EMPLOYMENT TRIBUNALS

Claimant: Ms R Denyer

Respondent: BPP University Ltd

Heard at: London South by cloud video platform **On:** 12 to 19 April 2023

Before: Employment Judge Nash
Ms J Cameron
Mr T Cook

Representation
Claimant: Ms Platt of counsel
Respondent: Mr Jones of counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following ACAS early conciliation on 19.4.22 only, the claimant applied to the tribunal on 28.4.22.

2. The tribunal had sight of an agreed bundle to 777 pages. A number of documents, taking the bundle up to 803 pages were added during the hearing. As a result, one of the witnesses, Ms Botterill, was recalled for further questions in relation to the added documents. A text dated 6.10.21 was added by consent on the third day of the hearing.

3. The tribunal heard from the following witnesses all of whom swore to their written statements: -

    a. The claimant
    b. Ms N Botterill at the material time the respondent's director of apprenticeship quality and the claimant's line manager
    c. Mr D Wooff at the material time principal lecturer in learning and teaching
    d. Mr B Seddon of HR

e. Ms J Houston, Deputy Dean of the law school.

4. There was an application for an order of anonymization under rule 53 which was refused for reasons given orally at the hearing.

Claims

5. The Claimant brought the following claims:

   a. Discrimination on grounds of pregnancy or maternity contrary to section 18 of the Equality Act 2010 ("EQA").
   b. Discrimination on grounds of pregnancy or maternity contrary to section 13 of the EQA.
   c. Discrimination on grounds of sex contrary to section 13 of the EQA;
   d. Victimisation contrary to section 27 of the EQA;
   e. Automatic unfair dismissal pursuant to section 99 of the Employment Rights Act 1998 ("ERA") and regulation 20(3) of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312) ("MPL Regulations 1999");
   f. Wrongful dismissal.

Issues

6. The issues had been agreed prior to the hearing and there were some amendments by consent at the beginning of the hearing. The final agreed list of issues was as follows.

Discrimination on grounds of pregnancy or maternity (section 18 EQA)

1. Did the Respondent subject the Claimant to the following unfavourable treatment?

   i. The Respondent engineered the termination of the Claimant's employment following her miscarriage on 3 October 2021.
   ii. On 18 October 2021, the day the Claimant returned to work following sickness absence, she was informed by Nikki Botterill, her line manager, by email, that her second week of pregnancy-related sickness absence should be taken as annual leave, not sick pay.
   iii. On 19 October 2021, Nikki Botterill informed her that, during her pregnancy- related sickness absence, concerns had arisen regarding the quality of her work. This was the first time the Claimant had received any substantive criticism of her performance. One of the concerns on a piece of work contradicted feedback that the Claimant had received before her miscarriage.

2. Did any of the above acts, if established, occur during the protected period? Or, do they fall within the exception in section 18(5) EQA?

3. Did any of the above acts constitute unfavourable treatment?

4. Did any of the above acts constitute unfavourable treatment because of the Claimant's pregnancy or maternity?

Discrimination on grounds of pregnancy or maternity and / or sex (s 13 EQA)

5. In respect of each of the following treatments: (a) did it occur and (b) was it less favourable than the Respondent would have treated a hypothetical comparator?

5.1 On 18 October 2021, the day the Claimant returned to work following sickness absence, she was informed by Nikki Botterill, her line manager, by email, that her second week of pregnancy-related sickness absence should be taken as annual leave, not sick pay.
5.2 On 19 October 2021, Nikki Botterill informed her that, during her pregnancy-related sickness absence, concerns had arisen regarding the quality of her work. This was the first time the Claimant had received any substantive criticism of her performance. One of the concerns on a piece of work contradicted feedback that the Claimant had received before her miscarriage.
5.3 On 25 October 2021, David Wooff, another employee of the Respondent, produced a 1.5 page document criticising her work, which, in fact, on 19 July 2021, before her miscarriage, he had reviewed and stated, "I think the form looks great, nothing I can see that needs changing/adapting from this. Good job!". When questioned about this he said, "I didn't recognise it as the version I last saw, or I suspect I would have made the observations then". After the Claimant's miscarriage, Nikki Botterill adopted a different tone when providing feedback to the Claimant and sought-out opportunities to criticise her.
5.4 The Claimant's probationary review meeting was brought forward from 26 November to 15 November 2021, without explanation.
5.5 The Claimant's probationary review period was extended by three-months at the end of the probationary review meeting on 15 November 2021, without consideration of the Claimant's responses or explanation for why the "areas of concern" had not been mentioned or discussed previously.
5.6 The Claimant was asked on 21 December 2021, to attend a further probation meeting the next day with less 24 hours notice, with no reason given.
5.7 The Respondent did not follow a credible, competent and transparent grievance procedure. The Claimant relies upon the contents of the email dated 27 April 2022 from her Trade Union representative to the Respondent.
5.9 The Claimant's grievance was not upheld.
5.10 On 15 February 2022, the same day that the Claimant

was informed of the outcome of her grievance, she was asked to attend another probation review meeting.

5.11 The Respondent refused to arrange a hearing for the Claimant's grievance appeal before the probation review meeting on 28 February 2022. The Claimant was informed, following an adjournment of the probation review hearing on 28 February 2022, that she had failed to complete her probationary period and her contract would be terminated with one- month's pay in lieu of notice. This was confirmed in writing on 1 March 2022.

5.12 The Claimant was dismissed for performance reasons.

5.13 The Respondent did not provide the outcome until 13 May 2022, or a reason for the delay in doing so, to the combined disciplinary dismissal and grievance appeal hearing.

6. The Claimant relies on the following hypothetical comparator of [(a) a non-pregnant person in the same circumstances as the Claimant and (b)] a man in the same circumstances as the Claimant.

7. If so, was that treatment because of a protected characteristic, namely [pregnancy and/or] sex?

Victimisation

8. Did the Claimant do a protected act, namely on 17 December 2021 (not accepted) (email at page 511), 22 December 2021 (letter from Ince page 9was a pa) 424),15 February 2022 (grievance appeal page 574) and 4 March 2022 (appeal against dismissal page 583)?

9. Was the Claimant subjected to detriment as a result? Namely:

9.1 the Claimant was asked on 21 December 2021, to attend a further probation meeting the next day, with less than 24 hours notice, with no reason given.

9.2 Following the Claimant's grievance submitted on 22 December 2021, the Respondent delayed holding a grievance meeting until 27 January 2022, without reason.

9.3 On 15 February 2022, the Claimant's grievance was not upheld.

9.4 The Respondent did not follow a credible, competent and balanced grievance procedure / assessment: the Claimant was improperly denied witness testimony taken from "all parties involved" in the investigatory process that had been acquired after her grievance hearing.

9.5 The Claimant lodged a grievance appeal on 15 February 2022 and the Respondent refused to arrange a hearing for the appeal before the probation review meeting on 28 February 2022.

9.6 The Claimant was informed, following an adjournment of the probation review hearing on 28 February 2022, that she had failed to complete her probationary period and her contract would be terminated with one-month's pay in lieu of notice. This was confirmed in writing on 1 March 2022.
9.7 The Claimant appealed the decision to terminate her contract on 4 March 2022, and a combined disciplinary dismissal and grievance appeal hearing was held on 11 March 2022. The Claimant did not receive the witness testimony taken from "all parties involved" in the investigatory process until 8 April 2022.
9.8 The Respondent, without explanation, had not provided a decision following the hearing on 11 March 2022 by 28 April 2022, thus the Claimant had no choice but to lodge an ET1 with the Tribunal.
9.9 From the date the Claimant returned to work on 18 October 2021 to the date of dismissal, she did not receive any support or work improvement plan to assist her in meeting targets or improving her performance.

Automatic unfair dismissal

10. What was the reason for the Claimant's dismissal? Was it related to her pregnancy?

Wrongful dismissal

11. Was the Claimant paid the correct notice period in accordance with her terms and conditions of employment?

The Facts

7. The respondent is an education provider. It is a very large organization. It provides the academic element of apprenticeships. Apprentices work in their placements and the respondent provides the classroom element of learning. The respondent is regulated by a number of agencies including OFSTED and the Education Skills Funding Agency.

8. The claimant worked in the respondent's apprenticeship quality team which is responsible for ensuring regulatory compliance and learner satisfaction. Ms Botterill's evidence, to which there was no challenge, was that this was actioned through observing the teaching and coaching of apprentices, internal quality assurance, and ensuring staff understood regulatory requirements and their roles. The team reported to regular committees and senior managers to ensure compliance, for instance with kpi's. The respondent was operating four "contracts" with OFSTED with its four different schools which were delivering different apprenticeships.
9. The claimant was appointed Quality Improvement Manager in the apprenticeship quality team on 26.5.21. The role was focused on ensuring the

respondent was ready for OFSTED inspections. OFSTED inspections happen with 48 hours' notice. OFSTED observes and assesses teaching and investigates the respondent's records of coaching and assessments.

10. The respondent sought a candidate with an internal quality assurance qualification, which the claimant had.

11. The quality team relied very considerably on data, both to monitor and improve quality, and for compliance reasons. The quality team worked with those who gathered and analysed data, and with the lecturers in the different schools. One of their tasks was monitoring teaching. Lecturers were observed and graded on four metrics. If lecturers were graded as blue or green, they were (at least) meeting the thresholds, if they were not, it was a cause for concern. This was not simply a matter of checking individual performance. The data was analysed to ensure that thresholds were met and to identify and solve potential problem areas, for instance a school where performance was slipping below 90% blue/green. There was also considerable use of sampling.

12. The claimant signed a written contract of employment, which included the following terms:

> Probationary Period
> The first 6 months of your employment will be probationary. The Company may terminate your employment at any time during or at the end of this period on one month's notice in writing. Your performance and suitability for continued employment will be reviewed throughout your probationary period and the Company reserves the right in its absolute discretion to extend the probationary period beyond the initial 6 month term up to a further 3 months.

