



EMPLOYMENT TRIBUNALS

Claimant
Ms Z Faqi

v

Respondent
Mr M Yusuf Faisal

Heard at: By Cloud Video Platform

On: 15 February 2021
22 and 23 March 2021

Before: Employment Judge Brown

Members: Ms J Costley and Mr D Snashall

Appearances:

For the Claimant: In person

For the Respondent: In person

JUDGMENT having been sent to the parties on 20 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. I must apologise for the time it has taken for these written reasons to be provided. A request for written reasons was brought to my attention on 20 May 2022. The recording of the reasons in question (by then over a year old) had to be converted to a file format compatible with the equipment used by the Tribunal's typists, which took some time, and was then placed in a lengthy queue for typing. There has been a further two-week delay since the draft typed reasons were sent to me as a result of my annual leave.
2. The Respondent is the proprietor of a school trading under the name of Assunnah Primary School. The Claimant worked for the Respondent from 3 September 2018 to 21 April 2019, when she was dismissed from her role as a Room Leader in the Nursery.
3. On 29 May 2019, following ACAS Early Conciliation which started and ended the same day, the Claimant presented a claim to the Employment Tribunals complaining that she had been unfairly dismissed, discriminated

against because of sex and pregnancy and was owed other payments.

4. The Respondent originally presented a response otherwise than on a prescribed form and that response was rejected. The Respondent sought reconsideration of the rejection on 10 September 2019 and was permitted to defend the claim out of time.
5. In the response that was accepted, the Respondent said in essence that the Claimant had been dismissed for poor performance.
6. A Preliminary Hearing took place on 18 February 2020. The Respondent had provided a Case Management Agenda in advance of that hearing but was not present or represented. Employment Judge Hyams who heard that Preliminary Hearing identified the issues in the claim and made Case Management Orders.
7. The issues were identified as follows: reference should be made to paragraph 12 of those Case Management Orders. The matter was listed for a Final Hearing between 15 February and 17 February 2021.
8. The Covid-19 pandemic intervened and the Final Hearing took place by Cloud Video Platform (CVP) without objection from either party. The Tribunal was satisfied that the parties were able to participate fairly and effectively by CVP.
9. There had been a substantial failure to comply with Case Management Orders in advance of the Final Hearing on 15 February 2021. The Tribunal decided late on 15 February 2021, having tried to salvage the hearing as best we could, that fairness required us to adjourn to enable, in particular, the Respondent to adduce witness evidence, it having provided no witness evidence on which it sought to rely.
10. We made further Case Management Orders on 15 February 2021 for the Final Hearing, including for the production of an agreed single bundle and for exchange of witness statements.
11. We therefore had, by the resumed hearing on 22 March 2021, an agreed bundle and three witness statements for the Respondent; as well as the Claimant's statement, which had been served on 15 February 2021. A witness statement had also sent to the Employment Tribunal, but not the Respondent, on 4 March 2021, seeking anonymity in so doing. Having heard the parties, we concluded that we could not admit this statement in evidence without the Respondent seeing it and the Claimant served it on the Respondent on the morning of 17 March 2021.
12. The Respondent having objected to the admission of this statement, and after hearing further submissions, we decided not to admit the statement for the reasons that we gave at the time.
13. There were some further less than satisfactory aspects of the hearing as a whole: despite timetabling the hearing at the start and relying on the parties to give realistic time estimates, the Respondent then substantially overran the time estimate for the cross examination of the Claimant: his

questions took nearly three times as long as originally estimated. In the middle of his oral evidence, the Respondent told us for the first time at 3.01pm on 22 March 2021, 14 minutes before he said he needed to leave the hearing, that he had to leave to collect his children from school. One of the Respondent's three witnesses had not made himself available during 22 March 2021, partly because of the over run in the cross examination of the Claimant's evidence and we were therefore left with little real option but to adjourn the hearing shortly after 3.15pm on 22 March 2021.

14. Since all parts of this disruption were caused by the Respondent (following earlier non-compliance with case management directions in advance of 15 February 2021) and since we had not had a chance to case manage a shorter hearing day earlier because we had not been told about his childcare commitments and because otherwise there was a risk that the ability for the hearing to conclude was jeopardised, we concluded in considering the overriding objective that the Respondent had lost the ability to call the third of his witnesses as a result of the conduct, though we admitted the statement and we gave it the weight we considered appropriate in the absence of an opportunity for the Claimant to cross examine on it.
15. We should also record in these Reasons that the Claimant experienced some distress on the afternoon of 22 March 2021 and indicated that she would not be attending the hearing the following morning. Since only closing submissions were left before we adjourned to deliberate, we invited the Claimant to send written closing submissions which we could take into account in place of oral submissions, while also seeing what we could do to encourage the Claimant and enable the Claimant to attend the hearing.
16. We limited the parties to 20 minutes each in oral submissions given the extensive additional commentary in effect during cross examination. The Claimant decided not to attend for closing submissions, but as she had indicated, sent the Tribunal and the Respondent written closing submissions, to which the Respondent was able to reply, and which we took into account in place of oral closing submissions.
17. We made the following findings of fact on the balance of probabilities.

