# EMPLOYMENT TRIBUNALS

**Claimant:** D Topping

**Respondent:** Stepping Stones Nursery (Hoddlesden) Limited

**HELD AT:** Manchester (by CVP) **ON:** 1, 2, 15, 22 and 23 November 2021

**BEFORE:** Employment Judge Batten
E Cadbury
I Frame

**REPRESENTATION:**

**Claimant:** J Easton, lay representative
**Respondent:** M Howsen, consultant

**JUDGMENT** having been sent to the parties on 3 December 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

1. By a claim form dated 16 June 2020, the claimant presented complaints of automatic unfair dismissal for pregnancy, detriment due to pregnancy, pregnancy/maternity discrimination, unauthorised deductions from wages and unpaid holiday pay due at the termination of her employment. On 20 June 2020, the respondent submitted a response to the claim. A case management preliminary hearing took place on 23 February 2021 before Employment Judge Warren, at which the complaints were discussed in detail and a lengthy list of issues was drawn up.

2. In the course of this hearing, the parties agreed that the amount of £76.74 gross was owed in respect of holiday pay and £314.16 gross for unpaid wages. Judgement for those sums is given by consent of the parties.

3. Oral judgment was given in respect of the complaints in the list of issues below, on the last hearing day. At the end of the oral judgment, the respondent's representative requested written reasons.

## Evidence

4. A bundle of documents comprising 275 pages was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing including the unredacted versions of furlough spreadsheets. References to page numbers in these Reasons are references to the page numbers in the bundle.

5. The claimant gave evidence herself and called Jodie Mills, a former employee of the respondent to give evidence in support of her claim. The respondent called 2 witnesses, being: Julie Mercer – the owner of the nursery; and Zara Costello – the claimant's line manager. All of the witnesses gave evidence from written witness statements and were subject to cross-examination.

## Issues to be determined

6. At the outset of the hearing, the Tribunal discussed the complaints and issues with the parties. It was agreed that the issues to be determined by the Tribunal at this hearing were as follows:

**Unfair Dismissal - section 99 of the Employment Rights Act 1996 ("ERA")**

**The Claimant asserts that her dismissal was automatically unfair because "the reason or principal reason for the dismissal" was her pregnancy and not redundancy.**

**Issues:**

**1. What was the reason or principal reason for the Claimant's dismissal?**

**2. Was the dismissal of a prescribed kind i.e. related to the Claimant's pregnancy?**

**Detriment on grounds of pregnancy - section 47C ERA**

**The Claimant asserts that the Respondent's failure to consult properly with her on or before the 20 April 2020 about:**

**(i) changes to her contract of employment (i.e. the reductions from 37 hours to 20 hours and the further reduction from hours to 16 hours);**

**(ii) the furlough scheme and how it applied to her (including the application to her of the SSP when she was not in fact sick but was `self-isolating'**

**with its agreement) and any changes to her as and when new information emerged, and**

**(iii) over the termination of her contract;**

**and that each amounted to detriments.**

**Issues:**

1. **Did one or more of the acts complained of and described above amount to a detriment?**

2. **If so, was that act or acts done for a prescribed reason i.e. the Claimant's pregnancy?**

**Unlawful unfavourable treatment on the grounds of pregnancy - section 18 of the Equality Act 2010**

**The Claimant asserts that the Respondent's failure to consult properly with her on or before the 20 April 2020 about:**

**(i) changes to her contract of employment (i.e. the reductions from 37 hours to 20 hours and the further reduction from 2020 hours to 16 hours);**

**(ii) the furlough scheme and how it applied to her (including the application to her of the SSP when she was not in fact sick but was `self-isolating' with its agreement) and any changes to her as and when new information emerged, and**

**(iii) her solely being selected for redundancy and the post-hoc criteria, culminating in the termination of her contract with dismissal itself;**

**were each acts of unlawful discrimination.**

**Issues:**

1. **Did any of the acts or omissions described above amount to unfavourable treatment of the Claimant?**

2. **If so, were any of those acts or omissions because of her pregnancy**

## Findings of Fact

7. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

8. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

9. The findings of fact relevant to the issues which have been determined are as follows.

10. The claimant commenced employment with the respondent on 24 February 2020 as a Nursery Nurse. The claimant is a Level 3 qualified nursery nurse. Her contract of employment appears in the bundle at page 48. It was signed on 17 February 2020 and provides for 37 hours per week, paid at the National Minimum Wage rate which, at the material time was £7.70 because the claimant was 21 years of age.

