EMPLOYMENT TRIBUNALS

Claimant: Miss J Hodkinson

Respondent: B & R Care Limited

Heard at: Manchester **On:** 21, 22 and 23 August 2024

Before: Employment Judge K M Ross
Mr P Dobson
Ms C Nield

REPRESENTATION:

Claimant: In person
Respondent: Ms Bibia (Senior Litigation Executive)

JUDGMENT having been sent to the parties on 29 August 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Oral reasons were given on 23 August 2024 and written reasons were requested by the respondent at the hearing.

2. The claimant was employed by the respondent as a Senior Care Assistant from 9 October 2021 until 19 August 2022. The claimant was dismissed by the respondent.

3. The respondent said the reason for dismissal was the claimant's failure to demonstrate suitability for her role during her probationary period, in particular the failure to complete training.

4. The claimant, who was pregnant at the time she was dismissed, said the real reason for dismissal was pregnancy.

5. The claimant presented a claim to this Tribunal. The case was case managed by Employment Judge Cowx at a hearing on 17 February 2023 where he identified

the issues. Employment Judge Cowx asked the claimant to provide further information, which her solicitor did.

6. At the outset of the hearing before this Tribunal, I incorporated the additional information into the List of issues identified by Judge Cowx to create a finalised List of Issues which was agreed with the parties and provided to them.

Evidence and Witnesses

7. We heard from the claimant. For the respondent we heard from the Registered Manager, Mrs Higham (who has now retired) and from Ms Sutton, Deputy Manager.

8. A witness statement was provided by Mr Jones but he did not attend and so the Tribunal attached limited weight to his evidence.

9. The Tribunal varied the timetable suggested by Employment Judge Cowx as Mrs Higham was unavailable to attend on the second day of the hearing due to a funeral.

10. The Tribunal had a bundle of documents of 136 pages. The respondent provided a supplementary bundle and so did the claimant. In addition, the respondent disclosed a payroll document (137) and a “clean” copy of document 71 which we numbered 71(a)-(c).

The Facts

11. We find the following facts.

12. The claimant was employed by the respondent as a Senior Care Assistant from 9 October 2021 to 19 August 2022. The respondent provides residential care for the elderly and disabled. The claimant worked for the respondent at a residential care home.

13. The Tribunal found the claimant to be a clear, straightforward and honest witness who made concessions where necessary.

14. It was not disputed that the claimant was a good worker. Ms Sutton described the claimant as very good with the residents of the care home and a “team player”. Mrs Higham said in cross examination that she had no issues with the claimant professionally.

15. It is not disputed that the claimant worked regularly for the respondent on a Saturday and a Sunday on a 12 hour shift, 8.00am to 8.00pm. Sometimes she worked overtime for the respondent if they requested it on other days if she was available and could arrange childcare. The claimant also had another job during the week working for Trafford Borough Council as a Children/Family Practitioner. At the time of these events the claimant had three young children. The claimant also attended university.

16. There is no dispute that pursuant to CQC Regulations the respondent, a care home, was required to ensure all staff received appropriate training including

statutory training and other mandatory training. There is no dispute that there was a contractual requirement for the claimant to participate in training (page 58).

17. At page 5 of the respondent's supplementary bundle the respondent's guidance states that staff should be supported to make sure they can participate in that training. The respondent's policy states that staff should receive regular appraisals of their performance in their role. The respondent's policy also states learning and development and required training should be monitored and appropriate action taken quickly when training requirements are not met.

18. There was no dispute that the claimant had completed her medication training and indeed there was no dispute that Mrs Higham asked the claimant to train other staff in this area of work.

19. The respondent says that the claimant failed to complete essential training and that was the real reason she was dismissed in August 2022. The claimant says the real reason for her dismissal was pregnancy. The Tribunal find there was no specific contractual requirement or reference anywhere that all training must be completed within the probationary period. The claimant's contract, offer letter and probation period document do not state that.

20. We find the claimant attended an induction which appears to have occurred on 30 October 2021 (page 68) after the claimant was successful at interview in August 2021.

