EMPLOYMENT TRIBUNALS

Claimant:	Ms Sophie Hall
Respondent:	1. Fresh Logistics Ltd 2. David Price 3. Oliver Saffell
Heard at:	Nottingham
On:	16, 17 and 18 March 2020 Evidence 18 May 2020 Submissions 10 June 2020 Deliberations
Before:	Employment Judge Jeram, Mr Beveridge, Ms McLeod
Representatives:	
Claimant	Mr Ian Palmer, lay representative
Respondent	Mr N Singer of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claims against the second and third respondents are dismissed on withdrawal by the claimant.
2. The claim of automatic unfair dismissal is not well founded and is dismissed;
3. The claim of pregnancy discrimination is not well founded and is dismissed;
4. The claim for notice pay succeeds in the sum of £235.95

REASONS

Background and Issues

1. By a claim presented on 15 March 2019, the claimant presented claims of automatic unfair dismissal, pregnancy discrimination and notice pay.

2. At the outset of the hearing, we discussed the claims pursued by the claimant, who confirmed that in the respondent having accepted vicarious liability for the second and third respondents, the claims against them were withdrawn; the claims being pursued were clarified and the issues to be determined by the Tribunal were identified as follows:
   a. Was the reason or principal reason for the dismissal a reason connected to the pregnancy of the claimant such that the dismissal was automatically unfair for the purposes of s.99 ERA 1996?
   b. Did the respondent treat the claimant unfavourably because of the claimant's pregnancy, where the unfavourable treatment is a comment said to have been made by David Price during the week commencing 19 November 2018 *"at least no one died or got pregnant*".
   c. How many weeks' notice pay was due to the Claimant upon termination of her contract of employment?

Evidence

3. We heard from:

a. For the Claimant case: the Claimant and Danielle Bailey (ex-employee of the respondent);
b. For the Respondent's case: Luke Seale (Operations Manager), David Price (Operations Director) and Oliver Saffell (Business Development Director).

4. We had regard to:
   a. An agreed bundle that contained 313 pages, although during the hearing pages 309 to 313 were replaced by better copies and pages 314-8 were added;
   b. A 'side bundle' created by the Claimant that contained pages numbered 300 to 360, although pages 313a and 313b were also added during the hearing.

   (References to page numbers are prefixed with 'SB' where they refer to a page in the side bundle.)

Preliminary Matters

5. An unusual, and indeed central, feature of this case is the that each party called the integrity of the other into question about fundamental aspects of their own cases. It is necessary for us to address them at the outset.

   <u>The Respondent</u>

6. The claimant alleged that the respondent had fabricated documents at the appeal stage of her dismissal, and sought to rely upon them in this litigation. Her case was that, in preparation for her appeal against dismissal, she had requested and received a number of documents from her personnel file that were not genuine, but manufactured for the purpose of lending support to the reason for the dismissal, ostensibly capability.

7. In her claim form, the claimant stated that she *'had suspicions that some of the documentation provided . . . had actually been electronically created by Oliver Saffell . . .in an attempt to validate David Price's arguments and unsubstantiated reasons for my summary dismissal'*.

8. This was a reference to documents sent by Oliver Saffell ('OS') to the claimant, at her request, in advance the appeal hearing and were said to have been found in her personnel file. The respondent denied the allegation in its response.

9. Although little detail was given in her own witness statement, the matter was pursued by the claimant in her cross examination of David Price ('DP') and OS. During the hearing, it became evident that five documents were called into question by the claimant:
   a. three letters ostensibly sent by the claimant's previous line manager, Lindsey Watmough ('LW'), to the claimant that culminate in a 3-month warning about the Claimant's unsatisfactory performance[1];
   b. a disciplinary log, which records the fact of the warning given by LW[2];
   c. a letter ostensibly from DP recording a further 3-month warning for underperformance[3].

10. The claimant alleged that OS and DP had fabricated documents to provide some evidential basis for its contention that the issues with her performance were unconnected with her pregnancy.

[1] A letter dated 30 July 2018 inviting the claimant to an investigatory meeting to discuss underperformance; a letter dated 31 July 2018 inviting the claimant to a disciplinary meeting to discuss underperformance; a letter dated 2 August 2018 confirming a 3-month written warning – at pages 149, 150 and 151 respectively
[2] Page 152-3
[3] Dated 29 November 2018 – page 157-8

11. The allegations of fabrication were denied in evidence and the matter was addressed in the parties' closing submissions. We deal with these allegations in our findings of fact below.

The Claimant

12. The claimant's integrity was called into question by the respondent because of events that took place after the exchange of witness statements and immediately before the commencement of the final hearing. On the claimant's own account, she produced two documents in a 'side bundle' of documents to place before the Tribunal which, if taken at face value, would serve to significantly advance her case. They were amended during the weekend immediately preceding the final hearing to state in terms that they had been fabricated, but there remained an issue before us as to why she had ever produced them.

13. It is necessary to set out some of the procedural history.

14. The respondent provided its disclosure, by providing copy documents, on 11 October 2019.

15. On 13 December 2019, and in response to an unsuccessful application to strike out the respondent's case as a result of alleged failures to comply with case management orders, Employment Judge Heap directed that *'if there are . . other documents that the Claimant says have been omitted from the hearing bundle then she should compile a side bundle of those documents and provide a copy to the Respondent'.*

16. Exchange of witness statements occurred by email on 29 January 2020.

17. The claimant in her statement said *'there were some added letters I had not seen before, I had no clue where these additional letters had come from and why they appeared in my personal file . .[they] were not mine, it looked like he was trying to set me up and I felt betrayed'* .

18. The claimant's witness statement did not specify which documents she questioned; at no point did she positively aver that they had been fabricated. There was only passing reference to her previous line manager, LW, in her statement.

19. Immediately after the exchange of witness statements, Mr Palmer (the claimant's lay representative and the father of her partner) sent to the respondent's solicitor a side bundle containing a number of items, one of which was described in the accompanying index as document number 44: *'False letter 31/07/2018'.*

20. On 6 March 2020 Mr Palmer sent another bundle of documents to the respondent's solicitor. The covering email explained that the attachment was a *'side bundle . to be used at the forthcoming ET'*; he explained that there was a need to renumber the documents *'to save any confusion'* and he would take responsibility for producing the bundles *'for use at the forthcoming hearing'*.

21. The attachment to the email on 6 March 2019 contained a 'side bundle' significantly longer than that which was sent on 29 January 2020. It also contained an index. One of the documents in the side bundle was the same as document number 44 in the bundle sent on 29 January 2020; this time, however, it was no longer described in the index as *'false letter'* but instead as '*letter to claimant from Lindsey*

Watmough 31/7/18 [page] 314'. In addition, the side bundle now contained another document, described in the index to the bundle as *'letter to claimant from David Price 29/11/2018 [page] 315'.* These are the two principal documents that the respondent maintains undermines the claimant's credibility.

