EMPLOYMENT TRIBUNALS

Claimant: Miss L Livesey

Respondent: Slater and Gordon (UK) 1 Ltd

Heard at: Manchester (remote public hearing via CVP)

On: 3-4 June 2021

Before: Judge BJ Doyle, Ms B Hillon and Mr J Flynn

Representation
Claimant: In person
Respondent: Mr R Quickfall, counsel

JUDGMENT

The claimant's complaints of pregnancy discrimination and unfair dismissal for a reason related to pregnancy are not well-founded. The claim is dismissed.

REASONS

Written reasons

1. These are the written reasons for the Tribunal's unanimous judgment delivered orally in outline at the conclusion of the final hearing on 4 June 2021 (and signed by the judge on 7 June 2021). The judgment was sent to the parties by the Tribunal administration on 21 June 2021. The written reasons are provided in response to a timely application made by the claimant on 22 June 2021 under rule 62 of the Employment Tribunal Rules of Procedure 2013. The request for written reasons was referred to the judge on 10 July 2021.

The claim and issues

2. The claim was presented to the Tribunal on 27 June 2020. It arises from the employment of the claimant between 9 March 2020 and 12 June 2020 as a Legal Assistant in the Specialist Injury Department of the Manchester office of the respondent law firm.

3. The claimant complains of unfair dismissal by reason of pregnancy contrary to section 99 of the Employment Rights Act 1996 and pregnancy discrimination contrary to section 18 of the Equality Act 2010.

4. The respondent presented a response to the claim on 31 July 2020. It asserts that the dismissal of the claimant was by reason of misconduct and not by reason of pregnancy. The claimant does not otherwise qualify for ordinary unfair dismissal protection under section 98 of the Employment Rights Act 1996.

5. The claim was the subject of a case management hearing conducted by Employment Judge Holmes on 18 November 2020. As a result a draft list of issues was prepared by the respondent's solicitor. An updated list of issues was then adopted at the commencement of the final hearing [162-164]. It will be cross-referenced in the Tribunal's disposal below.

The hearing

6. The final hearing was conducted as a wholly remote public hearing via the Cloud Video Platform (CVP) with the implicit consent of the parties because of the present restrictions placed upon the Tribunal by the Covid-19 pandemic. No issues arose from this medium of hearing.

The evidence

7. The Tribunal had before it a joint bundle of documents comprising 157 pages. References to the bundle below are in square brackets. A small number of additional documents were disclosed at the commencement of the hearing. They were admitted and numbered as [158-167]

8. The Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard evidence from Victoria Higgins (a qualified solicitor since March 2016 and Senior Associate and Team Leader in the respondent's Specialist Injury Department in its Manchester office, employed by the respondent since July 2018), who dismissed the claimant. It also heard evidence from Kate Cameron, the respondent's Operations Manager since October 2019, who heard the claimant's appeal against that decision.

Assessment of the evidence

9. Although there were passages in the evidence before the Tribunal where the claimant's credibility or the consistency of dates pleaded by the respondent (and referred to in witness evidence) were put in issue, the Tribunal has not found it necessary to approach its assessment of the evidence or its findings of fact from those angles. The witness and documentary evidence largely spoke for itself.

10. The claimant was an apparently honest witness, whose understandable approach to the evidence was to attempt to put the respondent's motives, and the coincidence of her pregnancy and the investigation of her Facebook posts, to the test. In places, her evidence was confused or confusing, and not always consistent (which is of a piece with Ms Higgins's growing lack of trust in her as

an employee, which the Tribunal reflects in its findings of fact below). She had the disadvantage of being a litigant in person, without professional assistance in marshalling her evidence. The Tribunal has not found it necessary to reject her account, but instead it has looked to find the best possible evidence of what was said and done and when and by who and for what reason.

11. The respondent's two witnesses – and Ms Higgins, in particular – were impressive witnesses, whose accounts were honest, detailed and consistent, and most importantly of all, were supported by the documentary evidence. The Tribunal had no hesitation in building its findings of fact largely around the evidence of Ms Higgins and Ms Cameron, whose accounts were plausible, credible and compelling.

Findings of fact

12. Ms Higgins and her assistant interviewed the claimant in person on or around 10 February 2020. The claimant came from a conveyancing background. She had not worked in a personal injury team before and she had no experience of working with a case management system. At the interview, Ms Higgins was not "blown away" by the claimant's performance and experience, but she was able to start fairly promptly. Ms Higgins worked in a busy department. She represented clients in the Manchester Arena Bombing Inquiry, which would bring an increased workload. The claimant's ability to start work without delay was an attractive proposition.

13. The claimant's contract of employment is at [44-55].

14. The claimant joined Ms Higgins's team on 9 March 2020 as a Legal Assistant. Prior to the claimant joining her team, Ms Higgins had managed without a Legal Assistant since October 2019. She was used to utilising other members of the team such as Paralegals, along with assistance from Legal Assistants from other teams. Ms Higgins acknowledged that the claimant started at a difficult time. Ms Higgins and her team were very busy. The coronavirus pandemic forced all concerned to engage in new ways of working.