Findings of Fact

18. The Claimant was employed under a written Contract of Employment which is found at page 42 of the hearing bundle. That provided at page 43 that she was a full time employee, it provided for a salary of £14,827.04 and it set out her daily working hours as Monday to Friday which were 7.30am until 4pm Monday to Thursday and 7.30am until 1.30pm on Fridays.
19. Section 21 of the Contract, although the paragraph numbers don't always align exactly to the text, made provision for a probationary period of one term, during which the Contract said,

21. The EMPLOYEE will work for one term on probation, during which Assunnah Primary School will implement relevant monitoring and observing techniques in conjunction with the School Manager and the 'Board of Governors' to assess the EMPLOYEE'S level of commitment and ability to develop the appropriate standards of a Teacher. After which it will be agreed with the EMPLOYEE whether the contract should continue or be terminated.
20. At page 46, at sections 79 – 82, it made provision for sickness absence.
21. Section 83 made provision for payment of Statutory Sick Pay.
22. On page 47, sections 86 – 101 made provision for what was described as a disciplinary procedure. That was said to include matters including inadequacy of performing the job role; in other words what the Tribunal would narrowly think of as capability or performance reasons, rather than conduct reasons. Section 87 set out a three step warning process involving an informal verbal warning, a formal verbal warning and finally a written warning.
23. That Contract was signed by the parties on 27 November 2018, therefore some time after the Claimant had begun her employment.
24. The School also had a Maternity Leave Policy in essentially uncontroversial terms which recognised employees' statutory maternity rights.
25. It also had a Grievance Policy which was again in essentially uncontroversial terms by which an aggrieved employee could send a Grievance to either the School Senior Leadership Team or its Governing Body.
26. The Claimant was required, along with all staff, to sign in at the start of each working day. On 10 September 2018 the Claimant was sent an email by the School's Head Teacher Feroz Adam saying,

"Assalamualaikum

As a staff member you are required to sign in daily using the Microsoft StaffHub application on your Android mobile or iPhone.

This must be done on a daily basis when you reach school. You will also need to sign out when you leave. The application requires the use of your location in order to work. Please ensure that this is enabled.

You must make sure that you sign in at work and sign out at work when you leave. You will be notified if you sign in or sign out away from work. This may mean that you were late or left work earlier than usual.

You will need to use your Assunnah email address and password to login.

Please see the link below to download the application on your phone.

Android:

https://play.google.com/store/apps/details?id=ols.microsoft.com.shiftr&hl=en_GB

Apple iPhone:

<https://itunes.apple.com/gb/app/microsoft-staffhub/id1122181468?mt=8>

Jazak Allaah

Wasalam

Feroz Adam

Head Teacher

27. No records of the Claimant's start times was put before us in evidence. Mr Yusuf said that there were difficulties obtaining this information from Microsoft and on 22 March 2021, he invited us to consider making a Third Party Disclosure Order against Microsoft for this evidence. We decided not to grant a Third Party Disclosure Order at that late stage. There was no evidence of those records being shown to the Claimant at any stage during her employment and there was no written record of repeated lack of punctuality by the Claimant. The Claimant accepted in evidence that she had occasionally been slightly late and had been significantly late on one occasion in the early stages of her pregnancy when she had had to go to Accident and Emergency.
28. A Staff Supervision Meeting took place between the Claimant and her then Line Manager on 17 October 2018. The Claimant's Line Manager at that time was Ms Samsam Abdullahi.
29. The meeting identified three action points for the Claimant,

"Action Points:
To have a to do list and prioritise time and tasks.
To be confident when dealing with staff and delegating tasks.
To ensure special books are updated regularly."
30. The review form included a section for 'Professional Development Issues' and no issues were identified in that box. There was another section for 'Any Other Issues and Comments' and no issues about the Claimant's performance or punctuality were included in that box. Ms Abdullahi's evidence was that the Claimant's performance and punctuality had not been poor in the period leading up to that initial supervision.
31. The Review Meeting which was envisaged in the 17 October 2018 meeting to take place on 14 December 2018 did not happen because of an Ofsted inspection at the School which was ultimately unfavourable to the School.
32. An issue which the Tribunal had to consider was whether the Claimant's probation had been extended. The Claimant's case was that it had not. The Respondent's case was that there had been an extension of the Claimant's probation.
33. There was no formal indication that the Claimant's probation was being extended and the Respondent has not satisfied us that there was any

indication or communication to the Claimant that her probation was being extended beyond the end of the original period which was the first term of her employment.