11. Prior to the COVID-19 pandemic, the respondent catered for approximately 34 children daily, with over 60 children on its books.

12. On 2 March 2020, the claimant told her line manager, Ms Costello, that she was pregnant. The next day (3 March 2020) a pregnancy risk assessment was carried out which appears in the bundle.

13. A few days later, in the course of a discussion about the claimant's pregnancy, Ms Costello told the claimant that Ms Mercer, the owner of the nursery, would "come round to it", and she mentioned the fact that the claimant was on probation. Other comments were made, including questions about whether the claimant was, in fact, going to keep the baby and whether that would be a good idea, and reference was made to the claimant's partner or father of the baby at the time.

14. In the week commencing 16 March 2020, the global pandemic situation was developing. The claimant began to question whether she, as a pregnant woman, should be self-isolating. Ms Mercer talked to the claimant about reducing her hours.

15. On Friday 20 March 2020, the respondent convened a meeting with staff because the numbers of children attending the nursery were beginning to reduce as people decided to self-isolate or work from home. The respondent anticipated that its finances would be affected, as no doubt they would be, if people took their children out of the nursery and there were less places filled. It was therefore put to the staff that working hours might need to be reduced. Nobody objected to that proposal and staff were asked how many hours they might be willing to drop.

16. The next Monday, 23 March 2020, the claimant went to work and she had a conversation with the managers about shielding. The respondent suggested that she should go off sick and the claimant agreed to do so and agreed to be paid Statutory Sick Pay. As a result, the claimant went home early that day without finishing her shift.

17. The following day, Tuesday 24 March 2020, the claimant was called back to work by the respondent, to a meeting in the kitchen. The respondent announced that it was having to reduce staff hours even more than it had expected because less children were coming to the nursery than it had expected. Ms Mercer's evidence to the Tribunal was that the respondent could not guarantee anything beyond 20 working hours per week for the claimant. No evidence or rationale was produced to explain why the claimant should have this precise figure imposed upon her, either at the time or in evidence to the Tribunal. The claimant had, by that stage, agreed to be off sick and in receipt of SSP. In this regard, the Tribunal noted that the weekly rate of SSP is less than the claimant's pay for 20 hours per week.

18. The claimant was asked to sign a document confirming that she would reduce her hours from 37 to 20 per week. The document appears in the bundle at page 62. It is not a standard letter when compared with the other respondent's letters in the bundle. It was typed up in haste by Ms Costello and the letter told the claimant that she might be furloughed under the furlough scheme which was to be introduced shortly by the Government and that, if so, she was warned that she might later have to pay back any money received from the furlough scheme. That was an incorrect and misleading statement, given the terms under which employees were furloughed. At the time, the claimant was the only employee to have her hours formally cut. She was the only employee to get such a letter and she was asked to sign it immediately.

19. From Monday 30 March 2020, the claimant was placed on the furlough scheme and in receipt of furlough pay. She was paid at 80% of 20 hours per week, even though the claimant had never worked only 20 hours per week and despite that the reference date for calculation of furlough pay had been established to be 19 March 2020, a date when the claimant was working full-time, 37 hours per week. The claimant's colleagues were paid at 80% of 37 hours per week and suffered no reduction in hours/pay. They had not been asked to sign a letter as the claimant had been nor were any of them asked, as the claimant was, to reduce their hours from full-time hours to some fraction of full-time hours.

20. On 2 April 2020, the claimant was asked to sign a letter (which appears in the bundle at page 63) about furlough and her agreeing to 80% of wages. Again, there is no evidence that any other employees were asked to sign this letter, whether on furlough or not. In fact, the letter talks about the claimant being furloughed in the future when the respondent's claims for furlough pay for the claimant started from 30 March 2020 onwards.

21. On 20 April 2020, the claimant was asked to telephone the nursery. The claimant was by then on furlough. She spoke to Ms Costello who told her that she was being made redundant. The claimant was shocked and upset. There was a short conversation in which no mention was made of any selection process having been carried out or criteria applied to the claimant which might lead to her selection for redundancy. In the note which Ms Costello compiled, it is apparent that the discussion included the issue of

whether the claimant might be better off on benefits. There had been no consultation, and no warning of redundancy. The claimant was told that she would get a letter to confirm her redundancy the next day, 21 April 2020. That letter did not in fact arrive until 24 April 2020.