15. Shortly after the claimant joined the respondent, she disclosed to Ms Higgins on 12 March 2020 that she had asthma and diabetes. This was prompted by generic guidance circulated by HR. With her permission, Ms Higgins passed this information on to Niva Reitz, HR Business Partner, by email and sought further assistance. Based on Government guidance at the time, these conditions rendered the claimant to be a vulnerable person in terms of Covid-19 risks. Guidance from Niva Reitz was that the claimant should phone 111 to ascertain how she should proceed in terms of working from home versus office attendance. Ms Higgins spoke to the claimant about this. They agreed that she should work from home until guidance had been obtained to minimise any risks to her.

16. There were subsequently some issues about the claimant being provided with the right equipment to enable her to work from home, but those issues (which are dealt with in paragraphs 5-7 of the claimant's witness statement) are not central to the present claim.

17. The rest of Ms Higgins's team were due to trial homeworking in the week commencing 16 March 2020 in any event. This trial period was arranged by her Senior Practice Director so that they could help to identify and iron out any potential homeworking issues in case of an enforced lockdown situation.

18. Exactly a week after the trial began, the national lockdown commenced following an announcement from the Prime Minister on the evening of Monday 23 March 2020. During lockdown, Ms Higgins tried to make sure everyone in the team had what they needed to work safely. She attended daily meetings with her manager and/or Senior Practice Director and the other Team Leaders who were located nationally. In turn, Ms Higgins held daily meetings with her team to cascade messages and to check in on team members from a welfare perspective.

19. Ms Higgins was conscious that the claimant was very new to the business. She was aware that she lived alone. She therefore made a conscious effort to touch base with her regularly and tried not to put her under any pressure in respect of targets or tasks. All she required the claimant to do initially was to attend training sessions on elements of her role. She gave her a grace period to settle in and ensure she had all her training completed.

20. Two of Ms Higgins's team members spent time with the claimant explaining the litigation process and how claims work and operate in practice to help put her tasks into context. One of her Legal Assistants also "touched base" with the claimant from a finance perspective to help her with basic finance tasks which she would need to complete as part of her duties.

21. During the team meetings Ms Higgins checked with each team member if they were OK and if they were managing with workload and homeworking. She also checked to see if they needed any equipment and tried to arrange this for them where they did. Eventually, as they became more accustomed to the new way of working, team meetings for this purpose moved from daily to twice weekly.

22. Throughout the claimant's employment Ms Higgins was extremely busy with her own caseload of work. She had another member of her team start at the same time as the claimant and who also needed management and support. Ms Higgins was managing two teams remotely (the Civil Litigation team and the Manchester Arena Inquiry team), attending daily management meetings and feeding messages back to her teams, as well as adjusting and adapting to remote working herself.

23. Given all the changes and challenges, together with her own workload, Ms Higgins had not given the claimant's performance any thought until around 6 weeks into her probation period. If she held a team meeting, Ms Higgins would ask the claimant to perform certain tasks (for example, to diarise the next meeting to discuss ongoing cases and to amend team lists when cases were settled to remove any directions relating to settled cases etc from the diary). Ms Higgins started to notice that the claimant was not actioning these tasks and that she was not asking for help or suggesting reasons why she may not be able to complete the tasks.

24. Ms Higgins had a lot of dictations in her dictation list which the claimant was tasked to pick up. Ms Higgins was confused as to why there was such a backlog. She spoke to two other members of the team to ascertain if they had delegated any work to the claimant. Ms Higgins had a lot of dictations backing up and she needed to know what the claimant's work capacity was like. They both informed her that they had not given the claimant much work to do. One of those colleagues told Ms Higgins that she had some frustrations with the claimant because, when she did give the claimant a task to do, she would not do it, but also would not "shout up" and ask if she did not know how to do it. It was only when that colleague would follow up with the claimant about the task that the claimant would then say she did not know how to do it or that she had computer issues that day or that she had forgotten. From Ms Higgins's perspective, this was far from helpful, when the nature of the work they did was time critical.

25. Ms Higgins decided to approach these issues with the claimant informally to try and identify if there were any underlying reasons and to help support her to improve and better manage her time to ensure tasks were completed when requested. The claimant did not have a high workload and so should have had ample time to complete her tasks.

26. Ms Higgins spoke to the claimant on 24 April 2020. She explained to the claimant the need to action tasks promptly as much of the work they did in the department was time critical given the court directions they were working to. If she could not do a task for any reason, she needed to "shout up" straightaway and not wait to be asked or chased. If Ms Higgins had not been so busy and/or working remotely, she may have picked up on these issues sooner and so she felt it was only fair to give the claimant additional support to help her improve in the areas identified.

27. During this discussion, the claimant told Ms Higgins that she could do with more training. Ms Higgins agreed to provide this to her personally. She asked the claimant to put a meeting into their diaries for this training to take place. As her Legal Assistant, the claimant had full access to Ms Higgins's Outlook calendar/diary. Scheduling appointments was part of her role. The claimant failed to action this task. Ms Higgins had to chase her to ask her again to do it. The claimant explained that Ms Higgins's diary looked busy and she did not know the best time. If Ms Higgins could let her know the best time, she would put it in her diary. Ms Higgins regarded this as being far from helpful, as she may as well have done it herself. She felt frustrated that, despite their discussion, the claimant was continuing in the same way as before – not actioning tasks, not saying if there was a problem and then giving excuses.