22. On the face of it, the '*letter to claimant from Lindsey Watmough 31/7/18 [page] 314'* appears to be, as the description suggests, a letter written by the claimant's former line manager to the claimant on 31 July 2018. The attention to detail is immaculate: the letter was set out on paper bearing the company logo; it adopted the same size margins, font and font size as the respondent's house style. As with other letters from LW that had already been disclosed and were contained in the main bundle, it was unsigned, and the document left the same size gap for the signature as the letters in the main bundle. In that letter LW appears to congratulate the claimant on her *'outstanding performance'* during the first 12 months of employment with the respondent, as a result of which the claimant was been nominated by the directors for a national award in compliance sponsored by the transport and logistics industry. In the letter, the claimant was invited for an expenses-paid overnight stay at the London Hilton Hotel on Park Lane in London on Friday 28 September 2018, the night of the awards ceremony. The final paragraph stated: *"I would be grateful if you could keep this information confidential until such time you have confirmed to me you are able to attend, after which I shall make the announcement to your work colleagues and confirm the event arrangements to you".*

23. LW had vacated her position by early October 2018 and had left the respondent's employment by January 2019.

24. The second document in issue is a document described in the index to the side bundle as *'letter to claimant from David Price 29/11/2018 [page] 315'.*

25. Again, the format of that letter was identical to the respondent's house style. The contents of the letter, if taken at face value, suggested that DP had written to the claimant on 29 November 2018 stating *"following on from our meeting on 28 November 2018, I have carefully considered the mitigating circumstances you have raised, namely your recent poor health due to your pregnancy. . . An action plan shall be formulated for you . . To assist you in your job role during this period of general poor health related to your pregnancy".*

26. After receipt of the side bundle, the respondent made verbal and email enquiries of the Hilton Hotel on Park Lane, asking if, as the contents of the '*letter to claimant from Lindsey Watmough 31/7/18 [page] 314'* suggested, the hotel had hosted a Compliance in the Transport Industry Event on 28 September 2018. On Friday 13 March 2020, the Groups, Conference and Events Sales Coordinator for the London Hilton Hotel on Park Lane responded by email stating that, according to her records, *"we did not have any event on that day".* That email was disclosed to Mr Palmer that same afternoon.

27. At 19.49 on Saturday 14 March 2020, the Claimant via Mr Palmer replied by email, in which she claimed that she had *'incorrectly sent the wrong versions of these 'false letters''* and the correct versions were now attached. The attached documents were the documents at page 314 and 315 of the side bundle sent on 6 March 2020, however they now contained two lines of typed script in red ink, beneath the company logo towards the top of the page, stating: *'PLEASE NOTE*

THIS DOCUMENT HAS BEEN CREATED FOR THE SOLE PURPOSE OF COMPARISON TO AND THE DISPROVING OF THE RESPONDENTS EVIDENCE'.

28. On the morning of first day of the hearing, Monday 16 March 2020, the claimant produced for the Tribunal, a side bundle. The pages at SB314 and SB315 were identical to the two documents sent to the respondent's solicitor on 6 March, save that they now bore the caveat above. No explanation was provided by Mr Palmer or the claimant herself for recent events at the outset of the hearing. It was therefore only in a piecemeal fashion, during cross-examination of the claimant, that we heard the claimant's explanation for the documents.

29. The claimant accepted that she, with the assistance of Mr Palmer, created the documents at SB314 and SB315; the reason for doing so, she said, was to demonstrate how easy it was for the respondent to fabricate the documents that she alleged it had fabricated. It was her case was that on 31 January 2019 OS created the documents at page 149, 150, 151 (documents relating to capability proceedings instigated by LW) and pages 152-3 (disciplinary log). Whilst we initially understood that he was also accused of fabricating page 157-8 (letter from DP dated 29 November 2018), the claimant resiled from that during the cross-examination of OS, leaving DP as the author of that document[4]. In any event, the contention was that the documents were fabricated by the respondent to support the reason for dismissal given by DP, namely that she was dismissed on grounds of capability.

[4] something that DP accepts, albeit the claimant maintains was fabricated by him in place of a document at page 155 which the claimant insists is the 'genuine' document that DP wrote.

30. We have no difficulty accepting the claimant's evidence that she did not have the technical ability to produce SB314 and SB315, and that she relied heavily on Mr Palmer to create them. We accept her evidence that Mr Palmer had a significant hand in the preparation of the claimant's case from the outset and throughout proceedings; our findings below illustrate what we have found to be the limits of the claimant's general administrative ability. Nevertheless, the claimant accepted in cross examination that she was *'heavily involved'* in the preparation of her own case.

31. We reject the claimant's explanation and set out our rationale below.

32. First, and most obviously, it seems to us that if the claimant wished to say that the respondent had fabricated documents, and wanted to demonstrate how easily it was to fabricate documents, she would have said so in her witness statement. Her statement contains a single paragraph about her management by LW, wherein she speaks highly of her, yet fails to address the documents at pages 149 – 151 which suggest that LW subjected her to disciplinary proceedings and gave her a 6-month written warning for the standard of her work, much less does she say what her case is about those documents. She did not even say that she had not received them.

33. We consider that to be an important omission because, on her own case, she was alert to the respondent's attempts to manufacture a case to justify its dismissal of her as at 31 January 2019; those suspicions would have been confirmed, if not on 28 June 2019 when the response was entered, then certainly when the respondent disclosed those same documents again, in the course of these proceedings, on 11 October 2019. She had a significant amount of time to say what she wished to

say, but did not do so. Her written work, whether prepared by her or on her behalf, was detailed and articulate; there appears to have been nothing stopping her from setting out her case in writing, if she wished to do so.

34. We also find that it would have been important for the claimant to set out her case in her statement, however briefly, because there was a risk that the Tribunal would take them at face value and accept them as genuine; at the very least, without her setting out her position in terms, there was a danger that the Tribunal would resolve any doubt in favour of the respondent.

35. We consider that the failure to set out the bare minimum of the case that she seeks to advance now in her witness statement is a significant omission which undermines the claimant's explanation as to why she fabricated SB314 and SB315.

36. Turning then to the two documents at SB314 and SB315 themselves. Initially, the claimant's evidence was that the lack of authenticity should have been obvious to the respondent: she said she saw the index served on the respondent on 6 March 2020 and did not change the wording of it. When put to her, she said that the impression that SB314 was a letter sent to her from LW was the impression she wanted to give but nevertheless, she did not *"see it that way"* i.e. misleading. She initially denied in cross examination that the email from the Hilton Hotel was what triggered the inclusion of the caveat on those documents, claiming that she considered *"it was obvious all along"* that the documents were not real.

37. Later in her evidence, however, the claimant could not explain why, if the documents were obviously inauthentic, the caveat was added. She could not explain why she chose to prove how easy it is to fabricate a document by

fabricating a document whose contents would serve to advance her case, rather than make the same point by using irrelevant or obviously fabricated contents. She could not explain why, if she wished to make the point that it was easy to fabricate documents, she did so by fabricating two documents, both of whose contents would, if taken at face value, serve to advance her case.

38. We consider that it must have been obvious to the Claimant that the documents at SB314 and SB315, so carefully constructed, were in danger of being construed as genuine: that was, after all, their explicit purpose.

39. Furthermore, it must have been obvious to the claimant that if they were mistaken as genuine, or even give rise to doubt as to whether they were, they would disadvantage the respondent's case; the purpose of the hearing was, after all, for the parties to prove their cases.

40. The combination of failing to address in her witness statement her case that pages 149-151 (in particular) were fabricated as well as failing to explain that she herself had fabricated SB314 is particularly troubling given that SB314 was disclosed to the respondent 4 minutes after the exchange of witness statements, and therefore at a time when it would have been evident to the claimant that the respondent was not calling LW as a witness.

41. The claimant confirmed in evidence that the caveat was added to the documents at SB314 and SB315 after receiving the email from the events coordinator of the Park Lane Hilton Hotel, and because of it. We conclude, therefore, that had that email not been sent to the claimant, the caveat would not have added.

42. Mr Singer described himself as preparing a very different case on Friday to the case he was preparing on the Sunday before the hearing commenced. We recognise that submission; two members of this Tribunal read SB314 prior to the hearing commencing and, having overlooked the caveat at the top of the page, commenced the hearing believing that the respondent would need explain why a strong performer had been dismissed on grounds of capability.

