EMPLOYMENT TRIBUNALS

Claimant: Ms L Moffatt

Respondent: The Council of the City of Wakefield

Heard at: Leeds **On:** 14, 15, 18, 19 December 2023.
20 December 2023
(in chambers).

Before: Employment Judge D N Jones
Mr C Langman
Mr J Rhodes

REPRESENTATION:

Claimant: Mr B Kemp, partner
Respondent: Mr R Quickfall, counsel

JUDGMENT

1. The respondent unfavourably treated the claimant who was a contract worker, by failing to allow her to continue to work after 31 October 2022 because of her pregnancy related illness.

2. The claimant was a disabled person.

3. The respondent did not know and could not have been reasonably expected to know that the claimant had a disability. The complaint of disability discrimination is dismissed.

4. The other claims for pregnancy and sex discrimination are dismissed.

REASONS

1. The findings of the Tribunal are unanimous.

Introduction

2. These are claims for pregnancy discrimination and discrimination arising from disability. A complaint of unfair dismissal was earlier withdrawn. The claims for direct sex discrimination were withdrawn at the end of the hearing, given that it was accepted the events about which complaint were made were within the protected period of the claimant's pregnancy.

3. The complaints are contained in a list of issues which was allowed by amendment to the claim at a preliminary hearing before Employment Judge James on 4 July 2023. In respect of a number of those claims, the precise detriment and unfavourable/less favourable treatment is unclear, it merely reciting that it 'related' to a particular meeting or event.

4. In essence the claim is about the premature termination of the claimant's assignment with the respondent. She had been given a placement of work with them by her employer, a temporary employment agency. The claims relate to the cessation of that placement and the meeting the claimant had with her manager, Ms Windsor, on 24 October 2022, the week before her assignment was ended.

The Issues

5. At the preliminary hearing on 4 July 2023 Employment Judge James approved the list of issues which the parties had prepared.

6. At this hearing a number of the claims were withdrawn leaving the issues at paragraphs 1.2, 2.2.3, 2.2.8, 3, 5 and 6 of the list for determination.

The Evidence

7. The claimant gave evidence.

8. The respondent called Ms Amy Windsor, Team Leader of the Normanton and Featherstone Family Team 1, Miss Lisa Westoby, formerly Team Leader of the Normanton and Featherstone Family Team 2 and Mr George Belfield, Social Worker.

9. The respondent submitted witness statements from Ms Stacey Fotherby, Apprentice Social Worker, the Children and Family worker in Normanton and Featherstone Team 1, Ms Anne Howgate, Service Manager who addressed the complaint from Mr Kemp on behalf of the claimant and Mr Craig Wood, HR manager. Mr Kemp did not seek to question these witnesses.

10. The parties submitted a bundle of documents running to 415 pages and an additional bundle of 73 pages.

The Law

<u>Discrimination</u>

7. Section 41 of the Equality Act 2010 (EqA) provides:
Contract Workers

(1) A principal must not discriminate against a contract worker-
(a) as to the terms on which the principal allows the worker to do the work;
(b) by not allowing the worker to do, or to continue to do, the work;
(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(d) by subjecting the worker to any other detriment.

(5) A "principal" is a person who makes work available for an individual who is—
(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)."

8. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

9. Section 18 of the EqA provides:

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.

(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.

Disability

10. Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to undertake normal day-to-day activities. By section 212(1) of the EqA substantial means more than trivial or minor.

11. Paragraph 2 of Schedule 1 to the Act defines "long-term effect". An impairment will have been long-term if it lasted for at least 12 months or was likely to last for at least 12 months or was likely to last for the rest of the life of the person affected.

12. By paragraph 2(2) of Schedule 1 of the EqA, if an impairment has ceased to have a substantial adverse effect on a person's ability to undertake normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.

13. Guidance on the definition of disability has been issued by the Secretary of State pursuant to section 6(5) of the EqA.

Discrimination arising from disability

14. Section 15 of the Equality Act 2010 (EqA) provides:

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Strike Out Application

15. At the commencement of the hearing Mr Kemp applied for the response to be struck out under rule 37, because the respondent had failed to serve witness statements by the 21 November 2023 but which were sent on 24 November 2023. The respondent had received the claimant's witness statement on time and he believed they had the opportunity to tailor the statements, but could not say that had in fact occurred. The respondent had assured them it had not. There was also a 2-week delay to the exchange of statements caused by the respondent and an additional bundle was later submitted and 3 documents added as late as 13 December 2023. The respondent had introduced an entirely new reason for the early termination of the claimant's assignment in the late served witness statements.

16. Mr Kemp did not seek an adjournment to adduce additional evidence to meet the changed case and fairly acknowledged he was able to address the material in both the witness statements and the files of documents.

17. If there is a breach of orders or unreasonable conduct of proceedings a Tribunal may strike out a claim under rule 37, but it must consider whether that is a proportionate sanction. If a fair trial remains possible, a Tribunal

should not strike out a claim or a response, see **Blockbuster Entertainment Ltd v James [2006] IRLR 630**. We were satisfied that the parties had sufficient time to prepare for this hearing and there could be a fair trial on the evidence and the merits of the case. To strike out the defence in those circumstances would not have met the overriding objective.

