EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Herring**

Respondent: **J Lovric & Son**

Heard at: **East London Hearing Centre**

On: **10, 11 October 2019, 11 February 2020 and 2 April 2020 (in chambers)**

Before: **Employment Judge Gardiner**

Members: **Mrs A Berry**
Mr K Rose

Representation

Claimant: Mr R Taylor, Solicitor

Respondent: Mr S Hoyle, Consultant

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent discriminated against the Claimant contrary to Section 18(2) Equality Act 2010 in:**

   a. **issuing the Claimant with a verbal warning for lateness;**

   b. **its failure to carry out a risk assessment as to the risks posed by the Claimant's pregnancy.**

2. **The Claimant's dismissal was automatically unfair contrary to Section 99 Employment Rights Act 1996 and Regulation 20 Maternity and Parental Leave etc Regulations 1999.**

3. The Claimant's complaints of direct discrimination on grounds of her sex contrary to Section 13 Equality Act 2010 are not well founded and are dismissed.

REASONS

Introduction

1. Mrs Laura Herring was employed by the Respondent, J Lovric Limited from 16 August 2017 until 7 September 2018 as a Sales Assistant. She claims she has suffered direct sex discrimination and direct discrimination on grounds of pregnancy in the way in which she was treated in advance of her dismissal, and in the dismissal itself. At the outset, Mr Taylor, the solicitor acting for Mrs Herring, clarified that she was also alleging that the dismissal was automatically unfair under Section 99 of the Employment Rights Act 1996, even though this had not been identified at two previous Preliminary Hearings. For the Respondent, Mr Hoyle, accepted that this was a live issue as the Claimant had ticked the unfair dismissal box on the ET1 Claim Form.

2. The Respondent denies discrimination and denies that the reason for the dismissal was connected to the Claimant's pregnancy and therefore an automatically unfair dismissal contrary to Section 99 of the Employment Rights Act 1996. Rather, it contends that the dismissal was a fair dismissal on grounds of capacity, given the period of the Claimant's sickness absence and her unwillingness to provide further medical information about her condition. It is common ground that the Claimant does not have the required continuity of service to bring an ordinary unfair dismissal claim.

3. It was agreed at the outset that the Tribunal would consider the issue of liability first including, if applicable, issues of contributory fault and any *Polkey* reduction, and then go on to consider remedy if the claim succeeds in part or in whole.

4. There appeared to be a dispute at the conclusion of the case about the liability issues that required determination. The issues had been identified by Regional Employment Judge Taylor at a hearing held on 29 April 2019. That was a hearing where the present representatives, Mr Taylor and Mr Hoyle, were both present. There was a subsequent hearing heard by EJ Prichard on 2 August 2019 at which the issues were discussed again. Again, on that occasion, the same representatives were present. Mr Hoyle contends that the effect of what is recorded by EJ Prichard was that certain of the issues listed by REJ Taylor had been effectively withdrawn. We disagree. The effect of EJ Prichard's discussion was to clarify, insofar as that could be achieved, the boundary between Section 13 and Section 18 of the Equality Act 2010 in the present case, by exploring when the Claimant's pregnancy ended. The sentence which reads "The Claimant is not complaining of events before the time she went off sick in late March 2018" we consider to be inaccurate. The case management summary does not record that the Claimant was withdrawing any of her claims as identified at the earlier case management hearing. We have checked EJ Prichard's file note taken at the hearing and no such withdrawal is noted in that document. Furthermore, at the start of this hearing

both representatives agreed that the issues for determination were those identified by REJ Taylor with the addition of a claim for automatically unfair dismissal.

5. Both the Claimant and her husband have given evidence in support of the Claimant's claims. There was also a witness statement from Peter Herring, the Claimant's father. That witness statement deals only with remedy issues, and therefore has not been considered at this point.

6. For the Respondent, there was oral evidence from John Lovric, the Manager Director, and from Vanessa Johnson, who was the Claimant's line manager. In addition, the Respondent provided a witness statement from Jaqueline Lovric, a co-director of the Respondent's business. Mrs Lovric was apparently unwell and therefore unable to attend to be cross-examined on her statement. This inevitably affects the weight we can give to her evidence, although much of it was uncontroversial. The Tribunal was referred to an agreed bundle of documents, running to 214 pages containing documents which were cross referred to in the course of the witness statements and the oral evidence.

7. At the conclusion of the case, Mr Hoyle made extensive oral submissions for over an hour. Mr Taylor submitted written submissions and produced copies of three cases which he had referenced in his submissions. The Tribunal started its deliberations and made findings of fact. However, upon consideration of whether the Claimant's dismissal was an act of direct discrimination or was an automatically unfair dismissal, the Tribunal decided that it would be appropriate to ask the parties to provide written submissions on the applicable legal principles. Accordingly, directions were given for the parties to exchange written submissions followed by supplementary submissions (if advised), providing any comments on the other party's submissions.

8. Although the Panel resumed its deliberations on 2 April 2020 as scheduled, it did not conclude those deliberations on that date. This is because the effect of Covid-19 on working practices prevented the Respondent from commenting on the Claimant's submissions. As a result, we agreed to permit the Respondent until 24 April 2020 to submit any final submissions. On behalf of the Respondent it was subsequently confirmed that no further submissions would be submitted.

