Case Numbers: 1400940/2021
1401132/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms Laura Nottola

Respondents: Atelier Clifton Limited (1)
Ms Ella Hawkey (2)

Heard at: Bristol **On:** 20 to 22 February 2023

Before: Employment Judge C H O'Rourke
Ms L B Simmonds
Ms L Fellows

Representation:

Claimant: Mr M Sellwood - Counsel
Respondents: Mr P Collins - Legal representative (Peninsula)

REASONS

(Having been requested subject to Rule 62 of the Tribunal's Rules of Procedure 2013)

1. The Claimant was an employee of the First Respondent (R1) and the Second Respondent (R2) was her manager and R1's Managing Director. R1 is a hairdressing business and the Claimant was a hairdresser. She was employed from June 2019, until her summary dismissal on 21 December 2020, for alleged gross misconduct. The Claimant was pregnant at the time.

2. As a consequence, she brings the following claims, as set out in the case management order of 13 January 2022 [96] and as further agreed at the outset of the Hearing:

    1. Pregnancy Related Unfair Dismissal (s.99 of the Employment Rights Act 1996 (the Act) and Regulation 20 of the Maternity & Parental Leave etc Regulations 1999)

        1.1 This claim is brought against R1 only.

1.2 Was the reason or principal reason for the dismissal of a prescribed kind or in prescribed circumstances (s99(1))? The Claimant relies on pregnancy (s99(3)(a) and Regulation 20(3)(a)).
1.3 The Claimant did not have at least two years' continuous employment and the burden is therefore on her to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was her pregnancy.

2. Direct Pregnancy and Maternity Discrimination (s 18 Equality Act 2010)

2.1 This claim is brought against both Respondents.
2.2 It is accepted that R1 dismissed the Claimant, and that this was unfavourable treatment. No comparator is required.
2.3 Was the Claimant's dismissal because of the pregnancy (s18(2)(a))?

3. Health and Safety Unfair Dismissal (s100(1) of the Act)

3.1 This claim is brought against R1 only.
3.2 Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal the reasons set out in section 100(1)(e) of the Act?
3.3 The Claimant asserts that in circumstances of danger which she reasonably believed to be serious and imminent, she took appropriate steps to protect herself or other persons, namely that she took steps to self-isolate during the Covid pandemic.
3.4 The Claimant did not have at least two years' continuous employment and the burden is therefore on her to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was for this reason.

4. Failure to Provide Written Reasons (ss 92 and 93 of the Act)

4.1 This claim is brought against R1 only.
4.2 Did R1 fail to provide the Claimant with a written statement giving particulars of the reasons for her dismissal?
4.3 Was that failure unreasonable (s93(1)(a))?
4.4 If there was an unreasonable failure to provide written reasons, then the Tribunal will consider making a declaration and will make an award of two weeks' pay (s93(2)).
4.5 It is noted that under section 92(4) the Claimant was entitled to that statement without requesting it by reason of being pregnant.

The Law

4. We reminded ourselves of the statutory tests (as set out above).

5. We referred ourselves to the following authorities:

    a. **Royal Mail Group Ltd v Efobi [2021] UKSC 33**, which confirmed that the burden of proof does not shift to the employer to explain the reasons for its treatment of the employee, unless the employee is able to prove, on the balance of probabilities, those matters which they wish the tribunal to find as facts, from which, in the absence of any other explanation, an unlawful act of discrimination can be inferred.

    b. **Amnesty International v Ahmed [2009] UKEAT IRLR 884**, in which then President Underhill confirmed that when deciding whether a claimant has proven discriminatory conduct by the respondent, the Tribunal should consider what inferences, if any, can be drawn from the primary facts, the mental processes (conscious or unconscious), the surrounding circumstances and explanations provided by the respondent.

    c. Under Reg 20(3)(a) MPL Regulations, a woman will be treated as unfairly dismissed if the reason or principal reason for her dismissal is a reason 'connected with' her pregnancy. In **Atkins v Coyle Personnel plc [2008] IRLR 420, EAT** the meaning of 'connected with' was considered and found to be requiring causal connection, but was not a 'but for' test.

