EMPLOYMENT TRIBUNALS

Claimant: Mrs K Hill

Respondent: 9ine Accounting Limited

Heard at: Midlands (East) Region

On: Wednesday 28 September 2022

Before: Employment Judge R Broughton (sitting alone)

Representation

Claimant: Mr Leonhardt - counsel
Respondent: Mr Mason – Director of the Respondent

RESERVED JUDGMENT

The claim that the Claimant was subjected to discrimination contrary to section 18 of the Equality Act 2010 (detriment and dismissal) is well founded and succeeds.

The claim that the Claimant was automatically unfairly dismissed contrary section 99 of the Employment Rights Act 1996 is well founded and succeeds.

The claim that the Respondent failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures is well founded and succeeds and a 20 % uplift for the compensatory amount for unfair dismissal is awarded and 15 % uplift for the compensation for Injury to feelings in respect of the dismissal.

The claim that the Respondent failed to provide the Claimant with a written statement of particulars contrary to section 1 of the Employment Rights Act 1996 is well founded and succeeds and compensation is awarded pursuant to section 38 Employment Act 2002.

The Respondent is ordered to pay the following sums to the Claimant :

(1) Injury to feelings in the sum of **£15,436.66** which includes 15% uplift on the sum representing injury to feelings arising from the dismissal plus interest at 8%

(2) Failure to provide written particulars: **£559.12**

(3) Loss of earnings : this is the subject of further orders. Decision is reserved on this

element of compensation.

RESERVED REASONS

Background

1. The Claimant issued a claim presented to the Employment Tribunal on 9 November 2020 following ACAS early conciliation from 30 September 2020 to 15 October 2020.

2. The Claimant had been employed by the Respondent from 21 October 2019 and her employment ended on 7 July 2020. She received one week's notice of termination from the Respondent.

3. The claim form identified the claims as follows:

   (a) that the Claimant was subjected to pregnancy discrimination contrary to section 18 of the Equality Act 2010

   (b) she was automatically unfairly dismissed contrary to section 99 of the Employment Rights Act 1996.

   (c) the Respondent failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, and

   (d) the Respondent failed to provide the Claimant with a written statement of contract particulars contrary to section 1 of the Employment Rights Act 1996.

4. The matter was set down for a preliminary hearing for case management to take place on 28 January 2021. The notice of a claim dated 16 November 2020 included case management orders.

5. The claim was issued against 9ine Accounting Limited. The sole director of the Respondent is Mr Russ Mason. Mr Mason contacted the Employment Tribunal by email on 9 December 2020. He requested an extension to submit a response to 14 February 2021. An extension to file the response was granted by Employment Judge Adkinson on 17 December 2020.

6. The matter then came before Employment Judge Britton on 30 March 2021 at a telephone preliminary hearing, which Mr Mason on behalf of the Respondent attended and Mr Kenealy, solicitor for the Claimant.

7. The Respondent's defence to the claim was essentially that her dismissal was because of concerns about her performance and other issues, including going on holiday during the Covid pandemic when she should have been self-isolating and issues with furlough however, the essence of the defence was that there were serious shortcomings in her performance.

8. Employment Judge Britton made a number of orders amending the original orders set out in the notice of claim. Following a failure to comply with those orders by the Respondent, a strike out warning that was issued by the Regional Employment Judge

Swann on 23 February 2022. There was no response to that strike out and, as a consequence, Employment Judge Hutchinson struck out the Response on 14 March 2022.

9. Mr Mason on behalf of the Respondent then submitted what was accepted as an application for reconsideration against that decision on 29 March 2022. The case was set down by Employment Judge Clark for a hearing. The order provided that the matter would be listed for an attended remedy hearing with orders that the Claimant's representative file a bundle of documents and a witness statement. It also provided that the Respondent's application for reconsideration of the strike out judgment would be determined as the first matter and if the application failed, a remedy hearing would follow.

10. The order provided that the Respondent may participate in the hearing in respect of remedy only in so long as any evidence, arguments or submissions do not seek to challenge liability.

Today's hearing

11. At today's hearing, the Claimant produced a hearing bundle. It numbered 28 documents and ran to 102 pages.

12. Additionally, the Claimant submitted a witness statement from Hannah Riley, a solicitor at the firm representing the Claimant, relevant to the reconsideration application.

13. The Claimant had prepared a witness statement and Counsel for the Claimant submitted written submissions.

14. Mr Mason had sent into the Tribunal on 27 September 2022 timed at 14:47 a list of documents which he had previously sent to the Claimant to be included in the hearing bundle for the final hearing. That consisted of 13 documents paginated R1 to R13.4. Mr Mason also brought with him copies of a number of emails dated 30 June 2020 timed at 17:07 from the Claimant to Mr Mason, an email 30 June 2020 timed at 16:56, an email 2 July 2020 timed at 12:40 from Mr Mason to the Claimant, an email trail to and from Mr Mason and the Claimant from 30 June 2020 at 16:56 to 2 July 2020 at 12:40.

15. Additionally, on 27 September 2022 the Respondent had sent into the Tribunal an email timed at 12:51 attaching two letters, one from a Manager at the Respondent, Jo Wardle, and another from Tanya Randall who replaced the Claimant as a Receptionist/Administrator from 15 July 2020. Those statements, however, were relevant to matters of liability and therefore would only be relevant in circumstances where the reconsideration application was granted.

16. The Respondent also sought to rely upon the email exchange between Mr Mason and Mr Kenealy from 2021 at 13:35 to 7 June 2021 at 10:57, which was on the Tribunal file.

17. The first issue that we had to determine at today's hearing was therefore the application for reconsideration of the strike out of the Response. Mr Mason's ground for seeking a reconsideration was that he had received no communication from the Claimant's solicitors or from the Tribunal since 6 August 2021.That application for reconsideration was refused . The reasons for refusing it were announced at the hearing itself. A judgment has been issued separately recording the decision.

18. As the application was not granted, we then turned to dealing with the substance of the claim.

19. Although the claim had been listed as a remedy hearing, there had been no liability Judgment issued under Rule 21 of the Employment Tribunal Rules and counsel for the Claimant therefore was in agreement that I would need to hear evidence from the Claimant on the issue of liability to determine the claims. There was also a jurisdictional issue to determine in respect of time limits. In accordance with the orders made by Employment Judge Clark and in light of the fact that the application for reconsideration of the strike out of the Response was not granted, the Respondent did not participate in that part of the hearing. Mr Mason was not permitted to adduce evidence in relation to liability or cross-examine the Claimant on matters of liability.

20. The Claimant gave evidence on issues of remedy under oath. She was asked questions by the Tribunal and Mr Mason was permitted to cross-examine her.

