EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110878/2019

Held in Glasgow on 7, 8 and 9 December 2020
(Members' Meetings 6 January and 10 February 2021)

Employment Judge S MacLean
Tribunal Member L Miller
Tribunal Member S Jones

Miss C Young	**Claimant** **In Person**
HM Revenue & Customs	**Respondent** **Represented by:** **Ms K Sutherland,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The Tribunal finds and declares that the respondent unlawfully discriminated against and victimised the claimant, contrary to Section 39 of the Equality Act 2010, and her complaint of discrimination contrary to sections 18 of the Equality Act 2010 succeeds.

2. In respect of unlawful discrimination, the Tribunal orders that the respondent shall pay to the claimant compensation for loss of earning amounting to **FOURTEEN THOUSAND FIVE HUNDRED AND SEVENTY-SIX POUNDS AND SEVENTY FOUR PENCE (£14,576.74).**

3. In respect of injury to the claimant's feelings the Tribunal also orders that the respondents shall pay to the claimant a further amount of **TWELVE THOUSAND POUNDS (£12,000)** for her injured feelings**.**

4. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, it is further ordered that the respondent shall pay to the claimant the additional sum of **TWO THOUSAND SIX HUNDRED AND TWENTYONE POUNDS AND TEN PENCE (£2,621.10)** representing the total of (a) interest of NINE HUNDRED AND NINETY POUNDS AND FORTY TWO PENCE (£990.42) on the claimant's loss of earning of £14,576.74, calculated at the appropriate interest rate of eight percent per annum by reference to the mid-point between 3 June 2019 (the date of the discrimination) and 12 February 2021 (being the date of this Judgment); and (b) interest of ONE THOUSAND SIX HUNDRED AND THIRTY POUNDS AND SIXTY EIGHT PENCE (£1,630.68) on the injury to feeling award of £12,000 calculated at the appropriate interest rate of eight percent per annum for the period between 3 June 2019 and 12 February 2021 being the date of this Judgment.

REASONS

Introduction

1. The claimant is pursuing a claim of unlawful pregnancy discrimination under section 18 of the Equality Act 2010 (the EqA). The claimant says that she was dismissed from employment due to pregnancy. She seeks compensation.

2. The respondent's position is that the claimant failed to meet the standards required of her during her probationary period and was dismissed as a result. The respondent denies that the dismissal was because of the claimant's pregnancy.

3. The final hearing was scheduled to take place in person. It was agreed that witness statements would be prepared, exchanged and taken as read. The witness statements were to be treated as the evidence in chief of the witnesses who would then be cross-examined and re-examined in the usual way.

4. In November 2020, respondent made an application for potentially two witnesses, Lesley Anderson and Jacqueline (Jackie) Duncan to give evidence

remotely by Cloud Video Platform (CVP). Before the final hearing, it was confirmed that Ms Duncan would be available to give evidence in person on 9 December 2020. It was also agreed that Ms Anderson and the respondent's representative, Ms Sutherland would participate remotely by CVP. The claimant attended in person.

5. Due to technical issues at the Glasgow Tribunal Centre (GTC) on 7 December 2020 the Tribunal was grateful to Ms Sutherland agreeing to travel from Edinburgh to the GTC to cross-examine the claimant. The Tribunal, the claimant and Ms Sutherland were in person in the hearing room.

6. Ms Sutherland represented the respondent remotely by CVP on 8 and 9 December 2020. The Employment Judge and the claimant were in in person in the hearing room on 8 and 9 December 2020.

7. On 8 December 2020, the Tribunal Members were present in the GTC connected to the hearing room remotely via CVP. Gary Langford attended and gave evidence in person. Ms Anderson, as arranged, gave evidence remotely by CVP.

8. On 9 December 2020, Ms Duncan attended and gave evidence in person. The Tribunal Members were also present in the hearing room.

9. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding the important parts of the evidence. Mr Sutherland and the claimant provided the Tribunal with written submissions which they gave orally when the evidence finished.

10. The Tribunal's approach was to consider the issues that it had to determine. The respondent conceded that dismissal can amount to unfavourable treatment and that the claimant was dismissed during a protected period.

11. The issues that the Tribunal had to determine were:

    (i) Did the respondent, during the protected period, treat the claimant unfavourably (unfavourable treatment being dismissal) because of her pregnancy)?

(ii) What financial loss has the claimant suffered as a result of her dismissal?

(iii) Is an award of future loss appropriate and if so at what level?

(iv) Has the claimant reasonably failed to mitigate her loss?

(v) Should an award be made for injury to feelings and if so, what is the appropriate *Vento* band?

The relevant law

12. Section 18 of the EqA provides that 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 an illness suffered by her as a result of it.

13. *South West Yorkshire Partnership NHS Foundation Trust v Jackson & others* UKEAT/0098/18 provides that the employment tribunal must enquire into the subjective reasoning of the respondent in order to determine the real "reason why" it dismissed the claimant.

14. Section 39 of the EqA provides that an employer must not discriminate against an employee by dismissing her or subjecting the employee to any detriment.

15. Section 124 of the EqA applies if the Tribunal finds that there has been a contravention of a provision referred to in section 120(1). The Tribunal may (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the complainant; (c) make an appropriate recommendation. The Tribunal must not make an order to pay compensation unless it first considers whether to make a declaration or recommendation.

16. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation, that a person contravened the provisions of the EqA the court must hold that the contravention occurred.

17. Section 136(2) of the EqA and *Ayodele v Citylink Limited* [2017] EWCA Civ 1913 provides that the general position is that the burden of proof initially rests with the claimant but will shift to the respondent if the claimant demonstrates a prima facie case of discrimination.

Findings in fact

18. The respondent employed the claimant as an administrative officer from 4 June 2018. Her employment was subject to the successful completion of a probationary period of 12 months during which her performance, attendance, conduct and behaviour was to be monitored and appraised. If employment is terminated during a probationary period, the respondent is to give the claimant five weeks' notice of termination.

19. Under the respondent's policy HR 15003 Probation: probationer's responsibilities, during the probationary period, the probationer is responsible for completing work to the required standard and on time; ensuring required standards of performance, attendance, conduct and behaviour are maintained and undertaking any necessary training.

20. The claimant also entered into an apprenticeship agreement with the respondent in which she undertook the Public Service Operational Delivery Apprenticeship (Level 3) programme. The apprenticeship agreement dated 8 October 2018, signed by the claimant and her then line manager Gary Langford, is part of and subject to the claimant's terms of employment. The terms of employment continue to apply during the apprenticeship programme and after it is concluded. The programme started on 11 June 2018 and was scheduled to end on 11 September 2019. The claimant's continued employment did not depend on the successful completion of her apprenticeship. Throughout the apprenticeship, the claimant's performance, attendance and conduct was subject to the respondent's policies and processes.

21. When her employment began the claimant was based in the Bathgate contact centre. The claimant resides in East Kilbride. She has a young son who has a disability. Due to the unpredictability of her child's behaviour the claimant

was primarily the beat person to settle and reassure him. The claimant had made arrangements for appropriate childcare on the basis that her she would not be available within a reasonable timescale in case of any emergency.

22. Around 4 June 2018 the claimant and others in her group were informed by the respondent that they would be moved to the East Kilbride contact centre because that is where most of them resided. The claimant rearranged her son's nursery arrangements to accommodate this. She attended her grandfather's funeral on the 8 June 2018. When returning to the office on 11 June 2018 the claimant was informed that the move to East Kilbride was not going ahead. This was extremely stressful for the claimant due to the changes that she had put in place for her son's childcare provisions, particularly given the sensitive nature of his condition.

23. The claimant was upset and shocked by the change in arrangements. It was stressful for her as she was unable to arrange for her son to return to the original nursery as the place had been taken and she could not financially leave the position. Her mental health deteriorated to such an extent she could not go to work. The claimant was placed on medication for depression. She unsuccessfully attempted to return to work during her sick absence period. The claimant was absent from work due to work related stress from 21 June 2018 until 17 July 2018.

24. An occupational health report was commissioned on 10 July 2018. The report advised that the claimant's anxiety and depression was likely to be covered by the EqA.

25. To accommodate the claimant's return to work and due to the nature of her son's care, the claimant had to take multiple periods of leave (including flexi leave) often at the last minute. Until alternative arrangements could be made the claimant had to use leave and flexi cover to cover her absences. The leave and flexi time taken by the claimant was agreed and approved by her manager, Alex Brown.

26. On 1 August 2018, the claimant attended a meeting with Shannon Thomas regarding concerns about the amount of sick absence taken by the claimant:

19 days of sick absence over one occasion. This was considered an unsatisfactory absence record and its effect was to reduce the claimant's overall efficiency as an employee because of disruption and uncertainty caused by the absences.

27. The claimant received a first and final written improvement warning on 10 August 2018. She was told that she was being placed on formal review period and of the expectation that there would be a sustained to improvement in her attendance. This was an opportunity to demonstrate she could reach and maintain the required attendance. The claimant was advised that for her appointment to be confirmed, her attendance record must be assessed as satisfactory. Attendance can be classed as unsatisfactory even though there are genuine reasons for the sick absence and there was no complaint about performance whilst at work. The claimant was informed of her right of appeal. The claimant appealed but it was rejected as it was sent a day late.

28. As a result of the claimant's caring responsibilities for her son on 21 September 2018 the claimant and Ms Brown met and completed a carer's passport which was to be reviewed on 21 March 2019 (the Carer's Passport). It recorded that the claimant had the ability to apply for leave through the current systems and that if this was not available, she should speak to her manager who would discuss the most appropriate way for this to be covered. It also recorded a discussion that special unpaid leave could have repercussions such as affecting leave balance and length of probation and that the claimant should try to minimise the use of emergency leave.

29. The claimant passed her level 2 apprenticeship examinations. She had a challenging target for completion of all assignments for months one to four by 31 October 2018. Ms Brown recorded in the Probation Report at the first review that the claimant may need additional time and support from the business, but she had also committed to use her own time.

30. The claimant was transferred with her colleagues to the East Kilbride contact centre on 1 October 2018. Their line manager was Mr Langford. As they were behind in their apprenticeship work Mr Langford gave them the first week to

work solely on this. That week the claimant was given emergency flexi leave on 3, 4 and 5 October 2018 as her son was unwell and hospitalised. The claimant and her colleagues were subsequently allocated one day per week to work on their apprenticeship.