22. The claimant was very upset. She posted the news of her redundancy on Facebook which led to a number of texts which appear in the bundle at page 86. Ms Costello texted the claimant to say that the respondent had guidance from Ms Mercer's accountant to the effect that anybody could be made redundant whilst on furlough.

23. On 21 April 2020, the respondent made its first claim for furlough pay to cover the period from 30 March to 24 April 2020. The list of employees in the claim included the claimant, and it appears in the bundle at page 215 and also page 151.

24. On 24 April 2020, the claimant still had not received the respondent's letter about her redundancy when she was asked to call the respondent again. Ms Costello suggested that she had been trying to get hold of the claimant, although there was no evidence to suggest that she had been chasing the claimant, for example no text or WhatsApp messages at the time.

25. The claimant spoke to Ms Costello, who told the claimant that she had been advised by "an HR provider" to speak to the claimant and to explain the reasons for her redundancy. The claimant was then told that she had been pooled and that others in the pool had 'out-competed' her in a selection process. The respondent's case had been that the selection process had taken place on 19 April 2020. The evidence of the selection process appears in the bundle at page 64 and it is dated 19 April 2020, however the metadata confirms that the document was not in fact written until 24 April 2020, which is the date on which the claimant received her letter of dismissal which appears in the bundle at page 71.

26. The claimant was advised of her right to appeal her dismissal but she felt there was little point in doing so. The claimant took the view that because of the respondent's treatment of her and because it had made her redundant whilst pregnant, she did not trust the respondent and so did not pursue an appeal.

27. On 30 April 2020 the claimant commenced early conciliation, naming Ms Mercer and also Stepping Stones Nursery as her employer(s) in the ACAS submission form.

28. In mid May 2020, the respondent embarked on an exercise to get its staff to sign what backdated letters about discussions which it said had taken place on 20 or 23 March 2020, about agreeing to reduce their hours. There were no specified hours in those letters, which appear in the bundle. In addition, several of the respondent's staff have signed up to 4 letters with no explanation of why that was necessary, beyond the fact that the respondent had by then engaged legal advisers and was aware of the claimant having commenced early conciliation.

**The Law**

29. A concise statement of the applicable law is as follows.

*Pregnancy discrimination*

30. Section 18(2) of the Equality Act 2010 ("EqA") provides:

*A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –*

*(a) because of the pregnancy, or*

*(b) because of illness suffered by her as a result of it.*

31. Section 18(4) EqA provides:

*A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave*.

32. The protected period begins when the pregnancy begins and ends, if the woman has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy or if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

33. Section 39(2) EqA provides, amongst other things, that an employer must not discriminate against an employee by dismissing the employee or subjecting that employee to a detriment.

34. Unfavourable treatment will be because of the protected characteristic if the characteristic is an "effective cause" of the treatment; it does not need to be the only or even the main cause.

35. Section 136 EqA provides:

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

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

36. The Court of Appeal in *Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913* reaffirmed that there is an initial burden of proof on the claimant; - the claimant must show that there is a prima facie case of discrimination which needs to be answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as *Igen Ltd v Wong [2005] IRLR 258* remained good law and should continue to be followed by courts and tribunals.

*Detriment on grounds of pregnancy*

37. Section 47C of the Employment Rights Act 1996 ("ERA") provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act by his employer done for a prescribed reason. Pregnancy is a prescribed reason.

*Unfair dismissal*

38. Section 99 ERA, read with Regulation 20 of the Maternity and Parental Leave etc Regulations 1999, provides, amongst other things, that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee is pregnant.

39. In the course of submissions, the Tribunal was referred to a number of additional cases by the parties' representatives, as follows:

