EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103506/2020 (V)

Held remotely via CVP on 15 and 16 March 2021

Employment Judge: C McManus
Members : M Taylor
D Calderwood

Ms Johan MacIver	**Claimant** **Represented by:-** **Mr M Briggs (Solicitor)**
Sandyford Surgery	**Respondent** **Represented by:-** **Mr A Hardman (Advocate)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:-

- The claimant's claim of unfair dismissal, in reliance on s100(d) Employment Rights Act, is unsuccessful and is dismissed.
- The claimant's claim of associative discrimination on the grounds of pregnancy and maternity under s13 Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of associative discrimination on the grounds of sex under s13 Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Background

1. The claimant's claims are:-

   (i) Unfair dismissal in terms of s.100 of the Employment Rights Act 1996 ("ERA"), contrary to her right under s.94, ERA; and

   (ii) Direct discrimination in terms of s.13 of the Equality Act 2010 ("EqA"), based on the protected characteristics of either pregnancy and maternity, or sex.

2. The claimant does not have the necessary qualifying service to bring an ordinary claim for unfair dismissal. She relies on the reasons for her dismissal by the respondent being (a) related to the terms of her emails to the respondent of 27 March 2020 re social distancing (b) related to the fact that her daughter was pregnant at the time and the claimant was concerned about the risk to her daughter from COVID 19.

3. There was a Preliminary Hearing ('PH') in this case for the purpose of case management. The Note issued after that PH sets out the matters discussed them. It is set out in that Note that the claimant's position is that her employment was terminated either in breach of s.100(1)(c) or s.100(1)(d) of the Employment Rights Act 1996 ("ERA"), or alternatively amounted to direct discrimination contrary to s.13(1) of the Equality Act 2010 ("EqA"). In that PH Note it was set out that the protected characteristic relied on is pregnancy and maternity. There was no reference to the protected characteristic of sex, although a claim on that basis is set out in the ET1 and was not withdrawn. The protected characteristic relied upon is that of the claimant's daughter, rather than the claimant herself ('associative discrimination'). As a preliminary matter, the claimant's representative confirmed that reliance was no placed on s100(1)(d) ERA.

4. The respondent resists the claim on the facts. It is their position that the sole or principal reason for dismissal was the reduced requirement to

employ the claimant in the circumstances impacting on the respondent as a result of the COVID 19 pandemic. It is the respondent's position that the reason for dismissal came about because (a) their ability to train the claimant became impracticable due to social distancing requirements imposed shortly after commencement of the claimant's employment, and (b) without adequate training, no role was available for the claimant.

5. The respondent also maintains that the Tribunal does not have jurisdiction to hear the claim of direct discrimination where the protected characteristic relied upon is pregnancy and maternity.

6. Both parties were ably professionally represented. The Tribunal is grateful to both representatives for the way in which they presented their respective cases to the Tribunal.

Issues for Determination

7. The issues for determination by the Tribunal were set out in the PH Note following proceedings as:-

    1. What was the reason for dismissal?
    2. Does the Tribunal have jurisdiction to hear a claim of direct discrimination where the protected characteristic relied upon is pregnancy and maternity?
    3. In the event that the Claimant succeeds in any part of her claim, what financial compensation is reasonable?

8. That PH Note made no reference to the claim under s13 also being based on associative discrimination on the grounds of the claimant's daughter's sex. That protected characteristic was also relied upon at the Final Hearing. The respondent's representative's position was that the claim under s13 EqA should be limited to the protected characteristic of pregnancy and maternity as there was no reliance on the protected characteristic of sex before the Final Hearing.

9. The ET1 does indicate a claim for associative discrimination based on sex. That box is ticked at 8.1. Paragraph 14 of the Paper Apart to the ET1 states:-

> "*The respondent, in discriminating against the claimant on the grounds of her daughter's pregnancy directly discriminated against her on the grounds of pregnancy and maternity, and sex in terms of section 13 EqA and contrary to the provisions of s39(2)(d) EqA."*

10. That did not alter the issues determined by the Tribunal, which were as set out in the PH Note.

Proceedings

11. This Final Hearing was conducted remotely using the Cloud Video Platform (CVP). The overriding objective of the Employment Tribunal, as set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), is to deal with a case fairly and justly. This hearing took place during restrictions in effect because of the COVID 19 pandemic. The Final Hearing took place via CVP in order to progress the case in accordance with the overriding objective and in accordance with guidance issued in response to the restrictions in place due to the Covid-19 pandemic. The President of the Employment Tribunal (Scotland) has issued:-

- Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic (being Joint Presidential Guidance issued with the President of the Employment Tribunals (England and Wales),
- FAQs about the Covid-19 pandemic (being a document issued jointly with the President of the Employment Tribunals (England and Wales),
- Practice Direction on the Fixing and Conduct of Remote Hearings

12. For the respondent, evidence was heard from Ms Janice Muirhead (Office Manager) and two doctor's from the respondent's practice, Dr Roderick

MacNeill and Dr Christine Crawford. The claimant gave evidence and called no witnesses. All evidence was heard on oath or affirmation. Witness statements had been taken and exchanged. All witnesses adopted their respective witness statements as their evidence in chief.

13. The parties' representatives had helpfully liaised to prepare a Joint Bundle. This was referred to in digital format and was set out chronologically, indexed and paginated. The numbers in square brackets ('[ ]') in this Judgment refer to the page number in that Joint Bundle.

Relevant Law

14. Section 100(1)(c), Employment Rights Act 1996 ('ERA') provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee "*brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety*".

15. Section 13 Equality Act 2010 (EqA) is the legislation making less favourable treatment on the grounds of a protected characteristic unlawful discrimination. The protected characteristics include pregnancy and maternity and sex (s4 EqA). The definition of direct discrimination in s13 EqA makes no reference to the protected characteristic of any particular person — it simply states that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably'. As a result, direct discrimination can occur when an employer treats an employee less favourably because of a protected characteristic that the employee does not personally possess. This is known as 'discrimination by association' or 'associative discrimination'.

Findings in Fact

16. The following material facts were agreed or have been determined by the Tribunal.

17. The respondent is a GP Practice in Glasgow. The claimant was employed by the respondent as a Relief Medical Receptionist commencing on 16th March 2020, with the expectation that employment would end on 28th September 2020 [57]. The claimant was employed in a temporary position to cover an employee's sickness absence, which was expected to last until 28 September 2020. The respondent would notify the claimant if the post became permanent [57]. No such notification was made. The employee for whom the claimant's job was cover returned to work at the end of September 2020. A similar role was advertised following a different employee resigning to take up a University course, but Ms Muirhead did not become aware of this until after September (by which time the claimant's role would have ended.) The claimant's working hours were to be 20 hours over 4 days. Her monthly salary was approx. £670 net, £784 gross [83].

18. The claimant's employment with the respondent commenced on 16 March 2020 and was terminated with effect from 30th March 2020 [80]. She was paid the equivalent of her salary until 30th April 2020 [80].

