EMPLOYMENT TRIBUNALS

Claimant: Miss M Georgiev

Respondent: Hanover Insolvency Limited

HELD AT: Manchester **ON:** 3-7 February 2020

BEFORE: Employment Judge Slater
Ms C S Jammeh
Mr A J Gill

REPRESENTATION:

Claimant: In person
Respondent: Miss H Trotter, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded.

2. The complaint of discrimination in relation to dismissal, contrary to s.18 and s.39 EqA 2010, is well founded.

3. The respondent was in breach of contract by dismissing the claimant without notice.

4. The complaints of unlawful deduction from wages in respect of holiday pay, payment under the “refer a friend” scheme and payment for variations are not well founded.

5. The complaint of unlawful deduction from wages in respect of payment for overtime is dismissed on withdrawal by the claimant.

6. By consent, the Tribunal makes a declaration that the respondent made an unlawful deduction from wages in respect of payment due for drafted cases and orders the respondent to pay the claimant the sum of £120, being the amount unlawfully deducted.

7. Remedy for the other successful complaints will be determined at a remedy hearing on 2-3 September 2020.

REASONS

Claims and issues

1. The claims and issues were discussed and agreed at the outset of the hearing, with some modification during the course of the hearing. The judge gave to the parties a typed list of claims and issues which the parties confirmed recorded the issues to be decided by the tribunal.

2. The agreed claims and issues were as follows.

<u>s.99 ERA unfair dismissal</u>

1. Was the claimant dismissed?

2. If so, was the reason or principal reason for dismissal connected with the claimant's pregnancy?

3. If the claimant was dismissed, is the dismissal treated as not having any effect as a result of a successful appeal, in accordance with the principles in *Ramesh Patel v Folkestone Nursing Home Ltd [2018] EWCA Civ 1843.* The respondent does not argue there was a contractual right of appeal.

<u>s.18 Equality Act discrimination</u>

4. Was the claimant dismissed?

5. If so, was this unfavourable treatment

    a. Because of the pregnancy, or
    b. Because of illness suffered by her as a result of the pregnancy?

6. If the claimant was dismissed on 8 October 2019 but successfully appealed against the dismissal, do the principles in *Ramesh Patel v Folkestone Nursing Home Ltd [2018] EWCA Civ 1843* mean that the s.18 Equality Act 2010 claim cannot succeed? The respondent does not argue there was a contractual right of appeal.

Breach of contract

7. Was the claimant dismissed?

8. What notice was the claimant entitled to? The claimant claims two weeks' pay, based on what she says she was told when dismissed. The respondent says that the claimant was entitled to one week's notice, if dismissed.

Holiday pay

9. The parties agreed that the claimant had two days' accrued but untaken holiday.

10. Did the respondent fail to pay the claimant in lieu of this? The claimant claims £164.24 for two days' accrued leave. The respondent says she was paid for 2 days' accrued, untaken leave. The claimant says she was not paid.

Unlawful deduction from wages

11. Did the respondent make unlawful deductions from wages by failing to pay the claimant the amounts set out in her claim form for:

    a. Refer a friend - £350. (R denies any entitlement).
    b. Variation request – The claimant claims payment of a balance of £640, £20 having been paid. The respondent denies the claimant is entitled to any further payment.

    The claim in respect of payment for overtime is withdrawn, the claimant accepting that she has received payment for this.

    The respondent concedes that the claimant is due a further £120 for drafted cases.

3. On the first day of the hearing, the respondent withdrew its positive case that the claimant would have been dismissed because of a phobia with phones and deleted paragraphs 38 and 42 of its amended grounds of resistance.

Evidence

4. We heard evidence from the claimant and from the following witnesses for the respondent:

Alexander Ryder, Drafting Manager and, at the relevant time, Senior Insolvency Administrator and case reviewer for the claimant.

Lucy Waring, Head of Pre-Appointment.

Daniel Morris, Consulting Managing Director of the respondent.

Suzanne Greaves, HR Manager.

5. There was an agreed bundle of documents to which a number of other documents were added during the hearing by consent. We refused to include an email from the respondent which had been prepared on 4 February 2020 for the purposes of these proceedings about the variation bonus. The author of the email, which we were told contained hearsay evidence, was not attending to give evidence. We considered this would have little weight if included.

Facts

6. The respondent is an insolvency practice that specialises in personal insolvency. It has around 110 staff.

7. Daniel Morris was the Consulting Managing Director of the respondent and the most senior person working in the business on a day-to-day basis. Suzanne Greaves, HR manager, in effect reported to Daniel Morris, although she also reported to the business owners. The business owners were not engaged on a day-to-day basis in the business.

8. The claimant was approached by Daniel Morris to work with the respondent. Daniel Morris knew the claimant from previous employment.

9. The respondent routinely records telephone calls. Our findings of fact relating to telephone calls are taken from transcripts of those calls.

10. The claimant began her employment with the respondent as an IVA drafting administrator on 9 July 2018. The first three months of employment was a probationary period. The claimant's contract of employment provided that there was no entitlement to notice of termination during the probationary period. This was, as the respondent's representative recognised, erroneous in so far as it did not comply with the provisions relating to statutory minimum notice. The contract of employment referred to the employer's non-contractual grievance, disciplinary and appeals procedures set out in the staff handbook. The contract stated that, during the first 12 months of service, no disciplinary procedure would apply. The respondent accepts that there was no contractual right of appeal against a decision to dismiss.

11. In accordance with normal procedure for a new drafter, the claimant was to spend time in other departments to get familiar with procedures. There is some dispute about whether all the claimant's periods in different departments was due to this practice or whether some of it related to a lack of confidence in making telephone calls. There was a dispute between the parties about the extent and reasons for the claimant's lack of confidence on telephone calls. However, since the respondent withdrew its positive case that the claimant would have been dismissed because of a telephone phobia, it is not necessary for us to make any findings of fact about this area of dispute.

12. The claimant spent some time in the Post Appointment Department. This was referred to in various messages as working "downstairs". The claimant enjoyed her work in that department. However, on 15 August 2018, she asked Daniel Morris to move into the drafting team, which was the job for which she had been employed. She joined the drafting team around 20 August 2018. This involved working in a call centre type environment. Daniel Morris worked on the same floor and was aware of the claimant working there.

13. On 29 August 2018, the claimant left work early because she was unwell. She discovered on that day that she was pregnant.

