# EMPLOYMENT TRIBUNALS

**Claimant: Hayley Bates**

**Respondent: A.S.H Elite Equine Ltd**

**Heard at:** **Reading Employment Tribunal (via CVP)**

**On:** **02 February 2023**

**Before:** **Employment Judge Bunting**

**Appearances**

**For the Claimant: Mr S Thakerar (counsel)**
**For the Respondent: No attendance**

## JUDGMENT

The Judgment of the Tribunal is that:

1. The claim relating to a failure to consult during a TUPE transfer was presented out of time, and it was reasonably practicable for the Claimant to have presented it in time under Reg 15 TUPE Regulations. Therefore, the Tribunal does not have jurisdiction to hear the claim, and the claim is dismissed.

2. The claimant was automatically unfairly dismissed under section 99 of the Employment Rights Act 1996 because the principal reason for her dismissal related to pregnancy and maternity. Her claim for unfair dismissal succeeds.

3. The Claimant is awarded the sum of **£1,088.00** for the unfair dismissal.

4. The Claimant is awarded an injury to feelings award, inclusive of interest, for the discrimination found of **£12,500.00**

5. The Claimant is awarded damages for loss of wages to the date of the remedies hearing of **£7,807.66** (the total wages lost of £9,837.66 net, less the £2,030 earned by the Claimant in that period of time).

6. The Claimant is awarded damages for the loss of accommodation (valued at £15,000), plus the loss of stabling (valued at £3,600) to the date of the remedies hearing of **£18,600.00**.

7. The Claimant is awarded damages for the loss of pension contributions to the date of the remedies hearing of **£897.26.**

8. The Claimant is awarded damages for loss of statutory rights in the sum of **£500.00**.

9. The Claimant is awarded damages for future loss of net wages for 13 weeks from 6 April 2023 (the date of the end of her maternity allowance) until 6 July 2023 of **£6,089.98**.

10. The Claimant's claim for unauthorised deductions from wages contrary to section 13 of the Employment Rights Act 1996 is well founded. The Respondent failed to pay the full wages that were properly payable to her.

11. The respondents failed to pay to the claimant her accrued and untaken holiday entitlement in the sum of 29 days accruing at the weekly rate of £468.46 net. The respondent is ordered to pay to the claimant the sum of **£2,717.91**.

12. The respondent having failed to comply with the ACAS Code of Practice the awards at paragraphs 4 – 11 that I have made to the claimant are uplifted by 10% in accordance with the provisions of section 124A of the Employment Rights Act in the sum of £4,911.27. The respondent is ordered to pay to the claimant the further sum of **£4,911.27.**

# WRITTEN REASONS

## INTRODUCTION

1. This case was listed for a full merits hearing on 02 February 2023 in relation to the claimant's claim for pregnancy discrimination and other matters.

2. The respondent did not attend the hearing and nor had it responded to any previous attempts to contact it (either by the solicitor for the claimant or the Tribunal). Nor had it given any indication that it wished to take part in the hearing.

3. Notice (properly served) had been given to the respondent of the hearing date, but there was no response and no indication that it would attend. On 27 January 2023 EJ Anstis declined to give judgment for the claimant, but stated that the

hearing of 02 February 2023 ‘will determine the claim and what (if any) remedy should be awarded’.

4. Mr Thakerar for the claimant confirmed that his instructing solicitors had made a number of attempts to contact the respondent, the most recent being the day before the hearing.

5. In those circumstances, the case proceeded in its absence.

6. Because of the fact that there had been no engagement by the respondent the case was listed in front of myself sitting alone, rather than with members, as would usually be the case for a discrimination claim. I confirmed with Mr Thakerar that he was content with this, which he stated that he was, and that there was no application for the appointment of members.

7. There was a hearing bundle of documents of 145 pages of PDF, as well as a witness statement from the claimant that ran to 14 pages.

8. I read the bundle and heard evidence from the claimant on her own behalf. There was no other evidence called. At the end of the hearing, I heard submissions from Mr Thakerar on behalf of the claimant.