21. Mr Mason did not produce a witness statement, but he made oral submissions on remedy and I will turn to those shortly.

22. Counsel for the Claimant also made oral submissions both on the issue of liability and on remedy.

23. Because the reconsideration application had taken all morning, the decision on liability and judgment was reserved.

24. I shall address the findings on liability first.

The issues

25. The issues to be determined are as follows:

1. ***Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)***

1.1 Did the respondent treat the claimant unfavourably by doing the following things:

1.1.1 Did Mr Mason make the comment to the Claimant on 11 February 2020, on learning that she was pregnant that: "Well, that's my plans for you ruined".

1.1.2 Did Mr Mason make the comment to the Claimant on 13 February 2020 (after Ms Turnbull had been dismissed): "*That would have been your new office but now you will be leaving soon*".

1.1.3 Did the Respondent dismiss her on 7 July 2020.

1.2 Did the unfavourable treatment take place in a protected period?

1.3 If not did it implement a decision taken in the protected period?

1.4 Was the unfavourable treatment because of the pregnancy?

1.5 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

1.6 Was the unfavourable treatment because the claimant was on compulsory maternity leave / the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

2. *Section 99 ERA: Automatic Unfair Dismissal*

2.1 Was the claimant dismissed?

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal?

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?

2.5 Was the reason or principal reason for dismissal related to the Claimant's pregnancy? If so, the claimant will be regarded as unfairly dismissed.

2.6 The respondent says the reason was capability (performance).

3. *Employment particulars: section 38 EA 2002*

3.1 Did the Respondent fail to provide the Claimant with particulars of her employment not later than two months after her employment started pursuant to section 1 (2) ERA?

3.2 *Did the employment tribunal find in favour of the Claimant under any claims pursuant to the jurisdictions listed in Schedule 5?*

3.3 *Is it just and equitable in all the circumstances, to increase the award by the higher amount equal to four weeks' pay?*

4. Acas *uplift*

4.1 Has the Respondent failed to comply with the ACAS Code and if so how?

4.2 Was the failure unreasonable?

4.3 Is it just and equitable in all the circumstances to increase any award it makes to the employee, by an amount which is no more than 25 per cent?

Findings of Fact

26. All findings of fact are based on a balance of probabilities. All the evidence has been considered however this judgment addresses only those findings relevant to the issues to be determined.

27. The Claimant's undisputed evidence which I accept, is that she was employed from

21 October 2019, after having worked for the Respondent from 8 October to 18 October 2019 through an agency.

28. I am satisfied that the Claimant asked Mr Mason about a written contract of employment but one was not provided. She did not raise a complaint or a grievance. While in her written statement she refers to raising this on 'numerous occasions' , she gave oral evidence in response to a question from me, that a couple of colleagues told her they had spoken to Mr Mason and "*I mentioned it to Mr Mason and he said it would happen.*" I am satisfied that she asked about a contract but not that she did so on 'numerous occasions' and indeed she does not identify when those occasions were.

29. In February 2020, the Claimant learned that she was pregnant. She informed Mr Mason, the sole director of the business, that she was pregnant on 11 February 2020. The Claimant complains that he had replied:

"*Well, that's my plans for you ruined*".

30. The Claimant's undisputed evidence which I accept, is that this comment: made her feel *"panicky",* she did not know whether her job or the plans that Mr Mason had for her progression, had '*gone'.* Under cross examination the Claimant gave evidence that Mr Mason behaved in a contradictory way, she accepted that he had congratulated her and was '*great'* one minute but then there were *'little digs'*, as if he was happy for her but upset about the impact of her pregnancy on him and his business.

31. Two days later on 13 February 2020 Ms Turnbull, who was Mr Mason's Personal Assistant, was dismissed. The Claimant complains that Mr Mason then told her:

"*That would have been your new office but now you will be leaving soon*".

32. The Claimant's undisputed evidence which I again accept, is that this comment made her feel: "*on edge*", unsure of her future with the Respondent.

33. The Claimant was on furlough during the Covid pandemic from March on June 2020, she returned to work in June 2020 but became unwell due to her pregnancy and was advised by her midwife to start her maternity leave earlier than she had intended.

34. On **22 June 2020,** the Claimant emailed Mr Mason regarding her maternity leave, at the time she was signed off as unfit for work. The Claimant explained that she had intended to start her maternity leave at the beginning of August however, due to medical issues, she wanted to start her maternity leave on 21 July 2020. The Claimant confirmed that it was her intention to take the full 52 weeks of maternity leave. She also requested to take her accrued annual leave prior to maternity leave commencing, which in effect meant that she would not be returning to work before starting maternity leave.

35. Although the Claimant has not produced any evidence from her midwife or other medical evidence, her undisputed evidence which I accept, is that her midwife had suggested that she sign her off work sick until her due date on 8 October 2022. The Claimant however felt that this would not be fair on the Respondent and therefore decided to start her maternity leave earlier and return earlier from maternity leave.

36. The Claimant's evidence is that Mr Mason replied to her on 22 June 2020 by email,

stating that he understood "*where you* [the Claimant] *are coming from*" and asked for an update on where the Claimant was regarding her archiving work in the office. The Claimant took that response to be an agreement to her starting her maternity leave on 21 July 2020. A copy of the email is not in the bundle and under cross examination, it was put to her by Mr Mason that he had not agreed to an earlier start date however, her evidence is that he had also in the same email told her that he "*completely understood*", about her request and made the comment *"enjoy the rest of the pregnancy*" and only went on to ask about the information he wanted about where she had got to with the projects she was working on.

37. The Claimant's undisputed evidence which on balance I accept, is that she provided an update on her work the following day.

38. On a balance of probabilities, given Mr Mason was not in a position to give evidence himself about what his intentions had been or the contents of the 22 June email, I accept the Claimant's evidence about what was contained in the email and that he had made it quite clear that he had no objection to her starting her maternity leave earlier. As maternity leave can be taken up to 11 weeks before the due date, counsel submits that the earliest date it could in fact have started would have been **30 July 2020.** I find on a balance of probabilities, that this would have been the date her maternity leave would have started but for the act of dismissal.

39. Shortly thereafter on **30 June 2020**, Mr Mason emailed the Claimant dismissing her with one week's notice, with an effective termination date of 7 July 2020 . The email alleged that the Claimant had not been keeping up with her workload and that there had been a distinct difference in the Claimant's work ethic shown with the quality of output of the Claimant's work. It also referred to errors that had been found with archiving (p.64-66) . It included the following:

"I know the timing of this communication isn't great but I've been considering your position at 9ine for some time now and it is rather unfortunate that we can't' sit down in person to discuss this further.