14. The claimant was on annual leave in the period 3rd to 9 September 2018.

15. The claimant was suffering considerably with morning sickness and dizziness.

16. On 13th or 14 September 2018, the claimant had a meeting with Alex Ryder and Lucy Waring. She informed them of her pregnancy. She asked that they not disclose this to any other members of staff. The claimant raised a concern that her pregnancy was causing her to feel ill and affecting her performance. On the basis of Lucy Waring's evidence, we find that they made the claimant aware that they had laptops available for home use if she was struggling to get into the office and that the respondent would allow employees to work from home in exceptional circumstances on a laptop provided by the respondent. The claimant expressed concern that the effect of her pregnancy-related illness would result in her not passing her probationary period. They reassured the claimant that she was doing just fine and would have no problems passing her probationary period based on the standard of her proposals. They assured the claimant that her work and performance were more than satisfactory. This is contrary to what the respondent has said in its original response and amended response in which it is denied that the claimant was informed that her work and performance were more than satisfactory at the meeting between the claimant, Lucy Waring and Alex Ryder on 13 September 2018. Suzanne Greaves, who approved the draft responses, was unable to provide any satisfactory explanation for the incorrect statement in the response.

17. On 17 September 2018, the claimant left work early because she was unwell. She was absent from work on 18 September. On 24 September 2018, the claimant was again absent from work. She called the office and spoke to Nicola Whitham. She told Nicola Whitham that she was having dizzy spells and was waiting for a call back from the doctor. She said she kept being sick. She said she was stressing out with having time off work as well. She said that people did not know that she was pregnant and it was giving her bad anxiety as well. Nicola Whitham said that she would let Lucy Waring know and the claimant could come in if she felt better later on.

18. On 26 September 2018, the claimant spoke to Suzanne Greaves by telephone. The claimant updated Suzanne Greaves that she had been to the doctor and was awaiting results from blood tests. She said she was getting stressed out and financially could not afford to take a week off work and was just going to see how

she got on. She said she had asked for it to be confidential so she was not sure Suzanne Greaves was aware, but she was pregnant. She said she was only 6 weeks at that time which is why she did not want to tell anyone because she had had a miscarriage before. She said she was feeling absolutely awful, she wanted to come in and had intended to come in that morning but had been sick. She said she could not afford to have time off and it was really, really stressing her out so she was going to try her best to come in. She was just going to have to see how she got on. Suzanne Greaves said she would tell Lucy that she had been advised to stay off till Friday and if she came in, she came in, if she didn't, she didn't. She said they would expect to see the claimant back in on Monday and if she felt well enough then she would come in. The claimant sent a message a few days later to a friend and colleague, J, in which she commented that she had spoken to Suzanne and she wasn't very sympathetic at all. Whilst we accept this was the claimant's perception, there is nothing in the transcript that displays an obvious lack of sympathy.

19. The claimant was signed off from work due to dizziness and nausea in the period 26 September to 2 October.

20. The claimant was concerned about whether she would be dismissed. On 29 September 2018, she sent a text to J in which she stated "work are going to get rid of me for sure."

21. It is evident from the text messages to J that the claimant was not happy working in the drafting department. She referred to it as a "horrid environment". She wrote that she might ask if she could go back downstairs, that she preferred it there, it was more relaxed and less pressure.

22. On 2 October 2018, the claimant texted J, saying she hadn't had the energy to look for anything else so would go back on Monday and see how it went. She wrote that she would rather have work lined up when she left. We take from this that the claimant was contemplating leaving if she could find another job because she was not happy in her drafting role.

23. The claimant obtained another fit note covering absence from the 2 to 8 October 2018 due to vomiting.

24. A text from the claimant to J on 6 October 2018 expressed concern that the respondent may dismiss her. In J's reply, she wrote that the claimant had a chance. She wrote that the claimant was good at her job and she was sure they would be delighted if the claimant offered to work from home. She wrote that there was a huge backlog with drafting.

25. On 7 October 2018, in a further text, the claimant wrote that she was back in the next day and doubted they would be willing to keep her on. J replied, writing:

> "I don't see why not. I think you should keep your options open. They are behind with drafting. Danny asked us if any of us were interested. Don't think

> anyone got back to him but he did say we could work from home. Push for that! You may be glad to get back to work after baby is born!"

26. The claimant replied that she would definitely try and push to work from home in that case.

27. There is no suggestion in this text correspondence that the claimant is seeking to change her employment status from that of employee to being self-employed. The discussion of the possibility of home working does not suggest this possibility is being considered other than as an employee. The claimant had previously been told by Lucy Waring that employees could exceptionally be allowed to work from home, using a laptop. The claimant would have no reason to believe, at this stage, that she could only work from home if she ceased to be an employee.

28. We heard from Daniel Morris that the respondent had recently acquired some laptops and equipment which enabled people to work at home in accordance with regulatory requirements. The people who worked from home were doing some additional work at weekends to the work they did in the office from Monday to Friday. They were all employees. They received payment for each case completed at home in addition to the normal salary and bonus. The respondent did not engage anyone on a self-employed basis to work from home.

29. On 8 October 2018, the claimant returned to work. She found that her belongings had been moved and another member of staff was at her desk. We heard that there was a practice of hot desking in the section where the claimant was working. The claimant has not satisfied us, on a balance of probabilities, that her belongings had been moved because she was going to be dismissed. We accept, however, that she formed this suspicion in the light of the events which followed.

30. The claimant was due to have her probationary meeting on 9 October 2018. Her 3 months' probationary period was ending on 8 October 2018.

31. On 8 October 2018, soon after the claimant arrived at work, there was a meeting between the claimant and Daniel Morris. Much about this meeting is in dispute. The areas of common ground are as follows. The meeting was initiated by Daniel Morris inviting the claimant to come into an office to speak to him. The claimant became very upset. The claimant told Mr Morris she was pregnant. The claimant had not told Daniel Morris before the meeting that she was pregnant. Mr Morris said this was the first he had known about the claimant being pregnant. There was some discussion about working at home which was initiated by the claimant. The meeting was about 15 minutes long. As a result of what was said in the meeting, the claimant ceased to be an employee as of that day. Suzanne Greaves contacted the accountant who dealt with their external payroll either that day or the day after and told them that the claimant's employment ended on 8 October 2018. Terms of self-employment were not agreed during the meeting.

32. The principal areas of dispute are as follows. Did Daniel Morris tell the claimant that she was dismissed and confirm this after she told him that she was pregnant or

did they have a discussion in which the claimant agreed, without dismissal being mentioned, that she would leave employment that day to work from home on a self-employed basis on terms still to be agreed? Did Suzanne Greaves join the meeting towards the end of that meeting?

