EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000512/2023

Held in Glasgow on 13 and 14 May 2024

Employment Judge L Murphy
Tribunal Member K Ramsay
Tribunal Member S Singh

Ms M Rezvani	**Claimant** **In Person**
Ahro Scientific Publishing Ltd	**First Respondent** **Not present and** **Not represented**
Dr A Yaro	**Second Respondent** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

(i) The First Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 (ERA) in respect of the period from 1 August to 22 September 2023 and is ordered to pay the claimant the sum of **FOUR THOUSAND SIX HUNDRED AND TWENTY-TWO POUNDS STERLING AND TWENTY FOUR PENCE (£4,622.24);**

(ii) The First Respondent has made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 (ERA) in respect of a failure to pay in lieu of 12.5 days' accrued untaken holiday on the termination of her employment and is ordered to pay the claimant the sum of **ONE THOUSAND ONE HUNDRED AND ELEVEN POUNDS STERLING AND THIRTEEN PENCE (£1,111.13);**

(iii) The First Respondent breached the claimant's contract of employment in failing to provide contractual notice of one calendar month when terminating her employment and the First Respondent is ordered to pay

the claimant damages in the sum of **TWO THOUSAND AND SIXTY TWO POUNDS STERLING AND EIGHTY NINE PENCE (£2,062.89);**

(iv) The claimant's complaint that her dismissal was unfavourable treatment because of pregnancy contrary to section 18 of the Equality Act 2010 (EA) against the First Respondent and Second Respondent, is well founded and succeeds. The First Respondent and the Second Respondent are ordered, jointly and severally, to pay the claimant an award for injury to feelings in the sum of **TEN THOUSAND FIVE HUNDRED AND FIFTY-TWO POUNDS STERLING (£10,552)** and an award of compensation for the claimant's financial losses in the sum of **THREE THOUSAND THREE HUNDRED AND THIRTY-THREE POUNDS STERLING AND SEVENTY-THREE PENCE (£3,333.73).** Both sums are expressed inclusive of judicial interest.

(v) The sums awarded at items (i) and (ii) (only) are expressed gross of tax and national insurance and it is for the First Respondent to make any deductions lawfully required to account to HMRC for any tax and national insurance due on the sums, if applicable.

REASONS

Issues

1. The claimant presented a claim on 6 October 2023. She alleges she was dismissed by the First Respondent. The original claim was brought against five respondents and included complaints no longer insisted upon. There have been two preliminary hearings (PHs) on case management. By the time the case called for a final hearing on the Glasgow Employment Tribunal on 13 May 2024, all respondents other than those named above had been removed from the proceedings. The claimant had withdrawn any complaints not listed in the issues below.

The respondents' non-attendance at the final hearing

2. The First Respondent was the claimant's employer. All extant complaints proceed against the First Respondent. An ET3 was entered on behalf of the First Respondent by Dr Yaro who purported to represent the First Respondent both on the face of the response and at the previous PHs.

3. No ET3 was entered by or on behalf of Dr Yaro as a respondent to the claim in his own right (the Second Respondent). The complaint of unfavourable treatment because of pregnancy pursuant to section 18 of EA is pursued against the Second Respondent (as well as the First Respondent). The claimant claims the Second Respondent is jointly liable for her allegedly discriminatory dismissal pursuant to section 110 of the EA.

4. Although the First Respondent entered an ET3, resisting the claim, neither respondent attended or was represented at the final hearing in May. Dr Yaro neither attended in the capacity of representative of the First Respondent or in his capacity as Second Respondent to the proceedings.

5. When he had not arrived by 10:20 am, the Clerk attempted to telephone him on two occasions, but obtained no answer. The claimant advised that she had not heard from him since January. There is no record of any correspondence from Dr Yaro to the Tribunal since 22 January 2024. His email of that date acknowledged the Notice of Hearing which was listed for 13-15 May 2024. At that time, he said "*I forwarded the mail to the board of directors and investors bureau of the company for further advise* [sic]. *We would inform the tribunal of their decision*".

6. We considered how to proceed. In accordance with Rule 47 of the ET Rules 2013, We took all information available to us into consideration. Based on the circumstances known to us, having made such enquiries as were practicable, there was no clear reason for the respondents' absence. We noted that the Notice of Hearing had been acknowledged so that there was no doubt about its receipt. We checked Companies House and noted the First Respondent company remained active as at the first day of the hearing. In the circumstances we concluded that the respondents had knowingly chosen not to attend the hearing and we decided to proceed with in the absence of the respondents. The Second Respondent did not have the right in any event without the Tribunal's consent to participate in the hearing, having failed to lodge an ET3.

The claimant's postponement applications

7. The claimant was previously represented by Belmont Solicitors. On 20 March 2024, that firm emailed the Tribunal to advise of their withdrawal from acting for the claimant. They advised that they no longer held instructions for her. On 10 May 2024 (the last working day before the hearing), the claimant sent an email to the Tribunal. She noted that she was now unrepresented and advised that she had not received her case documents from Belmont. She said she would be unprepared if she should attend and also would require accommodation to feed her baby. She made no application. Later that day, Belmont sent further correspondence, noting they had informed her in March of their withdrawal and had received no contact from her since. They advised they would have the papers ready for collection at 4pm that day. The claimant then copied the Tribunal into an email confirming that the papers would be collected by her husband that afternoon.

8. On the morning of 13 May 2024, the claimant made an application to postpone the hearing. She had not prepared a file for the Tribunal's use at the hearing, paginated or otherwise, and had not brought sufficient copies of her loose documents for the Tribunal panel. The individual at Belmont who had previously represented her had left that firm and attended the hearing with the claimant. He confirmed that he was not representing her. The claimant's application was to postpone the hearing for 5 to 6 weeks. She said she wanted time to contact two possible witnesses with whom she had not previously attempted contact and to try to get hold of other documents from Belmont. Based on her representations, we were not satisfied of the relevance of the witnesses or the documents. The postponement application was refused. Oral reasons were given.

9. The claimant was granted an adjournment, however, until 10 am on Tuesday 14 May 2024 to enable her to prepare 5 copies of a paginated file for use at the hearing. On 14 May, the claimant arrived at 10 am without a file or sufficient copies of her loose documents for the use of the panel. She advised that her former representative had volunteered to prepare and make copies of the file. He did not arrive at 10 am. She advised that she

believed he would arrive by 10.30 am with the documents and an adjournment was granted pending his arrival.

10. When he arrived, he had not prepared a paginated file or copied the documents for the panel. The claimant made a further application for the hearing to be postponed. She said 'extra' documentation had been received from Belmont the day before. We discussed her application and were not satisfied the 'extra' documents included any new relevant material. In any event, we confirmed the claimant could seek to admit such documents as were relevant into evidence at the hearing. The Tribunal refused the postponement application. Oral reasons were given.