You started life with 9ince with such vigour and enthusiasm that it appeared you would grow with the business and become a great asset within. "

40. Th email goes on to refer to Mr Mason working from the Claimant's work station while she was absent and realising that she was not keeping up to date with her workload and that there were lots of important client files hidden in her draws, numerous client records beneath her desk and client files which should have had a 'home' . Mr Mason goes on to allege that the Claimant had told him that she had sorted the backlog of filing before starting an archiving project however there was filing left to be done and that errors had been identified on the archiving project; " *I don't think your mind has entirely been on work when you have been in the office".*

41. Mr Mason made no attempt to ascertain what may have been on the Claimant's mind or allow her a right of reply and proceeded to confirm the decision to terminate her employment, with her final date of employment being 7 July 2020.

42. Mr Mason did at the end of the email state; *"Please give me a call if you wish to discuss further".* The Claimant did not call him . He does not however reference any right of appeal.

43. Mr Mason had produced in support of the application for reconsideration, some

evidence about the alleged performance issues. This evidence was considered as part of the reconsideration application in the context of the prima facie merits of the response, however because the reconsideration was refused, that evidence regarding liability was not considered as part of the substantive hearing.

44. The Claimant replied by email on 30 June 2020 thanking the Respondent for the time with them and querying the impact the dismissal would have on her entitlement to statutory maternity pay. She was informed that as the Respondent was no longer her employer, they were no longer responsible for paying her statutory maternity pay. The Claimant did not raise an appeal. Her evidence is that she did not consider Mr Mason would change his mind.

45. There were exchanges of emails on 2 July 2020 relating to the Claimant's accrued annual leave. The Claimant did not receive her wages for June 2020 because she had taken more than her annual leave entitlement and her wages were withheld . Mr Mason claims that she still owes the Respondent £708.33. Counsel for the Claimant confirmed that there is no claim by the Claimant in respect of an alleged unlawful deduction from wages The losses she claims date from the termination date in July only. In the last email the Claimant sent to Mr Mason, her undisputed evidence is that she stated that she believed the reason for her dismissal was because she was pregnant and the Respondent wanted to avoid paying her SMP. The Claimant's undisputed evidence is that she did not receive a response to that email.

46. The Claimant complains that the dismissal was because of her pregnancy and/or her intention to take maternity leave and thus it is automatically unfair.

47. In the circumstances, the default in terms of the failure to follow the ACAS process was serious. There was no meeting with the Claimant and although she was absent on sick leave at the time, there was no attempt otherwise to meet with her at her home or even explain the reasons over the telephone. There was no opportunity for her to respond to the allegations and no right of appeal.

Jurisdiction

48. The complaints, in relation to the alleged comments Mr Mason made in February 2020 were issued outside the primary 3 month time limit. No oral evidence was given by the Claimant about why she had not submitted a claim in relation to those complaints, within the primary 3 month time limits. Counsel for the Claimant however made submissions on this issue.

49. Counsel for the Claimant submits that the comments in February and the decision to dismiss amount to a continuing course of conduct in that; they related to the same pregnancy, they were carried out by the same individual, namely Mr Mason, who is the sole director of the business and thus it is argued that they are brought within time.

50. In the alternative, Counsel argues that it would be just and equitable to extend time. He submits that it would not be conducive to good industrial relations to not allow the claims to proceed, that it should not be 'used against her' that she did not bring the claims until she had been subjected to a more significant act i.e. the dismissal.

51. I now turn to the relevant legal principles to be applied.

Legal principles

Discrimination contrary to section 18 of the Equality Act 2010

52. Section 18 (7) Equality Act 2010 (EqA) stipulates that no claim of direct sex discrimination may be made under section 13 EqA based on the treatment of a woman that falls within section 18 EqA. The Claimant brings her complaints of discrimination pursuant to section 18 EqA only..

53. Section 18 of the EqA provides as follows:

Pregnancy and maternity discrimination: work cases

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

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

(a)because of the pregnancy, or

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

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

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

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

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

Comparator

54. In a claim of pregnancy and maternity discrimination under section 18 EqA the claimant does not require a comparator. S.18(2) provides that a pregnant woman suffers discrimination if she is treated '*unfavourably*' and that treatment is because of her pregnancy or an illness arising as a result of it.

Causation

55. Lord Justice Mummery in ***Madarassy v Nomura International plc 2007 ICR 867, CA***: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more,* sufficient *material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

56. The unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave. ***Onu v Akwiwu and anor; Taiwo v Olaigbe and anor 2014 ICR 571,***

CA, Lord Justice Underhill explained the test as follows:

'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****.'* Tribunal stress

57. ***Commissioner of Police of the Metropolis v Keohane*** **:** The unfavourable treatment was 'because of' the pregnancy within the meaning of S.18(2) regardless of the fact that the employers decision was partly based upon operational needs and the claim was made out.

58. Court of Appeal in ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA*** : Lord Justice Peter Gibson clarified that for an influence to be '*significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.'*

59. An employer may be able to successfully defend a direct discrimination claim if it can show that it was genuinely unaware of the claimant's protected characteristic.

Unfavourable treatment

60. The ECHR Code does not deal separately with the definition of 'unfavourably' in the context of section 18, claims however, it give examples of treatment that will be covered. Para 8.22 notes that the following would all be unlawful under s.18: disciplining a woman for refusing to carry out tasks due to pregnancy-related risks, assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result.

61. Depriving a woman of an opportunity for promotion because she is pregnant or on maternity leave will amount to unfavourable treatment : ***Commissioner of Police of the Metropolis v Keohane 2014 ICR 1073, EAT*****.** The EAT held that the employee does not have to wait and see if such a risk materialises before she is able to bring a complaint.

Automatic Unfair Dismissal

Section 99 Employment Rights Act 1996 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,

(b)ordinary, compulsory or additional maternity leave.

62. Employees who are dismissed for reasons connected with pregnancy are given special protection by the Employment Rights Act 1996 (ERA). The relevant provisions are contained in section 99 ERA and in the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312 ('the MPL Regulations'). There is no minimum service requirement (qualifying period) for the right to claim automatically unfair dismissal under section .99.

63. An employee is not required to prove his or her case. She only has to produce some evidence before the tribunal to create a presumption in law that the dismissal was for an inadmissible reason under S.99. Where an employer argues that the dismissal was for a different reason and was fair, it must show the real reason for dismissal and that it was one of the acceptable reasons under S.98(1) or (2).

