



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Hanna Janowicz

Konk Furniture Ltd

Heard at: Southampton

On: 8 and 9 February 2021

Before: Employment Judge Rayner

Appearances

For the Claimant: Ms B Likulunga, Solicitor

For the Respondent: Mr A Ratcliffe, Director

Judgment

1. The claimants claim of automatic unfair dismissal contrary to section 99 Employment Rights Act 1996 is dismissed
2. The claimants claim that she was discriminated against on grounds of pregnancy and maternity contrary to section 18 of the Equality Act 2010 is dismissed.
3. The claimants claim of victimisation contrary to section 27 Equality Act 2010 is dismissed.

Reasons

4. The hearing was conducted by the parties attending by video conference (CVP). It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England)

Regulations 2020, as amended and because it was in accordance with the overriding objective to do so.

5. Prior to this hearing both parties had indicated that they agreed to this case being heard by a judge sitting alone.

Background to the claim

6. The claimant filed her claim to the Employment Tribunal on 29 November 2019, following issue of an ACAS certificate on the 14 October 2019.
7. The claimants claim concerns the termination of her employment. The claimant was dismissed with effect from 17 October 2019 and therefore the claim was brought within the primary time limit of 3 months.
8. The claimant started work for the respondent on 12 March 2018 and at the point of termination she did not have the requisite two years continuity of service to bring a claim for ordinary unfair dismissal.
9. The claimant became pregnant and was due to start ordinary maternity leave at the end of October 2019. She was dismissed shortly before her maternity leave was due to start.
10. The claimant brought claims of automatic unfair dismissal contrary to section 99 of the Employment Rights Act 1996 and unlawful discrimination contrary to section 18 of the Equality Act 2010, asserting that the reason or the principal reason or part of the reason for her dismissal was her pregnancy and/or the fact that she was due to start ordinary maternity leave in October 2019.
11. The claimant also brought a claim of victimisation, relying on her grievance of 9 October 2019 as a protected act.
12. The respondent defends the claim on the basis that the only reason the claimant was dismissed was on grounds of capability, and that the fact of the claimant's

pregnancy and the fact that she was due to take ordinary maternity leave formed no part of the decision making.

The issues in the case

13. At a case management hearing before Employment Judge Salter on 9 April 2020, the issues in the case were agreed as follows:

Unfair dismissal

14. Qualification

14.1. The Claimant was an employee and she was dismissed. At the time of her dismissal, however, she had less than two-years continuity of employment.

14.2. The Reason for the Dismissal

15. What was the reason for the dismissal?

15.1. The Respondent asserts that it was a reason related to capability, namely performance.

15.2. The Claimant does not accept that this is the real reason for her dismissal which she says was for pregnancy or maternity. Having less than two years continuity of employment it will be for the claimant to show the reason for her dismissal.

16. Automatic Unfair Dismissal

16.1. If the Claimant is right, and she was dismissed for pregnancy or maternity, her dismissal is automatically unfair under s99 ERA. If the Claimant is not correct then her claim of unfair dismissal fails as she had less than two years' continuity of employment with the Respondent.

Equality Act Claims

16.2. The Claimant relies on the Protected Characteristic of pregnancy and maternity.

17. Section 18: Pregnancy & Maternity Discrimination

- 17.1. Did the Respondent treat the Claimant unfavourably by dismissing her?
- 17.2. Does the unfavourable treatment take place in a protected period and/or was it the implementation of a decision taken in that period?
- 17.3. If so, was it because of the pregnancy?
- 17.4. Was any unfavourable treatment because the Claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

18. Section 27: Victimisation

- 18.1. Did the Claimant do a protected act in her grievance of 10th October 2019.
- 18.2. If so, did the Respondent dismiss the Claimant because of the protected Act?
- 18.3. If so, were the allegations were made in bad faith
- 18.4. If so, then it is not a protected act.

19. Employer's Defence

- 19.1. The Respondent is not relying on the employer's defence within section 109 EQA.

20. Remedies

- 20.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

The hearing.

21. The hearing in this case took place over 2 days.

22. I heard evidence from the claimant her own behalf and from Mr Alex Ratcliffe, the director of the company, and Mrs Amy Yewdall, on behalf of the respondents.