31. Ms Brown sent Mr Langford an adviser handover report regarding the claimant from (the Adviser Handover Report). Although management had approved it stated, "the claimant had not managed her leave well" because of "difficulties at home" which had cause her to use leave and that she only had one hour, and six minutes annual leave left. It also stated that the claimant should focus on her apprenticeship; would need to build up her flexi leave; and that she had a final written warning in place for poor attendance. The Adviser Handover Report also explained that the claimant's trigger points for absence following the final written warning being issued were two days and four occasions and that she had one day of absence since the warning was issued.

32. On 8 October 2018, Mr Langford discussed with the claimant the deficit in flexitime. The respondent's flexible working policy provides that an employee's flexitime should be in deficit by no more than 22.12 hours at the end of each four-week reference period. During the conversation, Mr Langford advised the claimant that a plan had been put in place to reduce her flexi balance. It was agreed that the claimant would work back one hour per week. The claimant was also advised that she was not currently meeting the probation standards and discussed the attendance, performance and conduct standards.

33. On 22 October 2018, the claimant and Mr Langford spoke about her son's condition and the effect it was having on her health. Mr Langford arranged for the claimant to meet with one of the respondent's mental health advocates and allowed the claimant to work on her apprenticeship that day. The claimant was also given time to work on her apprenticeship on 29 and 30 October 2018.

34. The claimant was absent from work from 1 to 6 November 2018. This absence was initially recorded as viral flu but was subsequently recorded as a

pregnancy related absence. This absence triggered the points fixed after receiving the final written warning.

35. After taking advice from an HR caseworker, Mr Langford met with the claimant on 7 November 2018 for the second probation review in which she was given a warning that she was not on course to complete the probation satisfactorily and that the matter was being referred to a decision maker. Mr Langford recorded that the claimant had had four spells and twenty-five days of sickness since 4 June 2018. She had used her full leave entitlement for the year and was at the maximum deficit on her flexi sheet. There was no issue with her performance at work. Mr Langford stated that he would "recommend dismissal as Cheryl had not met the probation standards".

36. On 8 November 2018 Mr Langford was informed that the claimant and her group required to complete their apprenticeship work for level 3 exams by 28 November 2018.

37. The claimant was invited by letter dated 9 November 2018 to attend a formal meeting on 15 November 2018 to discuss the recommendation that had been made for the claimant's employment to be terminated on the grounds of unsatisfactory attendance. The letter records that her manager had deemed that the claimant had failed the review period and he had prepared a report requesting Jill Kidd, the Decision Maker to consider ending the claimant's employment with the respondent.

38. An occupational health report was commissioned on 13 November 2018 which stated that, "Recently stress and anxiety had been problematic for [the claimant] and she also had feelings of panic".

39. On 15 November 2018, Mr Langford put in place a stress reduction plan for the claimant which was to be reviewed monthly.

40. By letter dated 22 November 2018, the claimant was informed that Ms Kidd had decided to bring the claimant's employment to an end on the grounds that her attendance had not met the required standards during her probation. Enclosed with the letter was a copy of Ms Kidd's decision template showing

the factors that she considered when arriving at her decision. Ms Kidd agreed with Mr Langford's decision that the claimant's attendance was unsatisfactory during the review period and that Ms Kidd did not believe that the claimant had the potential to reach fully and maintain the required standards of attendance within a reasonable period. The decision to end the claimant's employment was also due to the amount of sick absence the claimant had since commencing employment with the respondent and in particular the amount of absence during the review period. The claimant was advised that she had five weeks' notice of termination and her last day of employment was 27 December 2018.

41. On 26 November 2018, Mr Langford was advised by the claimant that she had suffered a miscarriage. He sought advice from an HR caseworker who had been notified of the decision to dismiss the claimant.

42. Mr Langford had received a complaint from one of the claimant's apprenticeship group about the unreliability of the group's apprenticeship tutor. Mr Langford also knew that that there was an issue with the software failing to record that modules were competed and submitted.

43. The claimant did not work on her apprenticeship during her notice period. Mr Langford knew that it was a difficult time for the claimant as her colleagues were attending apprenticeship meetings and examinations while she was on her own applying for new employment. Mr Langford did not advise her to continue her apprenticeship work.

44. On 11 December 2018, the claimant was given special leave to take her son to an out of hours hospital.

45. On 17 December 2018, the claimant was late arriving at work after advising that she was unwell and had been locked out of her house.

46. By email sent on 17 December 2018, the claimant appealed against the decision to dismiss her and advised that the absence which caused her to fail her review period was pregnancy related and that she had been unaware that she was pregnant at the time of the absence.

47. Christine Kilmartin, Appeal Manager invited the claimant by email sent on 19 December 2018 to attend an appeal meeting on 10 January 2019.

48. On 19 December 2018, the claimant was late having been struck in traffic. She took unpaid leave on 21 December 2018 because her son was unwell after receiving vaccinations.

49. The claimant's last day of employment was 27 December 2018. She did not attend on this day as she could not get childcare for her son.

50. By letter dated 18 January 2019, the claimant was advised that her appeal was upheld, and she was to be reinstated without any break in service. Ms Kilmartin emailed Mr Langford (copying Ms Anderson and Ms Duncan) explaining that the absence that led to the claimant being referred to a decision maker should be disregarded for attendance management purposes as it was pregnancy related.

51. On 21 January 2019 Mr Langford spoke to the claimant about returning to work on 28 January 2019. The claimant was behind in her apprenticeship and given a week to catch up. Mr Langford said that he had discussed the matter with Ms Anderson and the claimant may be given an extension of time to complete the apprenticeship.

52. The claimant was absent from 4 February to 5 February 2021 as a result of suffering from shingles. The claimant asked Mr Langford if she could use on of her bank holidays in lieu. Mr Langford took advice from an HR caseworker and Ms Duncan. He informed that claimant that as she had an infectious disease, she required to take sick absence.

53. On 6 February 2019, the claimant spoke to Mr Langford about using some bank holidays in lieu of working on 7 and 8 February. Mr Langford pointed out that this would leave the claimant with no leave available until June 2019.

54. On 13 February 2019, the claimant attended work late as her son had vomited on her. Mr Langford spoke to the claimant and reviewed her stress reduction plan. He also advised the claimant that he needed to see a letter from her doctor advising that she had shingles as otherwise he would require to refer

the claimant to a decision maker regarding her attendance. They also discussed the claimant's flexi leave which was approaching its maximum and that the claimant did not any other options for leave. The claimant said that she intended on continuing the previous agreement of working one hour per week to reduce her flexitime deficit.

55. On 18 February 2019, the claimant attended work late as her son had been at NHS 24 during the night. The following day, she arrived late due to traffic. On 20 February 2019, the claimant advised that she would be late to work as her father-in-law was late in picking up her son.

56. Around 19 February 2019 Tracy Ralston Capability Champion raised with Sheila McGill Apprenticeship Tutor the possibility of the claimant being put on a break in learning (BIL) for the period that she was absent for sickness and the period that she was dismissed. As the claimant was not funded Ms McGill advised that BIL was not necessary and following discussion with Mr Langford it was considered appropriate to extend the end date of the claimant's Apprenticeship Agreement (11 September 2019) by three months. Ms Anderson was aware of this.

57. The claimant offered to catch up on her apprenticeship work in her own time. Mr Langford advised the claimant that there was authorisation for a three-month extension of her apprenticeship. To support her she was changing apprenticeship groups. The claimant was not informed that this would reflect badly on her probation.

58. Suzanne Smith, Apprenticeship Tutor was assigned to assist the claimant in completing the workshop for the first level 3 examinations which the claimant was scheduled to sit around this time. Ms Smith advised the claimant that the most important issue was to get up to date with the exams. The claimant was to focus on key items to read and complete within modules.

59. On 25 February 2019, the claimant's mother had been hospitalised the previous night with a terminal illness. Mr Langford spoke to an HR caseworker with a request from the claimant to swap a working day for a non-working day. Mr Langford also discussed that the claimant had already used special and

unpaid leave. It was suggested that a temporary change to the claimant's working hours to a start later or reduction of hours should be discussed with the claimant. Mr Langford said that the claimant final probation review was the following week, and he was considering an extension. However, he was going to set the claimant's expectations that she may not get through probation.

60. On 26 February 2019, the claimant came into work but was upset. Mr Langford agreed, following discussion with Ms Anderson that the previous day would be recorded as special leave so the claimant did not need to work on her non-working day and that the claimant could work on her apprenticeship at home on 26 February 2019.

61. Mr Langford also completed an online referral form to the reasonable adjustment support team. Mr Langford was advised by the respondent's workplace wellness team that he had put all supports in place that he could for the claimant.

62. On 27 February 2019, the claimant telephoned in sick and advised Mr Langford that she needed to attend the hospital in the afternoon. Mr Langford sought advice from an HR caseworker about the various complexities Mr Langford was advised to consider absence without pay and to seek advice from his manager.

63. On 28 February 2019, Mr Langford had a discussion with the claimant regarding her situation. Mr Langford explored a wish to provide flexibility with the claimant's start or finishing times or a temporary alternative working pattern where the claimant could work each Saturday and have a day off during the week or a reduction in her working hours. The claimant indicated that she did not wish to enter into a temporary or alternative working pattern but advised that a flexibility with start and finish times would be helpful. Mr Langford advised the claimant that he had no further options available to support her with leave given that she had exhausted all options and that any absence would either be recorded as sick absence or unauthorised absence.

64. Ms Anderson joined the meeting with the claimant and Mr Langford. Ms Anderson reiterated that there were no other options with regard to leave. She agreed to the flexibility of start and finish times and that the claimant could work a Saturday to cover if she needed a day during the week. Ms Anderson also mentioned an external group which helped families dealing with the situation the claimant was dealing with her mother. The claimant said that she had already made contact and had support for her mother from a MacMillan nurse.

65. The claimant was selected for a training course for a new line of business (EHL training) which she attended in early March 2019.

66. On 4 March 2019, Mr Langford spoke to the claimant who had left work the previous Friday having advised that she had Norovirus. The claimant had been unable to work on her apprenticeship a couple of hours before going home.

