

sb



## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Miss T Kasongo

AND

Humanscale UK Ltd

**HELD AT:** London Central      **ON:** 17 and 18 September 2019

**BEFORE:** Employment Judge Walker  
**Members:** Ms S Samik  
Mr J Carroll

***Representation:***

**For Claimant:** Ms M Grell, of Counsel  
**For Respondent:** Mr C Edwards, of Counsel

## REASONS

1. The Claimant brought claims for pregnancy discrimination and automatically unfair dismissal. The Claimant was a Marketing Executive and the Respondent is the UK subsidiary of an international manufacturer and seller of ergonomic office furniture with Headquarters in New York.

**Evidence**

2. The evidence provided to the Tribunal was as follows. The Tribunal had an agreed bundle of documents. The Respondent called two witnesses, Tamsin Grosvenor, a former employee who had been Senior Marketing Manager for the Respondent at the relevant time and Karen McGrath, International Human Resource Director who was their Senior Human Resource Manager International for the Irish entity at the relevant time and who was also responsible for HR matters for the UK. The Claimant gave evidence for herself.

3. The Tribunal were told that the Respondent had suffered a ransomware attack in 2018 as a result of which, it was unable to access its normal email and computer systems and historic records. It had however disclosed a significant number of emails which were held outside that system but acknowledged that not all of its records could be found.

## Issues

4. The issues which had been identified at the preliminary hearing for case management purposes were as follows:

### Under the Equality Act s.4 and 18

4.1 Did the Respondent discriminate against the Claimant during the protected period by treating her unfavourably because of (1) her pregnancy and/or (2) her illness on 29 January 2018 which she says was pregnancy related?

### Under the Employment Rights Act 1996 and the Maternity and Parental Leave etc Regulations 1999

4.2 Was the reason or principal reason for the Claimant's dismissal connected to her pregnancy?

5. In the course of these proceedings the Claimant appealed to the EAT on an order which had been made. In the EAT judgment, Her Honour Judge Stacey identified three principal factual issues for the Tribunal to determine and we therefore recorded those as part of the issues list. They were:

5.1 Did the Respondent know that the Claimant was or might be pregnant and if so when did they know and who knew?

5.2 When did the Respondent decide to dismiss the Claimant or alternatively subject her to the other detrimental treatment complained of? In practice there was no other detrimental treatment as it was solely the dismissal which was complained of.

5.3 What was the reason for her dismissal?

## Facts

6. The Claimant was appointed to the role of Marketing Executive with a start date of 27 March 2017. The offer letter said her employment would be subject to successful completion of a six month probationary period and the probation was therefore due to end in or around late September 2017.

7. The Claimant was given a contract of employment which set out various terms of her employment including her hours of work at clause 10 which were 8:30am to 5:30pm Monday to Friday with a one hour lunch break. She was also to work such additional hours as were necessary from time to time due to the company's business needs, or for the proper performance of her duties with no additional payment for overtime.

8. There was a provision about the probationary period which both provided for it to be automatically end after six months and additionally also said it could be extended.

9. Clause 11 addressed holidays and set out various procedures and time requirements for requesting holidays.

10. From the fairly early stage of employment the Claimant was absent for odd days. The full record should have been maintained by one of the Respondent's employees but we do not have a formal record of such. We do have various emails, texts and WhatsApp messages from which we can deduce that on 5 May 2017, the Claimant emailed her then Line Manager, Sabrina Wong due to having severe migraines and said she was off sick on 27 April for that reasons and also being sick. Again, on 27 June 2017 she emailed Sabrina Wong to say that she was off sick on 26 June due to heavy migraine pains.

11. In or about the end of July 2017 Sabrina Wong left and thereafter the Claimant reported to Tamsin Grosvenor. Before she left it appears that the Claimant had an appraisal. The process for appraisal was such that the Claimant would self appraise herself and then there would be comments written by the Manager. The appraisal form records her first level Line Manager as Sabrina Wong and her second level Line Manager as Tamsin Grosvenor but there is no suggestion that Tamsin Grosvenor played an active role in contributing to the comments. What we do know is that there was no criticism of the Claimant and at times the appraisal was relatively complimentary. Based on the fact that Sabrina Wong was the Line Manager according to the appraisal form, it was assumed that it was conducted before the end of July when Sabrina Wong left.

