CASE NO: 2601621/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs N Craven**

Respondents: **Wirksworth Swimming Pool**

Record of an attended Full Hearing heard at the Employment Tribunal

Heard at: **Nottingham** **On:** **7 & 8 March 2022**

Before: **Employment Judge M Butler**

Members: **Mr S Connor**
Mr C Tansley

Representation

Claimant: **No attendance**
Respondent: **Ms S Asprey, HR Representative.**

JUDGMENT

1. The claims of unfair dismissal under section 98 of the Employment Rights Act 1996 (ERA), section 99 (ERA) and sex discrimination under section 13 of the Equality Act 2010 (EqA) are not well founded and are dismissed.

REASONS

The Claims

1. By a claim form submitted on 30 May 2019, after a period of early conciliation, the Claimant brought claims of unfair dismissal, automatic unfair dismissal, pregnancy and maternity discrimination and direct sex discrimination. She alleged that her dismissal for gross misconduct in that she claimed wages and expenses for attending a first aid course she did not, in fact, attend was not within the range of

responses of a reasonable employer because she had attended the course. She further claimed that she was dismissed because she had had a baby and been on maternity leave. She also alleged that she had been treated unfavourably because of her pregnancy in that she had been overlooked for a promotion as she was due to commence maternity leave. She claimed the real reason that she was dismissed was because she had had a baby a taken maternity leave and had said she planned to have more children in the future.

2. Briefly, the Respondent denies the claims. After a reasonable investigation the decision to dismiss the Claimant for gross misconduct fell within the band of reasonable responses. The dismissal was for gross misconduct and not for any reason connected with Claimant's pregnancy or maternity leave. In relation to pregnancy and maternity discrimination, the Respondent denies that any treatment of the Claimant amounted to unfavourable treatment because of her pregnancy or in relation to the Claimant having exercised her right to maternity leave. In response to the direct discrimination claim, the Respondent said that the Claimant had not been overlooked for promotion because she was due to commence maternity leave as, in fact, she had not applied for the promotion. Further, the decision to dismiss the Claimant was unconnected with the fact she had had a baby, had taken maternity leave and planned to have more children in the future. The Respondent submitted that the claim of pregnancy and maternity discrimination was out of time under section 123(1)(a) EqA, the acts relied on did not form part of a continuing act and it was not just and equitable for the Tribunal to extend the time limit to allow the claim to proceed.

The Issues

3. The list of issues prepared by the Respondent was agreed as follows: -

Unfair dismissal –s.98 ERA 1996

I. Was the Claimant dismissed for a reason falling under s.98(2) Rights Act ERA?

a. The Respondent contends that the Claimant was dismissed for her conduct (s.98(b))

(i) Did the Respondent have an honest belief on reasonable grounds that the Claimant was guilty of the conduct complained of?
(ii) Did the Respondent form that view following a reasonable investigation?
(iii) Was the decision to dismiss the Claimant within the band of reasonable responses?

II. In the event that the Tribunal finds that the Respondent has fulfilled the requirements of s.98(1), was the Claimant's dismissal nevertheless unfair contrary to s.98(4) of the ERA 1996?

III. If the dismissal is found to have been unfair:

a. Did the Claimant contribute to her dismissal by culpable conduct?

b. Does the Respondent prove that if it had adopted a fair procedure the claimant would have been dismissed fairly in any event?

Unfair dismissal – s.99 ERA 1996

IV. Was the reason or principal reason for the Claimant's dismissal because of a prescribed kind?

a. The Claimant, in her claim form, contends that she was dismissed because she had had a baby and had been on maternity leave.

Pregnancy and Maternity Discrimination – S.19 EqA 2010

I. Did the Respondent treat the Claimant unfavourably because of the Claimant's pregnancy? The Claimant, in her claim form, alleges the following as unfavourable treatment:

a. The Claimant, in late 2016, had, allegedly, been overlooked for a promotion as she was due to commence maternity leave.

b. The Respondent's decision to dismiss the Claimant was unfair and the real reason she was dismissed was, allegedly, because she had had a baby and taken maternity leave and had said that she planned to have more children in the future.

II. Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?