33. The essential elements of the claimant's version of events are as follows. The claimant says that Mr Morris told her immediately that they were going to have to let her go. She said she then told him that she was pregnant and had been sick due to pregnancy-related illness. He confirmed her dismissal, saying that if staff are off sick they are not making him money. The claimant says she became very upset. She begged Daniel Morris to change his mind but he would not. She said that she had been told by managers that she was performing well. Daniel Morris advised her that the dismissal was solely due to her absence and not her performance. She said this was due to pregnancy -related illness. Daniel Morris again refused to change his mind and said that the best he could do would be to pay her 2 weeks' notice plus any outstanding bonus. The claimant was aware that IVA drafters had been working from home on Saturdays using the company laptops so asked if this was something that she could do. He said he would speak to HR and see if there was anything they could do but it was unlikely the respondent would be happy to let her use a laptop from home since she had been dismissed. The claimant says there was no mention of self-employment. The claimant says she left the office, collected her coat and went home. She denies that Suzanne Greaves joined the meeting before she left.

34. The essential elements of Daniel Morris' account of the meeting are as follows. Daniel Morris says that he invited her to speak with him because he observed her "heaving" at her desk and was concerned for her health and well-being. Daniel Morris's witness statement states that the claimant told him she was pregnant, she was emotional and tearful and talked to him about the financial pressure that she was under. He says he asked her what she wanted to do and how he could make the situation easier for her. She said she wanted to work from home. From the conversation, he said he was aware she was struggling to comply with the pressurised aspects of the role. To identify steps to reduce the pressure of the drafting role, he says he suggested that maybe she could complete work on a piecemeal fashion with no requirement for minimum hours or targets. This would allow her to work as much or as little as she wanted depending on how her symptoms were on a particular day. Daniel Morris asserts that the claimant agreed to this and said she was grateful for the opportunity. He asserts that they agreed that the claimant would therefore work from home on a self-employed basis. In oral evidence, Daniel Morris said that he was the person who first mentioned self-employment.

35. In the response, the respondent asserted that the claimant had told Daniel Morris that she was extremely concerned about her parents finding out about her pregnancy due to their religious beliefs. The claimant disputes this and says her mother knew about her pregnancy as soon as she did. Daniel Morris did not include evidence about this part of the conversation in his witness statement and, in answer to questions from the judge, said he did not know if religious belief had been discussed.

36. Although the response and amended response and Daniel Morris's witness statement make no mention of this, Daniel Morris gave oral evidence that Suzanne Greaves joined the meeting towards the end. We found Suzanne Greaves' witness statement to be somewhat ambiguous as to whether she joined the meeting when the claimant was still there or spoke to Daniel Morris after the meeting. However, in oral evidence, she amplified her evidence, asserting that she was invited into the meeting when she arrived at work and giving details about what was said that were not contained in her witness statement. On her own account, she did not witness the conversation between the claimant and Daniel Morris which Daniel Morris asserts resulted in the agreement to end the claimant's employment and to engage her on self-employed terms which were still to be agreed. Suzanne Greaves says that Daniel Morris told her that the claimant really was not very well and did not want to continue working. Rather than give up, she was going to work from home on a self-employed basis. Suzanne Greaves said she was a bit surprised because they did not have anyone who was self-employed. Suzanne Greaves said that she said "Oh OK" and might have said "are you OK with this Maya" to which the claimant smiled and said yes. Suzanne Greaves says this was the extent of the conversation. She says the meeting ended with Daniel Morris saying the claimant would come back for a laptop and that Lucy would sort it out with IT. Suzanne Greaves gave evidence that she did not ask Daniel Morris anything else about what had been agreed but decided to talk to solicitors to see how this would work and if there was anything she needed to do. However, she did not contact the solicitors that week. Suzanne Greaves did not make any notes of the meeting. Suzanne Greaves said she did not attend a meeting with the claimant and Daniel Morris on 9 October.

37. We prefer the claimant's account of the meeting to that of the respondent's witnesses for the following reasons.

38. The claimant's account that she was dismissed is supported by contemporaneous documents. Within less than an hour of the meeting, the claimant had sent a text to J saying:

> "They sacked me. Could have just told me over the phone rather than making me go all the way in!!"

39. The claimant had no reason to write to a friend that she had been sacked if she did not understand this to be the case.

40. There is further support for the claimant's account in a message dated 17 October, to another friend, M, saying:

> "I was drafting but they sacked me the day before my probation because I had 2 weeks off as I am pregnant and I have been really ill. I had a sick note from the doctors so I appealed the decision and they have offered me the job back but after what has happened I don't feel do [sic] in going back … Don't know what to do. They are only going to find another reason to get rid of me if I go back x"

41. On 12 October 2018, the claimant sent the respondent an email appealing against dismissal.

42. The reply from Suzanne Greaves on 15 October 2018, on behalf of the respondent, did not challenge the claimant's assertion that she had been dismissed, which we would have expected to be the case had the respondent genuinely understood that the claimant's employment had come to an end by mutual agreement. The first suggestion from the respondent that the claimant had left on agreed terms did not come until a letter dated 18 October 2018 in which Suzanne Greaves wrote:

> "After your prolonged sickness, we also offered you the opportunity to work from home with a much higher bonus rate and on a self-employed basis, which was an opportunity you thanked us for and agreed with the suggested terms, and said it was something you had always wanted to do."

43. In a telephone conversation on 23 October 2018 with the claimant, that Daniel Morris flagged up was being recorded, Daniel Morris stated: "your employment was still on probation as far as I was concerned anyway we both had a conversation…" If the meeting on 8 October had proceeded in the way Daniel Morris has said in evidence that it went, there would be no relevance in this comment about the claimant still being on probation. The reference to the claimant still being on probation is more consistent with Daniel Morris having taken the opportunity to dismiss the claimant when she was still within her probationary period. In the same conversation on 23 October, the claimant said "you unlawfully dismissed me and I think, and you did… And it was down to..". If the conversation on 8 October had been as Daniel Morris asserts, we would have expected him to reply, denying that he had dismissed the claimant and referring to the agreement they had reached for the ending of the claimant's employment. However, he replied: "Maya, Maya I think I know where this is going and I think you know where it is going, so take your advice."