23. The respondent also submitted unsigned statements from Beth Kaye; Grant Mascord; Jasmine Craven- Huffer and Martin Campbell.
24. The claimant was represented by Ms Likulunga, solicitor, and the respondent was represented by Mr Alex Ratcliffe, director.
25. I was provided with a bundle of documents agreed between the parties and during the course of the hearing, the respondent produced and disclosed a copy of the claimant's appraisal form from 2018 which was agreed and added to the bundle.
26. At the beginning of the hearing I explained to the parties that whilst I could read the unsigned statements provided by the respondent, the weight that I would attach to them would be less than the weight attached to any live, sworn evidence and that it was a matter for the respondent to determine whether or not he wished to call the individuals to give live, sworn evidence to the tribunal.

Findings of fact

27. The respondent makes and sells bespoke furniture and the claimant was employed as a delivery coordinator. The claimant was employed by the respondent from 12 March 2018.
28. The claimant's job was varied, but one of the central tasks was organizing the weekly deliveries of completed customer orders. I accept that it was the schedule for furniture delivery that determined the schedule for the construction of furniture by the factory. Orders would be actioned, and the furniture built according to the delivery schedule, to ensure that each delivery was efficient both because the delivery van was full, but also because the delivery route would be efficient.
29. The furniture was built to order, but when it was built was determined by when it was due to be delivered. Part of the claimant's role was to organise the deliveries and to ensure that each week the value of furniture delivered was at least £18,000.00.

30. The company is a small company employing 17 people in addition to the claimant. The claimant was issued with a contract of employment and following completion of her 3-month probationary period and following discussion with Mr Ratcliffe, the director of the company, the claimant was awarded an increase in pay from £18,000.00 per annum to £19,500.00 per annum.
31. Mr Ratcliffe's evidence was that he felt that, as the lowest paid member of staff the claimant ought to be paid more and that whilst he had some concerns about her performance, a pay rise may well serve to motivate her to improve her work. He also stated that she had only been in post a relatively short period of time at that point. In fact, the claimant was awarded a pay rise in May 2019, when she had been in post for 14 months. I find that in fact it is more likely than not that the pay rise was awarded because it was felt that it was appropriate to raise her pay more in line with other employees. I find that at the time, the pay rise was not about performance, or about motivating her, and I have no evidence before me that the claimant was told that this was the reason for her pay rise.
32. I accept that the respondent considered that the claimant's performance throughout her employment was not at quite the standard hoped for. I find that from time to time there were matters which were discussed with her by Mr Ratcliffe and by others. I find, for example, that the issue of a pricing calendar was raised with the claimant and that she was asked to produce one. I find that she did not always know all the relevant information about the furniture, and that she did tend to ask other staff to tell her what she needed to know, rather than doing the research on the companies computerised systems for example.
33. The claimant accepted that there were issues with the work she did, and she sought to correct them and to improve. I also find that she did her work to the best of her ability and nobody suggested to her that she had not completed the tasks required of her, particularly in respect of the production of a pricing calendar, to the required standard.
34. I also find that there were some difficulties with the delivery drivers and I accept Mr Ratcliffe's categorisation of the problem as being one which was not of the

claimants making. Mr Ratcliffe very fairly accepted that the drivers could be difficult but also stated that he thought that the claimant was sometimes heavy-handed and unhelpful in her approach to the problems and that it was her manner dealing with matters which sometimes meant that they remained unresolved. Whilst I accept that Mr Ratcliffe held this opinion at the time, I find that the claimant was told this and that she was not criticised as a result.

35. The claimant was subject to one appraisal during the case of her employment and I have seen the documents relating to it. These documents were disclosed by the respondent during the course of this hearing. It is a five-page appraisal form.

36. I accept that the claimant filled in the majority of the form. I also find on balance of probabilities, and given the evidence from the claimant, that it is more likely that Mr Ratcliffe filled in the page which set out the objectives the future. I note that there are no specific criticisms of the claimant included in the form. Mr Ratcliffe suggested in his evidence that he had not approached this task as seriously as he ought to have done.