12. The Tribunal were told that in about May 2017 the Claimant had been at an event at the Design Centre when she apparently disappeared for about an hour and on returning explained that she had to talk to her father over a family emergency.

13. The Claimant was absent with migraines on 24 August 2017 and again absent on 14 September 2017 saying she had been sick since the last night. The Claimant had a GP appointment on 10 October which meant her taking a half day off. On 17 October 2017, she emailed Tamsin Grosvenor to say that she would be a little late as she had to take her father to the hospital and on 30 October 2017, she texted to say that she was only asked yesterday and apologised for the short notice but she needed to take her father to a medical check up that morning and she would be in by lunch time. We have seen medical evidence and we are aware that the Claimant's father had some significant medical issues.

14. On 17 October 2017 Karen McGrath recorded a note of a discussion with Tamsin Grosvenor regarding the Claimant. Miss McGrath had recommended extending the Claimant's probation but Ms Grosvenor and Tina

Brennan, who was Interim Marketing Director at the time, decided to confirm her permanently in her role.

15. On 26 October 2017, Tamsin Grosvenor met with the Claimant regarding her probation. Tamsin Grosvenor later emailed the Claimant a letter which was dated 24 October 2017, which confirmed the successful completion of her probationary period. We understand that letter was a standard form letter prepared by the HR team. However, the email which sent it, which was dated 26 October 2017, recorded the discussion that they had had in the course of their meeting and in particular three areas for improvement that which they had discussed and also said “we agree to review these areas again at the end of November”. The three areas were “finalising tasks in good time, product knowledge and punctuality”. Under “punctuality” the email recorded this is a recurring issue indicating “we discussed recent examples of arriving at 8:50am twice so far, this week and 9am on one day last week without providing any notification or explanation”. The next paragraph was headed “what does improvement look like” and it recorded “coming to work on time. I mentioned in our meeting that I do not expect this to come up again”.

16. The Tribunal were also given a series of WhatsApp messages between the Respondent’s marketing group members which commenced on 21 September 2017 and ended on 14 February 2018. We were told that the messages recorded various staff members communicating with each other and amongst various communications which were frequently about work matters, they also would tend to tell each other when they were running late. Counsel went through those messages and of the four employees on it, they identified the following lateness:

- 16.1 The Claimant recording lateness on ten occasions,
- 16.2 Gosia recording either seven or eight occasions of lateness,
- 16.3 Julia recording five incidents of lateness and
- 16.4 Fanja recording nine events of lateness.

17. The WhatsApp messages were not of an official record of all lateness and certainly not an official record of all the Claimant’s lateness, but the WhatsApp messages show that despite what appeared to be a fairly firm message from Miss Grosvenor in her email about the Claimant’s probationary completion, the Claimant was late again relatively soon after.

18. Specifically, the WhatsApp messages show that on 7 November 2017 at 8:40am the Claimant messaged that she was running late but should be there in a few minutes. On 12 December 2017 at 8:34am she messaged that the bus was held up but she would be there shortly. On 14 December at 8:33am she messaged that she was also on my way, woke up with worse headache. On 19 December 2017 she recorded running a bit late but should be there shortly.

19. On 7 December 2017 the Claimant was expected to work late with the rest of the team because they had a large project involving a photoshoot with models which the Claimant had helped organise. On 4 December the

Claimant emailed Tamsin Grosvenor to say that unfortunately she had to go back for a follow up dentist appointment on Thursday 7 December which meant she would need to leave around 5:30pm. Later that evening on 4 December 2017 she emailed Tamsin Grosvenor to ask for her remaining half day holiday which she wanted to take off in order to go to the embassy to submit evidence for her visa to Africa. The background to this was the Claimant had asked for holiday after Christmas into the January period to go to a wedding which was in Africa and the reason for her request for the leave was that she had been asked to go to the embassy on 6 December at 12 noon. Tamsin Grosvenor agreed and the holiday was logged for 6 December AM. There was an exchange of emails and the Claimant confirmed that she would come into work for the afternoon of 6 December. That was important to the Respondent because they wanted to hold a meeting and also because it was the day before the important photoshoot. At 13:07 (that's 1:07pm) on 6 December the Claimant emailed Tamsin Grosvenor and the team saying I have a family emergency to attend to this afternoon but will be accessible via the phone. In consequence she was out of the office all day on 6 December, notwithstanding it was the day before the important photoshoot.

