EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000464/2023

Held in Glasgow on 22 February 2024

Employment Judge P O'Donnell
Members Ms S Jones and Mr G Doherty

Ms Amy McLaren	**Claimant** **In Person**
Hiflow Property Services	**Respondent** **Represented by:** **Ms Z Donaldson - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was discriminated against by the respondent contrary to ss18 and 39(2)(c) & (d) of the Equality Act 2010. The Tribunal makes an award of compensation to the claimant of £22150.33 (Twenty-two thousand, one hundred and fifty pounds, thirty three pence) in respect of that discrimination.

REASONS

Introduction

1. The claimant has brought complaints alleging that she was treated unfavourably because she was pregnant or for reasons relating to her pregnancy. The treatment in question related to disciplinary action taken against her and her dismissal.

2. The respondent denies the allegations and asserts that there were other reasons for the treatment complained of by the claimant.

3. There had been an earlier case management hearing which, for reasons set out in the Note of that hearing, had faced some difficulties. As a result, there were issues which had not been dealt with fully before the hearing.

4. One of the claims pursued by the claimant on her ET1 was unfair dismissal under the Employment Rights Act 1996 (ERA). She did not have two years' continuous service at the end of her employment which is normally required to be able to pursue such a claim and this issue was raised at the case management hearing.

5. However, it was quite clear that the claimant was alleging that her pregnancy (or reasons relating to it) was the reason for her dismissal and so her claim of unfair dismissal falls within s99 ERA which disapplies the two year service rule. Unfortunately, due to the issues with the case management hearing, this was not fully explored.

6. The claimant had also identified on her ET1 that she was pursuing a claim of discrimination under the Equality Act 2010 relying on the protected characteristic of pregnancy/maternity. There was discussion at the case management hearing as to whether this was a claim of direct discrimination under s13 of the Act. Again, due to the issues at the hearing, this was not fully explored. If it had been then it would have been clear that the relevant provision in the 2010 Act was s18 which specifically deals with claims involving pregnancy/maternity.

Evidence

7. The Tribunal heard evidence from the following witnesses:

    a. The claimant.

    b. Zephyrima Donaldson (ZD) – one of the directors of the respondent.

    c. Karen Duncan (KD) – the respondent's office supervisor.

8. The respondent had attached written statements from two of their employees to their ET3 form. One of those was from KD and the Tribunal considers that her oral evidence supersedes the written statement. The other employee

was not called to give evidence and so there was no opportunity for her evidence to be tested. The Tribunal, therefore, place little or no reliance on the content of the statement.

9. Neither party produced any documents to be referred to in their evidence. It became clear from the evidence that there were relevant documents of a significant nature (although only a small number). In particular, it became clear that the respondents had made notes at a disciplinary meeting which resulted in a warning to the claimant, the warning was issued in writing and that there was subsequent correspondence regarding the claimant's appeal of the warning. The Tribunal will comment in detail below on the effect on its decision arising from the absence of these documents.

10. The Tribunal considers that the quality and quantity of the evidence presented to it was, to a degree, lacking in detail. For example, the precise dates on which events took place could not be recalled (something which would have been assisted if the relevant documents had been produced) and there was a lack of detail about the alleged failings in the claimant's performance, attendance and timekeeping. The Tribunal recognises that both parties were representing themselves and sought to assist them by asking questions intended to elicit the necessary evidence but, ultimately, the Tribunal cannot make the parties cases for them.

11. One particular issue that arose early in the hearing was that Ms Donaldson asked the claimant only a small number of questions in cross-examination. The Judge intervened to explain to both parties the purpose of cross-examination and, in particular, the need for each party to put their case to the other and challenge their evidence. It was explained that if this was not done then the Tribunal would proceed on the basis that evidence was unchallenged.

12. The broad sequence of events was not in dispute between the parties but some of the detail was disputed. For the following reasons, where there was a dispute of fact between the parties then the Tribunal has preferred the evidence of the claimant.