13. There was no right to sick pay during the probationary period.

14. The respondent operated a number of policies including a Special Leave Policy which included compassionate and bereavement leave. The policy on compassionate leave was as follows.

> Policy Procedure
>
> 3.1 Where an absence from work is requested in accordance with the Special Leave Policy, this should be in writing and in advance, where the request for absence is foreseeable. It is acknowledged that in cases of compassionate leave and bereavement leave that this is not always possible…
>
> 3.3 Where a request is not foreseeable, then you must inform your Manager at the earliest opportunity, explaining the circumstances and the likely duration of the absence. Your Manager would ultimately be responsible for any authorisation of Special Leave.

3.4 Managers should seek advice from their Senior Manager and HR regarding Special Leave requests. If the leave of absence is approved under this Policy, your Manager will notify HR by completing and submitting an Authorised Leave form. The Authorised Leave Form is available on the Intranet…

3.6 Special Leave requests which your Manager is unable to approve or can only partially approve, should be discussed with you in the first instance, giving an appropriate explanation for the decision. If you remain dissatisfied with the explanation provided, you have the right to ask for these reasons to be confirmed in writing.

3.7 If you have not been permitted Special Leave and have received the reasons for the refusal of leave in writing and remain dissatisfied with the decision you may pursue this decision with reference to BPP's Grievance Procedure.

Compassionate Leave

4.1 Paid leave of absence on compassionate grounds may be granted at the discretion of your Manager following consultation with your Senior Manager, up to a maximum of 1 week (5 working days for a full-time employee or pro-rated for part-time employees) for any one particular event.

4.2 In addition, you have the right to take a 'reasonable' amount of unpaid time from work in regard to unexpected or sudden emergencies and to make necessary longer-term arrangements relating to a dependant or family member. See BPP Time off for Dependants Policy.
4.3 In very exceptional circumstances, the Company may consider granting you a period of paid compassionate leave in excess of the normal maximum of a week. This will only be granted following discussion between your line manager, senior Manager and the HR Business Partner.

4.4 When assessing the length of compassionate leave required, paid or unpaid, consideration will be given to the availability of you taking annual leave, the appropriateness of other forms of special leave or the possibility of agreeing on a temporary variation to your normal working hours of employment.

4.5 You can, regardless of service, apply for compassionate leave in the following circumstances:
· To deal with sudden or unavoidable events, e.g. death (see also bereavement Leave below);
· To deal with arrangements to cover serious family illness or illness of a dependant;
· To deal with the distress of a serious 'family' or 'dependant' matter;
· To deal with arrangements to cover unexpected changes to a dependant's care arrangements.

> 4.6 'Dependant' is defined as your spouse or partner, child, parent or anyone who relies on you for help on a daily basis. Furthermore, someone who reasonably relies on you for assistance during illness or to make arrangements for such provision of care is also classified as being a dependant for that period of time.
>
> 4.7 You are required to advise your line manager as soon as possible of the circumstances requiring you to apply for compassionate leave. An Authorised Leave form should be completed by the line manager and sent to HR.

15. The claimant worked remotely throughout her employment, as a result of the Covid pandemic and lockdown.

16. Ms Botterill provided the claimant with a training plan during a meeting on 26 May 2021. Ms Botterill's evidence was that she expected to give the claimant considerable support and input at first as she got up to speed on the role and the respondent's systems, but that this would reduce over time. Ms Houston told the tribunal that the respondents' set up was complex.

17. The claimant also worked extensively with Mr D Wooff, who worked in the separate learning and teaching team. His focus was to ensure that all apprenticeship programmes had support for learning and teaching. This was achieved by observations, learning walks, data analysis, and drawing conclusions and actions from the data.

18. In July the claimant sent Mr Wooff a peer observation form, who, after asking questions, wrote "I think the form looks great, nothing I can see that needs changing/ adapting from this. Good job!" The tribunal saw a number of emails where Ms Botterill and Mr Wooff praised the claimant, using positive language and "smileys".

19. However, there were also suggestions of errors by the claimant e.g., incorrect use of the respondent's branding. The tribunal did not accept the respondent case that it was concerned by considerable errors. The issues were consistent with a remote worker in a new job getting up to speed with new systems.

20. The claimant had her 3 months' probation review meeting with Ms Botterill on 2 September 2021. According to the claimant, Ms Botterill was pleased with her progress and offered the chance to apply for an MBA. Ms Botterill in contrast said she explained the concerns she had with the claimant's work. The only relevant documentary evidence was the completed review form. However, this was almost entirely only completed by the claimant. The only input from her manager was whether or not she was graded competent in each area. She was graded competent in most areas. This was notably different from the 6 month review form which included detailed input from Ms Botterill. The tribunal found that Ms Botterill was content with the claimant at this stage. Whilst there were some issues, there were no red flags. The amount of

work the claimant put into the form demonstrated her engagement at this stage. As a result of this, the tribunal found that there was a lack of direction for the claimant to understand what in her performance needed work.

21. The claimant had prepared an observation training for observers to conduct quality observations, with help from Mr Wooff. They arranged a telephone call to finalise the slides.

22. However, before this could happen, on 3 October 2021 the Claimant´s pregnancy ended by miscarriage. The claimant was hospitalised twice, suffered significant blood loss and was signed off work for two weeks.

23. The claimant advised Ms Botterill of her miscarriage on 4 October 2021. In the claimant's absence, Ms Botterill and Mr Wooff picked up the training which was due in three days. On 6 October Ms Botterill asked the claimant to send over her work and reschedule the upcoming session. Although Ms Botterill did not know, the claimant was at the time heading back to hospital and could not assist. The claimant was upset because of the timing of this request. Ms Botterill wished the claimant well and said there was no hurry but to send over the information when she had time.

24. Ms Botterill told the tribunal that she had looked at training prepared by the claimant and it was, contrary to what she had been told, incomplete. The claimant told the tribunal that she had not told Ms Botterill that the training was ready, because she had three days yet to finalise it. The only evidence in writing going to this point was an email from the claimant to Ms Botterill stating, "here's the presentation", with input from Mr Wooff and an email dated 8 October 2020 from Mr Wooff to Ms Botterill stating that the claimant had "said it was ready to go".

25. It was the claimant's case that the email of 8 October (and a second email of 25 October also from Mr Wooff to Ms Botterill), were evidence that Ms Botterill had asked Mr Wooff to collate information to be used against the claimant. In his email of 8 (not copied to the claimant) October Mr Wooff listed a number of errors the claimant had made. His email was detailed and made specific references. He was highly critical of the claimant's data relating to accountancy and tax teachers, "this means that the data you sent through is wrong, and the date on the analysis done by the school is also wrong… There are also some errors in the data calculations for the Act Ed tutors… The App school tutor count is wrong… I am rather frustrated by this…. The [Claimant] and I had a call explained what was wrong… Even with the screenshots included [the claimant] could not detect the issue so I had to explicitly outline what was needed in each cell… I can only conclude that I have no confidence in the data you sent me yesterday, all the data that was previously sent to schools… The data presented at the last apprenticeship quality committee was data I also had to recalculate. The data the [claimant] originally pulled together and passed to me as the analysis of qualitative comments was also wrong… I feel that this demonstrates a trend in respect of data handling checking and accuracy… I believe that the… Summary dated the 2020. 21 needs to be checked… I'm sorry to say, I have no confidence in the data that [the claimant] has pulled together- and unless things change, I genuinely feel that in the future, data [the claimant]

collates will need to be checked for accuracy… I know that [the claimant] is currently away from work, so I have not copied her into this email.… Had she been here this week I would have challenged her over this in person".

26. The claimant contended that Mr Wooff knew about her miscarriage at the time of the emails including from 8 October. Before the tribunal he denied this. According to the documents in the bundle, Mr Wooff had given a number of different explanations as to when and how he learnt about the claimant's miscarriage. On one occasion he said that the claimant had told him herself, which the claimant denied. He gave different dates when he had learnt about the miscarriage. The tribunal considered whether to drawn adverse inferences against Mr Wooff because of this inconsistency and decided against this for the following reasons. It was about one and a half years since the material events. The tribunal accepted that this was not likely to be something that was particularly memorable for Mr Wooff. From the evidence given to the tribunal Mr Wooff appeared to be focused on data rather than on personalities. Further, there was no reason for Mr Wooff to be informed about the claimant's personal circumstances so soon.

27. For the avoidance of doubt the tribunal did not accept that a reference in one of his emails to this being "the claimant's baby" indicated any knowledge of the miscarriage. This would be a crass thing for Mr Wooff to say and there was no evidence of behaving in that manner in any other way.

28. Further Mr Wooff's criticism of the claimant's work was detailed, and it was plausible that in light of these problems with the claimant's work he would have written to Ms Botterill. His criticisms were not limited to the claimant in that he complained of the data that "you" that is Ms Botterill had provided.

29. The claimant's case was, essentially, that no later than 8 October Ms Botterill had told Mr Wooff about her miscarriage and they were colluding to exit her from the business and the email of 8 October formed part of the paper trail to justify this. The respondent's witnesses were evidence building.

30. The tribunal did not accept this characterisation of the evidence the following reasons. The evidence showed that Ms Botterill and Mr Wooff were picking up work which the claimant had unavoidably and unexpectedly had to drop due to her illness. There was nothing inherently remarkable, let alone suspicious, that when they sought to pick up what she had been doing and make it work, there were a number of emails and messages between them. Further, such a conspiracy would have started surprisingly quickly after the notification of the miscarriage. It seemed inherently unlikely that Ms Botterill would collude with Mr Wooff, who worked in a different department, to exit a new employee about whom, on the claimant's case, they had previously had no concerns.

31. On 11 October Ms Botterill applied for compassionate leave to provide the claimant with full pay for the first week of her sickness absence. Because she was on her probationary period, she was not entitled to contractual full pay whilst on

sick leave. Ms Botterill informed the claimant what she was doing in an email that day. Because the emails were sent to the claimant's work email account, the claimant did not see this until her return to work on 18 October.

