Case Number: 3306541/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Boulton	**v**	**1. J Mould (Reading) Limited** **2. Jennifer Hepworth**

Heard at: Reading
On: 8 to 12 January 2024

Before: Employment Judge Shastri-Hurst
Members: Ms H Edwards
Ms D Ballard

Appearances
For the Claimant: Ms Johns, counsel
For the Respondents: Ms Hepworth, second respondent

JUDGMENT

1. The claim of automatic unfair dismissal because of pregnancy fails;

2. The claim of automatic unfair dismissal because of public interest disclosures fails;

3. The claim of automatic unfair dismissal because of health and safety disclosures fails;

4. The claim of detriment because of pregnancy fails;

5. The claim of detriment because of public interest disclosures fails;

6. The claim of detriment because of health and safety disclosures fails;

7. The claim of direct sex discrimination fails;

8. The claim of unfavourable treatment because of pregnancy fails.

REASONS

Introduction

1. The first respondent is a specialist demolition and recycling contractor. It is a family business that has been going for more than 50 years.

2. The claimant commenced work for the first respondent on 12 October 2020 as a Departmental Support Assistant. Her employment was subject to a three month probationary period. Her line manager was Richard Harris, the Demolition Manager. Ms Hepworth was the Manager.

3. The claimant was employed by the first respondent at the height of the Covid-19 pandemic. During her employment she became pregnant and informed Ms Hepworth on 9 March 2021.

4. On 30 March 2021, Ms Hepworth dismissed the claimant for poor performance. Her employment ended on 6 April 2021.

5. The claimant underwent the ACAS early conciliation process; Day A being 28 April 2021, Day B being 29 April 2021.

6. The claimant presented her claim to the tribunal on 4 May 2021. That claim form included claims of automatic unfair dismissal on the grounds of pregnancy, protected disclosures and health and safety disclosures, detriments on the same three grounds, direct discrimination on the basis of sex, and unfavourable treatment on the basis of pregnancy under the Equality Act .

7. We had the benefit of a bundle, the last numbered page in the bundle being number 268. There were a few pages missing and a few pages have been added to the bundle throughout the course of the hearing.

8. We had witness statements from the claimant, Ms Hepworth, Andrew Webb and Jay Mould who all attended to be cross examined.

The issues

9. In terms of the issues for the hearing, those were set out in Judge Reindorf's case management order, and copied here below for ease of reference.

Detriments and dismissal

(1) Did the Respondents:

(a) fail to assess workplace risks and alter working conditions or hours of work to avoid any significant risk to the health and safety of new or expectant mothers in the workplace (regulation 16(2), Management of Health and Safety at Work Regulations 1999; and/or

(b) subject the Claimant to unfounded and unwarranted criticisms in relation to her performance levels on 30 March 2021; and/or

(c) subject the Claimant to a sham disciplinary process on 30 March 2021?

(2) If so, in doing so did the Respondents subject the Claimant to detriment(s)?

(3) The Claimant was dismissed on 6 April 2021.

Pregnancy discrimination: section 18 Equality Act 2010

(4) If the Respondents subjected the Claimant to any or all of the detriments, in doing so did they treat her unfavourably because of her pregnancy?

(5) Was the Claimant's dismissal unfavourable treatment because of her pregnancy?

Direct pregnancy discrimination: section 13 Equality Act 2010

(6) If the Respondents subjected the Claimant to the detriment(s), in doing so did they:

(a) treat the Claimant less favourably than they would have treated a hypothetical non-pregnant comparator; and

(b) do so because of the Claimant's pregnancy?

(7) In dismissing the Claimant, did the First Respondent:

(c) treat her less favourably than he would have treated a hypothetical non-pregnant comparator; and

(d) do so because of the Claimant's pregnancy?

Detriment and automatically unfair dismissal: sections 47C and 99 Employment Rights Act 1996 and Regs 19 and 20 Maternity and Parental Leave etc Regulations 1999

(8) If the Respondents subjected the Claimant to the detriment(s), did they do so for the reason that she was pregnant (within s.47C(1) ERA and Regulation 19(2)(a) MAPLR)?

(9) Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal a reason connected with her pregnancy, within s.99 ERA and Reg 20(1)(a) and (3)(a) MAPLR?

Public interest disclosure detriment and automatically unfair dismissal: sections 47B and 103A Employment Rights Act 1996

(10) Disclosure 1: At a meeting with Mr Harris on 20 January 2021 did the Claimant:

(a) say that she did not feel safe at work because of Covid-19; and

(b) ask for safety measures such as screens around desks and markers on the floor in front of desks to be urgently put in place?

(11) Disclosure 2: On 9 March 2021 in a discussion with the Third Respondent did the Claimant:

(c) say that she felt uneasy that other members of staff did not seem phased or worried about Covid-19 and were therefore not adhering to social distancing rules;

(d) ask for the screens around her desk to be adjusted as they were not high enough on one comer and people would gravitate towards the lower screens to talk to her;

(e) discuss markers on the floor in front of desks to indicate where people should stand in order to keep to a safe distance

(12) Disclosure 3: In an email on 22 March 2021 did the Claimant ask for measures such as screens to be put into place because of the risk to her of catching Covid-19 in light of her pregnancy and unvaccinated status?

(13) If the Claimant made any of the disclosures, in doing so did she thereby make a disclosure of information which she reasonably believed:

(f) was made in the public interest; and

(g) tended to show that a person had failed, was failing or was likely to fail to comply with an obligation under health and safety law (within s.43B(1)(b)ERA 1996); and/or

(h) tended to show that the health or safety of any individual had been, was being or was likely to be endangered (within 43B(1)(d) ERA 1996)?

(14) If the Claimant made the protected disclosure(s):

(a) did the Respondent subject her to detriments 1(b) and/or 1(c) on the grounds that she had made any or all of the protected disclosures; and/or

(b) was the reason (or, if more than one, the principal reason) for the Claimant's dismissal that she made the protected disclosure(s)?

Health and safety detriment and automatically unfair dismissal: sections 44 and 100 Employment Rights Act 1996

(15) Was the Claimant employed at a place where there was no health and safety representative or safety committee, or there was such a representative or committee but it was not reasonably practicable for her to raise the matter by those means (within s.44(1)(c) ERA)?

(16) If so, did the Claimant bring to the First Respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

(17) If so:

(c) was the Claimant subjected to detriments 1(b) and/or 1(c) on the grounds that she brought those circumstances to the First Respondent's attention; and/or

(d) was the reason (or, if more than one, the principal reason) for the Claimant's dismissal that she brought those circumstances to the First Respondent's attention?

Remedy

(18) To what compensation and/or damages is the Claimant entitled?

Findings of fact

10. The claimant started work on 12 October 2020 as Departmental Support Assistant. Although we do not have a job offer letter in the bundle we accept she must have received one. She was not given a contract of employment at that time.

11. The claimant applied for the Departmental Support Assistant role and was interviewed on 2 October 2020 – page 125(a). The role was a new role that held more responsibility than the previous administrator role with the respondent, as can be seen at page 125(f); hence the higher salary of £30,000 compared to the previous £25,000. The claimant's terms and conditions when they were finally provided to her stated "Demolition Support Assistant" as her role. However, we accept this is a mistake. Likewise, her email signature had Administrator at the bottom. Again, this is a mistake and we note one that was not picked up or raised by the claimant during her employment.

Probationary period

12. Turning to the issue of probationary period. The claimant must have known she was subject to a probationary period of three months as she was not surprised to be called to the first probation review meeting that was held with Mr Harris in November 2020. We have heard and seen nothing to suggest that this meeting took her by surprise. We accept that she knew from the start of her employment that she was subject to a probationary period of three months: in fact, her probation is referenced in her statement at paragraph 28, in which she states that her probation period was to expire on 12 January 2021.

