was invited to find.

89.6 The Respondent's letters of 18 and 23 October were fabricated.

89.7 She had sent an email to the Respondent subsequently apologising for alleging that she had been stalked.

89.8 She is currently unemployed.

89.9 If was unreasonable that she was dismissed and her dismissal was discrimination.

***Conclusions***

90 Essentially, the Claimant's case was that the decision to dismiss her was unfair and the way they did it was unfair; and it must therefore have been because she is a woman with a dependent child.

91 Essentially, the Respondent's case is that the sole reason for her dismissal was because she was late on all three days of her induction and on no occasion notified her employer in advance that she was going to be late, in the context of having been told at interview that they needed someone reliable.

92 In considering whether the decision to dismiss the Claimant was an act of direct sex discrimination, as recorded by how the case was put by Employment Judge Jones at the Preliminary Hearing in March 2018, there are two decisions to make.

93 Firstly, was the initial decision conveyed by Mr Damania on behalf of the two partners concerned an act of direct sex discrimination?

94 Secondly, was the decision to dismiss the Claimant's appeal an act of direct sex discrimination?

95 So far as the initial decision to dismiss is concerned, in view of the Tribunal's findings of fact that the partners were unaware that a part of the Claimant's reason for being late was because of her daughter sickness, the claim must fail.

96 By the time that the partners were considering the Claimant's appeal they were aware that the Claimant had a dependent child and gave this as the, or a, reason for her sickness absence. Was their dismissal of the Claimant's appeal an act of direct sex discrimination? This decision requires a little more scrutiny. We have also considered whether or not the burden of proof shifts as provided for by s.136 Equality Act 2010.

97 So far as the Respondent's procedures in dismissing the Claimant are concerned we have some sympathy with the Claimant's viewpoint. It is correct that they did not in all respects follow their own procedures or the guidance given by ACAS in disciplinary procedures. The Claimant was not given prior knowledge of the purpose of the meeting at which she was dismissed, nor was she given a right of accompaniment, nor did her confirmation of dismissal notify her of any right of appeal. The Tribunal has in mind, however, that the Claimant had only been employed by the Respondent for three days, was not so far as we are aware a member of any trade union, and would have been unlikely in the three days to have built up a relationship with work colleague in order to bring one to the hearing.

98 So far as the substance of the decision to dismiss the Claimant is concerned, it would be surprising, perhaps even astonishing, if the Respondent had not dismissed the Claimant.

99 Under the Respondent's disciplinary procedures, persistent lateness was classified as gross misconduct. On 100 percent of the days that the Claimant worked for the Respondent not only was she late, she failed to notify her employer in advance that

she would be late on any of the three days in question; and she had been told explicitly at her interview for the job with Mrs Payne that someone reliable was needed and why.

100 From the findings of fact the Tribunal has made, does not consider that the burden of proof shifts to the Respondent. Even if it we were wrong about this, perhaps because of the Respondent's failure to follow their own policy, the Tribunal is satisfied that her dismissal was in no sense whatsoever because of her gender.

101 Firstly, the Claimant's comparator is a hypothetical one, as was stated in the Preliminary Hearing. In paragraph of the Preliminary Hearing before Employment Judge Jones she recorded at paragraph 10:

> "The Claimant considered her dismissal to be sex discrimination. We discussed whether the claim for this sex discrimination could actually be sex discrimination. The Claimant suggested in today's hearing that if she had been a man, the Respondent would not have dismissed her for being late consistently for the first three days of his (should say her) employment if he had been caring for a dependent child."

102 In cross examining Mr Damania the Claimant asked him if any other employee had been dismissed for lateness. His response, that an employee of about two months service had been dismissed for lateness and that she did not have a dependent child, suggests that lateness, not the presence or absence of a dependent child, was the reason for dismissal.

103 The Claimant contradicted her own case in her own evidence. Her husband is a man who has childcare responsibilities. She said that he took time off work to go to take their daughter to the doctor and he was dismissed by his employer for this. Whether or not the decision was unfair, it suggests that whether the Claimant was a man or a woman he or she would have been dismissed by the Respondent's partners.

104 Under the Respondent's disciplinary procedures, the Claimant committed gross misconduct by being late in all three days, in a job where she had been expressly told by Mrs Payne that she needed someone reliable to open the office because of her childcare responsibilities.

105 The Respondent has many female employees, including five partners who have dependent children and are able to maintain their employment and they have employees that work flexibly. This does not appear to be a workplace discriminating against women on the basis of timekeeping and childcare responsibilities.

106 Nor was the Respondent unreasonable towards the Claimant in that when she asked to leave work early on a second day of employment, having come in to work late, Mr Damania agreed her to do this.

