EMPLOYMENT TRIBUNALS

Claimant: Ms M Douek

Respondents: Meoros Ltd (1)
Ms C Weisfish (2)

Heard at: Manchester **On:** 6 & 7 December 2022

Before: Employment Judge Phil Allen
Ms S Howarth
Mr P Dobson

REPRESENTATION:

Claimant: Ms Akers, counsel
Second respondent: In person

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was treated unfavourably because she had exercised the right to ordinary and additional maternity leave contrary to section 18(4) of the Equality Act 2010 by the second respondent's refusal to allow the claimant to return to her tutor role in January or February 2021 and by the second respondent dismissing her from her employment with the first respondent without notice on 2 February 2021. The claim for maternity discrimination against the second respondent (Ms Weisfish) succeeds.

2. The claimant was not treated unfavourably because she had exercised the right to ordinary and additional maternity leave contrary to section 18(4) of the Equality Act 2010 by the failure of the second respondent to offer or discuss any suitable alternative role for the claimant. That allegation does not succeed and is dismissed.

3. As the first respondent (Meoros Ltd) no longer exists, having been dissolved on 16 November 2021, the Tribunal could not hear or determine the claimant's claims against the first respondent.

4. The second respondent (Ms Weisfish) is ordered to pay the claimant an award for injury to feelings arising from the discrimination found of **£11,000.**

5. The second respondent (Ms Weisfish) is ordered to pay the claimant interest on the injury to feelings award in the sum of **£1,622.58**.

6. The second respondent (Ms Weisfish) is ordered to pay the claimant the sum of **£1,002.96** as the award for the losses which resulted from the discrimination found.

7. The second respondent (Ms Weisfish) is ordered to pay the claimant interest on the discrimination award for losses in the sum of **£73.86**.

8. The ACAS code of practice on disciplinary and grievance procedures did not apply to the circumstances of the claimant's dismissal and no uplift for an unreasonable failure to comply with it under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 is awarded as a result.

The above Judgment having been made on 7 December 2022 and sent to the parties on 12 December 2022 and written reasons having been requested, the reasons below are provided.

REASONS

Introduction

1. The claimant was employed by the first respondent as a part time Tutor from April 2017. She commenced a period of maternity leave on 1 April 2020. She was dismissed by text message on 2 February 2021. The claimant claimed unfair dismissal and pregnancy and maternity discrimination.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 3 June 2021. Case management orders were made, and a list of issues was prepared and sent with the case management order which followed that hearing. The list of issues identified the following claims: automatic unfair dismissal under section 104(1) of the Employment Rights Act 1996 (dismissal for asserting a statutory right); automatic unfair dismissal under section 99 of the Employment Rights Act 1996 (dismissal related to pregnancy and/or maternity leave); ordinary unfair dismissal; wrongful dismissal (regarding notice); maternity leave discrimination under section 18 of the Equality Act 2010; breach of the Working Time Regulations 1998 (regarding non-payment of accrued but untaken annual leave); and failure to provide a written statement of the reasons for dismissal.

3. Ms Weisfish (throughout this Judgment, called the second respondent) was the sole director of the first respondent (Meoros Ltd). She attended the preliminary hearing and represented both herself and the first respondent. In the case management order it was recorded that the second respondent had indicated that she might close the company. The Employment Judge who conducted that hearing reminded the second respondent that where there were potentially outstanding debts against a company it simply could not be closed.

4. The first respondent was dissolved on 16 November 2021.

5. As the first respondent no longer existed as a legal entity, it was not possible for the Tribunal at the final hearing to determine the claims against it. That was discussed and agreed at the start of the afternoon of the first day. The Tribunal was able to hear and determine the claims against the second respondent. It was agreed that those claims could only be the claims under the Equality Act 2010. Accordingly, from the list of issues, the only issues to be determined were:

a. Can the claimant adduce facts which could suggest the following unfavourable treatment occurred and was related to maternity:

i. The respondent's refusal to allow the claimant to return to her tutor role in January 2021;

ii. The claimant's dismissal without notice on 2 February 2021; and/or

iii. The failure of the respondent to offer or discuss any suitable alternative role for the claimant.

b. If yes, can the respondent show a non-discriminatory explanation for the treatment?

c. In determining the above the Tribunal will have regard to the reverse burden of proof (section 136 Equality Act 2010).

d. If the claimant is successful:

i. What award should be made for injury to feelings having regard to the Vento guidelines?

ii. What other compensation should be awarded to the claimant?

Procedure

6. The claimant was represented by Ms Akers, counsel. The second respondent represented herself.

7. The hearing was conducted in-person with the parties and all witnesses in attendance at the Employment Tribunal in Manchester.

8. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 98 pages. Where a number is included in brackets in this Judgment, that is reference to the page number in the bundle. One page was added to the bundle on the second day of hearing after it was provided by the second respondent and the claimant did not object.

9. Witness statements were prepared for each of the witnesses: the claimant; her husband, Mr Douek; and the second respondent, Ms Weisfish.

10. Due to illness, one of the intended members of the Tribunal was replaced on the first morning of the hearing. The hearing briefly commenced with the Employment Judge and one member only present so that the position could be explained to the parties. The hearing then adjourned until 1.30 pm on the first day to allow time for the other (replacement) member to arrive and for the witness statements and related documents to be read.

11. The Tribunal read the witness statements and the documents in the bundle which were referred to in those statements.

12. The case management order had included an indicative timetable for the hearing, which identified the respondents' evidence being heard first. The proposed order was briefly discussed with the parties at the start of the hearing. As the second respondent was unrepresented and expressed a preference for the proposed order to be retained, the Tribunal followed the order of the parties set out in the case management order. The claimant's representative did not object.

13. The Tribunal heard evidence from the second respondent on the afternoon of the first day, who was cross examined by the claimant's representative, before being asked questions by the Tribunal. Briefly, on the second day, the second respondent returned to give further evidence and be cross-examined after the provision of the additional document.

14. The claimant and her husband gave evidence on the morning of the second day. They were each cross-examined by the second respondent. The claimant was asked questions by the Tribunal and the panel.

15. After the evidence was heard, each of the parties made oral submissions. Judgment was provided orally on liability issues.

16. Submissions were then heard from each of the parties on remedy. Judgment was provided orally on remedy issues.

17. A written Judgment was also prepared on 7 December 2022 and was sent to the parties on 12 December 2022. That Judgment included both the oral and remedy decisions. As reasons had been given orally, written reasons were not initially provided. Written reasons were requested by the claimant on 21 December 2022, and the written reasons are accordingly provided in this document for both the liability and remedy parts of the Judgment.

Facts

18. The claimant worked for the first respondent from April 2017 as a part time tutor. The first respondent was a tutoring company which worked in conjunction with local schools. The claimant's evidence was that it employed three additional tutors. The second respondent was the sole director of the first respondent. It was clear from the evidence heard that in practice all decisions made by and on behalf of the first respondent were made by the second respondent personally.

19. There was no written contract of employment in place between the claimant and the first respondent. There was no statement of terms and conditions of

employment provided. The Tribunal was also not provided with any documents which recorded any policies or procedures of the first respondent.

20. In her oral evidence, the second respondent gave evidence about what she discussed with all those who were being considered for a role with the first respondent. She also returned to emphasise what she referred to as the "*pact*" reached, during what she said when offered the opportunity to re-examine herself. It was the second respondent's evidence that she made it clear to those who applied that they would receive no holiday pay or sick pay and would not have any work to return to after maternity leave if there were no pupils available. In exchange, she explained that she paid twice the going rate (clarified as being twice the minimum wage) and she was willing to be flexible if the individual needed time off due to a sick child. The second respondent believed that the claimant had not acted in accordance with what had been agreed by claiming sick pay, by expecting to return to work following her return from maternity leave, and by bringing the Tribunal claim. The claimant recalled being told about holiday prior to being offered the role, but could not recall the other matters being mentioned (whilst she admitted that she could not recall all that was said, as it was some time ago).

21. The claimant's role involved tutoring pupils and teaching English, Maths and some Hebrew reading. Her evidence was that she taught on average eleven pupils a week over eleven hours in total in a normal week. In addition to an hourly rate, the claimant was normally paid a bonus of £100 twice a year in the form of shop vouchers.

22. Unfortunately, in early March 2019 the claimant suffered a miscarriage. The claimant provided fit notes to the first respondent. Text messages were exchanged between the claimant and the second respondent about the absence and the reasons for it.

23. On 3 April 2019 Mr Douek emailed the second respondent (53). He provided a billing sheet for March for the claimant and also an estimate of statutory sick pay.

24. It was the second respondent's evidence that she spoke to Mr Douek in a telephone conversation, in addition to the emails provided. Her evidence was that she found difficult what he said in that conversation.

25. The second respondent's evidence was that she considered paying statutory sick pay if it did not cost the company. When she found out that it was to be paid and funded by the company, her position was that the first respondent would not pay it.