67. The claimant subsequently emailed Mr Langford to advise that she could not work on Saturday 2 March 2019 as she accompanied her mother to her first chemotherapy session. She has stopped being sick at that point and wore a mask. Mr Langford reminded the claimant of their discussion that any absences would need to be recorded as sick or unauthorised. The claimant said that she would work Saturday 9 March to bring down her flexi deficit to under the 22.12 deficit. She had a further three weeks left on her flexi period to reduce it.

68. On 5 March 2019, Mr Langford spoke to the HR caseworker team to obtain advice about the claimant's proposal to work on Saturday 9 March 2019. He was advised that it is permissible for the claimant to go over the maximum flexitime deficit as long as she worked it below the flexi deficit limit that within the four-week period. Mr Langford confirmed there was already a plan in place for the claimant to reduce her flexitime deficit.

69. At the start of March 2019, the claimant advised Mr Langford that she was pregnant. Mr Langford informed Ms Anderson. Mr Langford carried out a health and safety risk assessment form.

70. On 14 March 2019, Mr Langford spoke to an HR caseworker enquiring whether he was able to complete the nine-month probation review over the telephone as the claimant was currently absent with pregnancy related sickness. Mr Langford was advised that he should wait and have a face-to-face meeting. He then discussed the background to the claimant's case and enquired about the risks if the claimant failed probation and was dismissed and what mitigations could be considered.

71. In relation to sick absence, Mr Langford was advised that the claimant could not be penalised as she had successfully completed the formal review and accountable absence had not reached triggers since the final written warning was implemented.

72. As regards leave, Mr Langford was advised that if the claimant had been authorised to use her leave in the previous office, it would be unfair to hold this against her. Mr Langford said that he and his manager (Ms Anderson) had discussed with the claimant her flexitime deficit balance which at the moment the claimant was still in deficit. Mr Langford was informed that this might add weight to dismissal. However, the annual leave situation would have to be considered.

73. Mr Langford also discussed the claimant's progress of her apprenticeship work and her general performance when she was in the office. Mr Langford said that the claimant had been given time to get back up to date when reinstated and had been moved to a new group as she was behind in her examinations. He was advised that this would add weight to the dismissal decision. Mr Langford did not mention that authorisation had been given to a three-month extension to the claimant's apprenticeship.

74. Mr Langford said that the claimant's performance is good on tax credit calls and she has a good manner with the public. The HR caseworker placed Mr Langford on hold to check with a colleague and then returned and advised, "she could understand why dismissal is an option however an extension would be more appropriate as she has successfully completed a formal review

period for attendance, and she was authorised by previous office to use her annual leave with no discussions happening at the time in the other office."

75. Mr Langford had concerns that the claimant was not meeting the standards of attendance because her personal circumstances. He needed to look at how the business could support her, and he had no indication that it was going to improve.

76. Mr Langford spoke to Ms Anderson about the final probation review. He was concerned about the risks of the claimant failing probation and being dismissed when pregnant. Ms Anderson advised that she would not be the claimant would not be given an extension to her probation. Considering this discussion Mr Langford felt conflicted this was contradictory to his conversation with HR.

77. At the final probation review around 20 March 2019 Mr Langford decided that the claimant had not passed her probation satisfactorily. They discussed the claimant's attendance level because of her personal circumstances. The claimant commented that a lot of the sick absence was caused by what had happened in the previous office. Mr Langford accepted that was the case. They discussed the claimant's performance. It was noted that the claimant was over her flexi balance and the need to build this up given the limited leave options. It was also noted that the claimant had used much of her annual leave due to childcare issues. The claimant said that her father and partner were now more available to help with this. They also discussed that the claimant had moved apprenticeship groups and that she was two months behind. She had caught up with examinations at the time of the final probation review. The claimant said she was behind in her apprenticeship because of the time she was dismissed before being reinstated. They discussed the outcome of the review. The claimant mentioned the possibility of extension. They discussed the claimant's personal circumstances. Mr Langford said that was not going to improve going forward. Mr Langford said that as the claimant had failed the probation the case would go to a decision maker who would be Ms Anderson. He told the claimant to prepare for the worst outcome being dismissal. The

claimant was concerned that the decision had already been taken and felt it was because she was pregnant.

78. By letter dated 16 April 2019, Ms Anderson invited the claimant to a meeting to discuss her probation year. The letter referred to the probation report from the claimant's manager "and their recommendation to dismiss". The claimant was given the right to be accompanied.

79. The meeting took place on 25 April 2019 (the 25 April Meeting). The claimant was accompanied by Stephen McMorrow, Trade Union Representative accompanied the claimant. Ms Anderson asked how the claimant was feeling as she knew that the claimant was suffering from bad morning sickness. Ms Anderson said that she was following the guidance in HR 15005 probation: Decision Maker. She would not make any decision that day but that the claimant would be advised of a decision within five working days. Ms Anderson said that the purpose of the meeting was for her to consider the claimant's progress in all areas of probation.

80. Ms Anderson said that she would refer to the probation report and to Mr Langford's recommendation to dismiss as he was not recommending an extension to the probation. The claimant and her representative said that Mr Langford had not recommended dismissal and that he had told the claimant so. The letter dated 16 April 2019 was a template letter. Ms Anderson said that the claimant had been upset during her some of her conversations with Mr Langford and may be confused. Mr Langford had not recommended an extension or confirmation of employment. If he had another template letter would have been used.

81. Mr McMorrow said that looking at the guidance and HR Report the two issues were to do with the apprenticeship and flexi. He said that the claimant was further on in her apprenticeship work than last recorded in the probation report. The claimant explained to Ms Anderson that the reason she was behind in her apprenticeship was that because she was dismissed previously and then reinstated. She was not far behind others in her team and had sat all the tests that she needed to. The claimant did not tell Ms Anderson during

the meeting that there were any difficulties with her first apprenticeship tutor or that it remained difficult for her to catch up on the apprenticeship during the weeks she was given after reinstatement.

82. Ms Anderson raised the claimant's sick absence. Mr McMorrow said that the claimant had passed her review period. The claimant agreed that Mr Langford had been supportive and that she had four spells of sickness totalling 23 days.

83. The claimant explained that she had been required to use annual leave when working in Bathgate contact centre. Her son had autism and to maintain her job and look after her son, she required to take annual leave. Mr McMorrow said that annual leave was agreed, approved and authorised. The claimant acknowledged that she had been given special leave. Mr McMorrow said that Ms Anderson should not use this as a rod. Ms Anderson said that she had to consider the whole probation period.

84. Mr McMorrow said that it was not legitimate to factor in annual leave and flexi leave as this should be dealt with at the time through misconduct guidance. Flexi leave was now within the parameters.

85. The claimant said that it had been a terrible year for her, and it was not a fair representation. Ms Anderson said she understood this especially through personal circumstances with the claimant's mother. Ms Anderson said that the claimant had been given an opportunity to reduce her hours but that the claimant had not agreed to this due to financial commitments. The claimant confirmed the position.

86. Ms Anderson said that she was not saying the claimant's use of annual leave was itself a reason for dismissal but overall, it had not been a great year for the claimant and that as it was her probation year, the only year that could be looked at was to consider whether to continue her employment.

87. With regard to the claimant being behind on her apprenticeship when she came to East Kilbride contact centre, the claimant confirmed that everyone had been behind and that she was now back up to speed.

88. Ms Anderson stated that she had not made her decision and that she would "consider all options and information available". The claimant had been given EHL training and Ms Anderson, "would not discriminate against" the claimant. In response, Mr McMorrow said he was under no illusion that Ms Anderson had not made up her decision. The reason for dismissal would need to stand up against the test. It needed to be based on a specific reason. HR had confirmed the only reasons that would weight towards dismissal would be flexi leave and apprenticeship. Ms Anderson replied that she needed to look at all available information. The claimant indicated that her annual leave renews in June so she could anticipate leave from May; she had no intention to take other leave and she was building back flexi. Ms Anderson said that anticipating leave at the present moment concerned her and suggested that she was already taking leave from her future year. The claimant said that she did not mention anticipated leave to say that she would take it. She would not. If she needed to take leave, she would use flexi but would make sure that she was within her parameters. The claimant said that the job meant a lot to her. She had things in place to help support her with her mother and her son. Her mother now lives in East Kilbride which is a lot better. The claimant had had a bad year and it was not what she was usually like to work. Mr McMorrow recommended an extension to the probationary period be given. Ms Anderson responded she would take this recommendation into account. She was not taking any pregnancy related absences or shingles into account. She would look back at all available information and notify the claimant of her decision within five working days. She was also invited to make any written representation by close of play. Ms Anderson said she would clarify points raised with Mr Langford.

89. Ms Anderson spoke to Mr Langford about the conversations that he had about a recommendation for the claimant's dismissal. Mr Langford said it was all noted in the probation report. An extension to probation was discussed. It was agreed taking everything into account the claimant could not see an immediate improvement in her circumstances. The claimant pre-empted that she had a low expectation of a positive outcome. When asked what had been

discussed the previous day Mr Langford reiterated it was said in the probation report and that the claimant should prepare for the worst.

90. The two options open to Ms Anderson following the case being referred to her were to extend the claimant's probationary period or to dismiss her. Before issuing her decision, Ms Anderson spoke to an HR case worker on 30 April 2019. Based on the information provided by Ms Anderson she was advised that her decision to dismiss was in accordance with the guidance and that the apprenticeship programme was a key component of probation which had been impacted by the failure to provide effective and regular service.

91. By letter dated 30 April 2019 Ms Anderson advised the claimant of her decision to dismiss the claimant on the grounds that she had not made the required standard during the probation period.

92. Ms Anderson referred to two of the claimant's responsibilities during her probation which Ms Anderson determined the claimant had not satisfied. These required being able to complete her work to the required standard and on time and to ensure that she maintained the required standards of performance, attendance, conduct and behaviour. Ms Anderson said that not including the pregnancy related absence the claimant's average attendance over both the period before her dismissal and after her reinstatement amounts to 71.5%. She also referred in her letter to the claimant's level of attendance having a negative impact on her performance or ability to complete her apprenticeship programme on time which led to the claimant being moved apprenticeship groups and also the claimant's management of her flexi time. The claimant was advised of her right of appeal.