Productions

11. During a further adjournment, the Tribunal used its resources to prepare copies of all the loose papers the claimant had including the 'extra' documents for the panel members. During the claimant's evidence in chief, which was taken orally, she referred to documents from her pile of papers time to time. Those that were admitted into evidence were paginated by the panel and punched into folders provided by the Tribunal as the hearing went along. In this way, we were referred to a small file of productions, prepared incrementally as described, which ran to 43 pages (excluding the ET1, ET3 and Tribunal Orders which were separately available to the participants). Only the claimant gave evidence at the hearing.

Issues

12. By the time of the final hearing, the issues to be decided were as follows:

    a. **Was there a dismissal?** Did the First Respondent dismiss the claimant? If so, from what date was the dismissal effective? Though it was not articulated in clear terms when the document was read as a whole, the First Respondent appeared to dispute in its ET3 that there had been a dismissal.

    b. **Breach of Contract:** If the First Respondent dismissed the claimant, did it provide one month's prior written notice which the claimant says she was entitled to under the terms of her written contract? If not, was the First Respondent entitled to dismiss the claimant without notice?

c. **Wages (holiday pay):** If the First Respondent dismissed the claimant, did it fail to pay her in lieu of accrued untaken holidays as at the termination date? The claimant says she was owed 12.5 days' annual leave at the time her employment terminated.

d. **Wages (arrears of pay):** Did the First Respondent make unauthorised deductions from the claimant's wages in related to the period from 1 August 2023 until her dismissal (if she was dismissed)?

e. **Pregnancy Discrimination:** If the First Respondent dismissed the claimant, was that dismissal unfavourable treatment for the purposes of section 18 EA?

   i. Did the dismissal take place in a protected period?

   ii. Was the dismissal because of the claimant's pregnancy?

Findings in fact

6. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities The facts found are those relevant and necessary to our determination of the issues. They are not intended to be a full chronology of events. In the remainder of this Judgment, the claimant is referred to as C. The First Respondent is referred to as R1 and the Second Respondent as R2.

7. C was employed by R1 from 28 February 2023 as an HR Executive. She was employed to work 5 days per week (Monday to Friday). She worked at R1's place of business at the Pentagon Business Centre Glasgow. She secured the position by responding to an online advert and was successful following an online interview conducted by R2. R2 was not a director of R1 but was the majority shareholder of that company. He held himself out to C and other employees as having authority to manage the affairs of R1. C understood R2 to be the founder, investor and manager of R1. During her employment with R1, R2 was the principal decision maker for R1 in relation to all matters and his approval was needed for any actions. He was, in some documentation, referred to as the Director-General. He was also sometimes referred to as Kalifa in correspondence, an Arabic word meaning 'ruler or leader'.

8. C was issued with a contract of employment on 19 February 2023. This purported to be signed by a Professor Catherine Johnson. Throughout the period of her employment, Catherine Johnson was on record with Companies House as a director of R1. C never met Prof Johnson before or during her employment but understood her to be a director of R1. The contract of employment included the following provisions so far as relevant:

…

1.5 We will pay you a basic annual salary of £32,000 per annum. This salary will:

a. accrue from day to day

b. be payable monthly in arrears on around the last day of each calendar month

c. be paid directly by us into your designated bank account...

…

1.8 you have a probation period of 3 months, which starts on the date specified at clause 1.2 above and ends on 20/05/2023 it. During this probationary period:

a. We will monitor your progress and how well you're carrying out your duties so that we may assist and or confirm your capability and suitability for the role, and

b. Your employment may be terminated by us at any time on one week's notice in advance of the termination date that we give you.

1.9 We also have the right to decide, in our discretion, to extend your probation period if we are unable to reach a positive conclusion about your suitability for the role during the probation period set out at clause 1.8.

...

3.1 in addition to normal public holidays, your holiday entitlement is 21 days paid holiday in each holiday year. AHRO Scientific Publishing

Limited's holiday year runs from the 1st of January and 31 December inclusive. (If you start or leave the business during this holiday year, your entitlement during that year would be pro-rated and rounded up to the nearest half day) a...

…

9.1 After successful completion of the probationary period referred to in clause 1.8, either you or AHRO Scientific Publishing Limited may terminate this agreement by giving no less than one calendar month's written notice to the other

OR

After successful completion of the probationary period referred to in clause 1.8, the prior written notice required from you or AHRO Scientific Publishing Limited to terminate your employment shall be as follows:

a. in the first five years of continuous employment one calendar month's notice;…

9. C was paid monthly in arrears into her bank account as the contract envisaged (until June 2023). She received pay slips. Her gross monthly pay was £2,666.66 and her net monthly pay was £2,062.89. R1 also paid an employer pension contribution on C's behalf of £64.40 per month.

10. Around two months after her employment commenced, C received an email from Prof Johnson who she had not met. She said words to the effect that R2 had regularly spoken to her about C's high performance and she complimented C on how she had changed the company after she started by bringing structure and policies.

11. During the period of C's employment with R1, as well as Catherine Johnson, two further individuals were recorded on Companies House as actively holding office for R1: Winsome Morgan (director) and Dhurawah Rajathelakan (Secretary). Both of these individuals resigned from office before C's employment ended. WM resigned office on 14 August 2023 and DR resigned on 8 August 2023.

12. C successfully passed her probationary period on 28 May 2023.

13. A major project with which R2, C and other managers employed by R1 were involved was the securing of the necessary certification for a Care Agency. This was a complex process which required significant input from C among others. R2 communicated to C and others that the goal of securing the necessary certification was a high priority because, once a care agency was established, this would have the capacity to generate much needed revenue for R1 and affiliated companies.

14. Around the end of May or early June 2023, after C and others in the management group achieved a step in the process towards securing care agency certification, C received a card from R2. It was signed by him and other management colleagues and it praised C for her work in relation to the care agency project and for helping to put order in the companies by implementing policies.

15. C's salary for the month of June 2023 arrived late at her bank account. She was paid on 4 July 2023 instead of on the last day of June. C's salary for the month of July 2023 also arrived late. She was paid on 2 August 2023 instead of on the last day of July.

16. C was not the only employee who was paid late for these months. Other employees had the same experience. There were concerns among employees about R1's financial position and its capacity to pay its employees.

17. The majority of R1's staff (around a further 54 individuals) were non-UK nationals employed by R1 or affiliated companies on the basis that they were sponsored by R1 or linked companies to work in the UK. R1 employed a small number of employees who were not under sponsorship for UK immigration purposes. Around 4 or 5 employees, including C, were not employed on this basis.

18. During the summer of 2023, R2 repeatedly told C that R1 was not making any money and that he was looking for investors.