Findings of fact

9. The Respondent operates a motor garage, which carries out MOTs on vehicles. Italso sells fuel, newspapers, foods and confectionary through a shop. The Claimant was employed as a Sales Assistant in the shop, working 16 hours a week over a number of shifts. There is a dispute over the date on which she started, although little turns on the difference. The Claimant says that she started work on 16 August 2017, albeit initially receiving training. By contrast, the Respondent says that she started only on 4 September 2017. Ordinarily such a dispute would be readily resolved by reference to the contract of employment. However, the Claimant was not given a contract of employment or any statement of employment particulars. Having regard to the contemporaneous text messages on page 104 of the bundle, the Tribunal concludes that the Claimant started paid work on the day that she alleges, namely 16 August 2017.

10. In her role, the Claimant generally worked as a lone worker. She shared the Sales Assistant role with four other part time members of staff. On occasions, her line manager, Vanessa Johnson would also work in the shop, as would Jacqueline Lovric. John Lovric generally worked in the MOT centre. There was therefore limited day to day contact between Mr Lovric and the Claimant.

11. Part of the Claimant's role was to ensure that the newspapers were unbatched and put out on display. Because the bundle of newspapers was sometimes left in front of the door of the shop if they were delivered before members of staff arrived, the Claimant's practice was to carry the bundle into the shop herself. She had not been trained to adopt a particular method for doing this. The result was that she was lifting a heavy bundle of newspapers at the start of each of her shifts. In addition, she had to restock the milk in the fridge, including two litre cartons. The milk arrived in shrink wrapped packs of several milk containers. Typically, two litre containers were wrapped together in batches of six or eight, making the total load heavy and unwieldy to carry. Generally, the Claimant would lift the entire batch from the doorway into the shop before unpacking the batch into the fridge. Again the Claimant had not been told to do otherwise.

12. Unsurprisingly, there was no specific evidence as to the precise weight of the bundle of newspapers and the combined packs of milk. However, given the weight of water or equivalent liquid[1], the weight of eight 2 litre containers together would be in the region of 16 kilograms. The weight of the newspaper bundles was described by the Claimant as being broadly comparable, which we accept.

13. In the course of oral evidence, the Respondent suggested that the Claimant was late for work at some point during her initial training. However, this was not said in any of the Respondent's witness statements, nor is it recorded in any contemporaneous document. The Claimant does not accept that she was late at this point. There is no evidence from which the Tribunal can find that the Claimant was late during this initial training.

14. There was one instance of the Claimant arriving late for her shift, on 4 November 2017, when she slept through her alarm [114]. She sent an apologetic text message to Vanessa Johnson, who responded by saying that she would overlook it as "*it does happen to us all at times and when you have done it, it makes you more sure of getting up in the future*". This was recognition that Ms Johnson was forgiving the Claimant on this occasion and would not hold it against her.

15. On 5 January 2018, the Claimant discovered that she was pregnant. Her expected date of delivery was 11 September 2018**.** She informed her employers of her pregnancy on 8 January 2018. Thereafter, the Claimant swapped shifts where necessary so that she could attend ante-natal appointments without taking time off work. She was feeling unwell in her first trimester, suffering from repeated instances of morning sickness.

[1] Although there was no specific evidence on the point, the Tribunal takes judicial notice that the weight of 1 litre of water is 1 kilogram

16. On 24 February 2018, she was particularly unwell, and arrived late for her shift in the shop. After arriving at work, she sent a text message to Vanessa at 11:08 apologising, saying that she "*seemed to be struggling with the early morning but my midwife tells me it should stop around week 14*" [133]. There was no text message sent in response.

17. Subsequently, and as a result of events on that day, the Claimant was issued with a verbal warning. There is a dispute as to the precise reason for the verbal warning. The Claimant says it was because she was late. Ms Johnson says it was not because she was late, but in part because she did not telephone the Respondent before the start of her shift to inform the Respondent that she would be late. In addition, the Respondent says that the verbal warning related to the two previous instances in which, in the Respondent's view, she had been late for work. The verbal warning was apparently recorded in a written note, but rather remarkably, this note was not included in the agreed bundle.

18. In advance of issuing the Claimant with a verbal warning, no disciplinary process was followed. The earliest written explanation provided to the Tribunal for this verbal warning was given in the outcome letter to the Claimant's grievance dated 13 August 2018. This stated as follows :

> "1. The warning you were given was a verbal warning after you had been late opening up three times by over an hour each time and it was followed up with the letter confirming this for our records. These were not pregnancy related as one of the late openings was on Sat 4th Nov 17 before you informed us of your pregnancy when you were one hour late. At no time on any other days did you call a member of staff to inform them that you would be late or unable to get to work and the station remained closed for over an hour which lead to several complaints from customers. This was never represented as a pregnancy issue.
>
> 2. Discussions were had with you about if you were able to do your job during your pregnancy to which you replied that the job was not difficult as you only sat behind the counter authorising fuel and taking payments and occasionally restocking the fridge with soft drinks with a maximum weight of 2kg bottle of drink, we do not consider, nor have you informed us that there was an adverse effect to your health or that of your baby
>
> 3…The papers are delivered in bundles all the staff presented employed that do the morning papers cut the string and bring in as many or as little amount of paper they want there is no limit and you never made me aware of why your husband was on the premises … At no point have you ever said that you had him in to help or that you were unable to do your job"

19. The Tribunal infers from this wording that the Claimant was disciplined on 24 February 2018 in part because she was late. Even on the Respondent's own case, this was the third alleged occasion on which she had been late. The natural reading of the words used in the grievance outcome letter was that her lateness on this occasion was a factor in her receiving the warning, apart from the fact that she had not phoned to say she would be late.

