EMPLOYMENT TRIBUNALS

Claimant: Mrs G Ferridge-Gunn

Respondent: Alcedo Orange Limited

Heard at: Liverpool (by CVP) **On:** 5, 6 and 7 January and 8 March 2022

Before: Employment Judge Benson
Mrs A Ramsden
Ms C Doyle

REPRESENTATION:

Claimant: Mr Ferridge-Gunn (Husband)
Respondent: Ms Peckham (Solicitor)

JUDGMENT having been sent to the parties on 17 March 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

Claims and Issues

1. The claimant brings claims of discrimination on the protected ground of her pregnancy and a claim of automatic unfair dismissal where she alleges that the reason or principal reason for her dismissal was connect to her pregnancy.

2. At the outset of the hearing the Tribunal clarified with the claimant's representative whether the unfavourable treatment upon which the claimant relied in her claim of discrimination was solely the dismissal, or whether it related to any other aspects of her treatment. Mr Ferridge-Gunn confirmed that the other issues about which there was a complaint, being the comments made by Ms R Caunt in relation to the claimant's pregnancy, were not relied upon as individual acts of discrimination, but rather background and an indication as to how Ms Caunt felt about the claimant being pregnant.

3. A case management hearing had taken place before Employment Judge Robinson on 8 December 2020 where he identified the issues and commented that

the factual issues were relatively narrow. In summary, the claimant contends that she was employed for one month, her probationary period was 12 weeks, and that when she announced she was pregnant on 19 February 2020 she was dismissed eight days later on 27 February 2020, having taken two days' leave because of morning sickness on 24 and 25 February 2020. The respondent's case is that they dismissed the claimant because they were dissatisfied with her performance and that she did not meet the targets set for her. Furthermore, that the claimant was not receptive to advice and training and was not a good "fit" for the respondent company. There is no dispute that the claimant was pregnant at the time of the dismissal, and that she later gave birth to a baby girl on 14 October 2020.

4. The issues therefore for the Tribunal to determine at this hearing were:

   (1) Was the claimant dismissed by the respondent because of her pregnancy?

   (2) Was the claimant automatically unfairly dismissed for a reason connected with her pregnancy?

5. This hearing was set to deal with liability and if necessary, remedy also.

Evidence and Submissions

6. The claimant gave evidence on her own behalf and the respondent's witnesses were Mr A Boardman, the Managing Director of the respondent; Ms Rosie Caunt, Registered Manager; Suzanne Oldfield, the respondent's Compliance Manager; Dee Fitzsimmons, the Area Recruitment Manager; and Katie Sainsbury, the coordinator/recruiter.

7. Evidence in chief was taken from all witnesses by way of written witness statements and each were cross-examined and questions asked of them by the Tribunal.

8. An agreed bundle of documents was prepared and available for use by the Tribunal. At the outset of the hearing a further three documents were produced by the respondent which the claimant had no objection to and were admitted as additional pages to the bundle.

9. Both Mr Ferridge-Gunn and Ms Peckham on behalf of the respondent made oral and written submissions which were considered by the Tribunal.

Findings of Fact

10. The claimant had worked in health and social care since 2012. From November 2018 until she joined the respondent company on 27 January 2020 she was employed as a Care Manager. Part of her previous role was to recruit staff, but this was a small part of her role as she had responsibility for a full range of management duties within her employer at that time. The role of Care Manager involved being on call for both staff and service users, and the claimant found the pressure that this put upon her and her family life (having recently got married) as something which she wished to move away from.

11. As such, the claimant applied for a Recruitment Manager role with the respondent on 7 January 2020. She attended an interview with the respondent on 10 January 2020 and was successful. During that interview, which was held with Mr Boardman and Ms Caunt she explained the nature of her role with her then employer, and that it included responsibility for recruitment of staff. We do not accept that the claimant gave any impression that she was an experienced recruiter to the extent suggested by the respondent, rather it was just part of her normal day-to-day duties. The claimant's CV listed all of her duties, including her responsibility for recruitment of new staff members and ensuring adequate induction.

12. A job offer was sent to the claimant on 10 January 2020 which included her salary details, together with the monthly target of recruitment of 12 "badges" (being badged staff) per month for both sides of the business, those being establishment and home care. It included details of her holiday entitlement, hours of work and the requirement to attend weekly recruitment KPI meetings.