13. There is no documentation regarding the probationary process other than the review form from the first review meeting on page 127.

14. At this stage we note how probationary periods are generally dealt with by the respondent. Ms Hepworth is routinely invited to probation meetings by the manager who is directly responsible for the employee under probation. She goes when reasonably able to do so. She trusts her managers to get on with the probation review process. Ms Hepworth told us, and we accept, that extensions of probationary periods are matters for the managers. Ms Hepworth will not become involved in extensions as there is no increase to an employer's obligations towards its employees by extending the probationary period. Ms Hepworth told us, and we accept, that she should always be involved in probation review meetings that are held to conclude the probation period, as that is the point at which the employer's obligations change and increase. This makes sense to us that this is the critical point at which Ms Hepworth will be involved. This is not inconsistent with her leaving the rest of the process up to the managers, as was suggested by Ms Johns.

15. In terms of paper work signing off on probation, that would be the last review sheet following the last meeting. For example, in this case, the last meeting would have taken place after the anticipated end date of 12 January 2021 and so the signing off of the last review sheet would have indicated that someone had passed their probationary period. It appears to us strange that the respondent does not seem to send out a short letter confirming the passing or extension of probationary periods for the benefit of employer and employee records, for clarity. However, that is the way they do things, or did things at the time the claimant was employed.

16. On 14 October 2020 the claimant and Ms Hepworth were invited to the first probation meeting, to be on 6 November 2020.

17. On 20 October 2020 Mrs Boulton asked Mr Harris for a copy of her contract and not for the employee handbook specifically. That request is at page 257. She did not receive a copy of her contract at that point. Mr Harris' response stated that he asked Ms Hepworth to provide a copy. On balance, we do not accept that Mr Harris asked Ms Hepworth for a copy of the contract. First, Ms Hepworth said she was not asked: second, there is a lack of contemporaneous emails from Mr Harris to Ms Hepworth to support Mr Harris' point. Finally, there would be no requirement for Mr Harris to ask Ms Hepworth as he would have had access to the claimant's contract himself.

18. On 6 November 2020 the first probation meeting took place. This is covered in Mrs Boulton's statement at paragraph 32 and in Ms Hepworth's statement at paragraph 8; both paragraphs contain what was allegedly said by Ms Hepworth in this meeting. We find there is no inconsistency between the two references in the parties' witness statements. Ms Hepworth made a comment to Mrs Boulton about her having good literacy skills having seen some of her emails. This was of importance to Mrs Boulton's specific role and so this was a real plus to have someone who had the ability to communicate in a manner that was grammatically correct.

19. The outcome of this meeting is recorded at page 127 in the review form document. There was one action point for the claimant to undertake as

recorded in this review form; that relating to the Sketch Up account. Mr Harris gave good feedback, recording that he was more than happy with Mrs Boulton's work. The review shows that Mrs Boulton had made a good start other than her attendance which needed some work, although this point need not be laboured and, indeed, was not laboured at the meeting. There were no specific concerns raised at this point with Mrs Boulton. If there were any concerns held by Mr Harris at this point we would have expected them to be recorded in the review form.

20. The next review meeting was scheduled to be on 4 December 2020, the probation end date at that point was still anticipated to be 12 January 2021.

21. On 17 November 2020, Mr Harris emailed the claimant, page 129, to instruct that they start using the Teams Task Planner and that the claimant was to take ownership of this. She was to start assigning tasks to various people to set realistic deadlines and chase. Specifically he said that information should be put in the teams task planner:

    - "when you need to set up a new quote
    - When you see things in emails that someone needs to respond to
    - Other tasks you need completing or response to questions / queries so you can complete tasks
    - Any information or documents you need us to complete to set up a site folder
    - And anything else you can think of."

22. On 4 December 2020, the claimant was invited to a second review meeting as was Ms Hepworth. That meeting took place on 8 December 2020. A note of the outcome of that meeting is found on pages 130, 131 and 131(a), all of which contain the same information in various forms.

23. The intention from Mr Harris was to hold a second review meeting; it appears in his calendar at page 218. However, we have no review form that was completed at this meeting. The contemporaneous evidence we have as to the content of this meeting is at page 130, in an email sent by Mr Harris the following day on 9 December 2020. That email ends with "I think that covers everything we spoke about in your review yesterday". We find that this was a formal review meeting in which the paperwork was not done properly. Ms Hepworth did not attend but was copied into the email.

24. The email from Mr Harris makes no comment as to the claimant's performance. There is no performance rating as per the review form following the first meeting.

25. The copy of the email at page 131(a) shows us a screenshot of that email in Ms Hepworth's inbox: we can see that there is a follow up flag attached to the email, dated 19 May 2021. It is the respondent's case that this is evidence of Mr Harris extending the claimant's probation to 19 May. This

email of 9 December was sent five weeks before the end of the claimant's anticipated probation. There is no mention of extension of probation in the body of the email. We would expect to see that, given Mr Harris did say that he thought his email covered everything that was discussed in the meeting. It also seems too long a period (four months) for an extension. We reject the respondent's position that Mr Harris extended the claimant's probation until 19 May 2021.

26. Regarding the action point from the first review meeting recorded at page 127; this action point was a general "getting familiar with" the Sketch Up programme. This was mentioned again in the second review meeting and is referenced at page 130, which sets out that the claimant needed to get Leon's log in details. We find that, by the time of the second review meeting, the claimant had done very little, if anything, regarding Sketch Up. We have no good evidence that the claimant completed the action point for the first review and we find that she still needed to take basic action regarding Sketch Up as set out at page 130, which states:

    - "[Mrs Boulton] to see if she can find out [Leon's] log in details and obtain account access.
    - [Mrs Boulton] to then when time allows refresh skills
    - [Mr Harris] to choose a project to compile a drawing on"

27. At this point in time, the claimant had lost the opportunity to ask Leon for his access code as he had left the respondent's employ by this point. The claimant was not being proactive about Sketch Up and there was no sense of urgency to obtain the information before Leon left.

28. The claimant makes the point that this email shows Mr Harris willing to give her ownership specifically of training and PPE. We accept the respondent's interpretation of this email, that ownership would be handed over only after the completion of the steps that are recorded as precursors to that ownership. For example, in relation to training, page 130 records that:

    - "[Mrs Boulton] to complete cost reference of all information.
    - [Mr Harris] and [Mrs Boulton] to then review and fill in any blanks etc
    - [Mrs Boulton] to then take full ownership of training, issue training request to [Mr Harris] then booking and liaising with the operatives."

29. This is an indication that there is room for growth in the role the claimant holds rather that it being an endorsement of her high skill set. We note particularly Mr Harris' comments at the bottom of his email which say:

> "If you work [through] the above and when needed just block some time out in my diary for section we need to work on together don't leave it for me to just say "ok we will do that tomorrow"."

30. We find that this indicates that Mr Harris had some feeling that Mrs Boulton needed to be prompted to be more proactive; to recognise that tasks needed to be done within a certain timeframe and plan accordingly, rather than leaving things to the last minute.

Tomlinson client

31. We then come to discuss the issues regarding the client Tomlinson which primarily start in November 2020 however there is prior reference to the page 140 which is an email dated 14 October 2020.

32. On page 140 there is a request from Tomlinson asking Mr Harris for a site visit at the beginning of a new project. This exchange on page 139 and 140 demonstrates to us that Mrs Boulton did have access to and used Mr Harris' inbox, replying on his behalf where appropriate.

33. The claimant emailed Tomlinson on 29 October 2020 (page 266) to ask that Tomlinson complete certain documents; the pre-demolition questionnaire and due diligence report.