32. The claimant characterised Ms Botterill's email of 11 October as cold. In the view of the tribunal some of the email was perhaps a little curt, telling the claimant she would need a fit note. However other elements of the email were on their face helpful and supportive - Ms Botterill promising the claimant that she would call in the week and see how the claimant was getting all. Further, it was not unreasonable for the respondent to expect that the claimant knew she was not entitled to full sick pay during the probationary period. The tribunal concluded that it was Mr Seddon of HR who made the decision concerning the claimant's special leave, because he was the person with knowledge of the policy. He was also used to making these decisions and advising managers.

33. There was no evidence before the tribunal of any other member of the respondent staff receiving more than one week's paid special leave, or to put it another way, of the respondent exercising its discretion to award two weeks paid special leave.

34. The claimant returned to work on 18 October having been absent from work for two weeks from 4 to 17 October inclusive. The last day of the protected period was 17 October 2021.

35. Ms Botterill and the claimant held a return to work meeting on 19 October 2021. The claimant said that Ms Botterill criticised her work at this meeting. Ms Botterill did not remember talking about work issues at this return to work meeting. On balance the tribunal preferred the claimant's evidence because it was more specific. Further the claimant made this same allegation on 27 January 2022 when she raised a grievance. The tribunal found that, accordingly, Ms Botterill did not run the return to work meeting in an appropriate manner. It was not appropriate or helpful to raise performance issues the day after the claimant had returned from work for miscarriage.

36. According to the claimant, from this time Ms Botterill's tone changed. The tribunal noted that there were a number of smiley emoji in Ms Botterill's email before the miscarriage but it was not taken to any afterwards.

37. On 19 October, the claimant emailed payroll to request to take the second week of her absence as annual leave. This meant that she received full pay for the second week.

38. On 25 October Mr Wooff sent a lengthy email to the claimant, copied to his manager, dealing with the peer observation data supplied by the claimant. The claimant had previously sent this information to Mr Wooff on 19 July and he had said that it looked "great".

39. The claimant accepted that, notwithstanding this inconsistency, the email of 25 October was, on its face, polite. Mr Wooff (incorrectly) started "I haven't seen these before." The email went through in some detail data provided by the

claimant and asked a number of questions. Mr Wooff made suggestions such as "I would include". Mr Wooff did not say that he had lost faith in the claimant or her data. There was precise questioning of the data. Mr Wooff asked what appeared to be relevant questions, such as whether there were any plans to analyse the data and if so, did that need to be in a separate dashboard or fed into an existing dashboard, would then be analysis via Excel?

40. The claimant contended that the reason Mr Wooff sent through detailed questions about her work on 25 October, when he had approved it in July, was that he now knew about the miscarriage and so he was targeting her. Mr Wooff told the tribunal that systems had changed since July so the appropriateness of the document has also changed. In view of the tribunal the most likely explanation was that Mr Wooff, as he said in his email of 8 October, had lost confidence in the claimant's data and so he now looked at her data with a more critical eye. Further, the OFSTED inspection was now closer and therefore these matters received more critical attention.

41. The claimant replied to Mr Wooff email, copied to his manager, forwarding his response in July. She did not reply to the questions set out in the email of the 25 October.

42. On 3 November HR emailed Ms Botterill advising her that the claimant's six-month probation period was due to end on 26 November and a meeting should be arranged her prior to that date. That same day Ms Botterill emailed the claimant telling her that OFSTED preparation had been done incorrectly. Ms Botterill contacted Mr Seddon of HR to report her concerns with the claimant's performance. Mr Seddon suggested extending the claimant's probationary period.

43. On 5 November 2021 Mr Wooff emailed an analysis of the claimant's work to both their managers at 1.08 in the morning. This included two screenshots from the claimant where there was no data at all. The claimant did not read this until the morning. The claimant found this email humiliating and the tribunal could understand why. The tribunal however did not accept the claimant's suggestion that these matters could have been better dealt with by telephone. It was a complex analysis of data which need to be set down in writing. The tone from Mr Wooff had changed. Previously his emails had been signed best wishes and kind regards whereas this email was signed simply regards.

44. On 8 November (incorrectly stated to be 5 November by the respondent) Mr Seddon emailed the claimant inviting her to her six-month probationary review meeting. The letter stated a possible outcome of this meeting was dismissal. The claimant's case was that she was told that day that her probationary meeting had been brought forward, which the respondent denied.

45. At this time Mr Wooff was checking all the claimant's data analysis work to ensure no incorrect data was sent to committee. The number of emails from Mr Wooff outside of working hours including late night illustrated that he had done considerable work. The claimant characterised this as "borderline harassment". Mr Wooff view was that he was simply doing his job.

46. Before the tribunal, the claimant said that she had limited recall of specific pieces of work and her interaction with Mr Wooff, because these matters happened about a year and half ago. The tribunal accordingly was more reliant on contemporary emails. The Tribunal noted at page 281 that the claimant's reply to Mr Wooff concentrated more on defending her position rather than moving forward with the work, for instance, "you did not mention this before…" The tribunal found that this was because, by this point, the claimant had concluded that Mr Wooff and others were mounting a campaign against her. Accordingly, she was defending her position and thus interpreted Mr Wooff work as part of the campaign. The view of the tribunal there was a considerable clash of working styles between Mr Wooff and the claimant, for instance, Mr Wooff preferred to put things in writing where whereas the claimant preferred to speak on the phone.

47. Ms Botterill held the claimant's six-month probation meeting on 15 November 2021. In contrast to the first meeting, Ms Botterill provided detailed written feedback. This was mixed. According to Ms Botterill, the claimant was open to receiving feedback but there had been several instances where this was not effective. The claimant's team working was strong with some exceptions. Communications were positive but she needed to improve listening. The overall effect was that it was a positive report, with significant reservations. According to Ms Botterill, if she focused on the actions, the claimant could be a highly valued member of the team.

48. In the view of the tribunal, Mr Seddon and Ms Botterill were of the view that, whilst there was no certainty that the claimant would be leaving the business, this was a realistic prospect. However, the six-month meeting notes showed that this was not brought clearly enough to the claimant's attention. Ms Botterill said that she was confident that they "could get there" with the claimant's data accuracy. This was hard to square with Mr Wooff's opinion.

49. Mr Wooff and the claimant were in effect still blaming each other for the difficulties with data. When Ms Botterill raised specific failures, for instance updating on coach forms, the claimant replied that this was caused by her difficulty in collaborating with the learning and teaching team. Ms Botterill said that she trusted Mr Wooff that she had collaborated with him some time.

50. On 16 November, the claimant asked Mr Seddon if she could discuss her concerns about Mr Wooff. He was very detail-driven and the claimant saw him as picky and petty. She found it difficult that when they spoke on the phone and he raised issue, he would then go away and then come back with further issues.

51. On 19 November, the claimant emailed Mr Seddon chasing targets and asking why she had not been clearly told what her performance failures were. Mr Seddon provided the claimant with notes of the probationary review meeting together with an objectives document, confirming the decision to extend the probationary period by a further 3 months.

52. The claimant, Ms Botterill and Mr Seddon met on 22 November for an objectives meeting. The meeting was delayed at the claimant's request to allow Mr Seddon to attend. Ms Botterill said that the claimant's attitude in this meeting was defensive and challenging. Ms Botterill said that after this meeting the claimant's performance declined further.

53. On 26 November Ms Botterill emailed the claimant and Mr Seddon to record that she had spoken to Mr Wooff and his manager about new ways of working for the claimant and Mr Wooff. Mr Seddon was in effect trying to get Mr Wooff and the claimant to work together better despite their different styles.

54. The claimant sent Mr Seddon on 4 December examples of what she felt was inappropriate communications from Mr Wooff. She provided a high degree of detail about their disagreements concerning data collection and presentation. On 7 December she sent Mr Seddon an email from Mr Wooff describing it as "patronising at best"; Mr Wooff had corrected the phrase "coaches that" to "coaches who".

55. The claimant emailed Mr Seddon on 12 December. She stated she was not encouraged to achieve her targets. She was suffering continued victimisation and was being "stripped apart from mistakes". She referred to a lack of support, last-minute instructions, impossible deadlines and being set up to fail. She stated that Ms Botterill continually "persecuted" her so as to deem her unsuitable for her role. She asked why the respondent had not exercised his discretion to pay her in full for her second week's sick leave. She also raised the fact that she had been contacted whilst off sick due to the miscarriage. Mr Seddon advised her to raise a formal grievance.

56. On 17 December Ms Botterill emailed Mr Wooff about new ways of working for him and the claimant. She thanked him for helping the claimant and acknowledged he was going above and beyond. She suggested he provide single feedback to the claimant, not bit by bit.

57. One occasion Ms Botterill criticised the claimant for cancelling her attendance at a meeting without clearing with Ms Botterill first. Ms Botterill then suggested a meeting between the claimant and Mr Wooff, which the claimant refused. Ms Botterill also criticised the claimant's IQA training slides. Ms Botterill complained that she had provided the claimant with feedback from the original work, but the claimant's second version of the work had not correctly implemented this feedback. There were specific concerns, for instance the title was incorrect, the focus was incorrect, there were difficulties with grammar, and the links went to the wrong place.

58. On 21 December 2021, Ms Botterill emailed Mr Seddon saying she did not think she could confirm the claimant in post. She said the claimant saw support as criticism and was not responding to feedback.

59. Mr Seddon suggested an early probationary meeting, the next day. The tribunal found that, by this point, Ms Botterill and Mr Seddon had decided to exit the claimant - and wanted to do so before the Christmas break. Because of the timing, the tribunal did not accept Mr Seddon's evidence that the meeting was to address concerns. The effect was that the claimant probationary period was extended by three months but a decision to terminate was made within a month.

60. That day, 21 December, Mr Seddon invited the claimant to a further probationary review meeting for the next day. The claimant declined the invitation to the meeting due to the unavailability of her trade union representative.