20. The Respondent's office was closed over the Christmas period and the Claimant had booked holiday from 2-15 January and was due to return on 15 January but on 26 December she emailed Tamsin Grosvenor to tell her she had miscalculated the return date by one day, which meant she would return on 16 January 2018. That was accepted, but the Claimant did not return on 16 January. The Claimant had problems with her return flight. She had booked with an airline called Medview Air. The Claimant told the Tribunal that on going to the airport on 15 January she discovered Medview Air was not flying and then checked her emails to find out if there was anything from the airline. She said she had had difficulty with wi-fi and email connection more generally during her trip. When she looked at her email she found one dated 12 January 2018, telling her that her flight was rescheduled to 17 January 2018 and she forwarded this to Tamsin Grosvenor on 15 January 2018. The email address for the airline was [MedviewInternational@gmail.com](mailto:MedviewInternational@gmail.com). The fact that the email was from a Gmail address and had typographical errors in it caused Tamsin Grosvenor to be suspicious. Specifically, the email misspelt the word reschedule leaving out the "s" in that word, additionally it said, "due operational reasons" omitting the word "to" in the body of the email.

21. The same day, 15 January 2018, the Claimant bought a ticket on Egypt Air to fly to Cairo and on to London, leaving Lagos on 22 January 2018 and arriving in London on 23 January at 12:35pm. The email confirmation is timed at 15.36 that day and was issued by a London sales office.

22. On Wednesday 17 January 2018 the Claimant emailed Tamsin Grosvenor to say that she had received another email from the airline and would call Tamsin Grosvenor tomorrow to discuss the situation in depth. On Friday 19 January 2018 she emailed Tamsin Grosvenor saying she had tried to call her and that Medview had been unable to fly and had rescheduled her flight twice after going to the airport, so she had to purchase a new ticket with a different airline, which we noted she had already done on 15 January.

23. Tamsin Grosvenor forwarded that email to Karen McGrath. They had already discussed the Claimant's return to work on 16 January 2018, and Karen McGrath's note of that first conversation refers to performance (worker poor quality), and to last minute absences.

24. Karen McGrath suggested putting the Claimant on a PIP which was shorthand for Performance Improvement Plan. Her note said that if there were no improvements made she suggested evoking the disciplinary procedures as per the employee handbook. However, on 19 January 2018, Karen McGrath and Tamsin Grosvenor decided to not to follow the PIP route but rather talked again in the light of the new email and decided to dismiss the Claimant, subject to checking the legal position.

25. On 23 January 2018, Karen McGrath tried to contact an employment lawyer and her email refers to a potential termination/dismissal matter she would like to discuss. She spoke to the employment lawyer on 25 January 2018, and the lawyer's notes of that conversation were disclosed following the EAT judgment. The notes show that Karen McGrath explained the position of the problem employee "TK". From the notes it is clear that the problem was that the Claimant had been late to work quite a few times, she had a lot of sick days here and there and more recently had returned two weeks late from the Christmas break. In fact, it was eight working days; not quite two weeks.

26. The note records the Claimant went back to Nigeria and claimed her flight was delayed repeatedly for a total of two weeks and the Respondent wanted to move on. The discussion considered the possibility of gross misconduct but the advice was because the Claimant had contacted the Respondent and had tried to keep them informed it was preferable to terminate and it would be possible to do so and pay her under the payment in lieu of notice provision in her employment contract.

27. The lawyer recommended that the letter of dismissal set out a few of the incidents that had prompted concerns in case there was any possibility of the employee trying to allege race discrimination.

28. The Claimant's representative encouraged the Tribunal to look very closely at the timescale and the sequence of events and we have done that.

29. Initially the lawyer prepared a draft letter on 31 January which was sent to the company to complete. Karen McGrath emailed it to Tamsin Grosvenor on 1 February 2018. However, Karen McGrath was flying to Hong Kong on 3 February due to return on 9 February and her schedule was too busy to allow her to visit London so she was unable to deal with the dismissal meeting. As a result, the Respondent contacted an HR consultant called Simon Morgan whom they had used previously.