34. On 13 January 2021, on the same page, the claimant chased this. We note that there is no evidence of her having chased this paperwork earlier.

35. Returning then to November 2020 and specifically 24 November 2020; page 136 contains an email from Tomlinson following the respondent's quotation asking for further information, setting out that the proposed start date will be 11 January 2021 for demolition.

36. On 11 December 2020, at page 133, Tomlinson again emailed Richard Harris asking him to complete forms and return with copies and evidence in support.

37. That same day Mr Harris handed that duty over to the claimant to pull together certain information.

38. Again, on the same day, Tomlinson put a very brief pause on the work but the pause was lifted later that same day.

39. On 18 December the respondent closed for two weeks over Christmas. During that closure, on 22 December 2020, page 132, Tomlinson chased their information.

40. The first day back for the respondent was 4 January and on that day at page 135, Mr Harris replied to Tomlinson's enquiry of 22 December.

41. On 4 January 2021, Tomlinson chased Mr Harris and on 4 January Mr Harris chased the claimant. At the end of the day, on 4 January, the claimant asked Ms Hepworth for information to help her fill in the forms. That request is at page 265.

42. On 5 January, at page 267, Mrs Boulton asked Mr Harris for help with gathering some of the documents.

43. On page 266, on 13 January, Mrs Boulton updated Tomlinson .

44. On 14 January she forwarded documents to Mr Harris regarding supplier and contractor build forms.

45. We considered what this communication with Tomlinson showed us. We find that it demonstrates that Mrs Boulton left matters until she was chased; she did not provide the client with an update until 13 January following their latest chaser on 4 January. Even when Mr Harris chased on 4 January the claimant left it until last thing in the day to ask Ms Hepworth for information.

46. The claimant says that this evidence shows she was chasing people and was being proactive. We find that, although the claimant can be said to have asked Mr Harris and Ms Hepworth for information, this is not her being proactive. She only ever reacted to being chased herself and did not reply in a timely fashion to enquiries and chasers, both from the client and her line manager. Even when the claimant chased people she did not do so within a reasonable time limit, demonstrated by page 266 in which she left it three months to chase Tomlinson for a response to a prior email.

47. Given that demolition was due to start on 11 January 2021 we find the claimant was not acting proactively to ensure that the required paperwork and deadlines were met and we can see why there was a need to use the task planner to ensure some order to time sensitive tasks. As at this point in December/January, we find that more formality and planning was needed regarding the timetable for paperwork required for demolition projects.

South East Water

48. Another matter raised with us relates to South East Water and a request for meter readings in which the claimant became involved in November 2020. We have paperwork in the bundle dating back over some time prior to November 2020: we record it simply for completeness.

49. On page 148 in September 2019 South East water emailed the respondent, renewing the annual hire and asking for meter readings. On page 147, this was responded to by Kate Booker within five days.

50. The email chain goes on over the next few pages. On 22 April 2020, there is a new request for the latest meter readings. The same request is made on 23 June, 7 July, and 21 July on page 146, 12 August, 24 August and on 2 September at page 145. On 2 September, Leon replied asking for details at page 145 and South East Water in turn replied.

51. On 7 September 2020, Leon provided the meter reading to South East Water on page 143.

52. On 1 October 2020 South East Water reminded the respondent of the annual hire expiring that day and on 5 October Leon replied on page 142.

53. On 9 November 2020 at page 142 South East Water again asked for meter readings. Leon was chased on 24 November and on 24 November Richard

Harris asked the claimant to do this with Nick Woodley's assistance. It looks to us like Leon had left at that point and someone was monitoring his inbox, hence why Mr Harris forwarded the request to the claimant.

54. On 6 January, South East Water chased (page 141) and Richard Harris on the same day forwarded the chaser to Mr Woodley.

55. The next day, 7 January, Mrs Boulton was able to supply the readings to South East Water meaning that Mr Woodley had provided the information to her within the last 24 hours.

56. We note from this lengthy chain that Leon had to do some work to obtain meter readings from the respondent. We do not agree with the respondent that this particular example is a clear example of the claimant's poor performance. We understand it maybe difficult for Leon or the claimant to get someone's assistance to actually go and obtain the meter readings. We also note that, by the time the claimant was involved, the request was for a routine meter reading and not as time sensitive as when an annual renewal is coming up. We also accept that Mr Harris' instruction to Mr Woodley would have had more weight than any chasing from the claimant, given their respective seniority in terms of their positions.

57. That leads us to January 2021.

January 2021

58. On 11 January at page 149(a), Mr Harris emailed saying that three people were off with positive tests or self-isolating because of Covid-19. We accept that they were site workers and were not workers in the office. Mr Harris sent a general reminder of the importance of everyone doing their bit to protect everyone else in relation to the pandemic. He also said that, if anyone had any concerns, they should feel free to raise them with him – page 149a. We find that the respondent was willing to listen to any covid concerns and offering to listen at that time.

59. On 19 January 2021, the claimant was emailed by a client at page 157. The client, Dominic Jankowski, requested some fairly basic information relating to missing information on induction and training logs that was needed before a job could start. On 20 January she was chased (page 156), and then Mr Harris replied explaining the claimant had been off sick and that they would "jump on this tomorrow".

60. The information was provided on 25 January, page 160, and therefore took three working days to reply to the client's request. We do not consider that this is by any means a huge dereliction of duty but does demonstrate to us that the claimant was not proactive in completing tasks set for her, particularly given that we find that there were no new jobs starting after 18 January 2021 until 15 February 2021 – page 268: this was evidence produced mid-way through the final hearing, from Ms Hepworth, who had gone back to the office to check what new demolition jobs had started from January 2021 onwards. The claimant was unable to challenge this evidence.

The alleged final probation meeting

61. On 20 January a meeting is held between the claimant and Mr Harris. We are not satisfied that the claimant was expressly told in this meeting that she had passed her probation. We have no paperwork to reflect or summarise the discussion in this meeting, not even of the kind we have seen in relation to the second review hearing which was just an email summary. There was no email or review form to show us what was discussed. There was no invitation to the meeting. The claimant told us that this meeting was held on an ad hoc basis, given that the claimant had returned from being off sick for 1.5 days. The only contemporaneous evidence we have is the reference to "a chat from the other day" that Mr Harris made on 22 January at page 158.

62. We notice that in the outcome of the second review meeting at page 130 Mr Harris specifically referred to that meeting as a review meeting. We consider that, if Mr Harris had intended the meeting on 20 January to be a formal end of probation meeting he would have referenced it as such in his email at page 158 rather than a "chat".

63. What we do have is page 193(a), which is an email from Mr Harris to Mrs Boulton on 8 April 2021 in which he says:

> "Maybe [sic] [best] for you to write something like. During all of my probations [sic] reviews no issues of capability were raised and in January my finally [sic] probation review took place, again with no issues raised and my [position] made permanent. I am able to provide written confirmation if needed should this matter need to be reviewed by a tribunal. Whilst I understand the employee no longer works for J Mould who carried out the reviews I'm fully aware his comments from the reviews were noted and circulated to Jennifer [Hepworth] via email."

64. We note that Mr Harris suggests the claimant says "all of my probationary meetings" rather than specifically "three review meetings". He also said that comments from the reviews were noted and circulated to Ms Hepworth. This only applied to review meetings 1 and 2. His text does say that a probation review took place in January. However, this is prefaced by him saying "It may be best for you to write something like" as opposed to this message confirming that this is actually what happened. He was advising her to say something that may help her case. In any event, this text is retrospective some months after the events.