21. Many of the documents in the bundle are confusing for the Panel. The claimant signed an appointment letter saying that she had a six month probationary period dated 10 October 2021 (page 61). The claimant's offer of appointment letter, also signed on 10 October 2021 (page 55), also referred to a six month probationary period. Confusingly, the claimant's contract of employment which she signed on 4 December 2021 (and therefore later) refers to a three month probationary period. The claimant said she was not given a copy of her contract of employment although she accepted that she had signed it. The claimant said that her understanding was that there was a probationary period of six months.

22. The Tribunal finds a six month probationary period would take the claimant to 9 April 2022.

23. The claimant agreed she had completed some training around her start of employment on 9 October 2021 and 10 October 2021 and said that it was given by Paula Austin. This is consistent with the documents at pages 60, 67 and 68.

24. Mrs Higham says there was a conversation about the claimant's probationary period on 28 January 2022 and relies on a document at page 71(a)-(c) in the bundle. This document entitled "Probation Review form for Support Staff" also appears in the bundle at pages 71, 72 and 73. However, that version at page 71 has a Post-it note which obliterates some of the document. The respondent provided the original document and it was copied. We numbered it as 71(a), (b) and (c).

25. The claimant's evidence was that she had never seen the probation review form. Mrs Higham confirmed that it was never given to the claimant.

26. The Tribunal find the document at page 71(a)-(c) is a strange document. At the top it states:

> "Before completing this form you are advised to read the university's probation policy and procedure at: https://www.york.ac.uk/admin/hr/resources/policy/probationpolicyhtm."

27. Elsewhere it suggests that a copy of the form should be submitted to hrenquiries@york.ac.uk. It appears to be a form relating to York University – there was no suggestion that York University is anything to do with the respondent.

28. The document expressly states on the first page:

> "The line manager should ensure that the employee is given a copy of this document at each stage of their probation and should retain the original to monitor progress against set objectives at follow-up meetings."

29. There was no dispute the claimant was never given a copy of the document during her employment.

30. The Tribunal has concerns about the authenticity of the document at page 71(a)-(c). Mrs Higham said in cross examination that page 71(a) related to a meeting which took place on 28 January 2022.

31. The Tribunal accepts the claimant's evidence that (as described above) she completed some initial training with manager Paula on 9 October and shadowed senior staff. This was not disputed by Mrs Higham in her statement at paragraph 6 – the claimant had completed medication training in the first three months.

32. The entries at section A and section B at page 71(a) state they refer to the initial meeting. The note states:

> "This should be completed by the line manager within a week of the employee commencing their employment."

33. The Tribunal finds the entries at Section A and section B of the Probation Review Form are consistent with a meeting which occurred on or around 9 October and 10 October 2021. The entry states:

> "Jade to complete medication training as part of senior role."

It goes on to state:

> "Medication training to start ASAP."

34. We find the claimant did her medication training as described by the claimant at the very beginning of her employment which is consistent with Mrs Higham's statement.

35. Section B says, "Red Rock training set up". The Tribunal was informed that Red Rock is an online training platform. The Tribunal find that the document at page 122 relates to the claimant's Red Rock training, as suggested by the respondent. It

shows it was activated on 10 October 2021, which is consistent with the meeting on 9 October and the entry at page 71(a) :“Red Rock training set up”.

36. The claimant was adamant there was no conversation about a probation review in January.

37. The Tribunal find the parties communicated regularly via WhatsApp about work related matters, as is often common these days. The parties had provided a printout of WhatsApp conversations and there was no dispute they were accurate. The Tribunal finds no reference at all to a probation review meeting in January 2022 in the WhatsApp messages, which is surprising.

38. The Tribunal is not satisfied that the entries on page 71(a) relate to a meeting in January 2022.

39. The claimant was a clear and coherent witness who made concessions where necessary. Mrs Higham has now retired from the respondent. She appeared to do her best when answering questions but had to be reminded frequently to answer the specific question. Given the lack of clarity about her evidence and our concerns about the veracity of the document at page 71(a)-(c), the lack of reference to any documentation given to the claimant and the lack of any WhatsApp messages relating to a probation review In January 2022, the Tribunal prefers the claimant's recollection that no such meeting took place in January 2022.