34. Ms Abdullahi's oral evidence was that she had been too busy and distracted by the Ofsted inspection and its consequences to indicate this to the Claimant formally, but the Tribunal considered that it would have taken no more than an email to record in writing the School's decision to extend the Claimant's probation and we did not consider that this explained a failure to communicate a decision that had in fact been taken. We were not persuaded that it was probable there had been an extension of the Claimant's probation.
35. The Respondent suggested that the unfavourable Ofsted Report was because of the Claimant. We reject that evidence. We also reject Ms Abdullahi's evidence that there was an informal communication to the Claimant that her probation was being extended. We prefer the Claimant's evidence as the truthful evidence that she was not informed that her probationary period was being extended and we are fortified in reaching those conclusions because of the absence of any further steps that were taken in relation to the Claimant's probation after December 2018. The only time thereafter that probation was raised was in the email which communicated to the Claimant that she was being dismissed.
36. Ms Abdullahi left or ceased to be the Claimant's Manager in January 2019 and therefore could not give evidence about the period after this in relation to the Claimant. The Respondent did not call Ms Shamima Aktar who had been the Claimant's Line Manager for the period after Ms Abdullahi ceased to be the Claimant's Line Manager, though Ms Aktar is still employed by the School. We noted that Ms Aktar was the anonymous witness whose statement the Claimant sought to rely on, but we note that the School itself did not call Ms Aktar to give evidence about the Claimant's performance.
37. The Claimant fell pregnant and an ultrasound took place on 8 February 2019. The Claimant had informed the Respondent by 12 February 2019 that she was pregnant because a risk assessment took place that day. The risk assessment noted a number of risks and we find that these included generic risks in relation to pregnant women, as set out on page 176 of the bundle, first row, fourth column from the right in respect of morning sickness and visits to the lavatory. On page 177 of the bundle, first row, fourth column from the right, the risk assessment identified matters which the Claimant herself had experienced in the context of this stage of her pregnancy. Those matters included reference to sickness that the Claimant had experienced which was described at that stage as 'controlled' and the Claimant was receiving anti-sickness medication.
38. The same day, on 12 February 2019, Haringey Council indicated to the Respondent and provided to the Respondent a letter to be sent to parents, that as a result of the inadequate Ofsted Report the School would be removed from a local directory of providers and state funding would therefore not be available for placed pupils.

39. The Claimant was sent an email on 10 March 2019. This followed a meeting on 7 March 2019. The meeting referred to targets to which the Claimant would be subject over the following weeks. The email was to the Claimant from the Respondent.
40. The Tribunal noted that this email made no reference to the Claimant's probation and certainly did not suggest that her probationary period had been extended, or that these were matters which had been raised in the context of poor performance by the Claimant or an extension of her probationary period. We accept therefore that there were identified some areas for improvement for the Claimant's performance and that these were not all pregnancy related.
41. On 23 March 2019, the Claimant was hospitalised overnight with *hyperemesis gravidarum* (excessive vomiting). She was thereafter certified unfit for work by sickness certificates covering the following periods and for the following reasons:
- 41.1 25 March 2019 - 1 April 2019: vomiting with dehydration;
- 41.2 1 April 2019 – 8 April 2019: excessive pregnancy vomiting;
- 41.3 8 April 2019 – 15 April 2019: *hyperemesis gravidarum* (excessive vomiting / morning sickness); and
- 41.4 15 April 2019 – 29 April 2019: pregnant, feels unwell, lethargic, bed ridden, low mood.
42. In each case, the Doctor's opinion was that the Claimant was not fit for any work and there was no indication that the Claimant could work with reasonable adjustments.
43. Therefore, the Claimant was off sick from 25 March 2019 until the termination of her employment.
44. On 25 March 2019 at 10:01, Shamima Aktar wrote to the Claimant by email saying,

"Assalamu alaikum Ust Zahra,

We pray that you are in the best of health and Emaan.

We will like to invite you for a meeting to discuss your targets and review your performance- following the previous performance meeting 2 weeks ago.

Please choose from the dates given below from what is suitable for you to attend:

- *Wednesday 27th March*
- *Thursday 28th March*
- *Friday 29th March*

Please bring with you your doctors appointment letters and notes,

During this meeting we will discuss next steps and ways we can work together to ensure the needs of both parties are met, i'A

JazakAllah khair,

*Shamima Aktar
Early years lead"*

45. The Claimant replied on the same day at 11:07,

"Wa alaykum salaam,

I am happy to attend on Friday 29th of March. I will bring my doctors notes with me in sha Allah.

*I would like to request to be accompanied by someone if that is possible?
I still await a copy of the risk assessment and the grievance policy of the school, if you can attach it please.*

*Jazak Allahu khairan
Zahra"*

46. We find in light of the Claimant's email, that she had not yet received a copy of the 12 February 2019 risk assessment.

