EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Tajtlova	**v**	**Sumitomo Corporation Europe Limited**

Heard at: London Central **On**: 4 – 6 December 2017

Before: Employment Judge Hodgson
Dr S Jary
Mr D Schofield

Representation

For the Claimant: Mr I Ahmed, counsel
For the Respondents: Mr G Paul, solicitor

JUDGMENT

1. **The claim of direct discrimination contrary to section 18 Equality Act 2010 succeeds.**
2. **The claim of unfair dismissal contrary to section 99 Employment Rights Act 1996 succeeds.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 3 October 2016 the claimant brought claims of direct discrimination, and automatic unfair dismissal.

The Issues

2.1 At the commencement of the hearing the issues to be considered were identified.

2.2 The claimant brings claims of automatic unfair dismissal pursuant to section 99 Employment Rights Act 1996. She relies on pregnancy, or maternity.

2.3 The claimant alleges direct discrimination contrary to section 18 Equality Act 2010. It is her case that the respondent treated her unfavourably by dismissing her because of pregnancy, or because of illness suffered as a result of it, or because of proposed maternity leave.

2.4 It is the respondent's case that the claimant was dismissed for a reason related to capability. The respondent alleges pregnancy, pregnancy related illness, or any maternity leave, could not be the sole or principal reason.

2.5 It is respondent's case that the claimant was dismissed by two managers who jointly took the decision, Ms Debbie Franklin, the claimant's line manager, and Mr Jon Margree, the head of human resources for EMEA and CIS. It is alleged, in the week preceding 31 May, they jointly took a decision to dismiss the claimant because of performance related issues. It is their case that they knew nothing of the pregnancy at the time they decided to dismiss. They accept that they knew of her pregnancy from 3 June 2016 and that the letter of dismissal was sent on 30 June 2016, but the deny that the knowledge of pregnancy was a material influence on the decision.

Evidence

3.1 We heard from the claimant, C1.

3.2 For the respondent we heard from Ms Debbie Franklin, R3; Mr Jon Margree, R4; and Ms Elizabeth Dos Santos, R5.

3.3 We received a bundle, R1, and a chronology, R2.

Concessions/Applications

4.1 During submissions, the respondent conceded that the burden shifted in the direct discrimination claim such that it was for the respondent to prove, on the balance of probability, that the dismissal was in no sense whatsoever because of a protected characteristic of pregnancy and maternity.

The Facts

5.1 On 20 April 2015 the claimant commenced employment with the respondent as an assistant manager in the human resources department. She was subject to a probation period of six months which she passed on 20 October 2015. She received positive feedback; there was no cause for concern, save in relation to managerial responsibilities. Nevertheless, she was described as "very structured and organised." It was said she "demonstrated a good standard in respect of the quality of her work to date."

5.2 In December 2015, the claimant's grandmother died and she had a short period of time off. She returned to the Czech Republic for the funeral. In mid-January, she was locked out of her rented room in her landlord's flat. This caused some distress and ultimately led to the landlord being prosecuted. She accepts that during that period, for a few weeks leading up to February, her work performance was affected.

5.3 On 4 March 2016, the respondent sent a letter to the claimant regarding a new job grading scheme. The claimant's role was to be changed from M5 to P3. This was part of a wider process which the respondent refers to as "levelling."

5.4 The respondent raised no specific issues with the claimant prior to her appraisal on 6 April 2016.

5.5 On 6 April 2016, the claimant had her annual appraisal with her line manager, Ms Debbie Franklin. The appraisal contains some criticisms. These criticisms are of a general nature and are not supported by specific factual examples. It is said that she had shown "a lack of proactivity in the HR team and with the application of her job description." It states, "Andrea's knowledge level does not match the level required for the role and although during her probation she showed good promise, this promise faded and completely disappeared as the second half of the performance year progressed." The appraisal goes on to say, "Sometimes Andrea has demonstrated a lack of professional behaviour by being too emotional, showing panic if things do not go her way and by appearing to protect herself by deflecting things away from her by naming another team member rather than think about the level of service/outcome should be delivered and protecting the reputation of the HR team."

5.6 The appraisal also contained positive comments to the effect that the claimant "has shown good organisational skills and attention to detail." It is said she is a "quick learner," "adaptable," and shows "a willingness to help and find solutions."

5.7 The claimant's progress in meeting objectives was reviewed: two were recorded as being on track; two were recorded as achieved; and one was said to be behind. Further targets were set, most of which were to be achieved within one year. There was an earlier target concerning "improvement of compensation program" and "to show more focus on

professionalism." As to this latter target, what is intended is unclear, as no specific factual targets were set, there is reference to "being less emotional," "demonstrating professional knowledge and judgement in key tasks/situations," and "by being more focused on what the outcome should be on delivering in line with expectation." The overall rating given was "improve." This was the lowest rating the respondent could give and meant the claimant would not receive a bonus or a pay rise.

5.8 There is no suggestion that the claimant should be put on a performance improvement plan; the claimant specifically asked whether she should be put on a performance improvement plan and it was confirmed that this was not the intention. There is no suggestion that her job may be in jeopardy.

5.9 In early April 2016 the claimant became pregnant. She felt unwell at work. She used the bathroom a lot. She had headaches and had tiredness. The claimant told a colleague, Ms Cheryl Coulby and two other colleagues, that she was pregnant, after about four weeks. One night, she left on her desk a printout from the internet about pregnancy related sickness.

5.10 During this time, the claimant and her partner purchased a house.

5.11 Leading up to 31 May 2016, the claimant's line manager, Ms Franklin, and the head of human resources for EDEA and CIS, Mr John Margree, had some discussion about the claimant. The exact content of the discussion and the course of action they decided is disputed. It is apparent it led to a letter and a proposed meeting, and we will detail that below. Both Ms Franklin and Mr Margree allege that a final decision to dismiss the claimant occurred in the week leading up to 31 May 2016. Both acknowledged there is no documentary evidence in support. There is no email, file note, or minute of any meeting. In her evidence, Ms Franklin states at paragraph 12 and 13.