61. The next day 22 December the claimant submitted a grievance, a letter from her lawyers. The grievance included: –

> Please note that, for reasons outlined below, our client considers that, by the actions of Ms Botterill, and potentially others, acting on behalf of the Company she has been subjected to significantly unfavourable treatment because of her pregnancy and because of the illness she has suffered as a result of her pregnancy and thus directly discriminated against on the grounds of pregnancy and sex within the meaning of the Equality Act 2010.

62. The grievance further alleged that the respondent has fundamentally breached the claimant's contract of employment and she thus was entitled to resign. Nevertheless, she sought to resolve the matter by way of the grievance. It said she might proceed to the employment tribunal. It contended that the probationary period had been extended for minor reasons as a pretext because the claimant had been absent for pregnancy related reasons.

63. On 22 December, Mr Seddon emailed the claimant confirming that the probationary review meeting was postponed until the conclusion of the grievance.

64. On 24 December, the claimant emailed Ms Botterill saying she would not send over documentation requested because her probationary meeting had been brought forward with only 24 hours' notice and that she did "not feel comfortable sending of anything that we scrutinise from mistakes and cause further stress, without having the necessary training and support". She copied in HR.

65. Ms Botterill's evidence was that by this stage, the claimant was only working on the objectives she had been set. She was not performing other duties.

66. The respondent's business was closed from 24 December 2021 to 2 January 2022. Over the Christmas break the claimant discovered she was pregnant again. The claimant returned to work on 11 January 2022 and informed Ms Botterill of her pregnancy. She requested a new manager, instead of Ms Botterill, until the

grievance was determined. She asked for examples of the support respondent said it was giving her.

67. On 11 January, the deputy vice chancellor Ms Burnett was appointed as the claimant's point of contact. The claimant was told continue to work on her IQA work.

68. On 21 January, the claimant told Mr Seddon she was not comfortable conducting a piece of particular work as it involved working with Mr Wooff and Ms Botterill - until the grievance was determined.

69. Ms Botterill told the tribunal it was ineffective for the claimant to report to Ms Burnett because the roles were too far apart. Ms Botterill in effect accepted that this arrangement did not work.

70. On 12 January 2022, the head of HR business partners invited the claimant to a grievance investigation meeting on 14 January. On 13 January, the claimant told him that she was unable to attend the grievance investigation meeting due to the unavailability of her trade union representative and asked that it be rescheduled to stated available dates. After this there were further delays where the claimant and respondent sought to identify a mutually convenient date. After some time and date was agreed as 27 January.

71. At some time around 18 January it transpired that work commitments would prevent the respondent's chief administration officer, who had been tasked with the claimant's grievance, from conducting the grievance. The respondent appointed the deputy dean of its law school, Ms Houston, to hear the grievance. This change of personnel inevitably delayed the grievance.

72. On 21 January, the claimant was told to work with Mr Wooff and Ms Botterill. There was no real dispute that the claimant was receiving relatively little work by this point. The claimant sent Ms Burnett an email at the end of every day with a list of what she had done. The claimant said she found this humiliating. In effect Ms Burnett, although this was not explained to the claimant, simply functioned as a "post box" and passed the claimant's information to Ms Botterill, so that Ms Botterill could oversee the work.

73. The claimant attended a grievance investigation meeting with Ms Houston on 27 January 2022. The claimant's trade union representative read out a prepared statement which contained a detailed account of the claimant's allegations. Essentially, he said that Ms Botterill and Mr Wooff were trying to exit the claimant from the business because of her miscarriage.

74. On 2 February 2022 Ms Houston conducted a grievance investigation meeting with Mr Wooff. Ms Houston told Mr Wooff that the claimant made allegations of sex and pregnancy discrimination and difference of treatment after the claimant's sickness absence. Ms Houston raised Mr Wooff's change of approach to the claimant's work between July and October, but there was no real answer. Mr

Wooff told Ms Houston that he did not know why the claimant had been off sick at the time. (On another occasion he stated that he found this out in about December.) He then said he thought that perhaps the claimant had told her about the miscarriage.

75. The same day Ms Houston had a grievance investigation meeting with Ms Botterill. Ms Houston asked for examples of the emails on which Ms Botterill was relying "to close issues". Ms Houston told Ms Botterill that it was understandable that managers would spot problems when employees were away.

76. On 11 February HR informed the claimant that, due to a large number of documents submitted as part of the grievance investigation, the outcome would be provided the next week. Considering the number of documents before the tribunal, the tribunal accepted this was a reasonable amendment to the procedure.

77. Ms Houston provided a grievance outcome letter to the claimant on 15 February 2022. She concluded that there had been criticism before the claimant's illness. Ms Houston found the emails at the time of the miscarriage from Ms Botterill were supportive. Mr Wooff and Ms Botterill had discovered problems with the claimant's work during her sick leave, "there are repeat examples of you not correctly remembering discussions at meetings; and were some fundamental errors in your data analysis. BPP cannot submit incorrect or incomplete data to a regulator as this could trigger a regulatory visit and put BPP's relationship with the regulator and BPP's business at risk.". Ms Houston stated that Ms Botterill was at fault for failing to send a letter confirming the extension to the probationary period.

78. The same day 15 February the claimant was invited to a probation review meeting on 21 February. Later that day, the claimant appealed the grievance outcome - to the group HR director, Ms Matthews. She contended that Ms Houston had shown bias. Further, Mr Wooff had changed his mind on a specific piece of work. The claimant was given no meaningful plan to improve and Ms Houston did not seek all relevant witness testimony.

79. On 17 February, the claimant informed Ms Matthews that her union representative was unavailable for the review meeting on 21 February and requested a new date. She also stated she was not comfortable with Ms Botterill's presence at the probation review meeting and requested Ms Burnett instead. The respondent agreed to Ms Burnett, who had been the point of contact up to that point, to conduct the probation review meeting.

80. On 23 February, the claimant informed HR that her trade union representative was not available to attend the grievance appeal hearing on 2 March. The earliest the union representative could attend was 11 March.

81. The claimant did not say in her witness statement that she asked the respondent to delay the probationary review meeting until after the grievance appeal. According to her Witness statement, the respondent declined to delay the review

meeting but the claimant did not say that she had asked. The trade union representative at the beginning of the appeal meeting did not raise any procedural concerns. Accordingly, the tribunal found on the balance of probabilities that the claimant had not requested that the probationary review meeting be postponed until after the grievance appeal.

82. On 25 February Ms Botterill emailed Mr Seddon with comments on his draft for final probationary meeting. The tribunal found that HR was drafting a plan for the meeting and Ms Botterill was providing comments and justifications. This email was in effect the case against the claimant - why she should not be confirmed in post.

83. On 25 February HR invited the claimant to a grievance appeal meeting on 11 March.

84. The claimant attained 9 months continuous service on 26 February.

85. The tribunal was materially disadvantaged by not hearing from Ms Burnett without any good explanation. However, the evidence before the tribunal indicated that she knew little of the claimant's job or performance and so had a limited ability to judge whether or not the claimant showed be confirmed in post. In this regard, Mr Seddon's evidence was of limited assistance. He stated that Ms Burnett "would" have done in number of things. However, this was not evidence of what Ms Burnett actually did. Mr Seddon told the tribunal that he had briefed Ms Burnett the before the probationary review meeting.

86. The claimant's probation review meeting took place on 28 February 2022. The claimant attended with her union representative and Ms Burnett attended with Mr Seddon. Ms Botterill did not attend.

87. At the meeting, Ms Burnett refused to consider any matters after 21 December 2021, because this was the date of the postponed probationary review. From the minutes, the tribunal concluded that Ms Burnett had read out HR and Ms Botterill's statement. At the meeting, the trade union representative said the claimant had been discriminated against. The claimant said that Ms Burnett's attitude was cold, aggressive and confrontational, and she was not prepared to listen.

88. Ms Burnett terminated the claimant's employment during the probation review meeting on the stated grounds of her apparent failure to satisfactory complete her probationary period on the grounds of performance. Ms Botterill's evidence was that she was not involved in the decision to terminate. The tribunal found that the evidence was consistent with Ms Botterill - with the help of Mr Seddon - in effect making the decision to terminate. Ms Burnett in effect communicated this to the claimant.

89. Based on the evidence before it, the tribunal considered whether Ms Burnett went into the meeting with something of an open mind - that she would be willing to press "pause" on the process if appropriate. However, there was no evidence of

this before the tribunal and there was no evidence from Ms Burnett herself. Further, the Tribunal took into account Ms Burnett's interview with Ms Matthews during the appeal. She said that she asked for a full briefing from Ms Botterill and Mr Seddon. She needed evidence to convince her there were no performance issues. She admitted to concentrating on the claimant shortcomings, but said she did her best to listen.

90. The claimant's effective date of termination was 28 February 2022. Ms Burnett sent an outcome letter confirming the dismissal on 1 March 2022.

91. The claimant appealed against her dismissal. As this significantly overlapped with the grievance appeal grounds, the claimant suggested, and the respondent agreed that, that they be combined.

92. On 8 March, the respondent provided the claimant with what it described as witness testimony. This appeared to be the grievance investigation meeting minutes with Mr Wooff and Ms Botterill.

93. Ms Matthews heard the combined grievance and dismissal appeal hearing on 11 March. On 14 March, the respondent provided the claimant with notes from the hearing.

94. The claimant chased the outcome of the meeting on 6 April. HR apologised for the delay. It told the claimant and union representative via email about the reasons for delay - the relevant HR person had been on leave, Ms Matthews had been away, a significant matter had arisen and the Easter holidays. HR promised to reply by 22 April. The claimant's union representative provided the respondent with comments on the investigation meeting notes with Mr Wooff and Ms Botterill on 27 April.

95. The claimant, having decided that there had been sufficient delay, submitted her claim to the employment Tribunal on 28 April.

96. On 4 May 2022 Ms Matthews conducted her investigation meetings (in respect of the joint grievance and dismissal appeal). Mr Wooff said that he heard that the claimant had suffered a miscarriage in Christmas but could not remember who had told him.