44. On 7 January 2019, the claimant presented her claim. Her account on the claim form gives the main points relating to this meeting and other matters. We find nothing inconsistent between what the claimant wrote on the claim form and her witness statement. Much was made in cross examination of the claimant of the omission of what was put to the claimant as being important details. However, the purpose of the claim form is not to give all the supporting evidence. We accept the claimant's evidence that she understood from guidance on the tribunals website that she had to be succinct and would have an opportunity to give further details later. We do not consider that the claimant's credibility is undermined in any way by not giving, in the claim form, all the evidence she would later rely on.

45. The respondent has no contemporaneous documents which supports their account of the meeting on 8 October 2018. We would have expected, in particular, Suzanne Greaves, as an experienced HR professional, to make a careful note of what had been discussed and agreed since what happened at the meeting on 8 October led to the claimant's employment ending on that date. Suzanne Greaves

was aware that the claimant was pregnant and that her absences were pregnancy related.

46. We consider it inherently implausible that, in a 15 minute meeting, the claimant and Daniel Morris would get to a position where there was an agreement that the claimant's employment was ending on that day and the claimant was to become self-employed, even if the claimant thought that self-employment rather than continued employment was a good idea. There is no evidence the claimant had thoughts of self-employment before the meeting. Even on the respondent's account, terms for self-employment were not agreed at the meeting.

47. We also consider it inherently implausible that such a drastic solution as ending the claimant's employment and substituting self-employment would be considered by the claimant a good idea to get over what would be a temporary problem of morning sickness. If Daniel Morris had been motivated by wanting to help the claimant get through this difficult, but temporary, problem of pregnancy-related illness, a more likely solution to discuss would have been temporary home working as an employee. Lucy Waring had told the claimant on 13 and 14 September 2018 that this could be a possibility and they already had people doing drafting work at home at weekends.

48. We find, on a balance of probabilities, that, whatever the exact words used were, Daniel Morris made it clear to the claimant within moments of the meeting starting that he was dismissing her. After being told that she was pregnant and that her absences were pregnancy related, he then confirmed that she was being dismissed and that the reason for this was because of her absences. We find that the claimant raised the possibility of working from home in an attempt to salvage something from a difficult situation, where she was particularly worried about her financial situation. We find that self-employment was not mentioned. Daniel Morris said he would speak to HR to see what they could do. We find that Daniel Morris did not make it clear to the claimant that, if she was allowed to do work at home, this would be on a self-employed basis.

49. We find further support for our findings from the later telephone call between Lucy Waring and the claimant on the afternoon of 8 October. Lucy Waring referred to the claimant having spoken to Daniel Morris that morning about doing some work from home and said she was going to sort out the claimant with a laptop. The claimant replied: "oh brilliant OK". Lucy Waring informed the claimant that she would do drafts from home and they would pay her on the ones she got set. Lucy Waring asked: "Did Danny talk you through that or…?" The claimant replied: "Briefly. He just said he would talk to yourself or Suzanne. He's not really gone into detail or anything."

50. Lucy Waring told the claimant they would pay her £30 for each meeting set. Lucy Waring then said "Errm but obviously on a self-employed basis."

51. The claimant replied: "yeah, all right, no I really appreciate that. I mean when Danny spoke to me this morning first of all I wasn't expecting it and I broke down in front of him."

52. They then spoke about the claimant coming in the following day, 9 October, to collect the laptop. Lucy Waring told her to ask for her or Suzanne and she would get her the laptop. In fact, the claimant did not have any further contact with Lucy Waring after 8 October.

53. Having preferred the claimant's version of events on 8 October over that of Daniel Morris, we also prefer the claimant's evidence over that of Daniel Morris in finding that Daniel Morris told her that the respondent would give her 2 weeks' notice.

54. Even on the respondent's witnesses' version of events, Suzanne Greaves did not witness the most significant part of the meeting between the claimant and Mr Morris on 8 October.

55. We have considered whether Suzanne Greaves or the claimant may have become confused in their recollections of whether Suzanne Greaves was present at the end of the meeting between the claimant and Mr Morris on 8 October. Although the claimant was very distressed, we think it unlikely she would not have recalled Suzanne Greaves being there. Also, we consider it unlikely she would have been confused in her recollection of seeing Suzanne Greaves on 9 October, the day she returned to collect a laptop, rather than 8 October. We have preferred the claimant's account of the meeting on 8 October over that of Daniel Morris. There does not appear to be any reason that the claimant would be untruthful about whether or not Suzanne Greaves joined the meeting on 8 October or whether, instead, she met with Suzanne Greaves and Daniel Morris on 9 October.

56. We consider it possible that Suzanne Greaves is mistaken in her recollection, having confused a meeting on 9 October with one on 8 October. The timeline produced by her may lend support to this since it appears from the timeline that the claimant came into the office to collect the laptop on 8 October which is clearly incorrect, given the conversation about collecting the laptop between the claimant and Lucy Waring on 8 October, when it is arranged that the claimant will go in on 9 October.

57. Daniel Morris did not say anything in his witness statement about Suzanne Greaves being present at any part of the meeting on 8 October. As we noted previously, there is some ambiguity about the evidence given in Suzanne Greaves' witness statement about this meeting. In paragraph 7, the use of "following this" suggests that Daniel Morris called Suzanne Greaves in after he and the claimant had had their discussion. In paragraph 8, the use of the phrases "I had understood that Maya and Danny had mutually agreed the termination of Maya's employment" and "it had been separately agreed between them that she would work from home on a self-employed basis" is more consistent with Suzanne Greaves not having been at the meeting on 8 October than with her being present. The respondent's response and amended response make no reference to Suzanne Greaves being present at the meeting. If events occurred as outlined to us in oral evidence by Suzanne Greaves, it is surprising to us that she did not put this detail in her witness statement, particularly

given her experience as an HR professional. As previously noted, we would have expected Suzanne Greaves, as an HR professional, to have made a note of significant points had she been present at the meeting.

58. We find, on a balance of probabilities, that Suzanne Greaves was not present at any part of the meeting on 8 October but was informed, after that meeting, by Daniel Morris that the claimant's employment was ending that day. She acted on that information by contacting the accountant to get the claimant taken off the payroll, calculating the claimant's holiday pay due and working out that it was equivalent to the extra 2 days for which the claimant had been paid, since the payroll for the period to 10 October 2018 had already been processed.

59. After the telephone call with Lucy Waring, in which it was made clear to the claimant that work from home would be on a self-employed basis, the claimant had a telephone call that evening with her friend J. J had some experience of self-employment. Later that evening, after the telephone call, J sent a text to the claimant suggesting to the claimant that she would be better off self-employed, she would pay less tax and get an extra £10 per proposal. She would have the choice to do less hours. She said she would send the claimant details of their accountant.