65. The reason why Mr Harris told Ms Hepworth he could not come as a witness to this hearing was because he could not remember anything – page 228H. At this point we will deal with what we consider of Mr Harris' credibility on the documents we have in the bundle, including those at pages 193A, and 228A - 228I. We are inclined to agree with the respondent, that Mr Harris' documents do not take us any further. It appears he is inclined to attempt to please the person he is addressing at the specific time. We understand that he was angry towards the respondent and had serious personal matters going on in the spring of 2021. We accept that the most credible thing we can take from his various documents, submitted on the part of both the claimant and respondents, is that he has a little memory of relevant events.

We therefore do not place much weight on any of his evidence whether it helps the claimant or the respondents, particularly as he has not attended to be questioned.

66. We note specifically a text from Mr Harris to the claimant retelling of his running into Mr Webb on 5 August 2021, Mr Webb looking embarrassed and blaming Ms Hepworth for the claimant's dismissal. We have heard from Mr Webb on this, who told us that this was not the case and that he had in fact shut down the conversation with Mr Harris as it was taking place in front of clients. We found Mr Webb to be a credible and honest witness. We compare this with our findings on Mr Harris' documentary evidence above, and the weight we attach to them, and the fact that Mr Harris is not here to be questioned. We therefore accept the version of events as described by Mr Webb.

67. We find, returning to the meeting on 20 January, that the most likely run of events is that Mr Harris called the claimant into an impromptu meeting because she had been off sick for a couple of days, and he needed to talk to her about work. We find that he may well have said something encouraging about her work and that it was all going fine; however, we find that he did not specifically say she had passed her probation. We accept that, given the lack of information and given there was no change to the end of probation date of 12 January, it was reasonable for the claimant to assume that she had passed her probation. However, formally, this was not the case.

68. Ms Hepworth had not been advised of the claimant passing her probation. We have already found she is routinely involved in that final stage due to the change in employer obligations. Therefore, although it was reasonable for the claimant to understand she had passed her probation, in fact, she had not officially done so. It seems to us there is a potential procedural gap in the probation process at the respondent and that Ms Hepworth has no procedure by which she can confirm that all employees under probation have passed, given that she is reliant on being kept in the loop by her managers.

69. The meeting on 20 January is alleged to be a meeting in which the claimant made her first alleged protected disclosure regarding concerns about Covid-19. We do not accept the claimant's evidence at paragraph 21 of her statement that there were no screens on her desk until after the meeting with Richard Harris on 20 January. We have photos from the claimant which she has dated 21 January which show screens against two sides of her desk, one tall and one short – page 176. We do not accept that anyone could have put those screens up overnight. Mr Mould told us in his evidence that screens were put up over a weekend, as did Mr Webb. Further, we were told that the handyman, Ben, was engaged to source the screens and fit them. We find that this could not have happened overnight to answer a request from the claimant on 20 January. We accept Mr Webb and Mr Mould's evidence as well as their evidence that screens were put up for those who were in the office the most.

70. We note, however, in terms of the claimant's evidence on disclosure at paragraph 41 of her statement, it just says she discussed screens rather than the putting up of screens. We accept the claimant did discuss with Mr Harris that she had concerns based on her perception that measures in the workplace were not sufficient and she was worried about Covid-19 in the workplace. We accept that this is a disclosure of information and we will return to whether or not it equates to a protected disclosure in our conclusions later.

71. We at this point turn to address Covid-19 and the steps taken by the respondent at around this time, at the beginning of 2021.

72. We find that the respondent took all reasonable steps to make the workplace Covid-19 secure. Specifically, the respondent arranged antiviral fogging every week on a Friday (as the office had to be clear for 24 hours); putting up signs in the office enforcing social distancing, which can be seen in the photograph at page 178; making masks and hand sanitisers available; and regular cleaning with antibacterial equipment which was available for individuals to use as well. At the weigh-bridge, where vehicles came in to be weighed, adjustments were made to avoid or restrict face to face contact. The respondent created a cabin in which paperwork could be exchanged or dropped off; they did encourage mask wearing, see Mr Harris' text we referred to above, of 11 January. They were conscious of the need to comply with Covid-19 guidance, and reminded staff where necessary. For example, Ms Anstey's email at page 173 states that she had gone for a walk and found three members of staff not socially distancing. She said she was unable to see this and not react. She then states:

> "So just in case you need reminding '**CAN ALL STAFF PLEASE ENSURE THAT THEY WORK SAFELY WITHIN THE TWO METER DISTANCE RULE WITHOUT EXCEPTION!'"**

73. The respondent was also open to taking further reasonable steps on request such as requests to work from home.

74. Ms Hepworth at paragraph 25 told us that she had gone on a training course regarding Covid-19 in the workplace. We accept this and note that this evidence was not challenged.

75. There were also further steps that we find the claimant could have taken, such as opening windows, wearing a mask or visor and putting up signs over her desk. We also note that, on 25 January, the claimant was going to take over PPE issuing and ordering.

76. In terms of the layout of the office, we have the sketch plans, both of which are numbered 174(a), in which we can see that the desks within the demolition office are over two meters away from each other. We do not accept the claimant's evidence that people gathered by her desk when using the printer as this would not have made sense looking at the layout of the office, and the location of her desk compared with the printer. We further note Mr Webb's evidence that the only full-time person in the office was the

claimant, although Richard Harris was in a fair bit, but their desks were some distance apart. There were normally around two drivers coming in and out of the demolition office; there was a high screen by the door entering the office, a sign on the door setting out how many people could be in the office at any one time, and a and a line on the floor to demarcate distancing between people waiting to be seen. We have no first hand evidence of anyone else being concerned about measures the respondent had taken, other than the claimant.

77. On 22 January 2021, Mr Harris gave the claimant the instruction to start booking in pre-start meetings (meetings amongst the team, prior to a demolition project starting); that is at page 158 of the bundle in which he states:

> "Please can you have a look at all start dates with [sic] have and book in diary for yourself, Mick, Andy and me to have a pre-start meeting for each of the jobs. A min of 7 working days before the job is due to start, so we can go thought [sic] the job in the office and make sure we have everything we need."

78. We find that the claimant did not book in meetings as instructed. There were new jobs starting after 22 January, see page 268. There are no calendar entries on the claimant's or Mr Harris' diary calendars setting out a pre-start meeting for any of these jobs. The claimant said it may not have been in her diary or she may not have booked it into her diary. However, we do not accept this, as she was to be present at the meetings according to page 158 and therefore it would need to go into her diary as well as others' calendars.

79. Mrs Boulton also said they may have had impromptu meetings when all the required participants were in the office but, given the amount of time some of the members of staff were out of the office on site, we find it unlikely it would be easy to find a time when all required personnel were present, other than by booking it in the diary, particularly when these meetings would be time sensitive. In any event, the instruction from Mr Harris was to book meetings into the diary: therefore, even if they took place on an impromptu basis, they still should have been recorded in the diary.thre specific

80. On 28 January 2021, the claimant requested her contract again from Ms Hepworth. This is at page 161(a). On 3 February Ms Hepworth replied with a copy of the contract, page 162.

81. On 11 February a third screen was added to the claimant's desk; that can be seen at page 180. We note it was a lower screen as opposed to one of the high screens. This meant that, by this stage, the claimant had one high screen against the right hand side of her desk which was the nearest to the entrance to the office, and two lower screens in front of her and to her left. Her back then was to the wall of the office.

Mr Harris' departure

82. On 4 March 2021, Mr Harris left the respondent's employ acrimoniously and did not return. At page 181 Mr Webb emailed the claimant on this day to reassure her. The claimant said that this is evidence that Mr Webb was giving her an indication that her job was secure. We accepted Mr Webb's evidence as credible that Mr Webb just wanted to reassure the claimant and was basically saying "don't panic".