20. The Claimant did not ask the Respondent to carry out a pregnancy risk assessment to ascertain her ability to carry out all her duties whilst she was pregnant. No risk assessment was offered and none took place. The Respondent justifies this by claiming that the role did not involve any features that would pose a risk during pregnancy and therefore this was not a necessary step to take. It appears that no general risk assessment had been carried out at all in relation to the Claimant's role, in that no such risk assessment was provided as part of the Final Hearing Bundle and no reference was made to such a risk assessment in the witness evidence.

21. Whilst Ms Johnson may have asked in general terms about the Claimant's health, we find she did not specifically ask the Claimant whether she felt able to do all aspects of her role given her pregnancy. We reject the evidence at paragraph 2 of the Grievance Outcome letter suggesting that there had been a specific conversation between the Claimant and an unnamed member of the Respondent's staff.

22. The Claimant decided not to carry out what she regarded as the heavier aspects of her role. She generally arrived at the Garage with her husband, who on occasions helped the Claimant to carry the bundle of papers and the shrink-wrapped cartons of milk into the shop from the doorway. He is likely to have been there for only a limited period of time, and it is unsurprising that his presence was only noted on one occasion by one of the Respondent's staff. The Claimant asked for help in this way because she was concerned about the potential impact of this lifting on her pregnancy.

23. On 23 March 2018, the Claimant attended an antenatal appointment. The Claimant was noted to have hypertension and there were other potential health indicators suggesting that all was not well. The Claimant was hospitalised until 26 March 2018 and then signed off sick for two weeks [135]. In a text message sent on 26 March 2018, she explained to the Respondent that the reason for hospitalisation was that she was at high risk of pre-eclampsia through hypertension. She submitted a sicknote, the first of several. It was hand delivered by her husband. The sicknote gave the name Miss Laura O'Sullivan, which was the Claimant's maiden name. She was still registered with the same GP surgery as she had used when she was living at her previous address, and had never asked for the name on her medical records to be changed to her married name. The sicknote gave the reason for sickness as hypertension in pregnancy. The Respondent did not contact the Claimant to query the discrepancy between her name and the name on the sicknote.

24. A further sicknote, three weeks later, on 11 April 2018, gave the reason for the ongoing sickness absence as "*high blood pressure and proteinurea*". On 17 April 2018, following a routine antenatal appointment, the Claimant was referred to Broomfield Hospital. Further tests showed that tragically the Claimant's baby was no longer alive. She delivered the baby three days later. There were further health complications prompted by the ending of the pregnancy, including gynaecological problems. All subsequent sicknotes were for "*gynaecological problems*". These sicknotes continued to give the same reason up until the date on which the Claimant was dismissed.

25. The Claimant told another member of staff that her pregnancy had ended. On hearing the news, Vanessa Johnson sent the Claimant a text message on 17 April 2018 referring to the "*very sad news*" and adding "*So heartfelt sorry for u both, take care of each other*" [141]. The funeral for Harrison, as the Claimant and her husband had named the baby, took place on 18 May 2018 [145].

26. Despite the Claimant's absence on sick leave since 23 March 2018, there was a substantial delay in paying her statutory sick pay in respect of the period of absence. On 14 April 2018, the Claimant texted Vanessa saying that she had received zero wages for two weeks. She considered that she should be receiving statutory sick pay [139]. Vanessa's response, apparently based on their accountant's advice, was that she was not entitled to SSP, because she had not "*paid enough in*" to claim. She was not paid the SSP due to her since the start of her sickness absence until after 18 May 2018 [145]. This was approximately two months after she started her sick leave.

27. This delay in paying the Claimant was extremely frustrating to the Claimant and her husband. This frustration may have appeared to the Respondent as rudeness, but the Tribunal does not consider it was of particular significance. Her alleged rudeness and that of her husband was the reason given by the Respondent as to why subsequent payments of sick pay needed to be posted to the Claimant's address rather than collected by the Claimant's husband.

28. On 1 June 2018, Mr Lovric hand delivered a letter to the Claimant headed "*Consent to Obtain a Medical Report*" [33]. The letter asked for the Claimant's agreement to obtain a medical report from an occupational health provider. The purpose was to help him make decisions on how best the Claimant could be supported in returning to work, whether any reasonable adjustments were required to her working arrangements and for future work planning. The letter went on to say this:

> *"Please note that the Company is not requesting access to your medical records but a report on your current state of health and ability to return to work"*.

29. Mr Lovric said that once the report had been obtained, he wanted to meet with the Claimant so that they could discuss its contents and consider all the issues. Enclosed with the letter was a summary of the Claimant's rights under the Access to Medical Reports Act 1988. The Claimant agreed to attend a telephone appointment with the Respondent's nominated occupational health advisor, Clare Wilson. That took place on 21 June 2018.

30. In the meantime, the Claimant had asked Tabitha Stutridge, a Specialist Bereavement Midwife who was providing care to the Claimant, to prepare a letter [35]. The purpose of the letter was to inform her employer about her present state of health and the prospects for her return to work. The Tribunal finds that this letter was never received by the Respondent. Had it been received, it is likely to have been referred to by the Respondent in its subsequent correspondence.

31. The letter from Occupational Health, dated 21 June 2018 [36-37], provided the Respondent with significant detail of the events surrounding the loss of the Claimant's baby, and how she was coping since. It noted that her GP had offered counselling and

she had received information from a specialist midwife. In answer to the questions "*is the employee fit for their normal work? If not, please comment on their likely future fitness for their normal or alternative work?*", there was the following answer:

> "In my opinion, Mrs Herring is currently not fit for work. I would hope that if she can access counselling soon, she would be fit to return in the next 4-6 weeks … I am unable to advise when a full recovery will occur and Mrs Herring is likely to be psychologically fragile when significant dates such as birthdays and anniversaries occur. I would hope with time, a supportive and empathetic management approach to her return to work and with counselling input that there will be a good likelihood of her being able to provide a regular and effective service in the future."

