Case No. 1806746/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss N Carr

Respondents: 1. Huntress Search Limited
2. JCT600 Limited

Heard at: Leeds **on:** 6 to 8 March 2023

Before: Employment Judge Cox
Members: Mr K Lannaman
Mr R Webb

Representation:
Claimant: In person
Respondents: 1. Miss Jones, in-house legal adviser
2, Mr Wiltshire, counsel

JUDGMENT

1. The claim against the First Respondent of pregnancy discrimination by a decision to terminate her assignment with the Second Respondent is dismissed on withdrawal by the Claimant.

2. All other claims against both Respondents fail and are dismissed.

3. By 30 June 2023 the Claimant must pay the First Respondent £1,050 in respect of its preparation time.

4. By 30 June 2023 the Claimant must pay the First Respondent £409.04 in respect of Miss Pierce's expenses incurred in connection with attending as a witness.

5. By 31 August 2023 the Claimant must pay the Second Respondent £4,006 in respect of its costs incurred in defending the claim

REASONS

1. After a period of early conciliation through ACAS from 12 November to 17 December 2021, the Claimant presented a claim to the Tribunal on 20 December 2021. Her claim was against two Respondents, Huntress Search Limited, a temporary employment agency ("the agency"), and JCT600 Limited, which owns the Porsche showroom in Leeds ("the garage"). She alleged breach of her "day one rights" and pregnancy discrimination but gave no other details.

2. On 28 February 2022 the Tribunal conducted a Preliminary Hearing with the parties at which the Claimant gave details of what she was alleging and the Tribunal gave her leave to amend her claim accordingly.

3. At the Hearing of her claim, the Tribunal heard oral evidence from the Claimant. For the agency, it heard oral evidence from Miss Pierce, the agency's Managing Director. For the garage, the Tribunal heard oral evidence from Mr Filer, Head of Business; Mr Hustwith, Assistant General Sales Manager; Mr Podolanski, New Car Sales Manager; Mr Cuthbertson, Showroom Manager; Mr Miller, Senior Customer Adviser; Mrs Foster, Senior Receptionist; and Mrs Firbank, Receptionist.

4. The Tribunal also considered the documents to which it was referred in the Hearing file, which ran to 237 pages.

5. On the basis of that evidence, the Tribunal made the following findings on the Claimant's allegations.

Agreed facts

6. Certain facts were agreed by all parties.

7. The Claimant works for the Right Fuel Card Company as an employee from Monday to Friday. In May 2021, she took on extra work through the agency. It assigned her to work as an agency worker at the garage in the role of weekend receptionist.

8. At the end of July 2021, the Claimant told the agency that she was pregnant and confirmed this in an email on 27 July attaching her Mat B1 form. Her baby was due in the week beginning 5 December. In an email on 28 July the Claimant asked the agency to let the garage know of the change in her circumstances in case any health and safety measures needed to be carried out.

9. The Claimant's assignment at the garage was terminated on 9 September 2021.

Claims against the agency

10. The Claimant alleged that her assignment was terminated because of her pregnancy. At the Preliminary Hearing on 28 February 2022, the Claimant confirmed that she was making this allegation against both Respondents because she did not know whether it was the agency who had made the decision or whether the garage had made it and the agency had merely passed the decision on to the Claimant on the garage's instructions.

11. During the course of the first day of the main Hearing, the Claimant confirmed that she accepted that Mr Filer, Head of Business at the garage, had made the decision and that she was not alleging that the agency had discriminated against her because of her pregnancy in this respect. This claim against the First Respondent was therefore dismissed on withdrawal by the Claimant.

Failure to notify of pregnancy

12. The Claimant's remaining allegation against the agency was that it had failed to notify the garage of her pregnancy, even though she had asked it to do so. She said this amounted to the agency treating her unfavourably because of her pregnancy. The Tribunal accepts that this would be a detriment to her because it would mean the garage did not know it needed to carry out a health and safety risk assessment for her pregnancy. Under Section 39(2)(d) read with Section 18(2) of the Equality Act 2010 (EqA), subjecting an employee to a detriment because of her pregnancy is unlawful.