- Moon v Homeworthy Furniture (Northern) Limited [1976] IRLR 298
- Orr v Vaughan [1981] IRLR 63
- Ladbroke Courage Holidays Limited v Asten [1981] IRLR 159
- Timex Corporation v Thomson [1981] IRLR 522
- James W Cook & Co (Wivenhoe) Limited v Tipper [1990] IRLR 386
- O'Neill v Governors of St Thomas More RC VA Upper School [1996] IRLR 372
- Blatt v North and another – ET 2301667/1996
- Zafar v Glasgow City Council [1998] ICR 120
- Waite v Tomassen UK Limited – ET 1900285/1998
- Nagarajan v London Regional Transport [2000] 1 AC 501
- Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065
- Painter v Hutchinson [2007] EWHC 758
- London Borough of Islington v Ladele [2009] IRLR 154
- Makysmiuk v Bar Roma Partnership UKEAT/0018/12
- Bly v Sheffield and Hallamshire County Football Association Limited – ET 1805053/2013
- Marlowe v AIG [2017] UKEAT/0267/17
- Interserve FM Limited v Tuleikyte [2017] IRLR 615
- South West Yorkshire Partnership NHS Trust v Jackson UKEAT/0090/18
- Northampton Borough Council v Cardoza and others [2019] EWHC 26
- Prosser v Community Gateway Association Limited – ET 2413672/2020
- Mhindurwa v Lovingangels Care Limited – ET 33116363/2020

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

**Submissions**

40. The representative of the claimant presented detailed written submissions and also made a number of oral submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was

asserted that:- there was no genuine redundancy situation; that no or no fair procedures were followed when the respondent purported to dismiss the claimant as redundant; that the respondent had brought no evidence of its financial situation upon which a number of its decisions and actions were said to be based; that the respondent had a problem with pregnant employees; that the claimant as a pregnant woman should have been treated as vulnerable to COVID and suspended on maternity grounds rather than subjected to pressure to agree to a reductions in hours and pay; that the reduction in hours was a fiction; that the claimant was the only employee to be subject to reductions in hours and pay and she was the only pregnant employee; the respondent has not explained in any meaningful way why the claimant was singled out for such treatment; that the treatment was in fact designed to encourage the claimant to resign and leave; that a number of documents have been backdated and/or could not have been produced on the dates suggested; and that the credibility of the respondent's witnesses should be questioned and their evidence should be discounted.

41. In the course of submissions, the claimant's representative also referred the Tribunal to guidance in the *EHRC Employment Code,* the ACAS guidance on managing redundancy for pregnant employees and to articles from the website of an organisation called "Pregnant but screwed".

42. The respondent's representative also made a number of detailed submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- that the respondent has provided cogent evidence of the lead up to the claimant's reduction in hours; it was the claimant's choice to go off sick and she was not coerced into doing so; it was clear to the claimant that the respondent had less children coming in to the nursery after 23 March 2020; documents show other staff members also agreed to short-time working; the documents for other staff differed to those issued to the claimant because each individual's circumstances were different; that the respondent could not offer the claimant 37 hours of work when shielding ended, hence its letter to reduce her hours to 20 per week; that the respondent was not aware of the furlough scheme when it discussed arrangements with the claimant; that the respondent consulted its legal advisors in May 2020 and at that stage issued letters to staff to formalise and record arrangements previously made; the claimant was given her letter earlier due to her unique circumstances and because she was wanting to shield; on the issue of the reason for the claimant's dismissal, it was contended that context was important – the pandemic lockdown and the fact that the nursery was only open for key workers with a resulting reduction in income; the claimant's work group was over-staffed and an appropriate selection process was undertaken; it was logical that the claimant was selected for redundancy; and that in any event, the respondent suffered 3 staff departures in June and July so there was no need for other redundancies.

**Conclusions** (including where appropriate any additional findings of fact)

43. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way. The Tribunal looked first at the discrimination and detriment complaints, dealing with the issue of the claimant's dismissal last, as that was the final act relied upon.

*Detriment on grounds of pregnancy*

44. The Tribunal considered each of the 3 things about which she asserted that the respondent failed to consult her properly In respect of reducing the claimant's contractual working hours from 37 hours to 20 hours, the Tribunal has found that there was a meeting on 24 March 2020, where the reduction in the claimant's hours was first raised by the respondent and the figure of 20 hours was stated. There was no consultation about that reduction – the respondent simply said it was going to reduce working hours as even less children were coming to the nursery than it had anticipated. Ms Mercer's evidence was that the respondent could not guarantee anything for the claimant beyond 20 hours. No rationale was produced for why the claimant should be given only 20 hours, nor why such a precise figure should be imposed upon her nor how the figure was arrived at, particularly when the claimant was at this time officially off sick with agreement of the respondent and only being paid SSP, which the Tribunal noted is less than the claimant's 20 hours' pay. In terms of costs, there was no saving to the respondent arising from the proposal.