19. Until 4 August 2023, R2 used to attend R1's offices every day. He usually came to work in the afternoons after studying in the morning. He had a

positive relationship with C. He regularly asked for her opinion and advice during meetings.

20. On 4 August 2023, the Home Office (UK Visas and Immigration) commenced an investigation into R1. After that, R2 attended at the office in Washington Street much less frequently. For the initial 2 weeks after the investigation began, he did not attend at all.

21. On or about 18 August 2023, R2 sent C a WhatsApp. It read: "*I need to appoint onsite directors so thinking of you and her*." The 'you' referred to C and the 'her' referred to C's colleague, Roslyn Redfern (RR), Care Manager (who had been mentioned in the preceding WhatsApp message). C replied, "*Regarding this I don't think I wont be able* [sic]. *Will explain more for you later*".

22. C meant to say she didn't think she would be able. At this time, C was aware she was pregnant but she had not yet disclosed this to R2 or R1.

23. On or about 19 August 2023, R2 attended the office. C had been in communication with him by WhatsApp since the start of the investigation but this was his first attendance since 4 August. Around this time, R2 held a private meeting with C and RR. C explained staff were contacting her about salary, worried they wouldn't be paid and asking whether they should come to work. R2 said he was looking for investors for R1. R2 talked about possibly making people redundant. R2 told them that he had in mind all the 'sponsored people' for redundancy. There was no suggestion by R2 that C or RR's jobs might be at risk of redundancy during this meeting. C was not one of the 'sponsored people'.

24. At the meeting, C advised R2 he should take legal advice on the process if he wished to do that. In the meantime, R2 wanted C and RR to keep working. He allocated them further tasks. In C's case, he discussed with her relatively long-term projects such as rolling out training for new recruits to the care agency once certification was received. Certification was still some way off at that time.

25. A further meeting took place in August 2023 when all the staff attended. R2, C, RR and Louis, the Marketing Manager, attended on behalf of management. Staff were told that R2 was looking for investors and there

was no money coming in. R2 continued to tell C, RR and Louis to keep working on the process underway to secure care agency certification.

26. At the end of August 2023, C notified R2 that she was pregnant by email. She told him that her baby was due on 11 February 2024.

27. In the last week of August 2023, people were becoming increasingly concerned about not being paid. R1 employed a Clinical Manager called Dr Christine Nyirahabimana on a sponsored basis (Dr CN). Dr CN told C it was optional to come to the office and that they could work from home to save on transportation costs in circumstances where it was felt they were not confident about being paid for August due to R1's cash flow. C worked from home from then. She had been provided a work laptop which she was able to use remotely.

28. C was not paid at the end of August 2023. Nor were other employees, including RR and Dr CN. In her capacity as HR Executive, C received contact from many of R1's employees, asking about whether and when they could expect payment. Many of the staff decided to stop working around this time.

29. C did not see R2 in person after the end of August 2023. Any further contact she had with him was by email or WhatsApp.

30. On Saturday 9 September 2023, R2 sent an email to C in the following terms so far as relevant (sic):

Dear Maz,

…

Kindly disseminate this message to all staffs.

Having had negotiations with some friends and colleagues, I'll like to provide an update on ahro which is undergoing quite a difficult period. … At a point I decided not to listen to anyone but concentrate on finding solutions to the issues at hand. Having consulted with the governing council and my family … I've decided to bring in co-shareholders who would help stabilise the finance of the company. When I established the company in 2019, the financial advisor I spoke to recommended I put aside six months worth of

expenditure funds … I was able to go beyond that till June 2023. The July 2023 expenditure was part expenditure was part financed by tuition fees received from some of our prospective students.

Now that investors are now coming, a decision has been taken that staffs are made redundant for the next six weeks. Those who worked in August would be paid after the modality of share sales have been completed. As I've been informed that SSSC and CI has improved our application, the care manager and the academic department have been asked to continue working to enable them to solidify the gains achieved.

As you may know, I still remain the founder and shareholder of the company but I've realised one thing. Management is not made for me...

Therefore the shareholders will appoint a director to oversee the affairs of the company....

Best regards

31. Catherine Johnson remained recorded on Companies House as a director of the company at this time but C did not receive any contact from her. WM and DR had both resigned office by this point according to the companies house filings.

32. C was confused by R2's message and specifically its implications for her own employment. She was neither the Care Manager (RR) nor in the academic department (Dr CN). On the same date, C was copied into a response to R2 from R1's third party accountant. The accountant had been responsible for processing payroll on behalf of R1. The accountant wrote:

Thank you for confirming the current situation of the company and confirming all the staff will be redundant as of today.

Unfortunately I am not able to do any further work for you such as making the staff redundant and issuing their P45 until my invoice is paid in full ...

33. On Sunday 10 September 2023, C emailed R2 in the following terms so far as relevant:

Before passing your message to all employees could you please clarify the below questions:

1. *The company is going to redundant all employees apart from Roslyn and Christine? (Please keep in mind that sponsored employees in a short time will lose their visas, In addition, it is obvious to continue working in the care agency one person cannot do it all; Roslyn is capable but there will be more responsibilities for her going forward...*

2. *What do you mean by "for six weeks" in your email?*

3. *To make the employees redundant, all employees eligible for*

   a. *A notice period ...*

   b. *Redundancy pay...*

   c. *It should be fair …*

   So the official e-mail or announcement for redundancy should be clear and have all the above details.

34. On Monday 11 September 2023, R2 replied in the following terms so far as relevant (sic):

Maz,

The redundancy was based on advice because till the modality is completed with the sales of shares, the company doesn't have funds to run the company. What I mean bu [sic] *six weeks is Staffs would be recalled after six weeks because we need to put things in proper shape with the appointment of director of operations. If redundancy is a big word we can use suspension of work. Roz was asked to continue because she informed me that SSSC and CI had approved our application but if you think she cannot cope alone we will we have to think of what to do. But as I've been explaining the company is now bringing shareholders to drive the company forward...*

35. C replied by email to R2 on Tuesday 12 September. In her email, she raised various concerns. She urged him to focus on the staff situation and to deal with redundancies and payments. She advised him to follow the law and take specialist legal advice. She referred to her previous email and the need to observe notice pay and other payments. She queried whether he was

sure sponsored employees could be rehired in 6 weeks' time. Again, she queried whether Roslyn alone could cope with the work needed to establish the new care agency business. In the final paragraph of her response, she said:

And regarding myself to be honest, I feel like, based on my performance that you are aware of it has been proven if I did not tell you that I am pregnant, you would not think about making me redundant.

Best regards

36. Following her email, C did not receive a response from R2 by email. She had copied Roslyn into her correspondence and Roslyn replied the same day to C and R2. In her response, RR agreed with C that support from HR and marketing in the continuation of the agency was crucial. No email response was sent by R2 or Catherine Johnson these emails of 12 September 2023.