30. Meanwhile, on her return to work the Claimant joined Unite Union and asked for assistance in filing a grievance about her employer. They asked her to obtain the disciplinary grievance procedure which she did. In practice she

did not file a grievance but rather told the Tribunal that she learned that Tamsin Grosvenor was leaving, which she was, and decided on hearing that not to proceed with her grievance.

31. On Wednesday 24 January 2018, as we have noted, the Claimant returned to work and on Monday 29 2018 at 8.32 a.m., the Claimant texted Tamsin Grosvenor saying "I'm not feeling too much this morning I think it started from the tablets I am supposed to take medically. I'll will keep you posted with my health."

32. On 30 January, when the Claimant returned to work after her absence on 29 January, she says that there was a meeting between herself and Tamsin Grosvenor in which her absence was discussed. There is a distinct clash of evidence about this. The Claimant, in her witness statement, says that she took sickness absence from work on 29 January 2018 and when she returned to work on 30 January Tamsin Grosvenor abruptly pulled her in for a meeting. She belatedly asked her to explain what happened on her return journey and why she returned later than expected and then asked about her recent illness, given it was so soon after returning late from Nigeria. The Claimant says she told Tamsin Grosvenor that she suspected her sickness was either due to taking post malaria medication or that she could be pregnant as her symptoms pointed that way. She says Tamsin's demeanour was brash and she got up and left without concluding the conversation and stated they would deal with this later.

33. Tamsin Grosvenor disputes being told anything about the Claimant's pregnancy either at a meeting on 30 January or at any subsequent time during the Claimant's employment. Rather, her evidence is that there was a meeting on 25 January about the Claimant's late return from her holiday but no meeting on 30 January as alleged and indeed she says the first she learned of the Claimant's pregnancy was after the Claimant had filed a claim at this Tribunal.

34. The Tribunal carefully considered the Claimant's evidence about her suspected pregnancy and the meetings with the Respondent because it was necessary for us to determine this factual dispute. It was a matter of oral evidence and there was no confirmatory documentation as such and therefore we carefully considered the surrounding events as well as the credibility of the witnesses.

35. Overall, we concluded that we preferred the evidence of Tamsin Grosvenor. A number of factors supported our conclusion. We took into account the fact that the Claimant did not refer to her pregnancy at the dismissal meeting itself. She did not refer to her pregnancy in her appeal letter, albeit she did refer somewhat obliquely to health issues. She had recently joined the Unite Union and had contacted them with a view to submitting a grievance against, Tamsin Grosvenor as her line manager, but decided not to proceed once she learned that Tamsin was leaving. None of those matters indicate that the Claimant had previously mentioned her pregnancy. Additionally, the Claimant was very hazy about the dates of her

discussion and we simply do not find it credible that she would have confused the dates if she had in fact told Tamsin Grosvenor about her potential pregnancy.

36. The documents we do have show that Tamsin Grosvenor and Karen were alive to the possibility of an employee from an ethnic minority potentially arguing that her treatment was discriminatory on the grounds of race. If pregnancy had been raised, there was no reason why Tamsin Grosvenor would not have told Karen McGrath, but it appears from the notes that she did not.

37. Also, on an analysis of the documents, the Claimant's record of events does not seem complete, or at least it is confused and variable. We followed the timescale through very carefully and noted that on 30 January 2018 the Claimant texted her partner at 12.30 saying "I'm late!".

38. The same day, Karen McGrath emailed Simon Morgan requesting his assistance and asking when he would be free for a call. On Monday 5 February 2018, Simon Morgan replied that he had been away for the last week but was back now and offered to arrange a call. Karen replied the same day that she was travelling and was eight hours ahead but she said that she needed assistance with the dismissal and she asked if Mr Morgan would be free to assist Tamsin Grosvenor on Thursday or Friday, which would have been 8 or 9 February 2018.

39. On Tuesday 6 February 2018, Mr Morgan replied that he was out both days but could offer a colleague. Karen said she would check with Tamsin Grosvenor and on 9 February she emailed asking if Simon Morgan would be free on Monday or Tuesday, 12 or 13 February 2018. On Friday 9 February Mr Morgan replied to say his colleague could do Tuesday 13 and he also suggested he could brief him if they had a call later that day after 4:30pm which we understand to mean that he was willing to talk after 4:30pm on Friday 9 February 2018.