> **12. The Claimant simply didn't possess – or certainly display to us – the level of professionalism and experience necessary to perform the role properly. I had discussed my performance concerns with Jon Margree at various points during the first half of 2016. He shared my concerns. In May 2016 we decided that the Claimant was unlikely to improve to the extent required within a reasonable timeframe – even if we put a PIP in place - and that the Claimant's employment should therefore be terminated.**
>
> **13. I asked three of the Claimant's colleagues – Elizabeth Dos Santos, Aleesha Byrd and Claire White – to set out their experiences and observations in respect of the Claimant in writing to me by way of 'statements'. The request was made during the week commencing 23 May 2016, with 1 June as the deadline. All three provided statements on 1 June 2016 [pages 191-195]. The purpose behind asking for these statements was that, at the dismissal meeting on 2 June 2016, Jon would be able to demonstrate that it was not simply him and me that had issues with the Claimant's performance: rather, they were held by the HR team more broadly.**

5.12 It follows that she deals briefly with the reason for dismissal it is her case that there was an accumulation of concerns that led to the decision.

5.13 Ms Franklin states at paragraph 8(ii)(iv):

> **As Jon Margree will address in his witness statement, the Claimant had organised Communications Skills Workshops which took place In November and December 2015. A number of senior people within the EMEA and CIS business attended this training. The Claimant did not present it herself, but it became apparent that she had not read the feedback forms following the session. She subsequently tried to organise a second session for the same attendees in July 2016. Had the Claimant read and taken note of the feedback provided from the first sessions, she would have been aware of the feedback suggesting that the duration was excessive and that a second full-day session was not required [pages 185-188]. That second session was subsequently cancelled by the CFO. The complaints on this point, from senior people within the business, were damaging to the internal reputation of the Human Resources function within the business. This was, in many ways, the catalyst for the decision to dismiss.**

5.14 At paragraph 9 she states the following

> **9. In short, it became increasingly apparent to me that the Claimant did not demonstrate the required skills, knowledge and experience for her role, including the people management skills expected of her. As we were introducing a new grading scheme it made sense to reorganise the HR team structure and, around March 2016, her job role was 're-levelled' from Assistant Manager to Senior HR Executive [page 76]. The role was as an individual contributor with no direct management responsibility and the tasks she was required to perform should have been a better match for her background of ten years in various human resources roles. However, on numerous occasions the Claimant sought guidance and appeared to rely on instructions from other members of the HR team despite her CV highlighting knowledge and experience that would suggest the Claimant would know more than the other HR team members in the main areas of responsibility within her role [pages 1-4]. One example of this is with a statutory sick pay issue, the Claimant asked a colleague, Clare White, on more than one occasion about the rules and then still made an error in the letter explaining this to an employee. Another example is when the Claimant was dealing with a temporary employee from one of the Respondent's subsidiary companies who was raising a grievance, and the Claimant asked another team member what to say, and then reported to this team member so that the team member could then tell her what to say next. This approach did not reflect the level of experience and initiative required of a Senior HR Executive.**

5.15 Despite all these alleged specific concerns, Ms Franklin raised no issues with the claimant except during the appraisal meeting.

5.16 Mr Margree says the following at paragraph 9:

> **9. I had discussed my performance concerns regarding the Claimant with Debbie Franklin at various points during the first half of 2016 and she shared my concerns. Myself and Debbie decided during May 2016 that the Claimant was unlikely to improve to the extent required within a reasonable timeframe and that the Claimant's employment should therefore be terminated.**

5.17 It is clear that he had not discussed any concerns with the claimant prior to 31 May 2016.

5.18 It is common ground that no document, the ET3, or the statements of Ms Franklin or Mr Margree hints at any involvement of the chief finance officer, Mr Kimihiko Sato.

5.19 During oral evidence, Ms Franklin stated that Mr Sato had told her to dismiss the claimant. The exact date, and the circumstances, remain unclear. There has been a suggestion that this conversation took place early in May, but there is no document which would demonstrate when the conversation took place, or the effect of it.

5.20 Mr Margree denies having any specific discussion with Mr Sato. He accepts there was some form of communication from Ms Franklin, and he understood that Mr Sato required some form of action. As to what he believed was the intention of Mr Sato, Mr Margree evidence has been equivocal and contradictory. Having regard to the totality of his evidence, we find that he understood that it was the express wish of Mr Sato that the claimant should be dismissed. However, he denies taking any steps to clarify the position with Mr Sato or to ascertain his reasoning.

5.21 It is clear is that both Ms Franklin and Mr Margree excluded obvious, important, and relevant evidence from their witness statements. We have no doubt that this was a deliberate omission designed to obscure Mr Sato's involvement.

5.22 On 31 May 2016, Mr Margree wrote to the claimant as follows:

> **I am writing to invite you to attend a meeting to discuss your job role. This meeting has been arranged for Thursday, 2 June 2016 and will begin at 10.00 a.m. and held in room 4.**
>
> **The meeting will be attended by Jon Margree. You are entitled, if you wish, to be accompanied by another work colleague. Please inform me as soon as possible of your chosen companion so that I can make the necessary arrangements to allow him/her to attend.**

5.23 There was a brief meeting on 31 May 2016, at approximately 16:55. The claimant was handed the letter and told the meeting was about a job role.. The claimant says she joked about being dismissed. Mr Margee does not recall any reference to dismissal. He declined to explain the nature of the meeting, he made no comment as to whether it concerned dismissal or not; he does not recall question being raised.

5.24 The claimant believed that she would be presented with new terms and conditions. There was an ongoing process of reorganisation which the respondent referred to as levelling. The detail does not concern us, but the claimant understood that any managerial role had been removed and it would be necessary to readjust her job description. There was no specific indication given that the meeting had anything to do with her performance, either within the letter or orally.