    d. In **Onu v Akwiwu and anor; Taiwo v Olaigbe and anor [2014] ICR 571, CA**, Lord Justice Underhill stated: '*What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind… so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice*.'

    e. Mr Sellwood referred us to the case of **Oudahar v Esporta Group Ltd [2011] ICR 1406, EAT,** where the EAT stressed that the fact that the employer had preferred the account of a managerial witness and concluded that there was no risk to health and safety was irrelevant to the question of whether the reason for dismissal

fell within S.100(1)(e). It serves the interests of health and safety that an employee should be protected so long as he or she acts honestly and reasonably in the circumstances covered by S.100(1)(c)-(e) ERA. If employees were liable to be dismissed merely because their employers disagreed with their account of the facts or opinions as to the action required, the statutory provisions would confer little protection.

The Facts

6. We heard evidence from the Claimant. On behalf of the Respondents, we heard evidence from R2 and a Ms Lucy Edwards a former colleague of the Claimant. We also read, without objection from the Claimant, a statement from a former client of R1, a Ms Emma Aiken-Jones.

7. Chronology. We set out the following chronology in this matter:

   a. March 2020 (all dates 2020): Onset of the Covid pandemic and first lockdown.

   b. 13 August 2020: R2 held an appraisal with the Claimant [140].

   c. 28 September: There is an exchange of emails between the Claimant and R2, as to concerns of R2 about the Claimant's attitude at work [147-150].

   d. November: 2nd Lockdown. R1's salon closed. Also, sometime early in this month, the Claimant finds out that she is pregnant. She is offered a '12-week scan' on Saturday 19 December, but re-arranges that for 15 December.

   e. 30 November: Salon re-opens and R2 sends out a 'staff update' [151].

   f. 9 December: the Claimant asked R2 for time off to attend '*a medical appointment'*. R2 said that she told the Claimant that '*if this was urgent then she could call her clients to explain the late notice cancellations herself … so I left it with the Claimant to clear the afternoon so that she could attend her appointment and these hours were not deducted from her pay.'* (WS 13&17).

   g. 11 December: the Claimant and R2 provided services to Ms Aiken-Jones, who, on 15 December, texted R2 to say that she had tested positive for Covid [157].

h. 15 December: the Claimant had her 12-week scan, and her baby was confirmed to be healthy.

i. 16 December: the Claimant stated that she was informed by a colleague of Ms Aiken-Jones' Covid positive result (not having been informed of that fact directly by R2).

j. 17 December: the Claimant attended work. She said that she informed colleagues as to her pregnancy. R2 was off sick and had taken a Covid test, which was confirmed negative [161]. She advised the Claimant to also take a test if she could. The Claimant phoned NHS 111, informed them of her contact with Ms Aiken-Jones and was advised to self-isolate for ten days '*from when you were last in contact with this person'* [166]. The Claimant informed R2 by telephone of this advice and at that point also informed her of her pregnancy (WS15).

k. 21 December: The Claimant was contacted by a colleague at the Salon, to ask if she would be in work that day. The Claimant said that she wouldn't, as that was the last day of her self-isolation, but that she would be in on the 22nd [168]. She called R2 (at about 9am) and the outcome of that conversation was that she was dismissed. Later that day, the Claimant texted R2 requesting confirmation of her dismissal and the reasons for it [169]. Later that day she received an emailed letter from R2, inviting her to a disciplinary hearing on 28 December and stating that she was '*suspended pending investigation'*, in relation to '*your recent conduct and absence from work'* [170]. Also that day, R2 rang 'Track and Trace enquiries', to confirm self-isolation advice [172].

l. 24 December: R2 wrote to the Claimant, setting out the '*details of the grievances for our meeting, Monday 28th December 2020 …'* [180].

m. 26 December: R2 wrote again to the Claimant, setting out '*full details of the grievances/allegations of gross misconduct against you.'* [183].

n. 28 December: the disciplinary hearing proceeded, by Zoom [transcript 344]. At 17.35 that day, R2 emailed the Claimant to state that '*On consideration of the facts, evidence and your contribution today, I see no reason to re-consider termination of your employment for gross misconduct.'* [193].

o. 1 January 2021: the Claimant requested an appeal [207], which R2 refused on 2 January [210].