97. Ms Matthews' investigation meeting with Ms Botterill was notably more thorough than Ms Botterill's earlier meeting with Ms Burnett. Ms Matthews asked detailed questions, for instance concerning the decision to extend the probationary period Mr Wooff and Ms Botterill. Ms Matthews interviewed Ms Houston on 5 May.

98. On 6 May HR emailed the Deputy Dean with a list of questions as part of the investigation. He replied that he did not have a working relationship with the claimant but he had known about the miscarriage reasonably near the time and did not tell anyone else.

99. Two months after the initiation of the appeal, Ms Matthew sent the outcome letter to the claimant on 13 May. The appeal was rejected on the following grounds. Mr Wooff's feedback in October had been more robust than it had been in July because the of the upcoming Ofsted inspection. She found the claimant had been clear as to what areas required improvement, but that timeframe, objectives and support could have been confirmed more effectively. She said that found that Ms Botterill was the most appropriate person to conduct probationary reviews and, therefore, Ms Burnett was inevitably going to rely on Ms Botterill.

100. After termination, the respondent re-advertised the claimant's role. Ms Botterill's evidence was that it was offered to a recently married young woman who did not have children.

The Law

101. The law in respect of discrimination is found in the Equality Act 2010 as follows: –

18 Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it
(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) …
(6) A reference to the court includes a reference to—
(a) an employment tribunal…

102. The law in respect of unfair dismissal is found in the Employment Rights Act 1996 as follows –

99 Leave for family reasons

[(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.
(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
(3) A reason or set of circumstances prescribed under this section must relate to—
(a) pregnancy, childbirth or maternity,
[(aa) time off under section 57ZE,]
[(ab) time off under section 57ZJ or 57ZL,]
(b) ordinary, compulsory or additional maternity leave…

103. The law in respect of wrongful dismissal is as follows. Unless there has been a fundamental breach contract by the employee, they are entitled to the contractual notice contained in the contract of employment, subject to the statutory minimum, upon termination.

Submissions

104. The claimant provided opening statement on section 13 Equality Act. The parties also provided lengthy and detailed written submissions. The tribunal heard oral submissions from both parties including a detailed discussions on section 13 Equality Act and the EU Withdrawal Act.

Applying the law to the facts

Discrimination on grounds of pregnancy or maternity (section 18 EQA)

105. In this case, the acts relied upon by the claimant were not inherently discriminatory, therefore (as per *James v Eastleigh Borough Council* [1990] IRLR 572), the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact.

106. The tribunal reminded itself of the guidance in *Nagarajan v London Regional Transport 1999 ICR 877, HL* (a case under legacy race legislation but relevant to section 18) as follows,

> 'Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

107. It does not matter if the decision-maker was consciously or subconsciously motivated by a protected characteristic, such as pregnancy or maternity. The tribunal asks why they acted as they did.

108. The Tribunal also had regard to the comments of Lord Phillips, then President of the Supreme Court, in *R* (*E*) *v Governing Body* of *JFS* [2009] UKSC 15, also a case under legacy race discrimination. In deciding what were the grounds for discrimination, a Tribunal is simply required to identify the factual criteria applied by the respondent. This is simple shorthand for determining whether the proscribed factor operated on the alleged discriminator's mind. Whilst any discriminatory reason must be an effective cause of treatment, it does not have to be the only reason.

109. The Equalities and Human Rights Commissions Employment Code states that the protected characteristic needs to be a cause of the less favourable treatment, but it does not need to be the only or even the main cause.

110. The House of Lords in *Najaragan* stated that for discrimination to be made out "racial grounds" (the material test at that time), it must have a significant influence on the decision. According to *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT* (a legacy sex discrimination case relating to pregnancy), the discriminatory reason does not have to be the main reason, as long as it is an effective cause. See also the judgment of the *Employment Appeal Tribunal in Amnesty International v Ahmed* [2009] IRLR 884.

111. As to the burden of proof, the Tribunal directed itself in line with the guidance of the Court of Appeal in *Igen Ltd v Wong and Others* CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such

discrimination and in some cases the discrimination will not be an intention but merely an assumption.

112. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

113. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246. As stated in *Madarassy*: -

> "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

114. If the Claimant does not prove such facts, the claim will fail.

115. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed.

116. The Tribunal also directed itself in line with *Hewage v Grampian Health Board* [2012] UKSC 37 that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the tribunal is able to make positive findings on the evidence one way or the other.

117. In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated that:

> "No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon* …. it must surely not be inappropriate for

> a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race."'

118. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16* Mrs Justice Simler (then President of the EAT) stated that tribunals,

> "…must avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

119. On these facts, the tribunal was able to make positive findings on the evidence one way or the other. It was therefore not found necessary to work mechanistically through the provisions of the burden of proof case law. To put it another way, the tribunal concentrated on "the reason why" the respondent had acted as it had.

120. The tribunal firstly determined whether the respondent engineered the termination of the Claimant's employment following her miscarriage on 3 October 2021. By "engineer" the tribunal understood the claimant to be saying that during the protected period, the respondent had at least made the decision to exit her from the business and had taken a first step towards that end.

121. The tribunal considered the respondent's acts up to 18 October. The tribunal had found that Mr Worth had informed Ms Botterill that the claimant's work was not providing him with what he needed. He expressed considerable frustration with this. The tribunal had not found that there was any prompting from Ms Botterill. The tribunal had not found that Mr Wooff knew about the claimant's miscarriage at this time. The tribunal accepted that Mr Wooff was expressing genuine concern and frustration with the claimant's work.

122. Relatively little had occurred before 18 October, when the claimant returned to work from sick leave. The claimant had been off sick for two weeks and had just returned to work. Mr Wooff, the tribunal accepted, had started to become concerned about the quality of the claimant's work. He did this, the tribunal found, without knowing of the claimant's miscarriage and without encouragement from Ms Botterill. The initiative came from Mr Wooff.

123. In the circumstances the tribunal found that there was no evidence to indicate that the respondent made a decision to exit the claimant from the business or had taken any steps to that end. All that could be said was that the first signs of the respondent's concerns about the claimant's performance were showing. Further, the Tribunal found it inherently unlikely, whilst bearing in mind this was not the same as impossible, that Ms Botterill and/or Mr Wooff would have reached such a decision so quickly.

124. The second act of discrimination was that on 18 October 2021, the day the Claimant returned to work following sickness absence, she was informed by Nikki Botterill, her line manager, by email, that her second week of pregnancy-related sickness absence should be taken as annual leave, not sick pay.

125. The tribunal was not persuaded that this constituted unfavourable treatment. The claimant was treated in the same way as other respondent employees. There was no evidence before the tribunal that any other probationary employee had been provided with a second week discretionary full pay when off sick. There was a bare assertion to the contrary, but no more, in the claimant's witness statement. The respondent in paying the claimant only one week's full pay when off sick was doing nothing more than operating its contractual sickness absence procedure in its usual way. The written contract was without ambiguity. There was no evidence to indicate that, had the claimant been absent sick for some other reason, for instance a broken leg, that the respondent would have treated her more favourably.

126. The evidence pointed to the respondent seeking to mitigate the disadvantage in the claimant's case by the use of annual leave. The tribunal thought that this might be better viewed as a reasonable adjustments claim, that is asking for adjustments to the respondent's practice to fit around the needs of the person who had suffered a miscarriage. It was not an act of direct discrimination.

127. The third act of discrimination was that on 19 October 2021, Nikki Botterill informed her that, during her pregnancy- related sickness absence, concerns had arisen regarding the quality of her work. This was the first time the Claimant had received any substantive criticism of her performance. One of the concerns on a piece of work contradicted feedback that the Claimant had received before her miscarriage.

128. The tribunal accepted that this amounted to unfavourable treatment because it was criticism of the claimant's work performance.

129. The tribunal found that Mr Wooff was not aware of the claimant's pregnancy at the time he raised the concerns which led to Ms Botterill feeding back negatively to the claimant upon her return from sick leave. Accordingly, his criticism of the claimant's work could not have been linked to pregnancy or pregnancy related illness.

130. Ms Botterill was aware of the miscarriage but she was in receipt of robust and detailed criticisms of the claimant's performance by Mr Wooff. There was

accordingly a good rationale for Ms Botterill's criticism. For the avoidance of doubt, it was not put to Ms Botterill that her own medical history had any influence on her motivation and accordingly the Tribunal did not take this into account.

131. Accordingly tribunal found that there was no link between the claimant's miscarriage and Ms Botterill's negative feedback.

Discrimination on grounds of pregnancy or maternity and / or sex (section 13 EQA)

132. The parties disagreed fundamentally as to the correct interpretation of section 13 Equality Act 2010. There was considerable discussion in the written submissions and orally before the tribunal. The essential disagreement was whether or not section 13 provided protection against discrimination on the grounds of pregnancy or maternity which fell outside of section 18 that is, outside the protected period. Another way of looking at this, was to identify the correct comparator. The claimant's case was that the correct comparator would be someone who had not been pregnant, had not suffered a pregnancy-related illness, and was not believed likely to become pregnant again perhaps with further illness.

133. The tribunal decided that the most proportionate approach was to start by taking the claimant's case at his highest. If the claimant succeeded on the facts, applying the analysis of section 13 preferred by the claimant, then the tribunal would go on to analyse the competing submissions as to the effect of section 13. The disagreement between the parties as to the correct interpretation of section 13 Equality Act 2010 involved complex legal analysis involving European Union law including the effects of the EU Withdrawal Act. If the claimant did not succeed on the facts on this interpretation of the law, then this analysis would be otiose. To put it another way, the first step in the Tribunal's analysis would be to make findings of fact on the assumption that section 13 provided protection against direct maternity discrimination outside the protected period.

134. The first act of direct pregnancy discrimination relied upon was on 18 October 2021, the day the Claimant returned to work following sickness absence, she was informed by Nikki Botterill, her line manager, by email, that her second week of pregnancy-related sickness absence should be taken as annual leave, not sick pay.