26. The second respondent responded to Mr Douek later on 3 April (54). She said "*As I explained to you, I pay a better wage per hour on the understanding that I don't pay sick pay. I also give £200 bonus for succos and pesach with this in mind which I explain at the beginning of employment. I will pay the sick pay but will not then be giving a pesach bonus this time. I hope you understand.*" In her statement to the Tribunal, the second respondent's evidence was that the claimant was clearly told at the start of her employment that the respondents could not afford to pay holiday pay and sick pay and it was asserted that the claimant had agreed to those conditions.

27. In the evening of 3 April 2019 Mr Douek responded to the second respondent by email (55). He stated that he was a little surprised and disappointed with the response. He pointed out that statutory sick pay was a legal requirement. The email was relatively polite.

28. The claimant became pregnant again in around August 2019. She informed the second respondent on 8 January 2020. She commenced maternity leave on 1 April 2020. The Tribunal was provided with no documentation whatsoever from either party about the maternity leave, when it would commence, or when it would end. The second respondent gave no evidence about any requests made. Neither party evidenced any agreement reached about when the period of maternity leave would end.

29. The Tribunal was provided with a billing sheet for the claimant for the tutoring which she was undertaking in March 2020. That recorded that the claimant had been tutoring eleven pupils at the time. The second respondent's evidence was that seven pupils went on to move to High School or were no longer using the first respondent's services by the time of the claimant's return from maternity leave. Two were with a different teacher. The explanation about the other two was unclear. In answers to questions asked, the second respondent explained that when the claimant's maternity leave commenced that coincided with the first Covid lockdown period and therefore the vast majority of the pupils had not been taught by another tutor as a replacement for the claimant, because the tutoring had stopped during the first lockdown. It was also the second respondent's evidence was that all the staff were furloughed during the first lockdown as tutoring essentially ceased for a period at the time.

30. In August 2020 the claimant asked the second respondent to provide a letter for her mortgage provider. The Tribunal was provided with the exchange of text messages about it (57). A letter was provided signed by the second respondent on 26 August 2020 (60) which confirmed that the claimant was employed by the first respondent and was currently on maternity leave. It went on to say "*She is able to and plans to return to her full position once she has completed her maternity leave in January 2021. She will have similar hours and remuneration as before*". It was the second respondent's evidence that she told the claimant in August 2020 that she didn't know if she would have work for her when she came back from maternity leave, and the second respondent said the claimant said she understood.

31. The first/second respondent made no contact with the claimant to ask her when she would be returning to work. It was clear from the second respondent's evidence that she expected the person on maternity leave to make the contact and she considered there to be no obligation on herself to make any contact at all.

32. On 18 January 2021 the claimant telephoned the second respondent. The second respondent's witness statement referred to that being when the claimant's maternity leave was already over, although there was no evidence before the Tribunal about why that should have been the case as the claimant's year of leave under ordinary and additional maternity leave would not have ended until 31 March 2021. The second respondent's evidence was that it was a surprise to her that the claimant would return, as she had assumed she would return to her second job and

not her job with the first respondent. The second respondent's evidence was that she explained to the claimant that she did not have any work for her.

33. It was the second respondent's evidence that she did not give a tutor back their pupils when the tutor returned from maternity leave, nor did she provide any other work to the tutor unless it was available. She explained about an occasion when a new pupil was starting around the time, when she would explain to the parents that the person was returning from maternity leave and she would then allocate that pupil to the tutor. The second respondent referred to lots of tutors who had been on and returned from maternity leave and been satisfied with the arrangements, albeit that when the details were clarified with her it transpired that two employees of the first respondent (prior to the claimant) had taken maternity leave (albeit each on more than one occasion). It was clear that the second respondent did not do anything at all to ensure that a maternity returner returned to a comparable workload to that they had undertaken prior to being away. A maternity returner was only allocated new pupils as and when they became available.

34. In the telephone conversation between the claimant and the second respondent on 18 January 2021 the claimant raised the possibility of furlough. The second respondent did not see this as feasible because of the costs involved. At the time that the claimant asked to return from maternity leave, the first respondent still had at least one employee on furlough. By that stage the Government did not meet all of the costs of those on furlough. The second respondent could not genuinely recall in her evidence who was still on furlough and when that ended, although she referred to some tutors having a period of partial furlough. Furlough did have some costs for the first respondent. The second respondent referred to her accountant charging per person on furlough. The first respondent also needed to meet pension costs, which was one of the reasons given at the time by the second respondent for not being willing to place the claimant on furlough.