45. The claimant was anxious about the escalating pandemic and her pregnancy. The respondent asked the claimant to sign a document to agree to reduce her hours from 37 to 20 (page 62 in the bundle). The Tribunal agreed with the submissions of Mr Easton, that the claimant was presented with Hobson's Choice, between signing the document or quite possibly having no job. This was in the context of comments from the respondent's managers about whether the claimant should, or wanted to, keep the baby and other negative inferences which were made. The claimant's evidence was that she had hoped to build her hours back up, as the children returned to nursery, as the pandemic subsided. The claimant was clearly reluctant to sign, and the Tribunal considered that the she did not freely give her consent to the reduction in hours. She was given a letter which was not a standard letter, which had been drafted in haste and not even set out on the respondent's headed paper as other letters were. It was typed up in haste by Ms Costello and, further, for reasons unexplained by the respondent, the letter told the claimant that she might be furloughed but also that she might have to pay back any money she received from the scheme. The claimant was the only employee to have her hours formally cut and to get a letter like that, or any letter at the time, and to be asked to sign it there and then. In those circumstances, the Tribunal considered that the claimant's pregnancy operated in the minds of the respondent when it decided how to deal with her because the claimant was dealt with differently to all other employees. The only difference was that the claimant was pregnant. The respondent have failed to provide any other or credible explanation for the difference in treatment. In reaching this conclusion, the Tribunal also took into account that it was only after ACAS early conciliation commenced, on 30 April 2020, that

other employees were then asked to sign what were vague letters about potential reduction(s) in hours, and with no reductions specified. That, the Tribunal considered, was an attempt to "re-write history" once the respondent was on notice of a potential Tribunal claim.

46. The Tribunal considered how the furlough scheme was applied to the claimant. On Monday 30 March 2020, the claimant was placed on the furlough scheme and, from that date, she was paid 80% of 20 hours pay, even though she had never worked only 20 hours a week, and even though the reference date for calculation of furlough pay was 19 March 2020 when the claimant was working 37 hours. The claimant gave unchallenged evidence that a colleague, Chloe, was furloughed on 80% of 37 hours. From the very limited evidence produced by the respondent, it appeared to the Tribunal that most, if not all of the other employees of the respondent who were on furlough were furloughed on 80% of their original full-time hours. The only employee treated differently was the claimant who was on 80% of a lower number of hours, and the claimant was pregnant. The respondent has not shown any other reason for this approach to the claimant, save that the claimant had signed the letter about reducing her hours to 20 hours per week. Given that the furlough scheme paid out at no cost to the respondent, the number of hours upon which an employee was furloughed did not affect the respondent's finances.

47. The respondent's evidence was that, initially, they did not understand the furlough scheme or how it worked, they were not sure what was happening, and that, at the beginning, it was confusing. However, at no time thereafter did the respondent seek to remedy any mistake in applicable hours nor did it correct its misunderstandings for example by discussing the situation with the claimant, or by withdrawing the letter which suggested she might have to repay her furlough money nor by increasing the claimant's furlough pay referable to the 37 hours per week upon which she was entitled to be furloughed.

48. The Tribunal considered that putting the claimant on furlough was at no cost to the respondent, despite the suggestions by the respondent that there was some cost to them, albeit unexplained. The respondent brought no evidence to support its contention as to a cost save for an article in 'Nursery World' magazine which suggested that some nurseries might be affected by changes in the Government's approach to funding for the childcare sector. The respondent brought no direct evidence of how (if at all) such changes might, or indeed did affect the respondent, if at all. By the time of this hearing, the Tribunal considered that such evidence, for example form the respondent's accounts, should be readily available to it. Ms Mercer told the Tribunal that she spent whole weekends going through the figures and getting advice from an accountant. Without any form of accounting evidence, the Tribunal was extremely dubious about the financial effects that the respondent contended for. There was simply no evidence to substantiate what Ms Mercer suggested.