64. The situation is somewhat different, however, where the claimant lacks the two years' continuous service required to claim ordinary unfair dismissal. There is no qualifying period to claim automatically unfair dismissal under S.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 S.99 and the applicable regulations: ***Smith v Hayle Town Council 1978 ICR 996, CA*****.**

65. If it is found that the reason for dismissal was an inadmissible reason, it is no defence the employer to argue that the dismissal was nonetheless reasonable in all the circumstances and therefore fair: ***George v Beecham Group 1977 IRLR 43, ET*****.**

Written Particulars

66. Under the law as it stood before 6 April 2020, a section 1 statement had to be provided to employees not later than two months after their employment started pursuant to section 1 (2) ERA.

67. With effect from 6 April 2020, the right to a written statement is now a 'day one' right pursuant to regulation 3 of the Amendment Regulations.

68. **Section 38 Employment Act 2002** states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA.

Section 38 Failure to give statement of employment particulars

(1)This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the ***jurisdictions listed in Schedule 5.***

(2)If in the case of proceedings to which this section applies—

(a)the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or (in the case of a claim by an worker) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),
the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3)If in the case of proceedings to which this section applies—

(a)the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an worker) under section 41B or 41C of that Act,
*the tribunal must, subject to subsection (5**), increase the award by the minimum amount and may, <u>if it considers it just and equitable in all the circumstances</u>, increase the award by the higher amount instead.***

(4)In subsections (2) and (3)—

*(a)references to the minimum amount are to an amount equal to **two weeks' pay,** and*

*(b)references to the higher amount are to an amount equal to **four weeks' pay.***

(5)The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

Tribunal stress

69. The list of jurisdictions set out in Schedule 5 includes section 111 ERA (unfair dismissal) and sections 120 of the Equality Act 2010 (discrimination in work)

70. The crucial date for determining whether the employer was in breach of the rules on written particulars is the date on which the main proceedings were begun by the worker: section 38 (2)(b) and (3)(b).

71. In ***Costco Wholesale UK v Newfield EAT 0617/12*** the Appeal Tribunal held that the tribunal had not erred by awarding the maximum of four weeks' pay for the employer's failure to provide a S.1 statement. The tribunal had taken into account the fact that the employer was a large employer, had no excuse for failing to provide them and the failure had led to difficulty in establishing what contractual arrangements existed concerning what hours the claimant was required to work.

72. The EAT held that inadvertence might have excused a small and inexperienced employer with limited resources to some extent.

73. In an unfair dismissal claim, any S.38 increase is applied to the compensatory award before the application of the statutory maximum.

Acas Uplift

74. Section 207A(2) TULR(C)A provides that: 'If*, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'*

75. Schedule A2 TULR(C)A — S.207A(1) sets out the jurisdictions and includes Unfair dismissal and discrimination.

76. Pursuant to section 124A ERA, it is clear that, for the purposes of unfair dismissal compensation, any adjustment made in accordance with S.207A only applies to the compensatory award. It does not apply to the basic award, protective award or any other type of compensation awardable by a tribunal.

77. The potential for adjustment to the compensatory award under S.207A only applies if the employer's or employee's failure to comply with the provisions of the Code was 'unreasonable'.

78. ***Kuehne and Nagel Ltd v Cosgrove EAT 0165/13***, a tribunal may only consider adjusting the compensatory award once it has made an express finding that a failure to follow the Code was unreasonable.

79. The uplift ought not be used by a tribunal to mark its disapproval of the employer's conduct in respect of *unrelated* matters: ***Aptuit (Edinburgh) Ltd v Kennedy EAT 0057/06*.**

80. In ***Lawless v Print Plus EAT 0333/09*** Underhill P acknowledged that the relevant circumstances to be taken into account by tribunals when considering uplifts would vary from case to case but should always include the following:

- *whether the procedures were applied to some extent or were ignored altogether*
- *whether the failure to comply with the procedures was deliberate or inadvertent, and*
- *whether there were circumstances that mitigated the blameworthiness of the failure to comply.*

81. I have also considered the guidance in ***Slade and anor v Biggs and ors 2022 IRLR 216, EAT***, including consideration of whether the uplift potentially overlaps, with other general awards, such as injury to feelings in discrimination claims and If so, what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting.

82. It may not be necessary for a claimant who seeks an uplift of compensation on account of the employer's failure to comply with the Acas Code to direct the tribunal to particular provisions of the Code that he or she alleges have been breached: ***Gavli and anor v***

LHR Airports Ltd EAT 0012/21.

83. Section 207A(5), provides that the Acas Code adjustment must be made **before** any award under **S.38 EA** in respect of the employer's failure to provide written particulars of employment. The section 207A adjustment cannot affect the amount of an award under S.38 EA.

Submissions by Counsel for the Claimant on liability

84. Counsel for the Claimant submits that as far as liability is concerned, the Claimant's evidence is unchallenged. There is no alternative to the narrative that is set out in her Claim Form and in her witness statement and that all the claims are therefore made out.

85. The Claimant has given an account of the words that were said on 11 and 13 February 2020 and, in terms of the dismissal, the reason for the dismissal needs to be seen in the context of those comments in February 2020 and that those comments are sufficient to shift the burden of proof to the Respondent.

86. Counsel for the Claimant also refers to the timing of the dismissal in that it happened shortly after she had indicated that she wanted to take her maternity leave.

87. Further, any concerns that the Respondent had raised had not been such a great concern in terms of the timing of the actions, until she had requested maternity leave. I am therefore invited to find that the principal cause of the dismissal was the maternity leave.

Conclusions and analysis on liability issues

Pregnancy discrimination: 18 of the Equality Act 2010

88. The Claimant complains that the comments that were made to her on 11 February 2020 and 13 February 2020 amounted to unfavourable treatment because of her pregnancy.

89. I am satisfied on the Claimant's undisputed evidence that Mr Mason was informed of her pregnancy on the 11 February 2020 and therefore he had the requisite knowledge of her pregnancy. There is no dispute that the Claimant was pregnant and that the alleged comments took place during the protected period.

90. I am also satisfied on the evidence that Mr Mason made the statements as alleged.

Causation

91. I am satisfied that given the context in which the comments were made, that they were because of the Claimant's pregnancy. The Respondent is not in a position to put forward any alternative explanation.