83. Mrs Boulton's evidence was that she and Mr Webb had a conversation on this day. This evidence is set out at paragraph 48 of her statement in which she says that Mr Webb said he had:

> "spoken with John Mould and Jay Mould who were all willing to see me progress into a more senior role. Mr Webb explained that I was capable of more than my current role and was performing very well."

84. We find this evidence to not be credible considering Mr Harris, the demolition manager, had just walked out of his job with no handover and no notice; we find it unlikely that the most pressing thing for Jay and John Mould to discuss with Mr Webb would be Mrs Boulton's role. We accept Mr Webb's evidence that what was discussed on that day was the two site jobs that Mr Harris had left having been working on them, and how they were going to be managed. Mr Webb specifically denied that this conversation with the claimant happened as she suggested, as did Mr Jay Mould.

85. On 5 March 2021 the claimant alleged she had a conversation with Jay and John Mould. Jay's evidence to us was that the conversation was that:

> "We need to carry on with the work we were doing. One person leaving doesn't mean we are folding. We need to crack on with the work in front of us."

86. The thrust of Jay's communication to the claimant and others in the workforce was that work needed to continue and nothing should fall through the gaps; that Mrs Boulton was to let him know of anything in Mr Harris' diary that needed to be done. We do not accept that there was a discussion about the claimant's career progression on that day. Again, we consider it unlikely that the claimant's career would be one of the first things that Messrs Mould considered to be pressing at this time.

9 March 2021 conversation

87. On 9 March 2021, the claimant and the second respondent had a meeting at which Mrs Boulton told Ms Hepworth that she was pregnant. We also find that Mrs Boulton raised concerns about people coming in to the demolition office in relation to the Covid-19 risk and people not social distancing. This is said to be the second protected disclosure. We will return to whether or not this amounts to a qualifying disclosure in our conclusions.

88. In response to the claimant's concerns, Ms Hepworth advised the claimant that she could put up signs and verbally remind people about social distancing. We note that the claimant on her own evidence did not put up any signs around her desk until 30 March; that is at paragraph 68 of her statement.

89. At this point we turn to the issue of a risk assessment.

90. The claimant did not ever formally notify the respondent of her pregnancy in writing via a MAT B1 form. The claimant's case is that notification in writing was given in the emails on 15 and 22 March at page 185. We are not convinced by this argument but, in any event, if we accept that written notification was given, we find that the first respondent had done an informal risk assessment to ensure the safety of the claimant whilst at work. By this time, Ms Hepworth had done a general risk assessment considering women of a childbearing age and knew the risks the claimant's job presented. The only relevant risk within the claimant's role was manual handling, which we find the claimant was warned about on 9 March. This is at paragraph 25 of Ms Hepworth's witness statement and was not challenged.

91. Ms Hepworth had also identified specific roles that would lead to specific hazards requiring immediate adjustments when someone became pregnant. The claimant's role was not one of them. Further, Ms Hepworth had, at the point of Covid-19 hitting, performed a risk assessment of the workplace in relation to Covid-19, including a risk assessment for those falling within the vulnerable category such as Ms Hepworth herself (given her asthma). Once Mrs Boulton became pregnant, she also fell within that vulnerable category: a risk assessment had already been done to ensure vulnerable people had a safe working environment during the Covid-19 pandemic. We accept that the risk assessment was adequate and note that Ms Hepworth was content to work in the office come March 2021 herself, despite being vulnerable. We recall she had been on a course and was always aware of health and safety issues given the specific nature of the respondent's work.

92. On 15 March 2021, the claimant emailed Ms Hepworth to confirm appointment dates and to ask some questions about her maternity leave and pay; these are on pages 185 and 186.

93. The claimant points to the respondent's failure to respond to this email as supporting evidence that Ms Hepworth had decided to dismiss her. We do not accept this. We do not find Ms Hepworth's evidence that this email did not require a reply compelling given that specific questions were asked. However, we do accept Ms Hepworth's evidence at paragraph 27 and 30 of her statement as to why she did not respond, that being that after Richard Harris' departure there was a need to renew the asbestos licence as promptly as possible, and submit the relevant applications and paperwork. There were also other matters that had arisen due to Mr Harris' sudden departure.

94. On 18 March 2021, "Sophie" started working one day a week from 9am until 3pm.

95. On 22 March the claimant sent the email at page 185 which is said to be the third alleged protected disclosure. We accept that this is just about a disclosure of information, given that it can be reasonably inferred that reference to people becoming "relaxed" means that there was a lack of

social distancing, allegedly. We return to whether this is a qualifying disclosure in our conclusions.

Dismissal

96. On 30 March 2021, Mrs Boulton was invited to a "chat" by Ms Hepworth; that is at page 187. The claimant was asked to bring with her a task list which we understand had previously been requested of her by Ms Hepworth. In terms of this task list we find that there was no meeting of minds as to what the request for a task list meant. We accept that the term "task list" is vague and could reasonably be understood as a list of tasks that do not come up every day but are included within the job role more generally.

97. We accept that Ms Hepworth had not decided to dismiss the claimant at the point of asking the claimant for a chat, or at the commencement of the meeting. The purpose of the meeting was to understand what Mrs Boulton was working on, particularly given that Mrs Boulton had not completed the task that Ms Hepworth had set her, regarding completion of a spreadsheet by Monday 29 March. We accept that Mrs Boulton was asked what work she had been doing recently and was unable to give a clear answer. Although we accept she may have been caught off guard by that question, we find it a reasonable question to ask and one that should have been capable of being answered by Mrs Boulton at the time. The claimant produced a task list at page 182 which is a generic list of her job responsibilities; that list included taking minutes of demolition management meetings.

98. By this time, demolition management meetings had not been taking place for around four months. The last notes received by Ms Hepworth of such meetings were in November 2020 and we note that these meetings had all been cancelled in 2021, looking at the work calendars we have in the bundle; this means that the claimant would not have had to produce any minutes. That means that the task list provided on page 182 by Mrs Boulton was out of date.

99. Ms Hepworth had called the meeting to understand why the spreadsheet had not been done by the deadline set. The reason given by the claimant was that she had been busy, but then had been unable to tell Ms Hepworth what she had been working on. Ms Hepworth, during this meeting, determined that Mrs Boulton would not meet Ms Hepworth's high standards, and so decided to dismiss her.

100. In the dismissal letter at page 188, three specific points were raised by Ms Hepworth. We note that those three points are prefaced by way of example, which indicates to us that this is not an exhaustive list. The first example is that the claimant did not complete the task given to her, to input into a spreadsheet the information regarding exposure records as requested, by the deadline set of Monday 29 March. This meant that Ms Hepworth had to complete them herself. Although Mrs Boulton said that she had other work to do which put back her starting this exercise, we have not seen evidence to the effect that the claimant was so busy and we note that she did not start

this exercise until the Friday afternoon before the deadline. This demonstrates to us that Mrs Boulton was inclined to leave tasks until the last minute. This is further evidenced by Mrs Boulton's point to us, that the deadline was in fact pushed back to the Thursday, ,meaning she could have been left to complete the task on Monday or later. This just demonstrates to us her mindset that matters can be left to be done late in the day. We accept that a quality looked for in an administrator by Ms Hepworth is a proactive nature, and Mrs Boulton did not possess this.

101. In short, the claimant had been asked by her superior to do something by a set deadline and had failed to complete it.

102. In relation to the second and third tasks specifically mentioned on page 188, we have not heard a great deal of evidence on these matters. Those tasks were (second) producing a list of tenders that have been sent to clients, and (third) providing a list of staff that the claimant wanted included in the tray system for paperwork.