III. Was the unfavourable treatment because of her pregnancy; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Direct sex discrimination – S.13 EqA 2010

I. Did the Respondent treat the Claimant less favourably that the Respondent treats or would treat others because of the Claimant's sex? The Claimant relies on the following asserted less favourable treatment:

a. The Claimant, in late 2016, had, allegedly, been overlooked for a promotion as she was due to commence maternity leave; and

b. The Respondent's decision to dismiss the Claimant was unfair and the real reason she was dismissed was, allegedly, because she had had a baby and taken maternity leave and had said that she planned to have more children in the future.

Jurisdiction – S.123 EqA 2010

I. The Respondent submits that any act prior to 17 January 2019 is potentially out of time. Were all of the Claimant's complaints presented within the time limit set out in S123(1)(a) EqA 2010?

   a. If no, do the acts form part of a continuing act?

   b. If no, would it be just and equitable for the Tribunal to extend the time limit for which the Claimant had to bring her claim?

The Law

4. Section 98 ERA provides:

"(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 this subsection if it—

(a) ……..

(b) relates to the conduct of the employee,

(c) ……..

(d) ……..

(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."

5. Section 99 ERA provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

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

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,

(b) ordinary, compulsory or additional maternity leave,

(c) …….

(d) …….

(4) ……

(5) ……."

6. Section 18 EqA provides:

"(1) ……

(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) ……..

(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) ……

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4)."

7. Section 13 EqA provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) …….

(3) …….

(4) …….

(5) …….

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) …… "

8. Section 123 EqA provides:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) ……

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) ……

(4) ……"

The History of the Claims

9. The Claimant was employed by the Respondent as a Level 2 Swimming Teacher from 18 February 2015 until her dismissal on 18 January 2019. The claims are now approaching 3 years old. The first Case Management Hearing was held before Employment Judge Jeram on 28 October 2019, the case having already having been listed for 27, 28 and 29 April 2020. That hearing was postponed due to the Covid 19 pandemic which meant that attended hearings during lockdown could not take place. The next Preliminary Hearing for Case Management purposes was held on 27 April 2020 before Employment Judge Butler who is the Employment Judge in this hearing. The case was then relisted for 4, 5, 6 and 7 May 2021 but that hearing was postponed because it was proposed that it would take place remotely and the Claimant did not have access to appropriate technology. It was then relisted for 7, 8, 9 and 10 March 2022.

10. On 2 March 2022 the Claimant emailed the Tribunal saying, "I have the above case schedule for next week. I wanted to discuss the possibility of postponing this. I have just suffered a miscarriage and I am not in a good place. I think I would struggle to attend this hearing." The Respondent objected to the postponement and on 3 March 2022 Employment Judge Heap directed that the Claimant should provide medical evidence as to her fitness to attend the hearing and that she must attend the hearing on 7 March and bring with her appropriate medical evidence as to her fitness to attend and participate in the hearing as a witness and litigant in person, if not, why not and, if not, when she would be sufficiently recovered to enable her to attend and participate in the hearing. On 6 March at 11.14pm, the Claimant emailed the Tribunal saying "Due to routine tests after my husband tested positive, I have, tonight tested positive for Covid. I am unsure of the plan for tomorrow as I have had an email asking us not to attend Court if this is the case but no further information on what to do.

    Further to my other claim to postpone I would like to send my proof of miscarriage. This is very recent and very raw, and I am sure I don't need to tell you how this has effected (sic) me."

11. The evidence the Claimant produced was a photograph of a positive lateral flow test and a letter from University Hospitals of Leicester Early Pregnancy Assessment Clinic sent to her GP. Unfortunately, the date on that letter indicating when the Claimant attended hospital after suffering bleeding and pain was not clear. All that was legible was the number 21 which seemed to indicate she had attended the hospital on the 21st of a month unknown. Employment Judge Butler directed a member of the Tribunal's administrative staff to contact the Claimant to ask her to confirm the date of her miscarriage and whether she could attend the hearing by video. An email was sent to the Claimant after two attempts to contact

her by telephone which she did not answer. However, she did reply by email sent from her iPhone to say she had miscarried on 28 February "and confirmed at the hospital on 2 March."