5.25 On 1 June 2016, the claimant was feeling unwell. The claimant had health issues which we do not need to consider, but she was fearful of a miscarriage. She explained her symptoms to the GP. The GP asked her to rest. The claimant sent an email on 1 June 2016 confirming that she would not be able to attend that day. On 3 June 2016, the claimant sent an email stating, "As you might already be aware, I am pregnant and this has led to symptoms which are affecting my health and well-being." She sent a fitness note confirming she was not fit for work. Both Ms Franklin and Mr Margree knew no later than 3 June 2016 that the claimant was pregnant. The claimant did not return to work. The claimant did not attend any meeting.

5.26 Mr Margree responded saying that the claimant was suggesting she had "already told someone in the team, but as this is first information to either Debbie or me please confirm who already knows."

5.27 On 30 June 2016, Mr Margree and Ms Franklin sought advice from a solicitor, Mr David Wynne of Squire Patton Boggs LLP. It is common ground that this advice is now relied on in evidence. Privilege has been waived. There are documents which are disclosable, but the respondent has failed in its duty of disclosure.[1]

5.28 It is denied that any advice concerning the claimant's dismissal was sought prior to 30 June 2016, albeit it is acknowledged that any such advice would also be disclosable.

5.29 No attempt was made to discuss the matter with the claimant prior to her being sent a letter of dismissal dated 30 June 2016. That letter refers to the letter of 31 May 2016 as being an invitation to "a performance meeting." Ms Franklin accepts no wording in the letter of 31 May indicates it concerned performance.

5.30 The 30 June 2016 letter refers to the 2016 appraisal and the requirement to improve due to a lack of proactivity. It asserts "several objectives were set" including "two linked to demonstrating your professional competence." The letter goes on to assert that during April and May no improvement was forthcoming. It refers to a basic mistake in HR administration relating to a fixed term contract and letter; it also refers to "poor writing of emails which showed a lack of understanding of the company structure and environment." There are a number of other general allegations made referring to alleged lack of competence. None was discussed with the claimant. The exact dates of the alleged difficulties were not stated. It does, however, go on to say, "During your absence several more issues have come to light which further highlights in our view a lack of the necessary degree of initiative, professionalism and a lack of understanding of the tasks being undertaken." What these issues were, or their relevance to the dismissal decision, is not set out with any clarity. There is

[1] It was agreed on day one that privilege had been waived. The respondent failed to produce any documents during the course of the hearing. It was agreed during submissions that the matter should now be decided absent those documents, albeit, if they are disclosed at a later date and materially affect the outcome of the decision, either party may apply for a reconsideration.

reference to data submission for Willis Towers Watson, and poor efficiency. As to what reliance was put on these matters which arose post her absence, the letter is silent

5.31 The letter does not state when the decision to dismiss occurred. It does say, "It is with regret that we have not been able to give you this feedback face-to-face but as there seems from your certificates to be no immediate prospect of you returning to work we have decided that we are going to terminate your employment with immediate effect."

5.32 The letter does not mention the involvement of Mr Sato.

5.33 In his evidence, Mr Margree says the following:

> **14. After taking legal advice Debbie Franklin and I decided we would proceed with the Claimant's dismissal. As the Claimant was unlikely to be returning from sick leave in the near future, Debbie Franklin sent a letter to the Claimant dated 30 June 2016 (see pages 210-211) giving her notice that her employment was to be terminated with payment in lieu of notice. We would have preferred to do this in person but it did not appear that a return to the office from sick leave was imminent.**

5.34 The claimant appealed and that appeal was heard by an external consultant, Clarendon Consulting Services Limited. It is clear that the documentation provided was incomplete.

5.35 It is the respondent's case that following the decision to dismiss, Ms Franklin, Ms Franklin sought statements from three individuals.

5.36 There is one email from a person junior to the claimant, Ms Clare White, of 1 June 2016 which is critical of the claimant in a number of respects. As to when this was requested, and how, the email does not say. There are two undated statements: the first of Ms Elizabeth Dos Santos and the second from Ms Aleesha Bird. They are also critical of the claimant. They do not record how they came into existence. Ms Franklin, in oral evidence, stated that there had been a meeting when all three were present. Ms Franklin said that she told them, specifically, that the claimant was to be dismissed and she asked them to produce some form of written note concerning the claimant's ability.

5.37 Ms Franklin's evidence on this was sparse. In her statement Ms Franklin states at paragraph 13:

> **13. I asked three of the Claimant's colleagues – Elizabeth Dos Santos, Aleesha Byrd and Claire White – to set out their experiences and observations in respect of the Claimant in writing to me by way of 'statements'. The request was made during the week commencing 23 May 2016, with 1 June as the deadline. All three provided statements on 1 June 2016 [pages 191-195]. The purpose behind asking for these statements was that, at the dismissal meeting on 2 June 2016, Jon would be able to demonstrate that it was not simply him and me that had issues with the Claimant's performance: rather, they were held by the HR team more broadly.**

5.38 She makes no reference to saying that she discussed the matter with the three individuals in a single meeting when she told them all that the claimants would be dismissed. However, that is the evidence she gave orally.

5.39 Ms Santos in oral evidence stated that she had been told that the claimant was to be dismissed or terminated when Ms Franklin was asked to produce a note of evidence. She could not recall whether it was in the meeting or whether there was some form of individual discussion. She also referred, generally, to knowing the claimant was to be dismissed, albeit she could remember how it was communicated or when. Ms Santos's written evidence states, "I cannot recall if I was told at the time of being asked for the statement that the claimant's employment was to be terminated, but I was made aware of that fact prior to the proposed meeting on 2 June 2016." When asked about this statement, Ms Santos accepted that she had no recollection of what specifically was said to her when she was asked for the statement. She could not remember whether there was direct reference to dismissal or termination. She could not remember the context specifically, or the words used. As to when she was made aware of the possible dismissal, and how, she had no detail. Ultimately, Ms Santos resiled from her oral evidence, to the effect that she was told the claimant would have her employment terminated at the same time she was asked for the written statement, as it was inaccurate. Her written statement was accurate, her actual recollection of what was said to her about dismissal, and when it was said, is incomplete and unclear, she simply could not remember.