103. We note Mrs Boulton's appeal letter at page 192. In relation to the second task, she says: "I had not been asked for this by anyone since Mr Harris left so I was unaware it was still required." We also note Mrs Boulton relied on her need to arrange urgent training as the reason Task 2 had not been completed. The fact that the training task was said by the claimant to be urgent we find means that it was left late in the day to arrange. Mrs Boulton was by this point responsible for training and so the fact that it was left late was down to her.

104. On Mrs Boulton's own case, as set out in her appeal letter, we find this only compounds our view that she was reactive as opposed to proactive and left matters until they became urgent or she was chased.

105. In relation to the third task, we have Ms Anstey's evidence at page 206 in which she says:

> "My only experience is when I suggested we implement a tray system for all site based staff. I mentioned this to Claire and asked her if she could come up with a list of staff and I would do the same, just in case I had missed anyone. When the trays arrived I again asked Claire to produce a list of who she felt required a tray but did not receive one."

106. The claimant's contemporaneous evidence on this is in her appeal letter at page 192 in which she says:

> "The tray system was not something that I had suggested or requested. I assume they were therefore mainly put up for the benefit of others distributing internal office paperwork, however, nobody had put any names to them.
>
> The system I was using to distribute paperwork was working perfectly fine however I was asked if the trays would be beneficial to me and I said perhaps they would be useful for the site supervisors. I did not realise that I was expected to provide a list of site supervisors, had I known then of course I would have provided a list. … I was not asked to produce a list to the best of my recollection,

> and this has been added in my view, simply to support the company's position in dismissing me."

107. Again, the way this reads to us is that the claimant did not consider the task required would be useful to her and so did not take any steps to implement this system. We note that Mrs Boulton told us that she was not asked to produce a list to the best of her recollection. We find that either she was asked to produce a list or, if she was not, then her role required her to be sufficiently proactive to take steps to implement the tray system which was clearly discussed with her (and trays ordered accordingly).

108. A specific allegation in terms of the detriment claim is made, that the criticisms made of the claimant on 30 March were unfounded and unwarranted. We find the criticisms made of her were genuine and reflected her performance standard. We have heard evidence regarding the task planner, Sketch Up and Tomlinson all of which we find demonstrate that the claimant was reactive in her role and not sufficiently proactive. She was either leaving tasks until chased or not doing them when she did not see the benefit of them. Even if the criticisms were *objectively* unfounded or unwarranted, looking at a reasonable employer, we find that this is due to Ms Hepworth having high expectations of herself and her workers. Put simply, the claimant did not meet those high expectations. Thus, even if the criticisms were unfounded or unwarranted, the reason for the criticism was that Ms Hepworth had particularly high expectations of her workforce and even higher expectations of herself.

109. Another detriment is said to be subjecting the claimant to a sham disciplinary process on 30 March. We have already found that Ms Hepworth did not set out to embark on a disciplinary process when she asked the claimant to attend for a chat on 30 March 2021. There was no sham. The claimant had been employed for under two years and thus the ACAS Code of Practice relating to disciplinary procedures, including poor performance, did not apply. Ms Hepworth had a discussion with Ms Boulton that led her to conclude that the claimant was not meeting (nor would ever meet) her high standards and therefore decided to dismiss her during that meeting, citing in her letter three instances of poor performance.

Reason for dismissal

110. We turn then to the reason for dismissal on 30 March. We accept that what acted on Ms Hepworth's mind in the meeting of 30 March was her frustrations as to the claimant's performance and the inability to give clear information about what work she (the claimant) had in fact been doing. The whole point of the meeting for Ms Hepworth was to understand what the claimant had been doing, and Mrs Boulton was not able to shed any further light on this point. Having heard Ms Hepworth's evidence as to her reasoning for dismissing the claimant, we accepted this as genuine.

111. The lack of disciplinary procedure we find is due to the fact that Ms Hepworth was not informed of a completion of the claimant's probation by Mr Harris; she therefore understood that she did not need to follow the

respondent's procedure. We also find that Ms Hepworth, had she determined to dismiss the claimant in advance of the meeting, would have invited Mrs Boulton to a formal meeting as opposed to asking her for a chat. Ms Hepworth is someone who we find abides by the rules when they are legally required, even if she does not always go above and beyond what is legally required. The fact that Ms Hepworth only asked for a chat supports our finding that there was no premeditated decision to dismiss at this meeting. The claimant was also under two years' service and therefore the respondent was not required to follow a formal process in any event.

Post dismissal

112. The claimant appealed the decision to dismiss. We have already referred to the letter which starts at page 189. Ms Anstey was the Appeal Officer. It is the claimant's suggestion that Ms Anstey was primed not to allow the appeal. There is no evidence to suggest this. We find that Ms Anstey did a reasonable investigation, interviewing three witnesses and providing a statement herself.

113. In terms of what happened to the claimant's role after her dismissal, it is the respondent's position that the role was made redundant after the claimant's departure. Following her departure, the claimant's work was subsumed by Sophie who was, at that point, working one day a week 9am to 3pm. "Danielle" was then employed as an administrator on £22,000 a year from July 2021 full-time. This role, we find, was a more junior role than that of the Departmental Support Assistant role that the claimant held, and was paid £8,000 less a year accordingly.

114. In August and September 2021, Danielle left the respondent to go elsewhere.

115. At around the same time Sophie went up to two days a week doing 9am to 3pm. Sophie was completing administration and demolition projects and pre-qualify questionnaires in order that the respondent could tender and maintained the respondent's accreditation.

116. Sophie went on maternity leave in December 2021 but did a few hours of work for the respondent in January, February and March 2022.

117. When asked by the Tribunal where the rest of the claimant's role went, Ms Hepworth told us that there was no "rest". We find that the claimant's role on her departure was removed from the company's structure and not replaced.

The law

<u>Direct pregnancy discrimination under s.13 of the Equality Act 2010</u>

118. Direct discrimination is set out therein and says that:

> "13 Direct discrimination

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

119. There are two parts of direct discrimination; the less favourable treatment and the reason for that treatment. Sometimes, however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was. First, if the reason is the protected characteristic, then it is likely the claim will succeed – Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.

120. The Employment Appeal Tribunal in the case of the Commissioner of the City of London Police v Geldart [2020] ICR 920 confirmed that, where a case is advanced under s.13 on the grounds of pregnancy, the case of Webb v EMO Air Cargo [1993] IRLR 27 applies, in that there is no need for a direct comparator.

121. The correct approach is to determine whether the protected characteristic, here pregnancy, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572.

122. The ultimate question to ask is, what was the reason why the alleged perpetrator acted as they did, what consciously or unconsciously was the reason – Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine and is a different question from the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator, as well as taking surrounding circumstances into account.

Unfavourable treatment under s.13 of the Equality Act 2010

123. This claim is an alternative to s.13; a claimant cannot succeed on both s.13 and s.18. This section again does not require a comparator to be shown to have enjoyed different treatment to the claimant. Pursuant to s.18, a woman will suffer unlawful discrimination if she is treated unfavourably during the protected period that includes a part during which she is pregnant on the basis of her pregnancy.

124. The reason for unfavourable treatment, whether conscious or unconscious, must be pregnancy, which has been interpreted as meaning pregnancy must be an "effective cause" of the treatment of which is complained – O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Risk assessments

125. Turning specifically to deal with risk assessments, there has been no reported case to date on any successful complaint of sex discrimination based on a failure to undertake a general risk assessment in accordance with the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations"), Regulation 16. The obligation to undertake and, if

necessary, act on a specific risk assessment only arises as the law currently stands when the employee has notified the employer in writing of her pregnancy. That is at Regulation 18 of the 1999 Regulations.