28. By the end of May 2020 and the beginning of June 2020, Ms Higgins started to wonder what exactly the claimant was doing all day as she was not given much work to do. Despite their discussion and the extra training she received, the tasks she was given still were not being actioned promptly or at all.

29. Ms Higgins noticed that the claimant had sent some emails late at night. This did not make sense to her as she was not busy in the day and so there would have been no need for her to work in the evenings. Ms Higgins spoke to the claimant about this and told her to stop working after hours and that she needed

to focus on getting up to speed during the day. Ms Higgins asked the claimant to send her an email each morning with her list of tasks for the day so she could better monitor what she was doing and her capacity for work. In the office Ms Higgins could have visually seen what the claimant was doing and it would have been easier to identify the reasons why she was not able to complete tasks during working hours, but the home working situation meant Ms Higgins had no idea what the claimant was doing when not completing tasks assigned to her.

30. Throughout this time, the claimant was not time recording despite Ms Higgins telling her weeks earlier that she needed to complete the time recording training as it was an important part of the role that they needed to record the time spent on various matters even if this was non-chargeable time. The claimant had told Ms Higgins that she had completed the training. To further assist her, Ms Higgins gave her individual training on time recording, sharing her computer screen with her and explaining how time was recorded on the system, while showing her how this was completed. Ms Higgins also spent time giving her examples of both chargeable and non-chargeable tasks. Despite the training and explanations as to the importance of time recording, the claimant was still not doing it. When Ms Higgins chased her about this, and said that her time was not showing on the time reports, the claimant gave excuses such as "I forgot" or "I couldn't get on the system" or "the system wasn't working". Ms Higgins's opinion was that there was always an excuse with the claimant, but these issues were never raised at the time – only when chased as to why things were not being done.

31. By this point, Ms Higgins was starting to wonder whether the claimant was sat on the sofa just moving her mouse occasionally to make it look like she was online. A green icon would appear when online, yellow if inactive or red if engaged on the phone or attending a meeting. Ms Higgins did not trust that the claimant was doing any work. She could not understand what the claimant was doing with her day. She thought that the daily emails with tasks may help the claimant to focus on her work better and if she was struggling Ms Higgins could then pick up the phone to see if she needed help.

32. On 4 June 2020, the claimant and Ms Higgins exchanged a number of emails discussing the issues around her not recording time, the backlog in dictations and the need for her to send Ms Higgins daily emails with her task list for the day [56-60]. Even with the daily task emails, Ms Higgins still had to chase the claimant to send them to her [67]. The need to constantly chase even simple tasks to be completed was adding to Ms Higgins's already very busy workload and the pressures she was under. All these factors combined were ringing alarm bells for her. By this point she had little to no trust in the claimant.

33. At this time the claimant knew that she was pregnant, but she had not yet had her 13 weeks scan. She had been unwell with the effects of her diabetes. She contacted her GP on 5 June 2020 and she was referred for a hospital appointment on 9 June 2020. She had not yet disclosed her pregnancy. The claimant messaged Ms Higgins on 5 June 2020. She referred to the need for hospital tests on 9 June 2020 and asked whether she could book the day off as holiday [64]. Ms Higgins did not see that message at that time, as is explained below.

34. In advance of the expiry of the claimant's probationary period of 3 months as a new starter, Ms Higgins wrote to her team members to ask for feedback on the claimant's performance [62-63, 65-66]. She also liaised with HR regarding her concerns about the claimant's performance and the need to extend her probationary period [68-71]. She invited the claimant into a formal probationary review meeting around a week after her request for the claimant to send daily emails with her tasks for the day.

35. The meeting was due to take place on 8 June 2020. However, Ms Higgins had to go into the office unexpectedly that day to view some potentially distressing evidence. Ms Higgins did not want to go straight from dealing with this into a probationary review meeting with the claimant. It was only fair that the claimant had her full attention. Ms Higgins asked the claimant to move their meeting to the following day, 11 June 2020. The claimant told Ms Higgins that she had messaged her on Microsoft Teams on 5 June 2020 [64] to ask to have that day off work, which Ms Higgins had not seen as she was not accessing the Teams chat forum at that time. They therefore moved the probation review meeting to 10 June 2020.

36. At around 8am on the morning of 10 June 2020, the claimant sent Ms Higgins an email to say that she had to go into hospital after her probationary review meeting (around lunchtime) and would be there for a few days [78].

37. Ms Higgins already had trust issues with the claimant. This made her even more suspicious as she had not mentioned this appointment before and had not given any letter confirming the appointment. In the midst of the COVID-19 pandemic, Ms Higgins found it difficult to believe that she would have an appointment with little to no notice to stay in hospital for a few days. At this time, guidance was to stay home and hospital admissions/appointments were being cancelled. Cancer patients' treatment had been delayed, so the claimant's situation was contradictory to what Ms Higgins was hearing in the news. She questioned how much truth was in what the claimant was saying. It just did not "sit right" with her. The claimant suggested that she could work from hospital. Ms Higgins did not feel this was appropriate as, if she was unwell, she needed to focus on getting better. There were also data protection/confidentiality issues and it was just not appropriate. Ms Higgins forwarded the email to HR and sought their advice [76-78].