93. The misuse of flexi time level of her deficit was not the main basis for Ms Anderson's decision but was a factor. The claimant's failure to provide regular and effective service Ms Anderson considered was detrimental to the respondent's business which impacted on her progress on the apprenticeship.

94. Ms Anderson contacted an HR caseworker on 30 April 2019. She recorded thar she told him that the reasons for confirming dismissal were "due to the

fact that the apprenticeship programme was not completed on time due to the fact that [the claimant] could not demonstrate regular and effective service due to many ongoing personal issues, which has continued after moving from Bathgate and also taking into account informal discussions regarding flexi and plan in place to reduce." She also recorded that the HR caseworker agreed that the decision was in accordance with the guidance. The business had supported and made adjustments. It was acknowledged that the apprenticeship programme "is a key component and this is continuously impacted by ineffective and regular service".

95. By letter dated 30 April 2019, Ms Anderson advised the claimant of her decision to dismiss her on the grounds that the claimant had not met the required standard during the probation period. Ms Anderson referred to two of the claimant's responsibilities during her probation which Ms Anderson determined that the claimant has not satisfied: to complete her work to the required standard and on time; and to ensure she maintains the required standards of performance, attendance and conduct and behaviour. Ms Anderson recorded that, not including pregnancy related absences, the claimant's average attendance over both the period prior to her dismissal and after her reinstatement amounts to 71.5%. Ms Anderson referred to the claimant's level of attendance having a negative impact on her performance or ability to complete her apprenticeship programme on time, which led to the claimant being moved apprenticeship groups, and also the claimant's management of her flexi-time. The claimant was advised of her right to appeal

96. On 9 May 2019 Ms Anderson spoke to the claimant and advised that she was going to move the claimant to report to a different line manager.

97. The claimant appealed against Ms Anderson's decision to dismiss her. The grounds were that:

(i) The claimant was removed from her apprenticeship at the end of November 2018 until she was reinstated on 28 January 2019. The claimant missed out in sitting examinations and was not given an opportunity to sit these to remain up to date. She was scheduled to sit

two and that would leave her one exam behind the original group which she would sit at the next available opportunity. The claimant did not ask to be moved groups and was not made aware of the consequences of doing do.

(ii) There was no issue about flexi leave. The claimant exceeded the deficit on one occasion when she discovered her mother was terminally ill. The deficit was back under the limit within the four-week period. This was acceptable and a plan to reduce the deficit was in place.

(iii) HR recommended that an extension would be more appropriate than dismissal. The claimant understood that Ms Langford did not recommend extension because he did not see her situation improving because her mother was terminally ill.

98. The appeal was allocated to Jacqueline (Jackie) Duncan who contacted an HR caseworker. Ms Duncan was told it was evident that Ms Anderson was aware of the maternity absences. The decision to dismiss was based on "performance and non-maternity absence issues". It was suggested at the meeting with the claimant Ms Duncan needed to challenge the claimant about her ability to complete her apprenticeship and the quality of her work. She should also ask about the level of attendance given all annual leave had been used up.

99. By letter dated 14 May 2019 the claimant was invited to appeal meeting on 21 May 2019. The appeal was not a full rehearing of the case. The purpose was to examine the decision-making process and decide whether it was reasonable.

100. The appeal hearing took place on 21 May 2019 and the claimant was accompanied by Elsa Kerr, Trade Union Representative.

101. The claimant said that one of the reasons for the decision to terminate her employment was that she was behind her apprenticeship. However, she had been dismissed before and had been reinstated and had missed two to three months of her apprenticeship. The claimant had spoken to Mr Langford about

working from home and sitting the examinations. She understood that it had been agreed that there should be an extension to her apprenticeship but there was no discussion that this would reflect badly on the claimant's probation. Had she known that she would have worked from home. The claimant had been in work, but she was told that she was not to be on the apprenticeship scheme.

102. The claimant also explained that the reason given for her flexi being too high was because of issues with her son and then discovering her mother's terminal illness. As the claimant had no leave, she had taken a day's flexi which put her over the 25 hours' deficit but had agreed to work it back. She was back under the 22.12 hours throughout the four week of accounting period. This had been checked with Mr Langford and that there had been an agreement the claimant would work an extra hour per week and even of the claimant did so during the four-week accounting period.

103. Finally, the claimant said that Mr Langford had not recommended dismissal. The claimant confirmed that Mr Langford did not mention anything about the claimant's apprenticeship or flexi but only her personal situation. The claimant considered that other people had issues with flexi and being behind in their apprenticeship that were not dismissed. The claimant said that she had told Mr Langford that he could not discriminate by association.

104. Ms Duncan said that the claimant had used all annual leave, maxed out her flexi, been given unpaid leave, special leave and emergency leave. As the claimant was unavailable 29 percent of the time Ms Duncan asked if it impacted on her apprenticeship. The claimant said that she did not believe so.

105. The claimant was asked about what evidence she could provide to show that she was relied upon to come into work and on time. The claimant explained that she had caught up with her apprenticeship already and was only one exam behind. Her manager was happy with the standard and quality of work. She has also managed her shifts during her mother's illness. Her flexi time was back down and that she had not asked for any special leave. When the

claimant was going through the previous dismissal process she came to work and performed. Ms Kerr explained in relation to her reliability the claimant had got through a sustained improvement period and her annual leave entitlement renewing would help.

106. The claimant also said that she did not have issues with childcare now that she had plans in place. The only way she could support her son and keep her job was to use annual and flexi leave. If she could have a three-month extension to her probation, it would show she could improve. She worked hard when she was there and has not asked for any leave. She had been having difficulty with her mother and son and the move from Bathgate contact centre, but she did not see any reason why she would need time off. Her mother's care was all in place. Ms Duncan did not view the claimant referring to the new leave year as a positive sign.

107. By letter dated 29 May 2019 Ms Duncan wrote to the claimant explaining that her appeal had been unsuccessful. Ms Duncan considered that the procedure had been followed correctly and all the facts and evidence had been properly considered. Ms Duncan considered that Ms Anderson had taken the pregnancy related absences. There was no new evidence. In Ms Duncan's view there was no evidence to suggest that the claimant would give effective and a reliable service in the future. Her use of leave, flex, emergency leave, special leave, unpaid leave equated to 29 percent of her available time along with her frequent late starts and change of [RDO] had be a contributing factor in her ability to complete her apprenticeship on time as well as being a reliable front facing adviser. The frequency of requests for emergency leave, change in RDO, special leave, unpaid leave, high flex debit and late starts are mostly all acceptable forms of leave request within HMRC, the frequency and short notice was not conducive to regular or reliable service.

108. The claimant was stressed and upset by Ms Anderson's decision and the purported reason for it. The claimant had been given the impression that the respondent was implementing its policies with the intention of supporting her and then was told that she was being dismissed.

109. The claimant's annual gross salary before her dismissal was £19,160. Her net weekly salary before her dismissal was £289.60. If the claimant had 52 weeks' service immediately prior to the 15th week before the EWC, she would have been entitled to 26 weeks' full pay if still employed by the respondent.

110. The claimant obtained alternative employment on or around 10 July 2019 and worked until 4 October 2019. The claimant earned £3,019.10 in a temporary job which she obtained from 10 July 2020. The claimant stopped work to have her baby and gave birth on 31 October 2019.

111. The claimant applied for alternative roles up to June 2019 and thereafter did not apply for an alternative role. On 5 October 2019 the claimant received maternity allowance of £148.68 for 39 weeks at £148.68, that is £5,798.53. Had the claimant remained in her employment she would have returned to work after 39 weeks of maternity leave.

112. The claimant has been in receipt of Carer's Allowance of £67.25 per week for 22 weeks at the date of the hearing. The claimant will continue to receive Carer's Allowance until she obtains another role.

Observations on witnesses and conflict of evidence

113. The Tribunal considered that the claimant gave her evidence in a calm, understated and dignified manner. The Tribunal's impression was that the claimant was a motivated and conscientious employee who during the probationary period faced simultaneous challenging personal issues.

114. Mr Langford gave his evidence in a candid manner. The Tribunal was mindful that he was remained employed by the respondent. He displayed empathy for the claimant at the final hearing. The Tribunal had no doubt that while managing the claimant he was very supportive of her and endeavoured to assist her so far as he was able within the respondent's policies. However, managing the claimant was challenging and it appeared to the Tribunal that Mr Langford was out of his depth and relied on support from Ms Anderson. To his credit Mr Langford continually sought and followed HR advice. The

Tribunal considered that he was being truthful about his recollection of what was said before the claimant's employment was terminated.

115. By contrast other than when the claimant was informed about her mother's terminal illness Ms Anderson appeared to be indifferent towards the claimant's personal circumstances. Her focus was on the business. The Tribunal's impression was that Ms Anderson considered that the clamant and Mr Langford's management of her was a distraction.

116. Ms Duncan gave her evidence in a straightforward manner and reiterated the position taken by her in contemporaneous correspondence. While the Tribunal appreciated that Ms Duncan was giving evidence about events which took place over a year ago the impression was that Ms Duncan's consideration of the appeal was superficial and she had little grasp of the detail. The Tribunal considered that Ms Duncan relied heavily on the Ms Anderson having disregarding pregnancy related absences and the assumption therefore that pregnancy would not have factored in Ms Anderson's decision-making process

117. The Tribunal considered all the evidence and considered it appropriate to record its deliberations on the following material areas of conflicting evidence.

118. When the claimant was dismissed in November 2018 she did not continue to work on her apprenticeship until after her reinstatement. The evidence of Ms Anderson and Ms Duncan was that the claimant was behind her peers in her apprenticeship and she could have continued to work on her apprenticeship during her notice period. Mr Langford said in cross-examination that the claimant's apprenticeship group had fed back problems with the tutor which had resulted in the tutor being changed and that the recording of the modules indicated that work was incomplete rather than being extra work which did not need to be done. The Tribunal's impression was that neither Ms Anderson or Ms Duncan appeared to have a clear understanding of what progress the claimant had reached on her apprenticeship work and when. Given that the apprenticeship is bespoke to the respondent's organisation, the apprenticeship work enabled her to progress to examinations which she was

unable to sit; the claimant had been dismissed and while she had appealed the hearing was after her dismissal had taken effect, the Tribunal considered Ms Anderson's expectation that the claimant did work on her apprenticeship during the notice period incongruous.