13. The respondent's business involved the recruitment and provision of staff to care homes, which was the establishment part of the business, and staff to assist a person in their own home, known as domiciliary care. The claimant was required to recruit for both, and the offer letter provided a bonus scheme of £25 for each good badge achieved per month over the figure of eight.

14. A copy of the claimant's contract appears in the bundle at page 51 and it is dated 27 January 2020 however it is unsigned, and the claimant says that it was not provided to her until after her employment was terminated. It is accepted by the respondent that this was correct but that it was provided before the commencement of these proceedings. This is agreed by the claimant.

Experience

15. During the interview, the claimant had advised Mr Boardman and Ms Caunt that she would require training to learn their processes, software and procedures. We consider that the role of Recruitment Manager was something which was quite different to that of recruiting staff as and when required as part of the Care Manager role. The role of Recruitment Manager within the respondent's business was the focus of the business. It was fast paced and needed a constant through-put of candidates, interviews, job offers, document checks and inductions. It was only after that process that a new employee was badged, meaning that they were provided with their identity badge to start work. The process could take some weeks and it would differ from one candidate to the next. It required a constant through-put (or pipeline) of candidates being attracted to the business and then processed through the system. Any new employee joining the respondent would need an introduction to these processes, and we accept that the claimant told the respondent at the time she would need training in its processes and software.

Training

16. The claimant commenced her role on 27 January 2020. On the first day in the office she had to set up her own computer, including setting it up from the box. She did not have her own log-in details for either the e-learning or DBS system during the first week. On the first day Suzanne Oldfield sat with the claimant for somewhere between 1½ and 2 hours, taking the claimant through the software and what needed

to be input into the system concerning the candidates and new employees. Ms Oldfield provided the claimant with printed copies of the procedures and processes. Mr Boardman gave an overview of the company and her role and the claimant spent the afternoon shadowing others in the office and familiarising herself with the processes.

17. There was a dispute between the parties as to the amount of induction and training which was provided on the first day. The respondent's witnesses said that it was a full day of induction, whereas the claimant contended she had only had 1½ hours. We considered that the parties' understanding of "induction" differed. What the claimant meant was training on the processes and systems, whereas the respondent had a wider view which included an introduction to the company itself and shadowing other members of staff. It was clear to us that the claimant considered she did not need training on interviewing or face to face aspects of the recruitment process but only on the systems and processes themselves. The respondent held a contrary view. The claimant initially sought advice from Katie Sainsbury and also Suzanne Oldfield on these matters, and we were referred to emails confirming that.

18. As part of the claimant's training Ms Oldfield suggested that she observe other recruiters in the company Head Office in Southport. The claimant attended there on 6 February 2020 and met with the team. She met with Susan Oldfield and also Dee Fitzsimmons, who started the role a few weeks earlier than the claimant and was making good progress. Ms Fitzsimmons had set up a number of interviews during the day for the claimant to observe. The claimant did not however believe that this was the training she required and indicated to Ms Fitzsimmons that she did not need to accompany her. We considered that the claimant held the view that she was sufficiently experienced in interview techniques and that observing interviews would not have been a good use of her time. Both Ms Oldfield and Ms Fitzsimmons were surprised and disappointed at the claimant's attitude in not being receptive to their offers. We do not accept that Ms Fitzsimmons discouraged the claimant from attending as she alleges. Generally, we preferred Ms Fitzsimmons' account of the day.

19. The claimant did not raise with Mr Boardman on 14 or 21 February 2020 that a lack of training was an issue which impacted upon her performance. We considered that a lack of training was an issue which occurred to her after her dismissal rather than at the time.

<u>14 February 2020</u>

20. On 14 February 2020 the claimant met with Mr Boardman and Ms Caunt for the purposes of a KPI meeting to assess how she was progressing. This was part of a weekly arrangement to meet. The meeting was recorded, and we have had access to the transcript which is agreed. During that meeting it was clear that the claimant was not progressing at the rate which Mr Boardman expected. It was apparent that she had not got to grips with the process which was required for the position of Recruitment Manager. The claimant did not indicate that she required more training. The pace at which the claimant was finding candidates and contacting them for interview was not sufficiently fast enough to stop them going

elsewhere. As such Mr Boardman and Ms Caunt provided advice and guidance as to how to quicken this process up.

