EMPLOYMENT TRIBUNALS

Claimant: Ms A Dugdale

Respondent: Key Cars (Widnes) Ltd (in Liquidation)

Heard at: Manchester (remotely, by CVP) **On:** 9 March 2023

Before: Employment Judge Whittaker
(sitting alone)

REPRESENTATION:

Claimant: Mr Bronze of Counsel
Respondent: No appearance

JUDGMENT

The judgment of the Tribunal is that:

1. The claim of the claimant of automatic unfair dismissal for pregnancy related reasons contrary to section 99 of the Employment Rights Act 1996 succeeds.

2. The claimant's claims of harassment pursuant to s26 of the Equality Act 2010 on the grounds of the protected characteristic of pregnancy (two claims) succeed.

3. The claimant's claim for compensation for the failure of the respondent to issue her with a written statement of particulars of employment contrary to section 38 of the Employment Act 2002 succeeds. and the claimant is awarded compensation for that failure in the sum of £680 pursuant to s38 of the Employment Act 2002.

4. The claimant is awarded compensation for injury to feelings in respect of the 2 claims of harassment in the sum of £12,000 and interest on that figure of £1433-35

5. The claimant is awarded a compensatory award of £2890 for loss of earnings for unfair dismissal pursuant to s99 of the Employment Rights Act 1996. No basic award is made.

6. The Tribunal confirms that the Employment Protection – Recoupment of Benefits – Regulations 1996 apply to the award of loss of earnings of the claimant to cover the 17 weeks period between 1 July 2022 and 31 October 2022. That is the Prescribed Period. The total award of loss of earnings was £2,890 . This is the Prescribed Element for the purpose of the Regulations. The total monetary award to the claimant for unfair dismissal was the quoted sum for loss of earnings namely £2890. No other award was made in respect of that claim. The Regulations therefore apply to the full sum of £2890.

7. The total value of the financial awards is £17,003.35.

REASONS

Evidence and Witnesses

1. The Tribunal was supplied with an itemised and paginated bundle of documents consisting of 76 pages.

2. The claimant submitted a witness statement to the Tribunal. The claimant also gave evidence on oath and answered questions from the Tribunal about the content of that statement and further information relating to her claims of discrimination.

3. The claimant also submitted a witness statement from her mother. That statement did not bear any handwritten signature and the author of that statement, Lynn Dugdale, did not appear before the Tribunal to give evidence on oath about the content of that witness statement. The Tribunal therefore took the statement into account but gave it very limited weight bearing in mind that it did not bear the handwritten signature of the witness and neither had she appeared before the Employment Tribunal.

Findings of Fact

4. So far as the claim of automatic unfair dismissal is concerned, having considered the relevant documents and having considered the evidence of the claimant, the Tribunal made the following findings of fact and came to the following conclusions.

5. At all relevant times the claimant worked as a telephone operator within the offices of the respondent company, who were a taxi firm. Whilst the claimant was working in the offices she worked alone as did all the other telephone operators who worked shift systems.

6. It was a very common and accepted practice that all members of staff were allowed to take cigarette breaks during their working hours. They were able to do so on the basis that they were able to hear the telephone ringing and would have a short period of time, approximately ten seconds, in which they would be able to respond to any telephone calls that were received and return to the offices to answer the telephone calls. The respondent at all times argued that the telephone operators were

exempt from the requirement to have set breaks of 20/30 minutes because the working practices of the taxi company simply did not permit that to be the case. Cigarette breaks were however allowed throughout the shifts that all employees worked, including the claimant.

