EMPLOYMENT TRIBUNALS

Claimant: **Mrs K. Nasreen**

Respondent: **(1) Dr A. Malik**
(2) Dr A. Malik and Mr I. Ali t/a Malik Law Chambers (in intervention)

Heard at: **East London Hearing Centre (by CVP)**

On: **11-13 January 2022**

Before: **Employment Judge Massarella**
Mrs S. Barlow
Ms P. Alford

Appearances
For the Claimant: Mr Schuscheim (Adviser at the Whitechapel Legal Advice Clinic)
For the Respondent: Mr Z. Mian (Counsel), on part of Day 1 and part of Day 2 only

JUDGMENT having been sent to the parties on 14 January 2022 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

This has been a remote hearing by video (CVP), which has not been objected to by the parties. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. The case was listed for final hearing to begin on 4 February 2021. The Regional Employment Judge ordered that the hearing be converted to a preliminary hearing to assess the readiness of the case. That hearing came before EJ Russell, who summarised the procedural history in some detail. We do not repeat that history here, save to the following extent.

2. There had previously been an issue about the service of the claim form. On 9 December 2019, SCS Law wrote to the Tribunal. They stated that they acted for R1 (Dr Malik) and attached his ET3 and Grounds of Resistance. They then wrote that there had been a serious procedural flaw: that at no stage had the claim been served on R2, as a partnership, 'and at no stage has the partnership been granted the opportunity to file a response to the claim against them'. It is plain from this that the ET3 presented on 9 December 2019, was lodged solely on behalf of R1, not R2. It is the only ET3 which has been presented on Dr Malik's behalf.

3. At the hearing on 4 February 2021, EJ Russell clarified the identity of the Respondents, and the claims alleged against each of them. She confirmed that the complaint of unfair dismissal, unauthorised deductions from wages and unpaid holiday pay were pursued only against R2, the partners trading as Malik Law Chambers; the claims of discrimination because of sex and/or pregnancy or maternity leave were pursued against both Respondents. She wrote at paras 6-8:

> 'Following that short adjournment, it appears that Malik Law Chambers was a Partnership Act 1890 partnership rather than a limited liability partnership or limited liability company. Mr Ross' instructions from the litigation friend were that the partners of the Second Respondent were Ms Maria Ahmed, Mr Om Parkash and Mr Imtiaz Ali. The Companies House register shows a company called Malik Law Limited, whose records show that the First Respondent was a director until 1 May 2020 and whose current director is Mr Adil Ali Akbar. Mr Ross' instructions from the litigation friend are that nothing is known of the company or the named director. It is not the First Respondent's case that Malik Law Limited was the Claimant's employer. I note that in an Agenda completed by the First Respondent for a Preliminary Hearing in October 2018, he stated that the partners were Mr I A Malik and Ms Halima Malik. For his part, Mr Schuscheim noted that the SRA had previously taken the position that the First Respondent and Mr Imtiaz Ali were the relevant partners of Malik Law Chambers.
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> Whilst there is still a surprising degree of uncertainty about the partners of Malik Law Chambers at the relevant time, I am satisfied that it is in the interests of justice that each of those named by the First Respondent through his litigation friend be included as part of the list of partners trading as the Second Respondent. If once served with the claim form, one of those named believes that they have been incorrectly included, they can set out their reasons why in the Response. If the reasons are well-founded, they can be dismissed as a party.
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> At paragraph 5 of his Response presented on 9 December 2019, the First Respondent avers that he became a partner in February 2018. The Claimant's case is that she continued to provide medical certificates for the period until 28 March 2018. The First Respondent's case is that the Claimant's employment terminated in 2017. The effective date of termination is therefore in issue between the parties: if it was 2017 it appears that the First Respondent was not a partner; if in March 2018, it appears that he was. Accordingly, I consider it necessary for the First Respondent also to be named as one of the partners trading as the Second Respondent partnership.'

4. There was also an issue about Dr Malik's ability of to participate in the proceedings, which the Judge set out at paragraphs 9-13:

> 'Mr Ross informed me that the bankruptcy order was annulled on 27 August 2020 and a copy of the High Court Order confirming the same was provided to the Tribunal. Upon instruction from the litigation friend, Mr Ross stated that the High Court proceedings had been stayed until July 2021 so that further medical evidence could be obtained. A copy of the Order had been requested from the litigation friend appointed in those proceedings (another son of the First Respondent, not Mr Adil Malik) and would be provided.