Disability and medical condition (findings and ruling given on day 1 of the hearing, 14 December 2023)

18. The claimant had an admission to hospital on 27 June 2022 because she had pain in the upper stomach region. She underwent an ultrasound scan. That ultrasound scan identified a scar pregnancy. The claimant then had another ultrasound scan in July when it was discovered that there was no heartbeat. It was decided to treat what was an ectopic pregnancy by administering Methotrexate. That did not prove effective and it was necessary for the claimant to have surgery which she underwent on 10 November 2022 at the Hull Royal Infirmary. She was informed of that operation ten days before on 31 October 2022.

19. The claimant has had a gallbladder condition since 2017. This was not diagnosed until July 2022 when she underwent an MRI scan at hospital. It was observed that she had a severe case of gallstones. This caused bulging in the upper stomach. Ultimately the claimant underwent surgery for the removal of her gallbladder on 7 September 2023. That removed the problem of the extreme pain she was suffering in her upper abdomen.

20. The issue in this case is whether the condition relating to the gallbladder was a disability. A disability is defined in Section 6 of the EqA as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities. The fact that there was a condition in which the claimant had a number of gallstones plainly establishes she had a physical impairment and that is not disputed. Nor is it disputed that from 27 June 2022 that condition had a substantial adverse effect on her ability to undertake normal day to day activities. In her witness statement she described it as follows: Paragraph 9 – "*At this time it was understood that my pain, that being July 2022 was largely caused by my gallbladder with my pregnancy providing further complication. The pain is becoming more frequent and more intense with gallbladder attacks becoming a regular occurrence. The attacks were the same as I had experienced since 2017 and since but were now unavoidable and unmanageable. They could last multiple hours at a time. The impacts were debilitating. At the point they occurred I could do nothing but lay down and wait for it to pass. I would be violently sick producing bile several times during the attacks. The attacks mostly happened at night-time but not always and would by this time last between six and eight hours. After an attack pain would now start to linger and I would find myself physically exhausted and needing extended rest to bring myself back to normality"* and paragraph 10 – "*By this point it was clear my gallbladder had become a physical impairment worsening at a rapid pace*".

21. There is no question but that until the claimant had the surgery the symptoms would create a problem insofar as they would have an adverse effect on her ability to undertake normal day to day activity. The issue therefore is whether the condition was long-term.

22. Long term is defined, in paragraph 2 of Schedule 1 of the EqA. An impairment is long term if it has lasted for at least twelve months, is likely to be for at least twelve months or is likely to last for the rest of the life of the person affected.

23. In this case we have taken 27 June 2022 as the material date from which the claimant was suffering significant symptoms. She accepted that in cross examination although there had been problems since 2017 and the condition had not been unproblematic. For the earlier period the effects were not sufficiently adverse to restrict her normal day to day activities so as to constitute a disability which is why we find 27 June 2022, when she was admitted to hospital, is the relevant starting date.

24. In response the respondent says that the surgery could be expected within three months and that would have been undertaken at the very latest by 25 February 2022. That argument arises because of what is set out in the impact statement and paragraph 13 of the claimant's witness statement. As the categorisation was 3, or C as the claimant puts it in the impact statement, she needed to have the surgery within three months or less. The claimant says she identified the categorisation and that timeframe to demonstrate the gravity of the problem. Only immediate threats to life were in higher categories. Mr Quickfall therefore says, that after the claimant had had the surgery in respect of the pregnancy, the claimant could have expected the operation to be by the end of February which would be seven and a half months after the condition became significant. The respondent argues the surgery would not have been expected to be after twelve months of 27 June 2022 therefore it is submitted the relevant time for evaluating whether the condition would be likely to last more than twelve months would be 31 October 2022, when the claimant became aware she would have the surgery for the pregnancy within the week. That is because she would then be aware that the gallstone surgery could be done within 3 months, it being a category 3 or C case.

25. The claimant says that after she had had the operation for the pregnancy on 10 November 2022, she had a discussion with her surgeon and he told her it would be six to twelve months before she could have the operation to remove the gall stones. He also told her that she would have to wait three months between operations because of the significance of a surgical operation on the body and its need to recover. Either way that does not appear to affect the timeframe because, at the very least, three months appears to have been the timeframe from which the earliest surgery could have taken place.

26. In ***Boyle -v- SCA Packaging Limited [2009] ICR 1056*** the House of Lords held that the words in paragraph 2 of Schedule 1, *is likely to last for at least*

twelve months, mean that there is a real possibility or that it could well happen. The House of Lords disapproved the test, *more likely than not*.