13. This aspect of the claim was presented outside the three-month time limit laid down in Section 123 EqA. The alleged act of discrimination amounted to an omission. Section 123(3)(b) states that a failure to do something occurs on the date that the person decides not to do it. In the absence of any evidence to the contrary, a person is viewed as having decided not to do something when they do an act inconsistent with doing it. If they do not do an inconsistent act, then the omission is viewed as occurring at the end of the period during which they might reasonably have been expected to do it. In relation to this allegation, the Tribunal heard no evidence that the agency had decided not to notify the garage. The agency might reasonably have been expected to notify the garage promptly after it received the Claimant's request on 28 July that it should do so. The Tribunal therefore finds that any failure to notify happened by 1 August 2021. The Claimant did not contact ACAS under the early conciliation procedure until 17 November 2021, by which time the claim was already out of time, and did not present her claim to the Tribunal until 20 December 2021, seven weeks out of time.

14. The Tribunal can still hear a claim that has been brought outside the basic three-month time limit if it has been presented within another period that the Tribunal considers just and equitable. The Claimant gave evidence on the reasons for the delay. On 13 September 2021 she presented a complaint to the agency about

various matters arising from her employment at the garage. On 22 October 2021 Miss Pierce 'phoned her to give her the outcome of her investigation into the complaint and during that call the Claimant asked her if the agency had notified the garage of her pregnancy. Miss Pierce said that she did not know. After the call, Miss Pierce checked but could not find an email. In the report on her investigation sent to the Claimant on 27 October 2021 Miss Pierce confirmed that she had been unable to find an email notifying the garage.

15. The Claimant said in her evidence that she knew at the time about the three-month time limit for bringing a claim to the Tribunal. She also knew when she received Miss Pierce's report that the agency appeared not to have notified the garage of her pregnancy when she asked it to do so at the end of July. If she had acted at that point by contacting ACAS to start the early conciliation process, she could have brought her claim in time. She did not contact ACAS for a further three weeks and has given no good reason for that delay.

16. The Tribunal finds that the claim has presented outside the three-month time limit and not within another just and equitable period. It is dismissed for that reason.

17. If the Tribunal had decided that the claim was presented in another just and equitable period, it would not have upheld it because it would have found that the agency did in fact notify the garage of the Claimant's pregnancy.

18. The agency presented in evidence a copy of the email that was sent by Ms Olivia Wood, the Account Manager dealing with the Claimant's placement at the garage, to the receptionists at the garage at 11.25 on 28 July 2021. It read:

> *Hi, Just a quick email re Nattalie to let you know she is pregnant and is due in December, she is more than happy to carry on working weekends for you until she goes on mat leave, but it was just a heads up to inform you.*

The Claimant said that this email was a forgery of some description because it had misspelt her name (Nattalie rather than Nattaley) and Ms Wood had never got the spelling wrong before.

19. The Tribunal has no reason to doubt that this email was sent. The Tribunal accepts Miss Pierce's evidence, which was unchallenged, that she had not been able to find the email on the agency's server at the time she wrote her report on the Claimant's complaint because she was searching under the correct spelling of the Claimant's name. By the time disclosure of documents was due in this claim, however, the email had been found and a copy was sent to the Claimant. On 17 October 2022 the agency also sent the Claimant metadata to confirm the details of when it was sent, the sender and the recipients. On 5 September 2022 the garage's representative sent the Claimant an email confirming that the email had

been received and attached a screenshot of the received email in the garage's email server inbox.

20. The email also sits within an email trail between Ms Wood and the Claimant that supports the fact that it was sent. Forty minutes after receiving the Claimant's email asking her to notify the garage, Ms Wood says "yes of course I will update them". Ninety seconds later Ms Wood sends the disputed email to the garage. Ninety minutes later the Claimant emails Ms Wood: "Brill, have you also informed HR?". Seven minutes later Ms Wood responds that she has let the garage know and it would be for the garage to look at any risk assessment so the agency's HR would not be contacting her.

21. At the Hearing, two of the garage's witnesses, Mrs Forster and Mrs Firbank, confirmed that they had received Ms Wood's email.

22. In summary, even if the Tribunal had found that this claim had been presented within a just and equitable period, it would have dismissed it because the agency had not in fact failed to notify the garage of the Claimant's pregnancy.