9. I then gave an oral judgment in which I found in favour of the claimant on the merits. Following further submissions, I made the orders as set out above.

10. Subsequently, the claimant has requested written reasons for the decision, which I set out below.

<u>Delay</u>

11. It can be seen that there is lengthy delay in production of the written reasons. The chronology appears to be as follows. The judgment was sent by me to the Tribunal administration on 03 February 2023, but not sent out to the parties until 16 March 2023.

12. The next day (17 March 2023) the solicitor for the claimant submitted a request for written reasons. However, this request was not sent to me until 06 July 2023. There was then a further delay whilst I checked the chronology, and to see if anything further had been submitted by either party (it had not).

**FACTUAL BACKGROUND AND SUMMARY OF EVIDENCE**

13. The claimant states that she was employed by Prestige Liveries Ltd ('PLL') on or around 10 January 2020 as a Yard Manager. This company was subsequently wound up on 23 November 2021.

14. However, before then (on 01 May 2021) her employment transferred to the respondent.

15. The claimant was dismissed on 14 January 2022. The heart of her case was this dismissal which, she says, was motivated because of her recently disclosing that she was pregnant.

16. The dates of early conciliation for ACAS were from 05 April to 16 May 2022, with the claim form being issued on 15 June 2022.

17. In more detail, the claimant states that in October 2019 she was approached by Tony Asker (who would be the claimant's line manager and was part-owner of the business) to discuss whether she wished to work in his business, running the stables for PLL. As part of this, she would be provided with on-site accommodation (including bills) and stabling for one horse.

18. Notwithstanding that, the contract of employment with PLL is set out at pages 32-38 bundle. At para 29 it states, under the hearing 'Accommodation' that "Accommodation is not provided".

19. The claimant accepted the offer of employment and moved into what was intended to be temporary on-site accommodation in a flat on 10 January 2020 and stabling her horse on 13 January 2020. She was due to move to a bigger house

on-site when Mr Asker would move to Belgium. This was anticipated to be shortly afterwards, but did not in fact happen.

20. The claimant's account was that she was on call from when she moved in on 10 January 2020, which is when she considered that her employment started.

21. However, the claimant's P45 states that she left her previous employment on 12 January 2020. In a later WhatsApp message sent on 10 January 2022 to all staff asking for their employment start date, the claimant said that it was 18 January 2020 (pages 92-93).

22. As a result of a Subject Access Request (see below) a message was provided that was sent around the end of November/beginning of December 2021 (before 3 December 2021 – page 124). This appears to be between Tony Asker and Tim Pearce (a Senior Consultant with BCIA Business Recovery and Turnaround that was involved with advising the claimant on a number of occasions) where Mr Pearce says 'When did [the claimant] first start with you pal?'. The answer is 'I think it was either Jan or Feb 2020'. After checking, it is said 'As far as I can see Jan 2020'.

23. After that it is said 'Can you check? If it's not 2 years, we have more rights'.

24. There appear to have been a number of difficulties with paperwork on the part of the respondent. There were discussions over the summer of 2020 about whether the claimant should 'go self-employed', as well as indications there that other employees had difficulties getting paperwork (pages 47-50).

25. The claimant also states that there were various delays and difficulties getting payslips and other documents from the respondent. In addition, whilst the respondent was paying her, it would not always properly account for tax. This improved after the transfer in May 2021.

26. There was a meeting with Tony Asker, Tim Pearce and Jamie Buchanan on 14 May 2021 where all staff were informed that PLL was being changed to the respondent.

27. There is a lack of paperwork relating to this, but there was a contract of employment between the claimant and Tony Asker on behalf of the respondent dated 31 July 2021 (Page 39). That contract was silent in relation to accommodation and stabling, but the claimant continued to live in the respondent's accommodation and stable her horse there.

28. By that point the claimant was still living in the flat and, with no sign of Tony Asker moving out. She proposed moving off-site and renting accommodation. This was agreed in principle, although it never happened.