The law

6.1 Section 18 - Pregnancy and maternity discrimination: work cases, in so far as it is material to the dispute, in this case states:

> **(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, …**

6.2 The burden of proof is found at section 136 Equality Act 2010

> **Section 136 Equality Act 2010 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;
(b) …

6.3 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Annex
(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination 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 against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA

from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less[2] favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.4 Section 99 Employment Rights Act 1996 provides, in so far as it applicable:

(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if-

(a) the reason or principal reason for the dismissal is of a prescribed kind, 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,
(b) ..

6.5 Regulation 20 unfair dismissal of the Maternity and Parental Leave etc Regulations 1999 provides, in so far as it is applicable:

[2] We note that section 18 is a case of unfavourable treatment and not less favourable treatement. The principles set out in the annex are applicable to unfavourable treatment.

> **(1) An employee who is dismissed shall be regarded for the purposes of part X of the 1996 act as an unfairly dismissed if –**
>
> **(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (three)..**
>
> **(3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with –**
>
> **(a) the pregnancy of the employee**

6.6 This is a case where the claimant does not have the requisite qualifying period pursuant to section 108 Employment Rights Act 1996 to claim, what is commonly termed ordinary unfair dismissal, pursuant to section 98 Employment Rights Act 1996. This then leads to a consideration of whether it is the respondent or the claimant that has the burden of proving the reason for dismissal. We do not need to consider all the case law. It is said that **Maund v Penwith District Council** 1984 ICR 143, CA is authority for the general proposition that, where the employee has the requisite qualifying period for section 98 claims, the employee acquires the evidential burden to show, without having to prove, that there is an issue which warrants investigation, and should that evidential burden be discharged, the burden reverts to the respondent.

6.7 The Court of Appeal decision in **Smith v Hayle Town Council** 1978 ICR 996 is frequently cited as authority for the proposition that where an employee lacks the requisite continuous service to claim ordinary unfair dismissal he or she will acquire the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason. It is also argued that the case of **Ross v Eddie Stobart Ltd** EAT 68/13 supports **Hayle.**

6.8 It is possible that the question of the burden of proof is important in this case. The claimant does not have the two years employment, pursuant to section 108 need to bring an ordinary (section 98) claim of unfair dismissal. In those circumstances, it may be argued that she acquires the burden of proving, on the balance of probability, that the reason for dismissal was an automatically unfair reason.

6.9 We doubt that **Hayle** is still good authority. It is correct to say that **Ross** did consider **Hayle**. The appeal in that case was concerned with the assertion that the respondent maintained the burden of proof, even in cases where the claimant did not have the requisite qualifying period for a section 98 claim. HHJ Peter Clarke expressly stated that it was not open to the Employment Appeal Tribunal to depart from the majority opinion in **Hayle**. However, he concluded, (see paragraph 26) that the reference to the burden of proof was irrelevant, as it was not necessary to the employment tribunal's conclusion; the tribunal had not decided the case on the burden of proof.

6.10 It seems to us that there are two general questions which need to be addressed. First, in claims of automatic unfair dismissal, such as the

section 99 claim, is there a difference in the burden of proof which depends on whether the claimant has the period of continuous employment required for all claims of unfair dismissal that are not specifically exempted by section 108?

6.11 Second, what is the actual, or potential, effect of the burden of proof falling on the employee rather than the employer?

6.12 It is helpful to set out, briefly, why it is said that having two years qualifying service, so as to satisfy section 108(1), makes a difference.

6.13 The general right not to be unfairly dismissed is contained in part X at section 94 Employment Rights Act 1996; it is not contained in section 98.

6.14 It is clear that having two years' service allows an employee to bring a claim under section 98. Section 98 (1) states, "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show… the reason (or if more than one the principal reason) for the dismissal…" This provides a clear burden of proof for the purposes of section 98.

6.15 Claims of automatic unfair dismissal, for example under section 103A, which concerns protected disclosures, are silent as to the burden of proof. It appears there are, broadly, two possible interpretations. The first is that if a claimant cannot bring a claim of ordinary unfair dismissal, the burden as provided for in section 98, does not apply at all. The second is that a claimant who satisfies section 108(1), and who can bring a section 98 claim, may take benefit of the section 98 burden in relation to all other allegations of unfair dismissal.

6.16 Thus, it is argued that the length of service dictates the burden of proof. If this were only of academic interest, it would not be necessary to consider it. However, the burden may be of practical importance. In situations where the reason is unclear, if the burden falls on the claimant, the claimant's case may fail, but if the burden falls on the respondent, the claimant's case may succeed.

6.17 It is necessary to consider the case of **Kuzel v Roche Products** [2008] ICR 799 in which LJ Mummery gave the leading decision and in so doing has considered the burden of proof.

> **50. An unfair dismissal claim has a number of aspects any or all of which may be disputed. In this case the dispute is about the reason for dismissal and where the burden of proof lies. The burden may differ according to the nature of the disputed issue. On the specific issue of dismissal, for example, the claimant employee must prove that he was dismissed. This will not usually be a difficult burden to discharge. The production of a letter of dismissal usually proves the point. There are, however, cases in which there is disputed evidence about whether the employee resigned or whether he was constructively dismissed.**
>
> **51. Similarly there may be an issue as to the claimant's status affecting his right not to be unfairly dismissed...**

52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.

53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.

55. Sixthly, the burden of proof issue must be kept in proper perspective. As was observed in Maund, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof.

56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.

57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by

> **either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**
>
> **61. I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98 (1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was.**

6.18 We accept that this case does not deal directly with the position of an individual who, by operation of section 108, cannot claim ordinary unfair dismissal. It follows that as the point was not in issue, it cannot be said to have directly addressed **Hayle**. However, when the basis for the decision is considered carefully, it fundamentally undermines the notion that there can be a difference in the burden of proof which depends on whether section 108 is or is not satisfied.