12. Since the Claimant had sent her evidence so late in the day, it was not seen by Employment Judge Butler until early in the morning on 7 March so the email exchange between the Tribunal and the Claimant took place before the Tribunal was to begin reading in. The Respondent's witnesses had arrived at the Tribunal to await the start of the hearing. Employment Judge Butler could not reconcile the date on the hospital letter sent by the Claimant and the date she had given in her email. Whilst sympathetic to the Claimant having suffered a miscarriage and provided evidence, it was clearly necessary to ascertain the date on which the miscarriage occurred in order to consider whether the hearing should be postponed. Accordingly, Employment Judge Butler ordered the Claimant to provide a complete copy of the hospital letter to the Tribunal by 9.00am on 8 March in order to resolve the issues around the date of her miscarriage and the first day of the hearing was adjourned and the parties notified that it would commence at 10.00am on 8 March.

13. The Claimant did not comply with the order and, at 10.00am, the Tribunal decided to continue with the hearing as they were entitled to do under Rule 47 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Once more, the Respondent's witnesses had attended to give evidence and the hearing proceeded without the Claimant's attendance. At 10.25am the Tribunal clerk handed a full copy of the hospital letter to the Tribunal which had been sent by the Claimant at exactly 10.00am. Although not as clear as the original document sent to the Tribunal, what was clear from this most recent copy was the date of the Claimant's appointment at the hospital. This was not 21 February 2022 but 27 February 2022. However, even a cursory examination of this date showed that the date had been changed from 21 February on the original copy letter sent by the Claimant to 27 February and this was easily discernible because the number 7 bore no resemblance to other numbers 7's appearing immediately below it in the hospital's letter. We concluded, therefore, that the Claimant had deliberately altered the letter the make it appear that her miscarriage happened later than it actually did. The Claimant had therefore waited over a week before applying for a postponement because of her miscarriage. The Tribunal viewed the alteration of the letter with serious concern.

The Evidence

14. For the Respondent's, we heard evidence from Ms Fleur Fern, Manager, Stefanie Avery of HR Dept, Jane Godefroy, HR Manager at HR Dept, and Sarah Asprey, Managing Director of HR Dept and the Respondent's Representative. All of these witnesses adopted their witness statements on oath. We also had regard to the statement of the Claimant even though this was not signed or dated, and she did not attend the hearing. There was a bundle of documents extending to 253 pages and references to page numbers in this Judgment are to page numbers in the bundle.

The Factual Background

15. The evidence of the Respondent's witnesses was not challenged. Each of the witnesses gave a succinct account of their involvement with the Claimant supported where relevant by documents in the bundle. Unfortunately, although we have regard to the Claimant's witness statement, we treated the Claimant's evidence with circumspection, and we set out below some of the reasons for adopting this view.

16. At the Case Management Hearing before Employment Judge Jeram on 28 October 2019, the Claimant said she had a parking ticket to prove she was present at the First Aid course which the Respondent insisted she did not attend. The Claimant did not produce this parking ticket. Instead, after her disciplinary hearing she provided a copy of her bank statement showing the card payment she claimed was to prove that she had paid parking charges on the day of the course. Unfortunately for the Claimant, whilst the course ran on 11 December 2017, the bank statement entry she relies on is dated 11 December 2016.

17. The Claimant also seeks to rely on a certificate issued by the British Red Cross to show she successfully completed the course in question. There are two issues with this certificate. Firstly, it states that the Claimant attended the course on 1 December 2017. Secondly, the same certificate number is freely available on the internet showing that a Mr C D successfully completed the course on 4 January 2013. The Claimant's argument that this establishes that she attended the course is unconvincing.

18. Further, the Claimant complains that she was overlooked for promotion purely because she had taken maternity leave and had a baby. She relies on a hard copy of an email from herself to Ms Jannine McCarthy on 23 November 2016 (page 214) which says, "As you know I have said before I would love to be considered for a role like this, I do however understand I am not really in the best position considering I will be off after March for a few months., but I would like to put my name forward for it". The Respondent produced the email received by Ms McCarthy dated 23 November 2016 (page 219) as received by Ms McCarthy which did not have the words, "but I would like to put my name forward for it". This raised the suspicion that the Claimant had amended the email she sent to make it appear she had applied for the promotion.

19. The Claimant also sought to rely on an email she produced to show she had attended the First Aid course which was sent by Mr A Pembery at the British Red Cross (page 211). In the course of the disciplinary investigation and hearing, however, the British Red Cross provided a copy of the email sent to the Claimant dated 2 January 2019 with a complete paragraph therein which did not appear in the email relied on by the Claimant. This paragraph was crucial in that it said, "I do apologise that we are unable to find you on our registers, as discussed, if this had been raised with us in January last year when the booker emailed us to check your attendance, we would have been able to find you on the signing in register for the test centre. As we mentioned we are unable to confirm or deny

fully your attendance as so much time has now passed". This is yet another example of the Claimant providing documents which, on their face, appear to have been amended.