126. The point was directly considered for the first time by the Employment Appeal Tribunal and the Court of Appeal in turn in Madarassy v Nomura International Ltd [2007] EWCA Civ 33. The conclusion reached was that there was no absolute obligation on an employer to conduct a separate risk assessment for each employee who discloses her pregnancy.

127. Madarassy was then followed by the Employment Appeal Tribunal in O'Neill v Buckinghamshire County Council [2010] IRLR 348. Again, the need for a risk assessment was held not to have been made out in the absence of evidence that a particular job involved a risk to health and safety deriving from any process, working conditions or agent. A bare assertion that the employee was exposed to stress was not enough.

128. There is thus no general or universal obligation to undertake a risk assessment whenever an employee discloses her pregnancy, albeit it may be prudent to do so. There must be evidence of some risk before the obligation is engaged.

Protected disclosures under s,43B of the Employment Rights Act 1996

129. The Employment Appeal Tribunal has recently held in the case of Kealy v Westfield Community Development Association [2023] EAT 96 that there are two essential terms to consider when deciding whether there has been a protected disclosure. The first is whether there is a qualifying disclosure; that requires us to look at five steps as set out in the case of Williams v Michelle Brown Am UKEAR/0044/19 by His Honour Judge Auerbach in the Employment Appeal Tribunal. Those steps that need to be satisfied in order to prove a qualifying disclosure are as follows:

    129.1. There was a disclosure of information;

    129.2. The worker must have a belief in that disclosure being in the public interest;

    129.3. If the worker has that belief it must be reasonable;

    129.4. The worker must believe that the disclosure tends to show one of the factors set out in s.43B (1)(a) to (f); and,

    129.5. If the employer has that belief, the belief must be reasonable.

Reasonable belief

130. The requirement that a disclosure tended to show in the reasonable belief of an employee one of the matters set out in s.43(B)(i)(a) to (f) is both an objective and subjective test. It requires the Tribunal to determine whether the claimant had the requisite belief and whether, if so, that belief was

reasonable – Chesterton Global Ltd (t/a Chestertons) v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731 CA.

131. As put in the case of Soh v Imperial College of Science and Technology EAT 0350/14 there is a difference between, "I believe X is true" and "I believe that this information tends to show that X is true". It is the latter not the former that we require.

Public interest

132. In terms of whether a claimant reasonably believes that their disclosures is in the public interest, this is a relatively low threshold. The list of factors set out for the Tribunal to consider are set out the case of Chesterton and include:

132.1. The numbers of the group whose interest the disclosures serve;

132.2. The nature of the interests affected, and the extent to which those interests are affected by the wrongdoings disclosed:

132.3. The nature of the wrongdoing doing disclosed; and,

132.4. The identity of the alleged wrongdoer.

Health and Safety disclosures under s.44 of the Employment Rights Act 1996

133. S.44 of the Employment Rights Act provides that:

> "44 Health and safety cases.
>
> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
> …
> …
>
> (c) being an employee at a place where—
>
> (i) there was no such representative or safety committee
> …
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety."

134. The employee must reasonably believe that their working conditions or other circumstances are harmful or potentially harmful to health and safety and they must raise their concerns with the employer in a reasonable manner.

Detriment claims under sections 47B, 47C and 44 of the Employment Rights Act 1996

135. A detriment has been held to exist if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment – Ministry of Defence v Jeremiah [1980] ICR 13. In other words, if the claimant has suffered a disadvantage compared to other employees, it would be considered a detriment.

136. The causative test under the detriment claims is less strict than for automatic unfair dismissal in that the protected disclosure or pregnancy or health and safety disclosure need only "materially influence" the decision maker, which means that it must be more than a trivial influence – Fecitt and others v NHS Manchester [2012] ICR 372.

Automatic unfair dismissal

Burden of proof

137. In the index case, the claimant does not have the requisite two years' service under s.108 of the Employment Rights Act 1996 to bring an ordinary unfair dismissal claim. The legal burden of proof therefore rests with her in this case to prove, on the balance of probabilities, that the reason for dismissal was protected disclosures or pregnancy or health and safety disclosure – Smith v Hayle Town Council [1978] ICR 996 CA, Ross v Eddie Stobart Ltd EAT 0068/13. In practice, this requires the employee to present some evidence on first impressions that he/she was dismissed for the prohibited reason. Once that is done, it is for the employer to present evidence to the Tribunal to the contrary.

Reason for dismissal

138. The reason for dismissal has been held to be the set of facts known to an employer or it may be a set of beliefs held by it which causes it to dismiss the employee – Abernethy v Mott, Hay and Anderson [1974] ICR 323 CA.

139. An automatic unfair dismissal claim will only succeed where the Tribunal is satisfied that the principal reason for the dismissal was, in this case, protected disclosures, health and safety disclosures, or pregnancy.

140. "Principal reason" has been held to be the reason operating on the decision maker's mind at the time of making the dismissal. The Tribunal must answer the question of what consciously or unconsciously was the decision maker's reason behind the dismissal. It is not enough that, in this case, pregnancy or disclosures be a secondary or indirect reason.

Conclusions

Did the claimant make protected disclosures?

141. The first protected disclosure is said to have occurred on 20 January 2021. In terms of reasonable belief that this demonstrated a failure in legal obligation, we find that this is not proven. We are not satisfied that the claimant had a reasonable belief that her words tended to show that there

was a failure in legal obligation. We accept that we have not seen the Covid-19 guidance issued by the respondent. However, the respondent's account of what that guidance did and did not include was not challenged and the claimant was unable to tell us specifically what was within that guidance according to her recollection. In any event, given the measures that the claimant could see had been put in place by then, and the fact that her desire for screens was based on anecdotal evidence from friends and family, we find that she could not have had a reasonable belief that her words conveyed a failure in legal obligation.

142. Dealing with the second pleaded gateway, that being reasonable belief that her words tended to show that someone's health and safety was endangered, on this occasion we are not satisfied that this is the case. We accept that the claimant had a genuine belief that her health and safety may be at risk. However, in all the circumstances we have set out already in our findings, we are not satisfied that this belief was reasonable.

143. Finally, considering reasonable belief in the public interest of her disclosure on 20 January, we are not satisfied that the claimant reasonably believed that her words were in the public interest. At this stage her words focussed on self-interest and the claimant's own health, nothing more. We note the Chesterton factors and conclude as follows:

    143.1. There were limited people in the demolition office each day and therefore a limited number of people affected by the measures within the office;

    143.2. In terms of the nature of the interest affected, it was health and safety which is clearly important;

    143.3. In terms of the nature of wrongdoing, the allegation was that there was insufficient protection against Covid-19.

    143.4. Relating to the extent to which health and safety were affected by the alleged wrongdoing: it was not a wholesale failure to comply with government guidelines that was being alleged, but a shortfall in measures;

    143.5. In regard to the identity of the alleged wrongdoer: we note that the respondent is not a public body, whether part of government or a public sector body like a hospital. The respondent is a private family owned company.

144. Balancing those factors, we consider that the claimant did not reasonably believe that her words were in the public interest and, therefore, the first alleged protected disclosure is not a qualifying disclosure and therefore is not a protected disclosure.

145. For the same reasons we have set out above in relation to reasonable belief that her words conveyed a danger to health and safety, we do not find the claimant had a reasonable belief in her working conditions being potentially

harmful to health and safety. Therefore this is not a health and safety disclosure under s.44 of the Employment Rights Act 1996.

146. Tin relation to the second protected disclosure on 9 March 2021, we accept that the words used were a disclosure of information. However, for the reasons we have already set out in relation to the first disclosure, we do not find the claimant had a reasonable belief that her words tended to show there was a failure in legal obligation.

