EMPLOYMENT TRIBUNALS

Claimant: **Ms Sian Reid**

Respondent: **ADSI Limited**

Heard at: **East London Hearing Centre**

On: **18 and 19 March 2021**

Before: **Employment Judge Gardiner**

Members: **Mr P Pendle**
Ms K Labinjo

Representation

Claimant: In person

Respondent: Ms I Ferber, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's claim for pregnancy related discrimination under Section 18 Equality Act 2010 is not well founded and accordingly is dismissed.**

2. **The Claimant's claim for automatically unfair dismissal under Section 99 Employment Rights Act 1996 (dismissal for a pregnancy related reason) is not well founded and accordingly is dismissed.**

REASONS

1. On 19 June 2019, the Claimant was summarily dismissed from her role as an Account Manager for the Respondent. At the time she was pregnant. She alleges that her dismissal was an act of pregnancy discrimination, contrary to Section 18 Equality Act 2010. She also argues that the principal reason for the dismissal was

her pregnancy, and that the dismissal was therefore automatically unfair, contrary to Section 99 Employment Rights Act 1996.

2. The Respondent's defence is that the only reason for the Claimant's dismissal was that the Claimant was guilty of gross misconduct. As the Claimant herself accepted, she had manipulated the length of the phone calls logged as made by her to suggest she was spending longer speaking to customers than was the case. When a call was made to an actual or potential customer and was put through to voicemail, she would choose not to leave a message but instead continuing the call with the voicemail recording up to four minutes of silence. This would give the false impression to the Respondent she was engaged with the customer in a lengthy call.

3. At the Final Hearing, the Claimant gave evidence herself, by reference to her witness statement, and was cross-examined by Ms Ferber of counsel, who represented the Respondent. The Claimant also called evidence from Jodie Sclater, a work colleague at the time of the events giving rise to her dismissal, who was also cross-examined. The Respondent called evidence from Ms Carly Rand, who took the dismissal decision, and from Mr Adrian Spreadborough, who heard the Claimant's appeal.

4. There was an agreed bundle which was 188 pages in length, together with a limited number of additional pages which were added subsequently. At one point, the Tribunal was played an audio recording of part of a disciplinary hearing, with another employee.

Factual findings

5. The Respondent is a business which provides telesales services for O2 and other clients. It has two customer facing teams, the Accounts Team and the Relationship Team.

6. The Claimant started her employment with the Respondent on 5 February 2018. She was part of the Accounts Team. Her role involved calling existing and potential customers to see if further sales could be made. Her performance, and that of her fellow team members, was monitored. Various metrics were used to evaluate performance, including the length of outgoing calls to customers.

7. On 5 March 2019, the Claimant was issued with a verbal warning in relation to her performance during January and February 2019. The subsequent written record of this verbal warning noted that the Claimant had failed to achieve the minimum performance level required across a number of KPIs over a period of 2 consecutive months. It recorded that, during the performance meeting, the Claimant admitted that her organisation had slipped and this was an explanation for her inconsistent performance. Mrs Rand also told the Claimant she felt that the Claimant's attitude was a factor. Mrs Rand said that the Claimant needed to shift her mind from defeated to 'can do'. The letter stated that an increase in the Claimant's call numbers and achieving her targets was non-negotiable. It concluded by saying that

any further issues regarding the Claimant's capability may result in a further hearing.

8. Later in March, the Claimant discovered that she was pregnant. She shared this news with Mrs Rand on 26 March 2019, saying she thought she was about four weeks pregnant. She told Mrs Rand she had shared this news with Jodie Sclater and her manager Rob Foote but had yet to advise her family. Mrs Rand said she would mention this to Adrian Spreadborough, the Respondent's Managing Director, but otherwise the news would be kept confidential.

9. On 5 April 2019, as she had promised when she was first told of the pregnancy just over a week earlier, Mrs Rand carried out a pregnancy risk assessment [99]. She directed the Claimant to the Gov.UK website as a good place to look for information about her rights as a pregnant employee. On 10 April 2019, Mrs Rand had a quick catch-up meeting with the Claimant at which the Claimant confirmed that her first scan was scheduled for 23 May 2019.

10. Whilst the Claimant's performance had improved in March 2019, during April she had failed to achieve the required minimum performance level across a number of KPIs. On 7 May 2019, Mrs Rand held a further performance review meeting with her, to discuss her performance. At the end of the meeting, the Claimant was issued with a written warning for capability. She was told that this would remain on her file for the following 12 month period. A written record of the outcome of the meeting, including the written warning, was sent to the Claimant on 10 May 2019.