32. In the occupational health report, Clare Wilson recorded that she did not have access to the medical records. However, she did not ask for such access, nor did she say that her conclusions could only be provisional without them.

33. Despite the advice contained in this occupational health report, Mr Lovric wrote to the Claimant on 27 June 2018 [38] in a similar template to the earlier letter dated 1 June 2018, requesting further medical information. The second paragraph in both letters started "*I would like to obtain a report …*". In the first letter it continued "*from an occupational health provider*". In the second letter, it continued "*from your GP and/or consultant*" but continued with identical wording. The second letter did not make any reference to the occupational health report, nor did it explain why the information already provided was not sufficient. What was sought was a medical report from the Claimant's GP and/or Consultant. As with the previous letter, suitably amended to refer to the Claimant's GP/Consultant, this letter again stated that "*the company is not requesting access to your medical records but a report from your GP/Consultant treating you on your current medical condition*".

34. The occupational health adviser, Clare Wilson, had not ask for further medical evidence, whether by way of a report from any treating doctor or by way of medical records. For some reason, it seems that the Respondent was not satisfied with the answers she had provided, but did not consider it appropriate to seek further clarification from her. Nor did the Respondent choose to re-refer the Claimant to the same occupational health adviser for an updated assessment at any subsequent stage.

35. On 4 July 2018, the Respondent sent a further letter chasing for the Claimant's consent to the Respondent obtaining a report from the Claimant's GP/Consultant [40]. The letter went on to say that shortly a Case Review would take place and "*regrettably, should you fail to return the signed consent form, the Company may have to take decisions concerning your continued employment and possible adjustments without the benefit of potentially invaluable medical evidence and advice*". Again, no reference was made to the occupational health report.

36. On 11 July 2018, the Claimant sent a text message to John Lovric [148]. She said that she had spent some time with her family and had only got back yesterday. She had had no chance to sign the consent forms. She said that she was waiting for someone to

come back to her with advice as she had already provided doctors certificates and an occupational health report. As a result, she was a little upset that there was a need to dig further into something so personal and emotional to herself. She said that the sickness was pregnancy related so she should be covered under the Equality Act. She said that this was a very personal issue to have to deal with at the same time as grieving for her son, so "*please bear with me whilst I understand what is being asked of me and if it's necessary*".

37. The Respondent sent a third letter on 16 July 2018 in materially identical terms [50]. Again, it failed to make any reference to the previous occupational health report, and warned the Claimant that "*should she fail to return the signed consent form, the company may have to make decisions concerning your continued employment and possible adjustments without the benefit of potentially invaluable medical evidence and advice*".

38. On 20 July 2018, the Claimant was invited to a case review meeting on 25 July to discuss her health. The letter offered to hold the Case Review at her home if this would be preferable. It noted that if she was too unwell to participate in a Case Review, then she may wish to update the Respondent in writing, covering the points set out in an Agenda contained in the letter [53].

39. On 21 July 2018, the Claimant texted Mr Lovric to say that she had sought advice and was waiting for a plan of action from ACAS. She said that until she had had the opportunity to be fully advised and have an ACAS representative with her, she could not attend the meeting [149].

40. On 25 July 2018, Mr John Lovric sent a further letter in similar terms as that sent on 20 July 2018, inviting the Claimant to attend a case review meeting on 2 August 2018 [55]. It did not make any reference to the Claimant's text messages. However, he did refer to the Occupational Health Assessment, adding that "*having received that report, I deemed it necessary we write to your GP to find out further information about your illness, how it affects you and how we can support your return to work*". It did not explain why the occupational health report was deficient or why it was not appropriate to seek further information through occupational health rather than through the Claimant's GP.

41. On 1 August 2018, the Claimant wrote a detailed letter to the Respondent. It dealt point by point with the Respondent's Case Review Agenda, on the basis that "*I feel I am not yet ready to attend due to the nature of my condition*". It described the events around the loss of her baby in some detail as well as her current state of health. It included the words :

> "I hope this is enough personal detail of my medical condition for you to even try to understand exactly what I am going through as this is so hard to write and speak about that even my family don't know the full details"

42. She stated that she was awaiting counselling from professionals that were well trained and equipped to deal with my situation unlike standard therapists. She had not yet had the results to understand why her son died. She concluded by saying that she "*hoped*

this addressed all the questions on your agenda, however if there is something you feel is still unanswered then please ask. Please note as you are aware this ongoing sickness is pregnancy related only."

43. The letter also raised a written grievance, in nine numbered paragraphs. This complained about the previous verbal warning, alleging her absence was for a pregnancy related reason and that she had not been offered a disciplinary hearing before the sanction was imposed. She complained about the lack of a pregnancy risk assessment, and needing to get help from her husband with the heavier aspects of her job. She complained about the delay in paying her statutory sick pay, the circumstances of her occupational health consultation and the distress she experienced in being "*harassed*" for further medical information. She described the "*threat*" that decisions could be made about her future employment if she did not consent to providing further medical information as "*bullying*". She also complained about the lack of payslips when she first started.

44. On 2 August 2018, she was invited to a grievance meeting on 8 August 2018, to be heard by John Lovric [61]. This was despite the Claimant's letter the previous day stating she was not well enough for meetings/reviews. The Claimant therefore texted on 7 August 2018, stating that "*as specified in my original letter, I am unable to attend the meeting you suggest and very much look forward to your findings after investigating my points raised*" [150]. In the Claimant's absence, the Respondent chose not to convene a hearing, for which the Tribunal does not criticise the Respondent.