6.19 Paragraph 61 does deal with the interrelationship between the burden as it is set out in section 98 and its effects on the burden for the remaining provisions covered by section 108(3), for which no specific burden is specified. It states, “The general language of section 98(1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions.” Mummery LJ goes on to say, “It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was.” In our view, this leaves little room for doubt as to the meaning. There is no suggestion that the position is different when section 98 is not engaged directly because of qualification for section 108. It is put forward as a general proposition that the burden provided in section 98 is of general applicability. It would seem to us that there would be a degree of arbitrariness or illogicality in changing the burden, depending upon the length of service. There is no express provision for that in the Employment Rights Act 1996. Moreover, it would lead to difficulty where an individual has the two-year qualifying period, but chooses not to claim ordinary unfair dismissal. In that case, the tribunal would have to import the burden of proof from a provision which is not expressly relied on.

6.20 It follows that we doubt that **Hayle** remains good law. However, this case does not turn on the burden of proof and we do not have to finally conclude whether **Hayle** remains good law.

6.21 The burden of proof is of particular significance if one side or the other has the burden, but fails to discharge it. The question is what is the result? **Kuzel** makes it absolutely clear that the result does not depend upon an application of the burden of proof. The respondent does not have to prove the reason it advances in order to defeat a claim of automatic unfair dismissal. Paragraph 60 makes it clear that deciding the reason is a matter of fact for the tribunal and it turns on the question of the evidence produced and the permissible inferences on that evidence. It is open to a tribunal to find the true reason was a reason advanced by neither party. It therefore follows that the failure to discharge the burden does not constrain the tribunal to find the alternative explanation advanced; it is simply a question of fact for the tribunal. As nothing turns on the burden, we do not need to come to a final conclusion as to the current status of **Hayle**.

6.22 We would add that an over emphasis on the burden could lead a tribunal into error. The section 99 claim only requires that the sole or principal reasons is "connected with" pregnancy (see regulation 20). It seems to us this falls short of saying the sole or principal reason must be the pregnancy. "Connected" implies something less than the pregnancy itself being the sole or principal reason. This means the respondent could establish its sole or principal reason (redundancy would be an obvious example) and yet could lose a section 99 claim if the relevant connection exists.

6.23 We should add that **Kuzel** is consistent with the suggestion that there is some form of evidential requirement placed on the claimant. We do not need to consider that in detail. The claimant may point to any evidence, whether advanced by the claimant or not, in support of the claimant's case. An investigation as to whether that evidence exists will resolve the question of whether some evidence had been identified by the claimant.

6.24 Having regard to **Kuzel,** we think it is unsafe to now say that the claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason. We accept that an employer could argue that this is a misdirection in law which causes it disadvantage. There can be no disadvantage to the claimant. However, to direct ourselves that there is a burden on the claimant to establish the reason on the balance of probabilities, risks a clear conflict with the principles as set out in **Kuzel**. We will, therefore, consider the evidence as a whole and reach our view as to the reason, or reasons, for dismissal.

6.25 Whatever the position, we find that this case does not turn on a consideration of the burden of proof.

Conclusions

7.1 We deal first with the claim of direct discrimination.

7.2 During the course of submissions, Mr Paul conceded that the burden, pursuant to section 136 Equality Act 2010, had shifted to the respondent. Therefore, it was for the respondent to establish that it did not contravene the relevant provision. The tribunal noted it would treat this as a formal concession, and this was agreed.

7.3 For the removal of doubt, we would note that there is sufficient evidence to turn the burden, not least because the respondent's written evidence failed to mention the role of Mr Sato and his action was material to the dismissal. There is no explanation for this serious omission and that failure of explanation in itself would be enough to turn the burden, as the failure of explanation is unreasonable. This failure to mention the role of Mr Sato demonstrates that the evidence is seriously misleading and there can be no doubt that the attempt to obscure the full circumstances, and to mislead the tribunal, is deliberate. Moreover, the respondent has failed to comply with its duty of disclosure in a number of respects, including giving disclosure of documents which are material and for which privilege has been waived. It is likely that clear attempts to mislead the tribunal may justify a possible secondary inference of discrimination. We do not need to consider all the facts which would turn the burden.

7.4 There are a number of elements which constitute the respondent's explanation for the dismissal. We should detail those. First, it is alleged that the claimant's performance materially deteriorated after the probation period to such a degree that it was appropriate to dismiss her. Second, the decision was taken by two individuals Ms Franklin and Mr Margree. Third, that a final intention to dismiss was formed prior to 31 May 2016. Fourth, that prior to 3 June 2016 they had no knowledge of the claimant's pregnancy. Fifth, the knowledge of the fact of the claimant's pregnancy after 3 June 2016 had no influence on the decision.

7.5 We remind ourselves that it is rare to find direct evidence of discrimination. Discrimination can occur when individuals do not recognise it. Individuals may also be unwilling, or unable, to recognise that they have discriminated. The reverse burden recognises that difficulty. When there are facts from which the tribunal could decide that the relevant provision has been contravened, it is for the respondent to show that it did not contravene that provision. In this case, the respondent accepts that the tribunal could decide, in the absence of any other explanation, there had been a contravention of the provision. Therefore, the respondent accepts it must show it did not contravene the provision.

7.6 The respondent need only show its explanation on the balance of probability. However, the respondent should produce the available evidence.

7.7 It is necessary for us to consider each element of the alleged explanation.

7.8 First, it is alleged that the claimant's performance materially deteriorated after the probation period to such a degree that it was appropriate to dismiss. The evidence for this is limited. The claimant was successful in her probation period leading up to the middle of October 2015. Thereafter,

there was no criticism of her work, except at the appraisal. Thereafter, there was no further criticism.

7.9 Whilst there are elements of the appraisal which were satisfactory – some progress was made, and her general attitude and attributes – it would be fair to say that the appraisal is critical of her. The criticism is in general terms suggests a lack of "proactivity" and a lack of "initiative." What is meant by that is unclear. Moreover, there is no clear set of objectives set out. To the extent that specific tasks such as applying SCEU HR policies, and reviewing the compensation programme, are referenced, any failure in relation to those did not form part of any dismissal.