11. In evidence, the Claimant explained why she did not appeal either the verbal warning issued in March 2019 or the written warning in May 2019. She said she accepted that her performance had not been at the expected level, and therefore the warnings had been appropriate.

12. By late May 2019, the Claimant had chosen to take a number of days annual leave to attend various antenatal appointments. She was short of annual leave and asked Mrs Rand if she might bring forward the four days that employees are required to take as holiday over the Christmas and New Year period, when the Respondent's offices are closed. Her point was that she would have started her period of maternity leave by then, and so be unable to take the time as holiday at that point. Mrs Rand told her that this would not be possible. She could take this holiday at the end of her period of maternity leave, or potentially, by agreement, she might be entitled to be paid in lieu of these days. She told the Claimant to raise this issue with Mr Spreadborough if she was not happy with Mrs Rand's response. As a result, the Claimant emailed Mr Spreadborough on 28 May 2019, in the following terms:

> "Hi Adrian,
>
> My holiday for this year have the additional 3 days for Christmas break and 1 day for New Years eve, would it be possible for you to remove these please as they won't be required. Sorry for bothering whilst your're off, I had tried to

do so myself but it says that I can't cancel a holiday that is booked by the company."

13. Mr Spreadborough responded: "Not sure I understand why you won't need them as they are company closure days, you will still be employed so you still need them as you can't take other day's instead". The Claimant says that she replied to this email but did not receive a further reply from Mr Spreadborough. Mr Spreadborough says he did not receive a second email on this topic, and therefore was not at fault in not responding further. His first response had been sent whilst he was on holiday. There is no further email from the Claimant in the bundle, and the Respondent's position is that no such email was sent. Despite the Claimant's contrary recollection, we think it likely that Mr Spreadborough's email was the last email in the email chain on this topic.

14. On 5 June 2019, Mrs Rand held a pregnancy support meeting with the Claimant. The Claimant said that all was well with the pregnancy. Although there had been a couple of incidents of her feeling unwell, she was coping well. She did not ask for any additional support. The meeting also discussed in general terms the maternity process and returning to work after maternity leave. The Claimant indicated she did not know what she wanted at this point in terms of returning to work. The Claimant alleges Mrs Rand told her she would not allow her to return on a flexible basis. This contention was not supported by any contemporaneous documents. We consider it is unlikely to have been said by Mrs Rand, given the proactive and supportive way in which she was addressing the implications of the Claimant's pregnancy.

15. On Friday 14 June 2019, the Respondent started a general review of the performance levels carried out by team members. The explanation given for this review at this point is that such a review was overdue, in that the Respondent had not engaged a Customer Coach for about 18 months. This would have been one of the responsibilities of that employee. Without someone in that post, this task had not been undertaken on a regular basis. The review included the Claimant's performance and that of others within the same team.

16. As part of the review, Mr Rob Foote, the Claimant's team leader, reviewed the Claimant's call statistics for that day, noticing that there was less than 30 minutes of activity between 2pm and 5.25pm. The Claimant had not left a voicemail on the number she had called at 15:36. That call had lasted for 4 minutes. Mrs Rand spoke to the Claimant about her activity levels. The signed record on that day records she told him she could not defend her actions, other than she was feeling quite tired. She had not previously raised tiredness as a particular issue. The file note did not record the Claimant suggesting the tiredness was attributable to her pregnancy.

17. The following Monday, 17 June 2019, as part of the review, Mrs Rand identified several calls where the Claimant appeared to be leaving the line open when connecting to a voicemail. On each occasion, the line was left open for more than four minutes. She spoke to the Claimant in an informal meeting about this. In the meeting, the Claimant admitted the allegation and confirmed she had done this "for

some time". She said she had done this in order to increase her call figures. She said a number of others were doing the same.

18. Following that informal meeting, Mrs Rand conducted further investigations. These revealed that the Claimant had been leaving the line open on several occasions. She recorded that the Claimant had done this sixteen times over a period of two weeks. She decided to suspend the Claimant pending further investigation and communicated that suspension to her. The Claimant was informed she would be told the following day whether formal action will be taken.

19. By the next day, 18 June 2019, Mrs Rand's investigation had concluded. She considered that the Claimant merited disciplinary action. She had documented various discussions as part of her investigation but had not prepared an investigation report, as the Respondent's procedure suggested should be done. The Claimant was told she would be facing disciplinary action. The disciplinary hearing was fixed for 10.45am on Wednesday 19 July 2019. This was less than 24 hours after she was told she would be facing disciplinary action. The Respondent's disciplinary policy provides that the written invitation to a disciplinary hearing should give a minimum notice of 2 working days.