19. In order to be an effective contributor to the respondent's workplace, the claimant required training on the systems used by the respondent. In particular, the claimant required training on the EMIS system. That system is relevant to all aspects of the medical receptionist role. It includes the appointment book, patient records and prescriptions. Training is required on each segment of the system. That training normally takes place over one or two weeks before the employee is expected to be able to use the software on their own. The induction and training was expected to be provided by the respondent's Practice Manager, Janice Muirhead. In normal times, the claimant's training would have been on how to use the EMIS, and then supervised work using that system. That would have required the trainer to sit close to the claimant to initially show her how the systems worked with regard to the various aspects of the medical receptionist role, and then to ensure that the work

was being carried out properly and following the correct procedures. Close supervision was necessary because of the possible repercussions should the correct procedures and guidance not be followed.

20. During the claimant's first week at work, the respondent experienced unprecedented circumstances of pressure and change in the workplace due to the COVID-19 pandemic. On 16th March 2020, the UK Government issued COVID Guidance advising of the need for social distancing measures to be observed in workplaces. That week, the claimant attended work on 16th, 18th, 19th, and 23rd March. Because of the introduction of social distancing measures, the Respondent did not commence training the Claimant in her role. Instead, the Claimant was tasked to sort signed prescriptions and scan basic prescription codes as well as generally observing the receptionists from a distance. The practice manager, Janice Muirhead, was unable to provide a full induction to the Claimant because the social distancing requirements could not be followed while training the claimant and she did not have the time capacity to train the claimant because of the pressures of ensuring that the practice continued to serve its patients in the circumstances of the emerging pandemic. At that time, additional pressures were caused by one GP in the practice being required to self isolate and another being ill, and requiring cover.

21. During the week commencing 16 March, the claimant explained to Janice Muirhead and other staff on a number of occasions that she and her daughter were very anxious and concerned about COVID-19. Other staff expressed similar concerns to Janice Muirhead on a number of occasions. Other staff also had particular concerns about the impact of COVID on themselves and / or their family members because of their own particular circumstances and heath histories. The GPs, Janice Muirhead and all of the other staff at the surgery were under extreme pressure trying to meet patient demands and meet the evolving restrictions. The claimant's concerns were not prominent to Janice Muirhead at that time. The practice was dealing with an unprecedented demand and volume of

phone calls. Numerous emails were being received from the Health Board in response to the evolving situation. Janice Muirhead required to interpret the guidance and make changes to systems following the changing advice. She also had to make arrangements for IT support to enable the doctors to attend patients remotely and arrange for cover for the GP who was unwell at the time and for the GP who required to self isolate and so could not carry out their full range of duties.

22. From 16 March Janice Muirhead held daily briefings with staff on the latest guidance re the COVID 19 pandemic. Various steps were taken by the respondent to change working practices in accordance with that changing guidance.

23. The lack of opportunity to train the claimant and the requirement for social distancing meant that the claimant was unable to be an effective contributor at work. On Tuesday, 24 March 2020, because of the lack of suitable work which the claimant was able to do in these circumstances, Janice Muirhead telephoned the claimant and told her not to come to work that week. Her reason for so doing was to give her time to consider what duties the claimant could be given, given the effect that COVID-19 restrictions would have on social distancing, and the impact that would have on what useful work the Claimant could do, or whether she could be trained. The respondent and in particular Janice Muirhead were at that time seeking to ensure that all reasonable steps were being taken in the practice to meet the evolving restrictions and guidance and continue to serve their patients. On Tuesday 24 March, it was agreed among the respondent's clinical team that arrangements should be made for the entire practice team to work remotely where possible, and on reduced hours, from 30 March. This was to ensure social distancing and to reduce footfall in the surgery. The respondent did not have facilities for the reception staff to work remotely. Steps were being taken to obtain IT equipment, including web cams to enable the doctors to carry out remote appointments with patients, and a laptop to enable Janice Muirhead to

work remotely. Janice Muirhead looked into whether the claimant could be trained remotely and found that this could not be done at that time.

24. Janice Muirhead drew up a plans for a staff rota. She did this on 24 March 2020. This staff rota was to make suitable arrangements for those who required to be in the surgery to work, while maintaining social distancing requirements. The necessary arrangements were for the staff to work reduced hours, split into two teams. Janice Muirhead's notes on drawing up this staff rota are at [67] – [69]. These notes show Janice Muirhead's workings in drawing up two teams of staff, all working reduced hours. The claimant is not included in either of the two teams. The fact that the claimant's name is not included in either team reflects that when drawing up these rota Janice Muirhead could not see a way in which the claimant could work for the respondent. These notes show that Janice Muirhead had written '*JOH 20?'*. That was a reference to the claimant being contracted to work 20 hours a week, and signifying Janice Muirhead being unable to fit her into the new rota. The staff were split into these two teams, and required to work reduced hours, in order to ensure the respondent's compliance with social distancing requirements in the surgery.

25. Janice Muirhead realised that it would not be possible to accommodate the claimant in the new staff rota because :

a) The Claimant could not work independently because she was not trained in the surgery's procedures and systems.
b) Homeworking was not possible for reception staff.
c) Training her would be impracticable due to social distancing measures.
d) In the unprecedented circumstances, given the pressures and the difficulties staff were experiencing, and the lack of work which the claimant was able to do without training, the claimant's presence would make working more difficult for the other staff, rather than being a support to the practice.

e) Neither Janice Muirhead nor any of the other staff had time to train the claimant because of the immense pressure and other priorities caused by the response to the COVID 19 pandemic.

26. In these circumstances, and given that furlough was not permitted for any NHS staff (of which the claimant was one), it appeared to Ms Muirhead that the only option was to terminate the Claimant's employment. During Tuesday 24 and Wednesday 25 March Janice Muirhead considered if there were any alternatives to dismissing the claimant. Ms Muirhead asked Practice Mangers in 2 other practices for any ideas on how to retain the claimant in the unprecedented circumstances. Neither were able to suggest any option which could enable the claimant to be trained or to effectively contribute to the practice. After reflecting on the position, Ms Muirhead decided that the only option appeared to be to terminate the Claimant's employment. Ms Muirhead had not dismissed an employee before and did not relish the prospect of doing so.

27. On 25 March 2020, Ms Muirhead discussed the matter with the Staff Partner, Dr MacNeill and another GP in the practice, Dr Crawford. They both agreed with her that in the circumstances of the restrictions caused by the response COVID 19 pandemic, and where furlough was not available, there was no option other than to dismiss the claimant.

28. On Thursday 26 March 2020 Janice Muirhead told the staff at a staff meeting the arrangements in relation to the new rota and the staff working in two teams. These arrangements were in line with what is shown in Janice Muirhead's handwritten notes at [67] – [69]. The claimant was not included in the rota for the forthcoming weeks. The digital version of those rota are at [70] – [79]. The claimant was not included in those rota because by 26 March 2020 Janice Muirhead had decided that the claimant could not be accommodated in the teams and as furlough was not an option for NHS staff, would require to be dismissed.

29. Janice Muirhead was meant to be on a day off on Friday 27 March 2020. She worked from home on that day in her efforts to ensure the practice met the constantly changing advice in relation to dealing with the COVID pandemic and continued to serve its patients. She would normally have had her automatic out of office reply on that day, but had been instructed to leave it off because of the various matters which required to be dealt with in response to the COVID 19 pandemic.