107 There is no reason to suppose that any man or woman with childcare responsibilities would have been more favourably treated than the Claimant. We find and conclude that he/she would likewise have been dismissed.

108 The Claimant's claim is, therefore, dismissed.

109 After the Tribunal had given its judgment, Mr Damania made an application for costs on behalf of the Respondent. He clarified that no costs were claimed for his representation of the Respondent (as he is a human resources officer no costs would have been payable for this) and the costs sought were preparation for the hearing carried out by an associate solicitor of the Respondent.

***The relevant law (on costs applications)***

110 Rule 76 of the Employment Tribunals Rules of Procedure 2013 provide that:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that-

(a) a party …… has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success;"

111 Rule 84 of the Tribunals Rules provides that in deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

112 Rule 76 envisages a two-stage approach in the making of a costs order. The first stage is for the Tribunal to consider whether the party concerned has acted vexatiously, abusively, disruptively or otherwise unreasonably. If that threshold has been reached, the second stage is that the Tribunal is required to consider whether to exercise a discretion to award costs and, if making an award, for how much to award.

113 In deciding whether such a costs order should be made and the amount of the award, Rule 81 gives a discretion for the Tribunal to consider the paying party's ability to pay.

114 Guidance has been given that the vital point in exercising the discretion to order costs is to look at the whole picture of what has happened in the case and to ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

115 As regards whether a claim has no reasonable prospect of success, Tribunals have been reminded that this is a high threshold to reach, harder to establish than that a case is likely to fail.

116 In the case of *AQ v Holden (above)* guidance was given that although the threshold tests are the same whether a litigant is professionally represented or not, the application of those tests must take into account whether a litigant is professionally

represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals and, since legal aid is not available and they will not usually recover costs if successful, it is inevitable that many lay people will represent themselves. They are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. This is not to say, however that lay people are immune from orders for costs- some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

***Submissions on costs application***

117 The Judge notified the parties that the Tribunal would have in mind the guidance given in the case of *AQ v Holden (2012) IRLR 648 EAT* and also invited the Claimant to notify the Tribunal as to her ability to pay any costs order that might be made.

118 On behalf of the Respondent Mr Damania relied on the written submissions of the solicitor with conduct of the case and additionally made short oral submissions. In summary these included the following points:

118.1 The Claimant pursued a claim that was without merit and was bound to fail.

118.2 He set out a series of negotiations that were conducted without prejudice in order to seek to settle their case. His contention was that the Claimant unreasonably refused to engage in these negotiations. Initially, the Respondent's offer was for the Claimant to discontinue the claim she had started and for the Respondent not to claim costs. Then, on 22 July 2019 they offered £500. The Claimant, they said, made no offer until 2nd October 2018 when she offered £3,500 to settle the case. On 4 November 2019 the Respondent made an offer of £1500. The Claimant made a counter offer of £2,000 which the Respondent rejected.

118.3 The Claimant's application to amend her claim was without merit and the claim had no merit.

118.4 He made submissions as to the relevant law.

119 The Claimant's submissions in opposition to the application for costs included the following points:

119.1 She rejected the claim that she had behaved unreasonably or that there was no reasonable prospect of success in her claim.

119.2 She gave evidence as to her means and stated that she would be unable to afford to pay any amount of costs. She set out her incoming and outgoing payment. She explained that she is currently unemployed and they are in receipt of universal credit. Her husband works as a casual worker at catering and his pay fluctuates between approximately £200 - £1500 per month. They live in a council flat, she has a 12 year old

dependent child and the family is in debt.

***Conclusions (on costs application)***

120 Does the Tribunal consider that the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted? Additionally, or alternatively, did the claim have no reasonable prospects of success? In considering these questions the Tribunal has in mind the guidance given in the case of *AQ Ltd v Holden*, namely that the Claimant is a litigant in person.

121 The Tribunal considers that the Claimant's initial bringing of the proceedings was not unreasonable conduct on her part, having in mind the guidance given in the *AQ v Holden* case. Although she is someone who has worked in legal practices for over 20 years she has been working as a legal secretary in a property department and would not as such have expertise in employment law. We move on however to the Preliminary Hearing conducted by Employment Judge Jones on 25 March 2019.

122 In paragraph 5 of the Preliminary Hearing reference was made to the Tribunal enclosing a list of places where the Claimant can get free legal advice about employment matters. Employment Judge Jones went on to record that this might be useful to her or she may also be able to get legal advice from her present employers who are employment solicitors. She was, clearly, encouraging the Claimant to obtain some legal advice about her claim from one of the sources for free legal advice.