119. In February 2019 Mr Langford arranged for the claimant's apprenticeship agreement to be extended to allow her to catch up on examinations that she had missed and for support for her to move apprenticeship group. Mr Langford's evidence was that he spoke to Ms Anderson about this and told the claimant so. Ms Anderson said that she did not recall this discussion and that she did not recall seeing the contemporaneous file note made by Mr Langford when she made her decision. In any event she did not believe it would have made a difference to her decision as the claimant had already been given time to catch up. The Tribunal did not consider that Ms Anderson's evidence on this issue plausible. The Tribunal did not believe that Mr Langford would have explored an extension without first speaking to Ms Anderson. Having gone to the trouble to prepare a file note and being involved in an email exchange the Tribunal thought it surprising that it would not have been on the claimant's file whether Ms Anderson read it was another matter. The Tribunal was also at a loss to understand why an extension would be sought and granted in late February 2019 if by that stage there was view that the claimant had not taken advantage of the addition time given when she was reinstated in late January 2019. It was also unclear to the Tribunal how that additional time would have allowed the claimant to sit the examinations that she had missed.

120. Mr Langford referred to inconsistency between his contemporaneous note of the conversation with an HR case worker on 14 March 2019 and the computer record of the HR case worker. The latter does not record that he was told that an extension would be more appropriate. Mr Langford said that he was confident that this was the advice. The Tribunal accepted his evidence. The Tribunal had no doubt that was what Mr Langford understood the advice to be and, in all likelihood, it was the advice given. The Tribunal noted that in several respects Mr Langford's note is more detailed and records the HR

caseworker checking the position with a colleague which is also not mentioned in the computer record.

121. Mr Langford said that before the final probation review, he spoke to Ms Anderson and Ms Duncan and advised them that in his view dismissing the claimant now the business knew that she was pregnant would be too risky. He was told by either Ms Anderson or Ms Duncan that the claimant would not be given an extension to her probation period. Mr Langford said he had not been told prior to the claimant becoming pregnant by either Ms Anderson or Ms Duncan that the claimant would not be able to pass her probation period. Ms Anderson's position was that she did not give any advice to Mr Langford before the final probation review as to what decision he should make and did not tell him that she would not agree to extend the probation. She also said Mr Langford did not raise with her any concerns about dismissing the claimant on the grounds that it presented a risk to the business. Ms Duncan has said that Mr Langford never expressed any concerns to her that dismissing the claimant presented a risk in light of the respondent being aware that the claimant was pregnant.

122. The Tribunal considered that managing the claimant was challenging and it appeared that Mr Langford regularly sought support from his managers particularly Ms Anderson about managing the claimant. For example, Ms Anderson joined the meeting with the claimant and Mr Langford on 28 February 2019. He informed Ms Anderson of the claimant's pregnancy as soon as he was told. The Tribunal therefore considered that it was highly likely that Mr Langford would have wanted to discuss with Ms Anderson the claimant's probation the likelihood of her passing it; and the likelihood of the claimant's attendance improving given her caring commitments to her son and mother and now her pregnancy.

123. When Mr Langford spoke to the HR case worker, he knew that the claimant was pregnant and was absent for a pregnancy related illness. In the Tribunal's view it was inconceivable that having discussed the risks to the business with HR, Mr Langford would not have spoken to Ms Anderson about the risks of dismissing the claimant.

124. Mr Langford's discussion with the HR caseworker on 14 March 2019 was prompted by the claimant was absent for a pregnancy related illness when the final probation review was to take place. He also knew that the claimant was likely to fail probation and the case would be referred to Ms Anderson. Mr Langford found the claimant's case difficult to deal with. The Tribunal therefore consider that it is more likely that not Mr Langford would have expressed concern to Ms Anderson about dismissal given his involvement in the claimant's earlier reinstatement.

125. The Tribunal accept that Ms Anderson wanted Mr Langford to manage the claimant and make a recommendation. The Tribunal considered that Mr Langford's position that Ms Anderson said that she would not extend the claimant's probation was more probable. The Tribunal's reasoning was that Mr Langford had recommended dismissal on 7 November 2018. He therefore understood the process, he was not conflicted and was prepared to take that recommendation. In March 2019 Mr Langford knew that the claimant was likely to fail her probation. Having discussed the claimant's circumstances with an HR Caseworker Mr Langford understood that the advice was that an extension to the claimant's probation period was more appropriate than dismissal. While Mr Langford did not say in evidence that he wanted to recommend an extension to the claimant's probation the Tribunal considered that had he been unaware of Ms Anderson's position it likely that he would have done so as he was more likely than not to take the advice that he had received from an HR caseworker. It seemed to the Tribunal that he was conflicted when completing the final probation review because he knew that Ms Anderson was not prepared to extend the probation period and the claimant was to be dismissed.

126. An area of contention during the internal process was whether Mr Langford recommended the claimant's dismissal. The claimant's position was that no recommendation was made. The position of Ms Anderson and Ms Duncan was that Mr Langford did recommend dismissal. In the Tribunal's view it was open to Mr Langford to recommend dismissal knowing that it was not his decision. He did not do so. It was also open to him to recommend an extension

to probation, but he knew that recommendation was not going to be accepted by Ms Anderson to whom he reported and relied upon for support. There was no dispute that Mr Langford told the claimant to prepare for the worst outcome of dismissal. The Tribunal considered that was not because it was Mr Langford's recommendation but rather it was what he knew was to be the outcome.

127. The claimant's position was that during the final probation review she told Mr Langford that she thought she would be dismissed because she was pregnant. Mr Langford did not recall this being said to him. It is not recorded in the notes of the final probation review. Ms Anderson's evidence was that when Mr Langford spoke to her about the claimant being upset following the final probation review, Mr Langford did not suggest to her that the claimant thought she would be dismissed due to her pregnancy. The claimant did not raise during the meeting with Ms Anderson that she believed the real reason for any dismissal would be her pregnancy and nor did her representative.

128. The Tribunal considered that as the claimant was told at the final probation review who would be the decision maker and to expect the worse outcome it was highly likely that the claimant believed that her pregnancy was the reason for her dismissal. The reasoning was that the claimant understood that there were two options, but the impression given was that the decision had already been taken; she announced her pregnancy and had been absent for a pregnancy related illness. While the Tribunal had no doubt that was what she thought and probably implied to Mr Langford, the Tribunal considered that she may not have said so expressly. The Tribunal did not consider it surprising that he did not allude to this in any discussion with Ms Anderson given their earlier discussion. The Tribunal also felt that it was understandable not to specifically raise this at the meeting with Ms Anderson but noted that it was raise during the appeal.

129. In relation to Ms Anderson's decision making the claimant was of the view that Ms Anderson had predetermined the decision to terminate the employment. Mr McMorrow is recorded in the notes of the meeting as saying

that he was under no illusion that Ms Anderson had not made her decision. Ms Anderson denied that was so.

130. The Tribunal considered that Ms Anderson's witness statement suggested a more open-minded approach to the decision making than appears to be reflected in the contemporaneous documentation. For example, she refers to the offer to reduce hours; the claimant's refusal due to financial commitments and that, "it is possible that if this had been agreed, then there would have been a rational for allowing time for that adjustment to bed in." This possibility was not mentioned by Ms Anderson during the 25 April Meeting or in her decision-making manager's record. Given the findings about Ms Anderson's discussion with Mr Langford before the final probation review and her comments at the 25 April Meeting the Tribunal considered that the decision had been made. The Tribunal's impression was that regardless of any explanation offered by the claimant Ms Anderson's position at the 25 April Meeting was that the claimant had not passed the probation satisfactorily; the claimant had been supported; looking at the probation period as a whole the claimant was to be dismissed.

131. Turning to Ms Anderson's reasoning, her evidence was that claimant's use of flexi-time, and her level of deficit was not the key reason. The main reason was the claimant not having progressed satisfactorily her apprenticeship and all the management time which she had been given to help her progress of which she had not taken advantage.

132. The Tribunal considered that throughout the claimant's employment measures were implemented ostensibly demonstrating support and compassion towards the claimant, but in practice did not translate in the way she was managed. Examples include management authorising the claimant to uses most of her annual leave in the first three months of her employment then criticising her for not having retained annual leave for later in the year; providing a carer's passport but not reviewing it and taking little or no account of it during the decision-making processes; extending her apprenticeship then terminating her employment for her ability to complete her apprenticeship "on time" offering a flexi-time policy allowing a maximum deficit to be recouped

over four weeks then criticising the claimant for using the policy and having a flexi time deficit was consistently higher with those in her team.

133. The Tribunal's impression was that there was a lack of clarity by the respondent's witnesses about what type of leave was being granted to the claimant; when it was granted; and the impact (if any) of certain types of leave on annual leave. This obfuscated their understanding of what if any policy/leave the claimant had "misused".

Submissions for the respondent

134. Ms Sutherland helpfully prepared written submissions summarising the claim; issues to be determined; proposed findings in fact; and the law. Copies were provided to the Tribunal and the claimant before Ms Sutherland referred to the document when making oral submissions. The following is a summary.

135. The respondent accepted that dismissal amounts to unfavourable treatment and that this occurred during the "protected period". It is not accepted that the decision to dismiss the claimant was "because of" her pregnancy. The respondent accepted that it was aware of the claimant's pregnancy at the time it decided to dismiss her.

136. With reference to section 18 of the EqA it was submitted that this is a case in which the factual basis for the respondent's decision to dismiss the claimant is disputed. Therefore, the Tribunal has to enquire into the respondent's subjective reasoning to determine the real "reason why" it dismissed the claimant. The claimant's pregnancy need not be the sole reason for the decision but it must materially influence the respondent's conscious or subconscious decision-making.

137. The Tribunal was referred to *South West Yorkshire Partnership NHS Foundation Trust v Jackson and others UKEAT/0090/18* and was reminded that it was not a "but for" test which is to be applied when determining if the decision was discriminatory.

138. The burden of proof initially rests with the claimant but will shift to the respondent if the claimant demonstrates a *prima facie* case of discrimination

(*136(2) of the EqA 2010; Ayodele v Citylink Ltd [2017] EWCA Civ 1913*). The respondent's position was that the claimant had failed to establish facts from which an inference could be drawn of discrimination. If the Tribunal disagrees, then it was submitted that the respondent's explanation for dismissal is sufficient to show that it did not discriminate against the claimant.