47. Ms Aktar replied also on 25 March 2019 at 13:55,

"Assalamu alaikum,

I pray you are well,

*I'a your meeting will take place on:
Friday 29th March- 9am*

Please bring your doctors letters/notes- the grievance policy will be forwarded to you soon by a member of SLT

Unfortunately I am not permitted to share the risk assessment prior to receiving the doctor notes – once doctors notes/appointment letters are received we can update the risk assessment with confirmation i'A

Jazakillah khair

*Shamima Aktar
Early years lead"*

48. The Claimant replied to that email, still on 25 March 2019 at 8pm,

"Asalaam alaykum Shamima,

Due to the stress and fragile state I'm in, I would need to be accompanied by a relative during the meeting. Regarding the risk assessment, once I provide my notes can you bring a copy of that, as well as a copy of my performance notes in sha Allah.

Jazak Allahu khairan I await the Grievance policy.."

49. The Claimant then sent a further email on 27 March 2019 at 1:41pm, saying,

"Let me know if I can be accompanied, otherwise I wouldn't be able to attend the

meeting on Friday.

I await your response.

Salam alaykum.”

50. The same day, that is 27 March 2019, Ms Aktar wrote to the Respondent asking,

“Assalamu alaikum,

Can Mu’alim Faisal give Zahra the consent for this request,

JazakAllah khair

*Shamima Aktar
Early years lead”*

51. There was no documentary evidence before us of a response to Ms Aktar’s request.

52. The Claimant was sent a copy of the Respondent’s Grievance Policy on 28 March 2019.

53. On 1 April 2019, Ms Aktar wrote to the Claimant in an email at 14:03 saying,

“Assalamu alaikum,

I pray that you are in the best of health, ameen

*This email is to confirm that your meeting is rescheduled for tomorrow:
Tuesday 2nd April 2019 9am*

i’A we can work together to discuss next steps and strategies

JazakAllah khair, see you tomorrow i’a”

54. The Claimant responded by email at 10:49, page 10 of the hearing bundle, as follows,

“Asalaamu alaykum wa rahmatulaahi wa barakatuh.

Today my meeting was scheduled for 9am (see email attached below) and nobody turned up.

I waited for 40 minutes and still nothing, I would have expected some professionalism and organisation just the way this is expected from members of staff. Ust Shamima has repeatedly called the school to inform I have arrived but no one arrived.

I have showed Ust Shamima my doctors notes which I will be scanning over via email as the photocopier was not working, I expect to receive my pay after this.

Due to my health and having no one to accompany me, I will not be attending any meetings at the moment as I cannot come alone and my partner was very upset that he took time off work and our time was wasted.

Anything you wish to discuss, please do via email. I await your response in sha

Allah.

Wa salaam alaykum.

Zahra”

55. The Claimant wrote it seems again later on 2 April 2019, saying,

“Asalaam alaykum.

I still await a response. I’m not fit enough to attend the meeting alone.

I still do not know what is going on? Nobody is informing me anything. Will I receive my sick pay? Will I also receive maternity?

I would like a response from Faisal or Feroz as I am aware that the decisions are made from either one of you.

I await your response again.

Wa Salam alaykum

Zahra”

56. Then on 3 April 2019, while as we have noted the Claimant was signed off sick and had been certified as unfit for any work, Ms Aktar wrote to the Claimant saying,

“Assalamu alaikum, hope you’re well,

Next week Thursday is Parent-teacher consultation day, you will need your key children’s summary reports – this will be through classroom monitor, there is a section that says summary you just need to print it, you will provide parents with a copy and keep a copy in your special books.

*If you are unsure of how to do it let me know,
If you are still unwell and unable to come this week, you can do the summaries-at home –(please email me copies when done,)but you will need to be in for the parent consultation next Thursday.*

If for any reason you can’t come in please let me know in advance however the summaries will need to be printed and handed in to me before next Thursday, currently Fatima and Halima are taking bookings for your key children for you so when you come in the timings are done for you i’A.

*Shamima Aktar
Early years lead”*

57. Ms Aktar wrote again to the Claimant by email about seven minutes later saying,

“Also, can the reports be printed and in school by Tuesday so they can be ready in envelopes by Thursday after I review them

*Shamima Aktar
Early years lead”*

58. On 9 April 2019, the Respondent wrote to the Claimant copying Ms Aktar and the Head Teacher saying,

“Assalamu alaykum,

*I pray that you are in good health and Emaan.
Following your email, I would like to confirm that your medical letter shows that in March, that you were not fit for work from 25th to 1st April. Thus you are entitled for £94.25 of statutory sick pay (SSP) on 25th, 26th, 27th, 28th and 29th March.*

As you remember Ustaada you did not work on 14 January 1st, 6th and, 8th of February, and we paid you fully the amount of £204.13 overpaid to you is to be subtracted against the £94.25 of SSP to you.

This works out as follows:

*204.13 – 94.25
= 109.88 owed to us. Please can this amount be paid to us ASAP.*

As for any SSP owed to you for April, we will pay you at the usual end of month payment cycle.

Your medical note shows that your unfit for work status was yesterday Monday 8 April 2019. This note indicates that your supposed to be reporting back to work today. As you are not at work today, we would like you to clarify what your long term intentions are. Are you going to remain unfit for work?