60. The following morning, the claimant texted J to say: "I can't believe how stressed out I was about it all initially but working from home is ideal for me and it's what I have wanted to do for a while." We accept that the claimant was putting a positive spin on events. She did not also understand, at this point, all the implications for her of being self-employed.

61. We find that the claimant would not have been financially as well off, or better off, if she had worked at home on a self-employed basis than if she had remained as an employee, working from home on a temporary basis, as required. This is without taking account of implications for maternity leave and pay of a change in employment status.

62. Around this time the claimant also spoke to her partner who suggested she get advice from the citizens advice bureau.

63. On 9 October 2018, the claimant went into the office to collect a laptop. We prefer the claimant's version of events to that of Daniel Morris and Suzanne Greaves, finding that the claimant had a meeting with them on that day. We accept the claimant's account that she said that she was happy to work from home but expressed concern about self-employment. As noted from the conversation with Lucy Waring, the claimant had expected to see either Lucy Waring or Suzanne Greaves that day.

64. The claimant began trying to work from home with the laptop but encountered various technical problems.

65. The claimant took advice from ACAS. As a result of this advice, she wrote to Suzanne Greaves on 12 October 2018. The first version of the letter was sent at

11.42. Later in the day she sent one with the corrected date in the first paragraph, which had erroneously referred to 8 November 2018 rather than 8 October 2018. The letter began: “I write to notify you that I am appealing against your decision to dismiss me on Monday, 8 October 2018, on the grounds of my sickness absence.”

66. She went on to say that, as Suzanne was aware, the reason for her absence from 29 August 2018 was purely down to her pregnancy sickness. She wrote that she had been assured by Alex and Lucy that her work performance was satisfactory. She wrote: “following your offer to work on a self-employed basis, I have decided this option is not acceptable for me. This option is having me stripped of any employment rights. I feel the offer to work for you on a self-employed basis is purely to avoid any form of employment benefits I should have been entitled to during my employment and on this basis I feel I have been treated unfairly with the decision you have made.” She wrote about the technical issues that she was having and wrote that she was not happy to continue with the arrangement. She raised various matters to do with payments she considered due to her.

67. She concluded her letter:

> “As you can appreciate, I feel I have been dismissed solely on the fact that I am pregnant, at no point has my performance been questioned, this was purely due to my sickness absence and Danny mentioned in my dismissal meeting. I am sure if I had been dismissed on performance I would not have been given the opportunity to work on a self-employed basis and a laptop and phone would not have been provided for me. I do not feel confident that any work that I may complete on a self-employed basis I would be paid to me due to the reasons mentioned above. I feel I have been put in an impossible situation, due to my pregnancy illness I am not in a position to currently look for employment, I feel any potential employers would be reluctant to employ me knowing that I am pregnant. I am extremely upset and disappointed that I have been put in this unfair position.”

68. On 15 October 2018, Suzanne Greaves replied to the claimant. As previously noted, she did not respond to the assertion that the claimant had been dismissed. She wrote that she was sorry to hear about the difficulties with the systems, working from home. She wrote “it seems a shame as you were so excited and relieved to have the opportunity to work from home. I recall you saying it was something you always wanted to do.” She wrote “you are more than welcome to come back and work from the office, on an employed basis. Let me know when you are able to return. On your return Lucy can go through all your payment queries, which we will look to resolve.”

69. Suzanne Greaves did not consider at the time that she was determining an appeal.

70. The claimant replied on 16 October 2018. She wrote that she was extremely pleased to have the opportunity to work from home, however, being stripped of any

employment rights was a concern for her. She wrote that she would like to accept the offer to return to work. She wrote:

> "It has been advised that I inform you of my current health situation in order for any possible adjustments to be made to my working condition. I been suffering [sic] with severe stress and anxiety as well as the pregnancy illness and I have a few concerns about my return to work. Hitting the drafting targets and the stress that comes along with the role is a worry with how I am now feeling.
>
> "Is it an option for me to discuss with Lucy a possible target reduction or role which is not so pressured.
>
> "I do not want to let the Danny or myself down and the pressure to hit a target which I do not feel is achievable for me at this time is a major concern to me.
>
> "Please can you let me know what my options are and if this is something we are able to discuss upon my return."

71. Suzanne Greaves responded the same day. She wrote:

> "When you return, we can monitor your performance carrying out the drafting role, however are unable to offer any further adjustments at the moment.
>
> "Let me know of a suitable start back date."

72. The claimant replied at 7.46 a.m. on 18 October 2018 writing that she was getting advice on her current position and would get back to them that day.

73. At 13.39 that same day, Suzanne Greaves wrote to the claimant. Suzanne Greaves explained this letter in her witness statement as being written because, from a commercial point of view, the respondent needed the matter as to whether the claimant was to return to work in an employed capacity to be resolved as soon as possible. However, this does not explain to us satisfactorily why she was writing in the early afternoon on a day when the claimant had said she would get back to the respondent after taking advice, without even waiting to the end of the day. It also does not explain to us the tone and much of the contents of this letter. We consider the tone of the letter to be pejorative in parts, in particular, the description of the claimant having a "phobia" of talking on the phone, a term which had not been used by the claimant, and the description of the claimant having a "mental illness" in response to the claimant having talked about suffering severe stress and anxiety. We do not accept the position put to the claimant in cross examination that the use of "mental illness" in this context was a purely neutral, or indeed accurate, description. The tone and contents of this letter are not what we would have expected from an experienced HR professional.

74. The claimant was unclear about exact dates in relation to the stages of miscarriage which she subsequently suffered, considering it possible that she had

confused dates in her witness statement with those relating to a subsequent miscarriage. However, we find that around this period, the claimant was making visits to the hospital because of feeling ill and, at some point around this time, she learnt that she was starting to miscarry. Subsequently, sadly, the claimant did suffer a miscarriage.

75. Despite the difficult circumstances, the claimant managed to carry on correspondence with the respondent for a few more days.

76. On 23 October 2018, at 12.07, the claimant wrote back to Suzanne Greaves. She started her email writing: "I am extremely disappointed with the unprofessional tone of your email." It was put to the claimant in cross examination that this was aggressive. We do not agree. We consider it fair comment, having regard to the tone and contents of Suzanne Greaves' email of 18 October 2018. The claimant took issue with various points in Suzanne Greaves' email, including what had been written about phone work. She wrote:

> "I do not feel any of the below points you have mentioned are relevant, this only seems to be a way of deflecting from the fact that I was dismissed due to my pregnancy -related absence. I do not feel 2 weeks as sickness can be considered prolonged."