35. On 25 January the claimant texted the second respondent asking whether she had spoken to her accountant about putting the claimant on furlough (61). She suggested an approach to the pension costs if they were the issue. The second respondent responded:

> "*It's not only the pension. To be honest, I'm not happy with your husband's behaviour. I didn't like his tone and felt intimidated by him and I'm not sure I want that stress. It's not something I need to put up with*"

36. The claimant responded later on the same date:

> "*A bit shocked by this message. I was planning to return to work. Are you putting me on furlough if you don't have the work or was that formal notice?*"

37. The second respondent's response shortly afterwards was (62):

> "*I have to think carefully. I don't have work at the moment and I felt you had good skills and a good rapport with the kids. However I do have a fear that if something happened you're husband would milk me for all I'm worth! I feel insecure about it*"

38. The claimant then texted the second respondent twice asking to know the position. At 2.50 pm on 2 February 2021 the second respondent sent a text message the content of which is confirmed below. The claimant asserted that this amounted to a dismissal and the second respondent accepted in evidence that, whilst she did not understand the legal position, if she considered it in her own head she would consider the email to have been the termination of the employment. The email said:

> "*At the moment I want to leave it. I hope you understand"*

39. The claimant responded the next day asking:

> "*Please confirm if I am now considered dismissed? Also when I will receive my P45 and any final pay"*

40. The second respondent responded by saying she was not aware of any final pay, but she would ask her accountant and would generate a P45. The P45 was sent on 8 February 2021. The P45 (65) recorded the leaving date as being 6 January 2021. The second respondent did not know why it said that date and she confirmed she had not asked for it to be included on the P45. It was her evidence that the document was prepared by her accountant, and she assumed that reflected the end of the period of maternity payments to the claimant.

41. In the response form prepared on behalf of both respondents by the second respondent, it was stated that the claimant's employment ended because she did not have work for the claimant when she came back from maternity leave as the first respondent had been very badly hit by Covid and had many fewer pupils, some schools did not let them in, and most of the pupils that the claimant had been teaching no longer received help from the first respondent. It was also stated that if the first respondent picked up, she would not hesitate to re-employ the claimant.

42. In her answers to cross-examination, the second respondent was very clear that the claimant's husband was not the reason for the claimant's dismissal, it was just something which the second respondent would have addressed with the claimant had she remained employed. The second respondent said it was something maybe she should not have added.

43. There was very little evidence provided about the work undertaken by the claimant or the first respondent. The second respondent referred to two spreadsheets as showing the decline in the first respondent's work between the claimant starting maternity leave and after her return. A spreadsheet from February 2020 (67) appeared to show twenty-eight pupils paying for tutoring with a suggested total income figure of £4,037. A spreadsheet from April 2021 (70) appeared to show fourteen pupils paying for tutoring with a suggested total income figure of £2,196. During the hearing the second respondent also provided an additional spreadsheet for February 2021 (that is when the claimant was dismissed) which showed the first respondent as having eighteen pupils with a total income figure of £2,505,50.

44. The first respondent did not pay the claimant for annual leave at all during the claimant's employment. It did not pay the claimant in lieu of accrued but untaken annual leave on termination, in accordance with the view of second respondent which she emphasised in evidence, that her tutors had agreed to forego the right to

paid annual leave. When she was questions about it, the claimant's own evidence was that the pay for annual leave was not something she was looking for.

45. There was some evidence heard about the claimant's tutoring and where she would tutor. The second respondent evidenced that the claimant had expressed a wish not to tutor Hebrew. The second respondent decided that because she was not passionate about it, she would not ask her to tutor Hebrew with other pupils. The claimant had also previously provided tutoring from the second respondent's home, but the second respondent and her husband had decided to end that arrangement. None of these issues were explored with, or discussed with, the claimant when she was due to return from maternity leave or at the time of the termination of her employment.

46. It was the second respondent's evidence that she had decided to stop providing tutoring services through the first respondent for the end of the academic year 2020/21. She could not recall when she had done so, but she spoke to the remaining tutors employed by her well ahead of the end of the academic year about her intentions and she assisted them in finding other work. She believed that she first spoke to them while the claimant was still employed. She accepted that in doing so she treated the claimant differently to them as she did not speak to the claimant. She asserted that the reason why she did not speak to the claimant was not because she was on maternity leave, but rather because she "*didn't know if the claimant was coming back*".

47. The Tribunal was provided with a copy of a letter (74) sent by the second respondent to parents of children tutored by the first respondent which stated that all lessons would terminate at the end of that academic year in July 2021. The second respondent's evidence was that the letter was sent to parents in July 2021 with the end of term reports. The first respondent ceased to employ any tutors or provide any tutoring services from July 2021.