Ustaada Zahra, we are unable to maintain this situation any more because there are a children, parents of these children, your colleagues at work and management that are all dependent on your physical presence. We all need to know where we are going from here. We need a decision that's best for yourself, our children, their parents, your work colleagues, and your employer. It's an ammanah on our shoulders and we need to reflect upon these responsibilities, and come up with a satisfactory solution for all parties involved.

Jazakillahu Khayran,

Wassalaamu Alaykum

*Mohammed Yusuf
School Manager”*

59. Then on 10 April 2019, the Claimant responded and she attached her medical certificate covering the period from 8 April 2019. That Certificate as we have noted made it clear that the Claimant's absence was related to her pregnancy.
60. The Respondent wrote again to the Claimant on 18 April 2019 at 15:23 saying,

“Assalamu alaykum,

I hope and pray that you are in good health and Emaan.

Ustaadha, since your last email on 10 April 2019 we have as of yet not received an answer to the question we asked about our future at the school / setting. Seeing that you are unwell and that you have taken may days of illness. Please can you clarify your intentions. You also need to bear in mind that you have not met your performance targets nor are you able to meet them any time soon due to your illness. We need to be confident that you can be a high performing employee, determined to succeed and striving for your pupils do to well.

We need to know the following:

1. *If you are likely to improve, and if so when?*
2. *Are there likely to be further absences?*

3. *Will the children's development be affected?*
4. *Is this a long term issue, or temporary?*

We need to be honest, sincere, and objective and need an answer for these questions. I appreciate that this may be a difficult time for you to ponder about these questions – however the children and parents do have rights over us and we do need to ensure that these are not violated.

Jazak Allah

*Mohamed Yusuf
School Manager”*

61. The Claimant responded on 19 April 2019 at 9:53pm saying,

“Wa alaykum salaam,

Following our previous emails, my doctor has still deemed me unfit for work. I am suffering from a pregnancy related illness.

Regarding your questions, I do not know when I will improve nor when. I am unable to tell you if there will be further absences again as I do not know when I will recover. At the moment, my illness is temporary and I am hoping I will recover. My intentions is to return to work when I am fit and my health is in a good state.

In regards to the children's development being affected I am not sure why I am being asked this question. As mentioned previously, it is management and members of staffs duty to ensure that children's needs are met at all times.

I understand that children and parents have a right over us but at this point I am not fit and there is no empathy towards me from management. I have been extremely stressed due to this, being told that I will be dismissed, being blamed and overall I feel this has not been dealt with professionally.

Wa salaam alaykum.”

62. We note that some of the times and dates of the emails are difficult to comprehend and given that some emails appear to have been sent at times preceding the emails to which they responded, and given that we have seen some emails which contain inconsistent dates and times, there appears to have been mis-description of time zones so we cannot always rely entirely on the times and dates for emails which have been sent. But there was no dispute between he parties that these emails were sent, or that they were sent in this sequence.
63. In respect of this email in particular from the Claimant, we have seen another version of it which is timed stamped and dated 20 April 2019 at 10:53.
64. The Respondent then had some conversations with the School Governors and Head Teacher on 21 April 2019, a Sunday at 7.21. The Head Techer Mr Adam wrote to the Respondent and others saying,

“Wa Alaikum Salaam

The governors decided in the last meeting that we have to dismiss her. I remember the minutes being sent to governors shortly after the meeting. I assume everyone received an read them?

But moving forward, the purpose of the email was to give her the option to resign from her own will, however she is not doing so leaving the only option to dismiss her. The next steps of how to do this is to be discussed.

Jazak Allaah

Wasalam

*Feroz Adam
Head Teacher”*

65. There was a response to that email from it seems, from Adnan Hassan at 07:13 on Sunday 21 April 2019, saying

“As salamu alaykum,

Hope you all are well,

This issue is dragging on and we’re just going round in circles. Can we stop dragging our feet and come to some sort of conclusion here!

Jzk khayran

Adnan”

66. The Tribunal noted a reference to minutes of the Governors meeting but those were not disclosed and so we have not had a chance to see what they say.

67. The Respondent then wrote to the Claimant, also on 21 April 2019, dismissing her. His email at page 20 of the bundle said,

“Assalamu alaykum,

I hope and pray that you are in good health and emaan.

Looking at your performance in periods of probation, we would like to conclude that we cannot continue with your employment at the school. The basis of this decision is unresolved probationary targets as a key worker, and performance of duties.

I appreciate that you have ongoing medical issues, however the medical grounds have resulted in a compromise of you performing your role affecting the future development of our children. We ask Allaah to cure you and free you from all difficulties. We also ask that our children’s future can be sufficiently recovered.

Moving forward, we will continue to pay your SSP until the 15th April 2019, however this email can serve as a dismissal notice.

We wish you the best for your future and ask Allaah to grant you good health and success – aameen.