77. The claimant wrote that she had accepted the offer to return to work on an employed basis. She wrote that she had been provided with a note from her doctors to advise she could return to work on the basis that she was offered a less stressful role or adjustments were made to avoid any risk to her and the baby. She wrote:

> "I have advised you that with my current health situation I am unable to go back to the drafting role, this is not in relation to the phone work as you have mentioned it is with regards to the high targets and the pressure of the role which I feel I cannot meet with feeling unwell due to my pregnancy."

78. She wrote that she considered commenting on her "mental illness" was completely inappropriate.

79. About 30 minutes later, Daniel Morris telephoned the claimant. Daniel Morris and the claimant were aware that they were being recorded. It is clear from the transcript that the claimant had difficulty in speaking without being interrupted by Daniel Morris. Daniel Morris was asking what the claimant wanted. He told her there were no jobs going downstairs and no other roles. The claimant explained that what she was asking for had nothing to do with the phones it was to do with targets. The claimant said that if they could not make any adjustments and could not accommodate her she would have to get advice on that. As previously noted, Daniel Morris said:

> "I think I know where you are going with this right, but there are no... We put our position in writing. Your employment was still in probation as far as I was concerned anyway we both had a conversation..."

80. The claimant said:

> "You unlawfully dismissed me and I think, and you did…. And it was down to.."

81. Daniel Morris then interrupted and said:

> "Maya, Maya I think I know where this is going and I think you know where it is going, so take your advice."

82. Daniel Morris then said that when the claimant took advice they would respond through the appropriate channels. They would not enter into any further email correspondence directly. He said: "OK our position has been set out all right." The claimant replied "all right". The call then came to an abrupt end. We accept the claimant's evidence that Daniel Morris put the phone down without saying goodbye.

83. Within 5 minutes, Suzanne Greaves wrote to the claimant to confirm, following that conversation, that there were no vacancies in the post appointment department at that time.

84. The claimant replied shortly afterwards, she wrote: "as you have advised you cannot offer any adjustments to the role or offer any alternative vacancies at the moment, can you confirm if you are suspending me which would be at my usual rate of pay?"

85. Suzanne Greaves replied:

> "Your employment was terminated by mutual consent on Monday, 8 October 2018. You therefore have not been suspended as you are no longer an employee – therefore suspension rules do not apply.
>
> "As previously mentioned, there is the option for you to return back to work on an employed basis in your original role of insolvency administrator-drafter.
>
> "You accepted this offer in your email dated 16 October, yet we are still waiting on a confirmed start date for you.
>
> "Please can you advise of a suitable return date."

86. On 24 October 2018, Suzanne Greaves wrote again to the claimant. She offered the claimant a position handling all the incoming post appointment calls into the Customer Service Department, resolving any queries or transferring the call to the correct team, actioning any customer service email queries and postal queries.

87. The claimant did not reply to this letter. We accept the claimant's evidence that she had lost faith in the respondent by this point. Also, as previously noted, the claimant was unwell, either suffering or having just suffered a miscarriage.

88. On 26 October 2018, the claimant contacted ACAS under the early conciliation procedure. The ACAS certificate was issued on 26 November 2018 and the claimant presented her claim to this employment tribunal on 7 January 2019.

89. We make the following additional findings of fact in relation to the complaints of unlawful deduction from wages.

90. In relation to holiday pay, we find that employees were paid up to the 10th day of each month. The claimant's employment ended on 8 October. By this date, payroll had already been processed and payment was made to the claimant for the month ending 10 October 2018 as if she had worked for the whole month. She was, therefore, paid for 9 and 10 October although she did not work on these days. The parties agree that the claimant had 2 days' accrued but untaken annual leave at the effective date of termination.

91. In relation to the refer a friend scheme, the only documentary evidence shown to us is a letter which it is accepted the claimant had not seen, since this predated her employment. However, what is written in this letter from Suzanne Greaves to staff dated 7 January 2016 is consistent with what the claimant says she was told about the scheme. If an employee referred a family member or a friend as a possible employee, the employee who referred them would receive £150 payable after the candidate had passed their 3 month probationary and a further £200 after the candidate had completed a full 6 months' service. The email does not say that the referring employee had to still be a current employee at the time the payments fell due. There was nothing in the respondent's witness statements about the scheme. Suzanne Greaves gave additional oral evidence that the employee had to be employed at the time the payment was made. We find that the respondent had never made such a payment to someone who was not still employed at the date the payment became due. The claimant is unable to give us any information to the contrary. There is no evidence that the claimant was told that she had to still be in employment to receive such a payment.

92. In relation to bonuses for variation requests, we found the evidence to be extremely unsatisfactory. We would have expected the respondent to have provided us with some documentary evidence about the criteria for payment and the amount of payment due. The claimant's contract of employment is silent about payment other than for basic salary and overtime. The respondent's witness statements do not address this issue. Lucy Waring gave some additional oral evidence about this. This was to the effect that, as well as spotting the change in circumstances which could lead to a variation to the IVA, the employee had to make a call to the client to explain the situation and agree to the variation being made. We accept that the claimant's evidence reflects her understanding of the scheme. This is consistent with what she wrote to Suzanne Greaves about payment for variation requests she had put forward in her email of 12 October 2018. She was advised by a manager, Adam, that variations she requested would be verified by him and she would not be required to contact the client. We are unclear as to the amount that would be due for any verified variation request. In that email, it appears that she was accepting that payment of £20 was correct for 4 cases. However, she is claiming a payment which

would be much more than £5 per case. The respondent did not reply to the substance of what the claimant said about payment due for variation requests in correspondence. Their responses to these proceedings did not give any information about the criteria under which payment might become due, simply admitting that the claimant was entitled to payment for variations at £5 each totalling £20 and denied that any further payment was owed to the claimant.

Comments on credibility of the claimant

93. In relation to matters where there are disputes on relevant facts, we have explained why we have referred one version of events over the other. In particular, we have explained why we have accepted the evidence of the claimant and rejected that of the respondent in relation to what happened at the crucial meeting on 8 October 2018.