43. We acknowledge that the position in relation to the document at SB315 is different to that at SB314, in that it relates to a letter purporting to be written by DP, who the claimant had long known was to be called as a witness for the respondent when she served it upon the respondent. However, by then, i.e. by 6 March 2020, SB315 (which the claimant accepts she fabricated) when read together with another letter at page 155-6 in the bundle (which the claimant says she received but DP denies writing) when read together would have the effect, if taken at face value, would have the effect of fundamentally undermining DP's evidence. We expand on this matter in our findings below.

44. Put simply, what the claimant wished to argue needed to be expressed and why she fabricated SB314 and SB315 needed explaining. Whilst we attach significantly less weight to what happened in Tribunal, bearing in mind as we do the fact that Mr Palmer is a lay representative, we consider it relevant to mention that no explanation was forthcoming at the outset of the hearing, despite the recent events over the weekend. We note that neither the claimant nor Mr Palmer did anything to explain their position at the outset of the hearing, even when Mr Singer was seeking to clarify which documents had been included in the side bundle provided to us: by contrast Mr Palmer was vocal about the lack of disclosure and the poor

quality of copy documents that the respondent had provided to him on the first day and second day of the hearing.

45. In his closing submissions, Mr Palmer could not explain when the rationale of creating the documents at SB314 and SB315 or the recent adding of the caveat to them were to be explained to the respondent or to the Tribunal.

46. Finally, as a matter of common sense, it seems to us that that was a much simpler and more compelling method by which to challenge the respondent's evidence; on her own case, LW was an excellent manager who was supportive of her and the claimant knew how to obtain a witness summons, because she had done so in respect of her witness DB to support her allegation that DP had made a discriminatory comment.

47. We were not satisfied with Mr Palmer's explanation that it had not occurred to him or the claimant to simply call LW to rebut the allegedly fabricated evidence at pages 149-51 in her name. We also did not accept Mr Palmer's submission that something – what, he could not say when pressed – occurred at the Preliminary Hearing before Employment Judge Hutchinson on 3 September 2019 that led him to understand that the number of witnesses the claimant could call was limited to, and therefore necessarily determined by, the number of witnesses the respondent elected to call (at the time, two). We reject that because the language of the case management summary does not suggest that the claimant considered herself restricted (she was recorded as likely to call *'at least one'* additional witnesses); second, we consider it unlikely that such a fundamental misunderstanding occurred, given the detailed and conscientious way the claimant's case was presented throughout these proceedings; and third, because that explanation goes

some way to undermining the explanation that it had not occurred to the claimant to simply call LW as a witness.

48. It is in those circumstances, that we reject the claimant's explanation that SB314 and SB315 were created to illustrate how easy it was for the respondent to create its own documents.

49. The fact that the claimant created documents that appeared authentic, which would have the effect, if accepted at face value, of bolstering her case, or at least giving rise to doubt about the respondent's case, and yet fails to provide any cogent or compelling reason for taking such contrived and hazardously misleading steps serves to significantly undermine our confidence in the veracity of the claimant's evidence.

50. The respondent invites the Tribunal to make an express finding that the claimant fabricated SB314 and SB315 in attempt to mislead the Tribunal, albeit her attempts were ultimately thwarted. We recognise that that proposed motivation is not inconsistent with the claimant's actions. We recognise that in dismissing the claimant's explanation, we are left with no explanation for her actions. However, we remind ourselves that our role is to determine the issues before us and we consider that her actions, without an acceptable explanation, is sufficient of itself to undermine her own case. Put another way, it is not necessary for us to go that far to determine the issues before us.

51. Our concerns about the claimant's evidence did not stop there. The claimant's written case was lengthy, accusatory and hyperbolic, with serious allegations against DP in particular, some of which she abandoned without explanation (e.g.

the reason he allegedly invited her to an interview). Her appeal letter, grounds of complaint and witness statement contained assertions that, whilst appearing to be crafted with care, were inconsistent in important ways (e.g. the words used by DP when he was told the claimant was pregnant). Furthermore, there was a sharp contrast between the claimant's written evidence and her oral evidence. A curious feature of her verbal evidence was her determination to maintain the truth of previous written statements she had made even when they were inconsistent as between one another, leading to her, for example, giving three different answers to three consecutive questions as to when it was said that DP's attitude towards her changed. A further point of note was her inability to deny in terms central points in the respondent's case when they put to her and yet refusing to accept them as correct either e.g. whether LW gave her a warning for her performance, and whether DB removed it.

52. Our overall impression of the claimant's evidence was that she strained to maintain the narrative contained in documents produced after the dismissal, even when it appeared to contradict her own recollection of events at the time. Mr Singer described the claimant's evidence as *'chaotic. . [with] the air of someone making things up as she went along'*. We do not disagree; we found her to be a highly unreliable witness.

Danielle Bailey

53. We had significantly less concern about the claimant's witness, Danielle Bailey (DB), but nevertheless our impression of her was someone who did not give evidence freely or provide any significant detail over and above those basic facts

that were already in her statement, despite being given the opportunity to do so during cross examination. We preferred the evidence of the respondent's witnesses where it differed to that given by DB.

Evidence of the respondent's witnesses DP, OS and LS

54. We had none of the concerns for the respondent's witnesses as we did for the claimant and, in that sense, their evidence was largely unremarkable: they gave their evidence freely, acknowledged gaps in their knowledge, and made appropriate concessions.

Findings of Fact

55. We make the following findings on the balance of probabilities.

56. The claimant commenced employment as a compliance administration assistant in the respondent's Derby office on 20 March 2017. The respondent provides temperature controlled distribution by road for clients in the food, drink, healthcare and pharmaceutical industries.

57. The claimant's contract of employment stipulates that during the probationary period, the contract may be terminated by *"either party giving one week's notice to the other".* After completion of the probationary period, however, the contract requires that *"the employee shall give the employer a minimum of 4 weeks' notice of his/her intention to terminate the employment":* it is silent as to how much notice the respondent is to give the claimant should it seek to terminate the contract.

58. The compliance team ensures that the respondent is operating within legal and other regulatory requirements. It was the claimant's role as compliance administration assistant to maintain documents relating to the roadworthiness of vehicles, update vehicle maintenance schedules, check 'defect sheets' created by drivers in respect of their vehicles, liaise with suppliers, booking vehicles in for servicing, maintenance and inspections, order parts, complete driver licence checks, collating and filing paperwork, ensure safe working practices on the site is being followed by staff and contractors.

59. The claimant was managed on a day to day basis by the Compliance Manager, LW. The claimant enjoyed working with LW, who she described as an *'excellent'* manager.

60. In January 2018 the claimant received a bonus payment of £442 and in March 2018 and received a bonus payment of £50. We were invited to accept that those payments reflect positively on the claimant's performance, and in the absence of any evidence from the respondent to the contrary, we accept that she did, in January 2018 and March 2018, perform sufficiently well to achieve a bonus payment.