37. On Wednesday 13 September 2023, C sent R2 a WhatsApp. She asked for her last 3 payslips and asked him to pay the accountant so the accountant could process P45s. R2 replied that the company was not in a position to make payment. In a further message the same day he added he was no longer in charge of the finance of the company. C sent a further message asking who was responsible now and who the employees should contact. R2 replied he would let her know by Friday (15 September). In the event, he did not and she had no further contact from R2 or anyone else on behalf of the First Respondent until 22 September.

38. Around this time, C kept an eye on Companies House records for R1. She knew that R2 remained the majority shareholder of R1 and that, by September 2023, Catherine Johnson remained the (somewhat elusive) sole director.

39. On that date, R2 contacted C by Whatsapp. He said "*We need the key to your office for the new management*".

40. C replied that she was still an employee and asked to meet with the new management. R2 replied that "*The management is not going to meet any staff on an individual basis*". He refused to pass C's number to them.

41. C replied: "*That's fine. Since you've already stepped down … I will wait until the new management officially starts their work and get in touch with me regarding the key*."

42. R2 replied with a row of 7 laughing emojis in response to her WhatsApp.

43. C at this stage believed her employment was terminated. R2 had asked her to return her room key for her private room within the office which gave her to understand she was not expected to return to her place of work. The laughing face emojis left her feeling without hope that there would be contact from any other representative of R1. On the same date she contacted ACAS to initiate the early conciliation process in anticipation of raising a claim.

44. On 22 September 2023, C had taken some but not all the annual leave pro rated for the year to date. She had not taken the public holidays and had some unallocated leave untaken. As at 22 September, she had 12.5 days' accrued annual leave outstanding. R1 made no payment to her in respect of this outstanding annual leave.

45. RR and Dr CN were retained after 22 September by R1. C understood from a subsequent conversation with RR that RR was subsequently paid for August 2023. C never received payment for August or for any days worked in September 2023.

46. C was very upset about the termination of her employment. The unclear communications about the fate of her employment between 9 and 22 September 2022 caused her confusion and stress. The final message of laughing emojis on 22 September caused her to feel particularly distressed. She was in disbelief because she felt confident that she was a high performer. She was very tearful about the situation. She and her husband had decided to start a family believing they were financially secure having regard to her income. This development made her feel stressed and under pressure. She feared too that she would be disadvantaged in her applications for new roles by the fact that she was visibly pregnant.

47. Nevertheless, C did apply for a number of new positions in the period from 22 September. She applied online for the position of HR L&D Coordinator with Royal Voluntary Service and, following an online interview, she was

offered the position. She started the job on 31 October 2023. Her gross salary per annum was £23,902. Her average net monthly pay from her new employer (based on the bank statements available for November and December 2023) was £1,735.24. RVS paid an employer's pension contribution on her behalf of 5% of £23,902 (i.e. £99.59 per month).

48. After she had accepted the job with RVS or after she had begun working for them, C received 3 or 4 job offers pursuant to other applications she had made to different employers in the period after 22 September 2023. C declined these.

49. C went on maternity leave from 2 February 2023. Her baby was born on 10 February 2023. C was not entitled to Statutory Maternity Pay from her new employer because she lacked the qualifying service. Instead, C received Maternity Allowance from the Government in the amount of £689.92 per month (£159.22 per week).

50. At the time of the hearing in May 2023, C remained on maternity leave. She had not applied for any new jobs during her maternity leave and remains employed by RVS.

51. At the time of the hearing, R1 still employed two heads of department according to C's review of its published website.

Relevant Law

Was there a dismissal?

52. Where the fact of dismissal is disputed, it is for the employee to satisfy the Tribunal on this point, on the balance of probabilities.

53. A dismissal will not be effective until the employee actually knows she is being dismissed (**Gisda Cyf v Barratt** [2010] IRLR 1073*,* SC*).* A notice of dismissal must specify an ascertainable date from which the dismissal is to take effect (e.g. **International Computers Ltd v Kennedy** [1981] IRLR 28). Subject to certain exceptions where resignation or dismissal is intimated in the 'heat of the moment', once notice of termination has been given, it cannot be unilaterally withdrawn (**Riordan v War Office** [1959] 3 All ER 552).

54. The test proposed by Sir John Donaldson in the early case of **Martin v Glynwed Distribution Ltd** [1983] IRLR 198, [1983] ICR 511, at 519 was expressed as follows:

"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?"

55. Though the authorities are not entirely consistent, where an employer uses ambiguous statements, there is caselaw support for the principle that the issue to be decided is how a reasonable listener would have construed the words used in all the circumstances of the case. In other words, an objective approach. (See, for example, **East Kent Hospitals University NHS Foundation Trust v Levy** UKEAT/0232/17/LA).

Unauthorised deductions from wages

56. Under section 13 of ERA, a worker has the right not to suffer unauthorised deductions from her wages.

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

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

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

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

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation

to the worker the employer has notified to the worker in writing on such an occasion.

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

…

57. Section 14 sets out various deductions which are excepted where the right not to suffer unauthorised deductions does not apply. None of the circumstances are relevant to the present case. Sections 17 to 21 set out provisions providing additional protection to retail workers in certain circumstances. These provisions have no application to the present case.

Holiday pay (wages claim)

58. Under Reg 14 of the Working Time Regulations 1998, employees are entitled to accrued untaken holiday outstanding at the date of termination. This can be enforced by way of a claim for unauthorised deductions from wages under section 13 and 23 of ERA.

Breach of contract (notice)

59. The remedy in the event of failure to give due notice is a claim for breach of contract (**Westwood v Secretary of State for Employment** [1984] IRLR 209, HL and **Secretary of State for Employment v Wilson** [1977] IRLR, 483, EAT). The Tribunal has jurisdiction to hear claims for damages for breach of contract if the claim arises or is outstanding on the termination of the employment pursuant to the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 (subject to certain qualifications).

Unfavourable treatment because of pregnancy

60. Section 18 of EA contains provisions relating to pregnancy and maternity discrimination 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) …

(3) …

(4) …

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

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

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13 [which deals with direct discrimination], *so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—*

(a) it is in or after the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), …

61. Discrimination under section 18 does not require a comparator. However, where there is a complaint of pregnancy discrimination, it remains necessary to establish a causal connection between the treatment and the pregnancy. The pregnancy must be an effective cause of the unfavourable

treatment (**O'Neill v. (1) Governors of St Thomas More RCVA Upper School & Anr** [1996] IRLR 372). In considering whether there is a causal connection, there is no need to ask how a man would have been treated had he been sick or absent from work.

62. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

> *"**136 Burden of proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
>
> *(5) …*
>
> *(6) A reference to the court includes a reference to—*
>
> *(a) an employment tribunal;*
>
> *…"*

63. The effect of section 136 is that, if C makes out a *prima facie* case of discrimination or other prohibited conduct, it will be for the respondents to show an explanation which is not discrimination.

64. There are two stages: Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which C has adduced or proved. If there are disputed facts, the burden of proof is on C to prove those

facts. The respondents' explanation is to be left out of account in applying Stage 1.

65. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed a prohibited act. 'Something more' is, therefore, required (**Madarassy**).

66. Direct evidence of direct discrimination is rare. Depending on the facts and circumstances, various types of evidence have been held in different cases to have supplied that 'something more' which has allowed an inference of prohibited conduct to be drawn.

67. If the claimant shows facts from which the Tribunal could decide a prohibited act has occurred, then, under Stage 2, the respondent must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected characteristic or protected act (**Igen v Wong** [2005] IRLR 258).

68. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove discrimination (or victimisation). However, they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage v Grampian Health Board** [2012] IRLR 870).

69. Part 8 of the EA contains ancillary provisions about prohibited conduct under the Act and it contains the following, so far as relevant:

S.110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

….

70. Section 109 of EA includes the following provisions:

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

Remedy (Pregnancy discrimination)

71. Where there is a breach of the EA, compensation is considered under s.124.

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps

for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate—

(4) …

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

*(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by **…** the sheriff under section 119.*

72. Section 119 includes provision for injury to feelings:

(1) This section applies if … the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) …

(3) The sheriff has power to make any order which could be made by the Court of Session—

(a) in proceedings for reparation;

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

73. In assessing an award for injury to feelings, the focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (**Komeng v Creative Support Ltd** UKEAT/0275/18/JOJ). For an injury to feelings award to be made, it is not required that C's injured feelings are caused by his/her knowledge that he/she has been discriminated against. The EAT in **Taylor v XLN Telecom Ltd** [2010] IRLR 49 held that the calculation of the remedy for discrimination is the same as in other torts, and that knowledge of the discriminator's motives was not necessary for recovery of injury to feelings. The EAT observed, however, that the distress and humiliation suffered by a claimant will generally be greater where the discrimination has been overt or the claimant appreciates

at the time that the motivation was discriminatory.

74. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of Appeal give guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> *"1) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award made for injury to feelings exceed £25,000.*
>
> *2) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.*
>
> *3) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."*

75. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested guidance be provided by the President of Employment Tribunals as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint presidential guidance updating the **Vento** bands for awards for injury to feelings. In respect of claims presented on or after 6 April 2023, the Vento bands include a lower band of £1,100 - £11,200; a middle band of £11,200 - £37,700; and a higher band of £37,700 - £56,200.

76. An award may also be made for financial losses sustained as a result of discrimination. Where loss has occurred as a result of the discrimination, tribunals are expected to award compensation that is both adequate to compensate for the loss and proportionate to it (**Wisbey v Commissioner of the City of London Police** [2021] EWCA Civ 650). The aim is to put the

claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (**Ministry of Defence v Wheeler** [1998] IRLR 23)

77. The question is "what would have occurred if there had been no discriminatory dismissal… If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss" (**Abbey National plc and anr v Chagger** [2010] ICR 397).

78. There is a duty of mitigation, namely to take reasonable steps to keep losses sustained by a dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof where a failure to mitigate is asserted (**Ministry of Defence v Hunt and ors** [1996] ICR 554). It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the claimant acted unreasonably.

79. The Tribunal may include interest on the sums awarded and should consider whether to do so without the need for any application by a party in the proceedings. If it does so, it shall apply a prescribed rate. The rate of interest in Scotland is prescribed by legislation and is currently 8% (The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996).

Discussion and Decision

Was C dismissed? If so, when?

80. It is for C to show that she was dismissed. There was no suggestion by C that she had resigned and held herself constructively dismissed and no evidence to this effect. She maintained at the PH in December 2023 that she was dismissed with effect from 9 September 2023.

81. We considered the contents of R2's email to C on 9 September 2023. That email contained ambiguity. The context of the email was that R2 was a senior manager sending an instruction to C, who was the most senior member of HR in the company. The instruction was to disseminate a message to all staff and the message that followed the instruction must

therefore be construed as the text C was being instructed to disseminate. It was not strictly a message sent directly to C for her own attention. Nonetheless, it would be artificial to place too much emphasis on this technical distinction in circumstances where the ensuing content plainly also carried potentially significant implications for C's own employment.

82. R2 set out the proposed message as follows:

"*Now that investors are now coming, a decision has been taken that staffs are made redundant for the next six weeks... As I've been informed that SSSC and CI has improved our application, the care manager and the academic department have been asked to continue working to enable them to solidify the gains achieved."*

83. Viewed in isolation, the words "*a decision has been taken that staffs are made redundant*" might appear plain enough and sufficient to communicate an immediate dismissal. However, that potential interpretation is weakened by the fact that R1 was sending the email to C, apparently in her capacity as HR Executive, giving her a management instruction in such capacity to carry out work, namely, communicating with staff on behalf of the company. R2 could have instructed another manager to disseminate the message. He could have instructed the care manager or the academic department to do so. Emailing C in these terms could leave a reasonable observer in significant doubt as to what she should take from the communication so far as her own position was concerned. Additionally, the content engendered uncertainty for all affected employees by the qualifying the words *'made redundant'* with the words: "*for the next six weeks*".

84. We acknowledge that the words "*the care manager and the academic department have been asked to continue working to enable them to solidify the gains achieved"* could be suggested to imply that C, who held neither of those roles, had not been retained. However, we conclude that this potential interpretation is ultimately undermined by the fact that R2 was corresponding with C with ongoing work instructions. When we considered R2's email of 9 September in the round, including the context in which it was sent, we assessed that a reasonable listener would not draw from that communication the understanding that C had been dismissed. We concluded they would understand that she remained in employment at least

for the time being, and remained expected to do the bidding of the company, at least for the time being. Nevertheless, a reasonable listener would also understand that R2's message put in doubt C's future with R1 and raised the spectre of redundancy for her (and many others).

85. C herself subjectively understood herself to remain employed at that point and her subsequent emails of 10 and 12 September were consistent with such an understanding. They were sent from her work email address to R2. They were signed off with her job title email signature and their content was very much consistent with her job role of HR advisor to R1. She provided HR advice and warnings about the implications of R2's instructions in his 9th September email. Though C's subjective understanding is by no means conclusive of the matter, her subsequent emails and the responses she received form part of the narrative of how matters developed from and after 9 September and provide relevant context to how later communications are to be read and understood.