13. First, the Tribunal found the claimant to be a credible and reliable witness who was willing to accept when she could not recall precise details of events.

14. Second, the claimant's evidence was not challenged on significant issues. For example, she gave evidence that the main point of discussion at the disciplinary hearing and the main reason for her warning were her absences due to morning sickness (although she accepted that other issues were discussed). As will be clear from what is said below, this is quite significant as this is a clear act of pregnancy discrimination in and of itself. The respondent did not challenge this evidence at all in cross-examination.

15. Third, and related to the point above, there was the failure by the respondent to produce the minutes of the disciplinary meeting and the subsequent written warning. These were contemporaneous documents which would have set out what was said at the time. These were documents created by the respondent and within their control which they could have produced to rebut the claimant's evidence (assuming that the documents did, actually, do so). Similarly, the claimant alleged that she was told by ZD that she had to take holidays for any ante-natal appointments and this was not disputed in either cross-examination or in ZD's evidence-in-chief.

16. Fourth, and again related to what is said above, there was a wholesale lack of detail in the evidence that was put to the claimant. For example, it was put to her that she had five doctor's appointments during her employment and she accepted that she had had two such appointments. No detail was put to her about when the other appointments occurred or what they were for which would have allowed her to respond in detail.

17. There were similarly broad assertions made about the claimant's timekeeping, being off sick, leaving the office (to go to the shops or doctor's appointments) without telling anyone) and her performance but no detail of when the claimant was late or when she had been absent was put to her or set out in evidence-in-chief. The Tribunal considers that these are all matters for which the respondent would have records and these could have been produced as evidence.

Findings in fact

18. The Tribunal made the following relevant findings in fact.

19. The claimant was employed as an administrator by the respondent from 26 January 2023 until she was dismissed on 15 September 2023.

20. The respondent is a business involved heating and plumbing repairs as well as joinery. It employs a total of 19 employees; 2 directors, 3 office staff; 8 gas engineers; a plumber; 3 joiners; one apprentice. It does work for insurance companies and housing associations.

21. The claimant's job involved booking jobs for engineers and other administrative duties.

22. A significant proportion of communications within the respondent's staff was done by way of a group chat on WhatsApp. Staff were expected to use their own personal mobile phones to access the group chat and post messages on it.

23. The respondent had a policy that personal phones should not be used for personal matters during working hours.

24. On 31 July 2023, the claimant informed ZD that she was pregnant. ZD did not offer any particular congratulations to the claimant.

25. Prior to informing ZD of her pregnancy, the claimant had not been subject to any formal warnings, either verbal or written. She had been spoken to about an error she had made early in her employment when arranging a job but this had not resulted in any disciplinary action. The claimant had had time off for two doctor's appointment prior to 31 July 2023. She had also had time off due to illness.

26. During August 2023 (the claimant could not recall the precise date), ZD informed the claimant that she would have to take holidays when she needed time off for any appointments related to her pregnancy.

27. The claimant had two absences due to morning sickness within 7 days of each other during August 2023. One absence was for a day and the other absence was for two days. Neither party could recall the precise dates of these absences but nothing turns on that.

28. On or around 23 August 2023, the claimant was invited to a disciplinary meeting in writing. The primary reason given for the meeting were her absences due to morning sickness although other issues relating to her performance, conduct and timekeeping were to be discussed.

29. The disciplinary meeting was held on 30 August 2023 by ZD. KD also attended and took notes. This meeting was mainly concerned with the claimant's absences but other matters were raised such as how the claimant conducted herself in the office and the fact that she was using her phone during office hours.

30. The disciplinary meeting resulted in a written warning to the claimant and a reduction in her hours from 39.5 hours a week to 29 hours. The primary reason for these sanctions were the claimant's absences due to morning sickness although other reasons relating to performance and conduct were mentioned.