27. In respect of when the Tribunal must evaluate whether it was likely to last for more than twelve months, in ***McDougall v Richmond Adult Community College 2008 ICR 431*** the Court of Appeal held that it is the date of the discriminatory act. In ***Singapore Airlines Limited -v- Casado Guigiro EAT 0386/13*** the Employment Appeal Tribunal held that it was an error of law of the Tribunal to take into account acts which post-dated the discriminatory act in determining whether the condition was likely to last more than twelve months. Mr Quickfall is right when he submits we have to start with the proposition of what was likely as of the 2 November 2022, which had been the last allegation of discrimination. Was it likely that the gallbladder surgery would have been completed so the claimant would have expected a recovery from that condition within twelve months of 27 June 2022?

28. In evidence the claimant said when she had the MRI scan she had a discussion about the removal of the gallbladder. She said she was told she needed surgery and normally it would be a twenty-six week wait but it could not be until after her pregnancy had been dealt with. At the time of the MRI scan she still was not aware that her pregnancy was not viable and so the timeframe could have been from January or February 2023 after which there would then be the six months wait. The situation changed because she underwent the surgery for the pregnancy on 10 November 2022, notice of that operation being given to her on 31 October 2022.

29. The claimant has referred in her statement to the online information at the Doncaster and Bassetlaw Teaching Hospitals which suggested the wait for surgery is twenty-six weeks. That is said to be still the position. We accept the evidence of the claimant about what she was told at the MRI scan. We find that although the NHS have indicated that three months is the appropriate longest time frame for a condition of gallbladder symptoms of this gravity, that is not a realistic expectation but an aspiration. We also recognise that post-Covid 19 the NHS has had a significant impact on its ability to meet targets. Therefore, as of 2 November 2022 before she had had her further discussion with the surgeon could the condition, the impairment, have lasted beyond the 27 June 2023? Was it a real possibility?

30. Had the surgery taken place six months after the claimant was put on the waiting list it would have been 25 May 2023, that is a month less than twelve months. However, we are not asking the question is it more likely than not, we are saying is it a real possibility or could it well happen that the condition would not have been treated by way of surgery by 25 May. Realistically we are satisfied it could well have been the case that the claimant could not have had the surgery within the six months' time frame of 2 November 2022 and that, with the pressures that the NHS was under, it could well have been beyond 27 June 2023. We therefore find that the claimant was a disabled person at the time of the discriminatory acts.

Background/findings

31. The respondent is a local authority which has a statutory responsibility to provide children services in the City of Wakefield.

32. The claimant had a written agreement with Seven Resourcing Limited trading as Seven Social Care (Seven), dated 2 September 2022, to provide her services as a worker to a third party. The respondent had a contract with Reeds Employment agency to provide temporary agency workers. Seven provided workers to Reeds, who then provided temporary workers to the respondent.

33. The claimant was given a placement with the respondent to work as a Family Support worker which started on 12 September 2022. She worked as part of a locality safeguarding team at Normanton and Featherstone. The team, known as Team 1, was led by Ms Amy Windsor, its Team Leader. It comprised an Advanced Practitioner Social Worker, 6 Social workers and a Child and Family Worker. The claimant was to work as an additional Child and Family worker. Although the vacancies in the team were for a social worker and an advanced social worker, there was difficulty recruiting at this level and the Service Manager authorised recruitment of another Child and Family worker to support the team.

34. There is a dispute about the length of the assignment. The claimant says she understood it to have been 6 months. There is an email from Seven, dated 24 August 2022, stating that. The claimant believed this. Ms Windsor says it was for 12 weeks. Curiously the business case she made to her Director was for 8 weeks, but the order she placed with Reeds, which included other requests, specified 12 weeks. Ms Windsor says it is standard practice to recruit for 12 weeks. It was not disputed that the assignment could have been terminated earlier. The respondent believed this required them to provide 7 days' notice, but there is no documentary record to suggest any notice requirement on their part.

35. Mr Kemp draws attention to email correspondence sent by Ms Windsor to all in Team 1 in respect of working rotas at Christmas, a date which was beyond 3 months and a request to manage Mission Christmas, which is a scheme to provide children who they supported with Christmas presents, sent in September. The claimant volunteered. Ms Windsor said she sent emails to all members of the Team and would not have left the claimant out of these. She says that the principal task in arranging the Christmas Mission was collecting the names and addresses. The claimant says delivery of the presents was another part of it. The claimant says that Ms Windsor confirmed it was a 6-month placement at an interview prior to the placement and at a meeting on 24 October 2022. Ms Windsor disputed that.

36. We find the placement was for 12 weeks. That is plainly the practice of the respondent, notwithstanding its written policy refers to 8 weeks. Mr Wood confirmed the practice of the respondent in respect of agency work and there was no material in the communications between Reeds and the respondent to believe the claimant's assignment was an exception. Other placements in the documentation were for 12 weeks although some were then extended and

others were foreshortened. We consider it unlikely that Ms Windsor would have ever said the placement was for 6 months in these circumstances. There were no notes of either meeting. We recognise that by including the claimant in emails which include work at Christmas, the belief of the claimant that it was a 6-month placement was reinforced, but this was unintentional and a consequence of Ms Windsor's practice of copying all the team into the information she disseminated by email. As to the email from Seven to the claimant, this was plainly not a true reflection of the agreement which was subsequently entered into between the respondent and Reeds.