135. The tribunal had rejected this argument for the reasons set out in detail under section 18. If this claim were being argued in the alternative, on the assumption that section 13 covers direct pregnancy discrimination, the answer would be the same. The reason the claimant did not receive full pay in the second week of her sickness absence was her contractual entitlement. There was no evidence to indicate that had she been absent for some other reason the respondent would have acted differently.

136. The second act of discrimination relied on under section 13 was that on 19 October 2021, Nikki Botterill informed [the claimant] that, during her pregnancy-related sickness absence, concerns had arisen regarding the quality of her work. This was the first time the Claimant had received any substantive criticism of her

performance. One of the concerns on a piece of work contradicted feedback that the Claimant had received before her miscarriage.

137. The tribunal had rejected this argument for the reasons set out in detail under section 18. On the assumption section 13 covers direct pregnancy discrimination, the result would be the same.

138. The third act of discrimination relied on under section 13 was on 25 October 2021, David Wooff, …, produced a 1.5 page document criticising [the claimant's] work, which, in fact, on 19 July 2021, before her miscarriage, he had reviewed and stated, "I think the form looks great, nothing I can see that needs changing/adapting from this. Good job!". When questioned about this he said, "I didn't recognise it as the version I last saw, or I suspect I would have made the observations then".

139. The tribunal had found that when he sent his email on 8 October Mr Wooff was not aware of the claimant's pregnancy. The Tribunal found that he was not aware by 25 October for the following reasons. Mr Wooff had developed concerns about the claimant's data while she was absent sick, as illustrated by his email of 8 October, which the tribunal had found was not influenced by the claimant's pregnancy. The tribunal was satisfied that, from that point on, he took great care to analyse the claimant's data because he had started to lose faith in her data. There was accordingly a good explanation for Mr Wooff's approach in his email of 25 October. Further, it was only 17 days since the email of 8 October when the tribunal had found Mr Wooff was not aware of pregnancy and miscarriage. It was therefore less likely that he had become aware in such a brief period of time.

140. Further, the tribunal had not found that Ms Botterill was working with Mr Wooff to seek to exit the claimant from the business. The tribunal accepted that Mr Wooff created the email of 25 October on his own initiative. The evidence showed that Mr Wooff was independent-minded when it came to data analysis and integrity. In his email of 8 October he challenged, and implicitly criticised, Ms Botterill.

141. Therefore, the tribunal found that Mr Wooff's email of 25 October was not linked to the pregnancy and miscarriage.

142. The fourth act of discrimination relied upon was after the Claimant's miscarriage, Nikki Botterill adopted a different tone when providing feedback to the Claimant and sought-out opportunities to criticise her.

143. The tribunal accepted that there was a different tone to some extent from Ms Botterill towards the claimant after miscarriage. The tribunal had seen smilies before the claimant went sick and was not taken to any afterwards, for instance. The evidence showed that there was more criticism by Ms Botterill of the claimant after miscarriage them before. However, the tribunal found that the reason for this was Ms Botterill, partly under the influence of Mr Wooff and partly because of her own motion, became more concerned at the claimant's performance and what she saw as the claimant's failure to grow into the role as envisaged.

144. Ms Botterill was able to point to specific issues with the claimant's work such as slides not being ready and difficulties with the data. The tribunal did not find that Ms Botterill sought out opportunities to criticise the claimant. Much of the criticism was caused by Mr Wooff's frustrations with the data. Mr Wooff was working, as shown by the emails, until 1 AM in dealing with, in part, data prepared by the claimant.

145. Accordingly the Tribunal found that whilst there was to some extent a difference of tone when providing feedback, this was not linked to pregnancy and miscarriage and Ms Botterill did not seek out opportunities to criticise the claimant.

146. The fifth act of discrimination relied upon was the Claimant's probationary review meeting was brought forward from 26 November to 15 November 2021, without explanation.

147. The only evidence in the bundle was that the probationary review meeting was arranged once, on 15 November as a result of human resources reminding Ms Botterill. 26 November was exactly 6 months after the claimant started work. The first probation review meeting happened on the exact date that is 3 months after the claimant's start date.

148. In the view of the tribunal the most likely explanation was that the meeting was in effect pencilled in for 26 November, as a fall back date, and then the meeting was actually scheduled for 15 November.

149. The tribunal found that the reason that the meeting was held on 15 November rather than at the end of the claimant's six-month period was that Ms Botterill and human resources knew that the six-month review would not be plain sailing. There were concerns about the claimant's performance and they were looking not to confirm the claimant in post (which would be relatively straightforward) but to extend her probationary period. There was therefore a potential conflict. This was illustrated by the fact that human resources attended. In circumstances where an employee's probation is going to be extended, it is sensible not to leave the review meeting to the last minute. The tribunal did not accept that the decision to extend was linked to the claimant's pregnancy or miscarriage for the reasons set out in the following paragraphs under the sixth act of discrimination.

150. The sixth act of discrimination was that Claimant's probationary review period was extended by three-months at the end of the probationary review meeting on 15 November 2021, without consideration of the Claimant's responses or explanation for why the "areas of concern" had not been mentioned or discussed previously.

151. The tribunal found that the decision to extend the probationary period was not the claimant's pregnancy or miscarriage, but Ms Botterill and Mr Wooff's concerns about her performance. Mr Wooff sent an email at 1.08am on 4 November reflecting his having worked long hours on the claimant's data. He

showed that she had provided him with two screenshots was no data at all. The situation was made worse by the claimant becoming defensive, for instance she replied, "I acknowledged this before". The tribunal saw this as a sign that the claimant was concentrated more on defending her position than fixing the problems with the data. The reason for this was that the claimant believed that Mr Wooff and Ms Botterill were engaged a bad faith campaign to exit her. Accordingly, she interpreted feedback as part of this campaign. This made it extremely difficult if not impossible for her to work with Mr Wooff. Mr Wooff stated that he was working from the assumption that he had to check all the claimant's data from scratch. His attitude to the claimant had changed. Before he lost confidence in her he had signed off emails "kind regards and best wishes" whereas by November he signed simply "regards".

152. Further, if there was a settled intention on the part of Ms Botterill to terminate the claimant, there was no reason for the 6 month review meeting report to contain a number of positives. It was stated that the claimant could be a good member of the team.

153. The seventh act of discrimination was the Claimant was asked on 21 December 2021, to attend a further probation meeting the next day with less 24 hours' notice, with no reason given.

154. The tribunal had found that the respondent had made its decision to terminate the claimant by this point and it wanted her out of the business before Christmas. Ms Botterill had told Mr Seddon on the 21st that she was not going to confirm the claimant in post. Therefore, the claimant was given one day's notice of the meeting.

155. The tribunal considered why the respondent waited less than one month after the second probationary review to terminate the claimant. After the second review meeting her relations with Mr Wooff got worse not better, despite Mr Seddon and Ms Botterill intervening. The claimant had involved Mr Seddon, and he and Ms Botterill spent time trying to make the relationship between the claimant and Mr Wooff work. After the objectives meeting on 26 November, Ms Botterill emailed about new ways of working between Mr Wooff and the claimant. However, this did not bear fruit. The claimant emailed Mr Seddon on 4 December with a high degree of detail about a disagreement between her and Mr Wooff about data. The claimant continued to be highly critical of Mr Wooff to Mr Seddon describing him as "patronising at best".

156. On 17 December, the claimant emailed that she was being "stripped apart" for mistakes. This email reflected a clear breakdown of the working relationship between the claimant and her line manager. She made serious allegations of persecution. In the view of the tribunal it was clear to HR and Ms Botterill that this was a broken relationship. Attempts been made, new ways of working had been introduced but to no avail. In the view of the tribunal, the respondent could have provided clearer objectives for the claimant. Nevertheless, the reality was that she had made serious allegations against two people she worked with. Ms Botterill had suggested a meeting between her and Mr Wooff which the claimant refused

to attend. In the view of the tribunal, the respondent concluded that the situation was untenable and the claimant as a probationer should be the one to go. The decision was not linked to her pregnancy or miscarriage.

157. The eighth act of discrimination was the Respondent did not follow a credible, competent and transparent grievance procedure. The Claimant relies upon the contents of the email dated 27 April 2022 from her Trade Union representative to the Respondent.

158. The tribunal accepted there were shortcomings in the grievance process. Ms Houston when interviewing in particular Ms Botterill appeared to reflect back Ms Botterill's views, such as agreeing that shortcomings were sometimes discovered when the employee was off sick, rather than investigating them. Ms Houston did not press Mr Wooff or Ms Botterill, for instance on why Mr Wooff changed his opinion on the claimant's work between July and October.

159. The tribunal accepted the claimant's submission that there was an element of ticking boxes on the grievance. The tribunal contrasted this with the notably more thorough approach of Ms Matthews who unlike Ms Houston was an HR professional. Ms Houston was a senior employee who identified with managers rather than subordinates and, in effect, put herself, in Ms Botterill's shoes. The tribunal found that this was the reason for the shortcomings in the grievance, rather than Ms Houston having any prejudice against the claimant or being motivated by the claimant's pregnancy and/or miscarriage. The tribunal did not accept that there was a lack of transparency. The tribunal understood the claimant's case to be that she was not provided with the interview notes with Ms Botterill and Mr Wooff until late in the process. The tribunal did not accept that this approach was linked to the claimant's pregnancy or miscarriage. It is not uncommon for employers to refuse to provide witness evidence in grievances. Whilst this might create some difficulty for an employee who raises a grievance, it does make it easier for employers to obtain witness evidence.

160. The ninth act of discrimination was the failure to uphold the claimant's grievance. The tribunal did not find that this was an act of discrimination for the same reasons as set out under the eighth act of discrimination.

161. The tenth act of discrimination was on 15 February 2022, the same day that the Claimant was informed of the outcome of her grievance, she was asked to attend another probation review meeting.

162. The tribunal, for the reasons set out above, had found that the respondent had decided to dismiss the claimant before Christmas and was therefore putting this decision into practice as soon as it could. The tribunal had found that decision was not related to pregnancy or miscarriage.