Jazak Allaah

Wasalam alaykum

*Mohamed Yusuf
School Manager”*

68. This was, we find, the first reference to periods of probation since the

Claimant had notified the Respondent of her pregnancy. It followed an indication by the Claimant of some uncertainty about the likely period of her absence in the light of pregnancy related illness. We noted that Mr Yusuf drew a direct connection between the Claimant's illness which was pregnancy related and which he knew was pregnancy related and an alleged compromise in the Claimant's performance in her role. Even if there had been a compromise in the Claimant's performance of her role, Mr Yusuf himself, in his email was drawing a direct connection between this and the Claimant's pregnancy related illness.

69. The Tribunal made a few general observations about how the Claimant's employment had been managed by the Respondent. There was no referral of the Claimant to Occupational Health despite her ongoing sickness absence. The Claimant was not given by Mr Yusuf when he dismissed her, a right of Appeal against her dismissal. We also note that in dismissing the Claimant, the Respondent did not follow its own performance procedure described as we have identified as part of a disciplinary procedure, before dismissing the Claimant. There was certainly no evidence of warnings of escalating formality as to the Claimant's performance.
70. However, we remind ourselves that unreasonable conduct, as we find this to have been, does not equate to discriminatory conduct.

The Applicable Law

71. Section 99 of the Employment Rights Act 1996 provides,

99. Leave for family reasons

- (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;
 - [(aa) time off under section 57ZE]
 - [(ab) time off under section 57ZJ or 57ZL]
 - (b) ordinary, compulsory or additional maternity leave;
 - [(ba) ordinary or additional adoption leave]
 - [(bb) shared parental leave]
 - (c) parental leave;
 - [(ca) paternity leave]

- [(cb) parental bereavement leave]
- (d) time off under section 57A;

and it may also relate to redundancy or other factors.

- (4) A reason or set of circumstances prescribed under subsection (1) satisfies subsection (3)(c) or (d) if it relates to action which an employee-
 - (a) takes;
 - (b) agrees to take; or
 - (c) refuses to take;

under or in respect of a collective or workforce agreement which deals with parental leave.

- (5) Regulations under this section may-
 - (a) make different provision for different cases or circumstances;
 - (b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section.

72. Regulation 20 of the Maternity and Parental Leave Regulations 1999 provides:

20, Unfair dismissal

- (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—
 - (a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
 - (b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.
- (2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
 - (b) it is shown that the circumstances constituting the redundancy applied equally to one or more

employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

- (c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
- (3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—
- (a) the pregnancy of the employee;
 - (b) the fact that the employee has given birth to a child;
 - (c) the application of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;
 - (d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave;
 - (e) the fact that she took or sought to take—
 - (i) additional maternity leave
 - (ii) parental leave, or
 - (iii) time off under section 57A of the 1996 Act;
 - (f) the fact that she declined to sign a workforce agreement for the purposes of these Regulations, or
 - (g) the fact that the employee, being—
 - (i) a representative of members of the workforce for the purposes of Schedule 1, or
 - (ii) a candidate in an election in which any person elected will, on being elected, become such a representative,performed (or proposed to perform) any functions or activities as such a representative or candidate.
- (4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period.

- (5) Paragraph (3) of regulation 19 applies for the purposes of paragraph (3)(d) as it applies for the purpose of paragraph (2)(d) of that regulation.
- (6) Paragraph (1) does not apply in relation to an employee if—
 - (a) immediately before the end of her additional maternity leave period (or, if it ends by reason of dismissal, immediately before the dismissal) the number of employees employed by her employer, added to the number employed by any associated employer of his, did not exceed five, and
 - (b) it is not reasonably practicable for the employer (who may be the same employer or a successor of his) to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances or for an associated employer to offer her a job of that kind.
- (7) Paragraph (1) does not apply in relation to an employee if—
 - (a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances;
 - (b) an associated employer offers her a job of that kind, and
 - (c) she accepts or unreasonably refuses that offer.
- (8) Where on a complaint of unfair dismissal any question arises as to whether the operation of paragraph (1) is excluded by the provisions of paragraph (6) or (7), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

73. Section 18 of the Equality Act 2010 provides as material that,

18. Pregnancy and maternity discrimination: work cases

(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) ...
- (5) ...
- (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 of (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.

74. Section 39 of the Equality Act 2010 provides that,

39. Employees and applicants

- (1) An employer (A) must not discriminate against a person (B)—
 - (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (2) An employer (A) must not discriminate against an employee of A's (B)—
 - (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.
- (3) An employer (A) must not victimise a person (B)—

- (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (4) An employer (A) must not victimise an employee of A's (B)—
- (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.
- (5) A duty to make reasonable adjustments applies to an employer.
- (6) Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—
- (a) unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or
 - (b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.
- (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
- (a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
 - (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.
- (8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

75. Section 136 of the Equality Act 2010 makes provision for the incidents of the burden of proof and provides that,

136. Burden of Proof

- (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.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) [...]