29. The matters that led to the bulk of the complaints to the Tribunal started in November 2021. The claimant stated that on 23 November 2021 she discovered that she was pregnant.

30. She stated that (coincidentally) on that day there was an incident at work where a horse that was being loaded on to a lorry became distressed and, after several attempts, the claimant decided not to allow the horse to travel.

31. That evening Tim Pearce contacted the claimant to state that a complaint had been made over this, which would have to be investigated. The next day the claimant was suspended (on full pay) whilst this was done. This was communicated by email (pages 54-55 bundle).

32. The claimant was invited on 24 November 2021 to a disciplinary hearing on 2 December 2021. There are a number of issues that she raised in relation to the preparation of that hearing, which I do not need to consider. I was also provided with some of the evidence produced at that appeal, but again I do not consider that it is necessary to set this out given the outcome.

33. This outcome was communicated to the claimant on 06 December 2021 (page 64 bundle) in writing by an email from Tim Pearce. This concluded that the claimant had not done anything wrong and, as a result, no action would follow and no record made on her file.

34. Meanwhile, the claimant had told Tony Asker on 04 December 2021 that she was pregnant, and that she had been signed off work by her GP. However, from 09 December 2021 she returned to work, although she and her partner contracted Covid-19 over the Christmas period and was off work for some of it.

35. On 04 January 2022 the claimant again raised the question of accommodation by email to Tony Asker and Tim Pearce. In this she stated that this had been ongoing for two years and 'following a change in my personal circumstances', the flat would no longer be suitable.

36. The next communication from the respondent was on 14 January 2022. This is headed 'Termination of employment with immediate effect' and stated that the claimant was dismissed immediately 'due to ongoing needs and requirements of the business changing' as well as the fact that her employment 'doesn't appear to be a good fit, also some of our clients have raised concerns about your general attitude/behaviour'. Further 'Although this has been a tough decision, it is final'.

37. This is not signed by a named individual, but in the name of the company. The letter then sets out the procedures to be followed.

38. Subsequently the claimant made a Subject Access Request in which she requested a number of items (page 68) including details of the alleged complaints made against her, any performance issues, and details of discussions prior to determination. As a result, she received a number of documents which she comments on.

39. She also wrote to appeal the decision (page 86) in which she raises a number of issues, including the suggestion that the dismissal was due to her pregnancy.

40. An appeal meeting was held on 08 February 2022, with the outcome being sent to the claimant on 21 February 2022. The decision to dismiss was upheld. In that it is said that there were a number of complaints made by clients in January 2022, although it was accepted that it was not put into writing. It also states that there

were other conduct issues raised with the claimant previously, although this was denied.

41. The appeal letter stated that, in relation to the disciplinary hearing in December 2021, that 'whilst you may have acted harshly, and with some aggression towards the horse, we do not believe there was any malice from you' and so no action was taken.

42. However, it was agreed that the ACAS code had not been properly followed and that the respondent had not deal with the notification of pregnancy properly (page 93).

43. The claimant stated that she was given different accounts of who it was who had decided to terminate her employment and who knew about her pregnancy when.

**The Law**

*Unfair Dismissal*

44. Any employee (such as this Claimant) who has accrued the relevant period of employment (two years in this case) has the right under s94 Employment Rights Act 1996 not to be unfairly dismissed. Section 95 ERA states:

> **95 Circumstances in which an employee is dismissed.**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),

*Unfair Dismissal – s99 ERA and Regulation 20 of the Maternity & Parental Leave etc Regulations 1999*

45. However, in this case the primary case put forward by the claimant was that the reason or principal reason for the dismissal was her pregnancy. If that is made out, then two consequences that flow from that. Firstly, the dismissal is

automatically unfair (s99 ERA / Reg 20(3) MPL Regs) and, secondly, there is no minimum period of service (s108 ERA).

46. Section 99 ERA states that :

**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

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,

47. Section 108 ERA states that :

**108 Qualifying period of employment.**

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

(3) Subsection (1) does not apply if—

…

(b) subsection (1) of section 99 (read with any regulations made under that section) applies

*Pregnancy Discrimination – s18 Equality Act 2010*

48. Section 18 Equality Act 2010 reads:

***18 Pregnancy and maternity discrimination: work cases***

(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.