37. The objectives which he claims to have written onto the form included new objectives of *confidence in making decisions; Getting stuff to the garage other customers and pricing.*

38. In his witness statement Mr Ratcliffe states that *it was brought to my attention early on that Mrs Janowicz needed help with even quite simple tasks. At this point, though I was hopeful that her confidence and ability could only get better.*

39. In his sworn evidence to the tribunal he stated that the position which the claimant was recruited to, was a new position and that the claimant was expected to develop the role and set up systems. I have seen no evidence of any particular complaints or concerns that were raised to Mr Ratcliffe in respect of the claimant needing help to do simple tasks. I have been given no specific instances of any such concerns being raised by been referred to any particular dates of any such concerns. Even if such concerns did exist at an early stage, I am satisfied that they

were not of sufficient importance to the respondent for Mr Ratcliffe or anyone else to raise them with the claimant.

40. The claimant asked for and was awarded a pay rise at the end of May 2019. The claimant told the respondent in that she was pregnant after she had been given a pay rise, at the end of May 2019.

41. The claimant received an updated contract on 26 June 2019, confirming her role in at a higher salary.

42. I find that the respondent considered that the claimant was doing her job to an acceptable standard if not the standard hoped for, for most of her employment, and that this was reflected both in the fact that she was confirmed in position after completing her probationary period of 3 months; that she was awarded a pay rise; the fact that nothing was ever raised with her formally and in the fact that appraisal does not reflect any serious criticism of her.

43. However, I also find that Mr Ratcliffe and other members of staff did have concerns about the claimant's work, but that the expectation was that she would improve. I find that Mr Ratcliffe assumed that all those he employed would do the job to the standard he expected and that he trusted his staff to be doing things in the way he expected, and with an awareness of the needs of the business, particularly regarding the through flow of furniture construction and delivery.

44. Mr Ratcliffe accepts that he knew the claimant was pregnant and that he knew her maternity leave was due to start in October 2019.

45. Mr Ratcliffe, who gave evidence for the respondent states that he had a growing concern during the summer of 2019 about the level and value of orders being sent out with the drivers each week.

46. Mr Ratcliffe told the tribunal and I find as fact that it was necessary for the weekly orders sent out on delivery to be at least £18,000.00 in value, in order for the company to at least break even and possibly to make a profit. There is no

suggestion from the claimant or the respondent that this target figure was not achievable by the workshop, and no suggestion that there were not sufficient orders coming in to the company for the furniture to be made to the requisite value and to be ready for delivery each week.

47. The organisation of the delivery routes and the responsibility for making sure that the value of the orders, and thus the construction of furniture was part of the claimant's responsibility.

48. The respondent and the claimant agree that they had discussed the importance of orders on the delivery routes organised by the claimant being at least £18,000 in value each week.

49. In any event, I find that Mr Ratcliffe had spoken to the claimant over the summer and had made clear to her the importance of ensuring that £18,000 worth of deliveries were made each week and had specifically instructed her that if she became aware that any weeks delivery was going to be less than £18,000, she should bring it to his attention.

50. I find that the claimant understood that she had a target and that it was her responsibility to meet it.

51. I find that the claimant was well aware of the importance that Mr Ratcliffe placed upon her meeting these weekly targets, and that she also understood in July and August 2019, why it was so important to the company.

52. I have been referred to a document in the bundle which the respondent says is an advert they have placed for a replacement to cover the claimant's maternity absence. What I am referred to is in fact a receipt for an advert on Gumtree dated 24 September 2019 for an office admin job. It states it is for maternity cover and is flexible.

53. I find that it is a genuine advert and that it was placed in order to find cover for the claimant's maternity absence. I note that it is an advert for temporary cover and specifically refers maternity cover.

54. I find that in September 2019, when the advert was placed, Mr Ratcliffe knew and expected that the claimant would be taking maternity leave; was planning that during the claimant's maternity absence someone would be recruited to cover her role pending her return to work at the end of her maternity leave, and that the claimant would be returning to work at the end of her maternity leave. I make this finding on the basis of the advert and the fact that there is no suggestion that there were ever any questions raised or concerns about the practicalities of the claimant taking ordinary maternity leave and returning to work.

55. Mr Ratcliffe and other members of staff had been absent from the office in September 2019 at the London Design Fair. Mr Ratcliffe stated that he had hoped that following the earlier discussions about the importance of meeting the weekly target that there would be no further difficulties or issues with the deliveries.

56. At that point Mr Ratcliffe trusted the claimant to ensure that she met the targets and that if she did not, to contact him to tell him.