49. The Tribunal noted that the claimant was dismissed whilst on furlough. Such action goes against UK Government advice during the pandemic and, as has been found, there was no evidence of any saving for the respondent from a dismissal at the time. The Tribunal noted that the timing of the claimant's dismissal was never explained, save by reference to the 'Nursery World' article of 17 April 2020. That article is not mentioned in the respondent's response form (ET3) nor is it referred to in either of the respondent's witness statements. It was introduced in evidence at this hearing as the respondent's case "grew in the telling". The Tribunal considered that, upon receipt of the article in 2020, the respondent would (and certainly should) have sought advice on what the changes to Government funding of childcare might mean for the respondent's business. There was no evidence that the respondent sought or obtained such advice despite that the respondent's witnesses repeatedly said they had got advice from the accountant, who was not called to give evidence. It would have been very easy for the respondent to obtain a statement from the accountant or its HR advisers, as to the respondent's situation at the time, with projections on income of the nursery, to explain the decisions and the action taken.

50. The claimant was the only employee to be dismissed when she was, whilst she was on furlough, with no evidence of any cost saving to the respondent. No other employee was declared redundant then or at any other time. There were later resignations of other employees but those were at least 9 weeks later. The Tribunal found that those resignations could not have been and were not known to the respondent at the time when the claimant was dismissed.

51. Further, the Tribunal considered that there was no consultation or selection procedure until redundancy was suggested and the "procedure" was only mentioned in the telephone conversation which took place on 24 April 2020. The Tribunal found that the purported selection matrix was at best produced that day and was backdated to 19 April 2020. The Tribunal therefore rejected this document as being inauthentic, taking into account that the respondent had conveniently lost what it said were its contemporaneous notes of discussions it claimed to have had. In those circumstances, the Tribunal rejected the selection matrix, finding that it had been produced to justify the respondent's decision to make the claimant redundant. The Tribunal also considered that the selection matrix and criteria were, in any event, slanted against the claimant. All the criteria relate to matters which ultimately depend on length of service, so that, in effect, the respondent was deciding the redundancy based on "last in, first out". This meant that the claimant was bound to be selected, as she had the shortest service. The Tribunal decided, on the balance of probabilities, that that was the respondent's intention all along.

52. In attempting to explain the approach to furlough pay, Ms Mercer claimed that her insurers had refused to cover her for business interruption. In her witness statement at paragraph 21, she suggested that she had understood or believed that she needed to contribute 35% to furlough payments. That again was a very precise figure which Ms Mercer could not explain and for which

no evidence was produced, whether by spreadsheets, accountant's workings, rotas or records for nursery attendance, sources of funding for each child, and how all this was affected by furlough and the Government's proposals. The evidence was that the respondent in fact made claims for furlough pay in gross amounts and was paid those amounts, or very close to what was claimed for the employees. There no evidence that the respondent had ever contributed, either at 35% or at all, to the furlough pay which its employees received.

53. In light of the above, the Tribunal considered that each of the 3 aspects contended for in the list of issues, amounted to detriment and concluded that those acts were each done for the prescribed reason of the claimant's pregnancy - the respondent has shown no other reason.

*Discrimination – unfavourable treatment on grounds of pregnancy*

54. The claimant asserts 3 issues under this complaint. The Tribunal has found that the changes to the claimant's contractual hours were pregnancy related detriment – see paragraphs 44 and 45 above. In turn, the Tribunal also concluded that the reduction in hours also constituted unfavourable discrimination because of pregnancy. Likewise, the Tribunal has found the application of the furlough scheme to the claimant and her being "selected" for redundancy including the purported selection process culminating in the termination of her contract – see paragraphs 46 to 52 above. The Tribunal considered each of these matters also to be unlawful acts of discrimination. They were acts of unfavourable treatment and because of the claimant's pregnancy. The respondent has not shown any other reason for them, and the Tribunal drew inferences from the respondent's failure to bring evidence of its reasons for such conduct to the effect that the respondent was either unable or unwilling to explain its actions.

55. In this regard the Tribunal also noted that there were 2 other employees of the respondent who were on sick leave when the claimant was on sick leave, and when the claimant's hours were reduced to 20 hours. There was no evidence that any other employee on sick leave had been treated the same as the claimant. Neither were asked to reduce their hours in any way, even though they were on sick. The respondent's witnesses claimed that they were not able to call sick employees into work to discuss matters, but that was exactly what they did with the claimant when she was off sick and despite her anxiety about COVID and her pregnancy. The respondent also made no efforts to have other sick employees sign a letter as they had with the claimant or to ask them to agree to reduce their hours in any way. In the absence of an explanation from the respondent, the Tribunal found that the only difference was the claimant's pregnancy. Hence, the Tribunal concluded that those acts or omissions of the respondent to treat any other employee in the manner the claimant was treated, amounted to unfavourable treatment because of the claimant's pregnancy.