20. The only written communication from the Respondent was an email sent on 18 June 2019 at 18:53, which was worded as follows:

> "Further to our conversation and you waiving your right to notice, I will see you tomorrow at 10.45am.
>
> It is necessary to hold a hearing due to the discovery of you avoiding making calls to customers/prospects by leaving your phone line open after reaching a voicemail. This obviously creates the impression that your call numbers are higher than reality. It also means that the line is left open and the customers device records all of the background noise.
>
> This is deemed as gross misconduct and you need to be aware that the outcome of the hearing could be your dismissal from ADSI.
>
> You are entitled to representation, should you wish to be accompanied, please advise me as soon as this email is received."

21. The hearing was held on 19 June 2019, and was conducted by Mrs Rand, with Rob Foote in attendance. The hearing was recorded on Mr Foote's phone. There was an agreed transcript of the recording in the bundle. At the start of the hearing, Mrs Rand asked the Claimant to confirm she had had enough time before the meeting, given that "there was a fairly short turnaround time" between the oral and then the written invite and the start of the meeting. The Claimant confirmed she was happy to proceed.

22. By way of explanation for why she had acted in this way, the Claimant said "The reason why I done it is because my minutes were low. There was no, I didn't do it to avoid calls coming into me or anything like that". She said that she was wanting

to avoid talking to people because she had been really struggling with it. She said she got really anxious on the phone. She said that calling people "without an actual purpose" when they did not want her to call them made her "really nervous". She said she had not mentioned this previously to anyone because she felt that another employee, Richard, who was having similar difficulties, was not taken seriously.

23. Mrs Rand asked the Claimant how long had she been leaving her phone line open after reaching a voicemail. She said, by way of response, "it comes and goes. Its most recently just the past few weeks, say like a month or two". Mrs Rand asked her "So you haven't been doing this for a while?" to which she answered "No". At that point, Mrs Rand revealed that she had checked back as far as February, which was four months earlier, and noted it had been happening at that point too. She asked: "So are you telling me I'm wrong?". The Claimant replied "No, I quite possibly could have done it then but it's not that it's a continual thing, week by week, month by month". At no point during the meeting did the Claimant say she was sorry for the way she had acted. This was despite being given the opportunity to add anything. When asked about this in cross-examination, she said that she was in shock and she did not realise that saying sorry would potentially have a big impact on the penalty she received.

24. At the conclusion of the meeting, Mrs Rand told the Claimant that she found that the Claimant was guilty of gross misconduct and that the sanction would be summary dismissal. She said she would send him a letter giving the reasons for the dismissal.

25. This letter was sent on 21 June 2019. It summarised what Mrs Rand considered to be the key points of the meeting. In conclusion, she said that the Claimant's defence did not justify her actions and did not support her argument that she was not comfortable making calls. She said: "making outbound calls, building relationships and growing a base of customers all form part of the responsibilities of your role; this has not changed since when your employment commenced". She said she believed that the Claimant had set out to find a route that would create an impression of productive activity, namely deliberate insubordination. The letter ended by telling the Claimant that she had the right to appeal against the dismissal decision.

26. In advance of the disciplinary hearing, the Respondent had not sent the Claimant the results of its investigation. As a result, the Claimant had not had the opportunity to see the Respondent's analysis of the extent to which the Claimant had been leaving calls open. The Respondent's analysis had sampled the Claimant's calls on random days over a period of around four months. The Claimant was noted to have left the call open on 33 occasions, whereas she had conducted the call appropriately on 14 occasions.

27. During the same investigation, the Respondent had analysed the calls made by another employee, RS, on the same dates. He was found to have acted inappropriately in the same way on five occasions. In addition, he had

inappropriately called a non-customer number for lengthy periods on a further five occasions. The vast majority of his calls were handled correctly.

28. On the same day as the Claimant's disciplinary hearing, the Respondent held a disciplinary hearing with RS. RS was also accused of a similar disciplinary charge. This was that "when making outbound call and reaching a customer's voicemail, [he] had opted on occasions to neither leave a message nor terminate the call. There are also occasions where, when reaching an IVR system, you have chosen to remain in an automated service loop".