86. R2's email response on 11 September was also unclear. We do not consider that a reasonable listener could conclude that this email communicated a dismissal of C with an ascertainable date where the message of the 9 September had failed to do so. He talked of recalling staff after 6 weeks and suggested using the words "suspension from work" if 'redundancy' was "a big word". The mechanics of what he had in mind remained obscure and might be interpreted as an attempt to implement some sort of temporary lay off for the staff. (We heard no evidence about whether R1 had any contractual right to lay off other employees but C's contract of employment reserved no such entitlement to R1 in relation to C).

87. What is clear, however, is that at this stage, R2 continued to correspond with C in terms that were compatible with her still being in her role as HR Executive. The subject matter of his email extended to staffing issues beyond C's own position as a reasonable listener might expect if she remained employed but in a way which would be at odds with a belief on R2's part that she was, by then, already as an ex-employee.

88. In C's next email of 12 September, again from her work address, she too corresponds in a manner commensurate with the position of HR Executive. Though the majority of her email is concerned with company HR direction,

for the first time she refers (at the end of the message) directly to her own position. She says, "*And regarding myself…I feel like based on my performance… it has been proven that if I did not tell you that I am pregnant, you would not think about making me redundant*." She, therefore, puts it on the line to R2 for comment that (i) she believes she is being made redundant though she doesn't specify when; and (ii) she believes her pregnancy has played a part in this decision. R2 does not respond. He does not refute that she is being made redundant or indeed that C's pregnancy has been relevant.

89. In the days after her email of 12th September, when R2 makes no attempt to contradict or correct C about her perceived redundancy. He engages in WhatsApp correspondence with C the following day and does not seek to disabuse her of the understanding that she is to be made redundant. We accept that a reasonable onlooker would understand that by a combination of R2's words and actings, his responses and his latter omission to respond, he has communicated to C that she is among the large majority of the staff who are in the frame for redundancy. What remains lacking at this time, however, is an ascertainable date from which a reasonable onlooker could ascertain the termination was to take effect.

90. As September continues, the ongoing situation is that C has not been paid for August and R2 has given her no assurance that payment will be forthcoming either for that month or the month of September. On the contrary, he has told her the company doesn't have funds to pay the accountant and C is therefore aware that there is no prospect of being paid wages or of a P45 being processed for her or others. R2 has by now stopped allocating C work or giving C instructions to disseminate communications to other staff. R2 tells C he is no longer in charge of the finance of the company on 13 September but does not say he is no longer authorised to speak for R1. C knows nobody else who is authorised to make staffing decisions and no one purporting to have such authority contacts her. Though R2 suggests he will provide details for for someone employees can contact, he does not.

91. Against the backdrop of the sequence of communications from 9 September, we consider that R2's WhatsApp messages of 22 September

would be understood by a reasonable listener to bring C's employment to an end on that date. If viewed in isolation, we accept that they may not do so. However, when R2 requests C's key on 22 September, it is against a mutual understanding that she is among those affected by his plans to make staff redundant. She is expected to renounce her key to the HR room in the office with a clear implication that she is not invited or expected to return to her contractual place of work. We consider a reasonable listener would conclude this signifies the end of the relationship as far as R1 is concerned.

92. Although C purports in her response to believe she is still an employee, we are not persuaded that this is the interpretation a reasonable listener would make. In any case, when she tells R2 she will wait for new management to contact her, his response of multiple laughing emojis would, we think, disabuse any reasonable listener of any vestiges of hope they harboured that the employment might be rescued and continue. C knew R2 remained the majority shareholder of R1 and that Catherine Johnson remained the sole director. She knew that Ms Johnson had not made any intervention to date and that, with his laughing emojis, R2 had scoffed at her suggestion that contact might be forthcoming. As a matter of fact, we have found that C did understand her employment to have been ended by R1 at that point. She swiftly thereafter took action to seek a new job and progress a prospective claim against the respondents.

93. Although various communications by R2 on behalf of R1 to C are steeped in ambiguity, we find that the combination of the communications culminating in the request for the return of the key would reasonably be understood as a dismissal on the date of that request (22 September 2022). We are encouraged in our conclusion when we step back from the detail of individual communications and apply the test as proposed by Sir John Donaldson in **Martin v Glynwed Distribution Ltd** of: "Who *really* ended [it]?" The answer to that question, on the facts and circumstances of this case, can only be that R1 ended it (through the acting of its most senior manager, R2). C did not seek to bring her employment to an end either by an express or implied resignation, where many other employees would have done so and many did so. Instead, she clung to the diminishing prospect of a continuing role until R2's communications of 22 September put paid to that possibility in a way that as unkind as it was unconventional.

94. C was dismissed on 22 September 2023.

If the First Respondent dismissed the claimant, did it provide the contractual written notice to which she was entitled.

95. R1 dismissed C without any prior written notice. She was entitled to one month's written notice. R1 did not pay her in lieu of that notice. The notice period would take her to 21 October 2023. During that period, C made reasonable attempts to mitigate her losses by applying for other jobs. Indeed, she was offered a new job within that period on 11 October 2023 albeit the job did not begin until after the month of notice would have expired had it been served. C's loss arising from R1's breach of her employment contract is, therefore, one month's net pay. We award damages arising from the breach in the sum of **£2,062.89**.

Did R1 fail to pay C in lieu of accrued untaken holidays as at the termination date?

96. R1 made no payment to C in respect of accrued untaken holidays. C had accrued 12.5 days and the failure to pay this was an unauthorised deduction from her wages. C's daily gross wage rate for September was £2666.66/30 = £88.89. R1 is ordered to pay C 12.5 x 88.89 = **£1,111.13**.

Did R1 make unauthorised deductions from the claimant's wages in relation to the period from 1 August 2023 until her dismissal?

97. R1 failed to pay C for the month of August 2023. Payment fell due on or about 31 August 2023. The gross amount owed for this month was £2,666.66. R1 also failed to pay C for the period in September up to her dismissal on 22 September 2023. Payment fell due on or about 30 September 2023. The gross amount owed for September was 22 x £88.89 = £1,955.58. R1 made deductions from C's wages at the end of August and at the end of September. It is ordered to pay her the total gross sum of £**4,622.24** in respect of the deductions made in the two months.

Pregnancy Discrimination

98. We have found C was dismissed. The dismissal, we accept, amounts to unfavourable treatment. C was pregnant at the material time and was within the protected period for the purposes of section 18(6). We have further

found as a matter of fact that she communicated her pregnancy to R2, as manager for R1, at the end of August 2023.