Breach of Regulation 13 of the Agency Workers Regulations

23. The Claimant alleged that the garage had breached Regulation 13 of the Agency Workers Regulations 2010 by failing to inform her about a permanent vacancy for a receptionist. The garage accepted that Regulation 13 gave the Claimant the right to be informed by the garage of any relevant vacant posts with the garage, to give her the same opportunity as a comparable worker to find permanent employment with the garage. For these purposes, a comparable worker is one who is employed by the hirer at the same establishment as the agency worker and is engaged on the same or broadly similar work (Regulation 13(2)). The Tribunal found that the garage's directly employed receptionists were comparable workers. It did not accept the garage's submission that the fact that these receptionists worked longer hours than the Claimant and on weekdays rather than weekends meant that they did not do the same or broadly similar work. They were all carrying out broadly the same duties, as receptionists.

24. Regulation 13(4) states that the hirer may inform the agency worker of a vacancy by a general announcement in a suitable place in its establishment. From this it is clear that there is no requirement for the hirer to notify the agency worker individually. The Government guidance on the Regulations sates: "*Hirers can choose how to publicise vacancies, whether it is via the internet/intranet or on a notice board in a communal area. But the agency worker should know where and how to access this information*." Whilst this guidance is not in any way binding on the Tribunal, it accepts that it is an accurate reflection of a hirer's obligations under Regulation 13.

25. The Claimant alleged that she was not informed about a vacancy for a receptionist that had been posted on the garage's website on 1 September 2021. While the garage uses the agency to source agency workers for temporary positions, it recruits its permanent workforce by advertising on its website, which is fully accessible to the general public. The Claimant suggested in her evidence that she could not access the garage's website for some reason, but the Tribunal does not consider that evidence credible. There would be no reason for the garage to restrict access to a website on which it was advertising its products and advertising for posts it wanted to fill. Further, the Claimant accepted that she accessed the website to inform herself about the cars the garage was selling and to check on the vacancy that EH (an individual who called the garage with a query about the vacancy) said she was interested in.

26. The Tribunal accepts Mr Filer's evidence, which was clear and credible and consistent with that of Mrs Forster, that the resignation of a receptionist in early 2021 caused him to review the staffing of the garage's reception. Whilst this was happening, the garage asked the agency to provide an agency worker as temporary cover. This was the Claimant. By June 2021 Mr Filer had completed his review and decided that the garage needed to recruit a permanent receptionist working 25 hours a week. This would involve weekday working. The first advertisement for the post was posted on the garage's website on 29 June 2021. This advertisement did not attract any suitable candidates, so the post was advertised again, in identical terms, on 1 September.

27. The Tribunal accepts the evidence of Mrs Forster and Mrs Firbank that around the time when the post was first advertised in June, they each left notes for the Claimant to alert her to the fact that there was a permanent post for which she might be interested in applying and told her to look on the garage's website and apply online if she was interested. Mrs Firbank even gave her the reference number for the vacancy. The Claimant accepted in evidence that she "might have" received these notes. Mrs Forster and Mrs Firbank left notes for the Claimant because they worked weekdays rather than weekends and did not have the opportunity to speak to her. Mrs Forster and Mrs Firbank were concerned to let the Claimant know about the vacancy because she had previously said that she would be interested in extra hours if they became available.

28. Ms Wood from the agency also emailed the Claimant about the permanent role and confirmed that it would involve weekday working "via Porsche". The Claimant told her she was not interested because it involved weekday working and she had another job in the week.

29. From these facts, the Tribunal concludes that the garage did inform the Claimant of the existence of the vacancy when it was first advertised, and that she had the same opportunity to apply for the post as the other receptionists did. This claim therefore failed and was dismissed.

Allegation of comments "you look like you're about to drop"

30. The Claimant alleged that two employees of the garage, Mr Miller and Mr Cuthbertson, said to her "you look like you're about to drop". This was a reference, she said, to the fact that her pregnancy was now visible.

31. The garage said that this claim had been presented out of time because the Claimant said in her evidence that the comments were made on 4 August. The Claimant's evidence about the timing of the comments was unclear. If the comments were made in the second half of August, the claim had been presented in time. The Tribunal decided to deal with the allegation on its merits and on the assumption that the claim had been brought in time.

32. The Claimant gave no detail about these alleged comments in her witness statement. She said during cross-examination that each man had made these comments to her on the same day and in the same terms but in separate conversations.

33. The Tribunal preferred the evidence of Mr Miller and Mr Cuthbertson, which was clear and unequivocal, that they did not make these comments. It preferred their evidence for several reasons.