21. Mr Boardman commented to the claimant that the figures which the claimant had achieved were the worse he had seen, but the outcome of the meeting was such that the claimant was given advice and encouragement as to how to proceed. It was agreed that they would meet in a week's time. The claimant was engaged and listening constructively during the meeting and appeared to welcome the advice provided.

21 February 2020

22. A second KPI meeting was held on 21 February 2020, again with Mr Boardman and Ms Caunt. The meeting was again recorded and the transcript to which we were referred was agreed. The meeting was a more positive meeting. The claimant had offered roles to a number of candidates and was in the process of ensuring that they were badged. During the meeting the minutes reflect that the claimant was asked how many people had been badged or were imminent. Her response was that there were three people ready to be badged and others waiting for references, which she said she would chase. Although it is not entirely clear to us in the transcript of the meeting as to how many others she was referring to, it appears to be those who were attending the training on 21 February. There were eventually five people who attended training. Mr Boardman responded at the end of that discussion, "make it a target to get them through by the end of the week", which on our calculation would be by 28 February 2020, which was the following Friday. Mr Boardman commented that it looked as though there had been a better week and that there had been a real improvement.

Recruitment Process

23. At the outset of the employment the claimant was provided with a recruitment flowchart which identified various stages of the process. Essentially a candidate would be contacted via Indeed or Facebook by the Recruitment Manager who would seek to attract as many candidates as possible. The respondent was seeking good quality candidates as they paid higher wages than other organisations, and the claimant would sift through the applications to decide who would be called for interview. Although the claimant was initially having face to face interviews, after the meeting with Mr Boardman on 14 February it was agreed that the interviews could be conducted remotely.

24. Either before or, if necessary, after the interview the candidates would be asked to provide the necessary documentation to identify themselves and in order that a DBS check could be completed. Some candidates provided the information at one time, but others did not have the necessary paperwork and it would be part of the Recruitment Manager's role to chase for that and to ensure that it was obtained.

25. Following the interview, the candidates would either be offered roles or not. If they were offered a role the Recruitment Manager would ensure that the documentation necessary to apply for the DBS checks and other compliance matters were obtained and in place, and then provide them to the Compliance Manager (Suzanne Oldfield) to ensure that they were approved and sufficient to be able to "badge" the candidate. In order to be badged, the candidate would also have to

attend an induction course which the Recruitment Manager would arrange. These were held approximately every two weeks.

Attitude

26. From the outset Mr Boardman and his team found the attitude of the claimant difficult. She did not immediately fit into the culture of the organisation, which was very team orientated. The claimant preferred to work independently and use her own systems and was not receptive to the advice which her colleagues and Mr Broadman sought to give. The claimant felt that she knew what she was doing and did not need advice unless she asked for it. This caused bad feeling amongst her colleagues who found her dismissive and negative.

Pregnancy

27. On 19 February 2020 the claimant advised Ms Caunt that she was pregnant. She was embarrassed at having to do so, having only recently started work. Ms Caunt offered her congratulations. She said she would let Mr Boardman know, and Mr Boardman was aware of the pregnancy by the time of the meeting on 21 February 2020.

28. On Monday 24 and Tuesday 25 February 2020 the claimant was absent from work with morning sickness. She came into work on 24 February 2020 but was sent home by Ms Caunt. That morning, having informed Ms Caunt about her morning sickness, Ms Caunt made the following remarks. She asked whether it was a virus, how long was she likely to be off for and "I'm sorry I'm not sympathetic but I've never been pregnant", and also "stop faffing and go home" and "is it contagious". The claimant considered that there was a lack of empathy by Ms Caunt and she felt that she was letting the team down. Ms Caunt does not deny making the comments in her statement nor does Mr Boardman deny it in a later grievance response letter. At the hearing before us Ms Caunt said that she would not have made the comment about being unsympathetic. We find this comment was made and preferred the evidence of the claimant on this point.

29. On 25 February 2020 Ms Caunt contacted the claimant to ask her to come into work the next day to reschedule her appointments.