> Pragmatically, Mr Schuscheim agreed with my observation that it would be a bold Tribunal which pressed on with a final hearing where the High Court had apparently accepted that there was an issue about the First Respondent's ability to participate in legal proceedings due to his health.
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> In all of the circumstances, I concluded that it would not be in the interests of justice for the hearing to proceed in circumstances where the High Court stay Order gave rise to real doubt about the First Respondent's ability to participate in a hearing. Whilst a copy of the Order was not available, on instruction Mr Ross confirmed that it existed, a copy was being obtained and would be provided to the Tribunal. I consider that I am able to rely upon the assertions of Counsel who has a professional duty not to mislead the Tribunal and I postponed this hearing. It will not be relisted until the position is more clear about the First Respondent's capacity to conduct litigation, as determined by the High Court in the SRA proceedings.
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> Given the history of the case and the importance of the High Court Order as the basis for the postponement, I have made an Order that a copy must be provided to the Tribunal by 4pm on 19 February 2021. I did not consider it proportionate to make this in the form of an Unless Order, however, in the event of non-compliance, a possible strike out of the Response will be considered at an open Preliminary Hearing which I have listed for 1 March 2021.
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> If the First Respondent fails to comply with this Order or seek a variation, setting out valid reasons for an extension of time, it may result in the Tribunal deciding to strike out the Response or imposing some other sanction as appropriate.'

5. On 19 February 2021, R1's representatives wrote to the Tribunal attaching a copy of the High Court order, which had been referred to at the hearing before EJ Russell.

6. A PH was listed on 1 March 2021 and came before EJ Jones. The Judge recorded at paras 8 and 9 of her order:

> 'On 19 February, the First Respondent sent the Tribunal a copy of the order. It was not as had been described. It was made by Mr Justice Marcus Smith at the High Court and dated 14 December 2020. The High Court proceedings were not stayed as they are listed for a final hearing beginning at the end of June.
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> The High Court order also stated that the issue of the First Respondent's fitness to participate in and prepare for the substantive hearing would be determined at that hearing, to be listed with a time estimate of two days in the period 22-31 March 2021. The order included various case management orders to assist the parties in their preparation for the substantive hearing. One of those was that the Claimant attend an appointment with Dr Isaac for a further examination today, 1 March, from which a medical report would be produced.'

7. The Claimant's representative invited the Tribunal to strike out R1's response because it was different from the order that R1 had described to EJ Russell on the previous occasion. EJ Jones declined to do so for the following reasons (at paras 11 and 12):

> 'Mr Ross confirmed that the information he gave to the Tribunal on 4 February came from the litigation friend who is not a lawyer and also not the litigation friend in relation to the High Court matter. It is likely that this was his understanding what Mr Justice Smith had ordered. The issue of the First Respondent's capacity is still to be decided and any strikeout should wait until such time as that is done.

> I accepted that the core issue that caused EJ Russell to postpone the hearing on 4 February had not yet been determined. The First Respondent's capacity is likely to be settled quite quickly, which should minimise any further delay in this matter being brought to hearing. This claim was issued in 2018 and it is not in the interests of justice or the overriding objective for it to continue to run in this way or for it not to be heard until 2022. In the circumstances I declined the application to strike out the First Respondent's response.'

8. On 13 May 2021, the Claimant's representative made an application for an unless order, that the First Respondent disclose the High Court order relating to his capacity. EJ Jones made an unless order on 8 June 2021 that the First Respondent send the document to the Tribunal and the Claimant by 22 June 2021, failing which his response would be struck out.

9. On 16 June 2021, R1's solicitors, SCS. came off the record and notified the Tribunal that R1 would now be represented by Mr Zeeshan Mian (of Tan Chambers), Counsel who was instructed on a direct access basis.

10. On 16 June 2021, R1's new legal representatives wrote to the Tribunal, stating that they did not have instructions to disclose the High Court order relating to his capacity, but did have instructions to disclose the medical report 'which is of the same effect and should satisfy the Tribunal Judge that at the Respondent did not have mental capacity in the past'.

11. On 21 June 2021 Ms Mehak Tariq of Tan Chambers wrote to the Tribunal in the same terms, adding that 'I also have instructions that the Respondent is now capable to represent himself in this claim'. On 28 June 2021 the Claimant's representatives wrote to the Tribunal asking that it confirmed that R1's response was struck out because he had not complied with the unless order. On 23 July 2021, the Tribunal wrote to the parties confirming that R1's response was struck out.