48. At the end of her evidence, the second respondent was asked about her feelings towards the claimant for bringing a Tribunal claim. She explained that as they were both orthodox Jews she did not believe that a claim should have been brought in an Employment Tribunal at all. She believed that under Jewish law the parties should have gone to Beth Din to resolve the matters. The second respondent in fact telephoned the claimant's mother to explain this, after ACAS contacted her as part of early conciliation. It was the second respondent's evidence that this was not to intimidate the claimant, but rather it was to tell her that it was her obligation.

49. The claimant commenced new employment on 12 April 2021. Payslips were provided for the claimant from her new employment.

The Law

50. The claimant claims direct discrimination because of the protected characteristic of maternity. Sections 18(2) and (4) of the Equality Act 2010 provide that:

> "**A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy..**
>
> **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."**

51. The protected period commences when the pregnancy begins and ends when the claimant returns from maternity leave.

52. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes the employer dismissing the employee or subjecting her to any other detriment.

53. In this case, the second respondent will have subjected the claimant to direct discrimination if, because she was exercising or had exercised her right to maternity leave, she treated her unfavourably. As the claimant's representative submitted, there is no requirement for a comparison in cases of pregnancy discrimination (as there is for other types of discrimination).

54. In deciding what was the cause of the acts complained of including dismissal, the Tribunal must ask itself what was the effective and predominant cause, or the real and efficient cause, of the act complained of. It is the motivation of the decision-maker which is the issue to be determined, in considering the cause.

55. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

56. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proven facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the second respondent, that the second respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated unfavourably; there must be something more (which shows discrimination because of the protected characteristic – here maternity leave).

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the second respondent. Section 123(2) of the Equality

> Act 2010 provides that the Tribunal must uphold the claim unless the second respondent proves that she did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

57. The Tribunal was mindful that unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment**.**

58. An employer is liable for the discriminatory acts of its employees and officers. The employees themselves can also be personally liable under section 110 of the Equality Act 2010. That applies where the employee does something which would be treated as having been done by the employer under section 109 and the doing of that thing by the individual amounts to a contravention of the Equality Act by the employer. The Tribunal took those provisions into account. In this case that meant that the Tribunal was able to consider the discrimination claims against the second respondent, even though the first respondent no longer legally existed.

59. On remedy, that is governed by section 124 of the Equality Act 2010. The Tribunal may order the second respondent to pay compensation to the claimant. Where compensation for discrimination is awarded, it is on the basis that, as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct.

60. **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** is the case which established the bands for injury to feelings awards, which have subsequently been modified and updated. In **Vento**, the Court of Appeal laid down three levels of award: most serious; middle; and lower. The Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. When making an injury to feelings award, the Tribunal must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards nor to allow double recovery. The Tribunal should not allow its award to be inflated by any feeling of indignation or outrage towards the respondent. Awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation.

61. Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"If, in the case of 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) that 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%.

62. The claimant's representative submitted and the Tribunal accepted, that the wording of section 207A(2) states that it applies to any award made to an employee and is not limited (within the words used) to an award against the employer.

63. The ACAS code of practice on disciplinary and grievance procedures starts by explaining that the code is designed to help employers and employees deal with disciplinary and grievance situations in the workplace. It goes on to say that disciplinary situations included misconduct and/or poor performance. It also says that the code expressly does not apply to redundancy dismissals. Recent case law has confirmed that an uplift can be awarded where the reason given for the dismissal is a sham and the dismissal was in fact one for conduct or performance. However, the code does not apply in all dismissal situations (as the code itself makes clear).

64. Interest is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. regulation 6(1)(a) provides that, in the case of any sum for injury to feelings, interest shall be calculated for the period beginning on the date of the act of discrimination complained of and ending on the date of calculation. Regulation 6(1)(b) provides that interest begins on the mid-point date, being the day which falls half way through the period beginning with the date of the act of discrimination complained of and ending with the date of calculation. The applicable rate is 8% per annum. Regulation 6(3) provides that where, in the circumstances, whether relating to the case as a whole or a particular sum awarded, "*serious injustice would be caused*" if interest were to be awarded in respect of the period in regulation 6(1), the Tribunal may calculate interest for a different period or periods (on any particular sum) as it considers appropriate in the circumstances.

65. Both parties focused on the facts in making their submissions. Neither party referred specifically to any case law (save for the claimant's representative referring to **Vento** during her submissions on remedy).

Conclusions – applying the Law to the Facts

66. It was very clear to the Tribunal that the second respondent considered herself and the company which she ran to be above the law, or at least to fall outside the law. She emphasised to us why she believed that a conversation with a potential new employee should mean that the individual ceased to have any rights, or at least a number of important rights, because they agreed to take up employment when it had been made clear that those rights do not apply. She was also very clear that she does not believe that an individual should bring a claim to the Employment Tribunal because it should be resolved within the community, within the means that she outlined.