30. When the claimant was absent on 24 and 25 February 2020 Ms Caunt found that documents, including references, DBS checks and training certificates, had not been uploaded to the system. She gave evidence that her and others rectified this over the two days the claimant was absent. On 24 February 2020 the claimant completed the badging of one employee before she left work, and when she attended work on 26 February 2020, she completed a further one but had to leave early in order to attend her first midwife appointment. Ms Caunt considered that the claimant had misled Ms Caunt and Mr Boardman the previous Friday, and on 26 February 2020 Ms Caunt called Mr Boardman and updated him. She raised the concerns that the claimant was not doing her job correctly and was not prepared to take or accept advice from colleagues. She advised him that the claimant had misled him at the meeting on 21 February concerning the number of badges which had been or would be achieved. She told him that the recruitment process just was not working and having the claimant as a recruiter was unsustainable.

Meeting on 27 February 2020

31. The claimant was asked to attend a meeting on 27 February 2020 with Mr Boardman and Ms Caunt. At that meeting the claimant was told that her employment was being terminated as it was not working out and her performance was below par. She was paid two weeks pay in lieu of her notice.

32. The claimant submitted a grievance on 28 February 2020 saying that she considered that the reason for her dismissal was her pregnancy.

33. On 2 March 2020 Mr Boardman responded. He referred to the claimant failing in her role as a Recruitment Manager and that the decision to dismiss had nothing to do with her pregnancy. He referred to the claimant having led him to believe she was an experienced recruiter and that her claim that she was new to the area probably partly accounted for her poor performance. He referred to badges and targets not having been met and the fact that the claimant was not prepared to take on board the help offered or listen to advice given. He commented that all of the people involved with her training commented that she was reluctant to take advice, often cutting them off before they had finished a sentence, saying she knew how to do it.

34. Mr Boardman's evidence before us was that the reason for the claimant's dismissal was her poor performance, her poor attitude and the attitude she showed towards her colleagues, who found her extremely rude, and that he had been misled on 21 February 2020. He was provided with the information concerning the claimant's assurances given on 21 February 2020 by Ms Caunt.

Evidence of Ms Sainsbury and the respondent's other witnesses

35. We consider that the evidence of Ms Sainsbury was unreliable. She was in a difficult position, having made accusations about her employer when she was unhappy with them but had rebuilt bridges and was continuing in her employment. We do not accept that there was any falsification of documents by the respondent. There was clearly a mix-up in respect of the calendar provided to this Tribunal, but as the respondent had access to the correct calendar at the time which showed the claimant's appointments nothing turns on it.

36. We have also noted that a number of witnesses used almost identical wording in their statements in relation to their view as to whether the respondent would have discriminated against the claimant because of her pregnancy. The majority of the witnesses did not accept that they had discussed the wording with others, despite this being difficult to accept in view of the clear similarities in the wording. In any event, we again consider that nothing material turns on this.

The Law

Pregnancy and Maternity – Equality Act 2010 ("EQA")

37. Employers are prohibited by section 39(2)(c) from discriminating against a person by dismissing her.

38. Section 18 of the EQA protects persons with the protected characteristic of marriage and civil partnership: it states as follows:

> *"(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 ...*
>
> *(6) The protected period, in relation to a woman's pregnancy begins when the pregnancy beings, and ends:*
>
> *(a) …at the end of the additional maternity leave period …"*

39. The respondent accepts that any allegations of pregnancy discrimination relate to events occurring during the "protected period".

40. "Unfavourable treatment" is addressed at paras 8.21 onwards of the EHRC Code of Practice as follows, and we are obliged to take this into account so far as relevant (s15(4) Equality Act 2006):

> "An employer must not demote or dismiss a woman, or deny her training or promotion opportunities, because she is pregnant or on maternity leave. Nor must an employer take into account any period of pregnancy-related sickness absence when making a decision about her employment.

41. As examples only, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the following reasons:

- the fact that, because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed-term contract;
- the pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations;
- the costs to the business of covering her work;
- any absence due to pregnancy related illness;
- her inability to attend a disciplinary hearing due to morning sickness or other pregnancy-related conditions;
- performance issues due to morning sickness or other pregnancy-related conditions."

42. For a discrimination claim to succeed the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave. The meaning of this expression was considered by the EAT in Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14. There, His Honour Judge Richardson confirmed that the law required a consideration of the 'grounds' for the treatment. He referred to In Onu v Akwiwu and anor; Taiwo v Olaigbe and anor 2014 ICR 571, CA, Lord

Justice Underhill stated: '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.'