30. While Janice Muirhead was working from home on Friday 27th March, she sent an email to all staff [63]. This email stated:-

"*Hi Folks,*

Just to let everyone know how much the doctors and myself appreciate how we have all pulled together as a team. Everyone's efforts the last few weeks dealing with difficult and changing situations day to day including doctors working remotely and using video conferences consultations, we have all adapted. Hopefully everyone getting a wee bit extra time off will benefit your own well-being. Please find a couple of attachments Christine has asked me to share which may be of help and these can be shared with family, friends or even patients.

You are reminded not to come in if you feel unwell or at risk from COVID 1 [sic], refer to NHS Inform! If you have any concerns please see me or speak to one of the doctors. Things may get harder over the next few weeks whether at home or at work, so if anyone needs support, please let us know and as Fiona said, 'It's ok not to be ok'.

Stay safe."

31. The claimant responded to that e-mail at 12.43 0n Friday 27 March as follows [65]:-

"*Hi Janice,*

Many thanks for this.

And even although I have only been in the team for a short time it us [sic] obvious what a great bunch of caring people you are and your team are. They are a credit to you.

Looking forward to seeing you on Monday at 1pm. I am still hopping along but have been given exercises to do hopefully things will improve.

Thanks again."

32. Janice Muirhead replied to the claimant by email sent at 13.52 on Friday 27 March in the following terms [64]:-

"*Thanks for the reply. You certainly joined us as [sic] a very difficult time and every day brings new challenges! Can you phone in at 12:30 PM on Monday to check your start time with us as I may put in [sic] back to 2pm if it is quiet. Have a good weekend."*

33. The claimant sent a further email to Janice Muirhead at 17.00 on Friday 27 March 2020, as follows [64]:-

"Hi Janice,
Just a quick point.
Is everyone in the practice doing social distancing.
Thanks."

34. Ms Muirhead replied by email [64] at 17.06 "*As best we can.*" The Claimant replied at 17.25 saying [64]:-

"*Just really asking because of my daughter being pregnant. I know nobody wants to bring it home but I am especially worried about bringing it back to her.*

Thanks."

35. Ms Muirhead did not respond to that email. Ms Muirhead did not wish to engage further with the claimant because she knew the claimant was likely to be dismissed after her discussion with Dr MacNeil on Monday, 30 March. She did not think it was appropriate to give the claimant an indication of that by email. Janice Muirhead had had a difficult week and did not wish to enter into a discussion with the claimant at that time. She was prepared to tell the claimant the news about her decision after she had discussed the situation with Dr MacNeill on his return to the surgery on Monday 30 March.

36. On Monday 30 March, around 8.30 am, Ms Muirhead discussed and reviewed the matter with Dr MacNeil. They also considered employment law guidance on fixed term contracts and discussed exposure of the practice to a claim under employment law. Dr MacNeil agreed with Janice Muirhead's decision to dismiss the claimant. A factor in that decision was the belief that the claimant would have no grounds to bring a claim before the Employment Tribunal in respect of her dismissal. The respondent is able to access advice, including employment advice from the British Medical Association (BMA). Janice Muirhead did not seek such advice because she understood that an employee without 2 years' service does not have the qualifying service to bring an unfair dismissal claim and because Janice Muirhead did not believe that there were any grounds that the claimant could bring a claim to the Employment Tribunal in respect of her dismissal. This was because Janice Muirhead knew that the reasons for the claimant's dismissal was because of the effect of the unprecedented circumstances caused by the Covid 19 pandemic. She discussed with Dr MacNeill that the claimant would not have grounds to bring a claim to an Employment Tribunal. Dr MacNeill asked this because he wished to be satisfied that the respondent was not acting unlawfully in dismissing the claimant. Janice Muirhead sought to do the best she could for the claimant. She proposed that the claimant receive

payment equivalent to wages until end April 2020, although the claimant had no contractual or statutory right to any such payment.

37. Janice Muirhead had intended that the claimant be told of the decision that she be dismissed at a meeting. In her discussions with Dr MacNeill, his position was that as the practice were required to reduced footfall in the surgery, the claimant should not come in and instead should be phoned. Janice Muirhead prepared for the phone call by writing notes for herself to refer to. She did not retain these notes because after the phone call she believed that that task was over, and would be without repercussion.

38. Janice Muirhead phoned the claimant around noon on Monday 30 March 2020. She told the claimant that due to the circumstances her employment was being terminated. The circumstances Janice Muirhead were referring to were the circumstances of the evolving restrictions and requirements as a result of the COVID 19 pandemic and the facts of the claimant being untrained on the systems used by the respondent, being unable to be trained at that time because of the social distancing requirements and the lack of capacity of other staff members to train her and the fact of the claimant being unable to effectively assist the respondent's work without that training. Janice Muirhead did not detail what those circumstances were in the conversation with the claimant. She felt awkward. There was a silence after Ms Muirhead told the claimant that she was being dismissed. Ms Muirhead felt that silence to be long and sought to say something fill the silence. Ms Muirhead said that she knew the Claimant had concerns about her daughter. She also explained the Respondent would pay one month's salary as a goodwill payment. She said that should the situation change she would let the Claimant know.

39. The claimant interpreted Janice Muirhead's reference to the 'circumstances' to mean the circumstances of the claimant being concerned about the effects of COVID 19 on her pregnant daughter.

Those circumstances were not part of the reasons for the claimant's dismissal.

40. Janice Muirhead followed up that telephone call by email to the claimant dated 30 March [80]. In that email she sought to confirm the reason for dismissal. That letter stated:-

> "*Further to my telephone conversation today, I regretfully write to confirm we will be terminating your employment with immediate effect. This is due to the ongoing and unprecedented Covid-19 situation which is impacting our practice workings*.
> *As a gesture of goodwill, the doctors have agreed to pay you a month's salary at the end of April.*
> *I hope that your daughter's forthcoming delivery goes well and you and your family keep safe.*
> *Wishing you all the best for the future.*
>
> *Kind regards."*

41. The claimant's employment was terminated with effect from 30th March 2020. After the termination of her employment she was paid the equivalent of her salary until 30th April 2020 i.e. the sum of 669.71 by the respondent as a goodwill gesture.

42. Neither the Claimant's daughter's pregnancy, nor her emails of Friday 27th March formed any part of the decision to dismiss the claimant.

43. Since termination of employment, the Claimant has sought one role prior to 28th September 2020, the intended end-date for her employment, and that as a Contact Tracer [85]. The claimant has sought to continue her own hypnotherapy business, which has been restricted because of the circumstances of the effect of the COVID 19 pandemic and resultant restrictions. She has been in receipt of Universal Credit.

Code of Practice

44. In determining the claims under the Equality Act 2010, the Tribunal had regard to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011).

Submissions

45. Both representatives agreed that the outcome of this case would turn on the Tribunal's determination of what was the real reason for the claimant's dismissal. Both representatives spoke to their respective written skeleton arguments / submissions.

Respondent's Representative's Submissions

46. The respondent's representative invited the Tribunal to adopt his proposed findings in facts and his revised skeleton argument. He relied on the respondent's witnesses all giving their evidence as truthfully as they could. He submitted that there were no issues of credibility with regard to the respondent's witnesses. He noted that there was one area where there was direct conflict in the evidence, that being between the claimant and Janice Muirhead's recollection of the phone call at 12.02pm on Monday 30 March. The respondent's representative invited the Tribunal to prefer the evidence of Janice Muirhead on that phone call, on the basis that her evidence was more reliable than that of the claimant.