12. On 17 August 2021, R1 representative made an application for relief from sanction. On 13 October 2021 EJ Jones refused the application because it was out of time.

13. On 13 October 2021, the claim form was served on the individuals who the Tribunal had been informed were the four partners of R2.

14. On 15 October 2021 the Claimant wrote to the Tribunal pointing out that there were errors in the correspondence in relation to which of the Respondents' responses had been struck out.

15. On 14 December 2021, EJ Jones confirmed that the confirmation of dismissal was in relation to R1's defence of the proceedings and refused again to grant relief from sanction.

16. On 14 December 2021 Mr Parkash presented his ET3. He stated that he was not a director or owner of R2. On 18 December 2021 Ms Ahmed presented her ET3, also stating that her employment ended on 30 November 2017, and that Dr Malik and Mr Ali were the sole owners of Malik Law Chambers and her employers. No ET3 was received from Dr Malik or Mr Ali, in their capacity as partners in R2.

17. On 25 November 2021, Dr Malik lodged an appeal with the EAT against the decision not to grant relief from sanction.

18. On 16 December 2021, EJ Jones wrote to the Claimant asking if she wished to continue the proceedings against Ms Ahmed and Mr Parkash. She ordered the Claimant to provide a witness statement setting out her complaint of pregnancy and maternity discrimination, attaching a schedule of loss and copies of other relevant documents.

19. On 23 December 2021, R1's representative applied for a postponement of the January 2022 hearing, on the grounds that there was a pending appeal. On 31 December 2021 EJ Jones refused the application, copying the document to the other partners, including Mr Ali, confirming that the hearing would proceed on 11 January 2022.

The hearing

20. The Claimant and her representative, Mr Schuscheim, attended the hearing. In the light of the information provided by Ms Ahmed and Mr Parkash in their ET3s, at the beginning of this hearing, Mr Schuscheim was instructed that the Claimant consented to the removal of those individuals as parties to the proceedings.

21. Neither Dr Malik nor Mr Ali were present, and there was no representation. We adjourned the hearing, while the Tribunal's clerk attempted to contact Dr Malik at the address of his representatives, Tan Chambers. The Tribunal did not have a phone number or email address for Mr Ali, only a postal address, thus it was not practicable to make further enquiries of him. The Tribunal clerk was told (by Mr Mazher Ali) that neither Ms Tariq, whose name was on much of the correspondence, nor Mr Mian was available. Mr Ali agreed to pass on messages. On the Judge's instruction the clerk sent an email to the representatives:

> 'The hearing will resume at 2p.m. today. If the Respondents are not present, or represented, and no satisfactory explanation is provided for the non-attendance, the Tribunal will consider whether the hearing should go ahead in their absence, pursuant to rule 47.'

22. Nothing further was received from the representatives by the time the hearing resumed at 2 p.m. Mr Shuscheim made an application under rule 47 for the hearing to proceed in the absence of Dr Malik and Mr Ali. Just as he was concluding that application, the Tribunal received an email from Mr Mian to the Tribunal's clerk stating:

> 'I have just received your email at 14:18. I understood that this trial was adjourned due to Respondent i.e. Dr Malik's pending appeal against the Order. I can arrive at Tribunal by 3pm. Could you kindly indicate if this is acceptable?'

23. In fact, the Tribunal file showed that the email refusing the postponement had been sent directly to Mr Mian, to the same email address from which he had just sent the above email, on 31 December 2021. When he attended the hearing, at shortly thereafter, Mr Mian gave an explanation for this contradiction, which was as follows: that his regular paralegal was away on leave, and another paralegal had come in to cover for him and had informed him that the hearing had been

postponed. The Judge asked him if he had asked the paralegal to show him the communication from the Tribunal in which that decision was recorded. He confirmed that he had not. We found his explanation to be highly unsatisfactory.

24. Mr Mian confirmed that he was only representing R1, he was not representing Mr Ali, and that Dr Malik would not be attending the hearing.

25. The Tribunal then rose and deliberated on the application under rule 47 in relation to Dr Ali.

26. Rule 47 provides:

> 'If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.'

27. We had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The rule confers a very wide discretion, which includes a discretion to proceed with the hearing in the absence of a party. Before making the decision, we should have regard to the information referred to in the rule.