99. C has, therefore, established unfavourable treatment and a protected characteristic. We proceed to consider whether she has established the 'something more' that is necessary to discharge the Stage 1 burden upon her to show the unfavourable treatment was because of her pregnancy. We have taken into account all facts and evidence at this stage C excluding R's explanation. We took account, in particular, of the following factual context to the dismissal:

a. Before C notified her pregnancy to R2, she had successfully passed her probation and had been praised by R2 and the Company Director for her performance in the role. She had been praised specifically for work she had undertaken in relation to the critical project of obtaining certification for the care agency;

b. On 18 August 2023, shortly before she notified R2 of her pregnancy, R2 asked C and RR if she would be interested in being appointed as an 'onsite' director of R1;

c. In the meeting on or around 19 August 2023, R2 talked about possibly making people redundant but told C he had in mind 'the sponsored people', of whom C was not one. There was no suggestion by R2 that C or RR's jobs might be at risk when they had that conversation.

d. In the same meeting, R2's direction to C (and RR) was to keep working and he allocated relatively long-term projects such as rolling out training for recruits to the care agency once certified.

e. It is clear from R2's emails of 9 and 11 September 2023 that, at that time, the care agency work in which C had been intensely involved continued.

f. Relatively soon after the notification of her pregnancy to R2 (just around 9 days), he sent his email of 9 September. Though there was a lack of clarity regarding the specifics of what he proposed in relation to C's employment in that communication, it did say that the

care manager (RR) and the academic department had been asked to continue working, while C was aware, she had not.

g. C's employment was soon thereafter terminated while that of RR and Dr CN continued.

h. When C put to R2 that her notification of her pregnancy had resulted in her redundancy, he did not respond to deny this, despite having further communications with C after that email.

100. From these facts and evidence, we consider that this Tribunal, acting reasonably, could properly draw inferences adverse to the respondents. The Tribunal could properly infer that, following the notification of C's pregnancy, R2 had a change of attitude towards the proposed retention of C within the company which, earlier in August he had envisaged in at least the medium term while the care agency certification was being progressed and, thereafter, when recruits were made to that agency. No such change of attitude occurred in relation to RR or Dr CN who had not notified R2 of their pregnancy. We consider this Tribunal could reasonably and properly infer that R2 changed his mind about retaining C following her pregnancy news and decided to dismiss her along with other staff at that time.

101. In applying Stage 1 we need only find that the Tribunal could properly decide that C's pregnancy was an effective cause, conscious or otherwise, of the unfavourable treatment. It need not necessarily be the sole cause though it must be capable of being inferred that it was a substantial cause. We find that such an inference could properly be made. Therefore, we find that C has surmounted Stage 1 such that the burden shifts to the respondents under section 136(2) and (3) to show that R1 did not contravene section 18.

102. In R1's ET3, it is implied in the third bulleted paragraph in the typewritten document accompanying the response, that R1 resists the complaint on the basis that R1 disputes C's dismissal. If that is indeed R1's position, it does not succeed for the reasons set out earlier in the judgment. However, in the sixth bullet point in that document, R1 asserts that C's claim that she was made redundant because of her pregnancy is an "absolute lie". That paragraph goes on to state: "The issue of redundancy came in because the

company doesn't have any funds in the account." R1 comments in its response that C was not the first person in the company to be pregnant.

103. Putting to one side the apparent contradiction in R1's position regarding whether there was a dismissal, we considered at Stage 2 whether it had been proved by R2 that C's dismissal was in no sense whatsoever because of her pregnancy. The respondents did not attend the Tribunal or adduce any evidence to rebut the claim. There was some evidence before us, led by C herself, about her understanding of the financial circumstances of R1 in the summer months of 2023. We accept that its finances were precarious. We further accept that this led to many staff losing their jobs as had been foreshadowed in management discussions between R2 and C on 19 August 2023. However, in the absence of any evidence from the respondents, they have not discharged the Stage 2 burden of showing that C's selection for redundancy specifically was because of the financial situation of the company and in no sense whatsoever influenced by her pregnancy.

104. In those circumstances, applying section 136(2), we must find that R1 contravened section 18 of EA by dismissing C because of her pregnancy.

R2 liability for Section 8 contravention?

105. We find that R2 took the decision on behalf of R1 to dismiss C. R2, though he did not hold office as a director of R1, took all managerial decisions in relation to that company during C's employment, including the decision to recruit her. Everything had to be approved by R2. He was referred to as the Director-General or 'Khalifa'. With regard specifically to the decision to dismiss C, R2 communicated this and there was no evidence before us to suggest it had been taken by anyone else or that he was not involved. On the contrary, his messages implied that the decision was taken by him albeit, perhaps following what he described as "negotiations with some friends and colleagues". Although he latterly referred to the introduction of new shareholders and new management, we know as a matter of fact that no new directors were appointed and that he remained the majority shareholder of R1 through this period. We are satisfied, on the balance of probabilities, that R2 made the decision to dismiss C on behalf of the company employer.

106. There was no evidence before us as to the precise label given to the relationship between R2 and R1 in any communications between those two legal persons (other than that R2 he was a majority shareholder and that he was not on record as a director for filing purposes with Companies House). There is insufficient evidence on which to make a finding that R2 was an employee of R1. However, we conclude, on the balance of probabilities, that whether or not he was an employee of R1, he was acting as an agent of that company throughout the period of C's employment and when he effected her dismissal on 22 September 2023. We further find that he did so with the authority of R1 as his principal. We draw support for these conclusions from the following facts:

    a. R2 consistently held himself out throughout C's relationship with R1 as having authority to communicate with her and other employees on behalf of R1, and he did so;

    b. Though R2 in September 2023 suggested new management was coming, he continued to communicate on behalf of R1 with C;

    c. We have found R2 took the decision to dismiss C (and other employees of R1) on behalf of R1.

    d. There was no evidence that R2 was acting without the general authority of R1. On the contrary, following R2's decision to appoint C, the director, C Johnson signed C's contract of employment. R2 also discussed with Ms Johnson C's contribution and CJ wrote a complimentary email to C. Therefore, it can be readily inferred that C Johnson was aware of R2's interactions with staff on behalf of the company. There was no evidence that she at any time told C or any of her colleagues that R2 lacked the authority to undertake the management duties and decisions he was undertaking or to communicate on behalf of R1.

107. R2 was an agent of R1. By dismissing C in contravention of section 18 of EA, he did something which by virtue of section 109(2) of EA required to be treated as having been done by R1 (whether or not the dismissal was done with the knowledge and approval of CJ who was the sole director of R1 at the time of the dismissal).

108. It follows that, by operation of section 110(1) of EA, R2 contravened section 110 of that Act and R2 is personally liable, jointly and severally with R1 for the breach of section 18 of EA (pregnancy discrimination).

Remedy for pregnancy discrimination

Injury to feelings

109. With respect to injury to feelings, the claimant seeks between £11,200 and £16,825, according to the Schedule of Loss prepared for her by her former agent (the middle Vento band for claims presented after 6 April 2023).

110. We focused on the actual injury suffered. We reminded ourselves that the prohibited act that has been found to contravene the EA was her dismissal on 22 September 2023.