Burden of Proof

43. The EQA provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(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."*

44. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EQA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

45. If and when the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

46. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Automatically unfair dismissal – pregnancy and maternity Section 99 Employment Rights Act 1996 ("ERA")

47. Section 99 provides (so far as is material)):

> *"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if:*
>
> *(a) the reason or the 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."*

48. Regulation 20 Maternity and Parental Leave etc Regulations 1999 ("the 1999 Regulations") is worded as follows:

> *"(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if the reason or principal reason for the dismissal is of a kind specified in paragraph (3)*
>
> *b. …*
>
> *(2) …*
>
> *(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with the pregnancy of the employee:"*

49. The protection from unfair dismissal contained in the 1999 Regulations is not confined to circumstances where the employee is dismissed because she took leave under these provisions. Rather, the protection applies where the employee was dismissed for a reason connected with her taking of such leave.

50. Often claims are brought as both discrimination and section 99. It is possible for a section 99 claim to fail and for a discrimination claim to succeed on the same facts, given the different test of causation: under section 99, the inadmissible reason must be at least the principal reason for dismissal, whereas under the EQA the inadmissible reason need only be an effective cause.

51. In claims of automatic unfair dismissal, the general rule is that an employee is not required to prove his or her case. However, where the claimant lacks the two years' continuous service required to claim ordinary unfair dismissal the situation is different. There is no qualifying period to claim automatically unfair dismissal under section 99, but the effect of an employee having less than two years' continuous service is that the employee bears the burden of proof in showing that the reason for dismissal was a prescribed reason within the meaning of section 99 and the applicable regulations — Smith v Hayle Town Council 1978 ICR 996, CA.

Remedy

52. Awards of compensation in claims of discrimination are governed by section

124 of the Equality Act 2010 which provides that:

> *(2) The tribunal may—*
>
> *(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b)order the respondent to pay compensation to the complainant;*

53. *(c)make an appropriate recommendation*

54. The Tribunal has the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that he/she would have been in had the discrimination not occurred, essentially a "but for" test in causation when assessing damages flowing from discriminatory acts. Ministry of Defence v Cannock [1994] ICR 918

55. Awards may be made for injury to the claimant's feelings arising out of the detriments as found to be proven. The purpose of an award for injury to feelings is to compensate the Claimants for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. Prison Service and others v Johnson [1997] ICR 275.

56. In accordance with Ministry of Defence v Cannock [1994] above, the aim is to award a sum that, in so far as money can do so, puts the Claimants in the position he or she would have been had the discrimination not taken place.

57. An Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the Claimants. Corus Hotels Plc v Woodward [2006] UK EAT/0536/05.

58. Guidance was given in Vento v Chief Constable of West Yorkshire 2003 ICR 318) as to the appropriate level of injury to feelings awards. Reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

Conclusion

59. The claimant brings two claims. Both relate to the claimant's dismissal, which she says was both automatically unfair and discriminatory because of her pregnancy. The claims are brought under section 18 of the EQA and section 99 of the ERA. The tests are different in each, but our findings below relate to both.

60. We find that the claimant was not performing to the extent required by the respondent and was not engaging with its staff in the way that it expected and wished her to engage. The claimant had her own way of doing things, whereas it was reasonable for the respondent to expect her to follow its procedures and

processes which had been developed to assist it in its business. The claimant was not following them at the pace and in the timely fashion that the respondent required. The respondent's business model was focussed on getting as many candidates approached, short-listed, interviewed, certified, referenced and badged in as short as time as possible. This was not the way that the claimant had been used to operating, and she was taking some time to get up to speed and work to the urgency that the respondent required. This was a serious concern to the respondent, particularly as they had expected the claimant to be able to get up to speed as quickly as other staff had, including Ms Fitzsimmons.

61. The respondent was also frustrated that the claimant did not engage when offered assistance and advice. This was particularly the position with other members of staff who found her difficult to engage with and not appreciative of their advice. The claimant was new and did not settle into the respondent's culture quickly. She was not as outgoing as others in the office who were offering their advice and assistance. Her demeanour and independence caused the other members of staff to see her as rude and not someone who fitted in. We do not accept that she was rude, aggressive or had contempt for others, as alleged but we do accept that she was not developing good relationships with her colleagues who were seeking to assist her. The problem for the respondent was that she was working in a team and within a business that was reliant upon systems and processes that others could access, and it required speed and up-to-date entries which were essential to the fast paced recruitment of staff. The claimant was struggling to adapt to that environment and not at the stage required and expected by the respondent, nor do we think that she was likely to improve to the extent that it required.