40. The Tribunal turn to Friday 22 April 2022. The respondent relied on page 71(b) – that Mrs Higham conducted a meeting with the claimant on 22 April 2022. The claimant was adamant that there was no probation review meeting in April 2022. The claimant says at some point (possibly in April) there was a discussion by way of an appraisal. The respondent has not disclosed any appraisal documents in the bundle.

41. The Tribunal considered the WhatsApp messages. They make no reference to a probation review meeting on 22 April 2022. Instead, the WhatsApp messages show that the claimant attended a shift (8.00pm to 10.30pm) on 22 April 2022 (see WhatsApp entry for 14 April 2022 arranging the shift). The Tribunal finds that the payroll document shows three evenings at 2.5 hours – paid 7.5 hours’ overtime (page 137) in that period. The WhatsApp messages show the claimant agreed to attend three evenings at that time.

42. Mrs Higham suggested that she carried out the probation appraisal review after the claimant had completed the medication on the evening of 22 April. The claimant disputed any review took place in April. The Tribunal prefers the claimant’s recollection. The claimant said dealing with medication took approximately 2.5- 3 hours. The claimant had a young family and had to arrange childcare to attend work for the respondent. There is no dispute the short evening shift on 22 April was an overtime shift where the claimant was specifically asked to come in to deal with medication for the residents. The Tribunal find it implausible that a probation review was conducted without any formal notification or any record in the WhatsApp message on an evening shift when the claimant had attended on overtime to help the respondent out, and that the shift was 2.5 hours from 8pm -10.30pm

43. The Tribunal is not satisfied that 72(b) relates to a probation review meeting on Friday 22 April 2022.

44. We find there was never any formal communication until August 2022 that the claimant had failed her probation or needed it to be extended, despite the fact the probation period was agreed to be 6 months so had expired in April 2022.

45. The claimant did not dispute that she had not completed her training and agreed that on occasion Mrs Higham would raise the fact her training was not complete, with her. The claimant said she explained to Mrs Higham that because she had three young children at home and another job and attended university it was very difficult for her to complete training online at home. The Tribunal find Mrs Higham encouraged the claimant and other staff to complete the online training on a smart tablet or on their smartphone at home if they had not completed it in working hours. The claimant said she explained to Mrs Higham that her regular shifts were busy and there was no time to complete the shifts in working hours.

46. It was not disputed that the claimant's regular shifts were at the weekends and Mrs Higham usually worked Monday- Friday.

47. The Tribunal find there is record in the WhatsApp messages (see the entry on 9 March 2022) where the claimant is given a friendly reminder by Mrs Higham to complete her training and the reminder concludes with a kiss which is reflective of the light hearted and informal tone of the reminder.

48. In June 2022 an issue arose about a failure of the claimant to note medication. P93. A note of the meeting is dated 4 June 2022 with notes taken by Mrs Higham (page 70). The meeting appears to have discussed the medication error. It states:

> "A second written warning given to take more care when giving meds and accuracy of meds to be reviewed."

49. However, there is no formal invitation to the meeting and no formal written warning ever recorded. The meeting deals with other matters including feedback which is noted to be "good feedback" and "no issues care". There is also an entry saying the claimant should complete her Red Rock training before the end of June.

50. Based on the claimant's evidence and the contemporaneous WhatsApp messages and the concession by Mrs Higham in cross examination, the Tribunal find that that meeting appears to have taken place on 9 or 10 June not 4 June -see p112 At the time the meeting does not appear to have been regarded as serious by the respondent because the message from Mrs Higham on 10 June is "thanks for today, very positive" . p112.

51. A rota sheet on page 96 shows the claimant was absent on sick leave on a rostered shift on Sunday 24 July 2022. The claimant says she told Mrs Higham in or around late July that she was pregnant. The claimant says she told Mrs Higham on the telephone, and that she had definitely informed Mrs Higham of her pregnancy before the meeting which she was called to on 8 August.

52. The claimant was a clear witness. The Tribunal rely on the claimant's evidence that she told Mrs Higham on the telephone and find it is very likely to have been on or around 24 July when the claimant was unable to attend due to sickness. The claimant stated she suffered from pregnancy-related sickness.