38. The Probationary Review Meeting took place at 10am on 10 June 2020. The claimant quickly became emotional during the meeting. Ms Higgins explained to her that these issues had all been raised with her previously and that she had been given an opportunity to improve. The claimant did not appear shocked about the issues being raised with her. Ms Higgins tried to understand why she was upset and crying. The claimant accepted and agreed with all the points Ms Higgins had raised. The claimant did not try to defend her performance. The meeting ended on a positive note with a plan of action moving forwards. Ms Higgins felt that, given the exceptional circumstances with lockdown and homeworking, it was only fair to give the claimant the benefit of the doubt and a final chance to improve her performance and contribute positively to the team.

39. The claimant was so far away in terms of her performance. However, Ms Higgins was very aware that she had been really busy and that the claimant

had started at an extremely difficult and unprecedented time. The timing was very unfortunate and this may have contributed to her performance issues. Lockdown affected everyone in different ways and Ms Higgins was sympathetic to this. Had it not been for lockdown she would have failed the claimant's probationary period at that point. If they had been in the office, Ms Higgins would have been able to pick up on the issues more easily, which would have given the claimant greater time to improve and she may have felt better able to raise any issues in an office setting. Ms Higgins felt in the circumstances that the claimant needed to be given a fair chance. She therefore informed the claimant that she would be extending her probationary period by 2 months until 10 August 2020.

40. During the meeting the claimant also gave Ms Higgins some further details regarding her hospital appointment, noting that she had been unwell during lockdown with her diabetes. This was the first time Ms Higgins was made aware of this. Following the probationary review meeting Ms Higgins updated HR with the additional information regarding the claimant's hospital appointment [79-83].

41. Ms Higgins emailed the claimant at 11am on 10 June 2020 with a copy of the performance plan she had put together as a result of what they had discussed at the meeting. The claimant responded 2 days later with a signed copy. See [97-103]. A letter was sent to the claimant from the HR department confirming the extension of her probationary period on 11 June 2020 [88].

42. In the afternoon on 10 June 2020 at 16:07 the claimant sent Ms Higgins a WhatsApp message to say that she had just found out that she was 8.5 weeks pregnant. Ms Higgins congratulated her in generous terms and asked her permission to notify HR so that the appropriate support could be put in place for her moving forwards [72-73]. Once the claimant gave permission, Ms Higgins forwarded the messages to HR and confirmed to them that she had advised the claimant not to work from hospital and that she was unaware she had been poorly [74-75].

43. After Ms Higgins finished work on 10 June 2020, she could not get the idea out of her head that the claimant was not really in hospital as she was aware that many hospital appointments were not taking place and it seemed odd to have one that she only knew about on the day and that it just so happened to require her to leave work immediately after her probation review meeting.

44. Ms Higgins was on Facebook and was scrolling through her news feed when the claimant's profile came up as a "Someone You May Know" as she thought they had a couple of "friends" in common. Ms Higgins decided to click on the claimant's profile and she was looking through her posts out of curiosity. In her view at the time, lots of people when they are in hospital take photos of themselves from their bed or on the ward, tag themselves into a hospital and/or post statuses etc letting everyone on the social medial platform know they are there. Ms Higgins wondered if the claimant had done this, as she still did not really believe that was where she was.

45. The Tribunal rejects the claimant's suggestion that Ms Higgins had been aware of her Facebook content some time earlier – perhaps as early as when she

interviewed her. There is no evidence of that. The Tribunal also rejects the claimant's suggestion (made only in cross-examination and not at any earlier stage) that Ms Higgins only looked at her Facebook account in order to find evidence to make a case to dismiss her and to disguise the true reason for dismissal (pregnancy).

46. At first glance, the Ms Higgins did not find anything about the claimant going into hospital on her Facebook page. However, she very quickly came across what she regarded as some very inappropriate posts [90-94]. She could not believe what she had seen. She was appalled at the nature of the posts, which in her assessment expressed racist views, joked about Jimmy Saville's crimes against children, and joked about taking class A drugs.

47. When Ms Higgins read the posts, she knew she had to report the issue to HR, but she knew that the outcome would almost certainly end in a dismissal, given the severity of the views expressed in the posts. She could not simply ignore what she had seen though as she found the posts to be extremely offensive. She was genuinely shocked and in complete disbelief that someone she was working so closely with would hold and share these views.

48. When Ms Higgins looked at the claimant's Facebook profile, neither her pregnancy nor maternity leave were a consideration to her. She did not go on to Facebook with the intention of finding the claimant's profile. It was only when the claimant came up as "Someone You May Know" that curiosity took hold. At this point, Ms Higgins did not trust the claimant given that her time during working hours was unaccounted for and coupled with Ms Higgins's suspicions over her last-minute hospital stay, which she had said would last a few days. Something just did not quite add up for Ms Higgins. She wanted to see if the claimant had posted anything that would either confirm or dispel her suspicions. Her pregnancy did not enter her head for a second.

49. The next morning (11 June 2020) Ms Higgins spoke to Niva Reitz in HR to ask for advice. See [89-95]. Niva Reitz advised her to take screen shots of the posts. Ms Higgins went back online and on to Facebook to do so. When she did this, she scrolled a little further back and this is when she saw a post from the claimant joking about throwing boiling water over Muslim children as part of a water fight. The claimant did not appear to have privacy settings on her profile to prevent public viewing as Ms Higgins was not on her friends list. Ms Higgins was able to view the posts without issue. She was not sure whether she would have been able to view more posts if she had been friends with the claimant.