47. The respondent's representative relied upon Janice Muirhead's evidence as to what was said on that phone call being consistent with her evidence on the thought process previous week; being consistent with Dr MacNeil's recollection of his conversations with Janice Muirhead the previous week, and being more consistent with the terms of the letter of dismissal [80] than the claimant's position. Reliance was placed on the reference to '*our practice workings'* in that letter. It was submitted that it is significant that

reference is made in that letter to the practice's workings, and not to the claimant's personal situation.

48. The respondent's representative's submission was that there is nothing in the evidence to suggest that the reason for the claimant's dismissal was personal at all to the claimant, or was to any extent because the claimant's daughter was pregnant or because of the claimant's email querying social distancing arrangements. He submitted that the claims should fail on their facts and then the Tribunal is not required to address any further questions. He submitted that the evidence demonstrates the reason for dismissal was as explained by the Respondents' witnesses and set out in the letter of dismissal, being "*due to the ongoing and unprecedented Covid-19 situation which is impacting on our practice workings*". The respondent's position was that that reason for dismissal is explained as coming about because (i) the respondents' took a managerial decision that their ability to train the claimant became impracticable due to social distancing requirements imposed shortly after commencement of the claimant's employment, and (ii) without adequate training, they took a reasonable managerial decision that no role was available for the claimant.

49. The respondent's representative submitted that whether the Respondent's decision to dismiss is considered by the Tribunal to have been reasonable or not is irrelevant if it is accepted that the reason was not related to a breach of *s.100 ERA*. That is because the Tribunal have no jurisdiction to consider an 'ordinary' complaint of unfair dismissal where the employee has less than 2 years' service. (*s108 ERA*).

50. The respondent's representative's submission was that the claims must fail on the findings in fact. He accepted that the reason for dismissal was expressed to the claimant in vague terms, both by telephone and by email, but relied on the reason being explained as relating to the business of the Respondent, and not in any part relating to the Claimant. In particular he relied upon the reference to "*our practice workings*". His

submission was that it is more reasonable than unreasonable to conclude that, whatever may be thought of the manner of dismissal or reasonableness of it, the reason itself was clearly only related to the Respondent's "*practice workings*", and not in any way to the Claimant or her concerns. His submission was that neither the claimant's daughter's pregnancy nor the claimant's email to Janice Muirhead, Practice Manager, at 17.01 on 27th March 2020 [64], viz., "*Just a quick point. Is everyone in the practice doing social distancing.*" (sic) played any part in the decision to dismiss.

51. In his oral submissions, the respondent's representative accepted that the terms of the email relied upon were in terms of the provisions of s100(1)(c) ERA. His submission was that even were the Tribunal to conclude that the Claimant's dismissal was, in part, consequent upon the email exchange of Friday, 27th March 2020 (Bundle, p.64 – 66), it was not for the principal reason that she had raised concerns concerning Health & Safety. Reference was made to s.100(1) – *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is ……*"

52. The respondent's representative's submission was that on the evidence there is no indication that the claimant's emails of 27 March 2020 were the sole or principal reason for the claimant's dismissal. His submission was that for the claim to succeed, the claimant would require to prove that that was not an insignificant part of the decision to dismiss and that the evidence does not support that contention at all.

53. Reliance was placed by the respondent's representative on *London Borough of Islington v Ladele [2009] IRLR 154*, in particular the propositions set out at paragraph 40. His submission was that the facts in this case demonstrate that "*the reason why the Claimant was treated as she was"* ("the crucial question") was not on the prohibited ground of pregnancy of the Claimant's daughter, or because of the terms of her emails of 27 March 2020 in any way, even trivially.

54. The respondent's representative challenged the concept of the basis of the claimant's claim being discrimination by association because of the protected characteristic of pregnancy and maternity, or sex. He submitted that direct discrimination by association can occur in relation to all protected characteristics except marriage and civil partnership or pregnancy and maternity. His submission was that in cases of pregnancy and maternity, the characteristic must the Claimant's own pregnancy or maternity. This Claimant thus has no recourse to a Claim of direct discrimination under *s.13 EqA*.

55. It was the respondent's representative's submission that at the stage of the Final Hearing the claimant was seeking to extend her direct discrimination to include the protected characteristic of sex. His submission was that that was no part of the claim before the Tribunal and that the protected characteristic relied upon was only "pregnancy and maternity". Reliance was placed on the terms of the PH Note, para 7, Bundle, p.43. He submitted that the Claimant is restricted to her claim and is unable to extend that to include reference to a separate protected characteristic.

56. Reliance was placed by the respondent's representative on s.25(5) EqA which limits the extent of pregnancy and maternity discrimination under the Act to s.17 (non-work cases) and s.18 (work cases). He submitted that as this case relates to the claimant's work, s.18 is the appropriate section. S.18(1) makes it clear that "[t]*his section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity*." This subsection would be otiose, were the Claimant permitted to bring a claim in respect of this protected characteristic under s.13 of the Act. He submitted that s.18(7) is clear that the section is only engaged where, "…*in the protected period in relation to a pregnancy of hers, A* [in this case the Respondent] *treats her unfavourably*…).

57. Reliance was placed by the respondent's representative on the EAT decision in *Kuliaskoskas v Macduff Shellfish & Another UKEATS/0062/09/BI; UKEATS/0063/09/BI*, and the EAT's reasoning there as to why the protected characteristic of pregnancy and maternity is treated differently (although noting that that was pre 2010). The respondent's representative submitted that even if the claimant is permitted to rely upon the protected characteristic of sex, the underlying principle established in *Kuliaskoskas v Macduff Shellfish* remains the leading authority relevant to this case.

58. The Respondent's representative sought to distinguish the present case from those in *Gyenes v Highland Welcome (UK) Ltd, 2014 WL 10246834 (2014)*. Reliance was placed on the Code of Practice to the Equality Act and the genesis of the Framework Directive. His submission was that the matter was not properly tested in *Gyenes*, where the respondent was not represented and where the decision shows that the Tribunal were sympathetic towards the claimant (with reference to paragraphs 2, 21, 34, 35 & 44 of the Judgment). His submission was that that ET decision is not binding on this Tribunal and that in any event, on the facts, neither the claimant's daughter's sex not her pregnancy and maternity were the reason for the claimant's dismissal.

59. With regard to the claimant's financial loss, the respondent's representative submitted that any financial loss to the claimant cannot extend beyond the period from 1st May to 30th September 2020, on the basis that the claimant's role would have ended on 28th September 2020, even on hindsight. Reliance was placed on there being evidence of only very limited attempts at mitigation demonstrated by the Claimant. It was submitted that any compensatory award should be subject to reduction for lack of mitigation of loss. He noted that the claimant's schedule of loss was calculated with regard to the claimant's gross income and not her net income.