53. The Tribunal finds that the tone of the WhatsApp messages is generally positive until late July onwards when the tone becomes more serious and less friendly. On 29 July 2022, after the Tribunal finds the claimant informed Mrs Higham she was pregnant, Mrs Higham said she is going to book a probationary review "next week". On 1 August 2022 Mrs Higham asked the claimant for her home address. Suddenly the matter became very formal. The respondent wrote to the claimant by post, dated 1 August 2022 (page 74), inviting her to a probationary meeting on 5 August to discuss the issue of a failure to follow a reasonable management instruction regarding completion of essential training as part of her role.

54. We find the letter of 1 August 2022 was not received by the claimant until 4 August, the day before the meeting scheduled for Friday 5 August, a non-working day. We accept the claimant's evidence set out in the WhatsApp messages that she was unable to attend because she had been given a medical appointment for her heart at short notice (see page 14 supplemental bundle ECG appointment). We find the claimant did not have 24 hours' notice of the meeting and did not have time to try to arrange childcare either.

55. We find on 5 August 2022 Mrs Higham asked the claimant for her email address, which she supplied. We find the meeting was rearranged to Monday 8 August, another non-working day, by email letter to the claimant (page 75).

56. We find the meeting took place on Monday 8 August 2022. Mrs Higham took notes (pages 76-78). Mrs Higham did not share the meeting notes with the claimant until the claimant received the bundle for this hearing. The claimant disputes the accuracy of the notes.

57. Mrs Higham says 5 August 2022 was the first time she knew the claimant was pregnant. The Tribunal prefer the claimant's recollection – that she told her at the end of July. There is no dispute that the claimant did explain to Mrs Higham the difficulties in doing the training outside working hours at that meeting.

58. We find that a note of a telephone conversation on 9 August which summarised the meeting on 8 August was sent to the claimant on 9 August 2022. P79 .The note is confusing in the extreme. On the one hand it says that there will be "no further action" following the meeting on 8 August, but then it goes on to say that leaves "concerns such as timekeeping and reasonable management instructions". For the Tribunal, that makes no real sense because the failure to comply with the management instruction was said to be the reason for the probationary review on 8 August in the first place. The note goes on to confirm that the claimant will attend the offices to complete her training on Sunday 14 and Sunday 21 August 2022, and she will have no other duties those days.

59. We find this is the first occasion when the claimant has been allocated specific ringfenced time to attend training during working hours.

60. Confusingly, (because the document previously stated there would be no further action) the document then goes on to say the claimant's probationary period has been extended and will be reviewed in one month's time, which would be 9 September 2022.

61. On Saturday 14 August 2022 when the claimant was due to attend the training, she informed the respondent that she was suffering from vomiting, morning sickness. We find it was pregnancy related sickness.

62. Mrs Higham responded on Sunday 15 August 2022 by rescheduling the training the claimant had been due to attend on 14 August 2022 to Friday 19 August 2022 from 9.00am to 5.00pm (without consultation with the claimant, for a non-working day), to be followed by another review meeting on the same day (Friday 19 August) and the training on 21 August 2022 to remain on the rota.

63. The letters Mrs Higham sent about this are also confusing. The letter dated 15 August (page 116 and page 80) refers to performance related concerns. The concerns include the previous concern about the reasonable management instruction regarding completion of essential training and a new complaint of failure to follow company rules about timely absence notification procedure reporting on 14 August.

64. The respondent says the letters were sent by email and by WhatsApp. The claimant does not dispute she received the letters.

65. The claimant contacted the respondent to say she could not attend on Friday 19 August (a non-working day) due to difficulties in arranging childcare (page 117). Mrs Higham responded by bringing the probationary review meeting *forward* to another non-working day on Thursday 18 August at 10.00am. The claimant contacted her to say she was working elsewhere until 2pm that day, Thursday 18 August) which was by now the very next day and asked if Mrs Higham could "do any later". Mrs Higham said to the claimant "3.00pm. "

66. We find Mrs Higham did not further rearrange the date for the claimant to attend training which the claimant had been unable to attend on 14 August. Mrs Higham initially rearranged it to Friday 19 August but did not arrange a new date for the claimant to attend to attend the training when the claimant said she was unable to attend on 19 August.