123 In paragraphs 9 and 10 of her case management discussion document, Employment Judge Jones expressed scepticism about the Claimant's claim. In paragraph 9 she referred to the Claimant's claim being of direct sex discrimination, that the Respondent treated her less favourably and dismissed her because she has a dependent child and referred to the Claimant considering this to be sex discrimination. In paragraph 10, Employment Judge Jones stated:

> "We discussed whether the claim for this sex discrimination could actually be sex discrimination. The Claimant suggested in today's hearing, that if she had been a man, the Respondent would not have dismissed her for being late consistently for the first three days of her employment, if he had been caring for a dependent child. "

124 The Tribunal considers that the Claimant's failure to make reasonable efforts to seek to obtain ensure some free legal advice, as urged on her by the Judge, and take stock of her case and the outcome of her application to amend being unsuccessful was unreasonable conduct. Her evidence was that her only attempt to get legal advice was to make one telephone call to a CAB, who did not answer the telephone. This, the Tribunal considers, was an inadequate response. After the Preliminary Hearing that took place on 10 May 2019, when her application to amend her claim was refused, it was particularly important for the Claimant to take stock of her case.

125 The Tribunal also considers that making a second application to amend her claim which had little or no merit to it a few weeks only before the hearing was also

unreasonable conduct. She had seen Employment Judge Jones's refusal of the first claim and her reasons for it. The time to have made her second application to amend was when Employment Judge Jones was considering an application to amend in the first place not several months later. Seeking to bring a new claim of race discrimination approximately a year after issuing proceedings by then well out of time, with nothing new to suggest that race had been a factor in the dismissal. The Tribunal considers that this was also unreasonable conduct.

126 So far as settlement discussions are concerned we do not consider the threshold of unreasonable conduct was reached. Although the Claimant was slow to engage in settlement discussions she did engage in discussions and at the end of the discussion the parties were only £500 apart. Nevertheless, if she had accepted the £1500 offered to her a few days ago she would be £1500 better off. She would have avoided these three days in the Employment Tribunal and the money would have been useful to her, having heard her evidence about debts.

127 We have also considered whether the Claimant's case had no reasonable prospect of success. We considered that it came marginally above that but it certainly had very little reasonable prospect of success. Any reasonably competent employment lawyer (if the Claimant could have obtained one) that had read the claim and the response and Employment Judge Jones's Preliminary Hearing summaries would have advised her to settle or withdraw her case.

128 Even without advice it is surprising if the Claimant had thought that she had any reasonable prospects of success in continuing with a direct sex discrimination case. Even on her own case she had been told at interview that someone reliable was needed and the reasons for this; she was late on all three days she worked for the Respondent; and she did not notify the Respondent on any of those occasions that she would be late. She has many years working experience, and has worked in legal practices, albeit not in employment law. It should not have been any great surprise to her in the circumstances that, whether she had a dependent child or not, she would be dismissed.

129 To the extent that we have set out, therefore, the Tribunal considers that the Claimant did act unreasonably in the conduct of litigation.

130 We have next considered whether to exercise our discretion to make an order for costs.

131 In so doing we have in mind the factors set out in the *AQ v Holden* case. We also have in mind that the Claimant's means are such that a costs order would have an impact not only on her but on her family. We are conscious that it has an effect on a 12 year old child. Set against that the Respondent has been put to considerable time and expense in defending the claim. The Claimant has behaved unreasonably in a number of respects. As has been made clear in the cases referred to above, litigants in person are not immune from costs orders being made against them. Nor, although we have taken into account the Claimant's financial circumstances, does that give her immunity against a costs order being made against her- otherwise the more impecunious a Claimant was, the more they could behave unreasonably with no consequences of having to pay costs caused by their unreasonable behaviour.

132 We have considered the Respondent's schedule of costs. The time from which the Tribunal considers that costs were incurred because of unreasonable conduct was by the time the Claimant had received both Preliminary Hearings from Employment Judge Jones. We have therefore considered the costs only from the heading which states drafting index, corresponding with the Claimant to agree the index, agreeing last minute editions preparing the final bundle. We have considered the costs from that point onwards, which are set out for the sum of £3,750. We do not understand how VAT can be payable on costs order where there is an inhouse solicitor and no explanation has been given for this by Mr Damania.

133 We also have in mind that what is put in the bill of costs is all the time spent on it which is not necessarily the same as party and party costs, in other words if the case was in the County Court and an order for costs were being made the party and party costs are only the costs that are essential to the conducting of the case. £3750 appears to be more than the party and party costs that would be awarded for this part of the Respondent's bill of costs.

134 Having taken into account all the above matters, we have decided to make an order for costs, although to award only a small proportion of the costs claimed by the Respondent. We order the Claimant to pay the Respondent costs of £1,000.

Employment Judge Goodrich

10 February 2020