29. During RS's disciplinary hearing, he was asked similar questions to those put to the Claimant. He was asked for how long his practice of leaving calls open had been going on. His answer was "Probably about 4 months, 5 months". He said he did it when he felt under pressure within himself. He said that when the call had been left open, he had used the time to "do other stuff". He said that he had first started doing this when he had overheard the Claimant talking to Jodie. He said that he was disappointed with his behaviour. When asked if there was anything he wanted to add, he said he was obviously very grateful for the opportunities he had in his job, and the opportunity to do the job in the first place. He was asked the question a second time and said that he wanted to apologise for the mistake and said he would never do it again. He said he wanted to start with a clean sheet.

30. The Claimant has argued that Mrs Rand laughed on one occasion during RS's disciplinary hearing. If she did, then the Claimant argues this showed that Mrs Rand was not taking RS's disciplinary process seriously and was never minded to dismiss him for misconduct. We were asked to listen to the relevant section of the audio recording. Having done so, we are not persuaded that the indistinct sound at this point on the transcript is Mrs Rand laughing.

31. Mrs Rand's decision in RS's case was to issue him with a final written warning, which she told him at the end of the disciplinary hearing. In her subsequent letter, she again summarised what she regarded as the key features of her meeting with him – that he did not try to justify or deny his actions; that he claimed to have used the time created by keeping the call open to process customer quotes and do other work; and how he had apologised.

32. The Claimant appealed against her dismissal and her appeal was heard by Adrian Spreadborough, Managing Director. Again, the appeal hearing was recorded and there is an agreed record of what was discussed during the appeal hearing in the bundle. Mr Spreadborough identified what he considered were the points that the Claimant was raising by way of appeal and discussed each in turn. At the end of the hearing, he asked her if there was anything more that she wanted to say. Her initial reply was that she thought she had told him everything that she needed to say. At that point, her union representative asked her if she was sorry. Her reply was "Yeah I am, that is actually something I was thinking about when that first letter I sent off, I did want to genuinely apologise to you for this because I didn't realise it had such an impact and obviously I do now".

33. On 25 July 2019, Mr Spreadborough sent the Claimant a detailed appeal outcome letter explaining why he was dismissing her appeal. The decision to dismiss her was therefore upheld.

34. The Claimant also seeks to compare the treatment she received with the treatment of another employee GC. GC faced disciplinary action in April 2019 for falsifying her call figures, in that she had been calling a number that was not a customer number and had been listening to a loop of options. The outcome letter, following her disciplinary hearing, issued her with a written warning. It noted that she had admitted that there was no excuse for her actions other than feeling under pressure to achieve the required targets. She was remorseful and apologetic for her behaviour.

Legal principles

Pregnancy and maternity discrimination

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

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

36. This provides that an employer will have committed an act of discrimination if, in the protected period, the employer treats a woman unfavourably because of the pregnancy or because of illness suffered as a result of the pregnancy. The protected period here runs from the start of the pregnancy until a period of two weeks after the end of the pregnancy (Section 18(6)(b)).

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

38. Under Section 18, there is no need for a comparison between the Claimant's treatment and the treatment of an employee who was not pregnant, or how such an employee would have been treated. In assessing whether there is unfavourable treatment under Section 18, the focus is on the mental processes of the person that took the decision said to amount to discrimination. In the present case, that is Mrs Rand. The Tribunal should consider whether Mrs Rand consciously or unconsciously was influenced to a significant (ie a non-trivial) extent by the Claimant's pregnancy. Her motive is irrelevant. Even though no comparator is required, it is open to the Claimant to point to more favourable treatment of other employees who were not pregnant as a potential basis for inferring discrimination in her case.

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

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

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

41. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a non-discriminatory explanation, that the treatment was in part the result of her pregnancy.

42. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the treatment. It is also open to the Tribunal to start at the second stage, effectively assuming that the burden of proof has transferred to the Respondent and ask why the Claimant was dismissed, recognising that it could be for more than one reason. Has the Respondent established that no part of the reason for the dismissal was the Claimant's pregnancy?

Automatically unfair dismissal

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

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

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

> (1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if-
>
> a. The reason or principal reason for the dismissal is of a kind specified in paragraph (3)
>
> b. …
>
> (2) …
>
> (3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with-
>
> a. The pregnancy of the employee;
>
> b. ….

45. We are to consider whether the principal reason for the Claimant's dismissal was 'associated with' the Claimant's pregnancy, even if not directly caused by it. The Respondent's case is that the principal reason, indeed the only reason, for her dismissal, was misconduct.