163. The eleventh act of discrimination was the Respondent refused to arrange a hearing for the Claimant's grievance appeal before the probation review meeting on 28 February 2022.

164. The tribunal found that this did not happen. The claimant did not request the grievance hearing appeal to be heard before the probationary review meeting.

165. The twelfth act of discrimination was the Claimant was informed, following an adjournment of the probation review hearing on 28 February 2022, that she had failed to complete her probationary period and her contract would be terminated with one- month's pay in lieu of notice. This was confirmed in writing on 1 March 2022.

166. The tribunal found for the same reasons as set out above that the respondent was putting into practice a decision made in December. For the avoidance of doubt, there was no evidence that matters had improved between late December and late February. In fact, things got worse. The claimant was unwilling to be managed by Ms Botterill. Therefore, the respondent was using Ms Burnett as in effect a post box. Thus the respondent was expending more resources on the claimant and there was no reason for its motivation to have changed since December. The claimant was not relying on her becoming pregnant for a second time as a reason for discrimination.

167. The 13th act of discrimination was dismissing the claimant for performance reasons. This was essentially the same as the 12th act of discrimination and the tribunal rejected it for the same reasons.

168. The 14th act of discrimination was the Respondent did not provide the outcome until 13 May 2022, or a reason for the delay in doing so, to the combined disciplinary dismissal and grievance appeal hearing.

169. The tribunal accepted that the respondent's conduct was poor. The question was why. The tribunal found that it was not connected to the claimant's pregnancy and miscarriage for the following reasons. The claimant was no longer an employee of the respondent and accordingly, however regrettably, was not a priority. There was a mixture of reasons for the delays. Some were due to the respondent - such as staff going on holiday, and Easter. Some were due to the claimant - availability of her trade union representative and sending back comments. Trade union representatives are often busy and it is common that it may take time to provide support to their members. Further, the people involved in this delay were not Ms Botterill and Mr Wooff. Whilst the respondent's treatment of the outcome was not acceptable, there was no reason to link this with the claimant's pregnancy or miscarriage.

170. Accordingly, based on the claimant's case on the law under section 13, that it is unlawful to directly discriminate on the grounds of pregnancy or pregnancy related illness outside the protected period, the respondent did not so discriminate. On the facts as found, and assuming the claimant's interpretation of section 13 is correct, the claim would fail. It was accordingly not proportionate to go on to the next step to consider whether the respondent or the claimant's interpretation of section 13 was correct.

Victimisation s27 Equality Act

171. The only disputed protected act was the email of 17 December 21 (page 511). The claimant's case was that the email was a protected act under S27(2)(d). Accordingly, the asserted acts must if verified be capable of amounting to a date of the Equality Act. The tribunal found that the email was not a protected act for the following reasons.

172. In the email the claimant used the word, victimisation. However, the tribunal did not find that it she used this as a term of art, that is an allegation under section 27 of the Act. She later said she meant this as direct discrimination. The word victimisation is used in a non-technical sense on many occasions by many people. There was nothing in the email to indicate that she meant it to be a reference to section 27 Equality Act.

173. The email contained a good deal of criticism of how the respondent was managing the claimant. The claimant also raised her not being paid in full for her sick leave. The claimant did not say that she was not paid because of the miscarriage; she was simply complaining of not being paid. She complained of being asked to do work whilst off sick. However, she did not state that she was being asked to do the work because she was absent on pregnancy-related sickness. Her complaint was that she felt let down and unsupported.

174. The Tribunal was bolstered in its findings by the claimant not relying on the respondent's contact with her during her sick leave as an act of discrimination. Further, in her professionally drafted grievance letter there was no allegation that this contact constituted a breach of the Equality Act.

175. There was no dispute that the letter of 22 December 2021 (page 44), the grievance of 15 February 22 (page 574) and the appeal against dismissal of 4 March (page 583) were all protected acts.

176. The Tribunal went on to consider causation, whether the claimant was subjected to any of the nine alleged detriments as a result of any of the three protected acts. The tribunal directed itself in line with the guidance from House of Lords in *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL* that it is required to identify 'the *real reason*, the core reason, the causa causans, the motive' for the respondent's conduct. The Tribunal further directed itself in line with *Igen Limited and Others v Wong and Others 2005 [ICR931]* where the Court of Appeal clarified that for an influence to be significant, it does not have to be of great importance. It is 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment will be breached by the merely trivial'. In addition, the Tribunal bore in mind the comments of the Employment Appeal Tribunal in *Villalba v Merrill Lynch & Co Inc and Others 2007 [ICR469]: -*

> 'We recognise that the concept of 'significant' can have different shades of meaning but we do not think it could be said here that the Tribunal thought that any relevant influence had to be important … if in relation to any particular decision a discriminatory influence is not a material influence or fact, then in our view it is trivial'.

177. The first alleged act of victimisation was the Claimant was asked on 21 December 2021, to attend a further probation meeting the next day, with less than 24 hours' notice, with no reason given. All of the protected acts happened after 21 December and accordingly cannot have caused this treatment.

178. The second alleged act of victimisation was, following the Claimant's grievance submitted on 22 December 2021, the Respondent delayed holding a grievance meeting until 27 January 2022, without reason.

179. The tribunal found that there were reasons for the respondent's delay which were not affected to the claimant's pregnancy or miscarriage. The respondent's business closed for the Christmas period almost immediately after the submission of the grievance. It did not reopen until 2 January. The claimant was absent until 11 January. The respondent invited the claimant to a grievance meeting on 14 January. There was then discussion between the claimant and the respondent about the date. The delay until 27 January was caused by both parties -the availability of the trade union representative and then the respondent changes the grievance officer. These were the reasons that the grievance meeting was not heard earlier.

180. The third alleged act of victimisation was on 15 February 2022, the Claimant's grievance was not upheld.

181. The tribunal had made its reasoned findings as to the motivation of the grievance officer under section 13. It had found that the manager who investigated the grievance in effect reflected the point of view of her fellow manager rather than a subordinate. Further, the rejection of the claimant's grievance was not on its face unreasonable. There was detailed evidence of issues with the claimant's performance and the claimant's probationary period has been extended. Accordingly, the rejection of the grievance was not caused by the protected acts.

182. The fourth act alleged act of victimisation was the Respondent did not follow a credible, competent and balanced grievance procedure / assessment: the Claimant was improperly denied witness testimony taken from "all parties involved" in the investigatory process that had been acquired after her grievance hearing.

183. This act overlapped very significantly with the third act, the rejection of the claimant's grievance. The tribunal had made findings as to why the grievance procedure proceeded as it did. The shortcomings in the grievance process were not caused by the protected acts but by Ms Houston as a senior manager identifying with other managers and adopting Ms Botterill's point of view.

184. The fifth alleged act of victimisation was the Claimant lodged a grievance appeal on 15 February 2022 and the Respondent refused to arrange a hearing for the appeal before the probation review meeting on 28 February 2022.

185. The tribunal had already made a finding that this did not occur. The claimant did not request the appeal hearing to happen before the probation review meeting.

186. The sixth alleged act of victimisation was the Claimant was informed, following an adjournment of the probation review hearing on 28 February 2022, that she had failed to complete her probationary period and her contract would be terminated with one-month's pay in lieu of notice. This was confirmed in writing on 1 March 2022.

187. The tribunal has already made its findings as to the reason for the claimant's dismissal. The tribunal went on to consider whether the grievance and the appeal against the rejection of the grievance had any impact or effect on the decision to dismiss. The tribunal found that the grievance and appeal had no effect because the decision had, in effect, been made in December 2021. The tribunal heard already made detailed findings as to this and found that nothing had occurred since December to make a positive difference which might change the respondent's decision to terminate .

188. The seventh alleged act of victimisation was the Claimant appealed the decision to terminate her contract on 4 March 2022, and a combined disciplinary dismissal and grievance appeal hearing was held on 11 March 2022. The Claimant did not receive the witness testimony taken from "all parties involved" in the investigatory process until 8 April 2022.

189. The tribunal determined that the respondent's failure to provide the minutes of the meetings between Ms Houston and Mr Wooff and Ms Botterill was not caused by the fact that the claimant had submitted the grievance, appealed against the rejection of the grievance and appealed against her dismissal. The tribunal had found that the reason these documents were not provided was because it is far from normal to provide such testimony in the circumstances. Further, the respondent was not treating the claimant's grievance and appeal as a matter of priority, regrettably, because she was no longer an employee.

190. The eighth alleged act of victimisation was the Respondent, without explanation, had not provided a decision following the hearing on 11 March 2022 by 28 April 2022, thus the Claimant had no choice but to lodge an ET1 with the Tribunal.

191. The tribunal has already made reasoned findings as to why there was a delay in the respondent provided the claimant with a decision. There was no reason to find that any of the protected act had any influence.

192. The ninth and final alleged act of victimisation was from the date the Claimant returned to work on 18 October 2021 to the date of dismissal, she did not receive any support or work improvement plan to assist her in meeting targets or improving her performance.

193. The tribunal had found that the claimant did receive considerable support from the respondent. Unfortunately, because she had determined by October that Mr Wooff and Ms Botterill were working together to exit her from the business, she was not able to take advantage of the support in practice.

194. Nevertheless, as Ms Matthews identified, there were significant shortcomings in the support. In particular after November the claimant was not as clear as she should have been as to her objectives and targets. However, this predated the first protected act. The tribunal had to determine whether the shortcomings were made worse by the protected acts.

195. In the view of the tribunal the shortcomings did not get worse after the grievance. By this time, the claimant was doing relatively little work. By 11 January she had transferred at her request away from Ms Botterill's line management. She was therefore in effect using Ms Burnett as a post box who unavoidably struggled to provide her with any meaningful support.

Automatic unfair dismissal section 99 Employment Rights Act

196. The sole issue was whether the reason for the claimant's dismissal was related to her pregnancy and miscarriage. It was agreed between the parties that if the claimant's case succeeded on the facts, then the respondent had breached section 99 and therefore if the reason for dismissal was either the claimant having taken sick leave for her miscarriage and/or the respondent's fear that she would become pregnant again, this would constitute automatic unfair dismissal.