8. Note on the Evidence and Credibility generally. Much of the evidence in this claim was based solely on oral conversation and therefore where there is a conflict of such evidence (as there is), we must state which evidence is preferred. We have no hesitation in stating that in such circumstances, we prefer the evidence of the Claimant, over that of R2, for the following reasons:

    a. In cross-examination, the Claimant's evidence was calm, straightforward and to the point. It was consistent with her statement and documentary evidence and where she was unsure, she said so.

    b. In contrast, R2's evidence was sometimes inconsistent with her statement and the documentary evidence. She frequently gave evasive answers to questions, having to be reminded on several occasions by the Tribunal to answer questions directly. She was unwilling to make any concession as to her account, even when confronted with contrary, documented evidence and in the most egregious example, refused to accept the clear wording of a text message from Ms Aiken-Jones, in relation to that person's symptoms [157].

9. Reason for the Dismissal. As claimed by the Claimant, she states that the reason for the dismissal was because of or connected to her pregnancy. As an alternative, she also states that it was also potentially because of her decision to self-isolate for ten days (itself linked to her pregnancy) and therefore automatically unfair, on health and safety grounds. In contrast, R2 stated that the true reason for the dismissal was the Claimant's '*insubordination … non-attendance … and breakdown in trust and respect between us…'* (35), which she considered gross misconduct. She categorically denied that the dismissal was because of the Claimant's pregnancy.

10. Burden of Proof. Applying **Efobi**, we consider whether or not the Claimant has established that on the balance of probabilities, those matters which she wishes the tribunal to find as facts, from which, in the absence of any other explanation, an unlawful act of discrimination can be inferred? If that is the case, it thus shifs the burden of proof to the Respondents to show a non-discriminatory reason, or in the context of dismissal, a fair reason for that dismissal. We consider that she has established such a case, for the following reasons:

    a. There is no dispute that she was pregnant at the point of dismissal and that R2 knew that.

b. There can be no doubt that at least three of the reasons for the dismissal (as set out in R2's letters of 24 and 26 December) were 'connected to' or were 'significantly influenced' by the Claimant's pregnancy:

    i. The criticism by R2 that the Claimant had failed to inform her earlier of her pregnancy [180 and 184];
    ii. The Claimant taking time off for her 12-week scan being viewed as '*unauthorised absence'* [180 and 183]
    iii. The Claimant not attending for work on 21 December [184]. As set out below, the Claimant was, in any event, complying with the then Covid isolation advice, but felt particularly vulnerable due to her pregnancy.

11. The burden of proof does therefore shift to the Respondents (in reality R2) to show a non-discriminatory reason for the dismissal. In that context, R2 refers to the following matters:

    a. She had had concerns for some time about the Claimant's conduct at work and in particular her attitude towards her. These were not minor matters and cumulatively went to the core of the employment contract, indicating a breakdown in trust and confidence.

    b. These matters came to a head between 9th and 21st December, with the Claimant's attitude and manner, on the latter date in particular, leaving R2 with no option but to dismiss her, for gross misconduct.

    c. R2 relied, in particular, on the following incidents:

        i. The contents of and lead up to the Claimant's appraisal, of 13 August [140]. R2 said that the Claimant had failed, at the outset, to comply with a request to provide feedback of her perceptions of her role, prior to the appraisal, in the timeframe laid down. R2 had provided the questions on the morning of 11 August and requested answers by midday the next day, however the Claimant did not provide them until late that evening, having been chased to do so [138]. R2 was challenged on this issue, it being pointed out that the deadline she set down was too tight and she could have easily sent out the questions several days in advance and also that the Claimant was not at work at that time and therefore could not be expected to respond in her free time. R2 didn't accept this suggestion, pointing out that there were only five questions and they were straightforward.