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins …

49. In this case the act of discrimination relied on is the act of dismissal itself. In such a case the Tribunal has to consider whether the respondent treated the claimant unfavourably by dismissing her. If so, then was the reason (or principal reason) for this related to the claimant's pregnancy.

50. The burden of proof in relation to the facts alleged by the claimant falls on her, on the balance of probabilities. If these are such that, in the absence of any other explanation, a Tribunal could find that discrimination took place, then the burden shifts to the respondent to show that it did not discriminate against the claimant by proving that their treatment of her was in no way related to her pregnancy (***Royal Mail Group Ltd v Efobi*** **[2021] UKSC 22**).

*Unlawful deduction from wages / holiday pay*

51. The relevant law is that contained at s13 and 14 of the Employment Rights Act 1996 which provides the right not to suffer unauthorised deductions from wages. Wages in this case includes holiday pay.

52. This reads, as far as is relevant, as follows :

**13 Right not to suffer unauthorised deductions.**

(1) "*An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*"

*(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

> (3) "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*."

*TUPE – time limits*

53. Where there is a transfer of an organisation from one employer to another there are various matters that need to be complied with. These are set out in the Transfer of Undertakings (Protection of Employment) Regs 2006 (the 'TUPE Regulations').

54. The TUPE Regulations also provide protection for employees in those circumstances.

55. The time limit for TUPE claims is set out in s15(12) TUPE Regs 2006:

> (12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—
>
> > (a) in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed …

> or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

56. I was not provided with any authority as to the interpretation of this section, but it was not suggested that the approach should be any different to the approach for extensions of time in other cases where similar wording is used under s23(3A) Employment Rights Act 1996.

57. An Employment Tribunal may only extend time where it is satisfied of the following:

    - That it was "not reasonably practicable" for the complaint to be presented before the end of the deadline.

    - While the claim was not presented before the end of the deadline, the claim was nevertheless presented within a reasonable period.

58. Unlike the test in discrimination cases for an extension of time (whether it is 'just and equitable' to do so), the test in deduction from wages and breach of contract claims is more stringent, i.e. whether or not it was reasonably practicable (or 'reasonably feasible') for a claimant to have presented their claim within time. While the 'just and equitable' test allows for consideration of the reason for the delay, the length of it, the effect of such delay on the cogency of the evidence, the speed with which a claimant took corrective action and the balance of prejudice to both parties, no such factors apply to the test I must apply.

59. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. Case law (***Marks & Spencer plc v Williams-Ryan*** **[2005] EWCA Civ 470**) confirms that the tribunal can take into account various factors such as:

- the substantial cause of the claimant's failure to comply with the time limit;
- whether and when the claimant knew of their rights, including whether the claimant was ignorant of any key information;
- whether the claimant had been advised by anyone and the nature of the advice given;
- whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.

*60.* In assessing this, there should be a 'liberal construction in favour of the employee' (***Dedman v British Building & Engineer Appliances Ltd* (1974) ICR 53**). In deciding whether something is 'reasonably practicable', '*'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'* (***Asda Stores Ltd v Kauser*, EAT 0165/07**). Another way of considering it is to ask whether it is 'reasonably feasible', which is between 'reasonable' and what is 'physically possible' (***Palmer v Southend-on-Sea Borough Council* (1984) ICR 372, CA**).

61. As confirmed in ***Marks & Spencer plc v Williams-Ryan*** a claimant's ignorance of the right to bring a claim or of the time limit or procedure for making a claim, will not automatically lead to a finding that it was not reasonably practicable for the claimant to present the claim in time. Where ignorance is a factor, the tribunal needs to be satisfied that the claimant's ignorance was reasonable in all the circumstances.