92. When considering the question of why Mr Mason acted as he did, I take into account the words which he used and the timing between when Mr Mason was told of her pregnancy and when he made the comments. The only reasonable inference to be drawn from the primary findings of fact is that those comments were said because of her pregnancy. Mr Mason I conclude was not only influenced to a significant degree by her pregnancy when making the comments but the fact of her pregnancy was what was

operating on his mind and caused him to make the comments which he did. The comments were made solely because of her pregnancy: ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA***

Less favourable treatment

93. The Claimant understood the comments to indicate that her opportunities for promotion would be negatively affected because of her pregnancy and objectively I find that it was reasonable for the comments to have that effect on the Claimant. I am satisfied that the comments amount to unfavourable treatment and gave rise to a detriment namely caused the Claimant concern about her future with the company and that there was a risk that the Claimant would be deprived of an opportunity for promotion: *Commissioner of Police of the Metropolis v Keohane 2014 ICR 1073, EAT*.

94. It is also submitted by the Claimant that the act of dismissal also amounted to pregnancy discrimination contrary to section 18 and unfair dismissal contrary to section 99 ERA. I address the issue of the act of dismissal separately below..

Jurisdiction

95. The claims in relation to the comments in February 2020 are potentially brought out of time. The ACAS conciliation period started on 30 September 2020, therefore if the last act was the 13 February 2020, the ACAS conciliation period having started more than 3 months after the last act, does not extend time. The claim was not issued until 9 November 2020 and therefore a claim in respect of an act which took place on 13 February 2020 would have been brought almost 6 months out of time (the time limit having expired on 12 May 2020). However, before determining the issue of jurisdiction in respect of these claims of section 18 detriment, I have gone on to consider the claims in respect of the termination of her employment.

Dismissal : section 18 unfavourable treatment and automatic unfairly dismissed: section 99 of the Employment Rights Act 1996

96. Mr Mason was aware of the Claimant's pregnancy on the 11 February 2020 and he made the comments on 11 and 13 February 2020 which related to her pregnancy and those comments suggested a negative attitude towards her future prospects with the Respondent because of her pregnancy.

97. The Claimant by email of the 22 June 2020 explained that she wanted to start her maternity leave earlier than originally intended and enquired about taking her accrued annual leave before her maternity leave started. It was only a week later, while she was still absent, that the decision was taken by Mr Mason to terminate her employment on 30 June 2020. Although Mr Mason raised issues about her performance in the email of the 30 June 2020, there had been no previous disciplinary proceedings and only a few months before Mr Mason had indicated that he had expected the Claimant to progress within the business.

98. The question is essentially a subjective one: why did the alleged discriminator act as he did? In determining that question, I have considered whether, based on the primary facts and the inferences that could reasonably be drawn from these, 'something more' than the fact that the Claimant was pregnant and that her contract had been terminated had been established such as to shift the burden onto the employer of proving that the reason for the decision to terminate her employment was not a discriminatory reason. As per the Court of Appeal in ***Igen v Wong Ltd 2005 ICR 931, CA*****,** and ***Madarassy v***

***Nomura International plc 2007 ICR 867, CA*.**

99. I have concluded that 'something more' had indeed been shown from the facts and inferences. This comprised a combination of the following; that Mr Mason knew of her pregnancy when the decision to dismiss was made; the fact that he had made the comments which he had made to the Claimant in February and the proximity in time between the email from the Claimant on 22 June and the decision to terminate her employment and the manner in which the termination was handled (not least the failure to provide the Claimant with an opportunity to respond before dismissing) . I conclude that the sole and if not certainly the principal reason for the decision to terminate her employment was the fact of her pregnancy and/or that she was seeking to exercise the right to take ordinary or additional maternity leave . I conclude that the issues about her performance were contrived to provide an excuse for terminating her employment before she was due to start her maternity leave or were in any event, not so serious that Mr Mason would have otherwise terminated her employment .

100. With respect to the section 99 ERA claim, the Claimant lacks two years' service as at the date of termination however, I find that she has satisfied the burden of establishing that the reason for dismissal related to her pregnancy and/or plans to take maternity leave.

101. **The claim that the termination of her employment amounted to an automatic unfair dismissal contrary to section 99 ERA is therefore well founded.**

102. **The claim that the termination of her employment amounted to unfavourable treatment because of her pregnancy and/or because she was exercising or seeking to exercise the right to ordinary and/or additional maternity leave contrary to section 18 EqA is also well founded.**

Claimant's submissions on jurisdiction

103. No oral evidence was given by the Claimant about why she had not submitted a claim within time, that was a matter that was dealt with by Counsel in his submissions. He submits that the comments in February and the decision to dismiss amounted to a continuing course of conduct in that they related to the same pregnancy, they were carried out by the same individual, namely Mr Mason, the sole Director of the business and thus it is argued that they are brought within time.

104. If the last act was **7 July 2020**, the date of termination, the 3 month time limit would have expired on 6 October 2020. ACAS conciliation started on 30 September 2020 and ended on 15 October with the claim issues on 9 November. Therefore the claims would have been brought in time.

105. The Claimant's submissions on this point are that there was a continued course of conduct and it is difficult to separate out things done by the Respondent in relation to the same director and which involve the same employee. In any event, it would be just and equitable to extend time. He argues it is not conducive to industrial relations to not be able to bring less significant, but still important allegations such as these and it should not be used against the Claimant that she did not bring a separate action until a more significant act took place, namely the dismissal.

106. In the alternative, Counsel argues that it would be just and equitable to extend time.

107. The Respondent did not make representations on this issue..

Legal Principles

108. The general rule is that a claim concerning work-related discrimination under Part 5 of the EqA must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of pursuant to section123 (1)(a) however conduct extending over a period is to be treated as done at the end of that period pursuant to section 123 (3)(a).

109. The leading case is ***Barclays Bank plc v Kapur and ors 1991 ICR 208, HL*** which I have considered.

110. In ***Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*****,** the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period .

111. The Court of Appeal in ***Aziz v FDA 2010 EWCA Civ 304, CA*** : in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

Just and equitable extension

112. Pursuant to section 123 (1)(b)EqA the employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so. However, in ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*****,** the Court of Appeal stated that '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*.'

113. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in ***British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT***) namely to have regard to all the circumstances of the case and in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Conclusion on jurisdiction

114. I am satisfied that the comments which Mr Mason made to the Claimant in February and the termination of her employment in July 2020, amounted to a course of continuing unfavourable conduct connected with her pregnancy. The behaviour although different in nature and with a gap of several months between the comments and the dismissal, was connected by the fact that it related to the Claimant's pregnancy and was conduct which related to a relatively short period of time (particularly taking into accounts

periods of absence from work while she was pregnant) which culminated in dismissal by the same director of the Respondent and the Claimant's line manager.

115. While there was not and nor is it submitted, any 'policy or regime' in place, the initial statements made to the Claimant created a state of affairs, namely indicated that the Claimant's employment situation (now that the Claimant had disclosed her pregnancy) was precarious and at risk which would continue until she was actually dismissed a few months later. This was not merely a one-off act with continuing consequences, it was part of a state of affairs in which throughout that period the Claimant's future with the Respondent was placed at risk. .