ii. At the appraisal itself, she criticised the Claimant's performance in respect of her perceived lack of '*warmth'* with clients. She did concede, however that overall the tone of the written appraisal was favourable, expressing pleasure with the Claimant's performance, her skill and her '*respectable'* takings. She said, however that the appraisal document at 140 was simply a note for her to use at the meeting and not a record of it and that several other issues were discussed, but not recorded on the note, or in any subsequent document. She said that she also raised concerns about the Claimant's non-compliance with H&S protocols, booking a holiday prior to it being authorised and adopting a professional attitude when liaising with her manager (R2). She said that the Claimant '*closed me down'*, said she was '*over-thinking things'* and that she '*felt undermined, baffled by the change in the Claimant's demeanour and frankly quite unwelcome in my own environment.'* (WS11). In cross-examination, R2 agreed that prior to this meeting, in the nine months that the Claimant had previously worked at the Salon, she had not raised any particular issues as to the Claimant's performance with her. She said that she nonetheless did have concerns and said she kept notes, but which were not in the bundle, but agreed that she had not mentioned such matters in her witness statement. Nor had she kept any notes of the additional matters she said she raised at the appraisal meeting, or communicated them subsequently to the Claimant, at the time.

iii. R2 said that on 20 August, she raised an issue orally with the Claimant as to her use of photographs of clients' hairstyles on her Instagram account. She said that she had asked all staff to share such photographs with her first, in order to co-ordinate marketing, but that the Claimant refused to do so, saying that '*fine, I won't post anything then'*. R2 accepted that she had no record of this conversation and also that she had generally cautioned all members of staff on this point in her staff update of 30 November [151], indicating that this was a staff-wide issue, not just for the Claimant. That update indicated that staff could post photos on their own Instagram pages, provided the Salon was 'tagged' on the page, so the Salon was getting the business, not the individual. The Claimant said that she did so and R2 provided no evidence to the contrary.

iv. R2 said that at the end of September, she felt that the tensions were such, between her and the Claimant that she felt it necessary to email her on that account. She emailed on 28 September, referring to '*hostility'* from the Claimant, to which the Claimant expressed surprise. R2 then further responded, referring to three matters: that the Claimant had 'rolled her eyes' when R2 had admonished members of staff; that when she complimented the Claimant on her work, she got '*zero response'* which made her feel awkward and that the Claimant had been dismissive of feedback from her [148]. The Claimant responded, referring to R2's own references to personal and financial challenges, sympathising with them and putting any concerns down to misinterpretation. Ms Edwards gave evidence, generally, on this issue, indicating her view that the Claimant had a lack of respect for R2 and referring to 'eye-rolling' by her. Overall, while we found that there was a degree of generalisation in her evidence and uncertainty over dates and the length of events, we accept that the evidence as a whole indicates tensions between the Claimant and R2. We note, as an aside, that it seems somewhat remarkable that R2 would confide in such a junior and young member of staff (at the time Ms Edwards was only 16) as to her concerns about the Claimant and to seek her opinions on a much more senior and experienced colleague, in effect using her to report back on the Claimant. This indicates to us a poor management style on R2's behalf, perhaps helping to explain later what we consider were 'knee-jerk' reactions by her.

v. Thereafter, nothing of any note occurs, until 9 December, when the Claimant asks for time off to attend a medical appointment. The Claimant said that at that point, until she'd had her 12-week scan, she didn't want to disclose her pregnancy to anybody and therefore simply told R2 that she had an appointment that she had to attend. It is clear from the evidence of both witnesses that this discussion was a tense and argumentative one, with R2 objecting to the request as December was a 'no-leave' month, due to high demand. However, what is also clear is that while R2 sought to deny it in cross-examination, she did (albeit reluctantly) agree to the Claimant taking the time off and did not make deductions from her pay for that time. An option open to her was to state that she would not agree to the time off and that if, nonetheless, the Claimant took it off, she would not be paid and might face disciplinary proceedings. When this was put to her, she somewhat bizarrely argued that to do so

would have been less fair that what she subsequently did, which was to include this incident in the post-dismissal disciplinary charges against the Claimant.