Claimant's Representative's Submissions

60. For the claimant, the claimant's representative adopted both his skeleton argument and his submissions with regard to factual matters. The claimant's representative acknowledged that the main area of factual dispute was the employer's reason for dismissal. His position was that this really comes down to the facts know to or beliefs held by Ms Janice Muirhead when she both took and communicated the decision to dismiss the Claimant.

61. The claimant's representative invited the Tribunal to find that the reason for the claimant's dismissal related to the contents of the two emails she sent to the Ms Janice Muirhead on 27 March 2020 [64]. He submitted that the evidence of the respondent as to when the decision to dismiss was taken is inconsistent. He relied on there being no contemporaneous supporting evidence which supports the respondent's witnesses' evidence on the reason for dismissal. He accepted that for the claimant to be successful the Tribunal would have to find that the respondents' witnesses were not credible or reliable at least in relation to part of their evidence. He submitted that the timeline of events supports the claimant's position, because she was dismissed immediately prior to commencing her first shift following the emails.

62. The claimant's representative invited the Tribunal to find on the facts that the reason for the claimant's dismissal was because she had raised concerns in her emails to Ms Muirhead. The Tribunal was reminded that the reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (*Abernethy v Mott Hay and Anderson* [1974] IRLR 213).

63. The claimant's representative's submission was that main area of factual dispute in this case relates to the employer's reason for dismissal. His position was that this really comes down to the facts known to or beliefs held by Ms Janice Muirhead when she both took and communicated the decision to dismiss the Claimant. The claimant's representative's

submission was that the contemporaneous evidence supports the claimant's position. His submission was that there was no contemporaneous evidence to support the respondent's position that the decision to dismiss had been all-but-taken at some point prior to Friday 27 March. He submitted that only an extremely generous reading of Ms Muirhead's rota notes at [67] and the letter of dismissal at [80] would describe them as being necessarily supportive of the respondent's position as to its reasons for dismissal. He submitted while the claimant's name is not included in either of team, there is very little that can be concluded in consequence of this: as the claimant was very new into the job and had not been trained on the appropriate systems at this stage, any exercise to divide manpower at this stage would most likely have been exclusive of her in any event. It would not have made sense to have included her in the exercise, as the limitations of her abilities at that point would have meant that allocating her to either team would have disadvantaged that team. Similarly, he submitted that the question mark beside the "JOH 20" note, which indicated the Claimant and the number of hours she was contracted to work, does not of itself suggest that a decision had already been taken to dismiss her. At best, for the respondent, it is a neutral factor. It might even be suggested that the fact there was a question mark beside an abbreviation of her name and the number of hours she was required to work might indicate that a decision had not been taken at this stage. Similarly, he submitted that the letter of dismissal is simply too vague to amount to any form of contemporaneous proof of the respondent's putative reasons for dismissal. The phrase "*unprecedented Covid-19 situation*" can cover a multitude of sins and, despite the allusion to the situation "*impacting [the respondent's] practice workings*", this again is not to the exclusion of the respondent's reasons for dismissal being those alleged by the Claimant.

64. The claimant's representative placed reliance on the contemporaneous documents. His submission was that these challenge the respondent's assertion that the decision had been taken before lunchtime on Friday 27 March. The significance of this date is the fact that the only contact

between the Claimant and the respondent between this time and the point of her dismissal were the two emails send by the Claimant to the respondent (both appearing at [64]) which, it was submitted, express her concerns as to whether or not social distancing measures were being observed. Particular reliance was placed on the email sent by Ms Muirhead to the Claimant at 13:52 on 27 March. It was submitted that this email poses a difficulty for the respondent's narrative insofar as it concerns arrangements that were being made for the Claimant's shift on Monday: in particular, the Claimant has been asked to "*phone in at 12:30pm on Monday [27 March] to check your start time with as I may put in back to 2pm if it is quiet*". He submitted that although Ms Muirhead's position on those emails may not be beyond the realms of possibility, the fact that there is an email discussing not only arrangements for starting shift times ("*can you phone in*") but also including an apparent justification for why the shift time might change ("*if it is quiet*") infers that this email was sent *before* the decision was made to dismiss the Claimant. Additionally, it was submitted that Ms Muirhead, as office manager of a busy GP surgery which had been dealing with the threat of Covid for a number of weeks, by this time, would have been aware that asking the Claimant to attend a busy GP surgery so that she could be told something that could have just as easily been done over the phone, was an unnecessary risk. It was submitted that such unnecessary risk taking seems somewhat contradictory to the tenor of the remaining evidence that had been given by the respondent, which is that they were not only mindful of such risks, but that they were taking proactive and even commendable steps to mitigate such risks. Reliance was placed on Ms Muirhead having been in communication with both the Claimant and Dr MacNeill throughout this period. It was submitted that no compelling explanation was offered as to why the matters could not have been discussed with either party during these conversations as opposed to have been postponed until the following Monday. The conclusion that the claimant's representative invited the Tribunal to draw was that such a contradiction in strategy by the respondent can best be explained by

doubting the probity of the account for the reason why the decision had not been communicated to the Claimant before 27 March.

65. In respect of the details of the message that was communicated to the Claimant while dismissing, the claimant's representative invited the Tribunal to prefer the evidence of the claimant. Reliance was placed on the notes referred to by Ms Muirhead not being before the Tribunal and no reference having been made to them previously. He invited the Tribunal to draw the conclusion that these notes – being first mentioned almost one year after the conversation took place – simply never existed and were invented in order to bolster a position that was under threat. The claimant's representative invited the Tribunal to prefer the claimant's account of this conversation. Reliance was placed on the claimant's position in cross examination that had she been told at the time what is being asserted as being the respondent's reasons, she would not have raised a claim. Reliance was placed on the claimant's position that it was only because something was said to the effect that she was being dismissed because of her daughter's pregnancy which caused her to consider the reasons for her dismissal to have been discriminatory. Reliance was placed on the claimant's evidence on this point having remained consistent throughout. It was the claimant's representative's position that although the claimant did not claim to give a verbatim account of what was said, she could remember with absolute clarity that it was "her circumstances" which was given as the reason. The Tribunal was invited to make a finding in fact that the reason for the claimant's dismissal was related to the emails she had sent on 27 March and the information contained within them.

66. The claimant's representative noted that the respondent's position is that (a) its reasons for dismissal were those set out at para.14 of Ms Muirhead's statement; and (b) that she had all-but-taken the decision to dismiss at some point prior to Friday 27 March. His submission was that there is a two fold difficulty for the respondent in this position because, in his submission, there is no contemporaneous evidence which

supports this position; and secondly, what contemporaneous evidence does exist appears to contradict this.

67. It was the claimant's representative's submission that the closest that the respondent comes to having documentary evidence supporting their position is Ms Muirhead's rota notes at [67] and the letter of dismissal at [80]. It was the claimant's representative's submission that only an extremely generous reading of these documents would describe them as being necessarily supportive of the respondent's position as to its reasons for dismissal. His submission was that the document at [67] goes on to divide the respondent's support staff into two teams. His position was that while the Claimant's name is not included in either of team, there is very little that can be concluded in consequence of this. His position was that as the Claimant was very new into the job and had not been trained on the appropriate systems at this stage, any exercise to divide manpower at this stage would most likely have been exclusive of her in any event. His position was that it would not have made sense to have included her in the exercise, as the limitations of her abilities at that point would have meant that allocating her to either team would have disadvantaged that team.