45. The Respondent sent the Claimant a grievance outcome letter dated 13 August 2018 [62], dismissing the grievance. It dealt with each of her complaints in turn. In summary :

a. It said that the warning letter for lateness was not related to pregnancy. It said that she had been given a verbal warning "*after you had been late opening up three times by over an hour each time*". A letter confirming this had apparently been sent subsequently although, as stated above, that letter has not been produced to the Tribunal by either side.

b. It claimed that the Respondent did not consider, nor had the Claimant informed the Respondent, that the job would have an adverse effect on her health or that of the baby. It was for the Claimant to decide and to advise the Respondent how much she was comfortable lifting. The Claimant had never told Mr Lovric that her husband was attending the premises in order to help out with the heavier duties.

c. Sick pay had been paid late, because the Respondent had concerns about the authenticity of the sick notes, given that they were in a different name. The Respondent considered that there was a potential fraud. The Respondent had subsequently paid the correct amount of SSP due after confirmation from HMRC.

d. Statutory sick pay had been paid by cheque because both the Claimant and her husband had been *"abusive towards staff"*.

e. The need to "*speak to your GP*" was in order to "*gain a full picture as to when you would be fit to return to work*". Given that she had withheld her consent from the Respondent contacting her GP, Mr Lovric wanted to meet with the Claimant. The letter stated that the Respondent's conduct did not amount to bullying and harassment.

46. As a result, the Claimant's grievance was dismissed. The letter offered the Claimant the right of appeal, which was to have been done within five working days. It was signed by John Lovric. The Claimant did not appeal.

47. On 20 August 2018, the Respondent sent the Claimant another letter inviting her to a Case Review Meeting on 28 August 2018 [65-66]. Again, it was in similar terms to the letters on 20 and 25 July 2018, in setting out the Case Review agenda and inviting her comments. It did not acknowledge that the Claimant had already provided written comments in relation to each agenda item in her letter of 1 August 2018.

48. There was no response to this letter, and therefore a further letter was sent on 29 August 2018, inviting her to a Case Review on 6 September 2018 [69]. The Claimant did not attend the Case Review. It was attended by John Lovric, Jackie Lovric, and Vanessa Jackson. The Respondent went through the agenda. The notes of the meeting make no reference to the occupational health report, nor do they refer to the Claimant's comments on the Case Review Agenda as set out in the letter date 1 August 2018. The notes set out 5 factors which appeared to be the basis why the Respondent could no longer keep her employed and concluded that the Claimant should be dismissed [71].

49. A letter confirming her dismissal and offering to pay her one week's salary in lieu of notice was sent to her the next day, 8 September 2018 [73]. The dismissal letter said that the occupational health report did not benefit from the input of the Claimant's GP but that the Claimant had refused her consent to such a report from the GP "*for reasons that I have not been able to ascertain*". As a result, Mr Lovric had to make his decision without access to this "*vital medical information*". It went on to say this:

> "The medical information I hold would not appear to be an accurate reflection of your current health status and you have unfortunately not allowed me access to further information with a view to assessing when a return to work may be possible or how I can support you in this regard."

50. The letter went to say that the Company had explored the possibility of making reasonable adjustments but stated that *"none were recommended and you would not appear to be well enough to return on a gradual basis"*. No alternative employment was available. As a result, her employment would be terminated on grounds of capability, namely her continued absence through ill health. It stated that the impact that the absence had had on the business had been detailed at the meeting on 6 September. The Claimant

had not been at the meeting on 6 September. The impact that the absence had on the business was not detailed in the dismissal letter.

51. The Claimant was offered the right of appeal and asked to submit her appeal within five working days from receipt of this written confirmation. In an email on 17 September 2018, the Claimant indicated that she wanted to appeal against the termination of employment *"by reason of being pregnant. This is because I feel this is an unfair judgment in the circumstances"*. Even though this was outside the timeframe stated in the dismissal letter, Mr Lovric agreed that the Claimant should be permitted an appeal.

52. Two dates were offered – 25 September 2018 and 3 October 2018. The Claimant did not attend on either date and the appeal was heard and rejected in her absence. The appeal outcome letter stated the allegation that the dismissal was on the grounds of her pregnancy was totally refuted:

> "In regards to pregnancy discrimination, as you explained to the Occupational Health advisor unfortunately you lost the baby at 19.5 weeks and while you have my deepest condolences; at that point ceased to be pregnant both medically and as defined by the Equality Act 2010, this includes the protection it affords pregnant employees"

Issues

53. The issues were identified by Regional Employment Judge Taylor during a Case Management discussion at a Preliminary Hearing on 29 April 2019. Alternative claims were made of direct discrimination under Section 18 of the Equality Act 2010 and also under Section 13 of the Equality Act 2010. The detriments alleged were as follows :

a. Disciplining her for late arrival to work in February 2018, when the Respondent knew that the Claimant was late for a pregnancy related reason;

b. Failing to carry out a pregnancy risk assessment;

c. Needlessly requiring the Claimant to consent to her medical records being accessed to obtain a medical report;

d. Dismissing her.

54. In addition, as identified at the start of the hearing, the Claimant alleges that her dismissal was an automatically unfair dismissal under Section 99 of the Employment Rights Act 1996. She alleges that her dismissal was in prescribed circumstances, namely the reason or the predominant reason for the dismissal was connected to the Claimant's pregnancy.