Conclusions

76. We think it is convenient to start with the email by which the Claimant was dismissed on 21 April 2019, in which the Respondent as we have found, expressly acknowledged that the Claimant had ongoing medical issues and said that the medical grounds had resulted in a compromise of the Claimant performing her role.
77. There was no issue before us that those medical grounds were entirely pregnancy related. The Claimant had told the Respondent as much and had produced clear medical evidence to that effect, which also showed that she was not fit for any work until 29 April 2019.
78. We do not consider that we need to go any further than this to conclude that the Claimant's pregnancy related illness was an effective cause of her dismissal, because the Respondent said so in terms in his own email by which he dismissed the Claimant. We are satisfied and do not see that there could be any controversy about the fact that the Claimant's dismissal was unfavourable treatment of her.
79. It follows in the Tribunal's judgement that we have been satisfied by the Claimant, without resort to the burden of proof provisions in the Equality Act 2010, that the Claimant's dismissal was because of pregnancy related illness, at least that was an effective cause and that this was therefore an act of unlawful pregnancy discrimination contrary to Section 18 and 39 of the Equality Act 2010.

80. However, since a dismissal is only unfair where a reason connected to pregnancy is the reason or principal reason for dismissal, we must go on to consider whether the Claimant has proved that, concluding as we do that the Claimant bears the burden of proving that.
81. We have been satisfied that the Claimant has shown that the principal reason for her dismissal was her pregnancy related illness and that this was, for the purposes of Regulation 20 of the Maternity and Parental Leave Regulations 1999, a reason connected to her pregnancy.
82. The reference in the 21 April 2019 email dismissing her, to periods of probation, was we find a device since the Claimant's probationary period had ended in December 2018 and had not been the subject of extension, or indeed discussion since then. This email was the first time probation was referred to following the Claimant's announcement of her pregnancy. As we have said, we gave particular weight to the absence of any reference to extend her probation in the 10 March 2019 email, which we concluded was an essentially unexceptional identification of areas for improvement following the adverse Ofsted report which affected the school generally.
83. The reference in the 21 April 2019 email to probationary targets, we find was to obscure the relationship between dismissal and pregnancy and to suggest that there were acute performance concerns in the Claimant's case which we have not been satisfied there were.
84. The Claimant has satisfied us that performance was not the reason, or predominant reason for her dismissal and that but for her pregnancy related absence, which was a significant focus of the Respondent's enquiries, she would not have been dismissed. It follows that she has satisfied us on the balance of probabilities that the principal reason for her dismissal was one connected to her pregnancy.
85. Such a reason for dismissal is automatically unfair and therefore we conclude that her dismissal, as well as being discriminatory under the Equality Act 2010, was unfair under the Employment Rights Act 1996.
86. It follows that the Claimant's complaints are well founded and we will therefore hear the parties on issues relating to Remedy.

Remedy

87. We have now heard evidence and submissions about remedy.
88. The Claimant says and we accept, that she did not receive monthly pay slips from the Respondent, but she has provided evidence that shows payment to her of monthly net pay of £1,167.81. We have noted that her gross contractual pay was £14,827.04. That monthly net pay equates to annual net pay of £14,013.72 and to a weekly net amount which we will use as the basis for our calculations of £269.49.

89. We have found that the Claimant was dismissed with effect from 21 April 2019. As a result of her dismissal the Claimant experienced immediate loss of earnings in the form of loss of continued statutory sick pay. That statutory sick pay was payable at a rate of £94.25 per week, which equates to £13.46 per day.
90. The Claimant's evidence, which we accept and which was not challenged, was that she would have been fit to return to work on 15 May 2019 and would have worked thereafter until the start of her maternity leave on 1 October 2019.
91. She would thereafter have been on maternity leave had she been employed by the Respondent at that time, in fact she received statutory maternity allowance and so she would have received statutory maternity pay for the first six weeks of her maternity leave at a rate of 90% of her gross pay. Therefore the Claimant has also experienced the loss of those six weeks of statutory maternity pay, although thereafter the Claimant received statutory maternity allowance which equates to ongoing statutory maternity pay.
92. The Claimant does not claim for any loss of earnings after her maternity leave. The Respondent did not argue that the Claimant had failed to mitigate her loss by obtaining alternative employment during that period and we in any event are satisfied that the Claimant did not unreasonably fail to mitigate that loss.
93. The Respondent did argue that the Claimant had caused the School loss through her performance and there was a consequent withdrawal of Council funding, but the Respondent has not satisfied us that the Claimant's conduct was blameworthy, or indeed caused their loss. The Respondent said that he had other evidence to rely on to that effect, but it had not been included in the Final hearing bundle and we did not consider that it was within the overriding objective for there to be a further adjournment of these proceedings in this case. Especially where such documentation would have been relevant to liability and therefore ought already to have been before us if it was to be relied on.
94. We therefore concluded that the Claimant had proved that she suffered loss of statutory sick pay, loss of pay thereafter and loss of statutory maternity pay after that.
95. The amounts in question are as follows:
- 93.1 for the period 22 April 2019 to 15 May 2019
- 23 days at the daily rate of £13.46 = £ 309.68;
- 93.2 for the period 15 May 2019 to 1 October 2019
- 139 days equating to 19.857 weeks,
at weekly net pay of £269.49 = £5,351.39;

93.3 for the first 6 weeks of the Claimant's maternity leave thereafter,

6 weeks at full pay would be £1,616.97

at 90% it is: £1,455.27 less the statutory maternity allowance that the Claimant received of £151.20 per week x 6 = £ 907.20

This means a loss to the Claimant of the balance of £ 548.07

96. That produces a total for past loss in the sum of **£6,209.14** and that is the amount which we award to the Claimant for past loss of earnings.