57. I find that the claimant did not however always meet this target and that as a result there were shortfalls on the value of the orders being sent out on routes organised and planned by the claimant. This was in the period from the end of September through to October 2019. I find that on at least one occasion the value of goods being sent out was only £9000, that is, half the target amount.

58. I also find that contrary to the specific instruction given to her, the claimant did not tell Mr Radcliffe that there was a drop in the value on any occasion.

59. When he returned from attending the London Design Fair at the end of September 2019 Mr Ratcliffe became aware that there was a shortfall in orders due to be sent out between the end of September and the end of October 2019. He realized this, not because the claimant had flagged the matter up to him but because of his observations and discussions with the staff in the workshops over the low level of orders they were having put through to them.

60. Mr Ratcliffe was concerned to find that orders had been sent out below £18,000 per week and that it looked as if there were several weeks on future orders which were going to be below £18,000.

61. When he carried out his own investigation, he confirmed that a number of the delivery schedules would mean weekly sales values of less than £18,000. He calculated that the delivery schedules in place at that point would lead to a significant loss of profit over the next month. Because of his concerns he decided to look in more detail at the driver routes and orders that the claimant had put in place for the following weeks. He confirmed his concern that not only that there were several weeks where the value of the orders being delivered were significantly less than £18,000 but also that the claimant had not brought this to his attention.

62. Mr Ratcliffe says that he was so concerned about this and the impact that it would have on the business, including concerns about possible redundancies, that he decided that he would have to speak to the claimant about her performance at that point. Before doing so, he spoke to both Mrs Yewdall and Beth Kaye, both of whom had worked for him for some time and whose opinion he trusted. He asked Ms Kaye to check his assumptions about the delivery routes and asked both women for their views more generally about the claimant's performance. I find that at this point he was so concerned that he was thinking about dismissing the claimant.

63. Mr Ratcliffe was told by both the women he asked, that they had some concerns about the claimant's performance. These were concerns about her ability to carry out tasks by herself and her tendency to ask them for measurements of items rather than finding it out for herself for example.

64. The claimant herself did accept that she did ask other staff to help her with calculating measurements of furniture, because they would have the measurements of each piece more readily to hand. I find that Mr Ratcliffe was given information that he trusted and believed and that there was a valid basis for him remaining very concerned about the claimant's performance.

65. Whilst Mr Ratcliffe did not carry out any formal investigation, he formed a general and genuine view at this point that the claimant was not performing at the standard he required in a number of respects and was not capable of doing the job that she had been employed to do. This was at the end of September 2019.
66. Mr Ratcliffe's evidence about his thinking at this point was that he considered that, unless the claimant was able to provide him with a good explanation he would have to dismiss her. I find that in fact he had made up his mind at that point that it was more than likely that he would dismiss her.
67. Before speaking to the claimant, he did speak to the same two members of staff about what would happen if he did dismiss the claimant and that he did raise a question in respect of her upcoming maternity absence.
68. His evidence was that he discussed with them both what he would do in the event that the claimant was not able to give him a satisfactory explanation. Part of the discussion was how they would manage the claimant's work if she were dismissed.
69. The respondent accepts that he asked whether the claimant's colleagues knew whether she was intending to return after her maternity leave.
70. Mr Ratcliffe stated that the reason he asked this, was because he did not relish the idea of dismissing the claimant, and hoped that he might avoid having to do so if an alternative could be found, such as a mutual amicable parting of the ways. He thought that if she was not intending to return after her maternity leave, that he may not have to dismiss her.
71. I find that whilst he was thinking about the claimant's maternity leave and her return to work, the fact that she was pregnant, about to take maternity leave, or that she wanted to return to work after her maternity leave was not a conscious cause of his decision to dismiss her. He had already made up his mind that he would probably have to dismiss her. What he was doing was considering all the options available to him, for communicating his likely decision to the claimant.

72.1

73. The respondent asked to meet with the claimant on 1 October 2019. The meeting was a short meeting and I accept the claimant's recollection of the meeting. I accept her evidence that she was not told what the meeting was about and that she was expecting it to be a meeting regarding her maternity leave.

74. At that meeting Mr Ratcliffe did ask her whether she was planning to return to work after maternity leave and that when she told him that she was, Mr Ratcliffe informed her that there would not be a job to come back to.

75. I find that when asked about why there would be no job, she was told by Mr Ratcliffe that this was because of mistakes that she had made and that she understood this to be a reference to the delivery routes she had booked in being less than £18,000.