28. R1 was now represented at the hearing through his Counsel, Mr Mian. We have decided that it is just to proceed with the hearing in the absence of Mr Ali. He was copied into a letter from the Tribunal of 16 December 2021, which stated in terms that the matter was listed for hearing from 11 January 2022 and that the Tribunal would make judgments on liability and remedy at that hearing. If Mr Ali was not already aware of the hearing, we are satisfied that this letter put him squarely on notice of it. If he required any further information, he could have requested it from the Tribunal. He took no steps to do so, nor did he make an application for a postponement or otherwise signal that he was not able to attend. That is consistent with the fact that he had not presented an ET3 and had taken no part in the proceedings whatsoever. Given that he did not present a response, his ability to participate in the hearing would have been subject to the discretion of the Tribunal in any event.

29. We also considered the extent to which Dr Malik ought to be permitted to participate in this hearing. We have concluded that he should not be permitted to participate at the liability stage at all: in his capacity as R1, his response has been struck out; in his capacity as one of the partners of R2, he had not presented a response and so is in the same position as Mr Ali in that respect. That he was aware of this hearing is apparent from the fact that he instructed his representatives to apply for it to be postponed, an application which was refused. He is entitled to attend the hearing but has elected not to do so.

30. We concluded that we would proceed with the hearing and would determine liability only. Should the Claimant succeed in any of her claims, we would list a separate remedy hearing as soon as practicable. At that stage we would consider whether to permit the Respondents to participate in that hearing, whether by way of evidence and/or submissions. In reaching that conclusion we had regard to the guidance in *Office Equipment Systems Ltd v Hughes* [2019]

ICR 201, in which the Court of Appeal held that in cases where a more substantial remedy is sought, a separate remedies hearing will be appropriate; only in exceptional circumstances would it then be justified to exclude the Respondent from participation in an oral hearing.

31. At the beginning of the second day of the hearing, Mr Zian informed the Tribunal that he had been instructed by Dr Malik not to continue to attend the hearing. He drew our attention to a letter which he had written to the Tribunal that morning, which included the following [*original format retained*]:

> 'I have been advised by Dr Malik to withdraw representation on the basis that he does not feel that being an observant gives him a fair trial (inability to cross examine the Claimant) particularly when Employment Appeal Tribunal is considering Dr Malik's appeal against similar Order. Dr Malik maintains that he had objectively complied with the Order by providing medical evidence demonstrating that he had recovered and was fit to participate in trial.
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> Secondly, Dr Malik had not employed the Respondent in any personal capacity therefore he could not have made parties to proceedings. Thirdly Dr Malik was partner at firm between 28 February 2018 and April 2018 (when firm was intervened) and he could not be added party to this Claim as partner of Malik Law Chambers.'

32. Mr Zian, who had attended only as a courtesy to the Tribunal, then left the hearing. We did not consider that the content of this letter materially changed the position. We did, however, notice that it confirmed that Dr Malik did not consider that he should have been added as a party to the claim in his capacity as a partner of R2. However, there was no explanation as to why he had not presented an ET3 in that capacity, or otherwise applied be removed as a named partner of R2 (as Ms Ahmed and Mr Parkash had done).

33. We had a bundle of some 300 pages and a witness statement from the Claimant. We heard evidence from her, in the course of which Mr Schuscheim took us to the relevant documents in the bundle. Following some questions from the Tribunal, Mr Schuscheim made concise and helpful oral closing submissions. We are grateful to him for his assistance throughout the hearing.

The issues

34. Mr Schuscheim prepared a list of issues for the hearing. He clarified that no holiday pay claim is pursued. That claim was dismissed on withdrawal. After some discussion, the issues were agreed to be as follows:

    1. Who was the Claimant's employer? The Claimant's primary contention is that it was R1. In the alternative, it was R2.

    2. Was Dr Malik a partner of R2 at the material time?

    3. Was Dr Malik an employee of R2 at all material times? Alternatively, was he an agent of R2, acting with R2's authority within the meaning of ss.109 and 110 EqA, throughout the material period?

    4. Was the Claimant dismissed?

5. If so, when was the Claimant dismissed? She contends that her last working day was 22 January 2018, and that she was dismissed on 28 February 2018. She contends that Dr Malik told her that ‘he no longer needed her’.