7.10 We have noted there were a number of allegations in the letter of dismissal. However, only two allegations are specifically considered in the witness evidence before us. The first is raised by Ms Franklin and concerns the claimant's alleged failure "related to the drafting of a simple offer of employment." We have considered this carefully. The complaint is that the claimant did not include in a covering letter, which enclosed specific terms and conditions of employment, reference to the fact that it was a fixed term contract. However, the terms and conditions attached to the letter were correct, and did specify it was a fixed term contract. That fact is not included in Ms Franklin's evidence. Moreover, the document containing the terms and conditions was not disclosed. Ms Franklin's written evidence fails to record that the claimant used the correct template letter, and it was the respondent's own template letter that failed to refer to the fixed term contract. It follows that the claimant correctly drafted the contract and used the correct template letter. The criticism eventually made of her in Ms Franklin's oral evidence was the claimant failed to correct the respondent's own incorrect template. We pause to note that this is one of the two specific examples relied on by the respondent to justify its contention that the claimant's work was poor and inadequate. Ms Franklin's evidence in this regard is incomplete and unbalanced. Criticising the claimant for correctly drafting a contract, and appropriately using the respondent's template, suggests exaggeration of the claimant's culpability and a degree of irrationality.

7.11 The second matter relied on is detailed in Mr Margree's statement. This concerns the claimant's organisation of a training course for senior managers for a communication skills workshop. Training had taken place in November. Feedback was given. It was always proposed there would be an additional day' training later the following year.

7.12 The evidence of both Ms Franklin and Mr Margree is incomplete and specific clarification was sought during their oral evidence. In particular, we sought to understand why the claimant was being criticised. Ultimately, Mr Margree criticised the claimant for failing to include in a paper file all of the feedback reports obtained. However, in his statement, Mr Margree criticises the claimant for suggesting that she should have recognised a number of feedback forms were negative and raised questions about the second day. She is then criticised for sending an invitation to a participant who had already returned to Japan. As regards

the latter, it is unclear why this was such a significant criticism rather than an understandable oversight. As regards the substantive criticism, Mr Margree's evidence again lacks balance. His statement suggests that it was the claimant's responsibility to decide whether the second day should continue. That evidence is misleading. Ms Franklin confirmed in her evidence that, in fact, it was her decision, sometime around the end of April, to proceed with the extra day, even though the claimant had raised concerns about the cost. Ms Franklin reviewed the feedback. It is fair to say that Ms Franklin criticised the claimant for not having all the feedback on a hard file. The claimant when asked to do so printed off the remainder of the documents; Ms Franklin considered them.

7.13 As it was Ms Franklin's decision to proceed with the second day, there appears to be no reason why the claimant should not have sent out invitations, and the reason for Mr Margree's criticism of the claimant for doing so remains obscure. It may be possible to rationalise the respondent's position by suggesting that Ms Franklin thought that she was in some way misled. However, she made no such suggestion in evidence. It may be that Ms Franklin made a poor decision, but it is difficult to see what blame attached the claimant for the ultimate decision, even if Ms Franklin's consideration was delayed by the need to print off some emails.

7.14 There is also reference in Mr Margree's statement to other concerns. He alleges the claimant produced poor minutes in a PIP meeting. However, he gives no detail and discloses no documents in support. The basis for his opinion is not set out.

7.15 The claimant is criticised for her own conduct of a PIP meeting at which Mr Margree was not present. His basis for that criticism remains obscure.

7.16 There is evidence of irrationality and exaggeration in the criticisms made of the claimant. The respondent has not produced relevant cogent evidence explaining the criticism. To the extent that particulars have been given, for the reasons we have set out above, it appears that the criticism of the claimant is disproportionate. We do not find that the respondent has produced cogent evidence demonstrating serious underperformance by the claimant.

7.17 Second, it is alleged that the decision to dismiss was taken by two individuals: Ms Franklin and Mr Margree.

7.18 This is the explanation put forward by the ET3, the witness statements of both Ms Franklin and Mr Margree, and the issues as clarified at the start of the hearing. During her oral evidence, Ms Franklin sought to explain what was the final straw that led to dismissal. She stated that the chief finance officer, Mr Sato, had instructed her to dismiss the claimant. This evidence was explored, and it is clear that Ms Franklin acted on instruction.

7.19 Mr Margree's evidence was more circumspect and equivocal. However, he knew that Mr Sato wished the claimant to be dismissed, and whilst the ultimate reason put forward may have been agreed between himself and Ms Franklin, the impetus was clear. In no sense whatsoever could it be

said to be an independent decision. They put into effect the instruction from Mr Sato.

7.20 It follows that the respondent's explanation that the decision was taken by Ms Franklin and Mr Margree alone cannot be sustained. There can be no doubt that Mr Sato's instruction directly caused the dismissal. His thought processes are relevant. There should be cogent evidence explaining why he directed the claimant be dismissed.

7.21 It may be that both Ms Franklin and Mr Margree independently believed that there was some difficulty with the claimant's work. Whether any concerns they had would have been sufficient to lead to the claimant's dismissal at the time it occurred, absent the instruction from Mr Sato, must be open to considerable doubt.

7.22 It is clear that Mr Sato's intervention precipitated a dismissal. His instruction was the most significant reason for the dismissal at the time.

7.23 It follows that the respondent fundamentally fails to establish one aspect of its explanation: that the decision was taken by Ms Franklin and Mr Margree. The decision was a mere rationalisation of an instruction given by Mr Sato.

7.24 The fact that the decision was taken by Mr Sato, and then rationalised and implemented by Ms Franklin and Mr Margree, fundamentally undermines the explanation put forward by the respondent. As it is common ground that the burden has shifted, it is for the respondent to give evidence to establish its explanation for the treatment. The tribunal would normally expect to see cogent evidence, that much is clear from **Madarassy**. The question arises as to what was Mr Sato's reason. We have virtually no evidence. There is one email from him (R1/187) addressed to the claimant. It says "One day course is too long. I spent a whole day already. Is another whole day necessary? How much do you spend for this seminar?" It may be possible to infer some discontent. However, it falls far short of demonstrating unhappiness with the claimant, or such unhappiness that it would suggest he would contemplate dismissal.