116. In the alternative, in the circumstances, I would in any event exercise the discretion to extend time in this case. The Claimant has not put forward any explanation for the delay and I have taken this into account however, that does not obviate the need to consider the balance of prejudice.

117. The comments were made to the Claimant by the sole director of the business, the Claimant was pregnant at the time and the comments made her feel 'panicky' and concerned for her future with the business. The prejudice to the Claimant would be to deprive her of claims which have obvious merit and to deprive her of the additional compensation she would otherwise be entitled to.

118. The complaints clearly have merit and whether they formed part of the claims or background facts, they are integral to the claim and would have to be considered along with what inferences it may be reasonable to draw from them to determine why Mr Mason terminated her employment. Evidence about those comments would therefore in any event need to be considered. Mr Mason would have been in a position to answer to the allegations about the comments he made, but for the failure by the Respondent to comply with case management orders resulting in a striking out of the response. There is no issue put before the Tribunal regarding cogency of the evidence or prejudice to the Respondent.

119. Taking into account all the circumstances, it would be just and equitable to extend time to allow the claims to proceed but for the fact that I have determined in any event that the acts amount to conduct extending to the date of termination on 7 July 2020.

Failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, and

120. The Respondent failed to carry out an investigation. While Mr Mason alleged that he had identified that filing had not been done and mistakes made with archiving, his mere personal observations of what he believes had or had not happened, do not constitute a meaningful investigation. There was no attempt to establish the facts. While it is not necessary in all cases to hold a meeting with the Claimant, where Mr Mason himself alleged that the Claimant had her mind 'elsewhere', it would have been incumbent on him to at least make some effort as part of an investigation process to invite an explanation from the Claimant. There was therefore a failure to comply with paragraph 5 of the Acas code:

5.It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of

evidence by the employer for use at any disciplinary hearing.

121. There was no attempt to inform the Claimant of the details of the alleged problems prior to the decision to decision. She was not told which files had not been dealt with and not told what the alleged problems with the archiving project were. There was also no disciplinary hearing with the Claimant to discuss the alleged issues. The Respondent I conclude failed to comply with paragraph 9,10 and 11 of the Acas code:

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain ***sufficient information*** *about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting. Hold a meeting with the employee to discuss the problem.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

Tribunal stress

122. Mr Mason did not give the Claimant a warning and an opportunity to improve. It is not alleged in the 20 June 2020 email that the issues were so serious as to amount to a fundamental breach of the employment relationship and nor does he set out what actual harm or impact the alleged performance issues had on the business. I conclude that this failure to issue any warning, which may have been a final warning, before dismissing amounts to a breach of paragraph 19, 20 and 21 of the Acas code:

19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or

loss of seniority.

123. Mr Mason did not inform the Claimant that she had a right of appeal, a breach of paragraph 22 of the Acas code:

22. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for *the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.*

Failure to provide the Claimant with a written statement of contract particulars contrary to section 1 of the Employment Rights Act 1996.

124. The Claimant was not issued with a written statement of particulars not later than two months after her employment started, or at any time thereafter up to the date of termination of her employment. The Claimant had requested a contract and had been told one would be provided, but it never materialised.

125. When Mr Mason cross-examined the Claimant on remedy, he did not put it to her that a contract had been provided; his line of cross-examination was concerned with the level of compensation to be ordered.

126. On the evidence, the Tribunal is satisfied that the Claimant was not provided with a written statement of particulars contrary to section 1 of the Employment Rights Act 1996.

127. In terms of liability, the Tribunal therefore finds that the Claimant's claims; her pregnancy discrimination claim contrary to section 18 of the Equality Act 2010 is well-founded, the automatic unfair dismissal claim contrary to section 99 of the Employment Rights Act 1996 is well-founded and the claim that the Respondent failed to provide the Claimant with a written statement of particulars is well-founded and all those claims succeed.

Remedy

128. Unfortunately, the schedule of loss provided by the Claimant's (pages 101 - 102) was not adequate, as Counsel for the Claimant accepted.

129. Counsel for the Claimant attempted orally to provide an alternative breakdown of the financial losses the Claimant has suffered since the date of termination, breaking it down into specific periods when she was in receipt of statutory maternity pay, maternity allowance and during those periods how much universal credit she had been paid. It became incredibly confusing, and Mr Mason quite understandably complained that this was all new information in terms of how the breakdown was being completed and it was so involved and detailed that he was struggling to understand the figures that had been produced. I had absolute sympathy with his position and expressed some frustration that the Claimant had not provided an accurate and sufficiently details schedule of loss.

130. Both parties agreed that it would not be possible during the course of this hearing to deal with the financial loss that the Claimant had suffered from the date of termination and that what was required, should a finding of liability be made in the Claimant's favour, are further orders for the Claimant to provide a fuller and amended schedule of loss and the Respondent (who is after all an accountant) to provide a counter schedule.

131. It was agreed that I would provide my judgment on the elements of remedy that I am able to determine on the evidence available which I have done as set out below. Separate case management orders will be prepared to address the outstanding elements which the parties may well find it possible to agree and thus avoid the need for a further hearing.

Findings of fact – remedy

132. Following her dismissal, there was a period of 14 weeks until the Claimant was due to give birth and she complains that she suffered a significant loss of earnings at what was a crucial time for her. This caused her stress because of the financial situation and on the advice of her midwife she did not look for alternative work. The Claimant did not produce any evidence from the midwife or other medical evidence regarding her health during this period, however her evidence on this issue was not challenged under cross examination by the Respondent.

133. The Claimant received universal credit payments. Her husband was made redundant in the first week of July 2020 . The Claimant produced a summary sheet showing their joint payments of universal credit.

134. The Claimant complains that her maternity leave should have been a special time but that she was worried about not having a job and about her family's financial situation.

135. In August 2021 until May 2022, the Claimant and her family had to move in with her husband's parents, a 2 bedroom flat with 3 children. Because she and her husband had both lost their jobs, they lost their home.

136. The Claimant gave evidence that she looked for work from 1 September 2021 after the end of what would have been her maternity leave. She gave evidence that the extent of the effort she made to find work was that she; "*made a few calls and taken my CV around the local area*". She referred to a "*lot of people*" not taking on staff due to the impact of the Covid pandemic and that the work which was available was temporary, Christmas work and she needed a steady income.

137. The Claimant confirmed under cross examination that she had produced no evidence to show that she looked for work from September 2021 up to March 2022.