62. The reasons set out by Mr Boardman for the decision to dismiss the claimant were her poor performance, her poor attitude and the attitude she showed towards her colleagues, who found her extremely rude, and that he had been misled on 21 February 2020. We accept that they were all factors in the decision, but in relation to the meeting on 21 February 2020 and whether the claimant had misled Mr Boardman concerning the progress of her badging new staff, he relied upon information given to him by Ms Caunt. It was she who had reviewed the claimant's progress on 24 and 25 February 2020 when the claimant was absent through a pregnancy-related illness. What she had discovered was that the respondent's systems were not up-to-date and there were administrative issues in the claimant not uploading documents and information to the system. We find that documents had been received and collated by the claimant, but as at the evening of 21 February 2020 had not been uploaded. This was something that the claimant has shown could and we consider would have been done had she been in the office for the full day of 24 and 25 February 2020 and indeed, as we have said, she proceeded to process and badge an employee on 24 February 2020 before she left and a further employee on 26 February 2020.

63. We were not persuaded that the respondent has shown that the claimant misled Mr Boardman at the meeting on 21 February. We find that based upon the evidence we have seen, had she not been absent for a pregnancy-related illness and then dismissed, she would by 28 February 2020 have completed the badges that she indicated on 21 February 2020 that she would complete.

64. On 26 February 2020 when Ms Caunt spoke to Mr Boardman and the decision to dismiss the claimant was made, the only thing that had changed since the meeting on 21 February 2020 when he was content with the progress that had been made by the claimant in recruiting employees, was the claimant's absence on 24 and 25 February with a pregnancy related illness, the information which Ms Caunt had discovered when the claimant was absent, and further that she had attended an antenatal appointment on the afternoon of 26 February 2020.

65. We consider that it is appropriate for us to draw inferences from comments made by Ms Caunt when the claimant told her that she was suffering from morning sickness, particularly the comments that she was not sympathetic and further her contacting the claimant on 25 February 2020 asking her to come in on 26 February 2020. Ms Caunt says that the context in which those comments were made were not as suggested by the claimant and that she was concerned about the claimant's health and as it was a care environment they were constantly concerned about diarrhoea, vomiting and other viral illnesses. We find that the comments, particularly that she was not sympathetic, were pointed and showed a lack of empathy, and we further draw an inference that Ms Caunt was influenced in her view of the claimant by the fact she was pregnant and having to leave work because she was unwell.

66. When Ms Caunt spoke to Mr Boardman about the claimant, she advised him that the recruitment process was not working and having the claimant as a recruiter was unsustainable. In essence Ms Caunt was saying to Mr Boardman that the claimant could not continue in her role. In doing that when she did, we consider that the claimant's pregnancy was a significant influence upon her view.

67. Mr Boardman, at that time, had none of the detailed information on the staff processed and badged during the week of 24 February, to which we have been referred at pages 68 and 69 of the bundle. At the meeting on 21 February 2020, he was content with the improved progress which the claimant was making in respect of recruitment but both he and Ms Caunt still had serious ongoing concerns about the claimant's attitude and general performance. As owner of the business any final decision to dismiss was his, but in this case his decision to dismiss when he did on 27 February 2020 was following his call with Ms Caunt and their discussions and the claimant having been absent for two days with a pregnancy related illness. He had given the claimant until the end of the week, 28 February 2020, to achieve the target she had indicated in the meeting, however he did not wait. We find that he relied upon Ms Caunt's incorrect views that he had been misled in the meeting.

68. In respect of the claim of discrimination pursuant to section 18 of the EQA, the claimant has successfully shown facts from which it can be shown that the decision to dismiss her was because of her pregnancy or a pregnancy-related absence. The very timing of her notification to her employer, her absences for pregnancy-related reasons on 24 and 25 February 2020 and her attendance at an antenatal appointment the day before her dismissal are all sufficient to shift the burden of proof. It is then for the respondent to show that the pregnancy, or a pregnancy-related absence, was in no sense whatsoever the reason for the dismissal. They failed to do that. On 21 February 2020 the claimant's performance had improved and essentially Mr Boardman was more satisfied with the way matters were progressing. It was the report and discussions with Ms Caunt which changed his

view and for the reasons set out above they were significantly influenced by the claimant's pregnancy and her pregnancy related absence.