31. The decision to issue the warning was made by ZD and confirmed in writing. The letter confirming the decision stated that the claimant could be dismissed if matters did not improve. The letter was handed to her by Mr Donaldson (the other director of the company) who told her it would be better if she looked for a new job.

32. The claimant felt isolated and bullied by what had happened. She withdrew from engaging in personal chat but continued to work. She felt that the warning was wrong and contacted ACAS for advice. She then submitted an appeal letter. An appeal meeting with Mr Donaldson was arranged but never took place.

33. On 15 September 2023, ZD asked the claimant to join her in the back of the office for a discussion. The claimant was not told what the meeting was about

and there was nothing to indicate that it was intended to be a disciplinary meeting.

34. At the meeting, it was said to the claimant that she had left early on the previous Friday (when the claimant was in the office alone) and showed her CCTV footage which ZD said demonstrated this and that the claimant had not been working but was just on her phone. The claimant disputed that she had left early and that she had not been working. The discussion became heated and ZD informed the claimant that her contract was being terminated. No reason for this was given at the time nor was the dismissal (or the reason for it) confirmed in writing.

35. The claimant left the business that day and did not return. She did not appeal her dismissal.

Relevant Law

36. Section 99 of the Employment Rights Act 1996 states:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section 'prescribed' means prescribed by regulations made by the Secretary of State.

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

(a) pregnancy, childbirth or maternity,

…

37. It was held in *Maund v Penwith District Council [1984] IRLR 24* that the burden of proof regarding the reason for dismissal lies with the employer unless the

employee does not have the requisite length of service to pursue a claim of "ordinary" unfair dismissal. If that is the case then the onus is on the employee.

38. Section 18 of the Equality Act 2010 provides as follows:

> *(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.*

39. These provisions do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is s39(2)(c) [dismissal] and (d) [any other detriment].

40. The question for the Tribunal in a claim under s18 of the Equality Act is whether an employee's pregnancy was an 'effective cause' of the treatment complained of (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*).

41. The burden of proof in claims under the 2010 Act is set out in s136:

> ***136 Burden of proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

42. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

43. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal *in Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870):-

"(1) Pursuant to s 63A of the SDA 1975[now s136 of the Equality Act 2010], it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary

facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

44. The *Igen* case was decided before the Equality Act was in force but the guidance remains authoritative, particularly in light of the *Hewage* case.

Decision

45. The Tribunal will proceed on the basis of dealing with the discrimination claim under the Equality Act first for three reasons. First, if the claimant succeeds in the discrimination claim then the unfair dismissal is rendered academic. Second, the test under the Equality Act is broader than under ERA; pregnancy needs only be the effective cause of dismissal (or any other detriment) in the discrimination rather than the sole or principal cause as it is in the unfair dismissal claim. Third, the unfair dismissal claim does not add anything in terms of remedy; the claimant could recover the same losses under both claims and there would be no double-counting. In fact, the unfair dismissal claim is more limited in terms of remedy as it does not include compensation for injury to feelings.

46. The Tribunal considers that there is no question that in subjecting her to a disciplinary process, issuing a written warning, reducing her hours and dismissing her, the respondent has treated the claimant unfavourably. The respondent did not seek to argue otherwise and there is no question that a reasonable employee subject to such treatment would consider this to be unfavourable treatment in the sense that they were being disadvantaged in the circumstances in which they had to work (applying the test for detriment set out in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

47. The real question for the Tribunal to determine is whether this treatment was done because the claimant was pregnant or because of a pregnancy related illness.

48. It should be made clear that there is no requirement for a comparison between the treatment of the claimant and any other employees in a claim under s18 EqA. The Tribunal raises this point because there had been discussion of comparators at the earlier case management hearing when it had been thought this was a claim under s13 EqA. However, the relevant statutory provision is s18 and this does not require comparators and the question for the Tribunal is whether there was unfavourable treatment on unlawful grounds. The treatment of others may, however, be relevant to the question of what inferences the Tribunal draws from the evidence about the reason for any unfavourable treatment.