7. On 4 August 2021 one of the directors of the company sent a message via the WhatsApp group of employees, including the claimant. It was sent by Mr Murphy who was one of the owners. That message indicated that there would be a change of practice so far as cigarette breaks were concerned. What the company was objecting to was people taking cigarette breaks and effectively putting the telephone "on hold" so that presumably it did not ring out and was not answered whilst the telephone operators, including the claimant, were away from their desk. The message made it clear that "going for a cigarette and putting the phones down is unacceptable and will be classed as gross misconduct". It ended with a vague message which said, "prohibited members of staff from going out for cigarette breaks during working hours". In simple English this final sentence did not make sense. In any event the Tribunal accepted from the claimant that the practice of taking cigarette breaks and that it did not change- with the knowledge and agreement and acceptance of the directors/owners of the company despite what had been sent by Mr Murphy in the WhatsApp message. The cigarette breaks were not prohibited. Members of staff, including the claimant, continued to take cigarette breaks, and that was with the knowledge of the owners/directors because at all times thee employees were subject to CCTV recording of not only what they said but also what they did throughout their shifts. The emphasis within the WhatsApp message was on making sure that telephone calls which were made to the taxi firm were promptly answered, and the claimant said that all members of staff were able to take cigarette breaks and yet still able to respond to telephone calls within a proper period of time. What the respondent was objecting to was effectively the telephone system being put on hold so that telephone calls were never answered when employees took a cigarette break.

8. The Tribunal was told by the claimant on oath, and it accepted, that employees continued to take cigarette breaks after 4 August and that was with the knowledge of the respondent through the CCTV system.

9. On 16 August the claimant started her shift at 6.00pm. She took a cigarette break some two hours 23 minutes later at 20:23. This came to the knowledge of the son-in-law of one of the directors who was sitting in a taxi outside the offices at the time and observed the claimant taking a cigarette break. The claimant said that the telephones were not put on hold and that she was at all times promptly able to respond to any telephone call that was received.

10. On 18 August the claimant's shift again started at 6.00pm and the claimant took a cigarette break some 12 minutes later at 6.12pm. The claimant told the Tribunal that she needed to go for some fresh air because throughout her pregnancy she was suffering from bouts of sickness. The Tribunal questioned how it was consistent with the need to go for fresh air whilst at the same time having a cigarette. The claimant acknowledged that it was not consistent to behave in that way but that going out for a cigarette break was a "force of habit" which she had succumbed to very soon after starting her shift. The claimant presumes that after a report was made by the son-in-law to one of the directors about her conduct on 16 August that the respondent then observed the CCTV in the following days and observed the conduct of the claimant on 18 August.

11. On 6 September 2021 the claimant was invited to a disciplinary hearing. She received an invitation in writing. It did not specify the detail of the disciplinary offences which the claimant was required to answer. However, in an email from Keith Murphy on 6 September at 16:46 – pages 65/66 in the bundle – Mr Murphy made it clear that the disciplinary offences related to taking a cigarette break on 18 August and 16 August and ignoring telephone calls during each of those cigarette breaks. In the same email Mr Murphy acknowledged that the claimant had never been issued with a written statement of particulars of employment or with any written contract of employment and confirmed that "terms were agreed orally". It is also important to record in that the claimant had told the respondent in writing that she believed that the disciplinary steps which were now being taken were discrimination on the grounds of pregnancy.

12. The disciplinary hearing took place on Tuesday 7 September. The claimant attended. The claimant gave very clear evidence indeed to the Employment Tribunal today that during the course of that disciplinary hearing she told the respondent that she believed that she was being treated differently because of pregnancy and asked why she was being brought to a disciplinary hearing when after 4 August other employees had also behaved in exactly the same way with regard to cigarette breaks but none of those had been disciplined. The claimant named her mother and two other employees, Marie Noon and Lisa McNee, being three employees who had behaved in exactly the same way.

13. During the course of the disciplinary hearing the respondent was dismissive of the point raised by the claimant about obvious differences in treatment. They offered no explanation and never investigated the allegations raised by the claimant at all. Their intransigence and failure to listen to what the claimant was saying -not surprisingly- upset the claimant. Despite this there was no offer or suggestion by the respondent that the disciplinary hearing should be adjourned and that the respondent would take the opportunity to investigate the serious issues which the claimant had raised about real and obvious comparisons between her treatment and that of at least three other employees who the claimant said had behaved in exactly the same way.