34. It is inherently not credible that two individuals would make exactly the same comment to the Claimant in separate conversations on the same day.

35. Both men had recently been on the garage's training, JCT600andMe, which all members of the garage's staff have to attend every year. That training makes clear the garage's expectations that staff will treat other with respect. The Claimant's evidence was that the comment was the first thing Mr Miller said in his conversation with her. In her 'phone conversation with Miss Pierce on 22 October (when Miss Pierce gave her feedback on her complaint) the Claimant said that the comment was the first thing Mr Cuthbertson said to her during their conversation. It is inherently unlikely that, having recently received training on how their employer expects them to treat colleagues with respect, both men would make a disrespectful comment to the Claimant as a conversation opener.

36. Both men confirmed that they had spoken to the Claimant in July and August about her pregnancy, but those conversations were warm and friendly. Mr Miller showed the Claimant pictures of his daughter, who had been born seven months previously. Mr Cuthbertson's partner was currently pregnant, and they had a short conversation in which they shared their excitement about the arrival of their babies. The Claimant did not deny that she had had conversations with both men about her pregnancy. The friendly nature of their exchanges makes it inherently not credible that the men would have made the alleged comment to her, which they both recognised in their evidence would have been a disrespectful comment to make.

37. The Tribunal also notes that in her complaint to the agency about her time at the garage the Claimant complained of "*several comments made by all male Porsche Staff regarding my pregnancy regarding how big I am 'you like your look* [sic] *about to drop'…*" If she knew that in fact these comments had been made by two specific individuals, the Tribunal considered that she would have named them. In an email to Miss Pierce on 27 September 2021, the Claimant stated that Mr Cuthbertson made "several comments 'you look like your about to drop?'". By the time of this litigation, her claim had changed to alleging that he had made the comment on one occasion. Again, this indicates that the Claimant's account is unreliable.

38. For these reasons, the Tribunal concluded that these comments were not made, and this allegation therefore failed and was dismissed.

Decision to terminate the assignment

39. The Claimant accepted during the course of the Hearing that it was Mr Filer who made the decision to terminate her assignment at the garage. It was also Mr Filer's unchallenged evidence that he did so. The Claimant alleged that he had made the decision because of her pregnancy. During the course of the Hearing, she also, and for the first time, alleged that his decision was because of an illness resulting from her pregnancy, namely, morning sickness that had caused her to be thirty minutes late for work on one occasion. She said that she had 'phoned the garage and spoken to the Service Manager, told her she would be late in and told her why. The Tribunal decided to allow the Claimant to amend her claim to put the allegation in this alternative way because the garage was in a position to defend it by way of short additional evidence from Mr Filer.

40. If Mr Filer did decide to terminate the Claimant's assignment because of her pregnancy or an illness resulting from it, that would be unlawful under Section 41(1)(b) read with Section 18(2) EqA.

41. The Tribunal accepted Mr Filer's evidence, which was clear and unequivocal and not challenged by the Claimant, that at the time he made the decision to terminate the Claimant's assignment he did not know that she was pregnant. This is supported by the fact that Miss Pierce told the Claimant in her conversation on 22 October 2021, when she gave her feedback on her complaint, that Mr Filer was unaware that the Claimant was pregnant until Miss Pierce called him to check the reasons for the termination of the assignment. The Tribunal also accepts Mr Filer's evidence, which was clear and unequivocal and unchallenged by the Claimant, that he did not know that she had been late to work on any occasion, let alone that she had been late to work because of morning sickness. That is unsurprising, given that Mr Filer is Head of Business at the garage and is very unlikely to have any knowledge of the detail of an agency worker's attendance.

42. The Tribunal accepts Mr Filer's evidence, which was consistent with the evidence from all the other witnesses for the garage, that the reason the Claimant's assignment was terminated was because of reports he had received that the Claimant's performance had become seriously unsatisfactory. Initially, he had high hopes that the Claimant would be good in the role, as did her fellow receptionists who hoped that she would become permanent. At around the beginning of July, however, when the permanent role was advertised, the Claimant's attitude to her work appeared to change.

43. It is very important to the garage's business that customers are given a high quality of service, because they are potentially going to be spending a lot of money on a car. The receptionist has an important role in greeting a customer entering the showroom and ensuring they are paired up quickly with a member of the sales staff. They also need to answer telephone calls from customers promptly. In July, the sales staff began to complain to their managers that the Claimant was spending time using her mobile 'phone rather than attending to customers. They raised their concerns with Mrs Forster and Mrs Firbank too.