49. The Tribunal bears in mind that the initial burden of proof lies on the claimant. However, it is also conscious of the oft-quoted axiom that discrimination is very often not overt or even conscious on the part of the alleged discriminator (*Anya v University of Oxford* [2001] IRLR 377) and so the Tribunal has to look at all the facts of the case in order to determine whether it can draw an inference that what might otherwise appear to be a fair minded decision was affected by unlawful discrimination.

50. In the present case, for the reasons set below, the Tribunal does draw the inference that the unfavourable treatment of the claimant by the respondent was because she was pregnant or because of her absences due to morning sickness.

51. The Tribunal should be clear that none of the reasons below are determinative in and of themselves. Rather, it is all of these reasons taken as a whole from which the Tribunal draws the inference of discrimination.

52. First, there is the timing of the action taken against the claimant. The disciplinary process and the claimant's dismissal all took place in the six weeks after she informed them of her pregnancy. Prior to this, the claimant had not been subject to any formal disciplinary action over the previous six months of her employment.

53. The respondent sought to say that there had been a plethora of issues with the claimant throughout her employment relating to what were said to be

frequent absences for sick or doctor's appointment, frequent lateness and issues with her performance. However, if there had been such issues, the fact that no formal disciplinary action was taken until after the claimant announced her pregnancy lends more weight to the inference that this was the underlying and effective cause of that disciplinary action.

54. As noted above, there was a lack of any detailed evidence led at the hearing about when all of these issues with the claimant had occurred. It was asserted in the ET3 that five informal warnings had been issued to the claimant but no evidence was led about when these were issued or why. In any event, in the Tribunal's industrial experience, it would be highly unusual for an employee to be subject to so many informal warnings in such a short period without the matter being escalated to a formal process.

55. Similarly, the respondent put great weight on the fact that the claimant did not often post in the office group chat on WhatsApp but led no evidence as to what it was she was expected to post or how often. There was no evidence about the frequency of posts by other office staff or what topics they would post from which the Tribunal could assess the claimant's engagement in this process (or lack thereof).

56. The respondent's position on the use of personal mobile phones was somewhat confused. Employees were expected to access the group chat by way of their personal mobile phones but the claimant was being criticised at the hearing for using her mobile phone during office hours. Clearly some use of the claimant's phone was expected if work related communications were predominantly being made via the group chat. The claimant was effectively being criticised for using her phone too much whilst at the same time being criticised for not using it enough.

57. Absent any evidence as to how often other employees were using their phones for what the respondent considered to be legitimate work purposes, the Tribunal considers that this criticism of the claimant was unfair and unreasonable. The respondent did assert that the claimant was using her phone for personal use during work hours but the Tribunal did not consider

that the evidence about this was satisfactory being not much more than an assertion to this effect.

58. Second, the Tribunal has accepted the claimant's evidence that the primary reason for the formal disciplinary action and the warning which resulted from it was her absences due to morning sickness. This, in itself, is an overt act of pregnancy discrimination.

59. In this regard, the Tribunal finds that it was not just the warning which was an act of discrimination but also the reduction in hours. Although this was said to be done because the respondent was not getting 39 hours work from the claimant, it is an inextricable part of the outcome of the disciplinary process and would not have happened if the claimant had not been discriminated against by the respondent.

60. The Tribunal also notes that the reason given for the reduction in hours in the ET3 (that it was due to the demands of the business and not a result of disciplinary action) is directly contradicted by the evidence given at the hearing is that it was a disciplinary sanction. The Tribunal is entitled to take account of such contradictions in considering what inferences to draw.

61. The disciplinary process and outcome are an important part of the factual matrix leading to the claimant's dismissal and so these do not just form an act of discrimination in itself but also have to be taken into account when drawing an inference as to whether the later decision to dismiss was, consciously or unconsciously, affected by the claimant's pregnancy.