Conclusions

46. We remind ourselves that this is not an ordinary unfair dismissal claim. We are therefore not reviewing the fairness of the process that was followed leading to the Claimant's dismissal. The only potential relevance of the procedure followed in the Claimant's case is insofar as it potentially provides a proper basis for potentially inferring that part of the reason for the dismissal was the Claimant's pregnancy (in relation to the pregnancy discrimination claim); or the predominant reason for the dismissal (in the case of the automatically unfair dismissal claim).

47. We do not consider that the Claimant's case is comparable to that of RS. In RS's case, the number of mishandled calls was substantially lower than that in the Claimant case; there was evidence that RS was using the time to carry out other tasks for the Respondent; and RS had both acknowledged that his behaviour was inappropriate and had apologised during his disciplinary hearing. In these circumstances, the different outcome in RS's case by itself is not a sufficient basis for drawing a potential inference that the Claimant's dismissal was tainted by the fact of her pregnancy. Furthermore, we accept that these distinctions were regarded by Mrs Rand as differentiating factors between the two cases, which made the Claimant's misconduct more serious than that of RS.

48. In addition, we do not accept that GC was in a comparable disciplinary position. She had received a written warning for repeatedly calling a number that was not a customer number. Although she was also misleading the Respondent as to the duration of her calls, she was not leaving silent voicemail messages on customer

voicemails for minutes at a time. This was potentially harming the Respondent's reputation with its customers. Unlike the Claimant, GC expressed remorse unprompted during her disciplinary hearing. Again, we accept that these distinctions were regarded by Mrs Rand as material factors which justified a different outcome in each case.

49. The two main points relied upon by the Claimant, in addition to the comparisons with RS and GC, were both points she had not chosen to include in her witness statement. The first was her further evidence that the Respondent had refused to allow her to take the annual leave in June that she would be expected to take over the Christmas and New Year period, some six months later. The Claimant did not have a statutory or contractual right to take this holiday before it had accrued. The Respondent's policy, which we accept, was that annual leave could only be taken once it had accrued. There was no evidence advanced by the Claimant that this annual leave would be lost as a result of her maternity leave. Rather, she would be able to take the holiday at the end of her period of maternity leave.

50. The second point concerned the treatment of her antenatal appointments. The Claimant argues that an inference can potentially be drawn from this treatment as to a reason for her dismissal. We disagree. The Claimant had apparently chosen to book a day's annual leave on each day on which she had an antenatal appointment. She had stated on the computer system for booking leave that the reason why she was booking a day's leave was for an antenatal appointment. It was her choice to take a day's leave on each occasion. She did not ask Mrs Rand if she could have the part of the day off work that was necessary to attend the appointment. Had she done so, we consider that Mrs Rand would have allowed her to take this time off work without using annual leave. We do so because the evidence indicates that Mrs Rand was aware of her legal obligations in relation to pregnant employees. She had carried out a pregnancy risk assessment within a week of being told of the Claimant's pregnancy. She also encouraged the Claimant to research her rights as a pregnant employee, and what her maternity leave entitlement would be.

51. In addition, in closing submissions, it was asserted by Mrs Jaggard that it would be disruptive for the Respondent if the Claimant was away from the office on maternity leave. This was advanced as a potential motive for wanting to dismiss her. However, this was not a point that was put to the Respondent and there was no specific evidence in this regard from the Claimant herself.

52. It is true that the Respondent did not provide the Claimant with documents recording the information obtained in the course of the disciplinary investigation. However, this potential failure to follow a fair procedure does not lead to any inference of discrimination based on pregnancy. It appears that RS was treated in the same way. There is no evidence in the documents disclosed in relation to his disciplinary that, unlike the Claimant, he had been provided with evidence of the Respondent's investigation in advance of his disciplinary hearing.

53. Therefore, we do not find that the burden of proof shifts to the Respondent to establish, on the balance of probabilities, that the entire reason for the dismissal was not to any extent influenced by the Claimant's pregnancy.

54. Even if the burden had shifted to the Respondent, we would have found that the Respondent discharged the burden of proof. We find that the only reason for the Claimant's dismissal was gross misconduct. Given the extent of the misconduct that the Claimant was admitting, there was a reasonable basis for dismissing the Claimant. Over a period of several months, she had been engaging in behaviour designed to mislead the Respondent as to her customer interaction. She accepted that this amounted to fraudulent conduct. This was the only reason for the Claimant's dismissal.

55. For the same reason, the Claimant's claim for automatic unfair dismissal fails.

Employment Judge Gardiner
Date: 9 April 2021