50. Subsequently, a video recording was taken of the scrolling of the Facebook posts. The Tribunal has viewed that recording. It confirms how quickly and easily the posts in question could be found. It would have taken very little time and effort to see the offensive posts in question. The Tribunal also agrees with the respondent's assessment and characterisation of these posts as objectionable and wholly inappropriate.

51. The water fight post and the Jimmy Saville post caused Ms Higgins the most concern. She had a number of Muslim clients and one in particular whom she knew used Facebook a lot and it would have been her "worst nightmare" if they had come across the claimant's profile. The thought of it made her "feel

physically sick". The respondent firm also has a number of Muslim employees in the department/firm and Ms Higgins has a Chinese colleague working in her team. Racism and discrimination of any kind sickens her. At the time, the Black Lives Matter movement was very prominent and there was a lot of unrest locally, nationally and worldwide.

52. Ms Higgins was aware that the respondent represented a number of the victims of Jimmy Saville's crimes. Having worked as a Paralegal years ago in an open plan office, she had sat next to the Abuse team and would hear some horrific things which would "shake her to her core" and the level of intrusiveness to even initiate these claims was horrendous. These victims had to have trust and faith in their legal advisers to be able to open up and disclose details of some of the worst crimes imaginable and that trust would have been destroyed in an instant had they seen an employee of the respondent posting jokes online about the abuse they suffered. Similarly, the nature of her work acting for catastrophically injured clients or bereaved families arising from (predominately) road traffic accidents requires a high level of empathy and compassion, which was the complete opposite to the posts shared by the claimant.

53. The claimant returned to work on 12 June 2020 [96].

54. At 12:29 on 12 June 2020, Ms Higgins emailed the claimant to ask her to attend a further probationary review meeting with herself and Natasha Geraldo, Employee Relations Manager, at 4pm that afternoon. The claimant responded to confirm her attendance. See [104-105]. Before the meeting took place, Ms Higgins discussed the posts with Niva Reitz and Natasha Geraldo from the HR department and they explained the options. They collectively agreed that, save for some explanation which they could not conceive of at that time, there was no way they could confirm to the claimant that her probationary period had been successful despite the 2 month extension and that she was not suitable for the role of Legal Assistant at the respondent.

55. Following their conversation, Natasha Geraldo provided Ms Higgins with a script to help her ensure she covered all the relevant points at the meeting [106]. While Ms Higgins was comfortable that there was no excuse she could think of which would have justified the posts, had the claimant raised anything unexpected during the meeting, she would have adjourned the meeting to investigate or consider the issues further with HR, as per the script, before making any decision. If nothing was raised which she felt would justify, explain or mitigate the issues, or any points she felt needed further investigation or consideration, she would continue with the script and confirm the claimant's dismissal.

56. Ms Higgins believed that the claimant had her camera phone off for the whole meeting, as did Natasha Geraldo. Given the seriousness of the discussions, Ms Higgins was planning to have her camera phone on, but followed their apparent lead and switched it off. With hindsight she wished she had had her camera phone on and insisted that the claimant had hers on too. The claimant did not appear to express any emotion. In Ms Higgins's view, it felt like a "Jekyll and Hyde situation" compared with their previous meeting two days prior. Ms

Higgins does not know if the claimant would have engaged more and communicated with her better had their cameras been on.

57. In fact, we now know, the claimant used her camera phone to audio-record the meeting or at least part of it. The Tribunal has listened to that recording so far as the claimant seeks to rely upon it as to the alleged familiar greeting between Ms Higgins and Ms Geraldo, and as to the accuracy of the minutes. See below. The Tribunal is satisfied that the recording does not make out the points in respect of which the claimant relies.

58. The claimant alleges that at the start of the meeting Ms Geraldo and Ms Higgins greeted each other saying “Hi babes”. Ms Higgins had only spoken to Ms Geraldo on a couple of occasions previously regarding an issue concerning a colleague with a long term sickness absence and the management of this. They do not know each other outside of work. They have never met in a work social setting. Ms Higgins thinks that she may have met Ms Geraldo once in person in the Manchester office, but she cannot recall with certainty. She does not know which office she works out of. If she needed HR assistance, she would contact Niva Reitz, who would usually pass the issue on to someone in her team. She has never contacted Ms Geraldo directly for assistance. She does not know her on a personal level. In any event, in her evidence, she would never refer to her close friends as “babes”, let alone a colleague she barely knew. This is not terminology or vocabulary she would use and certainly not in a meeting as serious as this.

59. The Tribunal accepts Ms Higgins’s evidence as to this matter. Having listened to the passage from the audio-recording it appears very unlikely that Ms Higgins or Ms Geraldo addressed each other as “Hi babes”. It is more likely that the phrase in question is something like “Hi, hi both”. Whatever the truth of the matter, it falls considerably short of undermining Ms Higgins as a witness. The Tribunal makes no finding as to the effect of this allegation upon the claimant’s credibility. It has no need to do so.