14. The claimant then received a letter of dismissal dated 9 September. It said absolutely nothing at all about the points which the claimant had raised about the comparison of treatment between herself and at least three other employees. It simply dismissed the claimant. It made no reference to the disciplinary allegation relating to 16 August but simply said that she had been dismissed for leaving her post 12 minutes into her shift on 18 August. No explanation was given as to why the allegation relating to 16 August had apparently been dropped or ignored or dismissed.

15. A detailed letter of appeal, quite obviously constructed and written by the claimant's solicitors, was then sent to the respondent. This appeared at pages 70-72. It was very detailed. It raised obvious allegations about difference in treatment and made it clear that the claimant was suggesting that pregnancy was the real reason for her dismissal. Despite the detailed reasons which were set out in the letter of appeal, the letter dismissing the appeal did not address a single one of the grounds of appeal. The letter which was sent to the claimant on 30 September said, "The decision to dismiss you stands". It did not indicate how, if at all, any of the detailed points of appeal which had been raised by the claimant had been addressed or why they had apparently been dismissed as having no merit.

16. Insofar as any notes of either the disciplinary or appeal hearing are concerned, there were no such notes in the bundle. At the conclusion of the disciplinary hearing the claimant said that she had been presented with a single piece of paper which had about five lines of writing on it. The claimant signed it to say that it was accurate. All that it said was that the respondent had recorded that she had taken a cigarette on 18 August and that she had been seen doing so on CCTV.

17. The claimant very clearly told the Tribunal that she knew that at all times her movements and her voice were being recorded on CCTV during her working hours, and that that applied to all others who did exactly the same job as the claimant.

Conclusions

18. Having made these findings of fact the Tribunal went on to consider whether or not the claimant had, on the balance of probabilities, proved primary facts which in the absence of any innocent explanation from the respondent would entitle the Tribunal to conclude that the reason or part of the reasoning for the dismissal of the claimant was the fact that the claimant was pregnant. The Tribunal has found that there was very strong evidence to show that the claimant had proved those primary facts and that as there was no explanation from the respondent that the Tribunal should conclude that the claimant had been unfairly dismissed, automatically, for reasons related to pregnancy. The primary facts which have been proved by the claimant were as follows:

(a) The new rule which was set out in the WhatsApp message on 4 August was not enforced either against the claimant or against any of the other employees. Cigarette breaks continued to be taken and that included other employees as well as the claimant and the respondent never took any objection to that continuing.

(b) The claimant was the only one who was disciplined for taking a cigarette break and no difference has ever been given by the respondent for the difference in treatment between the claimant and at least three other named employees.

(c) At the disciplinary hearing only the cigarette break taken on 18 August was raised by the respondent and no explanation has ever been given as to why the cigarette break on 16 August seemed to have been ignored entirely by the respondent. This was important because the claimant says that she took her break on 18 August only 12 minutes into her shift because she was feeling slightly unwell for pregnancy related reasons.

(d) The difference in treatment between the claimant and at least three other named employees was very clearly raised by the claimant at the disciplinary hearing, but that difference in treatment was ignored and dismissed by the respondent. The respondent made no attempt to adjourn the disciplinary hearing to address the points which had been raised and the letter of dismissal simply ignored what had been raised by the claimant about the difference in treatment.

(e) Significant issues, including the difference in treatment and the suggestion of pregnancy related dismissal, were raised in the appeal letter as serious

matters. These issues were completely ignored by the respondent who failed to address any of them at all.

(f) In the response which the respondent filed in the Employment Tribunal to the claims of the claimant, the respondent again failed to address the difference in treatment or any of the important points in the letter of appeal.