Relevant law

Pregnancy and maternity discrimination

55. Section 18 of the Equality Act 2010 is worded as follows :

> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity;
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-
> a. Because of the pregnancy, or
> b. Because of illness suffered by her as a result of it
> (3) …
> (4) …
> (5) For the purposes of subsection (2), if the treatment of a woman in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period)
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends-
> a. If she has the right to ordinary and additional maternity leave …
> b. If she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

56. This provides that an employer will have committed an act of discrimination if, in the protected period, the employer treats a woman unfavourably because of the pregnancy or because of illness suffered as a result of the pregnancy. The protected period here runs from the start of the pregnancy until a period of two weeks after the end of the pregnancy (Section 18(6)(b)). If the pregnancy is treated as having ended when the baby was stillborn, two weeks after that date would be 5 May 2018. The protected period ends then because the Claimant did not have the right to ordinary or additional maternity leave. The only circumstance in which a Claimant can rely on later treatment under Section 18 is if the treatment is implementing a decision taken during the protected period.

57. Where the reason for the treatment is pregnancy or pregnancy related illness and the treatment occurs within the protected period, then Section 13 of the Equality Act 2010 does not apply. The two sections are mutually exclusive.

58. Regulation 3 of the Management of Health and Safety at Work Regulations 1999 requires every employer to make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work for the purpose of identifying the measures they need to take to comply with statutory health and safety requirements.

59. Regulation 16 of the same Regulations is worded as follows:

> (1) Where:
>
> a. The persons working in an undertaking include women of child-bearing age; and

b. The work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC ….

the assessment required by regulation 3(1) shall also include an assessment of such risk."

60. Paragraph 1(b) of Annex I of the Directive refers to the handling of loads entailing risks, particularly of a dorsolumbar nature.

61. Regulation 18 provides that Regulation 16 does not require the employer to take any action in relation to an employee until she has notified the employer in writing that she is pregnant. In *Madarassay v Nomura International* [2007] ICR 867, Mummery LJ said (at paragraph 138) that a finding that the work involved potential risk to health and safety was necessary before there was an obligation on an employer to carry out a risk assessment under Regulation 16.

62. Mummery LJ referred with apparent approval (at paragraph 133) to *Hardman v Mallon t/a Orchard Lodge Nursing Home* [2002] IRLR 516, where the EAT (at paragraphs 14 and 15) had held that a failure to carry out a risk assessment required by Regulation 16 to be carried out on a pregnant employee was automatically unlawful discrimination. A similar view was expressed in the later EAT cases of *O'Neill v Buckinghamshire County Council* UKEAT/0020/09 and *Stevenson v JM Skinner & Co* UKEAT/0584/07, although the point did not arise for decision in those cases.

63. Therefore it is no defence for an employer to argue there was no unlawful discrimination because the reason why no risk assessment was carried out on a pregnant employee was that no risk assessments were carried out for any members of staff. That is not the defence advanced here. The Respondent's argument is simply that there was no risk to health and safety because the Claimant could unwrap the bundles of newspapers and take off the shrink wrap on the milk containers. If she had done so, the loads would be sufficiently light so as not to pose a risk to pregnant employees and therefore there would be no duty to carry out a pregnancy risk assessment.

64. Section 13 of the Equality Act 2010, which applies outside the protected period, is worded as follows:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

65. This requires a comparison between the treatment received by the Claimant and the treatment received by an actual or hypothetical comparator. Here, the Claimant relies on the way a hypothetical male employee would have been treated where the material circumstances were identical apart from her gender.

66. Where ongoing illness that started either during pregnancy or during the birth or its aftermath continues to cause the claimant to be unfit for work after the end of the protected period, then the ordinary principles applicable to discrimination law apply. From the date on which the protected period ends, the claimant must compare her treatment to the way that a man with a similar length of sickness absence would have been treated.

67. This is apparent from the following paragraph of *Brown v Rentokil* [1998] ICR 790, where the European Court of Justice said this:

> "26. However, where pathological conditions caused by pregnancy or childbirth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, *Hertz*, paras 16 and 17). In such circumstances, the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders, are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are, there is no discrimination on grounds of sex."

68. The same principle applies after the end of the protected period in circumstances no entitlement to ordinary or additional maternity leave has arisen.

69. In assessing whether there is unfavourable treatment (under Section 18) or less favourable treatment (under Section 13), the focus is on the mental processes of the person that took the decision said to amount to discrimination. In the present case, that is Vanessa Johnson (in relation to the verbal warning and the failure to carry out a risk assessment); John Lovric (in relation to the requests made for further medical information) and Vanessa Johnson, John Lovric and Jacqueline Lovric jointly (in relation to the dismissal decision). The Tribunal should consider whether they consciously or unconsciously were influenced to a significant (ie a non-trivial) extent by the Claimant's gender. Their motive is irrelevant.

70. So far as is material Section 136 of the Equality Act 2010 is worded as follows :

> "(2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

71. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

72. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the treatment was in part the result of her gender.

73. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in

status and detrimental treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristic of gender and the detrimental treatment, in the absence of a non-discriminatory explanation.

74. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the treatment.

Automatically unfair dismissal

75. Under Section 99 Employment Rights Act 1996 (so far as is material) :

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if :
> (a) the reason or the principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
> (3) A reason or set of circumstances prescribed under this section must relate to-
> (a) pregnancy, childbirth or maternity."

76. Regulation 20 Maternity and Parental Leave etc Regulations 1999 ("the 1999 Regulations") is worded as follows :

> (1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if-
>
> a. The reason or principal reason for the dismissal is of a kind specified in paragraph (3)
> b. …
>
> (2) …
>
> (3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with-
>
> a. The pregnancy of the employee;
> b. The fact that the employee has given birth to a child;
> c. ….
>
> (4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary and maternity leave period."