76. I also find that Mr Ratcliffe also told the claimant that he wasn't happy with her performance over the last few weeks, and that when she asked for examples, the examples he gave were that she had forgotten to bring her private phone to work once; that he had called in sick and that she had left after half a day without telling anyone.

77. I accept that there was no full discussion with the claimant about any aspect of the performance and I accept that she had no proper opportunity either to understand the criticisms of performance that were being made or to explain them.

78. The claimant understood that she was being dismissed at that meeting and I find that she was in fact dismissed at that meeting.

79. I find that Mr Ratcliffe did tell her that there would be no position for her to come back to; that she could work as planned until the end of October and that she would be paid statutory maternity pay. I accept that the claimant was shocked, upset and distressed. I also accept that she was confused about the reason for her dismissal.

80. The claimant did not receive anything in writing confirming either the notice period, the dismissal or the reason for her dismissal.
81. On 2 October 2019 the claimant started to feel unwell and contacted her midwife. She was told to go and visit the hospital. She was kept in for observation and signed off for the rest of the week to get well. The claimant sent a sick note to Mr Ratcliffe.
82. When the claimant returned to work she had still not received anything writing and therefore she spoke to Mrs Yewdall, the studio manager. I accept that Mrs Yewdall told the claimant that she didn't know the reasons for the dismissal.
83. Following this discussion, the claimant sent an email on 9 October 2019 to Mr Ratcliffe enclosing a grievance. In her grievance, she stated that no one had ever raised issues about her performance in the 18 months she had worked for the respondent. She also stated that she had been told that Mr Ratcliffe wanted to replace her position during her maternity leave and that she had been informed that she could stay until the end of October and that she would be paid the statutory maternity pay.
84. The claimant stated that she had asked to have things in writing. She referred to suffering stress as a result of the conversation and she also said that she had a right to return to her job after maternity leave and that any detriment. She stated that the treatment suffered could amount to pregnancy -related discrimination. She stated she considered that there had been unlawful actions.
85. There is no dispute between the parties but that the claimant's grievance amounts to a protected act for the purposes of the Equality Act, section 27 and I find that it was one.
86. Following the claimant's email she received a reply from Mr Ratcliffe on the same day in which Mr Ratcliffe thanked the claimant for raising points and stated the follows. *Please let me make my position clear. You are being dismissed from the company for performance issues. These issues are outlined in the attached letter.*

87. A letter was attached which set out a number of performance issues.

88. In response to the grievance, Mr Ratcliffe said in the letter:

The meeting which took place on Tuesday 1st October was firstly intended to avoid this entire situation. Knowing that you only had a month left of your job before your maternity leave it seemed rather harsh to simply dismiss you if you had no intention of returning after your leave. Rather than burden you with the stress of dismissal it was my thinking that if you weren't planning on returning after your leave it would have worked out for both of us. Instead what transpired was a conversation bringing up your performance issues and the fact that I didn't have faith in you carrying out the role to a focused and high enough standard. If you weren't going on maternity leave you would have been dismissed on the 1st with one week's notice for the errors outlined in the attached letter. However, this seemed wrong given that it might affect your maternity pay.

89. The respondent again asserted in response to the claimant's grievance that he had hoped to be able to reach an amicable solution; that he had discussed the performance issues and now out in detail in the dismissal letter. He also stated that the reason the claimant's role would be changed was because of her performance issues rather than a restructuring the company;

90. Mr Ratcliffe also asked the claimant to outline how she believed that his decision had been at all affected by her pregnancy. He thought it stemmed from perhaps a slightly too tactful approach he had taken in the meeting, but considered that afterwards he had made his position clear. He also said he would still offer her the option to work until her maternity leave date which would be her last day of employment.

91. The claimant considered that this letter changed the notice that she had been given to a one-week notice period and therefore assumed that her employment would end on 17 October.

92. I find that Mr Ratcliffe intended that the claimant would continue to work until she started her maternity leave. He accepts that he made reference to a one-week notice period and he accepted in evidence before me that this was in fact wrong and that the claimant was contractually entitled to a months notice.