68. The claimant's representative submitted that, similarly, the question mark beside the "JOH 20" note, which indicated the Claimant and the number of hours she was contracted to work, does not of itself suggest that a decision had already been taken to dismiss her. His position was that it was, at best, for the respondent, a neutral factor. His position was that it might even be suggested that the fact there was a question mark beside an abbreviation of her name and the number of hours she was required to work might indicate that a decision had not been taken at this stage.

69. The claimant's representative further submitted that, similarly, the letter of dismissal is simply too vague to amount to any form of contemporaneous proof of the respondent's putative reasons for dismissal. The phrase "*unprecedented Covid-19 situation*" can cover a multitude of sins and,

despite the allusion to the situation "*impacting [the respondent's] practice workings*", this again is not to the exclusion of the respondent's reasons for dismissal being those alleged by the Claimant.

70. The claimant's representative's submission was that, by contrast, there are a number of contemporaneous documents which challenge the respondent's assertion that the decision had been taken before lunchtime on Friday 27 March. He relied on the significance of this date being the fact that the only contact between the Claimant and the respondent between this time and the point of her dismissal were the two emails send by the Claimant to the respondent (both appearing at [64]) which express her concerns as to whether or not social distancing measures were being observed. The claimant's representative relied in particular on the email sent by Ms Muirhead to the Claimant at 13:52 on 27 March. His submission was that this email poses a difficulty for the respondent's narrative insofar as it concerns arrangements that were being made for the Claimant's shift on Monday: in particular, the Claimant has been asked to "*phone in at 12:30pm on Monday [27 March] to check your start time with as I may put in back to 2pm if it is quiet*". The claimant's representative noted that Ms Muirhead's position was that the reason she wanted to delay telling the Claimant about her decision until Monday to dismiss was both (a) that she had wanted to do it face-to-face; and (b) she had wanted to discuss the issue with Dr MacNeill, also face-to-face, before dismissing. His submission was that, while superficially, this justification may not be beyond the realms of possibility, the fact that there is an email discussing not only arrangements for starting shift times ("*can you phone in*") but also includes an apparent justification for why the shift time might change ("*if it is quiet*"), it would be an extremely odd email to send to an employee that you know is not going to be working that Monday. He submitted that the inference which fits best is that this email was sent *before* the decision was made to dismiss the Claimant.

71. Reliance was also placed by the claimant's representative on Ms Muirhead being office manager of a busy GP surgery which had been

dealing with the threat of Covid for a number of weeks. He submitted that by this time, she would have been aware that asking the claimant to attend a busy GP surgery so that she could be told something that could have just as easily been done over the phone, was an unnecessary risk. His submission was that such unnecessary risk taking seems somewhat contradictory to the tenor of the remaining evidence that had been given by the respondent, which is that they were not only mindful of such risks, but that they were taking proactive and even commendable steps to mitigate such risks.

72. The claimant's representative relied on the evidence that Ms Muirhead had been in communication with both the claimant and Dr MacNeill throughout this period. He submitted that no compelling explanation was offered as to why the matters could not have been discussed with either party during these conversations as opposed to have been postponed until the following Monday. The claimant's representative invited the Tribunal to draw the conclusion that that was a contradiction in strategy by the respondent that could best be explained by doubting the probity of the account that the reason the decision had not been communicated to the Claimant before 27 March is that it in fact one which had not been taken until after that.

73. Reliance was placed by the claimant's representative on Janice Muirhead's position in cross examination being that she read her decision from a note she had made of them. He relied on this note having not appeared in evidence and no prior reference having been made to this note. He invited the Tribunal to draw the conclusion that this note – being first mentioned almost one year after the conversation took place – simply never existed and was invented in order to bolster a position that was under threat.

74. The claimant's representative submitted that the Tribunal should prefer the Claimant's account of this conversation. He accepted that the reasons advanced by the respondent in evidence as to why they took the decision to dismiss the Claimant are not of themselves unreasonable. He relied on

the claimant's position in cross examination being that had she been told those reasons on the phone, she would not have raised a claim. He relied on the claimant's position that it was only because something was said to the effect that she was being dismissed because of her daughter's pregnancy which caused her to consider the reasons for her dismissal to have been discriminatory. He relied on the claimant's evidence on that point having remained consistent throughout. His position was that although her evidence did not claim to give a verbatim account of what was said, she could remember with absolute clarity that it was "her circumstances" which was given as the reason.

75. On that basis, the claimant's representative relied upon the claimant's position that the reason for her dismissal was in fact related to the emails she had sent on 27 March and the information contained within them.

76. In respect of the claim under s100ERA, it was submitted that the email from the claimant which is relied upon both disclosed the claimant's reasonable belief that the health and safety of her daughter was at risk and amounted a reasonable means of bringing this to the respondent's attention. It was submitted that if the reason for dismissal was that the claimant sent this email, then the provisions of s.100 are satisfied and her dismissal was unfair.

77. In respect of the claim under s13 EqA, reference was made to the respondent's representative's reliance on *Kulikaoskas v MacDuff Shellfish & Anor* UKEATS/0062/09/BI, which relates to the provisions of s.3A(1) of the Sex Discrimination Act 1975. It was submitted by the claimant's representative that the character of s.3A(1) is that it is the statutory predecessor to s.18, EqA, insofar as it limits the scope of the protection to a woman's pregnancy. He submitted that, similar to s.18, EqA, the drafting of the provision creates a possessive requirement over the protected characteristic ("*on the ground of* ***the woman's*** *pregnancy*" and "*in relation to* ***a pregnancy of hers***", chronologically). His submission was that it is made clear at para.28 of the judgment in *Kulikaoskas* that

the possessive character of s.3A(1) was the thing which was fatal to the appellant's case.

78. The claimant's representative relied on this being distinct from the drafting of s.13, which neither deploys the definite article ("***the*** *woman*") nor imposes any possessive requirements ("*pregnancy of* ***hers***") in relation to the Claimant and the protected characteristic. It was submitted that, rather, s.13 provides that discrimination occurs where less favourably treatment has been occasioned on an individual "*because of* ***a*** *protected characteristic*". Reliance was then placed on "*pregnancy and maternity*" being set out as one of the protected characteristics at s.4, EqA. It was submitted that no other provision within the EqA seeks to restrict the application of s.13 in relation to this (or indeed any) protected characteristic. The claimant's representative's position was that if the Parliamentary draftsmen had sought to exclude pregnancy and maternity from the ambit of s.13, it would have been open to them to do so. Reliance was placed on "pregnancy and maternity" being excluded from the ambit of the protection from harassment contained at s.26, EqA for example (s.26(5), EqA). His position was that on a bare reading of the legislation there is no reason to suggest that pregnancy and maternity does not fall within the protection of s.13. He then relied on the use of the indefinite article in s.13, EqA being broad enough to capture 'associative discrimination' i.e. the prohibition is contravened where the employer treats one employee less favourably than it treats or would treat another because of a protected characteristic, regardless of whether or not that employee has that protected characteristic.