*Unfair Dismissal*

56. In approaching a claim of automatic unfair dismissal, the Tribunal only has to answer the question of what was the reason (or the principal reason) for the claimant's dismissal. The respondent's case was that there was a redundancy situation, which necessitated a reduction in staff and costs. The Tribunal accepted that, in light of the COVID-19 pandemic, UK Government restrictions on the population/working arrangements meant and a consequent reduction in children coming to nurseries. Arguably, therefore, the respondent faced a redundancy situation. However, it faced that situation in March 2020. By 20 April 2020, the numbers of children attending the nursery each day had stabilised. The claimant was by then on furlough with other employees at no cost to the respondent. What happened then was that Ms Costello simply rang up the claimant and announced her dismissal as redundant. From the evidence presented, the Tribunal considered that the respondent dressed up the claimant's dismissal by constructing a redundancy process which either never took place or took place after the respondent has made its decision to dismiss the claimant. In any event, there was no warning of or consultation about redundancies, as might ordinarily be expected, particularly in a small and apparently close-knit workforce. Rather, the respondent sought to use "redundancy" in an effort to justify the claimant's dismissal.

57. The Tribunal also found it telling that it was only on Friday 24 April 2020, after announcing the claimant's dismissal on the Monday before, that Ms Costello told the claimant that she had been advised to give reasons for the dismissal by an HR adviser and, on that same day, the redundancy selection matrix was compiled. In reaching this conclusion, the Tribunal rejected the verbal testimony of the respondent's witnesses to the effect that they had run the process earlier in that week. The evidence pointed to the contrary, namely that Ms Costello's telephone call to the claimant, her explanations and the matrix were all a reaction to the Facebook posts, by the claimant about her dismissal, and the reactions to them by the wider Facebook community, which may have included parents or other staff, when none of the staff had been told about the suggested redundancy situation and none of whom were aware of any selection process being undertaken even though some had been included in the selection matrix. In those circumstances, the Tribunal considered that the respondent produced its selection matrix at that stage in a further attempt to justify its actions post-event.

58. Further, it was the respondent contention, during this hearing but not previously pleaded, that the timing of the claimant's dismissal was because of what was said in the 'Nursey World' article. The Tribunal has read that article with care. Despite what the respondent contended, nowhere in the article are nurseries advised to make employees redundant. The respondent offered no other reason for the timing of the claimant's dismissal beyond a belief that it might have to subsidise the wages of those on furlough. That belief was erroneous and, of itself, does not explain why only the claimant was made redundant and not more or other employees, especially as all other employees, except the cleaner, were in receipt of more furlough pay than the claimant was. Several staff had worked for the respondent for less than 2 years and so would not have been entitled to a statutory redundancy payment

from the respondent if they had been made redundant too. The Tribunal considered that, if the respondent faced the severe financial situation that was painted in oral evidence, but without substantiation by documents, the Tribunal would have expected a wider redundancy process and more redundancies to follow, but there were none. The respondent sought to rely on the fact that other employees had later resigned, but those resignations were over 2 months later and could not possibly have been known about at the time when the claimant was made redundant. In all those circumstances, the Tribunal concluded that the decision to make the claimant redundant was a decision targeted at her alone – she was pregnant and in light of the paucity of the evidence, it was apparent that was the only difference. There was no other credible explanation offered by the respondent.

59. In light of the Tribunal's findings of fact and the evidence before it, the Tribunal had no hesitation in concluding that the claimant's dismissal was related to the claimant's pregnancy. Only the claimant was dismissed. She was the only employee who was pregnant, and in the context of her treatment by the respondent since she told them, at the beginning of March 2020, that she was pregnant. The Employment Tribunal therefore concluded that the reason or the principal reason for the claimant's dismissal was pregnancy, and particularly in the absence of any evidence to justify another reason, or even to justify redundancy, the respondent's purported reason which was unsubstantiated and is rejected.

**Remedy**

60. As the complaint of unfair dismissal is well-founded, and the Tribunal has found that the claimant suffered unlawful detriment and discrimination, the claim shall proceed to a remedy hearing on listed on 14 February 2022.

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Employment Judge Batten
Date: 20 January 2022

REASONS SENT TO THE PARTIES ON
21 January 2022

FOR THE TRIBUNAL OFFICE

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