37. There was also a dispute about what was said at the interview in respect of the claimant's health. The claimant says she informed Ms Windsor about her pregnancy and gallstone problems. In her witness statement she states that she went to extra lengths to talk through her conditions and the impact they had on her so that adjustments could be made. She stated that she needed flexibility as a mother of two. The claimant's interest in a role which was flexible had been referred to by her in the email exchange with Seven, but the response from them was that it was 08.30 to 5.00 Monday to Friday. Ms Windsor stated that the claimant had told her she had had a miscarriage earlier in the year and a period out of work. She said there had been no mention of any other health problems including gallstones. She said she was not aware the claimant was pregnant, at that time.

38. There are no notes of this interview. The recollection of it was some months later, neither party having any reason to consider it was of particular significance or might, one day, be required as evidence in a court hearing. We find it likely the claimant only referred to her pregnancy. By this stage she knew the role was not flexible and no special arrangements were put in place for her, which tends to suggest the health issues were not discussed in any detail at this time.

39. The claimant commenced work on 12 September 2022. She shadowed Ms Fothergill for the first week. She took two days leave on 26 and 29 September 2022.

40. On Thursday, 6 October 2022 the claimant was admitted to hospital. She had a routine blood test to measure her pregnancy hormone levels and was admitted because of a suspicion she had internal bleeding. Tests were undertaken and it was eventually decided surgery was not required.

41. On 7 October 2022 Ms Windsor and the claimant communicated by text. The claimant briefly informed Ms Windsor that she was awaiting tests and asked if she could do work in hospital and she had already done some which a colleague had sent. Ms Windsor said she had not appreciated she had been asked to authorise the claimant to work in hospital, but subsequently approved two days' pay. Although this had been an allegation of discrimination, in respect of it having being queried initially, this was not pursued. Given that the text exchange between the claimant and Ms Windsor whilst she was still in hospital satisfactorily resolved this ("*That's amazing. Thanks Amy x")*, that was not surprising. Ms Fotherby also contacted the

claimant by text to see how she was on 10 and 11 October 2022. The claimant thanked her for asking. In the exchange she said she was not good and had a tumour and also that she was in a lot of pain. The claimant had also let her colleagues know she was in hospital, in a message on the Team WhatsApp group on 11 October 2022.

42. The claimant was discharged on Friday 14 October 2022.

43. The claimant returned to work on Monday 17 October 2022. In her statement, the claimant expressed concern that one of her colleagues had asked her what the hospital had said, and this was a breach of confidentiality because she had not told her. It appears the claimant has overlooked her WhatsApp message to the group on 11 October, when she said was still in hospital. Her colleagues were responding sympathetically to her, asking about her health after her sickness absence.

44. Ms Windsor was on annual leave that week and had asked Ms Westoby to oversee the Team in her absence. On 17 October 2022 the claimant arrived a little late and Ms Westoby spoke with her. There is a dispute about what was said and the sequence of events, but we prefer the evidence of Ms Westoby about this. The claimant had stated she had sent an email with a doctor's letter to Ms Westoby that morning and then had a discussion. It is clear that this letter was sent the following day on 18 October at 12.23. The letter itself is dated 18 October 2022. When this was drawn to the claimant's attention by Mr Quickfall, she said she must have been mistaken and the meeting would have been the day after her return. Recollections of meetings and discussions, drawn many months later, often lead to errors of this type. In evaluating which account might be correct, it undermines the recall of the claimant.

45. Ms Westoby's recollection was that the claimant looked pale. She expressed concern for her, wondering if she should have been at work. Ms Westoby believes the claimant said that her doctors did not think it was the foetus she still carried which was the problem but that it was something cancerous, might burst at any time and she could drop dead. She could not be precise about the words used. We find the claimant probably mentioned the tumour and Ms Westoby assumed this to be cancer, although in fact it was benign. She asked if the claimant should be in work and the claimant said that she was on medication which made her feel dizzy. Ms Westoby told the claimant she would speak to her Service Manager and the claimant should not transport children as it was not safe for them or her. She asked if the claimant could supervise contact alone because she might pass out. She said she would ask the reception to keep an eye on her. Ms Westoby attempted to reassure the claimant that despite the fact she was an agency worker and could be given 7 days' notice, that would not happen and she would be supported. Whilst we accept that Ms Westoby had intended to be helpful in making this remark, it was entirely understandable that the claimant viewed it otherwise as, in her vulnerable state, her manager drew attention to her limited job security.