79. Reliance was placed on *Webb v EMO Air Cargo (UK) Ltd* [1993] IRLR 27) in respect of there being no need to identify a comparator in claims brought on the basis of pregnancy and maternity discrimination (as approved by the EAT in relation to cases brought under s.13, EqA in *City of London Police v Geldart* [2020] ICE 920, at paras.84 to 92).

80. It was submitted that in such cases where the identity of a comparator is difficult to establish, the Tribunal should follow the approach set out in *London Borough of Islington v Ladele* [2009] IRLR 154, at para.40. This was as follows :-

"*The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*

(1) In every case the tribunal has to determine ***the reason why the claimant was treated as he was****. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572, 575— "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*

(2) If the tribunal is ***satisfied that the prohibited ground is one of the reasons*** *for the treatment, that* ***is sufficient to establish discrimination****. It* ***need not be the only or even the main reason****. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p 576) as explained by Peter Gibson LJ in Igen v Wong [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 paragraph 37.*

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to ***infer discrimination from all the material facts****. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in Igen v Wong.*

(4) The ***explanation*** *for the less favourable treatment* ***does not have to be a reasonable one****; it may be that the employer has treated*

the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases ***it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence****, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in Brown v Croydon LBC [2007] EWCA Civ 32, [2007] IRLR 259 paragraphs 28–39. …*

81. The claimant's representative submitted that should the Tribunal find that the provisions of s.13 do not apply to the protected characteristic of maternity and pregnancy, then the provisions of s.13 in relation to sex are engaged. His position was that the pregnancy of the Claimant's daughter is so inextricably bound up with her sex, that any dismissal on the basis of the daughter's pregnancy will also amount to a dismissal because of her daughter's sex.

82. It was the claimant's representative's submission that the question for the Tribunal is then whether the Claimant was dismissed *because of* her daughter's pregnancy. Reliance was placed on the guidance from *Ladele* expressly demonstrating that the discriminatory reason does not need to be primary or main reason. It was submitted that if the Tribunal finds that the reason for dismissal was influenced by the pregnancy of the Claimant's daughter to an extent that was more than a mere trivial one, then the Claimant has been discriminated against.

83. In relation to remedy, the claimant's representative relied upon the respondent hiring for the position in November 2020. He submitted that the Claimant has taken reasonable steps to mitigate her loss. He submitted that an award should be made for injury to feelings in the range of the upper lower or lower middle band of *Vento*. His position was that while this case involves a one-off act which may have been motivated (at least to some extent) by concern for the Claimant's daughter, it is still a serious detriment to occasion upon an employee, even notwithstanding the fact that it was not the Claimant's pregnancy in respect of which she had been dismissed.

Burden of Proof

84. The burden of proof is on the respondent in respect of their reasons for dismissal. In respect of the claimant's claims under the Equality Act, the burden of proof is first on the claimant. In respect of those claims, the Tribunal required to consider the strength of all the evidence, presented to it by both parties, and decide whether the claimant has made out her case, on the balance of probabilities. The standard of proof applied in Employment Tribunal cases is the civil standard of proof of 'on the balance of probabilities'. Mr Justice Denning in *Miller v Minister of Pensions 1947 2 All ER 372,KBD,* explained the civil standard proof in these terms:-

> *"[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.*'

85. Section 136 of the Equality Act 2010 applies to any proceedings brought under that Act. 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 contravention occurred' (s136(2)). This statutory position follows the development of case law. The Court of Appeal had provided guidance on the standard of proof in civil cases (including Employment Tribunals) in *Igen Ltd (formerly Leeds Careers Guidance) and ors -v- Wong and other cases 2005 ICR 931, CA*, revising the guidance in *Barton*. In approving the Barton principles, the Court of Appeal said:-

> *"The statutory amendments clearly require the ET to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."*

86. This relates to what is known as the 'shift' in the burden of proof. The guidance provided by the EAT in *Barton -v- Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 (*referred to in *Igen)* is as follows:-

> "(1) Pursuant to s.63A of the Sex Discrimination Act 1975 , it is for the Applicant 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 Respondents have committed an act of discrimination against the Applicant which is unlawful … These are referred to below as 'such facts'.
>
> (2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. …

(4) In deciding whether the applicant 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 is 'could'. 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 proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw … from an evasive or equivocal reply to a questionnaire …

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account … This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the Respondents have treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.

(9) 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.

(10) 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.

(11) 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 any part of the reasons for the treatment in question.

(12) 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."

87. The Court of Appeal in *Igen* decided that in considering what inferences or conclusions can be drawn from the primary facts, the ET must assume that there is no adequate explanation for those facts. The Equality Act 2010 section 136(2) clarifies that the Tribunal must assume there is no explanation at the first stage. The Court of Appeal in *Igen* concluded that i*t 'may be helpful for the Barton guidance to include a paragraph stating that the ET must assume no adequate explanation at the first stage'.* In that way the *Barton* guidance has been amended by *Igen.*

88. The approach in *Igen* was approved by Lord Justice Mummery in *Madarassy v Nomura International plc 2007 ICR 867, CA*. Both that case and *Igen* were approved by the Supreme Court in *Hewage v Grampian Health Board 2012 ICR 1054, SC*. That is the approach which has been applied by the Tribunal in this case, and is in accordance with the Equality Act section 136(2).

89. The Tribunal took into account that if an employment tribunal does make findings of fact from which an inference of discrimination could properly

be drawn, it will be an error of law for it not to do so and thus avoid the stage two enquiry of requiring the employer to disprove the inference (*Country Style Foods Ltd v Bouzir 2011 EWCA Civ 1519, CA*)

90. The Tribunal approached its considerations of the claimant's claims under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others* 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board* [2012] IRLR 870).

91. In the Equality Act claim, if the claimant had proven facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the relevant provision, the Tribunal would assume that there was no adequate explanation for those primary facts. The burden of proof would then move to the respondent. The Tribunal required to assess whether the respondent had proved a non-discriminatory explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities. The respondent required to present cogent evidence to discharge the burden of proof.

Comments on Evidence

92. Both representatives agreed that the outcome of this case would turn on the Tribunal's determination of what was the real reason for the claimant's dismissal.

93. The Tribunal found the respondent's witnesses to be entirely credible and reliable and their account of events to be entirely plausible and in line with the documentary evidence which was before the Tribunal. The Tribunal attached significant weight to the evidence of both Dr MacNeill and Dr Crawford that they had had discussions with Janice Muirhead about her

thoughts on the claimant having to be dismissed, before the claimant sent the emails which she relies on in her claims under the Equality Act. The Tribunal attached significance to Janice Muirhead's handwritten workings re the new staff team rota [67] - [69] and in particular to her evidence in cross examination on them. Ms Muirhead was asked in cross examination about the date of the decision to dismiss the claimant. Her position was 'I *would say my mind was made up by Wednesday 25th, Certainly by when I had the staff meeting on the Thursday and told everyone their reduced hours. The decision was made and my mind was made up by then."*