40. At 9:28am on 12 February 2018, the Claimant WhatsApped the group to say that she had just been to the GP that morning in case they were wondering where she was and she should be in shortly.

41. On 12 or 13 February 2018, Karen McGrath returned to the office from Hong Kong. She had actually arrived back on 9 February 2018, so she would have been back in the office around 12 or 13 February. She emailed Tamsin Grosvenor on 13 February 2018, to ask if Lena had agreed with the exit strategy dismissal for the Claimant, she said "I am mindful that we need to let Simon know asap in order for him to manage his diary accordingly and he is waiting for our confirmation.

42. On Wednesday 14 February 2018, at 8:22 a.m. the Claimant emailed Tamsin Grosvenor to notify her that she had a quick follow up appointment on Friday 16 February at 8:20am and she could not get a weekend slot.



43. On 14 February 2018 at 9 a.m., Tamsin Grosvenor replied to Karen apologising for the delay and confirming Lena's agreement with the plan and asking for advice on the next step. Then Laura Prendergast was instructed and did go ahead with finalising the letter based on Tamsin's edits and instructions from Karen. We understand Laura is the HR assistant to Karen.

44. Later on Wednesday 14 February 2018, Mr Morgan emailed Tamsin Grosvenor asking if she still wanted to attend a meeting that afternoon. Tamsin Grosvenor replied at 1:22pm saying that it was too late for today and asking when Mr Morgan's next availability was as she was looking to get this sorted as soon as possible. Mr Morgan replied at 1:54pm that he understood that Tamsin Grosvenor wanted to hold a meeting towards the end of the day and he could do the next afternoon or Friday afternoon and asking for the documentation. Tamsin Grosvenor replied at 2:14pm saying tomorrow afternoon in that case and she told him that Karen or Laura would supply the letter. Mr Morgan replied ok and asked what time and they agreed 3pm.

45. There was then an exchange of emails about the need for half an hour to prepare and then time to meet with the employee in the boardroom and also about the location of their meeting in advance of the meeting with the employee. Tamsin's response to a question put by Mr Morgan about whether she envisaged any issues managing the exit was "I anticipate a lot of excuses and offers of proof for the reasons behind multiple absences and incidents of lateness, but we can run through in our initial meeting".

46. On 15 February 2018, Tamsin Grosvenor and Mr Morgan met with the Claimant and delivered the letter of termination. Mr Morgan produced a note of the meeting. Nowhere in the note did it suggest that the Claimant had raised the possibility that she was pregnant. She did complain about it being Tamsin's personal decision. She also complained about a lack of warnings in line with the handbook. In the cross examination when asked about this the Claimant said she was shocked, which is why she did not raise her pregnancy, but it is noticeable that she did not.

47. The letter of termination set out the reasons for the dismissal as follows:-

"Regrettably, the company has reached the conclusion that since you began with us in March 2017 there have been too many incidents that call into question your reliability as an employee. These include multiple instances of lateness, sporadic short-term sickness absence, other unplanned absences and a recent incident where you returned to work from a 10 day period of annual leave 6 working days later than planned blaming transport delays. Having taken all factors into consideration, we have decided to move in a different direction and believe that it is in the best interests of the Company for us to part ways."

48. On 16 February the Claimant went to her GP and they wrote a letter the same day which recorded against the word "problem" the words "patient pregnant (New)". The comment was that given bleeding which the Claimant reported they advised her to attend a walk in unit for early pregnancy at

University College Hospital, which she did. The notes from the examination by University College Hospital show that the Claimant told them she did her first positive pregnancy test on 6 February.