93. He considered that the claimant had been told that she could work until she started her maternity leave.

Legal Principles

94. A woman who is pregnant or on maternity leave is protected from discrimination by S.18 of the Equality Act 2010. Such discrimination occurs where an employer treats a woman 'unfavourably' because of the pregnancy or maternity leave - S.18(2)(a) and 18(3) and (4).

95. Section 18 EQA 2010 protects women from unfavourable treatment because of any of four reasons:

- a) because of the pregnancy 18(2)a
- b) because of an illness suffered by her as a result of the pregnancy (18(2)b)
- c) because she is on compulsory maternity leave 18(3)
- d) because she is exercising or has exercised or has sought to exercise the right to ordinary or additional maternity leave (18(4))

96. The statutory protection arising from section 18.3 applies to a woman during what is called the *protected period*. This is defined by 18(6) and is the period which begins when the women's pregnancy begins, and continues until

- a) if she has the right to ordinary and additional maternity leave either
- b) the end of the period of additional maternity leave,
- c) or if she returns to work earlier, when she returns to work after the pregnancy.

97. The protection will only apply if an employer or the person who treats a woman unfavourable knew or ought to have known that the claimant was pregnant at the

time of the alleged unfavourable treatment. In this case there is no dispute that the Mr Ratcliffe knew the claimant was pregnant.

98. Women who are pregnant or have recently given birth are also protected under the rules on Automatic unfair dismissal within section 99 ERA 1996. This provides that a person who is dismissed shall be regarded as automatically unfairly dismissed if the reason or principle reason for the dismissal is of a prescribed kind such as pregnancy or maternity leave OR the dismissal takes place in prescribes circumstances.
99. Section 99 ERA 1998 is concerned with leave for family reasons and protects employees who are dismissed for a reason relating to pregnancy; childbirth or maternity or for a reason relating to ordinary, compulsory or additional maternity leave or for exercising a right for time off of antenatal care.
100. The claimant will bear burden of proving discrimination under the Equality Act 2010 subject to the burden of proof provisions contained in section 136 Equality act 2010. This means that the claimant must prove facts from which a court could decide that discrimination had taken place in the absence of any other explanation.
101. If the claimant does prove such facts then the burden of proof will shift to the respondent employer to prove that the treatment or actions were not discriminatory in any sense what so ever. Unless the court is satisfied that they have provided such an explanation, the court must find that discrimination has taken place.
102. It is not enough for a claimant to prove that she was pregnant, and that she was treated unfavourably during the protected period and that the employer knew that she was pregnant. She must also be able to prove facts which point to the grounds of the treatment being her pregnancy or her intention to take maternity leave for example.
103. In a pregnancy discrimination claim the claimant does not have to show that she was treated less favourably than another person but only that she has been treated unfavourably.

104. In order for a discrimination claim to succeed under S.18 EqA, the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave.

105. I have considered what this means, and have taken into account the guidance from *Onu v Akwivu and anor; Taiwo v Olaigbe and anor 2014 ICR 571, CA*, per Lord Justice Underhill:

'What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. ***But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind... so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence. Nor need it be conscious: a subconscious motivation, if proved, will suffice. (My emphasis.)***

106. In this case in this case the alleged grounds relied upon by the claimant is that the fact of the claimant's pregnancy or imminent maternity leave is said to have influenced Mr Ratcliffe's decision to terminate the claimant's employment. Ms Likulunga asserts that the circumstances of the case point towards a discriminatory motive either conscious or unconscious.

107. I have taken into account that it is unusual for an employer to admit to discrimination and that discrimination may be the result of either conscious or unconscious thought.

108. I approached the question of whether any unfavourable treatment was on grounds of pregnancy or maternity by considering and applying the test set out in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

109. This means that in order for the reverse burden of proof to be triggered, so that the respondent will be required to prove a non-discriminatory reason for any alleged adverse treatment, the Claimant needs to have proved on the evidence she presents to the tribunal that her pregnancy, or maternity leave was or could have been a reason for her treatment. This may be proved by direct evidence or by inferences which it would be reasonable for me to draw from the facts I have found.

110. I reminded the parties and myself that a difference in treatment and of status and difference in protected characteristic will not be sufficient to shift the burden of proof. Unreasonable treatment by the respondent would not generally be of assistance. What the Claimant must prove is facts from which I could reasonably conclude, or infer, that any or all of the Claimant's treatment was because of her pregnancy or because of her maternity leave for example. I must consider both the conscious and the subconscious motivation.