67. UK employment law provides all employees with certain minimum rights. Those minimum rights apply to all irrespective of what that individual has agreed to, or been told, when their employment commenced. Those rights include: the right to paid annual leave; the right in certain circumstances to statutory sick pay; the right to a minimum period of notice before the employment terminates; the right to a written statement of employment particulars; the right to a redundancy payment when employment ends due to a reduction or cessation of the work of a particular kind available; and the right to return to the same job following a period of maternity leave. For understandable public policy reasons, the law has been written to mean that those rights cannot be signed or agreed away.

68. Had we been able to hear a claim against the first respondent because it still legally existed at the date of the hearing, the claimant would inevitably have succeeded in some of her claims. Even taking the second respondent's evidence and explanations at their highest, the claimant was not paid for accrued but untaken annual leave, she was not given notice of termination, she was not given a statement of employment particulars, and she was not paid a redundancy payment when her employment ended in circumstances where the second respondent says (in summary) that there wasn't any work for the claimant to do. We cannot make any finding against the first respondent as it has been dissolved. Had it still existed, we inevitably would have done so.

69. In the light of the dissolution of the first respondent company, the Tribunal has been limited to determining the issues in the discrimination claim against the second respondent personally, which were the issues identified at the start of the hearing and set out at the start of this Judgment.

70. The third of those issues was not really something which the Tribunal needed to determine. It was a reminder of the way in which the first two questions should be approached. The Tribunal must have regard to the burden of proof and how that operates under the provisions of the Equality Act 2010. The Tribunal did so.

71. The first allegation was that the first and second respondent refused to allow the claimant to return to her tutor role in January 2021. Putting aside the precise date when this occurred, there is no real dispute that the first respondent and the second respondent did refuse to allow the claimant to return to the tutor role.

72. The second allegation was that the claimant was dismissed without notice on 2 February 2021. There was no dispute that the claimant was dismissed on that date by the text message sent by the second respondent.

73. The third allegation was that the first and second respondent failed to offer or discuss any suitable alternative role for the claimant at the time of the termination. Again, this is not really in dispute, the second respondent's position was that there was no suitable alternative role, so she did not do so. There was some discussion about furlough; but being on furlough is not really an alternative role.

74. Each of those allegations was factually made out. What the Tribunal needed to do was go on and apply the burden of proof provisions. As I have outlined when explaining the way in which the burden of proof works under the law, there needs to be something more before the burden of proof is reversed. That is the something

more or prima facie case that the second respondent subjected the claimant to the unfavourable treatment because she was exercising or had exercised her right to maternity leave.

75. In this case, the Tribunal identified the following things which amounted to the something more required to reverse the burden of proof (collectively, but each also would have done individually):

a. The timing of the matters alleged, which was when the claimant was wishing to come back to work from maternity leave;

b. There was work for the claimant to do as a tutor for the first respondent because there were eighteen pupils being tutored at the time who could have been taught by the claimant;

c. The fact that the claimant had initially been denied the statutory right to sick pay when she suffered a miscarriage in 2019, which demonstrated in the Tribunal's view the second and first respondents' approach to maternity-related issues;

d. The second respondent's evidence that she explained the fact that a maternity returner would not necessarily be given any work on their return, at interview;

e. The second respondent's clear evidence that she was indifferent to the requirements of employment law (save for paying statutory maternity pay itself);

f. The second respondent's admission that other employees were treated differently to the claimant, as they were informed about the future of the first respondent and the services it offered, when the claimant was not because she might not be coming back from maternity leave; and

g. The refusal to consider the claimant for furlough due to costs at a time when at least one other employee was on furlough or partial furlough.

76. Having identified those factors, the Tribunal found that the claimant had made out the prima facie case and the burden of proof was reversed.

77. Having reached that decision, the Tribunal turned to the next question: can the second respondent show a non-discriminatory explanation for the treatment? The second respondent needed to show that the treatment was in no sense whatsoever because the claimant was exercising, or had exercised, her right to maternity leave.

78. The Tribunal considered together the allegations that the second respondent had refused to allow the claimant to return to her tutor role and that she had dismissed her without notice (as the two allegations essentially went together).

79. When she was asked, the second respondent said that her reason was that the first respondent did not have the students and she would not transfer the students to another tutor (save for some occasions which she explained). The

spreadsheet provided showed that the first respondent had eighteen pupils at the time when the claimant was asking to return from maternity leave. The reason given by the second respondent was intrinsically interconnected with the fact that the claimant had exercised her right to take ordinary and additional maternity leave. The reason that the claimant had no allocated pupils at that time, was because she had been on maternity leave. The reason why she was dismissed was because she had no pupils, and the second respondent was not willing to return or allocate pupils to the claimant on her return from maternity leave.