49. The Tribunal note that when the Claimant had filed her ET1 she recorded in the grounds of claim that she had had a meeting with Tamsin Grosvenor on 27 January. That was a Saturday, so it clearly was an error, and we think she most likely she actually meant 29 January. She did not record in the ET1 that she mentioned her pregnancy at that time, but she did say that she thought Tamsin Grosvenor began to investigate her without her consent and that led her to contact the Union on 29 January to ask for help in making a grievance complaint. She recorded that about a week later Tamsin Grosvenor called the staff to a meeting to say she was leaving on 21 February so the Claimant did not pursue this. She then continues in the ET1 to explain that about a week later, possibly 29 January or 1 February, she recalled it as being a Monday, she was off sick for one day with vomiting and nausea. She says upon her return, possibly 6 February they met. At this point she said that she told Tamsin Grosvenor it could be the tablets but could be as a result of a pregnancy/maternity related illness. She said she had not yet taken a test at home or been to see her GP. However, she had booked an appointment to validate this for 16 February and she took a home test that day which was positive so she had insisted on seeing the GP to confirm.

50. As we have noted, the medical notes indicate that the Claimant took the home pregnancy test on 6 February 2018. She then had a medical appointment on 12 February and thereafter there was a further one 16 February. We have medical records which show that the appointment on 16 February was with the GP and the GP letter shows the question of the pregnancy was raised as a new issue at that appointment. Therefore, we considered that overall, the evidence given by Tamsin Grosvenor was more reliable and more credible. There was no meeting on 20 January 2018.

51. On 20 February the Claimant appealed against her dismissal and her appeal mentions the annual leave and then goes on to refer to her short term sickness absence, which occurred on her return. She says, "there has been evidence to show that this was in fact related to a health issue I had discussed with my Line Manager, Tamsin Grosvenor at the time and later would be discussed once confirmation was given by the hospital on 16 February 2018 as stated in the email sent to her about the doctor's appointment follow-up request". The appeal does not use the word pregnancy and does not explain what the health issue was.

52. In the event the Respondent refused to hear any appeal. Other correspondence and issues which arose about the Claimant's departure from the Respondent's premises and the return of company property are not relevant to the issues which we have to decide and therefore we will not address them in this judgment.

## Submissions

53. Both parties provided written submissions and case reports and made oral submissions.

### The Claimant's Submissions

54. The Claimant submitted that the evidence showed the Respondent knew that the Claimant was or might be pregnant and that after the Claimant told Tamsin that she planned to make an appointment to find out whether she was pregnant the Respondent knew or believed in the existence of the Claimant's pregnancy, The Tribunal was referred to the case of Ramdoolar v Bycity Ltd [2004] UKEAT/0236/04. The Claimant also argued that the reasons given by the Respondent for the Claimant's dismissal shifted from performance to absence from work to punctuality and sickness absence and returning to work late from annual leave. The Claimant says the Respondent's reasons for dismissal became the Claimant's pregnancy from 8.22 a.m. on 14 February 2018, when the Claimant told the Respondent by email that she was going to a follow up appointment with her GP.

55. The Claimant argued that her email of 14 February was important and the Respondent's actions thereafter were to make arrangements for the Claimant's dismissal with unseemly haste. The Claimant argues that the date of 15 February for the dismissal meeting was chosen so as to avoid the Claimant being able to confirm her pregnancy. The Claimant made various points about the evidence suggesting that the Respondent should have enquired about the Claimant's medical appointments and should have used its powers to allow the Claimant to go for an occupational health assessment.

56. The Claimant argues that the burden of proof shifts to the Respondent which has offered no credible evidence for the reasons why it sought to dismiss the Claimant at the speed which it did, or on the date that it did and in the way that it did.

57. The Claimant relied on the case of Onu v Akwivu & Anor, Taiwo v Olaigbe & Anor [2014] EWCA Civ 279 as authority for the principle that where the discriminatory grounds consists in the fact that the protected characteristic has operated on the discriminator's mind --- so as to lead him to act in the way complained of, it does not have to be the only factor. The Claimant argues this was the situation and the protected characteristic of the Claimant's pregnancy operated on the Respondent's mind. It was not the only factor influencing the decision but it had significant influence.

58. The Tribunal was also referred to the case of Kuzel v Roche Products Ltd [2008] EWCA Civ 380 which set out the approach a tribunal should take when both Claimant and Respondent assert differing reasons for the dismissal. The Tribunal, must consider the evidence as a whole and make primary findings of fact on the basis of the direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence. The Tribunal must then decide what was the principal reason

for the dismissal on the basis that it is for the Respondent employer to prove what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason is what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. The Claimant argues this was relevant given that the Respondent in this case failed to carry out a disciplinary process that would assist it to prove that the Claimant's dismissal was not pregnancy related.