197. The burden of proof was on the claimant.

198. Whilst the claimant was not dismissed until 28 February 2022, the tribunal had found that the decision to dismiss her was effectively made in late December 2021. This was a little over months after her sickness absence. The tribunal had found that the criticism of her performance on her return from sick leave was not related to her miscarriage of pregnancy. Because the claimant was absent unexpectedly on sick leave, her colleagues had to step in. They then discovered issues with her work of which they were previously unaware. This was in the context of a new member of staff whom the respondent expected to be getting up to speed. The tribunal reminded itself that the test is not a "but for" test. The tribunal was satisfied that there was a cascade of events, in that the miscarriage caused the claimant to be off sick, and the claimant's sickness resulted in the respondent looking more carefully at her work and finding fault. Nevertheless, the tribunal was satisfied that the respondent's attitude to the claimant's work would have changed even if she had not been absent sick although it might have taken some time longer. Mr Wooff who was detail-minded and analytical about data would have raised concerns in any event.

199. The tribunal considered the truncated dismissal procedure and whether it should draw any adverse inferences from this. The respondent's original plan, less than one month after the extension of the claimant's probationary period, was to invite the claimant to a meeting the next day where it was highly likely she would

be terminated. However, the tribunal did not find this to be evidence that the respondent had a proscribed motive for dismissal. The tribunal accepted that, all things being equal, employers are more willing to exit an employee during the probationary period, otherwise there would be little point in having a probationary period. A truncated procedure, as planned by the respondent, is not exceptional.

200. The tribunal found that it was Ms Botterill with the support and input of Mr Seddon who in effect made the decision not to confirm the claimant in post. Ms Botterill was the only person with the appropriate knowledge to be able to make the decision. Mr Seddon, because the claimant had involved him and he had come to know more about the claimant's working relationships with her colleagues, also had input into the decision. The only reason that Ms Botterill was not holding the third probationary review meeting was that the claimant had objected. The tribunal found that the respondent wanted to separate the claimant and Ms Botterill because of the breakdown in their working relationship.

201. Ms Matthews who heard the appeal identified that Ms Botterill was the appropriate person to hold the review meeting and that Ms Burnett was inappropriate. All witnesses agreed that Ms Bennett had little knowledge of and interaction with the claimant's work. Inevitably she did not have the necessary knowledge of the relevant issues and had to rely on Ms Botterill. The evidence for this was the draft plan for the meeting which showed that in effect Mr Seddon and Ms Botterill gave Ms Burnett a script to use. This was plausible as they were the only ones that the knowledge to be able to do this.

202. Ms Burnett did not appear before the tribunal. There was no evidence from her to the effect that, had she found a problem with the management case against the claimant, she would have intervened and in effect pressed pause on the dismissal. According to the evidence, Ms Burnett took the view that it was for the claimant to persuade her that she should not be dismissed. Accordingly, the decision to dismiss was in effect made by Ms Botterill with input from Mr Seddon. In the absence of any direct evidence from Ms Burnett and indeed any explanation as to why she did not give evidence, based on the documents this was the only conclusion the tribunal could come to.

203. The tribunal therefore considered the motivation of Ms Botterill in terminating the claimant's employment. The tribunal had found that the initial criticism upon the claimant's return to work from sick leave was not related to pregnancy or miscarriage. Mr Wooff had looked at the claimant's work and found problems and therefore his mindset had altered. As he said in his email, he had lost faith in the claimant's data. Once lost, his faith was hard to restore. He said he would not rely on the claimant's figures without checking them himself.

204. Ms Botterill had worked with Mr Wooff before and trusted him. Mr Wooff was providing Ms Botterill with a good deal of criticism of the claimant's work with detailed explanations. Mr Wooff, the tribunal had found, did not know about the pregnancy so this cannot have been his motivation.

205. It was difficult to determine when Mr Wooff found out about the miscarriage because he gave different accounts. This was not inconsistent with his simply attaching little importance to the news. On the balance of probabilities the Tribunal found that Mr Wooff discovered about the miscarriage in late 2021 or early 2022. These were the dates he gave and it fitted with the fact that the respondent was coming to the conclusion that it needed to terminate the claimant.

206. The evidence showed that Mr Wooff had stayed up working until 1AM to analyse and in his opinion fix the data provided by the claimant. Further there was a clash in working practices between Mr Wooff and the claimant, she preferred to discuss matters in person or by phone whereas he preferred long detailed emails. The tribunal accepted that Mr Wooff placed a high priority on absolute data integrity and accuracy. The claimant did this less particularly as, as accepted by Ms Botterill, it was difficult to gather the data at times. The claimant had to collect data from different schools and Ms Botterill accepted that could be delays in this.

207. In the view of the tribunal perhaps the most significant problem was that the claimant, according to her witness statement, had decided by 25 October that there was a conscious campaign against her by Ms Botterill and Mr Wooff. In her view they criticised whatever she did. The tribunal accepted that the claimant's witness statement was drafted over a year later when positions had probably hardened and the claimant's views may not have been so clear-cut at the time. Nevertheless , the evidence in the bundle showed that the claimant in effect assumed a defensive position in October and viewed any feedback through that lens. She did not see it as pure feedback but to some and increasing extent as a campaign against her. The claimant had been through a difficult experience in October and in the view of the tribunal was understandably bruised by this.

208. Ms Botterill did not manage the return to work meeting well. The tribunal accepted the claimant was genuinely blindsided by criticism which was different to previous feedback. It was understandable why the claimant had made the link between her absence and her miscarriage and the change in feedback. At the 3 3 month review meeting the claimant had put in a great deal of work whereas there had been almost no written input from Ms Botterill. Therefore, the claimant lacking guidance at this stage, would have been all surprised by the negative feedback.

209. Further, the relationship to the claimant and Mr Wooff became very difficult indeed. Both of them copied emails to each other to managers. When the respondent attempted to make their working relationship better, the claimant simply saw Mr Wooff as hostile to her. This was seen in her emails in which she said she did not want to meet him and she wanted him to understand what he was doing wrong. What he saw as protecting the integrity of data was perceived by her as borderline harassment. Accordingly, any good faith attempts to fix the working relationship, for instance a meeting with Mr Wooff or feedback from Ms Botterill, fell on stony ground. The effect of this was that Ms Botterill saw the claimant as not taking feedback well.

210. The evidence in the bundle showed that Ms Botterill had sought HR advice when considering extending the claimant's probationary period beyond 6 months. Ms Botterill, had she wished to exit the claimant could have done so at this point but instead chose to extend the probationary period and keep the claimant employed. This was not consistent with Ms Botterill being motivated by the claimant's pregnancy or miscarriage. The tribunal accepted that it was in Ms Botterill's interest to make this work. The alternative was going through a recruitment. Unfortunately, however, the claimant received relatively little support after the six-month meeting. She was told to look at videos for instance. The practical attempts at support – to help the working relationship with Mr Wooff in effect – were attempting to reconcile the unreconcilable.

211. The claimant relied on the fact that, the respondent having extended her probationary period by three months then sought to dismiss after less than one month. This claimant argued was particularly egregious considering the delays in providing her with objectives. The claimant on her case was only working to these objectives and not doing other work. There was evidence that she was refusing to attend meetings. Ms Botterill had further criticisms of her work for instance slides had not been prepared. In the end the relationship between her and Ms Botterill broke down, illustrated by the claimant asking to have her removed within a few days of her return from the Christmas break.

212. The tribunal found that the decision to terminate was made because the working relationship between the claimant and both Mr Wooff and Ms Botterill was breaking down or had broken down by December. Further, Mr Seddon was getting too involved spending too much time on this matter. Ms Botterill received criticisms of the claimant's work including detailed and on particularised criticisms from Mr Wooff whom she trusted.

213. The tribunal had some concerns about how the respondent managed the probationary period. In the view of the tribunal, in particular taking into account the experience of its lay members, the respondent may well want to review how it supports and manages its probationers. The respondent in the person of Ms Matthews, an HR professional, accepted that some of the claimant's targets and objectives needed to be communicated more clearly.

214. As this was a claim for automatic unfair dismissal under section 99 rather than so called ordinary unfair dismissal under section 98, the only question for the tribunal was whether the reason for dismissal was a prohibited reason. The tribunal having found that the reason for dismissal was not the claimant's pregnancy or miscarriage nor any fear of her becoming pregnant again that was the end of the tribunal's enquiry.

Wrongful dismissal

215. The question for the tribunal was whether the claimant was paid the correct notice period in accordance with her terms and conditions of employment.

216. The situation in which the claimant and respondent found themselves was not covered by an express term of the contract. It was not stated what would be the position when the probationary period in effect was extended for more than 9 months. In the view of the tribunal the contract was drafted on the assumption that a probationary period would be expended for no more than 3 months. This is a common provision in employment contracts in the experience of the tribunal.

217. On the facts, the tribunal had found that the respondent sought to dismiss during the probationary period that is before nine months. It failed to do so because firstly the claimant raised a grievance, and then events intervened. However, both parties acted as if they believed that the claimant was still within her probationary period at the date of dismissal. At no time did the claimant, who was represented by her trade union, assert that because 9 months had elapsed, she was no longer within the probationary period. She attended a probationary period review meeting without challenging the fact that she remained within her probationary period. Further she appealed, again with the represented by her trade union, without contending that she had been dismissed after the end of the probationary period.

218. The tribunal found that there was, accordingly, a mutually agreed implied variation of the claimant's contract to extend the probationary period beyond 9 months until the date of the probationary review meeting. The reason for this was a delay occasioned by the claimant's grievance and then various events. The parties' actions at the material time were consistent with this interpretation.

219. Accordingly, the respondent was entitled to dismiss the claimant on the basis that she was within her probationary period and it paid her the correct notice and she was not wrongfully dismissed.

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Employment Judge Nash
Date 24 May 2023

REASONS SENT TO THE PARTIES ON

25/05/2023

FOR THE TRIBUNAL OFFICE