44. Various of the garage's witnesses confirmed in their evidence that they had personally witnessed the Claimant's behaviour.

45. Mr Cuthbertson was working at the showroom from 3 August 2021. He was on secondment from the Second Respondent's York showroom to provide management cover. He confirmed in evidence that he had noticed that the Claimant's enthusiasm towards her role was not good and he often saw her using a personal mobile device. The Claimant was not engaging with customers and the 'phones were not being answered quickly.

46. Mr Miller noticed that from the end of June the Claimant had started to use her mobile 'phone a lot and kept customers waiting. He saw the Claimant using a laptop to view an online shopping website. The receptionist's duties included keeping the customer lounge area tidy and he noticed that this was not being done at weekends. On 5 July he received a complaint from a high value, repeat customer that he had arrived at the showroom to collect his new car and had been ignored by the receptionist due to her being on her mobile 'phone. The customer said that if he had not already made his purchase he would have walked out. Mr Miller apologised to the customer and raised it with Mr Hustwith who reported the matter to Mr Filer.

47. On 2 August, a customer posted the following on Google Review about his experience of the garage:

> *Completely empty on a Sunday afternoon, no-one offering any help or support, reception was more bothered about being on her phone than acknowledging a potential customer or asking if we needed anything…*

The review went on to complain about the lack of cars in the showroom.

48. In the Hearing, the Claimant alleged that this review had been fraudulently created by the garage and that the business did not have a Google Review account at this time. She presented no evidence to support that assertion. In an email to Miss Pierce on 27 September 2021, the Claimant had suggested that the review might have been posted by a member of Mr Podolanski's family. There was an incident, she said, when a customer who had a "similar look" to Mr Podolanski had shouted at her that no one was helping him and left the showroom. This seemed like a staged event, she thought. By the time of the Hearing, she was not maintaining that position.

49. Mr Hustwith was the first manager to become aware of this review and raised it with Mr Filer, who tried to contact the customer but without success.

50. Meanwhile, the sales team had been complaining to Mr Hustwith about the Claimant's behaviour. They were worried that this was having a serious impact on the business. August and September are especially busy months for the garage and customers were not being welcomed and greeted. On a weekend at the end of August, when providing management cover, Mr Hustwith took the opportunity to observe the Claimant's performance himself. He saw her failing to greet customers when they entered the site. On at least five occasions she was looking at something that was either a 'phone or some other personal device and was oblivious to the customers' presence. 'Phones were being left to ring for a very long time before the Claimant eventually answered them or other staff members intervened.

51. Mr Podolanski spoke to the Claimant about her reluctance to speak to customers and reminded her that she needed to speak to customers in a timely manner.

52. Mr Hustwith raised his concerns about the Claimant with Mr Filer, as did Mr Podolanski.

53. During cross-examination, the Claimant accepted that Ms Woods from the agency had called her at the end of July or beginning of August to ask why she was using her mobile 'phone at work. This must have been because the garage had raised the issue with Ms Woods.

54. On around 6 September, Mrs Foster told Mr Filer that she had received a 'phone call from EH, a member of the public who was enquiring about the receptionist vacancy. EH told Mrs Forster that when she had 'phoned to enquire about the vacancy, the receptionist (the Claimant) had been abrupt with her and tried to put her off from applying by saying the vacancy was "her job". Mr Filer agreed to 'phone EH and he interviewed her for the vacant post the following day. EH told Mr Filer that the Claimant had made her feel awkward and tried to put her off

applying for the job. Mr Filer apologised. He offered her the role, which she began on 2 October.

55. On around 8 September, Mrs Forster spoke to Mr Filer about the level of complaints she was getting about the Claimant. She did not think the situation could be allowed to continue. After a discussion with Mrs Forster about the Claimant, including the complaint from EH about her conduct on the 'phone, and taking into account the feedback he had already received from his managers, Mr Filer agreed that the situation had now become untenable. He told Mrs Forster to contact the agency and ask for the Claimant to be removed from the assignment and for a temporary replacement to be provided.