61. However, on 30 July 2018, the claimant was written to by LW, inviting her to an investigation meeting the following day, to discuss her *'under performing'* (page 149). The investigation meeting took place on 31 July. Given that the claimant speaks highly of LW, describing her as a supportive manager, we find, on the balance of probability, that the claimant's performance, or aspects of it, must have been an issue for some time, for the matter to have arrived at formal proceedings in July 2018. The concerns raised at the time related to her inconsistency in

carrying out her tasks, as well as a general lack of care and attention when carrying those tasks out. Examples including misfiling paperwork, failing to carry out simple management instructions such as checks of files, leaving documents prepared for customer audits unsigned on one occasion despite being asked to double check they had been done. After the investigation meeting, the claimant was invited to a disciplinary hearing on 2 August 2018; the invitation letter cited the reason for the meeting was *'under performance'* (page 150). On 2 August 2018, the claimant was given a letter, recording that she had been given a 6-month written warning for her under performance; although the claimant was given a right to appeal that warning to DP, she did not (page 151). An entry was typed into a disciplinary log and placed in the claimant's file; it recorded that on 2 August 2018, the action taken was described as *'Verbal warning with 6 months' performance management to include daily meetings. Issued by LW'* and the 'reason for disciplinary action' was stated as 'Under Performance' (page 152). We do not consider anything turns upon the inconsistency in the type of warning given, and nor were we invited to consider that anything did.

62. In making these findings, we reject the claimant's contention that the letters of 30 and 31 July 2018 and 2 August 2018 and the disciplinary log were 'fabricated'. We accept the evidence of DP that he was aware of the fact of, and reason for, the investigation in July and aware of the 6-month warning given to the claimant at the time, because LW, who then reported to him, told him as much. We also accept OS's evidence that those documents were in the claimant's personnel file when he accessed it on 31 January 2019, a point to which we will later return.

63. We also had regard to the claimant's own evidence. We note that in the claimant's letter of appeal, written after those documents were sent to her by OS on 31 January 2019, the claimant wrote (at page 180), of the disciplinary log entry that she had been placed on performance management for under performance, only *'I do not recollect what area of my performance this related to'*: she did not deny she was being performance managed.

64. Furthermore, the claimant was taken in cross-examination to an email dated 6 August 2018 between the claimant and LW (page 300-301), headed *'update'* in which the claimant appears set out 13 individual tasks or actions, with LW responding next to each entry, in red font, with her own comment or suggestion. When it was suggested to her that that email was an example of her being performance managed, the claimant denied it. Yet, when the claimant was taken to an email written by LW on 31 January 2019, stating in terms that the claimant was performance managed, stating *'we also had email handovers so Sofie would email me a list of exactly where she got to'* examples of which she had attached to the email (one such example being page 300-301), the claimant did not deny that LW would have no reason to lie, only *'yes, that's what she says'*. The claimant expressly disavows LW being part of any conspiracy to create false documents.

65. In light of the claimant's failure to deny the fact she was being performance managed in her letter of appeal, the existence of the email of 6 August 2018 and her inability to deny the email written by LW on 31 January 2018, it is difficult understand the basis upon which the claimant contended that the letters at page 149, 150, 151 and 152 were fabricated.

66. In or around September 2018, LW vacated the role of Compliance Manager and the claimant applied for it, as did her colleague, Danielle Bailey ('DB'). Both were interviewed for the role, as per the respondent's policy to interview all internal candidates. The claimant's interview was conducted by DP on 17 September 2018. During the interview, DP became increasingly concerned about the claimant's apparent lack of basic knowledge about compliance. The claimant criticised DP's demeanour during this interview; we deal with that suggestion as part of our broader findings in relation to his alleged poor behaviour later in our findings. Despite her lack of experience in the compliance department, DP elected to appoint DB, and she commenced as Compliance Manager on 8 October 2018.

67. DP asked DB to keep an eye on the claimant's work, given his concerns about her performance at interview; he sought to do the same.

68. The claimant did not feel as supported in her role being managed by DB as she had been when she was managed by LW; indeed, her case is that DB detracted from her ability to carry out her own role because of the number of interruptions from her. We note that the claimant, according to her pleaded case (page 16) sought a meeting with DP to explain how DB's inexperience was impacting on her ability to carry out her own role. In that narrow sense, the claimant appears to accept that her performance was not as it should be from early October.

69. As DP discovered, some time after the event, DB had decided to abandon the performance management and 'remove' the written warning given to the claimant by LW, in order to give the claimant a fresh start.

70. There came a time, although we remain unclear precisely when, that DP took over the supervision of the claimant; this was triggered by DB being away on holiday. In late October / November, the claimant asked to speak to DP, and in a short meeting told him that she had *'stuff going on at home'* which she felt was affecting her work, but that she was *'ok'*. The claimant accepted that this exchange took place. The claimant accepted in evidence, when put to her, that *'at this time'* she was making mistakes such as failing to flag up an overdue vehicle inspection meaning that it was operating illegally, which could have had serious repercussions for the respondent. We infer from her evidence that the claimant was, in late October / November, aware that DP considered her standard of work required improvement.

The Claimant's Health

71. The claimant claimed in her statement that from mid October 2018, she began to feel unwell. Her symptoms, by reference to her witness statement, consisted of *'itchy legs, constantly feeling thirsty headaches, dizziness and feeling tired'*. Those symptoms are, aside from itchy skin, identical to the list of common side effects of sertraline, as listed on the NHS website (page 231). The claimant was prescribed sertraline on 10 October 2018.

72. When it was put to the claimant that the claimed side effects were nothing to do with her pregnancy, the claimant responded *'not at that time, no'*. Implicit in that answer is that there came a time when those same symptoms were attributable to her pregnancy.

73. The claimant did not visit her GP until 12 November 2018[5]. On 12 November 2018, the notes of the GP state:

"3 week history of inc urinary freq during the day and nocturia – no weight loss/thirst – systemicalyl [sic] well – check bloods and msu +=".

74. The claimant accepted that the GP notes resembled what she had told the GP. We are not satisfied that the claimant suffered the symptoms she describes in her statement from mid October 2018, or that there came a time when she did. Had she suffered those symptoms, we would have expected her to have told the GP that she had been living with those symptoms for a month, rather than telling the GP that she had 3 weeks of increased urinary frequency and other information that suggested that she was otherwise systemically well. We would not have expected her to say to the GP that she had *'no thirst'* if, as she invites us to accept, she was *'constantly feeling thirsty'*. We find that as at 12 November 2018, other than an increased need to urinate, the claimant was systemically well and did not suffer the symptoms she claimed to suffer in her statement.

75. The claimant attended her GP again on 14 November 2018. The entry states:

"Bloods and msu are all ok, nocturia and daytime freq, tired, on desogestrel, no stress, works 30 hours, not tearful, no loss of [missing text] little specific symptom but sleep unrestorative."

76. We find that that the entry *'little specific symptom'* fundamentally undermines the claimant's claim that she suffered the series of symptoms she claims to have suffered for a month in her witness statement.

[5] Whilst the records suggest that the claimant attended her GP on 17 October 2018, either no entry was made on that day, or the text has in some other way been omitted; it was not suggested by the claimant that she attended her GP that day.

77. We find that as of 14 November 2018, the claimant had an increased need to urinate, was tired, was not suffering stress, and had little symptoms, and that her sleep was not restful. Had we entertained her claim that she was symptomatic in the manner described in her statement, we would not have been satisfied that the symptoms were attributable to the pregnancy rather than her anti-depressant medication. In any event, had we found that symptoms were attributable to her pregnancy, we had no evidence to link it to her performance at work.

78. We find the claimant's evidence about her health highly unsatisfactory.

79. On 14 November 2018, the claimant discovered that she was pregnant with her third child. She told colleagues, including DB, of the news on a social night out on Saturday 17 November 2018.

The Alleged Discriminatory Comment

80. The claimant alleges that at a morning staff (or operations) meeting in the week commencing Monday 19 November 2018 DP said, allegedly in response to a mistake that had occurred (unconnected to the claimant) *"at least no-one died or got pregnant*". In her further information, she added that DP said this whilst pointedly looking in her direction.