46. The claimant then arranged for her doctor to provide a letter and she provided it the next day. She had taken it into a meeting and Ms Westoby asked her to leave and email it. Dr Owen wrote, "*Today I have seen Lucy Moffatt for ongoing management of her C-section scar ectopic pregnancy. She has been under the care of Doncaster Royal Infirmary for the last 6 months and required a prolonged course of Methotrexate (type of chemotherapy also used for ectopic pregnancy) which has made her unwell. More recently, it was discovered that the pregnancy had embedded deeply in the wall of the womb forming a complex benign tumour. She is being referred to Hull for ongoing specialist management of this. This will require frequent attendance to Hull".*

47. On 24 October 2022 Ms Windsor had a meeting with the claimant. This is the subject of the first discrimination complaint. In paragraph 10 of the claim form, the claimant says:

> "*When Amy returned to work on the 24th October at 15:50 she asked for a conversation. In this conversation she asked me about my medications and said she was worried I might pass out. I explained that I was on pain relief and that I only took it infrequently. She then said "that's a lot of painkillers for not very much pain" which either insinuated I had more pain than I was letting on or that I wasn't being truthful. She told me that she wanted to consider adjustments because they "love having me here" and see how far they can accommodate me. I again referred to Lisa's comments the previous week about agency workers. Amy told me she could understand my anxiety but kept talking about the work supporting my mental health. Amy told me that she brought me in as "my team" and that "I don't see you as temporary". She told me that Stacey had started temporarily and been given a permanent role and also clarified that if she got rid of me it would be because of performance and not my health. She told me that she wanted to make it work "as much as I can". I took the opportunity to ask about my performance because we had missed my previous supervision. Her feedback was glowing in regards to my proactiveness and work with families. She raised a concern about the amount of time I had spent in a school which I clarified was Amy's understanding and as a result the feedback wasn't actually valid. In any event she clarified she had no worries. As the conversation progressed, she again referred to "wanting to make it work" and that I might not be looking after myself. In reality I was wearing less make up and this comment amongst many from Amy about my appearance made me feel terrible about the way I looked, I constantly felt I was being pictured as much more ill than I actually was. I did not want to be under constant evaluation.*
> *Amy questioned my mental motivations for deciding to work and I explained why I felt it was the right thing to do. She again asked me about medication and I again clarified it had only been used one time at that point, after playing with my children vigorously at the weekend. I told her that codeine was the painkiller used at other times.*
>
> *As the conversation progressed, we discussed the complexity of the surgery I might have and the methotrexate I had been given. I explained the current position as given to me by the hospital at that point and referred to the reasons why the benign tumour hadn't been operated on. Amy then asked how many bouts of chemotherapy I'd need and I clarified I'd had only the one round of methotrexate as previously explained to her. I again covered my worry about how my medical condition was being interpreted because of the constant*

changes to my medical plan by the hospital. Eventually Amy told me that all she needed to know was "how many medical appointments you will be having".

48. Although it is not clear from the list of issues or the claim form, the gist of this complaint seems to be that Ms Windsor expressed disbelief about the claimant's state of health and that she made disparaging remarks about her appearance. Those were the detriments.

49. The account in the claimant's witness statement is briefer, but includes additional comments attributed to Ms Windsor: "*I don't understand why you would be having chemotherapy if you didn't have cancer*", "*I just can't get my head around why the NHS would leave the baby inside of you, when the baby has died*". The claimant says there were two meetings in her statement, but that was disputed by Ms Windsor.

50. Ms Windsor recalled the meeting in her evidence. She had been informed by Ms Westoby that the claimant had been taking medication which could make her pass out and so a temporary restriction had been placed on the transportation of children by the claimant. She was reassured by the claimant that she only took the medication occasionally and agreed she could return to driving but should notify them in the event she needed to take the medication in which case other arrangements would be made about driving.

51. From these accounts we are satisfied there was a discussion about the claimant's medical condition and how it would impact upon her job. Within that, Ms Windsor expressed her puzzlement at the medical history which she found perplexing.

52. We prefer the account of Ms Windsor that there was only one meeting. The claim form suggested only one meeting took place and that is consistent with the text message sent by the claimant to Mr Belfield the next day.

53. The outcome was that the claimant felt reassured, in paragraph 10 of the Grounds of Complaint and paragraph 44 of her witness statement. In the text to Mr Belfield on 25 October 2022 the claimant said the meeting had been ok, and it was a case of wanting to know how she could be supported such as working from home.

54. All of this evidence suggests the meeting was a supportive one. The upshot was that the claimant was to be allowed to drive unless she called in any day to say she had taken the medication which made her drowsy. We do not regard the discussion about what treatment was given as carrying an implication the claimant was lying. Any reference to the claimant's paleness and not looking well was part of the more general discussion about the claimant's wellbeing and how she was presenting. The portrayal of these events as being detriments and therefore discriminatory was not realistic and was to extract particular comments or remarks and interpret them out of context.

55. The claimant refers to a number of other negative remarks during the week and further questioning whether she should be driving. These are not subject

to an allegation. We do not make a finding they were said on the limited evidence available.