vi. A subsequent criticism by R2 of the Claimant was that she had effectively deliberately misinterpreted NHS 111 self-isolation advice following being in contact with the infected client. It was clear from all the evidence, however that the Claimant had correctly interpreted the advice, which was to self-isolate for ten days following the date of contact, meaning that the last day of isolation would be 21 December, permitting a return to work on 22 December. Clearly, this decision by the Claimant was very inconvenient for R2, at a very busy time for the Salon, but the Claimant was complying with the law and advice at the time and cannot properly be criticised for it, particularly due to her pregnancy. R2's suggestion that in any event, even if the Claimant was right about the ten days (and she was), the period ended at 11 am on 21 December, as that was when the initial contact took place, thus permitting the Claimant to return to work at that point, was quite bizarre and entirely unsupported by any contemporaneous medical advice. What is clear is that when R2, on 21 December, sought advice from 'Track and Trace', she mislead the call-handler as to the relevant dates, in line with her wilful misinterpretation of Ms Aitken-Jones' text message describing her symptoms, thus skewing the advice given, to match her perceptions.

vii. These events then lead to the Claimant's summary dismissal on the morning of 21 December. The Claimant had phoned the Salon to confirm her position as to not returning to work until the next day and it is clear that an angry and intemperate conversation took place between her and R2. As stated, it is not in dispute that the Claimant had already informed R2 as to her pregnancy, having had the results of her scan. We think it more than likely, taking into account our views of credibility that R2 did say something of the nature of '*resign or be fired'* and that when the Claimant refused to resign, dismissed her.

viii. The subsequent 'disciplinary' process was, we consider, a sham, carried out in an effort by R2 to protect herself and R1 against a likely pregnancy discrimination claim, as the Claimant had intimated that possibility. While R2 claimed to have '*an open mind'*, we find that to be anything but the

case. She was the victim, the prosecutor, judge and jury and there was no question of her ever attempting to rescind her decision to dismiss. The eventual charges put forward by her, only on 26 December, were unfocussed and largely historic, indicating to us a desperate attempt, after the event, to justify her decision to dismiss, for reasons other than the Claimant's pregnancy. Even then, however, those reasons reference the pregnancy and are, in respect of the time off for the scan and the self-isolation, inextricably linked with that condition. This would have been a chance for her to 'step-back' and genuinely reconsider her decision, which, if she had done and the Claimant agreed to her rescinding the dismissal, may have prevented this claim, but she did not, further entrenching the position.

d. In summary, therefore, while it is clear that R2 had had her differences with the Claimant, there was no indication, as the Claimant states in her statement that if she was not pregnant, she would have nonetheless been dismissed. R2 clearly valued the Claimant's work, it was a very busy and lucrative time for the Salon and therefore R2 needed her at work. Such differences as they had had in the past had not been such, alone, as to the lead to the events of 21 December. There was no indication of any possible disciplinary proceedings, the most recent, non-pregnancy related matters were over two months previously and there had been a very pleasant and seemingly genuine exchange of best wishes between them on 17 December, when R2 announced her negative Covid test, with 'kisses' exchanged and use of 'emojis' and advice from the Claimant that that was '*good news! Drink homemade hot ginger honey + rum. It's a magic potion.'* What changed, subsequently, was possibly a misunderstanding between the women as to whether or not the Claimant was intending to work on the 21st, but also, crucially, the 'last straw' of the Claimant announcing her pregnancy. While R2 denied that this was a factor in her decision, the coincidence in time is too great and applying **Onu**, we find that *'the protected characteristic has operated on the discriminator's mind… so as to lead her to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice*.'

12. Accordingly, therefore, we find that the reason for the dismissal was connected to the Claimant's pregnancy and that accordingly, it was also an act of direct discrimination. Having found such, we don't consider therefore that any health and safety concerns can have been the principal reason for her dismissal, albeit they were clearly a factor.

13. As to the non-provision of written reasons, having found that the disciplinary process was a sham and even then did not attempt to take into account the Claimant's defence to the charges, but merely stated that R2 *'saw no reason to re-consider termination of your employment for gross misconduct'*, clearly this requirement has not been met and an award of two weeks' pay is appropriate.

Judgment

14. Accordingly, Judgment is as follows:

    a. The First Respondent automatically unfairly dismissed the Claimant for the reason of her pregnancy.

    b. Both Respondents directly discriminated against the Claimant on grounds of her pregnancy.

    c. The First Respondent unreasonably failed to provide the Claimant with written reasons for her dismissal.

    d. The Claimant's claim of automatic unfair dismissal for health and safety reasons fails and is dismissed.