81. The claimant claims that she was there, as was DB. DB lists a number of people she claims attended the meeting, including Luke Searle ('LS') who chairs the meetings, and Sam Watmough, but she does not list either of the accounts staff. Sam Watmough was on holiday on the first three days of the week commencing 19 November. LS gave evidence, which was not contradicted, that one or both

accounts staff would be in attendance at every meeting, save in exceptional circumstances, and that, according to his records, the only day on which the accounts staff might have been absent that week was the Wednesday. LS states that he heard no such comment as alleged by the claimant.

82. The claim is based on the claimant's contention that DP made the comment because he would have known of her pregnancy by this time, it being advanced that he would have acquired knowledge of her pregnancy via unspecified colleagues. We are not satisfied that DP knew of the claimant's pregnancy in the week commencing 19 November 2018; we prefer his specific account of how he learned of the pregnancy on 29 November 2018. Furthermore, on the claimant's own evidence, when she asked her colleagues present in the meeting at which the comment was made whether they had told DP of the pregnancy, *'they all said no'*. Speculation aside, the claimant adduced no evidential basis for the claimant's claim that he 'would have known'.

83. We turn to consider when the comment was allegedly made. The claimant maintains that it was made in the week commencing 19 November 2019. If Sam Watmough was present, the comment can only have been made on the Thursday or the Friday of that week, when it is likely that at least one of the accounts staff would have been present. The claimant approached both accounts staff to ask them to give evidence about this comment (SB309b) although in doing so, she undermined the evidence of her witness DB who suggested that neither were present. When asked, the claimant could not answer whether her case was that one of the accounts staff was present, or both of them were, despite her clearly

having asked both accounts staff for their assistance. We have no confidence that even if a comment was made, it was made in the week the claimant alleges.

84. We are not satisfied with the claimant's account of how many times the alleged comment was made; we understood from her statement that it had happened once. When it was put to the claimant that her witness statement suggested the comment was made on one occasion, the claimant maintained it had been said twice but that she had omitted to mention the second occasion from her statement; either version is inconsistent with her own pleaded claim which alleges it was repeated in a 'sarcastic manner' on 'several different occasions'.

85. Finally, and for the avoidance of doubt, we are not satisfied the comment was made at all. In deciding the extent to which we could rely on the claimant's own evidence, we take into account the fact that the claimant made no mention any behavioural impropriety on the part of DP in her letter of appeal and yet in the context of this litigation, the allegations against him grew in terms of both number and seriousness. By way of example only, of the numerous allegations she made about DP's behaviour towards her, we might have expected her to be consistent about the comment she alleges DP made when she first told him she was pregnant, yet the version she gives in her claim form[6] bears no resemblance whatsoever to the version she gives in her statement[7]. We find the claimant to be recklessly inconsistent and we cannot rely on the truth of her evidence.

86. The claimant's witness, DB, made her statement at a time when she accepted she was angry with the respondent for dismissing her for gross misconduct. When she

[6] Page 18: *"your [sic] no good to us if you can't do your job"*
[7] Para 14: *"congratulations, I guess"*

gave evidence, she delivered the bare facts in a cautious fashion. We took into account the fact that the she had attended under sufferance of a witness order, but the necessity for that order was cast into doubt when she volunteered that she had met with the claimant before the hearing, to *'catch up'*, albeit, she said, not to discuss the case. Whilst DB claimed that her life had moved on and that she no longer regarded the respondent's employees as *'evil people'*, we find it difficult to accept that the two of them did not discuss the case having arranged to meet two weeks before they were due to give evidence. We did not find DB to be a satisfactory witness.

87. Finally, had the comment been made as the claimant says it was, we would have expected some mention to be made in her appeal letter given to OS on 1 February 2019, which explicitly alleged that DP had dismissed her due to her pregnancy. We reject the claimant's explanation that the omission was because she *'had a limited amount of time'* to write her appeal letter and that generally, she was unwell because of her pregnancy: she had over a month longer than she was entitled to, under the respondent's procedure. Furthermore, she evidently had time to write four pages, and sufficient time to set out specific terms of a proposed settlement agreement, yet absent from that document is a single mention, however general, of DP behaving poorly in his interactions with her. It formed no part of her explanation that she omitted to mention the comment because had not realised it was an important part of her the claim that she was, in that same letter, inviting the respondent to settle: her explanation was that she simply did not do so because of the pressure of time. We note that when OS offered the claimant the opportunity to verbally expand on her appeal, she expanded on her settlement requirements; she did not mention DP's alleged behaviour. We find that the omission of this

alleged comment from the appeal letter and the appeal hearing is consistent with there being no such allegation in existence to settle. We are not satisfied of any of the factual allegations of poor behaviour directed at DP.

88. We accept LS's evidence that at no stage did he hear DP make such a comment; he was a central figure in the meeting and had the comment been made, the alleged impact of which was to cause the atmosphere in the room change and fall silent, we would have expected him to hear.

89. In arriving at these findings, we have also had regard to the impact on her credibility of a text message that she sent to DP on 11 January 2019, after she was dismissed and before she submitted her appeal letter, and which we address, for the sake of preserving the chronology, below.

Capability Proceedings

90. In November 2018, DP sought an audit of the compliance department, having discovered that a company vehicle was operating with an overdue inspection i.e. unlawfully. The audit was carried out by the claimant, DB (the current compliance manager), and LW (the previous compliance manager). We accept DP's evidence that the anomalies the audit threw up *'nearly all came back to [the claimant]'.* The errors consisted of missing logbooks, missed vehicle checks and misfiled documents. Vehicle parts had been ordered incorrectly by her, despite instruction, so that brake pads were ordered at nearly double the appropriate price and four headlights had been ordered from a main dealer instead of the chosen supplier, giving rise to an extra cost of £400. The claimant accepts that, when she met with

DP on 28 November 2018, the issue in relation to ordering parts was *'a recent failing'.*

91. The parties agree that on 26 November 2018, DP wrote to the claimant inviting her to an investigatory meeting on 28 November 2018 to discuss specified shortcomings in her performance, being: a failure to ensure proper record keeping; a failure to ensure standard value checks were being carried out when ordering services and equipment; and a failure to complete daily duties. The parties agree that the letter at page 154 to that effect is authentic.

92. We reject the claimant's case that she told DP on 26 November 2018 that she was pregnant, in part because she was inconsistent as to the order of events that day in her claim form as compared to her witness statement, but primarily because we considered that DP was a significantly more reliable witness of the truth of events than the claimant and we prefer his account of events, which we address later.

93. At the meeting on 28 November 2018, the claimant did not dispute that documents had been misfiled, or were missing altogether, or that vehicle inspections had been missed; she explained that she had ordered parts at significant expense to the respondent and contrary to a specific direction she had been given because she thought it would be 'quicker'. In summary, she accepted that the matters put to her were shortcomings in her performance and that she had no explanation. DP noted her acknowledgement in this regard in the outcome letter because he considered it unusual for an employee to overtly accept their shortcomings. The claimant does not dispute that by this stage, she may have made mistakes, but attributes any such mistakes to her pregnancy. The claimant was given a final written warning for 3 months and told that there would be daily meetings with DP to assist her in

making the necessary improvements in her work, with a review of her performance scheduled to take place on 12 December 2018.