94. The Tribunal accepted Janice Muirhead's position that the reason she wanted to delay telling the Claimant about her decision until Monday to dismiss was both (a) that she had thought it was appropriate to do it face-to-face; and (b) she had wanted to discuss the issue with Dr MacNeill, also face-to-face, before dismissing. The Tribunal attached significance to Ms Muirhead's evidence that '*Things were changing over that week so dramatically. It was so difficult and such hard work all that week. I was speaking to the doctors. I didn't think a delay in waiting until the Monday would in any way change what discussion we had."* The Tribunal accepted her evidence that *"I've never dismissed someone before. I was not looking forward to it. Dr MacNeill was due back on the Monday. It was always my intention to speak to [the claimant] face to face."* The noted her evidence in cross-examination that *"If I had opened up a conversation with Johan [on Friday 27 March 2020] ……I was ready to have a conversation with her on the Monday."* The Tribunal accepted that and that Janice Muirhead had had a difficult week at work and did not want to end it with dismissing the claimant on what was supposed to be Ms Muirhead's day off. The Tribunal accepted her evidence that she would normally have her out of office on but had been instructed to leave it off because of the various matters which required to be dealt with because of the response to the COVID 19 pandemic. The Tribunal accepted Janice Muirhead's position re the emails arranging the claimant to come in on the Monday as her "*trying to keep some normality until I*

had to terminate her employment." The Tribunal accepted Janice Muirhead's position that she would have preferred to give the claimant the news face to face.

95. The Tribunal attached significance to the content of the email exchange between Janice Muirhead and the claimant on 27 March 2020, prior the email relied upon by the claimant. The content and tome of Janice Muirhead's initial email to staff on that day was consistent with the respondent's evidence and inconsistent with the claimant's position on the reason for the dismissal. That position was also inconsistent with the claimant's comments on her earlier email to Janice Muirhead on 27 March commenting on the caring nature of Janice Muirhead and her team, as set out in the Findings in Fact.

96. The claimant sought to rely on Dr Crawford having shaken her hand on her first day. The Tribunal placed no significance on Dr Crawford having shaken the claimant's hand then. The Tribunal accepted Dr Crawford's evidence that she did so automatically and that at the time the guidance at the time was that hand shaking was safe so long as hands were washed.

97. The Tribunal accepted that Janice Muirhead's notes used for his discussion in dismissing the claimant were not retained because she considered the matter to be dealt with no repercussions.

98. The Tribunal attached significance to Dr MacNeill's evidence that he had sought to ensure that the practice had acted lawfully in dismissing the claimant and had discussed that with Janice Muirhead.

Decision

99. The Tribunal made its finding in facts taking into consideration the credibility and reliability of the witnesses and the documentary evidence which was before the Tribunal. This case was decided on those findings in fact. The claimant's representative accepted that to find for the

claimant, the Tribunal would require to find that the respondent's witnesses were at least in part untruthful, incredible or unreliable in their evidence. The Tribunal found that the respondent's witnesses were entirely truthful, credible and reliable. Their evidence on the reasons for the claimant's dismissal were entirely plausible and were entirely accepted.

100. The Tribunal did not consider that the claimant sought to be untruthful. The claimant was understandably focused on her own personal circumstances and was concerned about her pregnant daughter during the COVID 19 pandemic. It was not in dispute that in her phone call with the claimant informing her of the termination of her employment, Janice Muirhead referred to 'the circumstances'. It was significant that when the claimant's position in cross examination was that the phone call informing her that she was dismissed '*Came as a complete shock. Out of the blue*." She did not accept under cross examination that in those circumstances she would have less accurate recollection of the conversation than Janice Muirhead, who had anxiously built up to the phone call. The claimant did not accept that the circumstances referred to could be anything other than that her daughter was pregnant. The claimant did not accept that Janice Muirhead's reference could have been to the COVID 19 circumstances. The claimant was adamant that Janice Muirhead's reference was to the circumstances of the claimant's daughter being pregnant.

101. There was no challenge to the respondent's evidence that others in the practice were also concerned about the health and safety of themselves and those they lived with. That position is consistent with the terms of Janice Muirhead's email to all staff on 27 March. At the time the of the claimant's dismissal, the respondent was dealing with extremely challenging and changing circumstances. They were seeking to ensure that the practice continued to serve its patients while working within the new and evolving restrictions and guidelines. The claimant accepted that she could not be an effective contributor to the staff team until she was trained in the systems used by the respondent. There was no real

challenge to the respondent's position that that training could not be done while maintaining social distancing. The Tribunal accepted that these were the '*circumstances'* referred to by Janice Muirhead. It would have been better if more detail had been put in the letter to the claimant confirming the termination of the claimant's employment and the reasons for that. The Tribunal was satisfied that neither the claimant's daughter's pregnancy nor the terms of the claimant's email to Janice Muirhead of 27 March 2020 played any part in the decision to dismiss the claimant. The Tribunal accepted the respondent's representative's submissions (with the exception of his position re the claimant having not brought a claim under s13 EqA relying on the protected characteristic of sex as well as pregnancy and maternity).

102. The Tribunal considered it to be significant that the claimant's representative accepted that as the claimant was very new into the job and had not been trained on the appropriate systems at this stage, any exercise to divide the staff into teams would most likely have been exclusive of her because it would not have made sense to have included her in the exercise, as the limitations of her abilities at that point would have meant that allocating her to either team would have disadvantaged that team.

103. The Tribunal determined 'the crucial question' as identified by Lord Nicholls in *Nagarajan v London Regional Transport [*1999] IRLR 572, 575 i.e. the reason why reason why the claimant was treated as she was. The reason the claimant was treated as she was was because of the restrictions caused by the COVID 19 Pandemic, the resultant impracticability of training the claimant, the inability of the claimant to carry out the duties of her role without that training, and the lack of work which the claimant could do for the respondent without that training.

104. Following the *Barton* guidelines, as amended in *Igen*, the claimant did not prove facts from which the ET could, apart from section 136 EqA, conclude in the absence of an adequate explanation that the respondent

has committed, or is to be treated as having committed, the purported unlawful act of discrimination against the complainant.

105. For these reasons the claimant's claims are unsuccessful and are dismissed.

106. Although not discussed at the Hearing, it is noted that the Equality and Human Rights Commission's Code of Practice on Employment 2011 states at 3.18:-

> *"It is direct discrimination if an employer treats a worker less favourably because of the worker's association with another person who has a protected characteristic; however, this does not apply to marriage and civil partnership or pregnancy and maternity. In the case of pregnancy and maternity, a worked treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination."*

107. Had this case not failed on its facts, the Tribunal would not have accepted that the claimant could claim under s13 with regard to her daughter's pregnancy. The Tribunal would have taken into account that position at 3.18 and accepted the respondent's representative's submissions that s13 does not extend to associative discrimination on the grounds of pregnancy and maternity.

108. The ET1 does indicate a claim for associative discrimination based on sex. The box is ticked at 8.1 Paragraph 14 of the Paper Apart to the ET1 states:-

> "*The respondent, in discriminating against the claimant on the grounds of her daughter's pregnancy directly discriminated against her on the grounds of pregnancy and maternity, and sex in terms of section 13 EqA and contrary to the provisions of s39(2)(d) EqA."*

109. The claimant's daughter's pregnancy played no part in the decision to dismiss the claimant. On the facts found, the claimant's claims under both s13 EqA and s100 ERA are unsuccessful and are dismissed.

Employment Judge: C McManus
Date of Judgement: 31 March 2021
Entered in register: 27 April 2021
and copied to parties