77. Regulation 2 of the 1999 Regulations defines "given birth" as delivered a living child or, after twenty-four weeks of pregnancy, a still born child. So defined, the birth of Harrison did not fall within Regulation 20(3)(b) because he had sadly died in utero at less than 24 weeks gestation. In order to succeed in her automatically unfair dismissal claim, the Claimant must show that her dismissal was for a reason connected with pregnancy under Regulation 20(3)(a).

78. In *Clayton v Vigers* [1989] ICR 713, the EAT considered the predecessor of Regulation 20(3)(a) under earlier unfair dismissal legislation worded in similar terms, but where there was no separate statutory bar on dismissals for reasons connected to the fact that the employee has given birth to a child. The Claimant was dismissed six days after the birth. Given the then applicable statutory wording, the issue was whether this dismissal was connected to the pregnancy. The EAT held that the words "any reason connected with her pregnancy" should be construed widely so as to give full effect to the mischief at which the statute was aimed. This would include not just the pregnancy itself but other consequences affected by the pregnancy.

79. In *Caledonia Bureau v Caffrey* [1998] ICR 603 the Claimant was dismissed for ongoing post-natal depression in circumstances where her maternity leave had ended. Her automatic unfair dismissal claim succeeded. This case was again decided before the statutory wording was amended to include reasons related to the fact that the employee has given birth to a child and a corresponding subsection stating that this provision only applied when the dismissal ends the employee's ordinary or additional maternity leave.

80. There is no authority, as far as we are aware, under the current statutory wording, on whether a dismissal can be for a reason connected to pregnancy (rather than connected to the birth of a child) if it takes place after the pregnancy has ended. None have been cited to us by the parties.

81. Having reviewed *Coyle* and *Caffrey,* Harvey on Industrial Relations and Employment Law comments as follows:

> "In *Clayton v Vigers* … the EAT refused to accept that the relevant wording required a direct causal connection; it was sufficient that the dismissal was 'associated with' the pregnancy … On this analysis it is clear that illnesses associated with or related to pregnancy will fall within s 99 …. But if these look as if they will interfere with the woman's employment in the long term the employer might be able to resist the claim on the ground that the employee is no longer capable of doing the job she was employed to do or to work as required, and that this does not constitute a reason connected with her pregnancy at all. This is likely to be a difficult argument to advance in any but the clearest of cases …
>
> The rather surprising effect of ERA 1996 s99 as interpreted in *Clayton* and *Caffrey* is that national law goes further than EU law requires in protecting pregnant women against dismissal.
>
> However anomalous it might appear that a dismissal after the end of the protected period, for absences occurring after the protected period but which were for reasons connected with the employee's pregnancy or maternity, is not unlawful

> pregnancy or sex discrimination but may nevertheless be automatically unfair under s99, that is the effect of *Caffrey*, and the authority of the case on this point is unaffected by *Lyons*. It is submitted that the other authority on the correct approach to s99, *Clayton v Vigers* [1990] IRLR 177, which was not cited to the EAT in *Lyons*, remains good authority for the correct approach to identifying whether the reason for a dismissal is 'connected with pregnancy' etc".
> (at F/4/B/(2) paras 414, 415 and 416)

82. In accordance with the approach suggested in *Harvey* we are to consider whether the principal reason for the Claimant's dismissal was 'associated with' the Claimant's pregnancy, even if not directly caused by it.

Conclusions

Pregnancy discrimination : Section 18 Equality Act 2010

Disciplinary sanction

83. The Tribunal finds that the decision to issue the Claimant with a verbal warning in relation to events on 24 February 2018 was an act of direct discrimination because of illness suffered by her as a result of her pregnancy. On 24 February 2018, the Claimant was ill with pregnancy related sickness. It was that sickness that delayed her arrival at work. The Claimant was disciplined for her lateness on that date.

84. We do not accept the Respondent's non-discriminatory explanation for the disciplinary warning. This explanation was that the only reason for the disciplinary sanction was her failure to telephone the Respondent to advise them that she was ill before her shift was due to start.

85. The explanation given in these proceedings is not supported by contemporaneous evidence. The Respondent has not produced the written record of the verbal warning that was issued at the time. Furthermore, the earliest explanation provided by the Respondent, namely the explanation in the grievance outcome letter, is inaccurate and itself indicates that her lateness on 24 February was a factor in the warning. It is inaccurate in that there had not been three instances of lateness. As the Tribunal has found, she had not been late when carrying out her initial training. The wording used by the Respondent in the grievance outcome letter shows that her lateness by an hour on 24 February 2018 was at least part of the reason for the warning, as stated above.

Pregnancy risk assessment

86. The Respondent did notify the Claimant in writing that she was pregnant. This was done to a sufficient extent in the Claimant's text message to Vanessa Johnson on 24 February 2018. The Claimant's normal work duties did raise a risk to her health and safety. She had to transport the contents of shrink wrapped containers of milk weighing in the region of 16 kilograms from the ground outside the shop into the shop and into the fridge. She also had to lift heavy bundles of newspapers of broadly equivalent weight into the shop and place those items on the shelf. The Respondent does not dispute that it was the Claimant's role to move these items into the shop. Nor does it dispute that there could

be a risk to the Claimant's health and safety were she to do this in the state in which they had been left outside the shop door. Given their weight and size and the fact that they needed to be lifted from floor level, so requiring the Claimant to bend down, they could well risk injury to the Claimant or to her baby.