### **The Respondent's submissions**

59. The Respondent agreed with the Claimant insofar as the Respondent said that for the automatically unfair dismissal claim to succeed the Respondent must have known or believed in the existence of the pregnancy and similarly cited Ramdoolar v Bycity [2005] ICR 368 following Del Monte Foods Ltd v Mundon [1980] ICR 694 EAT. The main difference between the parties in relation to this is that the Respondent said the evidence does not point to the Respondent having any knowledge of the Claimant's suspected pregnancy.

60. The Respondent submitted that the evidence showed the areas which concerned the Respondent were real and there was a long standing and ongoing problem with the Claimant's attendance/lateness. The Respondent referred to the various examples of persistent lateness and various absences as well as the probation meeting at which the Claimant was told that there was a need for her to improve on the position.

61. The Respondent submitted that the Claimant's evidence was unreliable on the basis that it was vague and inconsistent and that she had explained the position slightly differently in her ET1 from the witness statement. In her witness statement the Claimant says she talked to Tamsin Grosvenor about her possible pregnancy at a meeting on 30 January 2018, whereas in the ET1 the Claimant says she took a home test later on in the day when she had met with Tamsin Grosvenor and talked about her possible pregnancy. The medical documents show the first pregnancy test was taken on 6 February 2018.

62. The Respondent also referred to the case of Really Easy Car Credit Ltd v Thompson UKEAT/0197/17/DA in which the EAT held that there was no requirement on the Respondent to revisit a decision it has already taken on learning of the employee's pregnancy.

### **The Law**

63. The key legislation is as follows: Section 99 of the Employment Rights Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a prescribed kind or the dismissal takes place in prescribed circumstances. Prescribed means prescribed by regulations made by the Secretary of State and include pregnancy, child birth or maternity.

64. The Maternity Regulations provide at Regulation 20 “an employee who is dismissed is entitled under s.99 of the 1996 Act to be regarded for the purposes of part 10 of that Act as unfairly dismissed if the reason or principal reason for the dismissal is of a kind specified in paragraph 3. Those reasons include reasons connected with the pregnancy of the employee.

65. Additionally, s.18 of the Equality Act provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers the employer treats her unfavourably

- (a) because of the pregnancy; or
- (b) because of illness suffered by her as a result of it.

66. The Equality Act addresses the burden of proof at s.136(2) stating if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

### **Conclusions**

67. We first considered the factual points raised by her Honour Judge Stacey and then we moved on to the legislative provisions. We also considered the Claimant’s representative’s submissions in some detail and particularly a number of the points she made when she encouraged us to consider that the Claimant’s evidence should be preferred and her claim should be successful.

68. We do not consider that the Claimant’s email on 14 February about her appointment on 16 February was impactful in anyway at all. What was clear was that Karen McGrath returned from Hong Kong and on her return started asking what was happening and chasing everyone up. Her return appears to have made her colleagues actively process what was already clearly underway. The Respondent’s staff got on with arranging a meeting in order to action the dismissal, which they had previously decided to undertake.

69. We do not find anything at all suspicious in the time line, or indeed in efforts being made at that point to move things forward. Indeed, we note that if the Respondent had been very anxious to move forward more quickly, it could have taken up the suggestion from Simon Morgan to use one of his colleagues to assist them. They did not do that. Rather they delayed until he was available.

70. We also note that Tamsin Grosvenor was due to leave the company on 21 February and there was a relatively short time for her to address this matter. In cross examination, when that was put to Karen McGrath, it was clear that it would have been difficult had Tamsin Grosvenor not concluded the dismissal before her employment ended.

71. We were encouraged to view the Claimant’s use of “follow up” in her email about her appointment with the doctor on 16 February as indicative of

her having talked about the position previously. However, we do not find that wording indicates anything significant. The Claimant had had a previous appointment on 12 February. If she had done a pregnancy test on 6 February she could have confirmed it on 12 February. Apparently the follow up appointment was from 12 February, but there was nothing around that time to indicate anything about pregnancy and indeed the follow-up was an expression she had used previously when there was a dentist appointment. The doctor's notes show that this was a new problem on 16 February.