56. On 9 September, Mrs Forster informed Ms Wood that the garage wanted to end the Claimant's assignment and for a replacement to be sent. Ms Wood told Miss Pierce about what the agency had said. Miss Pierce 'phoned the Claimant to let her know that her assignment had been cancelled and confirmed this by email on the same day. The Claimant queried why the assignment had been ended and mentioned that she had been late on one occasion because of morning sickness. Miss Pierce 'phoned Mr Filer to clarify the reasons for his decision and he confirmed that it was the Claimant's performance. It was during this call with Miss Pierce that he first became aware that the Claimant was pregnant.

57. The Claimant's evidence was that there were in fact no problems with her performance in the role but the Tribunal found her evidence unconvincing. Her evidence about her mobile 'phone use whilst at work was particularly unreliable. She initially appeared to accept that she had used her 'phone at work for medical reasons because she had complications with her pregnancy, but then said she had not used it at all. She said she had it on the desk beside her so that she could use it in case of a medical emergency and she had told "management" that that was why she had it there.

58. The Claimant said that if her performance had been unsatisfactory, someone would have raised it with her and no-one did. As the Claimant was an agency worker, it is unsurprising that the garage did not attempt to manage her performance as it would have done had she been its employee. One of the reasons employers use agency staff is so that they can replace a poor performer at short notice and without needing to manage them. Nevertheless, as stated above, the Tribunal accepts that Mr Podolanski did in fact talk to the Claimant about her performance and Ms Woods talked to her about her mobile 'phone use. The Tribunal prefers the evidence of the garage's witnesses, who were clear and mutually consistent, that the Claimant's performance was very unsatisfactory.

59. The Claimant's evidence was that she had not been unprofessional in her call with EH and had not tried to put her off applying for the role. The Tribunal does not accept that evidence, which is inconsistent with the agreed transcript of her 'phone conversation with Miss Pierce on 22 October 2021. There, the Claimant

says that she told the caller “Unfortunately, as far as I’m aware, I’m covering the role at the minute. I don’t think the role still available. It might be an old job advertisement. They would need to contact Porsche directly or send a CV online and I’ll make the team aware”. She also told Miss Pierce that she had told EH: “Well, there shouldn’t be a role out for my role because I’m currently still in my role. Unless they’re recruiting for me once I leave for maternity”. These comments are clearly intended to make the caller believe that the role is not currently available because the Claimant is filling it.

60. The Claimant’s evidence was that Miss Pierce told her that one of the reasons the garage decided to terminate her assignment was “lateness”. The Tribunal accepts that during their conversation on 22 October 2021, Miss Pierce does appear to accept that the agency was given two reasons for the termination, performance and lateness. But Miss Pierce also confirms to the Claimant during that conversation that she had ‘phoned Mr Filer direct to clarify his reasons for terminating the assignment and he confirmed that it was the Claimant’s performance.

61. As the Tribunal accepted that the reason Mr Filer decided to terminate the Claimant’s assignment was her conduct and performance and not her pregnancy or any illness caused by her pregnancy, this allegation failed and was dismissed.

Costs and preparation time orders

62. The Respondents both applied for the Tribunal to make an Order that the Claimant contribute towards their costs, expenses and time in defending the claim.

63. Under Rule 76 of its Rules of Procedure, the Tribunal has power to make such an Order where it considers that the Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the claim, or part of it, or in the way that the proceedings, or part of them, have been conducted. It also has power to make an Order if the claim had no reasonable prospect of success.

64. For a Respondent who is legally represented, as the garage is, the Order can be made in respect of their costs in defending the claim. For a Respondent who is not represented by anyone charging for their services, which is the case for the agency, the Order can be made in respect of the time they have spent in working on the case, but not time spent at the Hearing. The Tribunal can also make an Order to cover the expenses of a witness in connection with their attendance to give evidence.

65. The Respondents both said that there were grounds for an Order because the Claimant’s claims had no reasonable prospect of success and she had acted unreasonably in pursuing them and in her conduct of the proceedings.

66. If the Tribunal finds that there are grounds for an Order, it then has a discretion as to whether to make one. The Tribunal also has discretion as to whether to have regard to a party's ability to pay, both when deciding whether to make an Order at all and when deciding on the amount of an Order (Rule 84).

67. The Respondents' applications were made after the Tribunal delivered its Judgment and reasons. The Tribunal required the Respondents to put their applications in writing and provide them to the Claimant three hours in advance of the Tribunal's consideration of the application. The Tribunal was satisfied that this gave the Claimant a reasonable opportunity to make representations about the applications: the applications were not lengthy and covered much the same ground as the costs warning letters that the Respondents had sent the Claimant several months previously.