87. It is true, as the Respondent asserts, that the Claimant could have lightened the load by opening the newspaper bundle outside the shop door, or removing the packaging holding the milk containers together. However, she had never been instructed to do this by her line manager. Nor would this always have been practicable, if it was wet or windy, or if for some other reason access was required to the shop. Therefore, we conclude in the wording of Regulation 16 that the work was of a kind that could involve a risk to her health and safety and that this arose from processes and working conditions.

88. As a result, the Respondent was under a statutory duty to carry out a suitable risk assessment of the risks to the Claimant's health during her employment.

89. In breach of that legal obligation, there was no risk assessment of the Claimant's work at any point. When the Claimant informed the Respondent that she was pregnant, the Respondent ought to have carried out a risk assessment in relation to the Claimant's duties. It did not do so.

90. Because this assessment ought to have been carried because of the Claimant's pregnancy, the failure to do so was also because of the Claimant's pregnancy. We apply the reasoning in *Hardman v Mallon t/a Orchard Lodge Nursing Home* [2002] IRLR 516 : this failure automatically amounts to unlawful discrimination under Section 18 of the Equality Act 2010.

Direct discrimination on grounds of sex : Section 13 Equality Act 2010

Repeated requests for the Claimant to provide access to her medical records

91. Because these requests were only made after 5 May 2018, and after the end of the protected period, this allegation falls to be considered under Section 13 Equality Act 2010, rather than Section 18 Equality Act 2010. In relation to a claim for direct sex discrimination, the Claimant must establish a prima facie case that she has been treated unfavourably in comparison to how a male employee would have been treated in equivalent circumstances. We reject the Claimant's contention that there is no need for a comparison to be made on the grounds that this is essentially pregnancy discrimination. We do not consider that the case of *Linzi Close v Belfast Audi Limited*, a decision of the Industrial Tribunal in Northern Ireland (which was provided to us), assists the Claimant here. It appears that the treatment of which that claimant complained occurred during the protected period when the claim was being brought under the equivalent of Section 18 Equality Act 2010. It was not, as this Tribunal reads the case, being brought under the equivalent of Section 13 of the Equality Act 2010. In any event, it does not review any specific authority on the point and is not binding on this Tribunal.

92. The Claimant has not established a prima facie that she has been treated less favourably than a man would have been treated in these circumstances. The Respondent's explanation is that it wanted further evidence in the form of a report from the Claimant's GP or treating Consultant in circumstances where the advice from occupational health was not clear as to when the Claimant might be fit to return to work. The Tribunal considers that a man who had received an equivalently equivocal assessment by occupational health as to when he could return to work would have faced a similar enquiry from the Respondent that he consent to a report being provided by his GP or treating consultant.

Dismissing the Claimant

93. The Claimant was dismissed on 6 September 2018, although as the dismissal was taken in her absence, she only received notification of this on 7 or 8 September 2018. By then, four months had elapsed since the end of the protected period. The reason why the Claimant was dismissed then was because of the extent of her sickness absence to date, coupled with the fact that the Respondent did not have what it regarded as sufficient clarity as to when a return to work may be possible and what adjustments could be put in place to enable her to return.

94. There is no evidence from which the Tribunal could infer, in the absence of an adequate explanation, that a hypothetical male employee would have been treated differently. Therefore the burden of proof does not shift to require the Respondent to provide a non-discriminatory explanation. Had it shifted, we would have accepted the explanation provided by the Respondent for her dismissal. She was dismissed because of the total time she had been off work, coupled with the uncertainty as to when she might return. A hypothetical male employee who had been off work for four months with similar uncertainty as to when he might be able to return would also have been dismissed. As a result, this direct discrimination claim under Section 13 Equality Act 2010 fails.

Automatically unfair dismissal : Section 99 Employment Rights Act 1996

95. We conclude that the reason for the Claimant's dismissal was connected to her pregnancy, and therefore the Claimant's dismissal was automatically unfair.

96. She was absent from work because of illness caused by the manner in which her pregnancy ended. She was dismissed not just because of the length of that illness and her resulting absence, but also because she was reluctant to provide the Respondent with further information from her GP or treating consultant as to the illness and its prognosis. Her reluctance was because she regarded the circumstances of her illness as particularly private, given how emotionally distressing it had been to lose her baby. As a result of this reluctance, the Respondent did not consider it had the required clarity about when the Claimant would be fit to return to work, which was a further factor in her dismissal. The reason for her dismissal was therefore connected to her pregnancy, in the sense of being associated with it, in two fundamental respects – her ongoing illness and its effect on her ability to return to work; and her reluctance to allow the Respondent to discover personal medical information from her treating GP.

97. Although the Respondent asserted in its dismissal letter that the decision was taken because of the impact that her absence was having on the business, that alleged reason was not explained to the Claimant at the time, in terms of the particular business impact. We do not consider it was sufficiently explained in evidence before the Tribunal, such that we are persuaded it was the predominant reason for the dismissal, rather than a reason connected with the pregnancy.

Remedy Hearing

98. As a result of our findings, the Claimant is entitled to a remedy in relation to two acts of pregnancy discrimination, and our decision that the dismissal was automatically unfair contrary to Section 99 ERA 1996.

99. As a result, we will give the parties until 19 June 2020 to attempt to settle the Remedy issue. The parties are to write to the Tribunal by that date indicating whether they require the Tribunal to list a Remedy Hearing; and if they do, whether they both consent to the evidence being heard remotely, rather than at an in-person hearing. If a Remedy Hearing is requested, then it will be listed and a hearing will take place as soon as practicable, given current restrictions and caseloads.

Employment Judge Gardiner
Date: 30 April 2020