6. What was the reason for the dismissal?

7. The Claimant contends that it was pregnancy, and that it was an act of direct discrimination, contrary to s.18 EqA. In addition to financial losses, she claims injury to feelings and aggravated damages.

8. She also contends that the dismissal was unfair (s.94 ERA): the Respondent has not shown that the reason for the dismissal was for a potentially fair reason; further, the Claimant contends that no fair procedure was followed.

9. The Claimant contends that the Respondent made unauthorised deductions from her wages: she received no pay from 1 January 2018 up to her dismissal.

Findings of fact

35. The Claimant commenced employment on 5 December 2014. She was interviewed, and appointed, by Dr Malik. The SRA found in a decision of 18 April 2018 that Dr Malik and Mr Ali were ‘the firm’s managers, in connection with the firm’s business’. Dr Malik was responsible for recruitment decisions and also decisions relating to the termination of employees within the firm. The Claimant was aware of at least two employees whom he dismissed while she worked for the firm.

36. The Claimant worked as a receptionist. She reported directly to Dr Malik throughout the material period. He was her line manager. The Claimant was not given a contract of employment. However, the terms of the employment arrangement were that she would be paid monthly at the beginning of each month in respect of the previous month. She had 28 days’ paid holidays, which she used to return home to Pakistan. Dr Malik also permitted her to take one month’s unpaid holiday. She worked 41 hours per week, six days a week (Monday to Friday 9 AM to 5:30 PM and Sunday 10 AM to 2 PM). She received a Christmas bonus each year of £100.

37. Before 2018 she had a good relationship with Dr Malik. He was flexible in permitting her to take time off. She had time off occasionally by reason of illness. She received no sick pay.

38. The Claimant became pregnant towards the end of December. It is clear from the medical records that she and her husband had been trying for a baby for some time. It is also apparent that, as soon as she had a positive pregnancy test, she sought medical advice. She began to have adverse symptoms, including severe sickness, almost immediately at the start of her pregnancy. At this stage in January 2018 she was still working and we accept her evidence that she told Dr Malik that she was pregnant and that she was already having some sickness, and might encounter further difficulties in the pregnancy and might need some time off. She continued to work until 20 January 2018 which was her last day of work.

39. From 21 January 2018 onwards, there are then a series of text messages from the Claimant to Dr Malik, informing him that she was very unwell and apologising that she was unable to come into work. These messages continue into February, the last of them being 22 February 2018. They do not refer specifically to pregnancy; we find that they did not need to because the Claimant had already warned Dr Malik earlier in the month that the she might experience health difficulties because of the pregnancy.

40. There is no evidence that Dr Malik replied to any of these text messages. We accept the Claimant's evidence that she tried telephoning him but that he did not take her calls.

41. The Claimant's husband went into the office on her behalf to speak to Dr Malik and to give him copies of the sick notes and other medical evidence, to demonstrate that the Claimant was genuinely ill. On the balance of probabilities, we find that that occurred on 19 February 2018.

42. That evidence included an emergency department discharge summary from Barts Health NHS Trust, dated 5 February 2018, which expressly said that the Claimant was seven weeks pregnant at that point and that the diagnosis was 'hyperemesis' (severe morning sickness). It also referred to 'vomiting'.

43. We are satisfied that the Claimant's husband reiterated to Dr Malik that the Claimant's illness was pregnancy-related (that was the whole purpose of his visit). Dr Malik responded to his in a hostile fashion, was rude to him, refused to take copies of the medical evidence and told him that he did not need it because the Claimant 'was no longer needed'. We are satisfied that these words were unambiguous and amounted to an express dismissal, especially in circumstances where Dr Malik had ceased all communication with the Claimant and responded in a hostile fashion to her husband's attempts to communicate with him, refusing to accept medical evidence as to the reason for absence. That is also consistent with the fact that there was no further communication from Dr Malik or the firm asking the Claimant when she might be able to return to work. It was a summary dismissal.

44. On 22 February 2018 the Claimant sent Dr Malik by text a sicknote and a letter from the hospital, to which she attached the message 'Sir my sicknote and hospital letter and no joking'. We find that she did this because of the experience her husband had had and the fact that she had learnt that she had been dismissed. She was hoping that Dr Malik might reconsider his decision. He did not do so.