20. In considering the validity or otherwise of the documents relied on by the Claimant, we had to bear in mind that she had quite clearly attempted to deceive the Tribunal by amending the date on the letter she produced from the hospital concerning her miscarriage. Accordingly, in making our findings of fact we preferred the evidence of the Respondent's witnesses and considered the Claimant's evidence and the documents she relies on to be completely unreliable.

21. We find the following facts in relation to the issues before us:

    21.1. The Respondent, a charity, employed the Claimant as a Level 2 Swimming Teacher from 18 February 2015 until her dismissal for gross misconduct on 18 January 2019.

    21.2. The Claimant took maternity leave from 1 March 2017 until 7 December 2017.

    21.3. Prior to the commencement of the Claimant's maternity leave, on 23 November 2016, Ms J McCarthy wrote to all employees requesting expressions of interest from those interested in a promotion (page 214). On the same day, the Claimant replied that she was not in the best position to take up the role because she would be on maternity leave for a few months. The Claimant subsequently amended that email by suggesting she would like to be considered and relied on the amended copy as evidence of her application for the promotion.

    21.4. On her return from maternity leave, the Claimant was booked to attend a First Aid course which was a requirement of her employment and which was being run by the British Red Cross. Having first made the booking for 1 December 2017, the Claimant changed this to 11 December 2017 but did not attend. The Claimant wrongly claimed payment for attending this course and fabricated a certificate showing she had successfully completed it and placed this in her employee file. It wasn't until November 2018, when the Respondent carried out an audit of its employee files, that the fabricated certificate was discovered. This led to the Respondent suspending the Claimant on 20 November 2018 for not attending the course and claiming payment, fraudulently creating a First Aid certificate and dishonestly reporting training had taken place.

    21.5. On 30 November 2018, the Claimant raised a grievance to the Trustees of the Respondent alleging unfair treatment and sex discrimination by Ms Fern and also in relation to being asked whether she would like more children in the future. We accept that conversations about having more children took place with the Claimant present but find there was nothing sinister in these conversations which were nothing more than work

colleagues discussing together whether they anticipated having more children.

21.6. The Respondent's investigation into the Claimant's alleged misconduct was postponed while her grievance was investigated. The grievance was subsequently heard by Ms Avery on 7 December 2018. On 20 December 2018, Ms Avery confirmed to the Claimant that her grievance was not upheld as she had found no evidence to support the Claimant's allegation that she had been discriminated against on the grounds of her sex.

21.7. On 17 December 2017, Ms Avery wrote to the Claimant inviting her to a disciplinary hearing which was chaired by Ms Godefroy and took place on 4 January 2019.

21.8. On 23 December 2018, the Claimant appealed Ms Avery's decision in relation to her grievance and the appeal was heard by Ms Asprey on 9 January 2019.

21.9. On 18 January 2019, Ms Godefroy wrote to the Claimant confirming the allegations against her were upheld and she was dismissed for gross misconduct with effect from 18 January 2019.

21.10. On 21 January 2019, the Claimant appealed against her dismissal and that appeal was heard by Ms Asprey on 13 February 2019. In her appeal, the Claimant sought to rely on fabricated documents in respect of her alleged application for promotion and her attendance on the First Aid Training course. The Claimant deliberately amended these documents in an attempt to deceive the Respondent and bolster her claims.

21.11. Ms Asprey wrote to the Claimant on the same day, 19 February 2019, confirming her appeal against her grievance outcome was not upheld.

21.12. The reason for the Claimant's dismissal was that she had committed acts of gross misconduct. There is no credible evidence that the Respondent in anyway discriminated against the Claimant on the grounds of her sex or because she took maternity leave and had a baby. The reason for dismissal was taken after a thorough investigation of the allegations and the consideration of the documents relied on by the Claimant which were fabricated.

Submissions

22. The Claimant did not attend the hearing and so made no submissions. The Respondent made no submissions being content to rely on its evidence.