80. It was notable to the Tribunal that the first respondent did not undertake any redundancy consultation at the time or consider which of the existing tutors were no longer required based upon some selection process. The second respondent simply identified that the claimant should lose her job, because she had no pupils allocated to her at the time when she was returning from maternity leave.

81. The Tribunal found that the second respondent had not proved that the decisions addressed in these allegations were in no sense whatsoever because the claimant was exercising, or had exercised, her right to maternity leave. The reality is that they were in part, if not entirely, due to the claimant's maternity leave and it having been a period when the claimant had no allocated pupils (because she was on maternity leave).

82. The third allegation was subtly different. The second respondent's explanation for not offering to, or discussing with, the claimant alternative roles, was because there were none available. Putting aside the question of allocating pupils to tutors which we have already addressed, the Tribunal found that there were no other roles available and the reason why the second respondent did not offer or discuss them with the claimant was because they did not exist. The Tribunal found that the second respondent had shown, for that allegation, that the claimant's maternity leave was in no sense whatsoever the reason why alternative employment had not been discussed with, or offered to, the claimant

83. Accordingly, the Tribunal found that the claimant was treated unfavourably because she had exercised the right to ordinary and additional maternity leave contrary to section 18(4) of the Equality Act 2010 by the second respondent's refusal to allow the claimant to return to her tutor role in January or February 2021 and by the second respondent dismissing her from her employment with the first respondent without notice on 2 February 2021. The refusal to allow the claimant to return to her tutor role occurred in the period between 18 January and 2 February 2021.

84. For the reasons explained above, the claimant succeeded in her discrimination claim against the second respondent.

Remedy

85. In determining remedy, the Tribunal started with the schedule of loss prepared by the claimant.

86. Injury to feelings is an award made in accordance with the bands identified following the case of **Vento**. For this case, based upon the date of the claim, the lower band was £900 to £9,000 and the middle band was £9,000 to £27,000. The

lowest band is for one-off or relatively minor events, and the middle band is for more serious acts of discrimination.

87. The point of an injury to feelings award is to compensate the claimant and not to punish. The Tribunal took account of the injury to the claimant's own feelings.

88. For injury to feelings, the claimant submitted that the injury to feelings award should fall within the lower range of the middle band identified following the case of **Vento**. The Tribunal considered that to be correct and appropriate, particularly when it was taken into account that one of the acts of discrimination which the Tribunal found was that the claimant was dismissed. Being dismissed is, of its very nature, usually (if not always) more serious than a one-off or minor event. The Tribunal took into account the evidence of the claimant and her husband about the impact which dismissal had upon the claimant. The Tribunal considered the messages exchanged. It took account of the fact that the first respondent was a small company.

89. The figure which the claimant sought as an injury to feelings award was not an unreasonable or inappropriate one. The Tribunal agreed that an appropriate injury to feelings award should be at the lower end of the middle band (for the reasons given). The Tribunal determined that the appropriate figure for injury to feelings was £11,000 (which was not quite the amount which the claimant had claimed).

90. In terms of interest on the injury to feelings award, the Tribunal calculated that there were 673 days between the date of the dismissal and the date of the hearing. That was suggested to the parties, whilst it was made clear that they were able to provide an alternative figure if they wished to do so. Neither party provided an alternative number of days, nor objected to that figure. Interest is payable at the rate of 8% per annum.

91. The second respondent contended that the reason why there had been so many days was because of what she contended were the delays in the Tribunal process. Regulation 6(3) does provide that the Tribunal does not have to award the whole period of interest where serious injustice would be caused by doing so. The Tribunal did not take the view that the case had been particularly delayed (for a four-day hearing in the Manchester Employment Tribunal, it had been heard relatively quickly). Interest is there to ensure that the claimant is appropriately compensated in the light of the fact that she has to wait to receive the award for the period following the act of discrimination. The Tribunal did not find that there was any serious injustice caused by awarding interest for the full period.

92. The Tribunal awarded the interest figure using the full calculation which the Tribunal is required to use (at least in most circumstances). 673/365 of £11,000 multiplied by 0.08, resulted in an interest figure on the injury to feelings award of £1,622.58, which the second respondent was ordered to pay the claimant.