The agency's application

68. In relation to the claims against the agency, the Tribunal accepted that the Claimant acted unreasonably in failing to clarify before the first day of the Hearing that she was withdrawing any allegation that the agency had discriminated against her by terminating her assignment at the garage. She did, however, mention in an attachment headed "Claims pursued by Claimant" to an email on 14 July 2022, sent to the Tribunal and the Respondents, that her pregnancy discrimination claim against the agency was that it had failed to notify the garage of her pregnancy. In that email she was clarifying which claims identified at the Preliminary Hearing on 28 February 2022 she wanted to pursue. When the Tribunal wrote to the parties on 27 July 2022 to confirm its understanding of which claims had been withdrawn, it did not include the claim against the agency about the termination of the assignment. That was understandable, given that the Claimant did not expressly state that she was withdrawing it, she only said that her claim against the agency was the allegation of failure to notify her pregnancy. However, because the Claimant did provide that information, the Tribunal did not consider it appropriate to make a preparation time order in respect of the Claimant's conduct of that aspect of her claim against the First Respondent.

69. In relation to the alleged failure by the agency to notify the garage of the Claimant's pregnancy, on the other hand, the Tribunal was satisfied that the Claimant did act unreasonably in pursuing it. In response to the Claimant's repeated requests, the agency sent her copies of the email of 28 July 2021 on five occasions: 10 August, 30 August, 31 August, 5 September and 7 September 2022. As already mentioned above, on 5 September 2022 the garage sent her a screenshot of its email server inbox showing that the email had been received. On 17 October 2022 the agency sent the Claimant metadata to confirm the details of when it was sent, the sender and the recipients.

70. On 5 September 2022 the First Respondent wrote to the Claimant warning her that if she pursued this aspect of her claim, it would apply for a costs order

against her on the ground that she was acting unreasonably in pursuing the claim and that it had no reasonable prospect of success.

71. Whilst the Tribunal accepted that the Claimant might initially have had grounds for suspecting that the agency had failed to notify the garage of her pregnancy when Miss Pierce could not find a copy of the email of 28 July 2021, once she had received multiple copies of the email and the garage's documentary confirmation that it had been received, it became clear that the allegation had no reasonable prospect of success and she acted unreasonably in pursuing it. The agency warned her on 5 September 2022 that it would be applying for a costs order if she continued with the allegation. The Tribunal was satisfied that, had the Claimant acted reasonably, she would have withdrawn the allegation promptly, and by 12 September at the latest.

72. The Tribunal also accepted that the Claimant acted unreasonably in the conduct of her claim during September and October 2022 by repeatedly applying to the Tribunal for an order for specific disclosure in relation to the email of 28 July when multiple copies of it had already been provided to her and the Tribunal had refused to make an order for that reason.

73. The Tribunal found that most if not all of the agency's time in defending the claim was spent dealing with the allegation relating to the failure to notify. The agency knew that the garage accepted that it was Mr Filer who had made the decision to terminate the Claimant's assignment, and so it did not need to spend time preparing to defend that decision.

74. In all the circumstances, the Tribunal considered it appropriate to require the Claimant to compensate the agency for its preparation time from 12 September 2022 onwards and the expenses incurred to enable Miss Pierce to attend to give evidence. Her evidence was relevant to the allegation of failure to notify because she explained why she had not initially found the email.

75. The agency spent 50 hours after 12 September 2022 in preparation. The Tribunal considered that a reasonable and proportionate amount of time to spend, bearing in mind that it was during this period that disclosure of documents, preparation of the Hearing file and exchange of witness statements took place. The agency also had to spend time dealing with the Claimant's repeated applications for disclosure orders and preparing to present the agency's case at the Hearing. The current hourly rate for preparation time is £42, giving a total claim of £2,100.

76. In relation to Miss Pierce's expenses in attending the Hearing, the Tribunal saw receipts for her rail fares and hotel costs and accepted that she incurred £409.04 in expenses.