94. The content and outcome of the meeting on 28 November 2018 was captured in a letter dated 29 November 2018 and which appears in the main bundle at page 157. In that letter, DP confirmed *'whilst there is a plan in place to assist in improving your performance, immediate signs of improvement must be made, or further disciplinary action may be taken'.*

95. In making the finding that the outcome was captured in a letter dated 29 November 2018, we reject the claimant's contention that that document was fabricated by the respondent (to further its case, we understand, although we fail to see how).

96. By extension, we also reject the claimant's contention that the 'real' letter sent by DP to the claimant is dated 28 November 2019 and appears in the main bundle at page 155. The claimant and Mr Palmer produced the physical document during the hearing, in order to show it was signed and thereby persuade us that it was 'real'. We accept that the document at page 155 of the bundle appears similar to a letter produced by the respondent; indeed at first glance, so did DP. In DP's witness statement, he confirmed that he sent the document at page 155. When he came to confirm the contents of his statement in evidence, however, DP amended that part of his statement, explaining that his solicitor had inserted page references into his draft statement, and when he attended their offices, he cross referenced the draft statement with the bundle, and, at a glance, erroneously confirmed that the document dated 28 November 2018 at page 155 was the document he sent to the claimant. We accept that explanation, in part because it accords with our experience of how witness statements tend to be prepared for witnesses, and in

part because the first half of the first page of both documents are very similarly worded and subsequently follow a similar format, including bullet pointed text on the second half of the first page of each document.

97. We considered, but rejected, the possibility that DP produced two documents; we accept his evidence that he had produced only one document.

98. We reject the claimant's claim that the respondent sent to her the letter at page 155 for the following further reasons. First, as we have stated above, whilst the first half of the letter at page 155 mirrors the content and format of the letter at page 157 (save that the length of the warning is six, rather than three, months), the text in the second half of the letter adopts an unusually officious tone which is inconsistent with the tone DP used when he wrote to the claimant in other, uncontested, letters (see pages 154, 165, 166).

99. Second, in advance of her appeal, the claimant was sent a number of documents by OS on 31 January 2018, two of which were her disciplinary log and the letter at page 157. In her letter of appeal, the claimant referred to an entry in her disciplinary log which referred to a letter dated 29 November 2018 and in respect of which she denies having received *'any written confirmation of a written warning'.* It seems unusual to us that she would be so careful to avoid stating her position in relation to the letter of 29 November 2018, a copy of which that she had received alongside the disciplinary log, and furthermore to deny having received *'any written confirmation of a written warning'* when, on her own case, she certainly had received a letter dated 28 November 2018 in which she received a 6-month written warning.

100. The final reason we are not satisfied that the respondent wrote the letter on 28 November 2019 is because if it were read alongside the letter at SB315, which is dated 29 November 2019 (and which the claimant accepts she fabricated), on an ordinary reading of those two documents together, it would lend the appearance of DP expressly stating his knowledge of the claimant's pregnancy, of her suffering from pregnancy related illness, of his knowledge that they amounted to an explanation for her performance, and nevertheless giving her a six month warning. Given that the claimant accepts that she not only that she fabricated SB315 but also accepts that the contents of it are untrue, we considered that to be a coincidence too unfortunate to accept as likely.

101. We accept that that leaves a gap in our findings; if the respondent did not produce the document, then who did? The respondent invites us to find that the claimant fabricated it. We recognise that on our findings that is a possible, if not the most likely, explanation especially in light of the claimant's admitted fabrication SB314 and SB315. Again, however, we remind ourselves that our role is to resolve the issues required to determine the claims: this is not one of them - it is sufficient for our purposes to decide that the respondent did not send page 155 to the claimant.

102. When DP handed the letter dated 29 November 2018 to the claimant, she told him that she had something to tell him; she told him she was pregnant and that Lyndsey had told her to tell him that. He congratulated her. This was the first DP knew of the claimant's pregnancy; he had not acquired knowledge of it sooner via the claimant's colleagues, or otherwise.

103. On 29 November 2018, DP sat down with the claimant for two hours to devise a scheme of working to assist her in her role. They created a spreadsheet of her tasks, colour coded to indicate their urgency and importance; the claimant was told how to distribute the work amongst the maintenance staff to free herself to attend to her own tasks. DP and the claimant met each morning, in a similar manner we note, to that described by LW in her email of 31 January 2019, to discuss the claimant's work for rest of the day; individual matters requiring her attention were discussed and they were prioritised every morning by DP. The plan was to provide the claimant with a method of working that she could adopt as her own. Unfortunately, whilst DP expected the claimant to attend the daily meetings prepared to discuss her progress with tasks, she attended with a clean notepad and a pen *'as if it was her first day'*. We accept the examples given by DP that she would 'click' to review each vehicle daily, irrespective of whether it had been 'cleared' the previous day, and that she repeatedly failed to attend to tasks.

104. On 6 December 2018 until 16 December 2018, the claimant was absent from work by reason of illness; her fit note cited *'abdominal pain'.*

105. The claimant's medical records on 6 December 2018 note that the claimant was pregnant; her GP notes:

*'9w, feeling hot in night at times, also thirsty, *****well, occasional ***** pain groin area, current stress with work – feels run down, kids fine, tired, work pressure main thing, off food, ***** well, gets occ bloating also, no pv loss, no blood, BF supportive'.*

106. The claimant returned to work on 17 December 2018 and the following day, DP gave her a letter inviting her to an 'investigatory' meeting on 19 December 2018 to discuss her two of the same three matters that were set out in his letter of 26

November 2018. What was omitted was a reference to a concern that she had failed to carry out value checks; the claimant had been prevented from carry out any ordering since 26 November 2018.

107. Despite the meeting being described as investigatory, the claimant understood that there was a chance that she could be dismissed at that meeting; she alleged in her claim form that DP told her she would need to prepare to 'save her job'.

108. On 19 December, the claimant met with DP. DP discussed with her the lack of progress achieved between 29 November and 5 December 2018 and DP's impression that she was unable to prioritise her own work without being micromanaged. The claimant said she should be given more time to improve as she had had time off, ill; she said she enjoyed her job and didn't want to lose it; she said it was unfair that she was required to complete the spreadsheet and yet DB was not. The claimant cited (for the second time) pressures at home as mitigating circumstances and we also accept that she talked about her health. We accept that when DP asked the claimant whether she had been unwell during the week that they had been meeting, she replied that she had been fine until the evening of 5 December / morning of 6 December, which is why she visited her GP on 6 December; that answer would not be inconsistent with her GP records of 12 and 14 November 2018. We also considered it significant that when those words were put to the claimant in cross-examination, she responded *"I would have thought I would have mentioned my pregnancy; I cannot recall my exact words".* The claimant confirmed that there was nothing else she wished DP to take into account when considering the outcome of the meeting.

109. By agreement, DP reflected on his decision overnight. So as to avoid any awkward meetings with colleagues, DP and the claimant agreed that she would enter the premises the next day using a side door, the entrance code for which she sought by text message from DP. The claimant knew that there was a risk that the following day, DP might dismiss her: she accepted as much, albeit reluctantly, in cross-examination.

110. On 20 December 2018, the claimant met again with DP, who told her of his decision to dismiss her on grounds of capability with immediate effect. The stated reason was the absence of any discernible improvement between 29 November 2018 and 5 December 2018 and the safety critical nature of her administrative role. He gave her a letter confirming the decision and in which she was given the right to submit an appeal within 7 days of receipt. He omitted to deal with the claimant's entitlement to notice pay, although accepts he should have addressed this matter.

111. The claimant sent a text message she sent to DP on 11 January 2019, approximately 3 weeks after he had dismissed her, in which she stated:

'Hi Dave. I have just seen Jaynes post on Faceboook and just wanted to send my love to everyone and I hope, as everyone does, that he makes a full recovery and back to being his old self soon enough. My thoughts are with Alan and his family as well as you guys x thank you'.