62. Third, the respondent had told the claimant that she would need to take holidays for any GP or other appointments related to her pregnancy. This is wholly contrary to the claimant's statutory right to paid time off for ante-natal care under ss55 & 56 ERA.

63. As part of their case, the respondent has sought to paint itself as a family friendly workplace which accommodates working mothers. It is, therefore, highly surprising that they are wholly unaware of this fundamental right for pregnant workers.

64. On this point, the fact that the respondent has had pregnant employees in the past with no issue does not mean that they did not discriminate against the claimant in this case. The Tribunal has noted this assertion but, again, little or no evidence has been led about these other employees. The Tribunal does not consider this assertion is sufficient to outweigh the other factors which weigh in favour of drawing an inference in the claimant's favour regarding the reason for the unfavourable treatment which she faced.

65. Fourth, there is the failure of the respondent to produce any documentary evidence to support their case. As noted above, there were contemporaneous notes and correspondence relating to the disciplinary process that would have disclosed what had been said at the time. If these supported the respondent's case then the Tribunal considers that the respondent would have produced these and so the Tribunal draws an adverse inference from the absence of these documents.

66. Further, overlapping with the issue above about the lack of detailed evidence about the claimant's alleged failings, there was no documentary evidence relating to these such as attendance or timekeeping records.

67. Similarly, there was a dispute about the information displayed on the CCTV shown to the claimant at the meeting which culminated in her dismissal but neither the CCTV nor any still images from it which might have assisted in clarifying the position was produced. This was evidence wholly in the control of the respondents.

68. Fifth, the Tribunal found the evidence from ZD as to the reason for the claimant's dismissal to be confused and somewhat inadequate. Ms Donaldson in her evidence-in-chief stated that she was concerned, in light of the claimant's complaints of feeling bullied, how the claimant would cope with the appeal and so decided to dismiss her. However, there was no evidence that she discussed this with the claimant at the time and it was not put to the claimant in cross-examination that this had been why Ms Donaldson dismissed the claimant. Further, nothing to this effect was pled in the ET3.

69. Ms Donaldson went on to give evidence that it was not viable to employ the claimant because of her behaviour since the disciplinary meeting and outcome. It was put to the claimant that she had disengaged at work after the disciplinary meeting; she agreed that she did not engage in personal chat but disputed that she was not engaged with her work. This is a very different reason than the reason initially advanced in Ms Donaldson's evidence. It is also not one pled in the ET3 which sets out issues of performance, conduct and attendance as the reason for the claimant's dismissal.

70. Importantly, none of the reasons set out in the ET3 or in evidence were mentioned at the point of dismissal. No reason at all was given by ZD at the time or in any subsequent correspondence.

71. The Tribunal does not consider that there was any clear reason for the claimant's dismissal. Further, The Tribunal was entitled to take account of the contradictions in the reason given for dismissal in the ET3 and the evidence of Ms Donaldson.

72. It was clear to the Tribunal that the decision to dismiss was made in the heat of the moment at a meeting which was never intended to be a disciplinary or dismissal meeting. There is a much greater risk that decisions made in the heat of the moment without any proper consideration or reasoning to be unconsciously influenced by unlawful factors such as the claimant's pregnancy or reasons related to it. This is especially the case where Ms Donaldson had already carried out acts of discrimination in relation to the earlier disciplinary process.

73. The Tribunal considers that the respondent is now trying to "backfill" their reasoning for a decision taken in the heat of the moment. This is always a difficult and dangerous proposition for anyone because it runs the risk, as in this case, of the reasons being presented having gaps in their logic or being confused and inconsistent.

74. The Tribunal bears in mind that the initial burden of proof does not lie on the respondent although the burden can shift to the Respondent in the discrimination claim in terms of s136 of the Equality Act. However, the lack

of a credible explanation for the claimant's dismissal is a matter which the Tribunal can take into account in drawing any relevant inferences when considering whether the claimant has discharged her burden.