62. I also had regard to the EAT decision in ***John Lewis Partnership v Charman* (UKEAT/0079/11/ZT)**. In particular, at para 9:

> *The starting-point is that if an employee is reasonably ignorant of the relevant time limits it cannot be said to be reasonably practicable for him to comply with them. Brandon LJ said this in terms in* ***Wall's Meat Co. Ltd v Khan* [1979] ICR 52*,*** *at page 61, and the passage in question was*

*explicitly endorsed by Lord Phillips in* ***Williams-Ryan****: see paragraph 21 (page 1300 F-H). In the present case the Claimant was unquestionably ignorant of the time limits, whether one considers his own knowledge or that of himself and his father. The question is whether that ignorance was reasonable. I accept that it would not be reasonable if he ought reasonably to have made inquiries about how to bring an employment tribunal claim, which would inevitably have put him on notice of the time limits. The question thus comes down to whether the Claimant should have made such inquiries immediately following his dismissal. As to that, I think it is reasonable to infer, though I accept it is not explicit, that the Judge formed the view that it was reasonable for the Claimant and his father not to make such inquiries at the stage of the initial dismissal decision but to await the outcome of the internal appeal.*

63. If the first limb of the test under section 111(2)(b) is satisfied, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. This is a matter for the tribunal (***Wall's Meat Co Ltd v Khan*** **[1978] IRLR 499, [1979] ICR 52, CA)** bearing in mind the length of, and circumstances of, the delay.

## Analysis and Conclusion

### Findings of Fact

General comments on credibility

64. The fact that the respondent did not attend the hearing does not mean that I find for the claimant without more. It is still for her to make good her case, including in relation to her credibility, and establishing the facts that she relies on to the civil standard (the balance of probabilities).

65. However, having heard her account, I consider that I can accept it. Whilst she was not cross-examined, she answered a number of questions in chief and I consider that I was able to properly assess her evidence.

66. Her account was consistent, which is a significant point in her favour. In addition, I find that she gave clear and considered answers to the questions from Mr Thakerar and myself. Further, her answers were supported by the evidence.

67. Whilst I remind myself of the limited value of demeanour as a method of assessing credibility, there was no indication that she was not telling the truth.

68. In light of the above, I accept the claimant’s account to me in full. I shall consider some individual points in more detail below as they arise.

Start of employment

69. There is an unfortunate lack of clarity about this point, although this is something that the respondent has brought on itself by a lack of paperwork.

70. The contract of employment (page 32, para 2) states that employment started on 01 November 2019, although it does not appear that this can be correct on any view.

71. As can be seen from the message exchange at page 124 between Mr Pearce and Mr Asker where there is a discussion about when the claimant started work, they did not know.

72. I note that the Claimant gave a different start date in a WhatsApp message, but that was two years after she started, and it is not clear that she took this to be a considered answer on her part. I do not consider that much weight can be placed on the P45.

73. The contact was signed and dated the 10 January 2020 (page 38). That is the date that was referred to later on in the interactions between the claimant and respondent and the claimant gave a coherent explanation of why that is the relevant date. In those circumstances, that is the date that I find the employment started.

Accommodation and stabling

74. Whilst the contract states that accommodation would not be provided, I am satisfied on the evidence of the claimant, and in the bundle, that it was always the case that both sides understood that accommodation was part of the arraignment.

75. This can be seen in the email sent prior to dismissal on 04 January 2022. The claimant refers to the arrangement and, if that was incorrect, it is something that would have been addressed in the response. In any event, the claimant was clearly living on-site (without paying rent) in the respondent's accommodation throughout her employment, with the claimant's address on the contract signed in May 2021 being at Forge Flat.

76. Again, whilst the contract is silent on the stabling of horses, given the claimant's oral evidence and the nature of the business I accept that being able to stable her horse (without paying the £300 per month) was also part of the contact of employment. This can also be seen in the fact that it formed part of the arrangements after the dismissal (see, as an example, the conversation at page 82).

TUPE

77. The claimant states that there was a TUPE transfer in May 2021. Given that what appears to have happened is that all the people employed by PLL were transferred over to the employ of the respondent, I accept that that was the case.