112. The claimant's explanation for choosing to send this message to DP was that he was simply a convenient point of contact, and the kiss at the end was an automatic gesture. We consider that text to be warm and friendly towards DP and, as the claimant herself acknowledged, one which she did not need to send, at least to him, at all. We regard the text, and the explanation for it, as undermining her

description of a person whose behaviour, described variously as cruel, oppressive and overbearing, she had had to endure for months.

The Appeal

113. We remain unclear when, precisely, the claimant submitted her request to appeal (page 183 suggests 15 January 2019) but it is agreed she had certainly done so by 28 January 2019 although that letter itself does not appear in the bundle. Despite the appeal being submitted long after the deadline to appeal had expired, the claimant was invited to an appeal meeting on 1 February 2019 with OS.

114. On 30 and 31 January 2019, the claimant and OS entered into an email exchange whereby the claimant sought, but was refused, to be allowed to be accompanied by Mr Palmer and whereby she sought, and was sent, the contents of her personnel file. The claimant contends that the delay between seeking the documents and their receipt, described to us as 7.5 working hours, is indicative of OS fabricating four of the documents he sent to her on 31 January 2019[8] . We prefer OS's explanation; the reason it took so long to attend to her request was that he had other, competing, work demands.

115. For the purposes of explaining the next set of findings, it should be noted that there are two emails in the bundle, ostensibly from LW and both dated 31 January 2019. The first in time is at page 318 of the bundle and is timed at 09.57; it is sent from LW's 'Fresh Logistics' email address to OS. It contains no message, but three

[8] The fabricated documents being page 149 letter LW to C dated 30 July 2018, page 150 letter LW to C dated 31 July 2018, page 151 letter LW to C dated 2 August 2018, page 152-3 disciplinary log, but not page 157 which OS is said not to have had a hand in creating

attachments, which are identical in name to and therefore we accept were the same three documents that OS sent to the claimant later that same day. However, the claimant invites us to find that this email is evidence of foul play on the part of OS, because by that date LW was no longer employed with the respondent. We reject that suggestion for two reasons. First, whilst LW was no longer employed by the respondent and should not therefore have access to her own email account, we heard unchallenged evidence that she remained employed in the same building as the respondent and so we accept OS's suggestion that there remains the possibility of her simply accessing her old account for the sake of ease. Indeed, the lack of a complete explanation in that regard tends to suggest that OS was not simply concocting an excuse. We also accept that as the likelier explanation because of the existence of a second email from LW, sent 20 minutes later, from her new email account (and which is accepted by the claimant as being authentic – or at the very least not disputed), in which she provided a description of the claimant's performance management and attached 'examples of handovers'. The claimant does not seek to implicate LW in any conspiracy on the part of OS and DP to expel her from her employment; it is therefore too much of a stretch for us to accept that OS coincidentally sent to himself, in her guise, 3 documents he fabricated (leaving aside for a moment that on the claimant's evidence they were not created until hours later – see below) some 20 minutes before LW describes the claimant being performance managed, something that the claimant denies.

116. The 'document properties' of various documents were produced by the claimant and which are also said to support her contention that these documents were fabricated (page 172-7). All, save one document, appear to have been 'created' between 17.47 and 17.54 on 31 January 2019; we fail to see how this data supports

her claim that OS fabricated those documents given that the email we were taken to (page 171) suggests that he sent those same documents to her at 17.41.

117. The one exception to this was the data relating to the letter we have found was produced by DP and given to the claimant of 29 November 2019. The 'properties' of that document suggest that it was created at 16.31 on 31 January 2019 by OS, although the claimant accepts that OS did not have a hand in the creation of this document. The 'created' property of this document is consistent with much of the other data we have seen, leading us to conclude that what OS was doing was, as he explained, converting documents that already existed in 'word' format to pdf format. We consider nothing turns on the fact that he typed up two handwritten entries in the disciplinary log before he converted it to pdf.

118. Finally, it was suggested by the claimant that OS was, or at least might have been, motivated to manufacture documents out of a desire to protect the value of his shareholding in the respondent, the rationale being that had the claimant not been dismissed, the respondent would have to pay her maternity pay as well as arrange for cover, thereby adversely affecting profitability, upon which OS accepts his shareholding is, at least in part, based. We regard that suggestion, without more, as so remote as to be fanciful.

119. The appeal letter that is contained in the bundle is dated 31 January 2019 and purports to set out the claimant's position over 4 pages, concluding with detailed terms upon which she was prepared to enter into a settlement agreement to avoid litigation, and so we would expect the claimant to be particularly mindful of the accuracy of its contents. The appeal letter contains a number of inconsistencies, even on the claimant's own case. For example: the claimant claimed in the appeal

letter that she *'no recollection'* of the LW warning on 2 August 2018; her evidence before us was that there was no such warning and the letter of that date was fabricated. In the appeal letter, the claimant claimed to have never received any formal warning at all, yet she adduced page 155 to the effect that she had received a 6-month written warning from DP. In her appeal letter, she claimed she had '*no prior inclination, knowledge or notification of my pending dismissal'*, a claim that she repeated verbally at the appeal meeting (page 184) and yet in her evidence, she accepted that this assertion was untrue and she was unable to explain why she had claimed not to know. These inconsistencies go to undermine the claimant's credibility in these proceedings.

120. The appeal meeting itself took place on 1 February 2019. According to the claimant, the meeting consisted of OS stating that he had never done an appeal hearing before, the claimant submitting her appeal letter to him, and her refusing to answer his pre-prepared questions save and insofar as she could find the answer in the appeal document she had provided. We reject the claimant's evidence that OS refused to take into account the appeal letter; we prefer his evidence that his concern was to speak to her; his appeal outcome letter, consisting of 5 pages, indicates that he considered her appeal notice in considerable detail.

The Law

Automatic Unfair Dismissal

121. Section 99 reads:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if – (a) the reason or principal reason for the dismissal is of a prescribed kind.

(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

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

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

(3) The kinds of reason referred to in paragraphs (1) . . .are reasons connected with –

(a) the pregnancy of the employee"

(emphasis applied)

123. The guiding principles as to the burden of proof in cases such as this are to be found in Kuzel v Roche Products Ltd [2008] IRLR 530. It is necessary for the tribunal to find only one reason, or one principal reason for the dismissal; the reason for the dismissal is a question of fact for the tribunal; the reason consists of a set of facts which operated on the mind of the employer when dismissing the employee; the employer must show the reason for the dismissal; where an employee positively asserts that there was a different and inadmissible reason for the dismissal, s/he must produce some evidence supporting the case; having heard both sides the tribunal will consider the evidence as a whole and make

findings of primary fact on the basis of direct evidence or by reasonable inference from the primary facts established by the evidence; the tribunal must then decide what the reason or the principal reason was.

Pregnancy Discrimination

124. Section 18 of the Equality Act 2010 provides that:

(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) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends – (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(4) . . .

(emphasis applied)

125. Section 136 of the Equality Act 2010 governs the burden of proof in proceedings relating to a contravention of the Equality Act 2010 and it provides:

(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.

Notice Pay

126. Section 86(1) provides for not less than one week's notice to be given by an employer when terminating the contract of employment of a person who has been continuously employed for more than one month, but less than two years.

Automatic Unfair Dismissal – Conclusions

127. The claimant does not have the requisite qualifying service to bring an ordinary claim for unfair dismissal. It is nevertheless open to her to pursue a claim of automatic unfair dismissal; in order to succeed in her claim for automatic unfair dismissal, we must be satisfied that principal reason for the dismissal must a reason connected to the pregnancy of the claimant.