147. In terms of reasonable belief that her words tended to show that someone's health and safety was endangered, we do accept that she held that reasonable belief on this occasion. Given we know that Ms Anstey had a concern that some people were not always complying with social distancing, we accept that, in all the circumstances, it was reasonable for the claimant to believe her words conveyed that there was a risk to people's health and safety due to a lack of social distancing.

148. In terms of reasonable belief in public interest, we accept that the claimant held that reasonable belief on this occasion. Social distancing is something that affects others, including drivers coming in and out of the office space. We accept that this was a qualifying disclosure and was made to the claimant's employer; it is therefore a protected disclosure.

149. Given our conclusions in terms of the claimant's reasonable belief that these words tended to show health and safety was endangered, we also conclude that the claimant had a reasonable belief that a lack of social distancing may, potentially, be harmful to health and safety. Therefore, this disclosure on 9 March also amounted to a disclosure under s.44 of the Employment Rights Act 1996.

150. Turning to the third protected disclosure which is said to be the 22 March email on page 185, we have already found that this amounts to a disclosure of information.

151. For the same reasons we have already set out in relation to the first protected disclosure, we find that the claimant did not have a reasonable belief that her words tended to show a failure in legal obligation.

152. However, we do find she had a reasonable belief that her words tended to show that someone's health and safety was endangered for the same reasons set out in relation to the second protected disclosure. On this occasion however we find that the claimant had no reasonable belief that her disclosure was in the public interest. Her email on 22 March is very much focussed on herself as a pregnant person facing additional risks due to the pandemic rather than being focussed on a general concern that would affect others as well.

153. On that basis, the third alleged protected disclosure is not a qualifying disclosure and is therefore not a protected disclosure.

154. Given our conclusions on the claimant's reasonable belief regarding danger to health and safety, we also conclude that the claimant had a reasonable belief that people being relaxed and therefore potentially a lack of social distancing, may, potentially, be harmful to health and safety. Therefore, although this third disclosure is not a protected disclosure, it is a health and safety disclosure under s.44 of the Employment Rights Act 1996.

Automatic unfair dismissal claims/Discriminatory dismissal claims

155. We turn then to the dismissal claims, automatic claims of dismissal under sections 100, 103A and 99 of the Employment Rights Act 1996, as well as the dismissal as less favourable treatment under s.13 and unfavourable treatment under s.18 of the Equality Act 2010.

156. We have found that the reason for dismissal was the claimant's poor performance as set against Ms Hepworth's high standards.

157. The claimant relies on pregnancy first as being the reason for her dismissal. We note how the respondent treated pregnant women or those on parental leave. Specifically we were given the example of Sophie, who returned happily from maternity leave and is still working for the respondent. This is evidence to counter the claimant's position that the respondent would take against her because she was pregnant. Ms Hepworth had also made adjustments to a waste picking role in which a pregnant member of staff is currently working. We further note that Leon had exercised his right to have shared parental leave, and suffered no detriment we have heard about. This indicates to us that, far from discriminating against pregnant women or new parents, the respondent takes steps to support them.

158. Mrs Boulton also relies on the timing of the dismissal being three weeks after the notification to Ms Hepworth of her pregnancy. We accept however that this same timing applies to Ms Hepworth's first-hand experience of the claimant's work which was triggered by Mr Harris' unanticipated leaving. That departure meant that (a) Ms Hepworth took over first-hand management of the claimant and (b) that it was even more important that those still in the demolition office were on top of the workload. Ms Hepworth needed a safe pair of hands and was disappointed not to have one. We therefore reject the suggestion that pregnancy had anything to do with the claimant's dismissal and conclude that pregnancy was not the reason for that dismiss, and so reject the claim under s99 of the Employment Rights Act 1996.

159. In terms of the protected disclosure and the two health and safety disclosures we have upheld, we note that, when the claimant had raised screens as an issue, more were given: the photograph at page 180. We do not accept that the respondent would be difficult about someone raising concerns, given that Ms Anstey picked up on concerns at page 173, and Mr Harris sent out a message on 11 January 2021 saying that Covid-19 matters could be raised with him.

160. We also note that what Mr Webb said at paragraph 9 of his statement was not challenged, in that Ms Hepworth warned members of staff to take extra precautions around the claimant once it was known that she was pregnant.

161. At paragraph 29 of her statement, Mrs Hepworth's unchallenged evidence was that she would get the lowest screen of the claimant's desk replaced. Even though Ms Hepworth did not think the screens were necessary, she was content to make adjustments where possible. We conclude on that basis that the protected disclosure and the two health and safety disclosures were not the reason for the claimant's dismissal. Therefore, we dismiss the claims pursuant to s100 and s103A of the Employment Rights Act 1996.

162. In terms of s.13 and s.18 of the Equality Act 2010, we conclude the claimant's pregnancy did not significantly influence Ms Hepworth's decision to dismiss, neither was it an effective cause.

163. The automatic unfair dismissal claims fail as do the claims under s.13 and 18 of the Equality Act 2010.

Detriment claims

164. The first alleged detriment is the failure to perform a risk assessment under Regulation 16(2) of The Management of Health and Safety at Work Regulations 1999. We conclude that the duty to perform a risk assessment had not arisen by the time the claimant was dismissed from the respondent. The obligation only arises once pregnancy is confirmed in writing and the claimant, as we have said, relies on emails on 15 and 22 March 2021. As we have already commented, we are not convinced that this equates to formal notification of pregnancy in writing but, in any event, the obligation to perform a risk assessment only arises when there is evidence of some specific risk to the claimant given the specific nature of the role.

165. The claimant relies on Covid-19 as giving rise to some risk to the claimant. However, as we have found, a risk assessment regarding Covid-19 and those classed as vulnerable had already taken place. Both risk assessments would include the claimant once pregnant. The working environment was therefore already safe for the claimant to work in. There was therefore no specific or new risk to her role raised by Covid-19 that was apparent, that triggered the obligation on the respondent to perform a further risk assessment. The obligation therefore did not arise on the facts of this case. If we are wrong on this we find that the respondent had completed a risk assessment and adequate steps had been taken to ensure the health and safety of the claimant. That detriment claim therefore fails.

166. The second detriment claim is that the claimant was subjected to unfounded or unwarranted criticisms on 30 March 2021. We have found that the criticisms were not unfounded or unwarranted or, if they were, the reason for them was that the claimant did not meet Ms Hepworth's high standards. Therefore, we conclude that Mrs Boulton's pregnancy, her protected disclosure and her health and safety disclosures were not a material or

significant influence upon Ms Hepworth's critique of the claimant on 30 March. This detriment claim therefore fails.

167. The third detriment claim is said to be that Mrs Boulton was subject to a sham disciplinary process. We have found that the respondent did not subject Mrs Boulton to a sham disciplinary process. In any event, the reason for the meeting on 30 March was to find out what the claimant was working on. Once Ms Hepworth had determined to terminate the claimant's employment she did so without a process as Ms Hepworth believed she was still under a probation period, and therefore the respondent had no obligation to go through a formal process. The claimant was also employed for under two years and therefore the ACAS Code did not need to be followed. As such, in light of our findings on the reason for the meeting being called initially, we conclude that the claimant's pregnancy, her protected disclosure and her health and safety disclosures did not materially or significantly influence Ms Hepworth's actions on 30 March. That detriment claim therefore fails.

168. Therefore, we reject the claimant's detriment claims under s47B, s47C and s44 of the Employment Rights Act 1996.

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Employment Judge Shastri-Hurst

Date: 12 February 2024

Sent to the parties on: 16 February 2024

T Cadman
For the Tribunal Office