139. The respondent's position is that the claimant was dismissed because she failed her probationary period and not because she was pregnant. The claimant's employment was subject to the successful completion of a twelve-month probationary period and her contract expressly states that if the required standards are not achieved and maintained, the claimant's employment may be terminated. The Tribunal was referred to Ms Anderson's Decision Making-Manager's record and her evidence and that of Ms Duncan.

140. The Tribunal was reminded of the evidence about the claimant's progress in her apprenticeship which Ms Anderson said was a key factor in her decision. She also recorded in her Decision Making-Manager's record that it was due to the level of the claimant's regular and effective service before the first dismissal that she was behind in her apprenticeship. It was accepted that that there is dispute as to whether or not the claimant could work on her apprenticeship during the notice period. It was submitted that it reasonable proposition for Ms Anderson to make that if the Claimant was not providing regular and effective service prior to her dismissal this will have impacted her progress on the apprenticeship. The Tribunal should be concerned with the subjective reasoning of Ms Anderson and Ms Duncan and should focus on the information before Ms Anderson who provided reasons for her decision to dismiss the claimant which are unrelated to her pregnancy.

141. Ms Duncan during cross-examination was referred to the claimant's apprenticeship agreement and specifically clause 4.2. This was not something of which Ms Duncan had been aware at the time she heard the claimant's appeal and Ms Duncan's evidence was that her decision was not solely based on the claimant's progress in the apprenticeship. Further, this document was not put to Ms Anderson who was the decision maker. The Tribunal should be careful of what conclusions it draws from this document in

circumstances where the respondent's decision maker did not have the opportunity to comment on it.

142. Ms Anderson has also referred in her Decision Making-Manager's record to the concerns raised with the claimant about her use of flexi-time. The claimant ‘s evidence was that she reduced her flexi-time deficit to within acceptable parameters. Ms Anderson has explained that the Claimant's use of flexi-time was not the key reason for her decision. It was not disputed that the claimant’s flexi-time deficit was within 22.12 hours at times. Ms Anderson explained that the manner in which the claimant used her flexi-time and the fact she had to be spoken to about this on more than one occasion reflected badly on the claimant's time-management and that the claimant did not stick to the plan in place to reduce the deficit.

143. Ms Anderson says that the fact of the claimant's pregnancy did not influence her decision to dismiss the claimant and that she discounted any pregnancy related absences when calculating the level of service provided by the claimant. Ms Anderson denied that the claimant's pregnancy was one step too far.

144. In relation to the decision being predetermined it was submitted that the evidence does not support a finding that any pre-determined decision was materially influenced by the claimant's pregnancy. Mr Langford did not say that what he believed had been said to him was motivated by the claimant's pregnancy. In so far as whether any negative inference can be drawn, if the Tribunal takes the view that there was a pre-determined decision, without more, an inference of discrimination cannot be drawn.

145. The Tribunal was referred to Ms Duncan’s evidence and her belief that the Ms Anderson’s decision had not been influenced by the claimant’s pregnancy.

146. It was submitted that given the claimant’s performance it was not credible for the claimant to suggest that the respondent only looked to dismiss her after the respondent learned of her pregnancy. The claimant did not accept during cross-examination that she was told that she had failed the probationary period at the second probationary review which contradicts contemporaneous

evidence and the final written warning. The evidence demonstrates that the claimant was aware that dismissal was a possibility if she failed the probationary period.

147. Following the move to the East Kilbride contact centre circumstances for the claimant did not materially improve. There continued to be challenges in managing the claimant after her reinstatement. Ms Duncan advised that for her the main issue was the claimant's availability to work over the course of her. The claimant sought to explain the difficulties which she faced during her employment with the respondent. The Tribunal was reminded of the evidence about the supports that the respondent put in place.

148. The Tribunal may have sympathy for the claimant and empathise with the situation she found herself in. However, the question for the Tribunal is a simple one: was the decision of the respondent to dismiss the claimant materially influenced by her pregnancy? It does not matter if the Tribunal would have arrived at a different decision in light of the explanations provided by the claimant if it does not consider that the decision was materially influenced by the fact of the claimant's pregnancy, it must find that the decision was not discriminatory under section 18 of the EqA.

149. The evidence presented by the respondent's witnesses demonstrates that throughout the claimant's employment she was consistently not meeting the standards expected of her and that she was advised of this; there was not a sudden change when it came to the final probation review. While the Tribunal may take the view that the reasons offered by the claimant for her leave, flexi-deficit and position in her apprenticeship are reasonable, in circumstances where the claimant has consistently been advised that the respondent has concerns, I an inference cannot be drawn that the real reason for the claimant's dismissal was pregnancy.

150. Turning to remedy the Tribunal was referred to section 124 of the EqA. Dealing with financial loss from the claimant's last day of employment (3 June 2019) to 4 October 2019, 21 weeks passed which amounts to a loss of £6,081.81. During this period the claimant earned £3,019.10 and so her total

loss was £3,062.71. She then commenced a period of maternity leave during which she earned maternity allowance of £148.68 per week for 39 weeks. The claimant's position is that she would have returned to work after 39 weeks.

151. If the claimant would have had 52 weeks' service immediately prior to the 15th week before the EWC, she would have been entitled to 26 weeks' full pay if still employed by the respondent otherwise she would have been entitled to SMP which is at the same rate as MA. If entitled to full pay for 26 weeks her loss for the period during which she was effectively on maternity leave was £3,664.18.

152. Thirty-nine weeks from 4 October is 3 July 2020. From 3 July 2020 to the date of the hearing the claimant would have earned £6,661.03 (23 weeks since 3 July to date of hearing). The Carer's Allowance received by the claimant should be deducted from this figure which produces a total loss of £5,181.53. The total past loss of £11,908.42.

153. Awarding a year's salary for future loss would be excessive. The claimant's position is that since July 2020 she would have returned to work and therefore, almost six months has already passed since the point at which it can reasonably be expected that the claimant would have been searching for another role. The Tribunal was referred to the evidence that there are available jobs for the claimant notwithstanding Covid-19. While Covid-19 has had a detrimental impact on some areas of the economy it has created greater opportunity in others and the claimant was not previously working in an area severely impacted (e.g., hospitality or travel). There has been a failure to take reasonable steps to mitigate loss since the point at which the claimant says she would be looking to return to work. It does not appear that the claimant has applied for any jobs more recently.

154. Turning to injury to feelings the claimant is seeking an award of £32,000 which is in the upper *Vento* band. Should the claimant be successful, any award should be in the lower part of the middle *Vento* band of £8,800 – £26,300 (award up to £17,550).

155. This is not a case in which the claimant has suffered a course of discriminatory conduct. The claimant's position is that she suffered from depression and anxiety during her pregnancy. The claimant is linking this to her dismissal. It is accepted that there is evidence that the claimant had an underlying mental health condition. Based on the evidence available, it would be a step too far for the Tribunal to conclude that the claimant's dismissal alone caused her to suffer from depression and anxiety. While the claimant's position in cross-examination was that her mother's illness was not a source of anxiety or stress for her for someone with an underlying mental health condition, in the absence of medical evidence, it is not possible to conclude that the claimant's personal circumstances had nothing to do with the depression/anxiety that she was experiencing at that time. Also of relevance when considering the impact of the dismissal on the claimant in so far as her mental health is that she was able to secure and hold down another job following her dismissal.

156. The claimant has alleged that there is a link between her dismissal and suffering from post-natal depression. Without medical evidence to support such a link, the Tribunal is not in a position to reach a conclusion that this link does indeed exist. It is not doubted that the claimant believes this link exists, but this is not sufficient to make a finding in this respect. In particular, given the fact that the claimant has suffered from depression in the past, it is not known if this could have meant that the claimant was more likely to suffer from post-natal depression regardless of life events.

157. Also of relevance to the injury to feelings award is that the claimant was given an opportunity to attend a formal meeting, accompanied by a Trade Union Representative to explain her position prior to the decision being taken to dismiss the claimant. The claimant was thereafter given a right of appeal which she exercised, and a further formal meeting was held at which the claimant was again accompanied by her Trade Union representative. The Tribunal was referred to the case of *Sanderson v Bespoke Digital Agency Ltd ET/2405377/18* - case in which £12,000 was awarded for injury to feelings in light of the fact that her employer's acts of discrimination had contributed to the stress and anxiety that continued until the end of her pregnancy.

Submissions for the claimant

158. Having had sight of Ms Sutherland's written submissions the claimant responded orally and provided a written copy of what she said which is summarised.

159. The claimant believes that she was treated unfavourably by the respondent in the form of her dismissal. She that the respondent says her dismissal was due to failing her probationary period, but she does not accept that this is the real reason. She asks the Tribunal to consider it necessary to determine the factual criteria applied by the respondent in reaching its conclusion, that she failed to reach the minimum standards of my employment during her probation.

160. The claimant says that the real reason was her pregnancy. The respondent's assertion that if it was due to a failed probationary period was not reasonable set against both policy requirements and the fact that the issues of concern against her, that being attendance, alleged misuse of flexi time are unfounded, and being behind in my apprenticeship training were not unique to her. Being that I was moved to an apprenticeship group with a number of people who were also behind in their training, they had similar or the same start date as the claimant. She was the only pregnant member, and they have not been dismissed.

161. She asks that the Tribunal considers if it is reasonable that she would have expected management to have full and complete knowledge of my stage within my apprenticeship and their own guidance without the need for me to have to highlight their own policies and documents to them regarding this in any meetings.

162. The claimant also asked the Tribunal to consider that she was placed on a training course for a new line of business where only 20 people out of a large number of those who applied were selected. This would have cost the business money and essential resources. This decision was made prior to my pregnancy announcement, this course started in early March and I then announced my pregnancy. It was then suggested to me for the first time that

I should expect the outcome of my not passing probation to be dismissal, implying that a decision had been made prior to a Decision Maker Meeting having taken place. It is for that reason that she holds the firm belief that the knowledge of her pregnancy materially influenced or 'tilted the balance' of the Respondents decision making.