REMEDY

15. Following delivery of Judgment, we then proceeded to consider Remedy. We heard evidence from the Claimant and submissions from both representatives.

16. The Claimant's evidence can be summarised as follows:

    a. The dismissal had a detrimental impact on her health, resulting in her suffering severe stress, anxiety and panic attacks. She lost her sense of self-confidence and self-worth [letter from her GP – 337].

    b. These symptoms continued throughout her pregnancy, starting to get better around October 2021. She said that she twice went to her GP in this respect. She denied that such symptoms might be due to pregnancy and said that she didn't experience them in her subsequent pregnancy.

    c. She was dismissed days before another Covid lockdown and was therefore unable to search for work immediately. She did ask a friend, a fellow hairdresser, for advice [336], but without result. She

approached a salon in Bath (where she lives), but they confirmed that they could only offer a self-employed position, and as the Claimant didn't have any clientele in Bath, having worked in Bristol for two years, she declined this offer as not being financially viable [338-341].

d. By the time salons re-opened on 12 April 2021, she was only eight weeks from her due date.

e. She and her partner lost the opportunity to buy their first house, as, while they had a mortgage offer [332], it was withdrawn due to her losing her income.

f. Her daughter was born on 8 July 2021 and she took twelve months' maternity leave. She became pregnant with her second child about eight months later.

g. She decided, in July 2022, to seek work as a mobile hairdresser, one day a week, in the hope of building up clientele in Bath, with the prospect of returning to work in a salon after her second period of maternity leave. She continued working in that way until her son's birth on 14 January 2023, having earned £2190. She acknowledged that she'd not provided evidence of those earnings. She is now on her second period of maternity leave.

h. She stated that due to the Respondents' behaviour she lacks the confidence to work in a salon and therefore plans to stay self-employed on her return from maternity leave. She considers that it would take six months or so of such self-employment to build up sufficient clientele to match her earnings with R1.

i. She agreed that as she was paid pay in lieu of notice of one week by R1, her loss of earnings commences on 7 January 2021. She agreed that she has not sought to claim loss of pension contributions and therefore concedes that she cannot now seek such payments.

j. She was asked if she had the skills for any other employment and said that she has no training in anything else. She has done some French translation informally in the past, but has no qualifications in interpretation, or translation.

Submissions

17. On behalf of the Respondents, Mr Collins made the following submissions:

a. The claim for the past loss Compensatory Award was accepted.

b. The award for injury to feelings should be in the lower **Vento** band and the Tribunal is reminded that its purpose is to compensate the Claimant, not punish the Respondents. Any such award should be 'fair and reasonable', bearing in mind that the incidents found to be discriminatory do not constitute a prolonged campaign, but are effectively 'one-off' or in a short period of time.

c. No psychiatric evidence has been provided and the mental impact on the Claimant was clearly not longstanding, on her own evidence not lasting beyond October 2021.

d. The Tribunal should beware the risk of 'overlap' between an award for injury to feelings and any award for aggravated damages, with the risk of double recovery. It has been asserted that R2's handling of the disciplinary proceedings indicated that she viewed the Claimant as an 'irritant', but she wanted to deal with the matter promptly. Hindsight is a great thing, but she had done her best in very difficult circumstances.

e. As to an ACAS uplift, there has been clear failure to follow such procedure, but not entirely and therefore not justifying a 25% uplift, but perhaps 10%.

18. On behalf of the Claimant, Mr Sellwood made the following submissions:

a. As to the future loss element of the Compensatory Award, there has been no indication that the Claimant was going to leave R1's employment after her return from maternity leave. It would have been highly unusual for her to do so and therefore very unlikely.

b. In respect of injury to feelings, the Tribunal's findings indicate the most serious discrimination. One-off incidents are not restricted to the 'lower band'. £15,000 is sought for injury to feelings, which is at the lower end of the middle band and a separate award of £3000 for aggravated damages is also sought, thus avoiding double counting. In respect of the latter award, R2 clearly treated the Claimant as an 'irritant'. She sacked her in the midst of the Pandemic, only four days before Christmas.

c. In relation to the ACAS uplift and reliant on **Rentplus UK Ltd v Coulson [2022] EAT IRLR 664**, an employer cannot rely on a sham disciplinary process – the pretence of following one is not enough. R2's behaviour was the paradigm of unfairness and not a

minor technicality. She was the owner of the business, not just some manager.