56. On 31 October 2022 the claimant had not reported for work on time and Ms Windsor sent a text to ask where she was as she was due to attend a Teams meeting with the others at 10 am. At 11.30 am Ms Windsor sent another text to the claimant and asked her to call in for a chat. The claimant told her she had been late because she had received a call from her surgeon at Hull who informed her he was to operate to remove the tumour the following month. She had been given 10 November 2022 as the day for the operation.

57. Ms Windsor told the claimant that a new AP had been appointed and so her staffing needs were to be fulfilled. The consequence was that she no longer required the claimant and, as she was an agency worker, she was letting her go with 7 days' notice. The claimant raised her belief she had a 6-month assignment and there was some further discussion about the terms of agency work and how it could be ended.

58. At the time of the claimant's appointment, in Team 1 there was an Advanced Practitioner Social Worker (AP) which was covered by an agency worker. That post was filled permanently by an appointment on 26 September 2022. Claire, the new AP was to start in that role on 23 November 2022 and was working her notice elsewhere. There were four social workers, Helen, Christie, Chloe and Dawn. Christie left on 20 November 2022 but the agency AP practitioner replaced Christie from 20 November. George was an AYSE. Emily was appointed as an AYSE on 20 September 2022. Stacy Fotherby remained as the Child and Family worker. It was known from 26 September 2022 that Team 1 would be fully staffed from 23 November 2022.

59. Team 2 had no vacancies but some social worker posts were being filled by agency staff and, because they were temporary, the situation had a fluidity to it. Danielle Longstaff was a social worker who had worked with Ms Westoby when she had been at Bradford Council and then, afterwards, when she moved to the respondent on 5 September 2022. Ms Longstaff had worked as an agency social worker for the respondent from 20 April 2022 to 21 October 2022. She left then, having become dissatisfied with social work. Ms Westoby invited her to return as an agency Child and Family worker with a view then to moving to her role of social worker, permanently. This would have added the stability to the team she desired and to its quality because Ms Westoby valued Ms Longstaff as a professionally qualified social worker. Ms Longstaff was therefore appointed through Reeds on 14 November 2022. In the event however, she left on 9 December 2022 having decided she did not want to pursue that way forward.

60. Mr Kemp points to a passage in the witness statement of Ms Westoby, at paragraph 22, in which she states that it was the only reason she '*went for Danielle over Lucy*', which suggests the claimant was actively under consideration for the post in late October 2022. Reading the statement as a whole, particularly paragraph 27(c), and having regard to her evidence in cross examination, we were satisfied that the claimant had not in fact been

considered for the role Ms Longstaff took up and would not have been considered for it. It was not a vacant position and had been created for Ms Longstaff for a particular reason. The wording of the statement is misleading to that extent. Ms Westoby presented her evidence frankly and clearly and was the most impressive of those who gave evidence. We accepted what she said.

Analysis

Disability discrimination – section 15 EqA

61. We are not satisfied that the managers knew about the gall bladder condition. Although the claimant says she mentioned it and that she referred to taking morphine, we prefer the evidence of the respondent's witnesses, all of whom say they were unaware of it.

62. The only written record of her condition was the doctor's letter which was provided on 18 October 2022. That makes no mention of the gall bladder. It addresses the pregnancy and the complications requiring on-going treatment at Hull. These were matters the claimant spoke about at work.

63. There was no reason for the respondent to enquire about any possible disability. The claimant was entitled to disclose what she wished about her medical conditions. They are private matters. As she had not mentioned the gallstones and the gall bladder problem at all, the respondent's managers had no knowledge of any disability, nor ought they reasonably to have known the claimant had a disability.

64. In these circumstances, the disability discrimination case under section 15 of the EqA cannot succeed.

Pregnancy discrimination

The meeting on 24 October 2022

65. Our findings indicate this was a supportive meeting at which Ms Windsor updated herself about the claimant's condition, removed the temporary driving ban and sought to provide some reassurance.

66. The way in which this claim was expressed in paragraph 2.2.3 of the List of Issues is unsatisfactory. It poses the question, did the respondent treat the claimant unfavourably during a welfare discussion with Amy Windsor upon her return from annual leave on 24 October 2022. That fails to identify what it was at that meeting which is said to amount to the detriment or other unlawful conduct within section 41 of the EqA. It is for the claimant to set out her case, not for the respondent or Tribunal to have to try to figure it out. We have set out above the full paragraph from the claim form which relates to this meeting, but it does not identify what it is which constitutes the detriment in the discrimination claim.

67. In our findings we have taken the gist of the complaint from the witness statement. In other words, we have tried to figure it out. For the reasons we have set out, we reject the claimant's account of the meeting, insofar as it is suggested Ms Windsor behaved or spoke in a disparaging and inappropriate way. Nothing could be construed as a detriment.

Termination of the assignment early on 31 October 2022

68. The claimant was admitted to hospital within three weeks of her appointment as an agency worker and, although she was able to make up two days of paperwork, was absent for 6 days. She had been in pain in hospital and upon her return she did not look her normal self. She expressed concern about the impact of the drugs she had taken and referred to a tumour and life-threatening risks. This was taken seriously by Ms Westoby who took sensible and precautionary measures to safeguard children and the claimant by removing driving responsibilities for a week.