93. In terms of financial losses arising from the discrimination, the claimant contended that her losses ran at the rate of £165.81 per week. The second respondent contended that the losses awarded should only be at the rate of £40 per week. The claimant's figure was based upon the income which she received historically, prior to going on maternity leave. The second respondent's figure was based upon the pupils which she contended the claimant might have taught if she

returned to her only those pupils she had taught previously. The Tribunal found the second respondent's argument to be a position based upon, to a significant extent, continued discrimination against the claimant. The Tribunal did not find that the second respondent's approach was the right one to use. The Tribunal accepted the claimant's lost earnings figure, which was £165.81 per week.

94. The claimant obtained new employment on 12 April 2021. Taking the £165.81 per week pay figure from the claimant's employment with the first respondent, that resulted in a monthly lost pay figure of £718.51. The claimant's payslips from her new employment were provided to the Tribunal. Based upon those payslips, in April and May 2021 (which were included together in one payslip) the claimant's income in the new employment was higher than the lost income from the first respondent. There was also no loss in June. It was noted that there was no payslip for the new employment for July 2021, so there might potentially have been losses in July. However, in July 2021 the claimant's income from the first respondent would have stopped anyway as a result of the decision made to cease to provide all tutoring services. For all intents and purposes, the claimant mitigated her financial losses from the date when the new employment commenced.

95. The claimant's evidence was that she would have returned to work with the first respondent in February 2021 had work been available. The Tribunal accepted that work would not have been available instantly on 18 January 2021 when the claimant telephoned the second respondent to ask about it. There would have inevitably had to be a period before the claimant would have been able to return to work with the first respondent where there was no prior agreed return to work date (and it was not the end of the additional maternity leave period). On that basis, the Tribunal found that the claimant's losses commenced at the end of February/start of March 2021. That allowed time for tutoring to be re-organised so it was available for the claimant. From the start of March to 12 April 2021 was six weeks. So, the Tribunal awarded the claimant six weeks loss.

96. The financial losses awarded were six weeks at £165.81, plus the £1.35 pension contributions (per week) which would also have been made during that period, resulting in a total figure of £1,002.96, which the second respondent (Ms Weisfish) was ordered to pay the claimant as the award for the losses which resulted from the discrimination found.

97. The claimant also submitted that she should be paid in addition pay in lieu of accrued but untaken annual leave, as she asserted that was also a loss arising from the discrimination found (she did not pursue an argument for any other losses). The Tribunal thought very hard about this element of the sums claimed. The Tribunal found that had the claimant not been discriminated against by the second respondent, but had her employment ended when the first respondent ceased to provide tutoring services at the end of the academic year in July 2021, she would not have sought payment for the accrued but untaken annual leave from the first respondent and the first respondent would certainly not have paid it even though the claimant was in fact legally entitled to it. The Tribunal, in particular, relied upon the claimant's own evidence that it was not something she was looking for, and found that it was not something she would have raised had her employment ended in circumstances which weren't discriminatory but rather were at the end of the first respondent providing tutoring at all. In the Tribunal's view, on balance, the claimant

would not have claimed that amount from the first respondent anyway. As a result, the Tribunal did not find that the non-receipt of pay in lieu of accrued but untaken annual leave was a loss arising from the discrimination found.

98. The claimant also sought an uplift on the awards as she contended that the ACAS code of practice on disciplinary and grievance procedures applied to the circumstances of the claimant's dismissal and she sought an uplift for an unreasonable failure to comply with it under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The Tribunal looked at what was actually said in the code of practice on disciplinary and grievance procedures. As detailed above, that highlights that the code is designed to deal with situations of misconduct and/or poor performance. The dismissal of the claimant was not for misconduct or poor performance. It was also not a sham dismissal, in the sense that it was not a dismissal set up for another reason to cover up a dismissal for conduct or performance. It was not genuinely a dismissal for either of those reasons. On that basis the ACAS code of practice on disciplinary and grievance procedures did not apply to the claimant's dismissal and no uplift was awarded as a result. The Tribunal agreed that the first respondent should have undertaken some process before the claimant was dismissed, but it was not one to which that ACAS code would have applied and therefore the uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 did not apply in this case.

99. The interest on the award for loss was identified as running for half of the period between discrimination (the dismissal) and this hearing. On the same basis as the period of interest for the injury to feelings award, that was identified as being 336 days (to which neither party objected). The interest is awarded at 8%. 336/365 of £1,002.96 multiplied by 0.08, resulted in an interest award on the discrimination for losses in the sum of £73.86, which the second respondent (Ms Weisfish) was ordered to pay the claimant.

Employment Judge Phil Allen
3 January 2023

REASONS SENT TO THE PARTIES ON
10 January 2023

FOR THE TRIBUNAL OFFICE