97. Turning to the issue of injury to feelings, the Claimant says that she should be awarded damages for injury to feelings within the higher band of the bands for damages for injury to feelings set out in the Presidential Guidance on Damages for Injury to Feelings, including the second addendum which is that which applies to this case since it was presented after 6 April 2019. The Respondent says that any award for injury to feelings should be at the absolute bottom end of the lowest band.

98. We have taken into account the following factors,

98.1 Firstly, the length of the Claimant's service before she was dismissed. This was a fairly short period of employment, the Claimant had not secured statutory employment protection against unfair dismissal or for a redundancy payment.

98.2 We have taken into account the Claimant's salary as a factor to which we should at least look in assessing her appropriate award for damages to injury to feelings, reminding ourselves that such an award is purely compensatory and is not intended to punish an employer which has broken the law.

98.3 We have taken into account that the Claimant, in the period leading up to her dismissal, had been asking for help, support and understanding from her employer, but had not been receiving any sympathy and we have taken into account that the Respondent did not seem to be taking what the Claimant was saying on board, namely the Claimant was explaining that she was absent from work for pregnancy related illness. We are satisfied that the Claimant was clear about the situation and that what she said ought to have been treated with respect. Instead the Claimant was asked to give a certain date about her return to work in an inherently uncertain situation in which she was not fit for work and which she was protected against unfavourable treatment. Indeed, the Claimant was expected, while off sick, to come into the school to meet.

98.4 The Respondent has never apologised to the Claimant, or even identified that it was treating the Claimant in even an unfortunate way given that it was dismissing her so peremptorily and the Respondent has still not indicated or accepted that he did anything wrong. Of course that is his right, but in our view, it aggravates the Claimant's injury to her feelings.

- 98.5 The Respondent did not offer the Claimant a right of appeal against the decision to dismiss her without any warning and the Claimant knows and has known for some time that the Governors had been involved in a decision that she should be dismissed. We think that we can take into account the absence of a right of appeal in setting an award for injury to feelings.
- 98.6 We have taken into account that the Respondent has throughout these proceedings blamed the situation on the Claimant's lack of professionalism, but has not proved any such lack of professionalism despite ample opportunity to do so.
- 98.7 The Respondent has persistently laid the blame for a removal of funding at the Claimant's feet without proving that through evidence to support it.
99. Considering all of those factors and the parties' submissions, we think that this is neither a lower band, nor a higher band case. We think that it is a middle band case, it is a one off act – dismissal – but with some of the most serious consequences that one off act of discrimination can have, certainly so far as economic consequences are concerned.
100. We have noted that the Claimant got better after the period of sickness absence that she had. We have taken into account that this was a blatant act of discrimination, as we have found, it was evident on the face of the email by which the Claimant was dismissed which drew the connection between the Claimant's dismissal and her pregnancy related absence. We can understand the Claimant's feelings of helplessness and lack of agency in the way that she was treated and the Respondent has defended the proceedings throughout and therefore forced the Claimant to rely on the Tribunals to vindicate her rights through this process. All of which we consider are aggravating factors in the circumstances.
101. Considering where, therefore, within the middle band we should place an award, doing the best that we can in reaching a decision which is necessarily impressionistic, we have concluded that the amount, which is just and equitable to award, is £15,000 for injury to feelings.
102. In respect of each of the award for past financial loss and for damages for injury to feelings, interest is payable. On the award for injury to feelings, interest is payable at a rate of 8% for the period between the unlawful act and today's date, that is a period of 701 days, 8% of £15,000 is £1,200.
103. That equates to a daily interest rate of £3.29 and the interest therefore for the period 21 April to 23 March 2021 is £2,003.08.
104. On past loss of earnings, interest is recoverable from the mid-point of the date of the unlawful act and today, that is a period of 350.5 days. The rate of interest is 8% of the £6,209.14 which we have awarded. That is annual interest of £496.73 and a daily rate of £1.36; 350.5 days at £1.36 is £476.67.

105. It follows that the total award which is the product of financial loss, damages to injury to feelings and interest on each of those amounts is **£23,988.89**.

106. That is the amount we order the Respondent to pay to the Claimant.

Employment Judge T Brown

Date 15 July 2022

Judgment sent to the parties on

26 July 2022

For the Tribunal office