7.25 It would not be surprising to find some documentation setting out his thought processes. There could be an email enquiring about the claimant's role, or expressing dissatisfaction. We simply do not know. We do know that the respondent has materially failed in its duty of disclosure in a number of respects. It has not disclosed documents for which it waived privilege. The claimant is criticised in relation to an email concerning a job offer, but the disclosure in relation to that is incomplete, as the terms and conditions have not been produced. She is criticised in relation to minutes that she produced, but neither the original minutes, nor the amended minutes have been produced. It is therefore possible that there has been a failure to disclose material documents relevant to Mr Sato's thought processes.

7.26 Moreover, Mr Sato could have given evidence. It was clear on day one that he was implicated by Ms Franklin. It would have been possible, even

then, to seek to adjourn to produce evidence from him. The respondent has chosen to proceed without any reference in the documents, response, or witness statements to his involvement, and absent his own evident evidence. Even if there were no documents demonstrating his thought processes, he could have given evidence. His evidence may have been sufficiently cogent to satisfy the tribunal that of the explanation on the balance of probability. Absent that evidence, there is a total failure to give any adequate explanation for his thought processes and his involvement. As it is evident that his thought processes were the ones which led directly to the dismissal, this failure to produce that relevant evidence means that the respondent's explanation fails.

7.27 Third, it is contended that a final intention to dismiss was formed prior to 31 May 2016. The evidence we have on this point is limited. We have oral evidence from both Ms Franklin and Mr Margree. The documentary evidence is extremely limited. The only document criticising the claimant was the appraisal, and that criticism did not lead to a performance improvement plan or any indication that she would be dismissed. Both before and after the appraisal, there was no specific criticism of her work.

7.28 The letter of 31 May 2016 gives no indication at all that the claimant's performance was to be considered, or that she may be dismissed. Taken at its height, the reference to being accompanied by a work colleague, could indicate some form of action, albeit that was not necessarily dismissal.

7.29 We have considered whether Ms Santos's evidence supports the contention that she was told, unequivocally, the claimant would be dismissed prior to the letter of 31 May 2016. Whilst there is a general assertion from Ms Santos that she knew the claimant was to be dismissed, the basis for this, including how she was told, when she was told, the words that were used, or the context in which they were used, is not set out. In oral evidence, she confirmed that she could not recall the detail. Moreover, she was not able to confirm Ms Franklin's oral evidence that there had been a specific meeting with three people where they were all told. She had no recollection of that.

7.30 It is possible that the instructions given to the solicitors on 30 June 2016 could have cast some light on this question. The respondent has failed to disclose those documents.

7.31 In the circumstances, we are asked to accept the evidence of both Ms Franklin and Mr Margree. We do not have to finally decide whether a final intention to dismiss was formed prior to 31 May 2016 because of the reasons given in relation to contention two above. It is true that an individual who misleads or is dishonest in relation to one aspect of his or her evidence, cannot be taken to lie in relation to all contentions. It is possible to mislead about one matter, and be truthful about another. That said, in the case of both Ms Franklin and Mr Margree, we have serious doubts about the veracity of their evidence. Neither Ms Franklin's nor Mr Margree's statement mentions the role of Mr Sato. There is no doubt that Mr Sato's instruction was the reason why the claimant was dismissed

when she was. We have no doubt that this fact was hidden from the claimant and instead the decision was rationalised by reference to her performance. There may have been concerns about her performance, but those concerns were used to justify the dismissal rather than were the impetus leading to the dismissal.

7.32 We have considered whether the omission of the evidence relating to the role of Mr Sato could have been inadvertent. We reject that possibility. Mr Sato's role was not set out because there was a deliberate attempt to hide it. It is not feasible that these experienced HR managers would not have understood the importance of the instruction given by Mr Sato and its relevance to the real reason for dismissal. If we were wrong in relation to our decision on the second contention, which we say is fatal to the explanation, we would have to resolve whether we fundamentally rejected the evidence of both Ms Franklin and Mr Margree as to exactly when the final decision was made. We do not need to resolve that at this stage. We do observe, however, that their explanation depends entirely upon their being believed, as there is no other cogent evidence. It is a clear possibility that the decision was taken after they had knowledge.

7.33 Fourth, it is contended that prior to 3 June 2016 they had no knowledge of the claimant's pregnancy.

7.34 This is a matter that we do not need to resolve separately on the balance of probability, as determination of liability depends on the application of the burden of proof. It is possible that Ms Franklin, Mr Margree, and Mr Sato knew the claimant was pregnant. The claimant had told a number of individuals. We note that those individuals were never approached, and were not asked to comment about the claimant's competence. It is feasible that the fact of the claimant's pregnancy was communicated to senior management. This is not a case where it can be said that there could be a finding that one individual has acted inadvertently to implement the discriminatory decision of another. We simply do not know. There are occasions when an inference of discrimination must be drawn, even though it is not possible to identify which of a number of individuals behaved either consciously, or subconsciously, in a discriminatory manner. In this case, it is possible that any three of the primary individuals involved could have acted in a discriminatory way.

7.35 As the respondent has failed to establish its explanation, we do need not consider this further. We would also observe that a lack of knowledge prior to 3 June 2017 would not in itself be determinative of liability. It is possible that there was no knowledge before 3 June 2017, but the decision could have been taken at a time when there was knowledge. It is clear there was knowledge before the decision was communicated on 30 June 2017.

7.36 Fifth, it is alleged that the fact of the claimant's pregnancy, which they were aware of after 3 June 2016, had no material influence on the decision to dismiss.