138. In May 2022 she obtained work through an agency, Shorterm Limited, as a contract controller with Alstom in Derby, which is better paid than her employment with the Respondent. This job started on **16 May 2022** . Her undisputed evidence is that this was the first job which offered her a notice period and that this was important to her because she felt that after the way her employment ended with the Respondent, she needed some the security of at least a notice period.

Submissions on remedy

Claimant's submissions

Acas uplift

140. The Claimant submits that she was dismissed with no process at all. Although the Claimant accepted in cross-examination, that she had not requested an appeal, Counsel submits that she did not received a written statement of particulars and she was not told by Mr Mason that she could appeal.

141. Counsel submits that a full uplift of 25% should be applied.

Particulars of employment

142. Counsel submits that the Claimant had requested a contract and given she was about to go on maternity leave, it was particularly important that she had one. The absence of such a contract made it more likely that there would be disputes about contractual terms, such as the dispute that had arisen about how much holiday pay she had accrued and what her entitlement was.

143. Counsel submits that the Tribunal should award compensation equating to 4 weeks' pay taking into account the nature of the Respondent's business, she was about to go on maternity leave and was concerned at having no contract and disputes such as the one over holiday pay, are more likely in the absence of a written statement of terms.

Injury to feelings

144. Counsel for the Claimant submits that the injury to feelings award should include one sum for both the detriments and the dismissal. The incidents should be taken in the 'round' . The dismissal was significant and in the circumstances the compensation to be awarded should fall within the middle Vento band. It is submitted that the act of dismissal had a continuing impact. She was pregnant at the time and the dismissal caused a great deal of uncertainty. Her partner was also made redundant at the same time and her undisputed evidence is that she had to leave her home as a consequence of the termination of her employment.

145. Counsel has referred to the effect that the dismissal had on her ability to look for work and how she felt 'destabilised' by the way in which her employment had been ended.

146. The Claimant seeks £12,000, which is the lower end of the middle band.

Future financial loss

147. Counsel submits that the Claimant had asked to take her maternity leave from 24 July 2020 however, it can be taken up to 11 weeks before the due date, the earliest date it could have started would therefore have been **30 July 2020.** Counsel therefore submits that the first period of loss should cover the period from the termination date of 7 July 2020 to 29 July 2020. The Claimant seeks losses of 3 weeks and 2 days equating to **£866.32** (based on average net weekly earnings).

148. The Claimant seeks 6 weeks maternity pay at 90% of full pay which is £1,493.40.

149. In terms of financial losses from 1 August 2021, which is the date counsel submits would have been the end of her maternity leave period (not the 1 September 2021), counsel refers to the Claimant's evidence of a difficult job market, having a young baby to look after and her evidence on the impact on her confidence. Counsel argues that 9 months ls a reasonable period in the circumstances for her loss of earnings post maternity leave.

150. I was referred to the limited evidence in the bundle of attempts by the Claimant to mitigate her losses (pages 93 – 100) which only covers the period March and April 2022. The evidence consists of a few emails in March and April 2022 about a number of interviews and assessment for a few roles.

151. Counsel submits that the period of loss being claimed of 9 months from **1 August 2021**

to **16 May 2022** is a reasonable period in the circumstances.

152. Claimant's counsel accepts however that there are no documents to evidence any attempt to find work by the Claimant prior to March 2022.

Respondent's submissions

Acas uplift

153. Mr Mason made submissions that the full uplift should not be applied because the Claimant had not made herself available to discuss the issues. In response to dismissal, she had merely sent a ' thank you' response.

Particulars of employment

154. The Respondent argues that the Claimant was employed by a temporary agency before she started work with them and had received no written particulars because she was aware of what the role was because she had been performing it for a few weeks before she was employed by the Respondent directly.

Injury to feelings

155. The Respondent submits that although he appreciates "*with the benefit of hindsight the position of the Claimant's partner*" being made redundant and the knock on effect this would have had on the Claimant, this did not affect the decision of the Respondent and he submits it would be unreasonable to take her partner's circumstances into account. If the circumstances of her partner are not taken into account, then Mr Mason argues that it would be within the lower band of the Vento range applicable at that time, which was £900 to £9,000.

Future financial loss

156. Mr Mason submits that it is totally unreasonable for the Claimant to claim losses from 1 **August 2021 to 16 May 2022** and that the Claimant has not provided any supporting evidence that she was making any attempts to mitigate. He makes representations that no compensation should be ordered in those circumstances. He argues that if the Claimant had taken decisions in September 2021 not to pursue or look for work, that period should be discounted.

157. Mr Mason argues that the current job market is very vibrant and from October 2021 to May 2022 unemployment has been low and refers to a high number of vacancies for jobs and that her claim for losses during that period should be struck out.

Conclusions on remedy

Particulars of employment

158. The Respondent is not a large employer, however it is a professional business and no satisfactory explanation has been put forward by the Respondent for the failure to comply with the obligation to provide particulars.

159. I am satisfied that the Claimant asked about a written contract of employment but not on numerous occasions. She did not give evidence that the lack of contract caused her any particular concern because she was going to be absent on maternity leave .

160. I also take into account that the Claimant had been employed for only a relatively short period of time.

161. I do not consider on balance that it is just and equitable in all the circumstances, to increase the award by the higher amount equal to four weeks' pay. I am satisfied that 2 weeks provides the Claimant with adequate compensation for the default. Counsel's submission on the impact on her awareness about a right of appeal, is addressed as part of the Acas uplift.

Injury to feelings

162. Third Addendum to the Presidential Guidance provides that in respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: "*a lower band of £900 to £9,000 (less serious* cases*); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. NB these bands take account of the 10 per cent Simmons v Castle uplift"*

<u>February comments</u>

163. The comments made to the Claimant in February caused her some concern, she described feeling on 'edge' and ' panicky' however, she did not raise a complaint and continued to work hoping to remain employed by the Respondent. Those comments while no doubt caused her some concern were I find, modest in their impact. She accepts that Mr Mason seemed happy for her while also upset about the impact on his business of her pregnancy and that he made what she described as 'little digs'.

164. I have separated out the awards for injury to feelings for the acts of detriment and dismissal because although I have determined that there was a continuing course of conduct, it is not just and equitable to apply the Acas uplift for injury to feelings which relate to events which predate the dismissal itself.

165. I consider that a modest sum of **£1,500** should be applied to the upset and hurt caused by those comments early in her pregnancy. They were insensitive and it was reasonable to be hurt by them and she was upset by them.

<u>Termination of her employment</u>

166. The termination of the Claimant's employment however at a time when she was planning to shortly start a period of maternity leave, I accept caused her significant distress. The Claimant was pregnant and now without employment. I accept her evidence that this played a part in the Claimant and her husband losing their house. The Claimant I accept, felt 'destabilised' by the manner in which her employment had been terminated.