163. The claimant referred the Tribunal to her Apprenticeship Agreement which formed part of my contractual relationship with the respondent. Clause 4.2 states "Continuing employment is not dependent on successful completion of your apprenticeship", yet the main part of the decision making to her dismissal and failed appeal states that her unreasonable use of flexi time, emergency leave and special leave provide them with no confidence that she would complete my apprenticeship. If its completion was not dependent on her continued employment, it was not reasonable for the respondent to consider this a concern and contributing factor to her dismissal. If the policy documents were in fact followed correctly then the correct decision would have been an extension of time to apprenticeship.

164. The respondent also failed to take into consideration the mitigating circumstances of the claimant being behind in her training. The initial reason she and others were behind was wholly the fault of the respondent and a matter out with her control. She and others made up this time and this was accepted. Before her dismissal the claimant had again fallen behind due to the instruction that there 'was no point' in her undertaking training and also being told she would not be permitted to attend any workshops or examinations in view of the decision to bring her employment to an end, prior to re-instatement.

165. The respondent considered the claimant's use of the flexi system as unreasonable. The claimant had a deficit was due to taking emergency leave to care for her son. These absences result in an automatic deduction being made. According to policy guidance, a reasonable response would have been to remove the claimant from utilising flexi. The flexi policy states, "The limits in your flexible working hours scheme may be up to 3 days at the END of a

four-week accounting period". the respondent accepted that this was the case for the claimant.

166. The claimant also referred to the Carer's Passport. Despite this document the periods of absence taken by the claimant in regard to her son's emergency care led to deficits in her hours for the purpose of flexi working. I do not consider this to be fair or reasonable in the circumstances. The respondent offered guidance in regard to stress and anxiety but failed to provide support relative to those absences. The claimant was unaware when employed that she could have applied for emergency dependents leave. She understood that such leave is not permitted to be counted towards absence for availability or absence management purposes. If the respondent was being fair; caring; and applying policy documents properly then emergency leave taken by the claimant should not have resulted in deficits to my flexi leave, or at least, should have been discounted.

167. In any event, the claimant does not accept that her absence at the time of dismissal was a genuine factor in the decision making as she had already made up time and passed their absence standard, as has been accepted by the respondent.

168. The Tribunal was asked to consider evidence of her meeting with Mr Langford. Given her circumstances it was unrealistic for the claimant not to use flexi hours or emergency/special leave.

169. A reasonable person reading the policy documents would not reach the conclusion that the right or reasonable outcome would be that the claimant failed her probationary period and ultimately was dismissed. The right decision would have been an extension of time to her probation and omitting the absences for flexi purposes relative to the emergency care of her child. It does not make sense to have reached the conclusion that the appropriate step was the termination of employment, the appropriate steps based on the policy documents would have been continued employment with an extension to my probationary period.

170. The timing of where the claimant was at with her apprenticeship training could not have been a genuine factor in view of the fact that it was not a condition of continued employment. The alleged overuse of the flexi system was not an appropriate response as the claimant was back within allowable parameters as stated in guidance and her absence levels had improved to an acceptable standard, which has been accepted by the respondent. For these reasons that the claimant says that the reason as stated is a sham and is not the reality of the reasoning of the respondent's decision making. The claimant believes it was news of her pregnancy and subjective viewpoint that this would simply lead to further absences on her part and therefore negatively impact on my ability to provide regular and effective service.

171. The Tribunal was referred to the claimant's schedule of loss. Regarding the additional six months claimed this is due to the impact of the lockdown. There were no childcare options available, that being, schools, nurseries, childminders and family members were not permitted to care for children and therefore attending a job would have been impossibility for the claimant with two young children.

172. The claimant said that it is well documented that stress during pregnancy has a real and tangible influence on the prevalence of post-natal depression. This includes stressful life events such as losing a job. The claimant offered the Tribunal access to her medical records if necessary and a contact number for her peri-natal mental health nurse in charge of the claimant's care.

Deliberations

173. The Tribunal referred to section 18 of the EqA and first considered if, during the protected period the respondent treated the claimant unfavourably because of her pregnancy.

174. The respondent accepted that dismissal amounts to unfavourable treatment and that the claimant's dismissal occurred during the protected period. The respondent accepts that it was aware of the claimant's pregnancy at the time of her dismissal but denied that she was dismissed because of her pregnancy. The claimant disputed this.

175. The Tribunal considered that this was a case where it had to determine the reason why the respondent dismissed the claimant. The claimant's pregnancy does not need to be the sole reason for the decision, but it must materially influence the respondent's conscious or subconscious decision-making.

176. The Tribunal is aware that it is for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination.

177. In order to do so the Tribunal should not necessarily expect to find direct evidence of pregnancy discrimination since few employers are prepared to admit such discrimination even to themselves.

178. In recognition of that it is appropriate for the Tribunal to draw inferences from primary facts which it has found. These facts do not require the Tribunal to reach a definitive determination at this stage but rather to consider the primary facts to assess what inferences of secondary fact could be draw from them.

179. The Tribunal considered what primary findings had been made from which inference of discrimination could be drawn.

- The claimant was reinstated on 28 January 2019 and given a week to catch up on apprenticeship work.
- The claimant’s apprenticeship was not scheduled to end until September 2019. There was authorisation for a three-month extension to the claimant’s apprenticeship (11 December 2019) and to support her she was changing groups. Ms Anderson was aware of this. The claimant was not been told that her change of groups or the delay in sitting examinations caused by her previous dismissal would be taken into account in her probation review.
- On 28 February 2019 Ms Anderson agreed to the flexibility of start and finish times and that the claimant could work a Saturday if she needed a day during the week.

- Mr Langford was advised by HR that it was permissible for the claimant to go over the maximum flexitime deficit as long as she worked it below the flexitime deficit limit within the four-week period. A plan was in place to reduce the claimant's flexi deficit.

- At the start of March 2019, the claimant advised Mr Langford that she was pregnant. Mr Langford informed Ms Anderson.

- The claimant had a pregnancy related absence in early March 2019.

- On 14 March 2019 the HR advice given to Mr Langford was that while dismissal was an option, an extension would be more appropriate as the claimant has successfully completed a formal review period for attendance, and she was authorised by previous office to use her annual leave with no discussions happening at the time in the other office. While the claimant had a flexi deficit a plan had been put in place to reduce it. Mr Langford said that the claimant had been given time to get up to date with her apprenticeship work when reinstated and had been moved to a new group as he was behind in examinations. He did not mention that authorisation had been given to a three-month extension.

- Mr Langford was advised before the final probation review that the claimant's probation period would not be extended.

- Mr Langford did not recommend dismissal. He advised Ms Anderson of the risks to the business of dismissing the claimant while she was pregnant.

- Ms Anderson had predetermined before the 25 April Meeting that the claimant was to be dismissed.

- The claimant's annual leave had been approved by managers.

- At the 25 April Meeting the claimant's flexi leave was within parameters and a plan to reduce the deficit was in place.

- The dismissal letter while mentioning that pregnancy related absences have been disregarded calculates the claimant's average attendance over both the period before her dismissal and after her reinstatement amounting 71.5 percent and states that this has had a negative impact on the claimant's performance/ability to complete the apprenticeship programme on time and this was a key contributing factor towards the requirement for the claimant to move groups. The dismissal letter also refers to the concerns of the claimant's managers about exceeding flexitime limit; there being no alternative available because of the use of annual leave, special leave and unpaid leave.

180. The Tribunal are of the view that considered cumulatively these facts from which the claimant has proved from which the conclusion could be drawn that there was discrimination because of pregnancy.

181. Given that the Tribunal turned to consider the explanation provided by the respondent to assess whether or not the respondent led cogent evidence which proved that the respondent did not commit that act and to show that the treatment was in no sense whatsoever on the grounds of pregnancy.

182. In this case the respondent said that she was dismissed because she failed her probationary period. The claimant's employment was subject to the successful completion of a twelve-month probationary period and her contract expressly states that if the required standards are not achieved and maintained, the claimant's employment may be terminated. Ms Anderson's evidence was that that claimant's use of flexi-time and her level of deficit was not the key reason for dismissal. The main reason was the claimant not having progressed satisfactorily her apprenticeship and all the management time which she had been given to help her progress of which she had not taken advantage.

183. The Tribunal was unconvinced. The Tribunal recognised that Ms Anderson's decision was partly based on need for employees to be reliable and provide efficient service. There was no doubt that a significant amount of management

time was spent on the claimant not only by Mr Langford but by default Ms Anderson.

184. The Tribunal felt that it was significant that until the claimant announced her pregnancy in March 2019 Mr Langford and Ms Anderson were supportive of extending the apprenticeship and of the claimant's need to use flexitime to accompany her mother for treatment which resulted temporarily in the claimant exceeding the flexitime deficit limit. There was no suggestion at that point that either of these supportive measures would be used against her when her probation was reviewed.

185. In the Tribunal's view factors relating to the claimant's pregnancy were operating on Ms Anderson's mind during the decision-making process. The management of the claimant had already escalated to senior managers, including Ms Anderson and was demanding. To support the claimant management had approved different types of leave and managing any further absences would be difficult. Before the claimant's pregnancy she had made progress on sitting examinations that she missed when she was dismissed; her apprenticeship was being extended by three months; there was no mention of her not taking advantage of management time that had previously been given to her; and she had an informal plan in place to reduce her flexi deficit. There was no suggestion that these measures would be held against the claimant at the probation review. To the contrary Ms Anderson was aware of these measures which were put in place to support the claimant in her employment.

186. After the claimant announced her pregnancy, she had pregnancy related absences. The management of the claimant was likely to be even more challenging during her pregnancy. Mr Langford spoke to Ms Anderson before the final probation review meeting. Ms Anderson reached a predetermined view about the claimant's dismissal despite Mr Langford's concerns. Ms Anderson knew that the claimant had been reinstated because of a failure to discount pregnancy related absences. Ms Anderson asked the claimant about her pregnancy related sick absence at the start of the 25 April Meeting. Ms Anderson was at pains to say that she was not discriminating as she

discounted pregnancy related absences. Ms Anderson commented on “all the management time” which the claimant had been given to help her progress of which in her view the claimant had not taken advantage. The claimant was now told that she had not progressed satisfactorily her apprenticeship which even without the extension did not end until September 2019; and there was misuse of flexi-leave despite the deficit being within the parameters.