60. At the meeting, in Ms Higgin’s assessment, the claimant’s demeanour was like night and day compared with the previous probationary review meeting. The claimant came across as very defensive and did not really say much. Natasha Geraldo took minutes during the meeting [110-113]. Ms Higgins gave the claimant the opportunity to go and take legal advice, but she declined. Ms Higgins went through each of the Facebook posts with the claimant. The claimant did not give any reasonable explanation as to any of the posts. She simply pointed out that she was not employed by the respondent when the posts were made. While this was true, Ms Higgins’s view was that the posts had only been made the previous year, the latest being just 3 months before she joined the respondent (the post was dated December 2019). It was not as though she had made the posts several years ago whilst an adolescent and lacking in the maturity to understand the potential implications of her actions and offence that could be taken.

61. The claimant also pointed out that the respondent had not told her when she started that she needed to change her privacy settings on her Facebook account. Ms Higgins did not feel this in any way mitigated the issues as if she had not made racist posts, joked about paedophilia and taking class A drug,

her privacy settings would not have mattered. The fact remained that all the evidence showed that she had made these posts. She never denied making the posts. The posts suggested she held views which she was openly sharing in public, that were not, in Ms Higgins's opinion, in line with the respondent's values, the diversity of their clients and employees, and which had no place in the legal profession. It made no difference that the claimant offered to delete the posts.

62. The claimant's contract of employment stated at clause 2.3 that her employment was subject to a probationary period during which her performance and suitability for continued employment would be reviewed [46]. Not only were there performance issues resulting in the probationary period being extended, but once the social media posts came to light, it was clear to Ms Higgins that the claimant was not suitable for continued employment.

63. Ms Higgins was aware that the claimant was pregnant. The idea of dismissing her in this knowledge did not sit right with Ms Higgins as she was aware of so many people being made redundant due to the pandemic. Being pregnant, the claimant was potentially going to find it even more difficult to find alternative employment. However, these issues were so serious that Ms Higgins did not believe there was any suitable outcome other than to terminate the claimant's employment. She did not trust the claimant due to her performance issues and the concerns she had over what she was doing during her working day. These posts were so awful, in the opinion of Ms Higgins, that she definitely did not trust her after having read these and she did not want to work with someone who held those types of views. Ms Higgins therefore confirmed to the claimant her decision that her probationary period was not successful and her employment was to be terminated with 1 week's payment in lieu of notice. While she felt bad for the situation she was putting her in, Ms Higgins could not avoid dismissing her just because she was pregnant. Had the claimant not been pregnant, Ms Higgins would have reached the same conclusion.

64. Following the hearing Ms Higgins emailed the claimant to confirm her decision in writing [107]. Natasha Geraldo sent the claimant a copy of the minutes and, following some email exchanges between them [114-117], the claimant agreed the wording with a couple of amendments [110-113]. On 12 June 2020 the claimant asked for a recording of the meeting, but she was told on 15 June 2020 that the meeting had not been recorded [109].

65. Again, we now know that the claimant made an audio recording of the meeting. She has alleged that the minutes of the meeting were not an accurate record of it. The Tribunal observes that the minutes are not a verbatim account of the meeting, and were not intended to be so, but they are a pretty accurate reflection of what was said and discussed. The Tribunal rejects any suggestion that the minutes were doctored or are unreliable.

66. The claimant appealed the dismissal decision by her email dated 12 June 2020 [119-120] and in her further email dated 18 June [124-125], which took the form of a grievance.

67. On or around 10 July 2020 Kate Cameron, an Operations Manager with the respondent, was contacted by Natasha Geraldo and asked to assist in dealing with the claimant's appeal against dismissal. She agreed to assist.

68. Kate Cameron was aware that the claimant had been dismissed, but she had not been involved in the decision. She lives in the South East of England and she is based in the firm's London office. Both the claimant and Ms Higgins worked in the respondent's Manchester office. Ms Cameron recalls having just one conversation with the claimant during her time with the respondent firm, which was in relation to some training on the computer system. Although she had had regular contact with Ms Higgins during the course of her day to day activities, Ms Higgins was one of many Team Leaders in the department. Ms Cameron had met Ms Higgins only once in person at the time of the claimant's appeal.

69. Ms Geraldo forwarded to Ms Cameron the claimant's letter of appeal [119-120], along with the claimant's grievance letter [124-125] and the transcript of the probationary review meeting [110-113]. The transcript of the meeting included screenshots of social media posts that had been made on the claimant's Facebook account, which were the reason for the claimant's dismissal. Ms Cameron reviewed all documents provided to her by Ms Geraldo and considered the claimant's appeal fully and in detail. She spoke to HR to understand the process in these circumstances. She was advised that as the claimant was in her probationary period when she was dismissed, the respondent did not generally offer the right of appeal in this situation. However, on this occasion, given the serious nature of the allegations, HR advised that it was appropriate to consider the claimant's appeal.

70. Having reviewed all of the information available to her, Ms Cameron agreed that the posts that had been made on the claimant's Facebook account were offensive, had the potential to cause considerable reputational damage to the respondent firm having been posted for the public to see and would most likely be considered offensive by colleagues and clients alike. Ms Cameron considered an argument put by the claimant in her appeal that it had been her sister who had posted the offensive posts on social media. Ms Cameron concluded that the comments were purported to have come from the claimant, having been posted on her Facebook page, and that it was therefore reasonable for anyone who saw those comments to conclude that she had posted them.