Conclusions

19. We reached the following conclusions on those matters that were contested, the award for future loss, the level of the award for injury to feelings, whether any award should be made for aggravated damages and the level of the ACAS uplift.

20. Future Loss. We saw no reason why future loss, to the date of the Claimant's second period of maternity leave should not be granted. We agree that she would have been very likely to have returned to work after her first period of maternity leave and accordingly, her full loss of earnings for that period is awarded, less the sums in mitigation which she has volunteered. We considered that any loss incurred following any return to work from the second period of maternity leave was too distant a link, causationally, from the point of her dismissal in December 2020, to some point, potentially, in 2024. Many other factors may have or will intervene in that period, such as the pressures of caring for two children and the need to avoid commuting from Bath to Bristol, thus reducing the chance of having remained in R1's employment.

21. Injury to Feelings. We are quite confident that this award should be in the 'middle band'. The discrimination was, by its nature, at a very sensitive time for the Claimant, when, as a newly-pregnant first-time mother, she should perhaps been at her most joyous. The fact of and nature of the dismissal will no doubt have soured and spoilt what would otherwise have been a very happy period in her life and we see no reason why entering into an unwanted period of unemployment, at Christmas, while pregnant and losing the prospect of a first mortgage will not have caused great upset to the Claimant's feelings. While she has not provided much in the way of medical evidence, we note her prompt, clear and no doubt true response, when it was asserted that her stress and anxiety may be pregnancy-related that that had not proved to be the case for her second pregnancy. The award sought is at the lower end of the Band and therefore is, we consider, entirely reasonable.

22. Aggravated Damages. We also agree that the claimed award for aggravated damages, of £3,000, is appropriate in this case. R2's handling of the Claimant was high-handed and dismissive. Both the tone of her telephone calls and the contents of her post-dismissal letters sought to belittle the Claimant. For example, despite deciding to call a 'disciplinary/grievance' meeting for 28 December, she declined initially to '*provide full outline of the intricacies of all points raised'* until 48 hours in advance of the meeting (so, presumably the 26th), but stated '*I will not be*

engaged further over the Christmas holiday', when it was her choice to set these dates [178]. She also sought, we consider deliberately, to rely on 'advice' received from Track and Trace, to counter the Claimant's case, when, as we have found, she mislead the call-handler at that service as to the true circumstances of her query. The tone of R2's rambling and disjointed letter of 26 December [183] was unprofessional and haranguing, for example accusing the Claimant of '*outright sabotage'* and indicated that R2 had lost all perspective on this matter and should have sought, if she was determined to continue with this process, to at least attempt to engage a third party to conduct it (she mentioned having a '*H&S representative'* for example).

23. ACAS Uplift. We agree with Mr Sellwood's submission that this case is a paradigm of unfairness and that applying **Rentplus** and based on our finding that the disciplinary process was a sham, the failure to follow the Code in any genuine sense was clearly unreasonable and that therefore the only possible uplift is one of 25%. We are conscious of the guidance in **Slade and anor v Biggs and ors [2022] IRLR 216, EAT**, as to potential overlap with other awards, but we consider that this award is discrete from say the award for aggravated damages, related as it is to specific statements or tone adopted by R2, rather than procedural failure. We don't consider that the effect of the uplift, raising the award by approximately £9000 is, in overall terms, disproportionate to the total award.

24. Calculation of Award. We set out our calculation of the award in the Remedy Schedule attached to the Judgment of 23 February 2023, to include calculation of interest and grossing up for tax purposes.

Employment Judge O'Rourke
Dated: 30 March 2023

Reasons sent to the Parties: 13 April 2023

FOR THE TRIBUNAL OFFICE