111. This means I must consider whether the facts that I find are sufficient for the burden of proof to pass to the respondent, and if it does, what the explanation given by the respondent is, whether it is a wholly non-discriminatory explanation and whether I accept that it is the true reason and the only reason for the unfavourable conduct complained of.

Victimisation

112. A person will victimise another contrary to section 27 of the Equality Act 2010 if that person subjects the claimant to detriment because the claimant has done a protected act.

113. The first question is whether or not the claimant has done a protected act. Here the claimant relies upon her grievance as a protected act. Within it, she made allegations of discrimination.

114. The question that I must consider is whether or not the claimant has been subjected to the unfavourable treatment that she alleges, and secondly if she has been, whether or not the reason for that detriment is because the claimant raised a grievance.

115. Conclusions

116. I conclude that the claimant has proved that she was treated unfavourably by the respondent in that she was dismissed. The dismissal falls within the protected period set out within section 18 of the Equality Act 2010. Mr Ratcliffe knew that the claimant was pregnant and knew that she would be taking ordinary maternity leave at the point that he made the decision to dismiss her .

117. The claimant raised a grievance on 9 October 2019 and I conclude that that grievance was a protected act within the meaning of section 27 of the Equality Act 2010.

118. The second question I must consider is whether or not the claimant has proved facts for which I could conclude that discrimination has taken place. This means I must consider whether or not facts I have found could support a conclusion, in the absence of a valid non-discriminatory explanation, that the claimant's pregnancy was a conscious cause or a subconscious cause of Mr Ratcliffe's treatment claimant.

119. From the facts that I have found in respect of the timing of the meeting, the questions about the claimant's intentions with respect to maternity leave, and the evidence in respect of the claimant's performance up until the autumn of 2019, I consider on balance of probabilities, that I *could* conclude in the absence of valid explanation that the fact that the claimant was pregnant and about to start the maternity leave was a factor for Mr Ratcliffe, either consciously or subconsciously.

120. In those circumstances I conclude that the burden of proof does shift to the respondent and to Mr Ratcliffe to provide a full and non-discriminatory explanation for his treatment of the claimant.

121. I have borne in mind that most people will not willingly admit to discrimination. I also bear in mind that some discrimination can arise from a subconscious concern or thinking about an individual. I have also borne in mind that it does not follow automatically, as has been suggested by the claimant's representative Ms Likulunga, that the circumstances in this case will necessarily mean that the reason or part of the reason for Mr Ratcliffe's decision to dismiss were either the fact of the claimant's pregnancy or the fact that she was intending to take maternity leave.

122. Those are the facts that lead me to conclude that the burden of proof is shifted. What I have then considered is the explanation provided by Mr Ratcliffe.

123. I conclude from the findings of fact I have made, that Mr Ratcliffe's approach to the claimant's maternity leave and his linking it with the question of dismissal, was indicative of his lack of experience in dealing with the employment relations matters, but I also accept that when he asked his other staff about the claimant's intentions, he was making an honest enquiry and that his reason for asking the question was simply to find out whether or not he would need to implement his expected decision to dismiss the claimant if he did not get a satisfactory explanation, or whether he could avoid the unpleasantness having to do so.

124. Mr Ratcliffe told me in evidence and I accept that 80% of the reason for him deciding to dismiss the claimant was his concern about the shortfalls in the value of the deliveries scheduled within the period the end of September to the middle of October 2019. I accept that he had in the back of his mind some other performance matters which he fairly accepts contributed to about 20% of his thinking.

125. Whilst the process followed by Mr Ratcliffe was not a wholly fair one in that the claimant was given no warning that she might be dismissed and that she was not told in advance of the meeting of the matters to be discussed, I conclude that the

respondent had formed a genuine view that the claimant's performance was no longer acceptable and that the mistakes she was continuing to make in respect of the value of weekly deliveries were grounds for dismissal.

126. have also considered to what extent the fact that the claimant was pregnant; was going to start maternity leave and wished to return at the end of it was a factor in the decision Mr Ratcliffe made to dismiss the claimant.

127. Mr Ratcliffe stated in his evidence to the tribunal that it formed no part of his thinking at all. He says the fact that the claimant was going on maternity leave was nothing to do with either the concerns that he had or his decision about what to do about them. He accepted very candidly that he had handled the matter badly and that he had made mistakes both in not addressing performance issues at an earlier stage, and in the way that he had approached the meeting.