69. The doctor's letter confirmed there was to be ongoing pregnancy related treatment in Hull. It would require frequent attendance there. On 24 October 2022 Ms Windsor was updated about the position by Ms Westoby and knew of what the doctor had reported. The claimant was still pale and did not look as well as she had in the early stages of the assignment.

70. On 31 October 2022 the claimant presented as dishevelled and seemed anxious about the news she had just received that she was to have the tumour surgically removed within the fortnight. Having updated Ms Windsor of this, she was informed that her agency work was to be terminated in 7 days.

71. On her own account, Ms Windsor misled the claimant of the reason for her giving her notice that day, which she now says was a lack of trust relating to a child protection issue of which she had become aware the previous week. The reason Ms Windsor gave to the claimant was that the Team was back to full complement and the claimant was no longer needed.

72. That explanation would have been satisfactory had notice been for the assignment to terminate on 23 November 2022, in 3 weeks. That was when the new AP took up her post. But Ms Windsor had known about that from 26 September 2022 and had seen no reason to foreshorten the assignment then, nor for the month of October. Why should she do so 3 weeks before the team was back to full complement? The issue of trust, the alleged reason, was not vouchsafed by her to Ms Howgate, who undertook the investigation of the complaint raised by Mr Kemp nor, we infer, the solicitor of the respondent who prepared the defence to the claim. When the response to the claim was filed there was no reference to the trust issue. It first came to light when the witness statements were served 3 days late, on 24 November 2023.

73. Are these facts from which the Tribunal could decide, in the absence of any other explanation, that a significant reason for the early termination of the

assignment on 31 October 2022 was because of pregnancy related illness? The facts are that the claimant's managers had become aware of her ectopic pregnancy and its unusual complications involving a tumour and the need for surgery. She had already lost a week of her short working period through a hospital admission and, on her return, her value to the respondent as a Child and Family worker was not what it had previously been because she could not transport children for a week. The value of the claimant's service over the remaining half of the 12-week assignment was to be reduced further by reason of the surgery for the removal of the tumour, a pregnancy related medical issue. We infer, in the light of those facts, that the assignment *could* have been foreshortened because of the pregnancy related illness and the impact it was having on the service the respondent had expected and hoped for. The sequence of events invite an explanation to discount that.

74. Insofar as Team 1 would have been back to full complement by 23 November 2022, we accept the explanation that the claimant's assignment would have been ended before it ran its course. There was no longer a need for a Child and Family worker and the expense of paying agency fees for this would not have been justified. There was no alternative need in Team 2 and the claimant would not have been required there. The position relating to Ms Longstaff was unusual and had been created to lure her back as a social worker, where the team required a permanent worker.

75. However, that does not explain the giving of notice three weeks earlier on 31 October 2022. For that we have to consider the trust issue raised by Ms Windsor.

76. This is what is said about that by Ms Windsor in her statement:

> *42. At some point I became aware that while I had been on leave a child was removed after Lucy did a visit with the Social Worker and said she saw the child eating dog food. What Lucy had said was the trigger for the child being removed. The Social Worker, though, said that did not happen – that there was dog food on the floor and the child was crawling around it, but they never observed the child eating it. So, what Lucy had said was not true. We had other information that supported the council's decision to remove the child from her parents, but had Lucy not said this, it could have been done in a more planned way.*
>
> *43. At some point during that week commencing 24th October 2022 I had a discussion with my Service Manager to say I was worried about Lucy's practice as I had shared the information I had received regarding Lucy having lied. We discussed how to address that and I said Claire, my new AP, is coming in to meet the team on the following Monday, 31st October 2022, I can just say to Lucy that I've got a new worker starting and can give her a week's notice for that. Although Claire wasn't starting for another few weeks, we didn't need to keep Lucy on until then because we now had Emily, as a Social Worker in her AYSE, who had by that time completed her induction and could do the work that Lucy was doing. Emily was newly qualified and this was her first Team role and supervision of contacts is a role that is given to newly qualified and AYSE Social Workers. Being conscious of the cost of agency workers, I'm constantly reviewing whether*

> *there is a need for them to remain. There wasn't really anything that I could have put in place about practice for Lucy then because I would have been asking her to leave very shortly anyway, with Claire starting. It was harsh, however this is the nature of agency work and has been my experience when I have been an agency worker. So, me and my service manager agreed I would do this and I did not ever raise any issues about practice with Lucy. Should I have raised the issues with Lucy? I don't know. For me it was about the impact – what difference would it have made if I had raised it? The issue with the removed child had been resolved by then. Had there not been issues with Lucy's practice, I probably would have given Lucy notice to end for Claire's start date, which ended up being 24th November 2022.*

77. This account seemed unusual, in that one would not have expected the observations of an agency child and family worker, which were not believed by the social worker who attended the home visit, to have been used in the decision-making process and court papers for an interim care order. It would be the social worker not the claimant who would prepare any report and therefore the social worker's views which counted. Why would the social worker use an observation of the agency worker which she disbelieved?