7.37 This is the respondent's contention. This is the central question and it cannot be answered absent consideration of the reverse burden. There is no document which specifically assists in answering this question. It is clear that the respondent's management knew of the claimant's pregnancy after 3 June 2016. We know legal advice was taken, privilege has been waived in relation to that advice, the relevant documents have not been produced. There is no email, notes of meetings, or any minutes which would assist us. The claimant was not invited to a meeting. We have not seen all drafts of the letters. In short, there is virtually no relevant documentation disclosed. We are asked to accept the accounts of Ms Franklin and Mr Margree. If there was cogent evidence which demonstrated that the dismissal was in no sense whatsoever because of pregnancy or maternity, this question would be resolved in their favour in the explanation made out. However, for the reasons already given, the burden has shifted, and the explanation is not made out. It follows that the respondent's contention that the claimant's pregnancy, had no material influence on the decision to dismiss fails.

7.38 We find that the dismissal was an act of direct discrimination contrary to section 18 Equality Act 2010.

7.39 We next must consider the unfair dismissal claim.

7.40 Section 99 of the Employment Rights Act 1996 provides that an employee shall be regarded as unfairly dismissed if the reason or principal reason is of a prescribed kind or occurs in prescribed circumstances. Section 99 states if that reason relates to pregnancy, childbirth or maternity, the claim will succeed.

7.41 The claimant relies on her pregnancy. The relevant prescribing regulations are the Maternity and Parental Leave etc Regulations 1999. Regulation 20 provides an employee who is dismissed is entitled under section 99 of the Employment Rights Act 1996 to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is a kind specified in paragraph (3). Paragraph (3) include reasons connected with the pregnancy of the employee.

7.42 We have considered above the importance of the burden of proof in the context of a section 99 claim. It is clear that deciding the sole or principal reason is a matter of fact for the tribunal. There is no reverse burden of proof in the automatic unfair dismissal claim.

7.43 The claimant has pointed to facts from which it could be inferred that the sole or principal reason was one that was connected with pregnancy. The claimant has not sought to pursue the unfair dismissal claim separately, or to differentiate it, from the discrimination claim.

7.44 Neither party has sought to suggest that the true reason for dismissal was the claimant's absence for a pregnancy related reason. No such case was pursued in cross-examination or in the submissions.

7.45 It is necessary for us to consider what is the sole or principal reason. We are not bound to accept either the reason put forward by the claimant, or the reason advanced by the respondent (see **Kuzel**). It is clear that there are various elements relevant to this decision. One element is the instruction given by Mr Sato. We do not have the detail of that. We do not know when the instruction was given or its terms. We do not know what reason, if any he gave, or if his instruction was unequivocal. We have a limited amount of evidence suggesting that he may have been unhappy with the claimant, but how serious that unhappiness was, is unclear. The second element involves the thought processes, and reasons, of Ms Franklin and Mr Margree. We reject their explanation that the claimant was dismissed solely because they considered her performance to be poor. We cannot discount the possibility that they did believe that there was some difficulty with her performance, but it is clear that that there was a rationalisation in order to give effect to Mr Sato's instruction. Neither Ms Franklin, nor Mr Margree, sought to challenge or question Mr Sato's direction or wish.

7.46 It follows that there are at least two elements to the decision: the implementation of the instruction, and rationalisation based on limited evidence of underperformance. As we have noted, it is possible to draw a secondary inference of discrimination. Therefore, discrimination is a material influence. As that material inference has been inferred, it is very difficult to say, factually, how far it influenced their decision. There is simply not enough evidence on which we could find, as a fact, the discrimination was the sole or principal reason. It is possible that Mr Sato wished to dismiss because the claimant was pregnant. It is possible he did not communicate that to Ms Franklin or to Mr Margree. It is also possible the Mr Sato knew nothing about the claimant's pregnancy or that his instruction to dismiss was equivocal. It is possible that Ms Franklin or Mr Margree, on learning about the pregnancy, chose to interpret Mr Sato's instruction as the requirement to dismiss. What we can say, on the balance of probability, is that there was at least an element of direct instruction to dismiss, and a rationalisation, based on scant evidence of underperformance.

7.47 This is a case where we can find on the balance of probability that the sole or principal reason was Ms Franklin put into effect what she considered to be an instruction from Mr Sato. If this were a case which relied purely on direct evidence of discrimination, it may be that we would not be able to find that evidence. We cannot ignore what inferences can be drawn from the primary findings of fact: that much is made clear by **Kuzel**.[3] We have noted that it is possible to draw an inference in the context of the discrimination claim. The facts from which the inference can be drawn include the deliberate misleading of the tribunal as to the role of Mr Sato, the inadequate evidence of underperformance of the claimant, the deliberate failure to disclose relevant evidence, and the failure to communicate to the claimant adequately or at all her need to improve. Further, the respondent's evidence that the decision was taken before Ms

[3] See in particular paragraphs 53, 58. and 60 of Kuzel.

Franklin and Mr Margree had knowledge of the claimant pregnancy is unsatisfactory. There is no supporting contemporaneous evidence and we have found the evidence of both Ms Franklin and Mr Margree to be unreliable and deliberately misleading. It is not necessary for us to find the sole or principal reason was the pregnancy itself. All we have to find is that the sole or principal reason was connected with the pregnancy. It follows there is primary evidence from which we can, and should, infer that the decision was taken when there was knowledge of pregnancy and that we been have misled about that. We infer the sole or principal reason was connected with the pregnancy. We do not need proof of when Mr Sato, Ms Franklin, or Mr Margree knew of the pregnancy. The respondent's witnesses have shown a willingness to withhold evidence and to mislead the tribunal. It is appropriate to draw inferences. It matters not whether the principal reason is seen as the instruction given by Ms Sato, or the rationalisation by Ms Franklin. All reasons for dismissal are a matrix of fact and belief operating on the mind of the dismissing manager, and in that sense finding the sole reason is really a way of summarising what may be a large and complex set of circumstances. Once we accept the inference that pregnancy was a material reason in the decision, we must accept it is a reason connected with pregnancy. It follows we find the principal reason is connected with pregnancy for the purpose of Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999. In those circumstances, the section 99 claim must succeed.

Employment Judge Hodgson

Dated: 09/03/2021.

Sent to the parties on:

08/05/2021.

For the Tribunal Office