75. Sixth, if Ms Donaldson's decision to dismiss was based on the claimant's reaction to the earlier disciplinary process and outcome then this lends more weight to the inference that pregnancy was an effective cause of the dismissal. The Tribunal has already found that the disciplinary process and outcome amounted to overt discrimination on the part of the respondent and so, as a matter of logic, the claimant's pregnancy is an effective cause of her reaction to that discrimination. To put it another way, if the claimant had not been pregnant then she would not have been discriminated against and there would have been no adverse reaction on her part leading to Ms Donaldson's decision to dismiss.

76. Taking account of all of these matters, the Tribunal considers that it has sufficient basis to draw the inference that, on the face of it, the claimant's pregnancy and her pregnancy related illness were the effective cause of her dismissal.

77. Turning to the question of whether the respondent has discharged their burden of proof, the Tribunal is not satisfied that the respondent has led sufficient reliable and credible evidence that the reason for the unfavourable treatment of the claimant was something other than the claimant's pregnancy or pregnancy related illness.

78. In respect of the treatment related to the disciplinary process, the Tribunal has found that this was directly caused by the claimant's absences due to morning sickness. Although it was said that other issues were involved, the respondent did not lead any evidence to challenge the claimant's evidence that this was the main reason for the disciplinary action and no evidence was led about the extent to which any other matter contributed to the decision to subject the claimant to disciplinary process.

79. In relation to the claimant's dismissal, the Tribunal did not consider that the evidence about this was satisfactory for the reasons it has set out above. In

particular, different reasons have been advanced in the ET3 and in the evidence. Further, in the evidence given at the hearing, different reasons were being advanced. One of those reasons was effectively that the respondent could no longer continue to employ the claimant because of her reaction to the disciplinary action. However, this explanation itself is affected by discrimination for the reasons set out above and so does not discharge the burden under s136(3) of the Equality Act.

80. In these circumstances, the Tribunal finds that the respondent acted unlawfully under s18 and 39(2)(d) of the Equality Act in subjecting her to a disciplinary process and sanctions because she had absent due to pregnancy-related illness and that the respondent acted unlawfully under s18 and 39(2)(c) of the Equality Act in dismissing her because she was pregnant.

81. Having made that finding, the Tribunal does not consider that it is necessary to deal with the unfair dismissal claim.

Remedies

82. Turning to the question of remedy, the Tribunal does consider it appropriate to make an award of compensation under s124 of the Equality Act in respect of loss of earnings for the period up to the date of the Tribunal hearing.

83. The claimant was dismissed on 15 September 2023 and the hearing was held on 19 February 2024, a total of 22 weeks. The Tribunal considers that the loss of wages should be based on the claimant's earning before her hours were reduced because it has found that the reduction in hours was an act of discrimination in itself. The unreduced take-home pay for the claimant was £344.64.

84. The loss of wages to the date of the Tribunal was 22 x £344.64 = £7582.08.

85. The claimant also received an employer's pension contribution of £11.58 a week and has suffered a loss in respect of that for the same period. This amounts to 22 x £11.58 = £254.76.

86. The claimant's total losses up to the date of the hearing is £7836.84.

87. The Tribunal also considers that it is appropriate to make an award for future loss of earnings under s124 of the Equality Act. The claimant remains unemployed and is due to give birth on 2 April 2024. The Tribunal considers that a reasonable period for any future loss would be 26 weeks from the date of the hearing; the claimant would then have given birth and the Tribunal considers that she would be able to secure alternative employment within this period.

88. The first 6 weeks of this period of future loss is based on the claimant's normal take home pay and employer's pension contribution. The total is 6 x £356.22 = £2137.32.

89. For the remaining 20 weeks, the claimant, if she had not been dismissed, would have been entitled to Statutory Maternity Pay. This would have been £310.18 for the first 6 weeks (90% of the claimant's earnings) and then £172.48 for the remaining 14 weeks. This is a total of £4275.80.