78. This is supported by the reported statement of Mr Pierce at the appeal hearing (page 83). After the claimant said that there was '*a continuous line of employment from 10th Jan. 2022 as there's no break in that. There's no differentiate between the two companies from a legal stand as in it's classed as one company and my employment continuous for 2 years*', Mr Pierce is recorded as saying '*that's my understanding … it is my understanding that it's continual employment*'.

79. I accept the claimant's account that nobody had mentioned TUPE during this process. Further, I accept that she (and other employees) did not see any specific reason for concern, although the claimant had a number of concerns about the paperwork which may well have led her to question this more closely.

80. Had she done so, then there was more than enough information at that point to investigate the issue fully, but she did not do so. It was only in November/December 2021 that she started to discuss the question of TUPE with others.

81. However, at that point, she made a conscious decision not to pursue that at the time in the hope that it would all be resolved and things would move on.

Disciplinary hearing and dismissal

82. I accept that the claimant was a good employee for PLL and, subsequently, the respondent. Her employment started shortly before the Covid-19 lockdown and continued throughout that in what would have been difficult circumstances.

83. I find that there was a complaint raised against her by a customer on 23 November 2021, and that this customer made reference to (unproven) previous incidents. However, there were a number of other people who spoke in support of her.

84. The message from Mr Asker (page 123) does indicate an initial reaction that it may be that the claimant would need to be dismissed. I accept that the reaction of the respondent had nothing to do with her pregnancy as it was not aware of the pregnancy at that point. In any event, the allegation was dismissed. Whatever concerns there were at the time, it is noticeable that no action was taken and it the claimant was told that 'no formal record will exist' (page 64) of the incident.

85. I find that two days before the dismissal, the claimant told Mr Asker that she was pregnant, although this does not appear to have been a factor at the disciplinary hearing.

86. It is significant that, at that point in early December 2021, there is no indication (other than the WhatsApp message referred to above) of any concerns about the claimant's behaviour or engagement. As the letter from Mr Pearce states 'we have no reason to believe that you have in anyway mistreated the horse in question, or for that matter, any horse'.

87. That is unequivocal in its terms. If there were genuine performance issues, then there is nothing raised here or in other formal or informal correspondence with the claimant. That is (to say the least) surprising.

88. In the absence of any explanation from the respondent, or evidence to the contrary, I conclude that there were no performance concerns at that time or at all, at least any that would stand up to scrutiny.

89. The obvious question is what changed between the beginning of December 2021 and 14 January 2022. For much of this time the claimant was off due to Covid-19 and it was the Christmas period.

90. The only contact between these two dates was the letter of 04 January 2022. I am satisfied that Mr Akers was worried about the fact that other staff members had gone on maternity leave and was concerned about costs. These crystalised on 04 January 2022 with the letter from the claimant referring to the change in her personal circumstances meaning that her current accommodation is no longer suitable due to the limitations on living and storage.

91. That can realistically only mean one thing; namely that the claimant was referencing her pregnancy. Moving forwards, the response to that from the respondent is to dismiss her.

92. I find that the most likely reason for that response is the defendant's pregnancy, and it is certainly more likely than not that that was the case. In fact that, I consider, is the only reasonable inference from the above.

93. In assessing this I take account of the fact that the stated reasons for dismissal are unclear. There are references to conduct issues, but there is nothing to support that, and it appears contrary to what happened in the disciplinary hearing in December 2021 and the rest of the evidence. Further, the respondent had been employed for nearly two years so it would have been obvious before that (if it were the case) that she was not a 'good fit'. In addition, the reference to 'ongoing needs and requirements of the business changing is vague and again, had these

been real they would (or at least should) have been discussed with her prior to dismissal.

94. I do not consider that there is anything in the appeal or events after the letter of 14 January 2023 that shows that that conclusion is incorrect. It is notable that the first reaction to the claimant's letter is to dismiss her.

Holiday pay

95. It is unclear where the respondent had the calculation of an additional week from. The claimant's evidence was that it was agreed between her and the respondent that she could 'carry over' some of the previous holiday until the 2021/2022 year. Having accepted her evidence as stated above, I see no reason not to accept this (even if it were not the case, it would likely have 'carried over' due to the Covid-19 situation).