94. We would not normally make generalised comments about the credibility of witnesses. However, the respondent, in defending this claim, has launched an attack on the credibility of the claimant. In particular, in paragraph 20 of Miss Trotter's skeleton argument, she writes:

> "The respondent contends that this claimant is not a witness of truth, and lacks credibility. The reality is that she has sought to capitalise on a change in employment status in light of her pregnancy in a cynical and disingenuous way. The accounts she gives of events are not supported by contemporaneous documents and call transcripts, and the respondent respectfully asks the tribunal to dismiss the claims in their entirety."

95. For the reasons we have given, we have concluded that the claimant's account of events is more consistent with contemporaneous documents than the respondent's account. It is also inherently more plausible.

96. The claimant has been consistent in all essential elements of her case. Her evidence was not shaken by rigorous cross-examination. The claimant appeared to us to be doing her best to give truthful evidence. We consider that the respondent's attack on the claimant's credibility is entirely unwarranted.

Submissions

97. Miss Trotter made oral submissions in addition to a written skeleton argument she had produced at the start of the hearing.

98. Ms Trotter's oral submissions were, in summary, as follows. She submitted that we should prefer the evidence the respondent to that of the claimant.

99. In relation to the wages claim about the variation bonus, Miss Trotter referred to Lucy Waring's evidence. She submitted that contact with the client was fundamental to the variation process and necessary before the bonus was earned and it would be extraordinary if noting the change only was needed.

100. In relation to holiday pay, she submitted that the claimant had been paid this by being paid for the 2 days between 8 and 10 October.

101. In relation to the refer a friend bonus, Miss Trotter submitted this only applied to current employees, referring to the email from Suzanne Greaves.

102. In relation to the unfair dismissal claim, Miss Trotter argued that the principles in **Patel v Folkestone Nursing Home Limited** [2018] EWCA Civ 1843 CA applied equally where there was no contractual right of appeal to where there was a contractual right of appeal. Miss Trotter referred to the evidence of Suzanne Greaves that she did not think she was determining an appeal. Miss Trotter submitted that an employer does not have to know what they are doing to be bound by the effects of their actions. The claimant put in an appeal against dismissal. The respondent responded that she could return on an employed basis. The appeal had been successful. This was an explicit decision to reinstate.

103. Miss Trotter submitted that **Patel** could apply to a section 18 Equality Act claim. At its highest, the tribunal could find that the claimant was dismissed, that was reversed so it was extinguished. Miss Trotter submitted that the claimant did not have the building block to get to an Equality Act claim. If the claimant could not establish a live dismissal, the Equality Act claim must fail. Miss Trotter submitted that a dismissal could not be extinguished under one statutory regime but remain live for another.

104. Miss Trotter confirmed that the respondent no longer advanced the phone phobia as an alternative reason for dismissal. The respondent did not have an alternative positive case to put forward about the reason for dismissal.

105. In relation to the breach of contract claim, Miss Trotter submitted that if the tribunal found there was a dismissal, the claimant was entitled to statutory notice. She submitted that a throwaway comment was not sufficient to bring about a variation of contract.

106. The claimant, who had become unwell during the course of Miss Trotter's submissions, chose not to make any submissions.

Law

107. Section 99 Employment Rights Act 1996 (the 1996 Act) read with the Maternity and Parental Leave etc Regulations 1999, provides, amongst other things, that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee is pregnant. The normal one year qualifying period for unfair dismissal does not apply (section 108(3) 1996 Act). However, where an employee does not have the year's continuous service necessary to claim "ordinary" unfair dismissal, the burden of proof is on the employee to prove that the reason for dismissal was a prescribed reason within section 99 1996 Act: **Smith v Hayle Town Council** [1978] ICR 996 CA.

108. Section 18(2) of the Equality Act 2010 (EqA) provides:

> "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……"

109. The protected period begins when the pregnancy begins.

110. Section 39(2) EqA provides, amongst other things, that an employer must not discriminate against an employee by dismissing the employee.

111. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

112. We were referred to the cases of **Patel v Folkestone Nursing Home Limited** [2018] EWCA Civ 1843 CA and **Salmon v Castlebeck Care (Teesdale) Ltd** [2015] IRLR 189 EAT in relation to the concept of a dismissal "disappearing" because of a successful outcome to an appeal against dismissal. We address the application of these cases in our conclusions.

Conclusions

<u>s.99 Employment Rights Act 1996 unfair dismissal</u>

113. The first issue to consider is whether the claimant was dismissed. In our findings of fact, we found that Daniel Morris told the claimant on 8 October 2018 that she was dismissed. He told her that this was because of her absence. After she told him that she was pregnant and that her absences were related to pregnancy, he confirmed that she was still dismissed. (See paragraph 48).

114. Miss Trotter has advanced, on behalf of the respondent, an argument that, in accordance with **Patel v Folkestone Nursing home**, the **Salmon** case and other cases referred to in the **Patel** case, the dismissal is treated as "disappearing" because the claimant appealed against her dismissal and that appeal was determined in her favour.

115. We do not accept the respondent's arguments for a number of reasons.

116. As a matter of principle, we do not consider that this line of authorities applies where there is no contractual right of appeal. All the decided cases deal with contractual rights of appeal. Miss Trotter argues that the principle can be extended

more widely. However, having considered carefully the case law, we do not agree. It appears to us that the reasoning underpinning the decisions rests on there being contractual rights. We refer, in particular, to paragraphs 26 to 29 of the Patel decision. Paragraph 29 states:

> "If an appeal is brought pursuant to such a term [a right of appeal under the contract] and is successful, the employer is contractually bound to treat the previous dismissal as having no effect and the employee is bound in the same way. That is inherent in the very concept of an appeal in respect of a disciplinary dismissal."

117. If there is no contractual right to appeal, it appears to us that, if an employee is allowed, at the employer's discretion, to appeal and is successful in that appeal the employee and employer cannot be contractually bound to treat the dismissal as having no effect.

118. There was no contractual right of appeal in this case, as is conceded by the respondent. The respondent's discipline, grievance and appeal procedure is stated to be non-contractual. In any event, the contract of employment states that the procedure does not apply until someone has been employed for 12 months. The claimant had less than 12 months' service when dismissed.