90. However, the claimant is now only entitled to Maternity Allowance at £172.48 for the period when she would otherwise have received Statutory Maternity Pay. This is a total of £3449.60.

91. The claimant's net loss for the period when she would have received Statutory Maternity Pay will, therefore, be £826.20.

92. The total future loss is, therefore, £2963.52.

93. The award of compensation for loss of wages for past and future loss amounts to £10800.36.

94. The Tribunal heard evidence that the claimant had been applying for work since her dismissal and has attended multiple interviews. The respondent led no evidence and made no submissions that the claimant had failed to mitigate her loss. The burden of proving any failure to mitigate lies on the respondent and they have not discharged this. There is, therefore, no basis to reduce the compensation for loss of wages due to a failure to mitigate.

95. The Tribunal does not consider that there is any other basis to reduce the award of compensation for loss.

96. The sum awarded as compensation for loss earnings relates to a claim of discrimination under the Equality Act and the Tribunal considered that it was appropriate to award interest on this sum in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In this case, the date of the contravention is 15 September 2023 (that is, the date of dismissal) and the "day of calculation" is 19 February 2024 when the Tribunal made its award.

97. Applying the formula in the Regulations, the Tribunal awards the sum of £185.70 as interest on the compensation for loss of earnings.

98. In relation to the discrimination claim, the Tribunal does consider that an award of compensation for injury to feelings should be made. Given the nature of the discrimination, the Tribunal considers that an award in the first Vento band is appropriate.

99. The Tribunal has taken account of the Presidential Guidance on awards for injury to feelings and the following factors in the case; the claimant had been employed for a relatively short period; she was dismissed at a time when she should have been looking forward to giving birth; there were multiple acts of discrimination albeit over a short period.

100. In these circumstances, the Tribunal finds that the sum of £8000 is an appropriate award in this case. An award at the lower end of the band would not adequately reflect the seriousness of the discrimination and the circumstances of the case. However, the act of discrimination is not of such a nature that would attract an award at the top of the band. The Tribunal, therefore, makes an award of injury to feelings under s124 of the Equality Act of £8000.

101. The Tribunal considered that it was appropriate to award interest on this sum in terms of the Employment Tribunals (Interest on Awards in Discrimination

Cases) Regulations 1996. The same dates as above are used to calculate the interest.

102. Applying the formula in the Regulations, the Tribunal awards the sum of £275.10 as interest on the compensation for injury to feelings.

103. The total unadjusted award is, therefore, £19261.16.

104. Finally, the Tribunal considers there should be an uplift to the compensation in relation to a failure by the respondent to follow the ACAS Code of Practice. The Tribunal considers that the respondent wholly failed to comply with the ACAS Code when dismissing the claimant. There was nothing close to being an attempt to comply with the ACAS Code; the meeting at which the claimant was dismissed was never described as disciplinary meeting; she was never informed that the meeting would be dealing with allegations of conduct that might lead to her dismissal; when the prospect of dismissal arose then there was no effort to halt the meeting and engage in a proper disciplinary process.

105. This failure was wholly unreasonable; there was no explanation why the respondent did not follow a procedure in dismissing the Claimant and they clearly knew how to comply with the ACAS Code as they did so in respect of the earlier disciplinary process. An uplift is, therefore, appropriate.

106. In terms of the amount of any uplift, the Tribunal has taken into account the wholesale failure by the respondent to act in accordance with the Code, the relatively small size of the respondent's business and the amount of the uplift in the context of the total award. In the circumstances of the case, the Tribunal considers an uplift of 15% is appropriate amounting to £2889.17.

107. The Tribunal, therefore, makes a total award to the Claimant of £22150.33 (Twenty-two thousand, one hundred and fifty pounds, thirty three pence).

Employment Judge Peter O'Donnell
Employment Judge

4/3/24
Date

Date sent to parties **7/3/24**