71. The claimant's appeal also asserted that her dismissal was connected to her being pregnant. This was not a factor in Ms Cameron concluding that the decision to dismiss her was correct. She agreed with the decision to dismiss the claimant solely based on the inappropriate and offensive posts made on her Facebook account. Ms Cameron was aware of the respondent's reputation as an inclusive employer. As a parent working for the respondent, it was her view that the respondent was not discriminatory in its practices and was very supportive of working parents.

72. Ms Cameron wrote to the claimant on 13 July 2020 [126] to confirm that, while the respondent did not offer an appeal stage for termination during a

probationary period, she had reviewed the claimant's points of appeal. She confirmed that, having done so, the decision made to dismiss her was upheld.

73. A number of points arising in the appeal have been addressed in Ms Higgins's evidence and the Tribunal deals with these points here.

74. The claimant asserts that she did not have direct client contact. Ms Higgins agrees with this to an extent. The claimant had very limited client contact at the time of her dismissal. She had emailed one client on one occasion. However, the intention was always for her to contact clients more, as is usual for Legal Assistants. The main reason the claimant did not have direct client contact at that point was that Ms Higgins did not feel her performance was at a level that she would be happy with the claimant having that contact. Even if clients and colleagues had not seen the posts, the fact that the claimant held these beliefs meant she was simply not suitable for working in Ms Higgins's team or in the legal profession at all.

75. The claimant made no mention at the probationary review meeting of her sister having made the posts. If she had done, Ms Higgins would have halted the meeting to take advice. However, Ms Higgins regards this explanation as implausible. The claimant's sister could have set up her own account using an alternative name if she did not want her ex-partner to view it (as was now being suggested). In any event, the account was in the claimant's name with several of the claimant's photos. Ms Higgins does not believe the posts were made by anybody other than the claimant. If the claimant did give permission to a third party to use her account and make posts in her name, she would, in Ms Higgins's opinion, still be responsible for those post as she was permitting these posts to be made in her name.

76. The claimant sought in evidence to the Tribunal to present herself as an infrequent or inexperienced social media user, especially in her answers to the Tribunal's questions. The Tribunal does not accept that self-portrayal. It is clear that she is or was a frequent and active Facebook-user and adopts that position herself in order to suggest that Ms Higgins would have to trawl through hundreds of posts to find offending posts. However, the video recording evidence suggests that it was relatively easy task of no more than a few seconds to find objectionable posts and no more than a few minutes to find many inappropriate and offensive posts.

77. Ms Higgins can see how the timing of the dismissal was very close to the claimant's pregnancy disclosure. This did not have any bearing on the decision. Had the claimant remained in employment, accommodating a period of maternity leave would not have been a problem. After the claimant's dismissal, Ms Higgins went back to managing the workload with Paralegals and occasional use of Legal Assistants from other teams. The claimant did not really help out that much at all and so losing her input would not have been insurmountable. Ms Higgins could have utilised paralegals to cover tasks or relied on temporary cover. The claimant's replacement started in November 2020, 5 months after the claimant's dismissal.

78. The respondent employs around 1,870 employees – of which around 623 are based in the Manchester Office, and so there are often pregnant women in the

office. When Ms Higgins took on the Team Leader position in July 2019, that was to cover a period of maternity leave. Shortly after lockdown, there was a Solicitor and a Legal Assistant in another team who were both pregnant (at the same time as the claimant) whose pregnancy and maternity leave were accommodated without issue. In February 2021 Ms Higgins had another Legal Assistant join her team following a period of maternity leave. She has also recently been interviewing candidates to cover a period of maternity leave for a colleague who is due to go on maternity leave.

79. Ms Higgins's evidence, which the Tribunal accepts, is that the reason she dismissed the claimant was because she was not suitable for employment with the respondent given the nature of the Facebook posts and her performance issues. Ms Higgins's decision had "nothing whatsoever" to do with the claimant's pregnancy or her presumed intention to take maternity leave. She would have made the same decision had she not been pregnant.

Relevant legal principles

80. Section 99 of the Employment Rights Act provides that an employee who is dismissed shall be regarded for the purposes of the unfair dismissal provisions in the Act as unfairly dismissed if the reason or principal reason for the dismissal is pregnancy, childbirth or maternity or the dismissal takes place in circumstances of pregnancy, childbirth or maternity.

81. So far as is relevant, section 18 of the Equality Act 2010 applies to the protected characteristic of pregnancy and maternity. An employer discriminates against a woman if, in the protected period in relation to her pregnancy, the employer treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of her pregnancy. The claimant's pregnancy had begun and it is not disputed that she was dismissed within her protected period.

82. Section 136 of the Equality Act 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision (that is, of the Equality Act 2010) concerned, the Tribunal must hold that the contravention occurred. This does not arise, however, if the respondent shows that it did not contravene the provision in question.

Submissions

83. The Tribunal has noted the parties' oral submissions. It does not reproduce them here. How they have been accounted for will be apparent from the findings of fact above and the discussion and conclusions below. No case law has been cited to the Tribunal and none appears relevant to the decision.

Discussion

84. Central to the issues in this claim is the answer to the question: why was the claimant dismissed?

85. Ms Higgins has provided a wholly credible and acceptable account of why the claimant was dismissed. Was the sole or principal reason for the dismissal the

fact that the claimant was pregnant and had just disclosed her pregnancy to Ms Higgins? Was the dismissal a discriminatory dismissal in that the material or effective cause was that the claimant was pregnant? The answer in the Tribunal's clear conclusion is "No" – her pregnancy was irrelevant to her dismissal. It was present in the background, but only as a coincidence of timing. But mere coincidence of time does not make good the claimant's case.