(g) The Tribunal finds, as set out below, that a comment had been made to the claimant about pregnancy related absence. The is found as set out below to be an act of harassment contrary to section 26 of the Equality Act 2010. The Tribunal finds that this suggests an obvious attitude on the part of the respondent to pregnancy and pregnancy related illnesses, and an obvious unwillingness to take such issues seriously. It therefore demonstrated to the Tribunal an obvious attitude to pregnancy on behalf of the respondent.

19. The Tribunal therefore asked itself why the claimant was treated differently to the three named comparators. Clearly there is no need for any comparator in a pregnancy related case but the fact that such obvious comparators exist was extremely instructive. Had the claimant been treated differently for any other protected characteristic which did require a comparator then the Tribunal was in no doubt whatsoever that a claim of direct discrimination contrary to section 13 would have succeeded. The overwhelming conclusion of the Tribunal, therefore, was that pregnancy was the reason, or at least part of the reason, for the dismissal of the claimant, and in those circumstances her claim of automatic unfair dismissal contrary to section 99 of the Employment Rights Act 1996 succeeds.

20. The claimant brought two claims of harassment. One claim related to a comment which had been made by one of the directors of the respondent company when the claimant was absent from work for a pregnancy related sickness reason. The director of the company told the claimant's mother that as far as he was concerned if the claimant was able to go shopping that the claimant was able to come to work. The respondent knew that the absence was pregnancy related. The claimant had indeed been able to go shopping with the support of her mother. There was no evidence at all to show that she had at the same time been able to conduct her duties under her contract of employment. There were in the opinion of the Tribunal real and obvious and real differences between working and shopping with the support of her mother. The claimant was absent for pregnancy related reasons. The comment made the respondent's representative, was in the opinion of the Tribunal, unwanted conduct. It was unwanted in relation to pregnancy. It had the effect required under section 26 and in the opinion of the Tribunal it was perfectly reasonable for the claimant to have been affected by the comment in the way that she described. In those circumstances that claim of harassment also succeeds.

21. In her witness statement the claimant had made an error in that she had indicated that the second claim of harassment related to a comment made on 10 December, some months after the claimant was dismissed. The claimant today corrected that to say that in fact it had taken place on 10 September, one day after she was dismissed. Her mother had gone to a meeting with the respondent at their request in order to discuss the ongoing employment relationship between the claimant's mother and the respondent company. During that meeting the respondent's representative had said to the claimant's mother that the claimant would be able to

return to work after 12 months once she had learned her lesson. The claimant's mother obviously passed on this comment to the claimant, who found it extremely upsetting. The respondent had been aware for some months that the claimant was pregnant. The claimant had made it clear in her letter dated 18 August (page 60) that "I qualify for 52 weeks' maternity leave". The claimant said that it was obvious that the reference to 12 months (52 weeks) was a reference to knowledge on the part of the respondent that the claimant was entitled to one year's maternity leave. In effect, therefore, the respondent was saying to the claimant that once she had taken her maternity leave and once that period of statutory protection had disappeared that the claimant would then be allowed to return to work. The claimant told the Tribunal that she found this extremely upsetting that she was in effect being told that she should sit at home for 52 weeks reflecting on how she had been treated. The Tribunal found that this comment was conduct related to pregnancy and that it met the statutory test imposed by section 26 relating to the effect that it had on the claimant. The Tribunal was satisfied that it was more than reasonable for the claimant to have been affected in that way by the comment which was made to her mother, which was clearly made with the knowledge or even intention that the claimant would be told what had been said by her mother. The Tribunal was therefore satisfied that the second comment made on 10 September was an act of harassment contrary to section 26 of the Equality Act 2010.

Remedy

22. A Schedule of Loss had been included in the bundle at pages 75/76 but it was both confusing and indeed factually and legally inaccurate. The claimant however, consistent with the manner in which she gave evidence to the Tribunal throughout today's hearing, was able to comprehensively explain matters to the Tribunal even though she said that she had explained this to her instructing solicitors. The Tribunal was at a loss to understand why therefore her instructions had not been reflected in the Schedule of Loss.