119. Even if we are wrong in our conclusion that the case law does not apply where there is no contractual right of appeal, we would have concluded that the principles in **Patel** have no relevance given the facts in this case. Although the claimant wrote to the respondent asking to appeal against her dismissal, we conclude that it was not dealt with as an appeal by Suzanne Greaves. Suzanne Greaves told us that she did not consider she was determining an appeal (see paragraph 69). Miss Trotter argued that it was not necessary for Mrs Greaves to know what she was doing for it to have the effect of being the outcome of an appeal. We are doubtful that the **Patel** principles could apply if the respondent did not know that they were determining an appeal. In any event, the respondent did not act in accordance with the respondent's own appeal process. There was no appeal hearing, for example. Suzanne Greaves did not tell the claimant that she had allowed her appeal. If the **Patel** principles had applied, the claimant would automatically have been reinstated. This did not happen. Instead of determining an appeal, we conclude that the respondent was making an offer of re-employment following a dismissal.

120. For these reasons, we reject the argument of the respondent and conclude that the dismissal is not to be treated as not having occurred for the purposes of the unfair dismissal claim.

121. We have concluded the claimant was dismissed. The next issue is whether the reason or principal reason for dismissal was connected with the claimant's pregnancy. We have found that Daniel Morris told the claimant that she was dismissed because of absences. Her absences were related to her pregnancy.

122. Daniel Morris says that he did not know, before the meeting on 8 October 2018, that the claimant was pregnant. The claimant has not challenged him on that evidence, so we proceed on the basis that Daniel Morris did not know, before the meeting began, that she was pregnant.

123. It has not been argued on behalf of the respondent that, because Daniel Morris did not know that the claimant was pregnant before he decided initially to dismiss her, that the reason or principal reason for dismissal could not be connected with pregnancy. However, we have considered whether such knowledge was essential. It does not appear to us that knowledge of the reason for absence is required if, as a matter of fact, absence is connected with pregnancy.

124. Even if such knowledge is required, on the facts in this case, once the claimant had told Mr Morris the reasons for her absence and he had an opportunity to retract the dismissal, he did not do so but confirmed that, whatever the reason for her absence, he was dismissing her (see paragraph 48). In the circumstances, we conclude that the reason or principal reason for dismissal was pregnancy-related absence and, therefore, was connected with the claimant's pregnancy.

125. We conclude that the complaint of unfair dismissal under section 99 of the Employment Rights Act 1996 and the 1999 Regulations is well founded. The dismissal was unfair.

s.18 and 39 Equality Act 2010 claim

126. On the facts, we have found that the claimant was dismissed on 8 October 2018.

127. Miss Trotter sought to apply the **Patel** principles to the Equality Act claim. We conclude that these principles cannot be applied to an Equality Act claim. The case law only relates to unfair dismissal complaints. The case law relates to a technical device by which a dismissal is deemed not to have occurred for the purposes of an unfair dismissal complaint. It does not mean that the act of dismissal complained about never occurred. If an act was an act of discrimination, the **Patel** principles cannot mean that discrimination is erased. There could be points to raise at the remedy stage relating to the offer of re-employment but this does not affect whether there was an act of discrimination.

128. Even if we were wrong and the **Patel** principles could apply to erase a dismissal for the purposes of a section 18 Equality Act claim, for the reasons we gave in relation to the section 99 Employment Rights Act unfair dismissal claim, we conclude that the **Patel** principles would not apply in this case.

129. We found that the claimant was dismissed because of absence for pregnancy-related reasons. We conclude that the claimant was treated unfavourably by being dismissed and this was because of illness suffered by her as a result of pregnancy. We conclude that the complaint of discrimination under section 18 of the Equality Act 2010 is well founded.

Breach of contract

130. We conclude that the claimant was dismissed on 8 October 2018. She was dismissed without notice. Under her original contract of employment, as varied in compliance with statutory minimum notice requirements, she was entitled to one week's notice of termination. However, Daniel Morris told the claimant on 8 October 2018 that he would give her 2 weeks' notice. We conclude that this was a variation of the contract. The respondent was in breach of contract by dismissing the claimant without notice and the period of notice to which she was entitled was 2 weeks.

Holiday pay

131. As noted in our findings of fact, the claimant was paid up to 10 October 2018, although her employment terminated on 8 October 2018. The parties agree that the claimant had accrued 2 days leave by the effective date of termination. By coincidence, this equated to the 2 extra days for which the claimant was paid but had not worked. It is understandable, since this was not explained to the claimant, and no payment of holiday pay was expressly noted on the payslip, that the claimant thought she had not been paid for her holiday entitlement. However, we conclude that, because the claimant had been paid for 2 days for which she had not worked, she had, in practice, been paid in lieu of accrued but untaken holiday. We, therefore, conclude that this complaint of unlawful deduction from wages is not well founded.

Refer a friend

132. The claimant seeks the payment of £350 for introducing her friend J to the respondent's employment. The respondent denies entitlement on the basis that the claimant was not still employed at the time the payments would have become due. They have not argued that J did not remain employed for the required period. The only documentation provided by the respondent about the scheme does not say expressly that the referring employee has to still be in employment at the time the payment would become due. There is no evidence that the claimant was told that this was the case. However, we have accepted the evidence of Suzanne Greaves which is to the effect that payments are only made to referring employees who are still in employment themselves. This would be consistent with the practice in many such bonus schemes. The claimant has not been able to provide evidence that payments were ever made under this scheme to people who had already left the respondent's employment. The burden of proof is on the claimant to satisfy us that payment was due to her. She has not managed to discharge this burden of proof and satisfy us that she met all the criteria for payment. We, therefore, conclude that this complaint is not well founded.

Variation request

133. The claimant seeks a payment of £640, £20 already having been paid to her. The respondent denies that there is any entitlement to any further payment because the claimant did not make calls to the clients after identifying changes in

circumstance which could lead to a variation. As we noted above, the evidence in relation to this matter is unsatisfactory. We would have expected the respondent to have produced documentary evidence about the criteria for the scheme and the amount of payments due. We have not heard of any requests for specific disclosure being made by the claimant relating to this complaint which have not been complied with. If the claimant did not make any such request, this is likely to be due to the claimant's inexperience, being a litigant in person (although it does not excuse any failure by the respondent to comply with the general order as to disclosure).

134. The burden of proof is on the claimant to satisfy us that payment was due to her. We do not consider that possible failures in relation to disclosure on the part of the respondent are sufficient to enable us to conclude that the claimant was entitled to payments which have not been made. We conclude that the claimant has not satisfied us, on a balance of probabilities, that she has met the requirements of the bonus scheme and that particular amounts were due to her which were not paid. We, therefore, conclude that this complaint is not well founded.

_____

Employment Judge Slater

Date: 7 February 2020

JUDGMENT & REASONS
SENT TO THE PARTIES ON

14 February 2020

FOR THE TRIBUNAL OFFICE