78. Ms Westoby gave evidence about the case. She had been part of the group, together with the Service Manager, that had discussed the matter during the week of 17 October 2022 that led to the family child protection proceedings being brought. She said that the comment of the claimant was at the lowest order of her list of concerns and had not been of any consequence in respect of the decisions to take the child into care or how it was done. There were other matters (which it is unnecessary to recite in these reasons) which led to the decision to remove the child.

79. Ms Windsor said that the social worker had spoken to her in the week of her return and had not initially said the claimant had lied but, because she made some repeated comments about the claimant, she probed what had happened which led to the worker saying she had not seen the incident and believed the claimant had lied about it. In evidence Ms Windsor said she would have intervened if she had seen a child eating a dog biscuit (clarifying this was the form of dog food) and the fact the claimant had not done this added to her sense of disbelief.

80. Ms Windsor agreed in her evidence that differing accounts from people who witness the same incident does not mean one of them must be lying but she did not think that had happened here. The social worker had known the family and the child and she did not think this would have happened. We found that rather odd. Any young infant might try to eat a dog biscuit within its reach and a disbelief in this happening would therefore not appear to have anything to do with knowing the family and child.

81. The claim of Ms Windsor that the child's case should have been handled in a more planned way had the claimant not said what she had was plainly incorrect. Ms Westoby said so and she had been directly involved in the decisions. For Ms Windsor to have presented the issue in this way is

troubling. It calls into question the claimant's fitness to work in the childcare field at the respondent or any other authority she might move to. If that were the case, one would have expected Ms Windsor and the Service Manager to have had to raise it with the claimant, not to keep it under wraps. At the very least it would need addressing as a training issue.

82. It was not clear why it was thought the claimant had invented the matter. It was suggested by Mr Belfield who had seen some photographs that she made more of the state of the home which he thought were not as troubling as the claimant's description, but this was not known to Ms Windsor at the time. The possibility the claimant had seen the child pick up a biscuit and put it in its mouth, given the social worker had seen the child crawling on a floor around dog biscuits, seemed consistent and explicable by both not having seen everything that happened rather than the claimant having lied.

83. The Service Manager had been instrumental in taking the child protection decisions and, according to Ms Windsor, approving early termination of the assignment of the claimant because of the trust issue. Her absence in these proceedings, not providing a confirmatory statement and giving evidence, was bewildering. She knew of the claimant's ill health. Ms Westoby had elevated the concerns about driving and a temporary restriction to her duties were put in place with the Service Manager's approval. She was a senior manager who became aware this temporary agency worker could not provide the level of support that had been expected due to her challenging state of health. No explanation was given for why she had not given evidence, not least to eliminate the suspicion that the pregnancy related illness had any influence on the decision to terminate the contract sooner.

84. On her own account Ms Windsor had misled the claimant about the reason for the earlier termination and, it appears, she had also misled Ms Howgate. Ms Windsor said she had not brought it up at the investigation meeting because she did not think she could raise it in response to the complaint, but she knew that seemed naïve now. The Tribunal had also been misled by the contents of the response as to the alleged reason for the termination on 31 October 2022.

85. The explanation for the termination on 31 October rather than 24 November is fraught by reason of the above concerns. It is for the respondent to satisfy the Tribunal that the pregnancy related illness played no part whatsoever in the decision, see the recent decision of the EAT in **Field v Steven Pye and Co [2022] IRLR 948** and the Court of Appeal in **Wong v Igen Ltd [2005] ICR 931**. In the absence of a clear and logical explanation from Ms Windsor supported by her manager who endorsed it, we do not find the respondent has discharged that burden.

86. We have not found it necessary, nor helpful, to make any further findings about the explanation and its validity nor to what extent it may have contributed to the impugned decision to foreshorten the assignment. It is the failure of the respondent to discharge the burden which section 136(2) EqA requires which forms the basis for our decision.

Remedy

87. The case shall be listed for a remedy hearing.

88. The findings we have made should narrow the issues which need to be addressed at that hearing. One complaint of discrimination has succeeded. The parties should have regard to that when considering what award might be made in respect of injury to feelings, having regard to what was said by the Court of Appeal in **Vento v Chief Constable of West Yorkshire [2003] ICR 318** and the Joint Presidential Guidance.

89. We have found the claimant would have had her assignment terminated by 24 November 2022 in any event because there was no longer the need for an agency worker then. Although that was not her belief, we cannot compensate her for what she mistakenly thought was the consequence of discriminatory action in our evaluation of injured feelings.

90. As to financial losses, bearing in mind that the claimant underwent surgery on 10 November 2022 and would not have been entitled to sick pay, it may be the scope for compensation for earnings lost is limited, but it will be for the parties to clarify how this part of the remedy decision should be approached.

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Employment Judge D N Jones

Date: 4 January 2024