23. The claimant said that she had been paid maternity leave and maternity allowances in exactly the same way as if she had still been an employee of the respondent up to the end of June 2022. She confirmed very clearly that she had not lost any money during that period of time and that she had received exactly what she would have received if she had still been employed by the respondent. Her period of loss therefore began on 1 July 2022. It continued for a period of four months until the claimant found suitable alternative employment at the end of October 2022. It was considerably to the credit of the claimant that as a single parent with three young children she was able to find other employment working 12 hour shifts ,5 days a week. Indeed finding employment which enabled her to work around her substantial childcare responsibilities was a challenge and the fact that the claimant had found such work within four months demonstrated that she had taken every reasonable step to mitigate her losses.

24. The claimant confirmed that her weekly take home pay with the respondent company had been £170 per week. The claimant was therefore unemployed for seven weeks between the beginning of July 2022 and the end of October 2022. The claimant confirmed that she had no continuing losses as she found employment at the very end of October 2022. The claimant therefore suffered loss of earnings for 17 weeks at £170 per week, a total of £2,890. This sum was awarded as compensation for unfair dismissal.

25. When announcing it's oral Judgement to the parties at the conclusion of the Hearing the Tribunal-mistakenly-awarded interest to the claimant in the sum of £355.95 on the loss or earnings of £2890. This was a mistake because interest is not due or payable on any award of loss of earnings for unfair dismissal contrary to the Employment Rights Act 1996. In this written Judgement that mistake has therefore been corrected and interest is only awarded in respect of injury to feelings as set out below. The total value of the compensation awarded to the the claimant has been adjusted accordingly.

26. In accordance with Regulation 4, the loss of earnings of £2890 represented the Prescribed Element. This was the total pecuniary loss awarded to the claimant for unfair dismissal. The claimant did not qualify for a Basic Award. She did not have the mininimum period of service with the respondent to qualify for such an award.

27. Finally, the Tribunal confirms that the Employment Protection – Recoupment of Benefits – Regulations 1996 apply to the award of loss of earnings of the claimant to cover the 17 weeks period between 1 July 2021 and 31 October 2021. The total award of loss of earnings was £2,890. This is the Prescribed Element

28. The claimant in her Schedule of Loss had indicated that she felt the appropriate figure for injury to feelings was £12,000. Bearing in mind that the claimant had been dismissed and bearing in mind the real upset which her dismissal had caused, including the manner of her dismissal and the refusal/failure of the respondent to explain away any of the points which the claimant had raised during the disciplinary and appeal process, the Tribunal was quickly able to agree with the suggested figure of £12,000 and awarded that to the claimant as injury to feelings.

29. Applying the Employment Tribunal Interest on Awards – Discrimination Cases – Regulations 19961996 Interest Regulations, the appropriate period was from 10 September 2021 to 9 March 2023. That was a total of 545 days. The annual interest at 8% would be £960 per annum - £2.63 per day. The interest awarded for 545 days at £2.63 per day was a total of £1,433.35.

30. The respondent had openly acknowledged that they had never complied with the requirements of the Employment Rights Act 1996 to prepare and issue to the claimant a written statement of employment particulars. They offered no explanation for their failure to do so. Pursuant to section 38 of the Employment Act 2002, therefore, the Tribunal was of the opinion that the claimant should be awarded the maximum four weeks' pay to represent the failure of the respondent. The weekly pay of the claimant was £170 and the total awarded to the claimant as compensation was therefore £680.

Summary

31. The claims of the claimant are successful, and the claimant is awarded in total compensation of £17,003.35 as set out above.

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Employment Judge Whittaker

Date: 11 May 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 May 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2415407/2021**

Name of case: **Ms A Dugdale** v **Key Cars (Widnes) Ltd (in Liquidation)**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 11 May 2023

the calculation day in this case is: 12 May 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.

ANNEX TO THE JUDGMENT
(MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.