The garage's application

77. On 2 November 2022 the garage wrote to the Claimant to set out why it considered that her claims had no reasonable prospect of success and that she was acting vexatiously in pursuing them in the light of the documentary evidence that she now had. By this time, disclosure was complete and witness statements had been exchanged. The reasons the garage gave were broadly the same reasons as those set out above for the Tribunal's decision to dismiss the claims. It gave her seven days to withdraw her claim, failing which it confirmed it intended to apply for a costs order against her.

78. The Tribunal accepted that by the time she received the costs warning, the Claimant should have been aware that her claims against the garage had no reasonable prospect of success. The Tribunal found that she acted unreasonably in pursuing them beyond this point. She knew from the outset that her fellow receptionists had in fact told her about the permanent vacancy in June, and the documents and witness statements confirmed that it was the same post that was being re-advertised in September. She knew from the outset that the disrespectful comments had not in fact been made. And she now had the witness statements that supported Mr Filer's evidence that the reason the garage had ended her assignment was because she was not paying attention to her duties. She also had the documentary evidence in the form of the Google Review. Further, she knew that, contrary to her evidence to the Tribunal, she had been using her mobile 'phone at work. In any event, she accepted on the first day of the Hearing that Mr Filer made the decision to terminate her assignment and that he did not know she was pregnant at the time. She was in a position to make that concession in October 2022, when she saw the garage's witness statements.

79. The garage's costs warning letter of 2 November 2022 put the Claimant on notice that she was risking a costs order being made against her if she continued with her claim, but she did so nonetheless. The Tribunal considered it fair to require the Claimant to pay towards the costs the garage incurred from 9 November 2022, when the time it had given her to withdraw her claim expired.

80. The Tribunal reviewed the costs schedule provided by the garage. It agreed some reductions with the garage's representative, to ensure that only costs incurred from 9 November were covered and VAT that could be recovered by the garage was excluded. Subject to those amendments, the Tribunal accepted that the costs claimed were reasonably incurred. The total amount claimed after the amendments was £8,013.37.

The Claimant's ability to pay

81. The Tribunal considered it fair to take into account the Claimant's ability to pay when deciding whether to make an order and, if so, in what amount.

82. The Claimant gave evidence that she was currently on sick leave from her other job with the Right Fuel Card Company, having previously taken a period of maternity leave. In that employment she is a sales executive, and her evidence was that she is on a salary of £24,000 a year plus an annual sales-related bonus of between £2,000 and £5,000. Her net earnings are usually around £1,900 a month. She was not, however, currently in receipt of any income from that employment and was not receiving sick pay either. She was receiving child benefit and universal credit of just under £1,200 but has living expenses, including childcare costs, of nearly £1,000 a month. She has no savings or other assets.

83. The Claimant was diagnosed with breast cancer in 2010 and had surgery at that time. In January this year she was diagnosed with ductal carcinoma in situ in the same breast. She has since had a CT scan and bone scan that show the cancer has not spread. She is likely to have surgery at the end of March but she has made no final decisions yet on the nature, extent and timing of that surgery. She provided no medical evidence that she was currently unfit for work because of her diagnosis, although the Tribunal accepted that she needs to spend some time attending medical appointments.

84. The Tribunal found that the Claimant currently had limited disposable income and the date of her return to work was not certain. It also recognised, however, that the Respondents had incurred substantial costs to defend claims that she has pursued unreasonably. Taking into account all the circumstances, the Tribunal considered it fair to make the Orders sought, but to reduce the amounts claimed for preparation time and legal costs significantly to reflect the Claimant's ability to pay. It decided that a 50% reduction would be appropriate. It also considered it fair to defer the date for payment, to allow the Claimant more time to raise the necessary funds on her return to work.

85. Because the Tribunal did not know the timing or nature of the Claimant's surgery, and had no medical evidence on likely recovery times, it made a working assumption that the Claimant's surgery would go ahead at the end of March and that she was likely to need at least two months to recover and so would not be able to return to work until the end of May 2022. Once she is fit for work, she will have the possibility of further income from weekend work through an agency, as she had when working through the First Respondent. In addition, she has a business offering alternative therapy services for which she sometimes charges and that is also likely to generate some income.

86. On that basis, the Tribunal concluded that the Claimant must pay the agency £1,050 for its preparation time by the end of June 2023 and the garage £4,006 for

its costs by the end of August 2023. In addition, the Claimant must pay Miss Pierce's expenses of £409.04 in full by the end of June 2023.

Employment Judge Cox
Date: 20 March 2023