69. In a claim of automatic unfair dismissal where the claimant has less than two years' service the burden is upon her to show that the reason or principal reason for her dismissal was connected with her pregnancy. We find that she has not shown that to be the case. Although it is not necessary for the respondent to shown their reason, we find from the evidence that we have heard that her general performance and a failure to comply with the respondent's own processes and procedures, together with her attitude towards others who offered help, were the principal reasons for the claimant's dismissal. Although her pregnancy and her absence on 24 and 25 February was a significant influence, for the reasons we have stated above, it was not the principle reason. Despite the instruction which she had been provided with, the claimant continued to adopt her own process, which was to keep notes and records in paper format rather than using the system in real time and uploading them in real time. Although the claimant was an experienced Care Manager, recruitment was only a small part of her work previously and she was finding it difficult to cope with its systems and the fast paced and focussed environment of a recruitment business and would not take the advice offered. Mr Boardman and Ms Caunt could see this. This impacted upon her relationship with her colleagues. We find that the claimant has not shown that the pregnancy or a reason connected with the pregnancy was the principal reason for her dismissal.

70. The claim of unfair dismissal fails.

71. The claim of discrimination succeeds.

72. The claim in respect of the failure to provide a section 1 statement, was conceded.

Remedy

Discrimination

73. We find that the claimant's employment would have ended at the end of her probationary period, which was a further two months after she was dismissed. The claimant was on a three-month probationary period. We have indicated in our findings above the difficulties and issues which the respondent was having with the claimant's performance and attitude. We consider that with the KPI meetings that were taking place weekly, although the claimant would have completed the badges she had said she would during the week of 28 February, the manner in which she worked, her failure to accept assistance, the performance expectations of the respondent, together with the ongoing concerns the respondent had about her relationships with colleagues and fit within the company would have resulted in her not passing her probationary period.

74. The claimant was paid in lieu of two-weeks notice. The claimant is therefore awarded 6 weeks' pay. The claimant's net income weekly pay was £361.87. Her award in respect of her financial losses is therefore £2171.22.

75. In relation to potential mitigation during that period, which Mrs Peckam raised, although the official lockdown in respect of the pandemic had not started it was

already underway and businesses were closing down. Having been dismissed without warning and when pregnant, it would not have been on the claimant's mind to start looking for a job immediately. We have no doubt that the claimant was shocked by what happened to her, having worked for her previously employer for some number of years without any issues, and we do not consider that it would have been reasonable for her (with those two factors in mind) to have started looking for a job in that two month period.

76. Turning to an injury to feelings award, we are guided by the Vento guidelines which put awards into three bands; lower, middle and upper. Having considered the evidence from the claimant it is clear that this discrimination had a significant impact upon her at the time. The claimant was pregnant and her dismissal a shock to her, having not had any performance issues prior to this and happening without any warning. She was worried about payment of her mortgage, and other financial commitments with one child to support and a new baby coming. This caused her stress, upset, shock and a loss of confidence. This impacted upon her family life and required her and her husband to borrow money from family. This was against a background of the start of the COVID pandemic and its uncertainties and worries as a pregnant woman. There was however no medical evidence produced to support that the impact caused the claimant any personal injury more than stress and shock.

77. This was, however, a one-off act and although it was a dismissal, the claimant had been employed for a very short time with the respondent.

78. Having taken all of these matters into account, we consider that the appropriate award is in the lower band in the amount of £6,000.

79. The Tribunal therefore awards £6,000 injury to feeling together with an award of £2171.22 in respect of the financial losses. We are obliged to consider whether interest should be added to the injury to feeing award and decide that it should. That interest would flow from the date of the discrimination, which was the end of February 2020. It amounts to a period of two years. The court rate is 8% and amounts to an additional £1,423.20. That gives a total of £9,594.22.

<u>Section 1 ERA Statement</u>

80. The final issue that we must consider is whether any award should be made in respect of the failure to provide a section 1 statement. We note that the Tribunal has no power to make an award if the section 1 statement is provided before the proceedings have commenced which is accepted. With that in mind we are unable to make an award in respect of this complaint.

Employment Judge Benson

Date: 23 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 May 2022

FOR THE TRIBUNAL OFFICE

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