167. While to dismiss someone because they are to take maternity leave is significant and to do so in such an offhand manner by email, without even speaking to them about the alleged reasons and giving them a chance to respond, is particularly egregious, the award of compensation depends not on nature of the act of discrimination par se but on the nature of the Claimant's reaction to it. The financial difficulties the Claimant suffered and the impact on her homelife flowed from the act of discrimination, while there were other factors, the loss of employment was I accept, a material factor.

168. The Claimant believed the dismissal was because she was due to take maternity leave and therefore she was aware of the discrimination. I take into account however the

relatively short period of employment and that she did not however raise a grievance and her response was a ' thank you' email. I also take into account that in terms of the impact on her health, she did not attend her GP because of any related stress.

169. In the circumstances, I determine that a sum of **£10,000** for injury to feelings arising from the act dismissal is just and equitable.

Interest

Injury to feelings

170. Interest is awarded from the date the discrimination commenced, which was 11 February 2020 to the date of this judgement pursuant to The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 .

171. The parties have not agreed a rate of interest and interest is therefore to be calculated as simple interest which accrues from day to day under Reg 3(1) and at 8% under Regulation 3(2).

Financial losses arising from the act of dismissal

172. For all other awards, interest is awarded for the period beginning on the 'mid-point date' and ending on the day of calculation under regulation 6 (1)(b) . The 'mid-point date' is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation: regulation 4(2) .

173. However, as these losses cannot be calculated until the provision of a further schedule of loss, this part of the judgment is reserved and interest will need to be calculated in due course.

Acas uplift

174. The Claimant complains that the Respondent failed to follow the ACAS Code of Practice and seeks a 25% increase on the compensatory award.

175. The dismissal of the Claimant is a matter to which the ACAS Code on disciplinary matters applies. I have set out in my findings the extent to which the Respondent failed to comply with that Code. I find that those failings were unreasonable. While the Claimant was absent on sick leave, a meeting could have been held with her at her home or even remotely or at least some discussion had with her by telephone rather than an email which made allegations of poor performance and immediately terminated her employment. An investigation could have been carried out which involved the Claimant and a details provided of what it was alleged she had done, including the alleged errors with the archiving project.

176. The ACAS procedures were applied to some extent in that the Respondent did write to the Claimant and provide reasons for the decision to terminate her employment. However, the failures were on a balance of probabilities deliberate. I take into account that Mr Mason is a professional person, he is an accountant and he would have known or had access to support had he not been clear how to carry out a fair disciplinary process.

177. I also take into account all the circumstances including the motivation for the breach which was to remove the Claimant before she started her maternity leave. I do consider that it is just and equitable to award an uplift. While a small employer, Mr Mason is an

accountant, familiar with regulations and professional codes of conduct, he is in that sense not an unsophisticated employer.

178. The Respondent's breach of the statutory procedures related only to the dismissal .

179. The Acas uplift includes a punitive element and I consider that a **20% uplift** to the compensatory award for **unfair dismissal** would be just and equitable in all the circumstances of this case.

180. In terms of the amount for **injury to feelings** related to the dismissal, there is an element of the award for injury to feelings which reflects the manner in which the Claimant was dismissed. To avoid double counting, the uplift for injury to feelings arising from the dismissal is limited to **15%**.

Loss of earnings

181. It is not submitted by the Respondent that there was an obligation on the Claimant to mitigate her losses during the period which would have been her ordinary and additional maternity leave. I am satisfied that the Claimant should be compensated for the financial loss she suffered during the period of 52 weeks when she should have been on maternity leaving. Her losses should be limited to the salary and benefits that she would have received had she remained employed by the Respondent on maternity leave . This will need to be addressed in an amended schedule of loss

182. The Respondent submits however that the Claimant failed to take reasonable steps to mitigate during the period after her maternity leave would have ended.

183. The Claimant refers to a lack of confidence about returning to the workplace because she was concerned about securing another role only to lose it again. In May 2020 she secured a new role but only because she had secured a notice provision.

184. There is a complete absence however of any documentary evidence of attempts to find work before March 2022.

185. The Claimant refers to problems in the job market, but the reality is there is no evidence produced by her to show that she made attempts to find work and that it was difficult to do so. Her own evidence about what steps she took is vague and scant.

186. Although she may have been lacking in some confidence, there is no medical evidence to evidence that the Claimant was so affected by the discrimination that this impaired her confidence to the extent that it prevented her from looking for work.

187. In the circumstances, I am not satisfied that the Claimant should be compensated for the entire period from August 2021 to 16 May 2022 in circumstances where there was so little evidence of any attempts by the Claimant to mitigate her situation.

188. It appears from her own evidence that she only began to take more actives steps to find work in March 2022 when she was undertaking assessments and having interviews, and then secured and started a role on 16 May 2020, a couple of months later .

189. Taking into account that there would have been a period before the assessments and interviews in March 2022, when she had to search for and apply for the jobs and in the absence of any further evidence on the point to assist me in this assessment, I consider that it would have taken the Claimant no more than **14 weeks** to have secured a role

had she taken reasonable steps to find work. The first email arranging an interview is 9 March 2022. If it took about 4 weeks to identify jobs and apply for them, I estimate that it would have taken her about 14 weeks from starting to actively look for work to securing a role, based on the limited evidence presented.

190. A final decision on the sum to be awarded for loss of earnings post termination, is reserved pending the further information the parties are to provide which will be set out in separate case management orders.

Remedy : summary

191. **The elements of compensation awarded are therefore:**

a. Acas uplift

1.1 unfair dismissal**: 20%**

1.2 Injury to feelings in respect of the dismissal: **15%**

b. Injury to feelings

2.1 February comments/ detriments:

£1,500. Interest is calculated from 11 February 2020 to 17 October 2022 @ 8% (no Acas uplift) = **£321.86** (£10 monthly interest) :

Subtotal: **£1821.86**

2.2 Dismissal :

£10,000 plus uplift of 15% (£1,500): interest is calculated from 30 June 2020 to 17 October 2022 @ 8% based on **£11,500 (with ACAS uplift)** = £2,114.74 interest (£76.67 month):

subtotal: **£13,614.74**

c. **Loss of earnings from the date of termination** : *this is subject to further orders. Decision reserved on this element of compensation.*

d. **Failure to provide written particulars**: 2 weeks' pay: **£559.12** (taken from Claimant's schedule of loss : gross average weekly pay)

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Employment Judge R Broughton

Date: 17 October 2022

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