72. We reject the submission also that the Respondent had failed to ask about the reason for the Claimant's medical appointments and that was somehow not credible. We accept Miss Grosvenor's evidence that it was not her normal practice to pry into the reason for medical appointments. Indeed, it would not necessarily be good practice for any manager to ask about reasonable medical appointments, if it was not absolutely necessary to do so.

73. We also reject the fact that it was relevant that in the staff handbook, the Respondent company reserved the right to send someone for a medical appointment. The Claimant submitted that the fact that process was not used had implications in this case. We are a Tribunal of three people whose job is, in part, to bring our general experience of employee issues to bear. We are well aware that those clauses are included in order to support companies in the process of sending employees for occupational health assessments, which is usually done when there is a real concern about occupational health issues particularly relating to disability issues or the need for reasonable adjustments or indeed somebody who is a long standing employee but whose health record is truly worrying. They are not necessarily used for a short term employee whose health record is disappointing. The failure to send an employee for occupational health assessment in this situation does not trigger any particular flags or concerns.

74. We reject the submission that the Respondent cherry picked from the handbook. Staff handbooks are written with some provisions being expressly "non-contractual". There was nothing that the Respondent did which is outside of normal practice, so as to impact on the burden of proof. We are satisfied that our factual findings are correct.

75. We therefore asked ourselves - did the Respondent know the Claimant was or might be pregnant. We have set out in some detail in the reasons why we concluded that the Claimant had not told Tamsin Grosvenor about her pregnancy either at a meeting on 30 January or indeed at any stage thereafter and that she had not told any other member of staff, therefore none of the Respondent's management team knew she was or might be pregnant. We have explained in some detail why we concluded that and the evidence we took into account.

76. The second question we had to consider was when did the Respondent decide to dismiss the Claimant. Our conclusion was that the first time this was decided on was, subject to checking the legal position, on 19 January 2018. Thereafter the legal position was confirmed in a discussion with the

lawyer on 25 January 2018. We have considered the point about any approval required from Lena, but we are satisfied that was a formality and it was never in doubt. Therefore, our decision is that the dismissal decision was primarily made on 19 January 2018, but the latest date was on confirmation of that decision, on 25 January 2018.

77. We had to consider the reason for the dismissal. The reason for the dismissal was that after becoming frustrated at the Claimant's continuing lateness and her absences in December 2017, notwithstanding the firm guidance given by Tamsin Grosvenor when she explained the basis on which she expected improvements after the probation confirmation meeting, the Claimant's failure to return to work on 16 January, and the suspicious emails about her return flight, made the Respondent decide she would never be a sufficiently reliable employee.

78. We also noted that Tamsin Grosvenor referred to some pressure from other employees in the team about their anger because they felt that had put everything into the work project and design function and the Claimant had not. Overall, we concluded that this also played a part and the reason for dismissal could be summarised as lack of confidence in the Claimant's reliability as an employee. This is the explanation in the dismissal letter and it accurately describes the facts we found.

79. In relation to the question of whether the Respondent discriminated against the Claimant because of her pregnancy, we are satisfied it did not, because it had no knowledge of that pregnancy. Further there was no knowledge that any of her absences were pregnancy related. There was nothing from which the Respondent might have guessed this.

80. We noted the Claimant had multiple absences for various sickness on occasions and that she herself said that she thought her recent sickness was due to the malaria tablets. That was in her text.

81. The trigger was the Claimant's failure to return from annual leave. The decision was clearly taken before the Claimant was absent from work on 29 January 2018. As we have noted, the only health issue mentioned at that time was the malaria tablets causing her sickness. Therefore, we are satisfied that the claim for discrimination fails.

82. As for the claim for unfair dismissal, we are required to consider what was the reason or principal reason for the Claimant's dismissal. We are satisfied that the reason or principal reason was the Claimant's unreliability up to and including failure to return from her holiday at the correct time. The dismissal was not connected to her pregnancy, nor was that a significant, or indeed contributing factor to it. Accordingly, we also find that that claim fails.

83. We went through all of the submissions made for the Claimant very carefully as noted above, but we are satisfied that this is a case where the claims of both pregnancy discrimination and automatic unfair dismissal should fail.

---

Employment Judge Walker

Dated: 06/03/2020

Reasons sent to the parties on:

06/03/2020.....

.....  
For the Tribunal Office