45. The Claimant received a payment from R2 on 2 January 2018, which was in respect of her salary for December 2017; she also received a Christmas bonus £100 on 15 January 2018. No further payments were made to her after that date. She was not paid for her work in January 2018 up to the 20th of that month. In response to a question from the Tribunal as to the sick pay arrangements within the firm, the Claimant told us that sick pay was never paid. There was no suggestion that there was any entitlement to contractual sick pay. She was not paid statutory sick pay.

46. The Claimant's bank statements record her salary being paid into her account by 'Malik Law Chambers'.

47. EJ Russell recorded that Dr Malik said in his original ET3 that he 'acted as a self-employed consultant solicitor until February 2018, when he joined the Second Respondent as a partner'. No specific date in February was given. Mr Mian asserted on instruction in his letter sent to the Tribunal on the second day of the hearing, that Dr Malik became a partner on 28 February 2018. If that was correct, there would undoubtedly have been documentary material which could have supported it. None was submitted to the Tribunal in support of that contention, or indeed at any point.

48. At the hearing before EJ Russell, R2 was identified as consisting of four partners, including Dr Malik, with the specific proviso that they could apply to have their names removed, if they were incorrectly included. Ms Ahmed and Mr Parkash did so apply and were removed; Dr Malik and Mr Ali did not. Both individuals had every opportunity to do so.

49. We think it implausible that Dr Malik would have elected to become a partner of R2 at the very time when it was in great difficulties and was placed into intervention within less than two months. We think it much more likely, on the balance of probabilities, that both Dr Malik and Mr Ali were partners in R2 at all material times and that Dr Malik sought to give a date in February 2018, in the hope that it might assist him in evading liability for the Claimant's dismissal.

The law

<u>Unfair dismissal</u>

50. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

51. S.98 ERA provides so far as relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within the subsection if it:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) […]

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Pregnancy discrimination

52. The EqA prohibits employers from treating an employee unfavourably (as opposed to less favourably) because of her pregnancy (s.18(2) EA 2010) or because she is exercising, is seeking to exercise or has exercised the right to maternity leave (s.18(4) EA 2010).

53. S.18 EqA provides:

18. Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

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

(a) because of the pregnancy, or

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

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) 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.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

[…]

54. Those provisions enact the decisions in *Webb v Emo Air Cargo Ltd. (No.2)* [1995] IRLR 645 HL). The House of Lords had referred the question of the proper comparator to the ECJ which held ([1994] IRLR 482 ECJ) that unfavourable treatment of a woman because she is pregnant is automatic sex discrimination without the need to compare the position of a woman with a man.

55. In order for a discrimination claim to succeed under s.18 EqA, the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave.

The meaning of this expression was considered in this context in *Indigo Design Build and Management Ltd. V Martinez* (UKEAT/0020/14/DM). HHJ Richardson referred to *Onu v Akwiwu* [2014] ICR 571, in which Lord Justice Underhill said:

> **'What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind… so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice.'**

<u>The burden of proof in discrimination cases</u>

56. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

57. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
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> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
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>> **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
>>
>> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
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>> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

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[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

Agency under the Equality Act 2010

58. The agency provisions in the EqA are contained in ss.109 and 110 and provide as follows:

> **109 - Liability of employers and principals**
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> **(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
>
> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
>
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**
>
> **[…]**
>
> **110 - Liability of employees and agents**
>
> **A person (A) contravenes this section if—**
>
> **(a) A is an employee or agent,**
>
> **(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and**
>
> **(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).**
>
> **(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).**
>
> **[…]**

59. In *Ministry of Defence v Kemeh* [2014] ICR 625, the Court of Appeal held that common law principles apply when deciding whether there is a principal-agent relationship for the purposes of the predecessor provisions found in s.32(2) RRA. In doing so, it is necessary to show that a person is acting on behalf of another and with that other's authority.

60. Although the decision in *Kemeh* was reached under the now-repealed provisions of the RRA, the Court of Appeal in *Unite the Union v Nailard* [2019] ICR 28 held that there were no grounds for giving s.109(2) EqA a different construction. The test of authority under s.109(2) is whether the discriminator was exercising authority conferred by the principal and not whether the principal had in fact authorised the discriminator to discriminate.

61. the EAT in *Bungay v Saini* EAT 0331/10 upheld an employment tribunal's decision that two board members of an advice centre had been acting as its agents when they discriminated against two of the centre's employees. The tribunal was entitled to find that since they were managing the centre as part of their authority as its directors, they were acting as its agents even though they performed their duties in a discriminatory manner.