111. We accepted that at the time of the dismissal, C felt upset and became weepy. We accept that the confusion caused by the opaque manner in which R1 communicated (through R2) the termination of C's employment added to the stress she felt during the period between 9 and 22 September and that the callousness of R2's final laughing emoji message was particularly distressing for C. We accepted that C's upset was compounded by the financial uncertainty wrought by her dismissal and that she felt particularly anxious about her prospects in the job market as a result of her visible pregnancy at the time her employment came to an end.

112. While we fully accepted the authenticity of C's evidence regarding the upset the dismissal caused, we also took into account that C's upset and anxiety was not of such a debilitating nature that she was unable to function or required to seek medical advice or intervention. She was able to and did take immediate active steps to look for work and indeed managed to secure a number of interviews and job offers in a short space of time following her dismissal. She felt able to and did take active steps with regard to the initiation of Early Conciliation through ACAS. She was thereafter able to take up her new post on a full time basis from 31 October 2023. In assessing quantum, we took all relevant factors into account and we determined that this case falls in the top of the lower **Vento** band. We award the sum of **£10,000** in respect of injury to feelings.

Financial losses

113. **Period A - from dismissal to 31 October 2023:** C has already been compensated for the period to 21 October 2023 (her would be notice period) by the award of damages in her breach of contract claim for notice pay. She started her new job on 31 October 2023. In the period from 21 to 31 October 2023, she was without work and without an income. Her net losses in the period from 21 to 31 October 2023 were 10 days' net pay, i.e. 10 x £67.82 = **£678.20.**

114. **Period B - from start of new job to start of mat leave (31 October 2023 to 2 February 2024):** During this period C had a continuing loss which was the differential between her net pay with R1 and her net pay with her new employer, RVS. Period B lasted 3 months and 3 days. The difference in net monthly income was £2,062.89 LESS £1,735.24 = £327.65. To obtain a rate for the net daily difference, we have multiplied that monthly figure by 12 and divided by 365 days in the year (£327.65 x 12 / 365 = £10.77 daily net difference). Therefore the total net difference over the 3 months and three days in Period B was (3 months x £327.65 = £982.95) + (3 days x £10.77 = £32.31) = **£1,015.27 net.**

115. **Period C – from start of mat leave to the date of the hearing (2 February – 13 May 2024):** C began a period of maternity leave from 2 February 2024 which continued to the date of the hearing. In her new employment with RVS she was not eligible due to her length of service for Statutory Maternity Pay. However, had she remained employed by R1, she would have been eligible for SMP. She would have been continuously employed for at least 26 weeks ending with the Qualifying Week, which is the 15th week before the expected week of childbirth (EWC). Her child was due on 11 February 2024. She would, therefore, have received higher rate SMP for 6 weeks from 2 February 2024 (i.e. until 15 March 2024). This would have been calculated as 90% of her pay. Her income, had she remained employed by R1 in this period would therefore have been approximately 0.9 x £2,062.89 = £1,856.60 net per month. To obtain a weekly figure we have divided this monthly figure by 4.33 to get a weekly net SMP income of £428.48 per week. Throughout the 6 weeks to 15 March, C would have received approximately £2,570.88. In fact, she received Maternity Allowance from

the state in the amount of £159.22 per week x 6 weeks = £1,104.18. C's total loss in the period from 2 February to 15 March was, therefore, £1,466.70. Thereafter, C had no continuing loss to the hearing date as the lower rate of SMP (£151.97) is around the same as or slightly less than the Maternity Allowance she was receiving. Accordingly, C's loss in period C is limited to **£1,466.70.**

116. **Period D – Future losses**. For as long as C remains on maternity leave there is no future loss because her income from Maternity Allowance is roughly the same as her income would have been on lower rate SMP had she remained in R1's employment throughout her maternity leave. We decline to award future losses beyond the end of C's maternity leave as we find that the loss at that stage becomes too speculative**.** At the time of the hearing, C had made no attempts to secure a better paid role to reduce her losses. While that has been a reasonable stance to take as the new mother of a young infant to the date of the hearing, we find that her losses would, as time goes on, cease to be attributable to R1's discriminatory dismissal of her, and rather become attributable to her own choice not to seek other, more highly remunerated work. There was little evidence before us about C's future employment prospects either within her current employer or in the labour market, but there was evidence that she relatively quickly managed to secure 4 or 5 job offers in the HR sector in late September / early October 2023. On balance, we find there are reasonable prospects that, if she were to undertake a thorough job search as her maternity leave draws to an end, there are good prospects she may secure a more lucrative position.

117. **Pension loss.** R1 paid an employer pension contribution on C's behalf of £64.40 per month. With RVS, she was entitled to an employer contribution of £99.59 per month. C, therefore experienced no pension loss other than in the period from 22 September 2023 to 31 October 2023 (i.e. 5.57 weeks). The loss, therefore, was £64.40/4.333 x 5.57 weeks = **£82.78**

118. C's total financial losses for Period A + B + C + D (including pension loss) is therefore £678.20 + £1,015.27 + £1,466.70 + £82.78 = **£3,242.95**.

Interest

119. C sought interest on any discrimination compensation in her Schedule of Loss. We considered whether we should use our discretion to award interest on her losses and injury to feelings award for the breach of the EA. We have discretion as to whether to award interest but if we choose to award it, we are constrained to do so at the prescribed rate of 8%.

120. We decided to award interest in this case. It is within judicial knowledge that the Bank of England base rate has sat at 5.25% since September 2023. We reminded ourselves that the aim is to put C in the position, so far as is reasonable, that she would have been had the discriminatory act not occurred (**Wheeler**). With interest rates holding at a relatively high rate over the material period (albeit less than the judicial rate of 8%), we considered that to decline to award interest on the sums would not be proportionate and would place the claimant in a worse position (financially) than she would have been if the discrimination had not occurred.

121. For C's injury to feelings award, interest runs from the date of the discriminatory act (22 September 2023) to the date of the calculation (31 May 2024). That is a period of 36 weeks or 252 days. The interest for a whole year would be £800 (that is 85 of £10,000). The interest for 252 days is, therefore, 252/365 x £800 = £552. We award **£552** interest on C's injury to feelings award.

122. With regard to C's past financial losses, interest runs from the midpoint to the date of the calculation. The midpoint is the date halfway between 22 September 2023 and 31 May 2024 (i.e. 18 weeks from 22 September 2023 which is 26 January 2024). A whole year's interest on C's past financial losses would be £259.36 (i.e. 8% of £3,242.95). The interest for 18 weeks to 26 January 2024 is 126/365 x £259.36 = £90.78. We award **£90.78** on C's past financial losses awarded as compensation for unlawful discrimination.

Employment Judge: **L Muphy**
Date of Judgment: **06 June 2024**
Entered in register: **07 June 2024**
and copied to parties