128. I accept Mr Ratcliffe's evidence as honest and truthful. I accept that he was not consciously motivated by the fact of the claimant's pregnancy or the fact that she was going to be taking maternity leave.

129. I have also considered whether there is any basis for finding that he was subconsciously motivated by those factors and I conclude that there is not.

130. In this case the only evidence that the claimant's pregnancy or imminent maternity leave was a factor at all is the circumstances themselves and the fact that the claimant was shortly to start her maternity leave.

131. I have made no findings of fact and it has not been suggested by the claimant that the claimant taking maternity leave was an issue or a problem for the respondent for example. It has not been suggested to the respondent that the claimant would not have been able to return to work had it not been for the concerns about her performance for example.

132. I have found that Mr Ratcliffe's concerns about the claimants performance were genuine concerns.

133. The decision to dismiss the claimant arises chronologically shortly before she was due to take her maternity leave and I find that Mr Ratcliffe was indeed unwise to combine a discussion about whether the claimant intended to return to work with a discussion about her performance and then immediately tell her that he had decided to dismiss her, for poor performance.

134. However, these fact formed no part of the grounds or the reason for Mr Ratcliffe deciding to dismiss the claimant. I conclude that Mr Ratcliffe was not influenced either consciously or subconsciously by the claimant's pregnancy or her imminent maternity leave when he was considering the claimants performance, or when concluding that she had made serious error and failed to tell him about them, or when thinking about what action he should take in respect of those errors or when deciding to dismiss the claimant. By the time the meeting took place, Mr Ratcliffe had decided that it was highly likely that he would dismiss the claimant but that he wanted to give her an opportunity to persuade him otherwise.

135. I conclude that the reason Mr Ratcliffe raised the question of whether the claimant wanted to return to work after her maternity leave was because he had hoped to avoid having to tell her that she was being dismissed so close to the start of her maternity leave. I find that his evidence before the tribunal in this respect was honest and that he accepted that his inexperience in dealing with such matters had meant that he had dealt with things badly. I accept his evidence set out in his subsequent letter to her that had she not been about to start maternity leave he would have dismissed her with notice in any event.

136. I find that his decision to dismiss was not dependent or on or influenced by whether the claimant would be returning from maternity leave. What was dependent on it, was the implementation of a likely decision.

137. I conclude that the decision to dismiss was not on grounds of the claimant's pregnancy, and nor was it on grounds that the claimant was taking or proposing to take maternity leave.

Automatic unfair dismissal contrary to section 99 Employment Rights Act 1996.

138. In respect of the claimants claim of automatic unfair dismissal it follows that having found that there is a wholly non-discriminatory reason for the claimant's dismissal that I conclude that the claimant pregnancy and or maternity absence were not the reason or principal reason for the claimant's dismissal.

139. The reason or principal reason for the claimant's dismissal was her capability, and in particular that she had failed to meet the targets required of her in respect of the value of delivery routes.

Victimisation contrary to section 27 Equality Act 2010.

140. The claimant has also made a claim of victimisation. Her claim is that having made a grievance which was a protected act, she was then subjected to a changed notice period and the that and that the respondent also changed the reasons why she was being dismissed, relying on matters which he had not in mind on 1 October.

141. I make my findings above in respect of the notice period, and whilst I find that the claimant understood that a change had been made I conclude that in fact, Mr Ratcliffe had not intended to make any such change to the notice period. I conclude that he had not therefore made a decision to change the notice period at all.

142. The treatment complained of did not take place. I conclude that there was a confusion which arose from the clumsy wording of Mr Ratcliffe's explanation. It was the result of a misunderstanding and not because the claimant had done a protected act by filing a grievance.

143. I conclude that although the matters set out in the letter were not all discussed with the claimant on 1 October that they were set out to assist the claimant in understanding what the difficulties with her performance were. I find that the reason why the claimant was dismissed was capability, as set out above and that the

respondent was seeking to provide further information to the claimant because she had requested the same in her grievance. I find that this is not unfavourable treatment.

144. I therefore dismiss the claimants claims

Employment Judge Rayner

Date: 03 March 2021

Judgment sent to the parties: 05 March 2021

FOR THE TRIBUNAL OFFICE