86. The claimant's pregnancy was not an effective cause of the dismissal. It was not the pregnancy that had raised Ms Higgins's suspicions about the claimant. Quite the reverse. Ms Higgins had good reason to become suspicious about the claimant's claim to be pregnant. She had pre-existing doubts about the claimant arising from the claimant's performance, her excuses, the lack of work during working hours, the work being undertaken late at night, and the emails being composed at that time of the day. Against the restrictions placed on all by the Covid-19 pandemic, Ms Higgins was also suspicious of the claimant's hospital visits (which, of course, were in fact genuine – but that does not retrospectively undermine Ms Higgins's suspicions).

87. Nevertheless, Ms Higgins had given the claimant the benefit of the doubt despite her impaired trust in her. She extended her probation period in circumstances when she could have legitimately terminated her employment at an earlier point. She supported the claimant because she felt that the claimant had not had a fair chance to establish herself in difficult and unusual circumstances. Yet she retained a niggling doubt about her trustworthiness.

88. It was that doubt – and not the news about her pregnancy, which Ms Higgins had responded to in genuine and generous terms – that caused her to follow up the Facebook invitation (no doubt produced by an algorithm, as social media often works) to explore the claimant's profile. She was seeking corroboration that the claimant was in hospital. She was not looking for damaging material or to glean evidence that could be used to dismiss the claimant because her pregnancy was somehow inconvenient. She had no reason to do so, as her evidence about her positive attitude to pregnant colleagues attested to – evidence entirely in keeping with the respondent's policy and practice, and its record in relation to pregnancy and maternity in its workplace. Nevertheless, damaging material she did quickly find and then could not ignore or "unsee". The claimant accepted herself that she could have been dismissed for that reason.

89. The Tribunal concludes that the claimant's pregnancy was not the sole or principal reason for the dismissal. It was not the reason for the dismissal at all. The claimant was dismissed because of her publicly visible Facebook content, which compounded concerns about her performance. Her pregnancy was not the effective cause of her dismissal. Ms Higgins had no proximate reason to want to dismiss her by reason of her pregnancy, having just extended her probationary period and being willing positively to address the performance concerns. Dismissing her at that time was more inconvenient than convenient. It is simply inconceivable, in the face of the Facebook evidence, that the claimant was dismissed in any way at all because of or by reason of or in connection with her pregnancy.

Disposal by reference to the issues

90. On the question of liability, the headline questions are whether the claimant was dismissed because she was pregnant and, if so, was the dismissal automatically unfair and discriminatory?

91. Turning first to the question of an automatically unfair dismissal contrary to section 99(1)(b) Employment Rights Act 1996. What was the reason for the dismissal? The Tribunal finds that the reason for the dismissal was misconduct related to inappropriate messages on the claimant's Facebook account coupled with capability related to the claimant's hitherto unsuccessful probationary period. Was the reason or principal reason for the dismissal related to the pregnancy of the claimant? The Tribunal finds that the reason or principal reason for the dismissal was not the claimant's pregnancy and did not relate to her pregnancy.

92. Considering next the complaints under the Equality Act 2010. The Tribunal is prepared to assume that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent potentially contravened provisions of the Equality Act 2010. The claimant was dismissed very shortly after she disclosed the fact of her pregnancy. The coincidence of timing is obvious and calls for an explanation – an explanation which the Tribunal must approach with an appropriate degree of scrutiny. However, the Tribunal is satisfied that there is another explanation for the dismissal, and one which is compelling and persuasive – the claimant's social media posts (viewed also against the pre-existing background of performance concerns). The respondent has shown that it did not contravene the provision in question as follows.

93. So far as direct discrimination contrary to section 13(1) Equality Act 2010 is concerned, was the claimant treated less favourably than others (that is, dismissed when others would not have been) because she was pregnant? The Tribunal finds that the claimant was not treated less favourably than others (that is, dismissed when others would not have been) because she was pregnant. She was not dismissed because she was pregnant. Any other employee who was or who was not pregnant would have been dismissed in similar circumstances, as identified above (the Facebook posts). The respondent would have dismissed anyone with the same messages as the claimant on their publicly accessible Facebook account. The respondent considered that the messages posed a significant risk to its reputation and may have caused distress to its clients and employees. It was entitled to take that view.

94. Finally, so far as pregnancy and maternity discrimination contrary to section 18(2) Equality Act 2010 is concerned, was the pregnancy an effective cause of the dismissal, that is, one of the reasons? The Tribunal finds that the claimant's pregnancy was not an effective cause of the dismissal. It was not the reason nor one of the reasons for her dismissal. The social media posts were the effective cause of the dismissal (with pre-existing concerns about performance weighing also in the balance).

95. The issues pertaining to remedy accordingly do not arise for consideration.

96. The claimant's complaints of pregnancy discrimination and unfair dismissal for a reason related to pregnancy are not well-founded. The claim is dismissed.

Judge Brian Doyle
Date: 15 July 2021

WRITTEN REASONS SENT TO THE PARTIES ON

29 July 2021

FOR THE TRIBUNAL OFFICE

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