128. It is agreed that when the claimant was dismissed she was pregnant, she had taken time off for abdominal pain and that DP knew of both of these things before he dismissed her.

129. We do not accept that that amounts to 'some evidence' (Kuzel) to support the claimant's case that the principal reason for the dismissal was her pregnancy or a reason connected with it, as opposed to simply establishing that she was pregnant at the time of the dismissal and had taken some time off for a reason that may be regarded as connected to her pregnancy. Our reasoning follows.

130. The mere fact that the claimant was pregnant at the time of the dismissal is not sufficient to amount to 'some evidence' that the dismissal itself was the reason for, or connected to, the pregnancy.

131. We reject the claimant's claim that she was underperforming because of her pregnancy; we find that she was not suffering symptoms as she claimed, and we were not satisfied as to how they impacted on her performance, even if she did.

132. If we are to consider, as we are asked to, that that reason for dismissal was the fact that the claimant had taken time off work for a reason connected to her pregnancy (abdominal pain), our conclusions are as follows. There was no evidence before us to suggest that the fact of the abdominal pain was causally connected to the pregnancy rather than simply co-extensive with it; if it was connected, we would have expected the claimant's GP records to be explicit about that, because that would be a relevant and important fact to note. Nevertheless, even assuming that the abdominal pain, and therefore the time off for abdominal pain, was causally connected to the pregnancy, there was no evidence before us that that time off was any part of DP's decision to dismiss the claimant at all, much less that it was the principal reason.

133. Nor do we accept that the claimant's illness between 6 December and 16 December 2018 is a fact from which we can infer her earlier under performance was, or even might be, connected with her pregnancy. First, her underperformance was a much longer-standing issue that pre-dated her pregnancy with no intervening event that might distinguish the two episodes and second, we have already accepted that the claimant told DP, when asked, that she was *'fine'* until the evening of 5 December. DP would have no reason to query that response when he received it.

134. We have considered the fact that the claimant received bonuses in January and March 2018 for her performance. We do not think that that evidence is inconsistent

with poor performance by July 2018, however; in fact, we consider that the fact that the claimant received a bonus in early 2018 could equally amount to an explanation as to why LW commenced capability proceedings as late as July 2018.

135. Whether taking these matters separately or together, therefore, we do not accept that the claimant has adduced 'some evidence' that the dismissal was connected to her pregnancy.

136. In any event, this is plainly not a case that turns on the burden of proof. We are amply satisfied that the claimant, who was being generously supported by LW even on her own case, was being investigated for her work performance by end July 2018; she was subject to a formal warning about it on 2 August 2018; her interview on 17 September 2018 was of sufficiently poor quality to ring alarm bells for DP; by early October DP had instructed DB to keep an eye on her performance; in November, the audit of the compliance team revealed significant errors on her part; by 26 November 2018, the claimant was, once again, being invited to an investigation meeting and by 28 November 2018, having accepted that she was failing to perform to standard, she was once again subject to a three-month written warning with a requirement that *'immediate signs of improvement must be made or further disciplinary action may be taken'*. Over the following days, as we have accepted, DP saw no discernible improvement; his letter of dismissal cited her failure to make improvements in her role. It is against that context that we turn to consider what was in the mind of DP when he decided to dismiss the claimant.

137. We find, on the balance of probability, that the principal reason for the dismissal was the claimant's underperformance.

138. In doing so, we have not disregarded the fact that DP had only recently acquired knowledge of the claimant's pregnancy and that she had taken time off work with abdominal pain since then; we are also cognisant of the fact that he had formally performance managed her over only a matter of days between 28 November 2018 and 5 December 2018. We do not expect to see obvious evidence of a dismissal for a prohibited reason and we were careful to not simply accept the respondent's case if capability was simply the excuse by which it sought to dismiss a pregnant employee. But we considered the following evidence to be particularly compelling, some of which was not in dispute:

a. DP undertook daily meetings with the claimant in a similar manner to that of LW 4 months previously;
b. DP ascribed priorities to each of the claimant's tasks and created a colour coded spreadsheet so that she had a visual reminder of her priorities;
c. DP described to the claimant how she could cascade work to others to free herself up to carry out her work;
d. That once it was discovered that the claimant had made purchasing errors, those tasks were not only taken away from her, but as a result, the reference to that as a failing was removed from the letter of 18 December 2018 inviting her to an 'investigatory' meeting, thereby suggesting that the respondent was not simply 'going through the motions';
e. The claimant had received two written warnings and been performance managed twice by two managers in 20 months of employment.

139. We found particularly evocative DP's evidence that, despite the assistance he gave, it was as if *'every day was her first day'*.

140. We therefore accept that, notwithstanding the short period of time given to claimant to prove herself, she had been warned about the possibility of further action in the absence of immediate improvement; in the circumstances the employer was entitled to conclude that waiting a longer period of time would be an exercise in futility.

141. There was compelling evidence before us to persuade us that it was the underperformance of the claimant that was the principal reason for her dismissal.

Discriminatory Comment – Our Conclusions

142. The burden of proof provisions requires a claimant to prove essential facts from which the Tribunal could infer discrimination i.e. she must establish a 'prima facie' case. It is only if she does so that the respondent is required to provide a non-discriminatory answer for the case against it.

143. We have found, having considered all the evidence before us, that we are not satisfied that the comment was made at all. The claimant has failed to discharge the initial burden of proof that she bears and there is therefore nothing for the respondent to address and nothing for the Tribunal to address.

144. In his closing submissions, Mr Palmer attempted to expand on the discrimination claims in respect of allegations that he had not identified at the outset of the hearing, nor pursued in his evidence. Mr Singer submitted that that it would be improper to consider those allegations save for, perhaps, to the extent that the claimant alleged that her dismissal was discriminatory. We note that that is not one the bases upon which the claimant seeks to expand her claims, but in

any event and for the avoidance of doubt, we confirm that had that had that claim been pursued, we would have accepted capability as a complete explanation for dismissal.

Notice Pay – Our Conclusion

145. The claimant claims that the contract requires the employer to give four weeks' notice, although we understood from Mr Palmer from the outset of the hearing that his case is based on fairness; that the provisions for each party should be the same.

146. The contract does not expressly require the employer to give four weeks' notice to an employee on termination of the contract after s/he has completed the probationary period: it is silent as to the minimum notice period the employer is required to give in those circumstances.

147. However, the contract does explicitly confer equivalency on the parties when terminating *before* the conclusion of the probationary period (*"either party giving one weeks' notice"*), in contrast to the position after the conclusion of the probationary period when the minimum notice requirement is expressed as an obligation only of the employee (*"the employee shall give 4 weeks' notice"*); that difference in wording suggests that it was the parties intention that there did not necessarily need to be parity after the conclusion of the probationary period in the same way as there it is required before the conclusion of the probationary period. If parity after the conclusion of the probationary period is what the parties wanted to achieve, that is what the contract would have said. It is therefore neither appropriate nor necessary to imply a term to the effect that there should be parity

between the parties in respect of the notice period after an employee successfully completes their probationary period.

148. The silence in respect of the employer's obligation after the conclusion of the probationary period is addressed by the statutory minimum notice period conferred on an employee by virtue of s.86(1) ERA 1996 and the claimant is accordingly entitled to her statutory entitlement of one week's pay of £235.95.

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Employment Judge Jeram

Date 14 July 2020

JUDGMENT SENT TO THE PARTIES ON

28 July 2020

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