96. In those circumstances, I accept the claimant's evidence that she was not paid the holiday pay that she was entitled to (29 days).

**Conclusions**

97. In light of those findings of fact I turn to my findings on the claimant's claim.

TUPE Claim

98. It is clear that in May 2021 that there was a TUPE transfer (this appears to have confirmed by Mr Pearce in the appeal hearing) and that there was a failure to comply with the TUPE Regulations.

99. However, the claim was not presented within the required 3 months, and was not in fact presented until 15 June 2022 (although there was a period of ACAS conciliation between 05 April and 16 May 2022).

100. Further, the claimant's evidence was that she was aware of the transfer of name on 14 May 2021, although she stated that she was not aware of TUPE until she was suspended in November 2021. Even if that is correct (and I do consider that she could reasonably have known about this from May 2021), when asked why

she took no action at that point, she said that she "thought it best to keep my head down and carry on with the job … ". In effect she said that she decided not to do anything about it for the sake of cordial relationships.

101. Whilst that may well be understandable, I find that by that point the claimant certainly had more than sufficient information in order to bring a claim and, even if was not reasonably practicable to have brought a claim before then, she made an informed decision to not bring a claim at that point.

102. For that reason, the TUPE claim is out of time.

Discrimination Claim

103. I then consider the discrimination claim. I have set out above my conclusion on the start date of employment. However, according to ss99 and 108 Employment Rights Act 1996, where the reason for dismissal is related to pregnancy then the time limit is disapplied.

104. In addition, where a person is dismissed because of pregnancy, then the dismissal is automatically regarded as being unfair.

105. From my findings of fact above, and in the absence of any explanation from the respondent, my conclusions on the dismissal follows the findings of fact.

106. In those circumstances, I conclude that the reason for the dismissal was the claimant's pregnancy. That means that the dismissal was unfair under s99 ERA as well as the fact that she was discriminated under s18 Equality Act.

Holiday Pay

107. In light of my findings above, the claimant was owed money for holiday for which she was entitled, but did not take. For that reason, the claimant succeeds in this aspect of her claim.

**Remedy**

108. There a number of potential remedies following the findings as set out above. However, the claimant is seeking only damages.

109. There are a number of different heads of damages as set out below. I remind myself of the overlap between the s99 claim and the s18 claim and the need to guard against double recovery.

*Unfair Dismissal – basic award (ERA)*

110. Section 118 ERA states that there should be a 'basic' award calculated in accordance with ss119-122 and 126 ERA.

111. The calculation is as set out in s119 :

**119 Basic award**

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment

*Unfair dismissal – compensatory aware (ERA)*

112. In addition to the basic aware, there is a compensatory award calculated in accordance with ss123-124, 124A and 126. Section 123 states that, subject to certain caveats, '*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*'.

*Pregnancy discrimination*

113. Section 124(2)(b) Equality Act 2010 gives the Tribunal the power to award compensation to a successful claimant. This '*corresponds to the amount which could be awarded by the county court*'.

114. This includes the power to award compensation for injury to feelings (which is not available in a s99 ERA case). In determining the level of any such award, the Tribunal is guided by ***Vento v Chief Constable of West Yorkshire Police (No.2)*** **2003 ICR 318**.

115. Where, as in this case, a dismissal is discriminatory under the Equality Act 2010 and unfair under ERA, s126 ERA precludes a double recovery. Compensation will generally be awarded under the Equality Act rather than ERA (***D'Souza v London Borough of Lambert*** **[1997] IRLR 677**) and the 'Presidential Guidance : Employment Tribunal awards for injury to feelings and psychiatric injury' (as supplemented by, at the date of the claim being lodged and at the hearing, the Fifth Addendum, 28 March 2022).