187. The Tribunal concluded that the respondent failed to show that the claimant’s dismissal was in no sense whatsoever on the grounds of pregnancy. The Tribunal felt that the claimant’s pregnancy had a significant influence on Ms Anderson’s decision-making and her willingness to persevere with supporting the claimant through what had already been a challenging and difficult probationary year.

188. Having concluded that the respondent treated the claimant unfavourably because of her pregnancy the Tribunal moved onto consider the question of remedy. The Tribunal referred to section 124 of the EqA.

189. As the Tribunal upheld the complaint of discrimination under section 18 of the EqA. The Tribunal considered that it was appropriate in its judgment to make a declaration to that effect.

190. The claimant did not seek a recommendation. She is no longer employed by the respondent. The Tribunal therefore did not consider this further.

191. The claimant seeks compensation. The Tribunal referred to the claimant’s schedule of loss and the respondent’s submissions.

192. The Tribunal asked what financial loss has the claimant suffered as a result of her dismissal? The claimant’s last day of employment was 3 June 2019. She went on maternity leave on 4 October 2019. During this 21-week period the claimant would have been paid £6,081.81 (21 x £268.61). During this period the claimant earned £3,019.10 and so her loss was £3,062.71 (£6,081.81 - £3,019.10).

193. If the claimant had 52 weeks’ service immediately prior to the 15th week before the EWC, she would have been entitled to 26 weeks' full pay if still employed

by the respondent. Given that the claimant worked her notice and continued working for another employer until her maternity leave commenced the Tribunal considered that she would have received 26 weeks' full pay: £7,529.86 (26 x £289.61). From this sum the Tribunal deducted 26 weeks of maternity allowance £3,865.68 (26 x £148.68) leaving a balance of £3,664.18.

194. The claimant would have returned to work on 3 July 2020 to the date of the hearing the claimant would have earned £6,661.03 (23 weeks since 3 July 2020 to date of hearing). During this period the claimant received Carer's Allowance of £1,479.50 which should be deducted from this figure producing a loss of £5,181.53. The total past loss is £11,908.42.

195. The Tribunal then considered whether an award of future loss was appropriate and if so at what level.

196. The claimant is seeking a future loss of year's wages. Her position is that since 3 July 2020 she would have returned to work. She alleges that there is a link between her dismissal and suffering from post-natal depression. There was no medical evidence produced to support such a link. Like Ms Sutherland, the Tribunal did not doubt that the claimant believed that a link existed. However, the Tribunal agreed with Ms Sutherland's submission that it is not in a position to reach a conclusion that there was a link especially given the claimant's medical history.

197. While the claimant gave evidence about post-natal depression and ongoing mediation the Tribunal did not understand that from 3 July 2020 the claimant was medically unfit to work. The respondent presented evidence of available jobs for the claimant notwithstanding Covid-19 and argued that while Covid-19 has had a detrimental impact on some areas of the economy it has created greater opportunity in others and the claimant was not previously working in an area severely impacted.

198. The Tribunal agreed with Ms Sutherland's submission that the sector in which the claimant was previously working had not been as severely impacted. In some respects, the opportunities had expanded.

199. The Tribunal considered whether the claimant had mitigated her loss by considering what a reasonable person would have done if they had no hope of seeking compensation from their previous employer.

200. The respondent produced evidence of available jobs. At the date of the final hearing six months had passed since the claimant indicated her intention to return to work. She had not searched for another role. Given the restrictions that were in place since March 2019 and over the summer in relation to childcare the Tribunal could understand why a reasonable person would have delayed applying for jobs until the schools returned for the new term in August 2019; nursery places became available and extended family were permitted to provide childcare. In the Tribunal's view from early September 2020 a reasonable person would have taken steps to seek employment by applying for jobs, registering with agencies; and seeking the assistance of the Jobcentre. The claimant had not taken such steps by the hearing. While the Tribunal acknowledged that the pandemic had a significant impact on employment that was less so in the sector that the claimant worked particularly as many businesses and organisations are facilitating employees home working.

201. In her schedule of loss, the claimant estimated that it would take six months from the hearing to find employment with a similar pay. The claimant was not bound by notice requirements and had a previous connection with an agency. The Tribunal considered that has she started her search at the beginning of September 2020 it is probable that she would have found alternative employment by the end of February 2021. The Tribunal therefore awarded future loss of 12 weeks' pay £3,475.32 (12 x £289.61). From this figure should be deducted 12 weeks' Carers Allowance of £807 (12 x £67.25) that is £2,668.32. When added to the past loss of £11,908.42 the total compensation for loss of earning is £14,576.74.

202. The Tribunal next considered whether to make an award be made for injury to feelings and if so, what is the appropriate *Vento* band?

203. An award for injury to feelings is compensatory. It should be just to both parties. It should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

204. The Tribunal reminded itself that an award of injury to feelings is to compensate for "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression." (see *Vento v Chief Constable of West Yorkshire* Police (No. 2) [2002] EWCA Civ 1871 [2003] IRLR 102*).*

205. In *Vento*, the Court of Appeal observed there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

206. For claims presented on or after 6 April 2019, the *Vento* bands are now a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

207. The claimant sought an injury to feeling award of £32,000 which is in the upper *Vento* band. Ms Sutherland's submission was that should the claimant be successful, any award of injury to feelings should be in the lower part of the middle *Vento* band.

208. This is not a case in which the claimant has suffered a course of discriminatory conduct on the ground of her pregnancy. The claimant's position is that she suffered from depression and anxiety during her pregnancy and is linking this

to her dismissal. The respondent accepted that there is evidence that the claimant had an underlying mental health condition but that alone did not mean that the claimant's dismissal caused her to suffer from depression

209. The Tribunal considered that in the year that the respondent employed the claimant she had a myriad of personal problems which most employees might encounter over many years of employment. Given her underlying mental health condition, the number of issues that she had to deal with the Tribunal considered that the claimant was very resilient and had significant achievements including securing new employment after her dismissal. The Tribunal did not consider that in the absence of medical evidence it could conclude that the dismissal alone contributed to the claimant's depression and was linked to her post-natal depression. However, the Tribunal considered that when dismissing the claimant Ms Anderson knew that the claimant had an underlying mental health condition; she could not afford financially to reduce her hours; had caring responsibilities; had previously miscarried; and was already experiencing pregnancy related illness.

210. The Tribunal noted that Ms Sutherland submitted that it was relevant to the injury to feelings award that the claimant was given an opportunity to attend a meeting, accompanied by a Trade Union Representative to explain her position before the decision being taken to dismiss was taken and she had right of appeal which she exercised. As explained above the decision was communicated after the 25 April Meeting although the Tribunal considered that it was predetermined; the appeal rubberstamped that decision. The Tribunal's impression was that the respondent was going through the motions with a closed mind.

211. In the Tribunal's judgment this is a case that appropriately falls into the lower end of the middle band of the *Vento* guidelines. The subjective feelings described by the claimant in her evidence at the final hearing were entirely plausible and credible. From a personal perspective the claimant's probationary year could not have been more challenging. Many of the issues that arose were one off and those that were continuing the claimant had endeavoured to find solutions only to find that the respondent's professed

support was then used against her. Those dealing with the matter for the respondent exhibited closed minds contrary to sound decision making and proper application of natural justice. On one hand the respondent had not embarked on a lengthy campaign of discriminatory treatment to merit an award at the top band. On the other hand, the respondent's failings were so significant that they cannot be properly categorised as a less serious case falling in the lower band. This placed the case in the Tribunal's judgment in the middle band of Vento.

212. The Tribunal considered that it was plausible and credible that the claimant would feel hurt feelings being told by Ms Anderson that Mr Langford had recommended dismissal despite the conversation he had with the claimant and her representative; having her apprenticeship extended and attending training courses to then be told that she was dismissed; being provided with reasons for dismissal which appeared to contradict the support that had been put in place the month previously; and Ms Anderson knowing that the claimant could not afford financially to reduce her working hours yet she was being dismissed while pregnant. The claimant appealed but to no avail.

213. Applying a broad brush, the Tribunal assess the amount payable to the claimant for injury to feelings as £12,000 and that is the amount the Tribunal ordered the respondent to pay to the claimant.

214. The Tribunal turned to the question of interest. It is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by regulation 3(2) is the rate fixed for the time being, currently an amount of eight per cent per annum in Scotland.

215. Under regulation 6(1)(a) for an award of injury to feelings the period of the award of interest starts on the date of the act of discrimination complained of and ending on the day on which the Tribunal calculates the amount of interest. In the case of other sums of damages or compensation and arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the calculation. The mid-point date is the date halfway through

the period beginning on the date of the act of unlawful of discrimination and ending on the date of calculation. For the purposes of both awards the date of calculation is 12 February 2021 being the date of this Judgement.

216. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in regulation 6(1) and (2), it may, under regulation 6(3), calculate interest for a different period, as it considers appropriate. The Tribunal received no submission to that effect from either party, and it did not consider it appropriate to do so. The Tribunal cannot alter the interest rate of eight per cent per annum, as that is prescribed by law, and it is a matter in respect of which it has no judicial discretion to vary the interest rate, only the period to which that rate refers.

217. Accordingly, the appropriate rate of interest is eight per cent. The Tribunal orders the respondent to pay the clamant the additional sum of £990.42 representing interest on the claimant's total loss of earnings of £14.576.74, calculated by reference to the mid-point between 3 June 2019 (the claimant's dismissal) and 12 February 2021 a period of 620 days. The mid-point is 310 days. **The Tribunal's calculation is £14,576.74 x 0.08 x 310/365 days = £990.42**.

218. Further the Tribunal orders that the respondent shall pay to the claimant the additional sum of interest upon the injury to feelings award of £12,000 calculated at the appropriate rate of interest of eight percent for the period between 3 June 2019, the date the claimant's dismissal and 12 February 2021 being the date of this Judgment, a period of 620 days. **The Tribunal's calculation to is £12,000 x 0.08 x 620/365 days = £1,630.68.** Adding the two interest amounts together the total interest payable is **£2,621.10**.

Employment Judge: Shona McLean
Date of Judgment: 17th February 2021
Entered in Register:17th February 2021
Copied to Parties