Conclusions

23. In relation to the claim of unfair dismissal under section 98 ERA, we refer to the Judgment in ***British Homes Stores Ltd v Burchell [1980] ICR303 EAT***. This Judgment set down a 3-fold test in establishing the reason for a dismissal. The employer must show that:

    a. It believed the employee guilty of misconduct;

    b. It had in mind reasonable grounds upon which to sustain that belief; and

    c. At the stage of which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

24. We have already remarked that the investigation by the Respondent was thorough and the Claimant was given an opportunity after the disciplinary hearing to produce further evidence to support her allegations. In ***Sainsbury Supermarkets Ltd v Hitt [2003] IRLR23***, the Court of Appeal clarified that the question for the Tribunal is to decide whether an investigation into alleged or suspected misconduct was reasonable in the circumstances of the case. The Claimant had already been given the benefit of the doubt when there was a question mark as to whether she attended the First Aid course on 11 December 2017. The delay in suspending her and then commencing disciplinary proceedings was entirely due to that benefit being given. It was not until November 2018 that discrepancies arose when the Respondent's files were audited. We therefore find that the delay in suspending and disciplining the Claimant is of no consequence especially since she had lived with her deceit for 11 months.

25. It is quite apparent to us that the test in Burchell is satisfied. As we have already remarked, the Claimant was given an opportunity to produce further evidence to support her case and she did so by producing fabricated documents. This was a case of dishonestly claiming payment for attending a course which the Claimant did not attend. The decision to dismiss for gross misconduct fell clearly within the range of responses of a reasonable employer.

26. It follows that the claim under s.99 ERA must fail because the principal and, indeed, the only reason for the dismissal was gross misconduct. In any event, that claim is out of time pursuant to section 123 EqA. Even if the claim had merit, since the allegation of pregnancy and maternity discrimination can only found a claim which arises during the protected period. In this case, the Claimant relies on matters which arose outside of that period. The Claimant would have had to apply to the Tribunal for her claim to be admitted out of time on just and equitable grounds. No such arguments have been forthcoming. This claim, therefore, has no basis in law and the Tribunal has no jurisdiction to hear it.

27. In relation to the direct sex discrimination claim, we are unsure as to which comparator or comparators the Claimant relies on in support of her contention that she was treated less favourably because of her sex. We remind ourselves at this point of the principles relative to the burden of proof in discrimination cases.

Section 136 EqA deals with the burden of proof and provides at sub-section (2) that if there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravene the provision concerned, the Court must hold that the contravention occurred this provision repeated that in section 63A of the Sex Discrimination Act 1975. The burden of proof was considered by The Court of Appeal in ***Igen Ltd and others v Wong [2005] EWCA Civ 142*** and ***Madarassy v Nomura International Plc [2007] EWCA Civ 33***. Madarassy reinforced the principles set out in Igen that the Claimant must show more than the mere possibility of discrimination before the burden of proof shifts to the Respondent. Further, the primary facts must be such that a reasonable Tribunal, having heard all the evidence from both sides, could conclude that the Respondent committed the discriminatory act.

28. In this case, we find there is no evidence, even on a prima facie basis, that the Claimant suffered any discrimination for any reason. The Claimant's claims are based on invention, deceit and fabrication. Put simply, none of the matters about which she now complains happened. Accordingly, there is no basis on which we might conclude that discrimination could have happened and no basis for concluding that the burden of proof should shift to the Respondent requiring an explanation.

29. The Respondent has indicated that it wishes to pursue costs against the Claimant. Rule 76 of the Rules of Procedure provides:

> "(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
>
> a) A party (or that parties representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> b) Any claim or response had no reasonable prospects of success."

29. This is a case where we have found as fact that the Claimant produced fabricated documents, firstly, to dishonestly claim payment to which she was not entitled and, secondly, to deceive those investigating her misconduct in order that she would not be dismissed. Further, in the conduct of these proceedings, the Claimant forwarded a clearly fabricated document to the Tribunal regarding the date of her miscarriage. This conduct is abusive, disruptive, and unreasonable. We also considered that, since the Claimant relied so heavily on fabricated documents, we must conclude that her claims had no reasonable prospect of success. A party to a hearing who pursues claims having relied on such documents must be fully aware that the claims will have little or no basis for succeeding.

30. The Tribunal has a discretion as to whether to award costs. In determining whether to exercise that discretion, we must consider whether an award of costs is appropriate. That will be a matter for a separate hearing or separate consideration and an order in respect of the costs application is attached to this Judgment.

Employment Judge M Butler

Date: 30 March 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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