Unauthorised deduction from wages

62. Part 2, ss.13 to 27B of the Employment Rights Act 1996 Act ('ERA') set out the statutory basis for a claim of unauthorised deduction from wages.

63. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. Any agreement or consent authorising the deduction from wages to be made must be entered into before the event giving rise to the deduction.

Conclusions

64. We are satisfied that the Claimant's employer was R2. That is consistent with such information as is available to us, including the Claimant's bank statements, which record her salary being paid into her account by 'Malik Law Chambers'. That is also consistent with the information provided by Ms Ahmed in her ET3 that, like the Claimant, she was an employee of Malik Law Chambers, whose owners were Dr Malik and Mr Ali. On the balance of probabilities, we think it unlikely that the Claimant was employed by Dr Malik as an individual.

65. R2 was vicariously liable for any acts of discrimination by R1, who we have already found was a partner in R2.

66. If we are wrong in our conclusion that Dr Malik was at all material times a partner in R2, we went on to consider whether he was an employee of R2 for the purposes of R2's vicarious liability. That is not a question which we consider we are able to answer: partners in law firms may be employees or they may not. We did not have sufficient evidence to determine the question either way. Nor is it necessary to do so given our finding that Dr Malik was a partner in R2. As a partner in R2, the Claimant was entitled to bring proceedings against him as an individual, named Respondent to a claim of discrimination, whether or not she also brought proceedings against R2.

67. In any event, we would have no hesitation in finding that Dr Malik was an agent of R2. The SRA found in a decision of 18 April 2018 that Dr Malik and Mr Ali were 'the firm's managers, in connection with the firm's business'. He was also the Claimant's line manager throughout: it was he who gave her instructions on a day-to-day basis, who dealt with requests for annual leave, it was to him that she reported that she was sick. As a partner in the firm, the firm's manager and the Claimant's line manager, we are satisfied that he was at all times acting with the authority of R2, including when he dismissed her, and was an agent of R2 within the meaning of ss.109 and 110 EqA.

68. We have already found as a fact that the Claimant was summarily dismissed by Dr Malik on 19 February 2018. Before the Claimant became pregnant, and before she started to encounter pregnancy-related illness, she had had a good working relationship with Dr Malik. There was no evidence of any disciplinary or performance concerns whatsoever. We are satisfied that we are able to make a positive finding as to the reason why the Claimant was dismissed. We infer from all the evidence that his attitude to her changed when he realised that she was having a difficult pregnancy, which was giving rise to a protracted period of

sickness absence and (inevitably) a period of maternity leave. This was inconvenient to the firm and Dr Malik decided to dispense with her services in a summary fashion.

69. We cross-checked our conclusions by reference to the burden of proof provisions. We are satisfied that there are facts from which the Tribunal could reasonably infer that the Respondents acted unlawfully: the fact that there were no problems in the employment relationship before the Claimant became pregnant; the problems only arose after the Claimant became pregnant; Dr Malik's attitude to her and her husband became hostile and uncooperative; without explanation, the Respondents stopped paying the Claimant, even in respect of the period in January 2018 when she worked; the Respondents took none of the usual steps in relation to a pregnant employee, such as asking for information about proposed maternity leave, due date, arranging for a pregnancy risk assessment etc; we are satisfied that none of these things happened because Dr Malik had no intention to continue employing the Claimant. The burden of proof plainly passes to the Respondents to show that there was no discrimination whatsoever. They have not discharged that burden, and the claim of direct pregnancy discrimination must succeed.

70. Because the reason for the dismissal was pregnancy, it follows that it was unfair on ordinary principles. There was no pleaded claim of automatically unfair dismissal by reason of pregnancy, but that makes no practical difference in circumstances where we have concluded that the dismissal was discriminatory: the statutory cap will not apply.

71. We accept the Claimant's evidence that she was not paid for her work in January 2018 up to the 20th of that month. There was no entitlement to contractual sick pay. However, she would of course have been entitled to statutory sick pay, which was not paid to her. In those respects, we uphold the Claimant's claim of unauthorised deductions from wages. The amount of the deductions will be determined at the remedy hearing.

Remedy

72. The remedy hearing will take place on 14 February 2022. A separate order has already been sent out containing directions.

Employment Judge Massarella
Date: 11 February 2022