116. This sets out three bands as follows :

- Lower band - £990 - £9,900
- Middle band - £9,900 – £29,600
- Upper band - £29,600 – £49,300

117. There is also provision for compensation in excess of £49,300 in the most exceptional cases.

*ACAS*

118. In cases where a party has failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures a Tribunal has the power to increase the amount of compensation by up to 25% it is just and equitable to do so.

119. In assessing this, I ask myself the following questions :

1. Is the case such as to make it just and equitable to award any ACAS uplift?
2. If so, what does the ET consider a just and equitable percentage, not exceeding, although possibly equalling, 25%?

3. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
4. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

*Loss of Statutory Rights*

120. Where someone is unfairly dismissed, there is power to make an order for a loss of statutory rights within the compensatory award. This is an amount to compensate the claimant for the fact that in any new employment she will have 'lost' the protections accrued during her previous employment.

Findings on remedy

121. Having heard submissions from Mr Thakerar, and considered the Schedule of Loss, I made the awards set out above for the following reasons. In addition, the claimant (in her oral evidence and bundle) provided evidence in relation to mitigation of loss.

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*Unfair dismissal – basic award*

122. The basic award is based on her annual salary of £29,908.56, which equates to a weekly amount of £575.16 gross (£468.46 net). Given her age and lengthy of service, an award of two weeks pay (capped at £544) was made.

*Discrimination – compensatory award*

123. The award under this heading comprised a number of different strands.

124. In relation to the injury to feelings, the claimant claimed £25,000 on the basis that this was towards the top of the middle band.

125. Although it is a 'one-off' incident in the sense that there is one act, but as the act was dismissal and the dismissal was a clear reaction to the fact of her pregnancy. I agree that it falls within the middle band.

126. However, whilst not underestimating the impact on the claimant, it is not a case where any psychiatric evidence was provided. I consider that it is a case towards the lower end of the middle bracket, and so made an award of £12,500.

127. There was an award of loss of earnings from 29 January 2022 (the end of the notice period) to 06 July 2022 (when she started maternity leave), as well as a sum of 90% of her gross pay for six weeks which is what she would have been entitled to at the start of her maternity leave. She would also have been entitled to statutory maternity pay for 33 weeks after that.

128. In addition, the claimant claimed for loss of her pension contributions. I accept that that is a loss that she should be entitled to, and therefore made that award.

129. There were two specific areas that the claimant also claimed for, which was loss of accommodation and loss of stabling, which was claimed up to the date of the hearing.

130. Although neither were included in her written contract, I have accepted above that these were both matters that both parties considered were part of the working agreements.

131. For that reason, the claimant has incurred the specific losses (in the sense of having to pay for these) as a direct result of her dismissal.

132. I accept that she did everything that she could reasonably have done after the dismissal, and prior to the commencement of her maternity period, to mitigate the loss. Although the sums that she earned during that period were less than she would have earned, realistically it would have been difficult for her to have obtained full time employment shortly before going on maternity leave in what is a small jobs market.

133. However, set off against the compensatory award are the sums that the claimant received by way of statutory maternity pay (£4,410) and other earnings from self-

employed work that she undertook after her dismissal (£2,030), but prior to her maternity leave, by way of mitigating her loss.

*Holiday Pay*

134. This is calculated on the basis of the daily rate of £93.69, multiplied by 29.

*Loss of statutory rights*

135. A global approach is taken to this, with this being an appropriate figure to compensation the claimant for the loss of rights.

*ACAS*

136. The claimant asked for an uplift of 25%. Given the admitted breach of the ACAS Code, I agree that an uplift is appropriate.

137. However, applying the test as set out above (including ensuring I guard against double recovery), I considered that an uplift of 25% would be too high. Bearing in mind the other awards above, and the circumstances of the case, I made an uplift of 10%.

Conclusion

138. For the reasons set out above, apart from in relation to the TUPE claim, the claimant succeeds on all her claims.

139. The total award is as set out in the breakdown at the top of this judgment.

04 August 2023

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**Employment Judge Bunting**

Sent to the parties on:
9 August 2023
……………………………
For the Tribunal:

…………………………..

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

## Public access to employment tribunal decisions

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