67. The respondent arranged a probationary meeting over the telephone for the claimant on a non-working day (18 August) at very short notice, which could result in her dismissal. The items to be discussed included failure to attend training. The respondent had already said in the document at page 79 that no further action was going to be taken in that regard and that her probation was being extended to a date one month later i.e. 9 September 2022.

68. The claimant did not attend the telephone meeting in the sense that when Mrs Higham telephoned her at 3.00pm and twice later on 18 August she did not answer the telephone. The claimant said in cross examination at the Tribunal that she was engaged in a work-related matter in her other job.

69. Mrs Higham sent a WhatsApp message cancelling the claimant's shift on Sunday 21 August which had been previously been agreed for her to complete the training. When the claimant responded by WhatsApp to ask if she was being sacked, Mrs Higham said she was: “Unfortunately. I have tried to ring you, no answer. Dismissal with immediate effect and letter to follow”. p118

70. Although the respondent says a letter was sent by post dated 19 August, the claimant says she did not receive it and the Tribunal are satisfied that the claimant is truthful about this. We find the claimant contacted the respondent asking for a copy of the letter and it was emailed to her by Ms Sutton on 2 September 2022.

71. The claimant appealed against her dismissal by a letter dated 5 September 2022, but she withdrew her appeal.

The Issues

72. The issues for the Tribunal to decide were as follows:

1. Pregnancy Discrimination

1.1 Did the respondent treat the claimant unfavourably by doing the following things:

(1) not arranging a risk assessment for the claimant after the claimant had informed the respondent that she was pregnant;

(2) on 19 August 2022, cancelling the claimant's training arranged for 21 August 2022;

(3) dismissing the claimant on 19 August 2022 for failing her probationary period not completing her training (which the respondent had itself cancelled);

(4) not complying with the ACAS Code of Practice by not informing her in writing that the respondent was considering dismissing the claimant on 19 August 2022, not providing written confirmation of the mattes to be considered on 19 August 2022 and not providing any supporting documents, not going her the opportunity to attend a meeting before that decision to dismiss was taken and not offering her the opportunity to be accompanied to that meeting.

1.2 Did the unfavourable treatment take place in a protected period?

1.3 Was the unfavourable treatment because of the pregnancy?

1.4 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

2. Automatic Unfair Dismissal

2.1 Was the principal reason for the claimant's dismissal because of her:

(a) alleged pregnancy and/or by reason of a pregnancy-related reason, namely her pregnancy-related illness (morning sickness) and associated sickness absences?

2.2 The respondent relies on the principal reason for the claimant's dismissal being due to her failing the probation period and having failed to complete the mandatory training.

3. Indirect Discrimination related to Sex

3.1 Did the respondent have the following provision, criterion or practice ("PCP"):

(a) Employees must attend training sessions/work-related meetings on their non-working days and/or in their own time.

3.2 Did the PCP apply to all employees? The respondent denies applying the above PCP to all employees.

3.3 Did the PCP put persons of one group at a particular disadvantage, namely: female workers who are more likely to have childcare responsibilities?

3.4 Did the claimant suffer a disadvantage as a result of the respondent applying the above PCP?

3.5 Can the respondent show the PCP was a proportionate means of achieving a legitimate aim?

(a) The respondent says there is a proportionate legitimate aim in ensuring that training is completed to ensure the claimant completed her mandatory training. Meetings were scheduled based on availability.

3.6 The Tribunal will decide in particular:

(a) Was the PCP an appropriate and reasonably necessary way to achieve those aims?

(b) Could something less discriminatory have been done instead?

(c) How should the needs of the claimant and the respondent be balanced?

The Relevant Law

73. The Tribunal reminded itself that the relevant law is at sections13,18 and 19 Equality Act 2010 and section 99 Employment Rights Act 1996. The Tribunal had regard to the burden of proof (section 136 Equality Act 2010).

74. So far as the indirect discrimination claim is concerned, we reminded ourselves that the purpose of the law of indirect discrimination in the words of Baroness Hale is "an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic" (Chief Constable of West Yorkshire Police & Another v Homer [2012] ICR 704).

75. We remind ourselves of the guidance so far as the burden of proof is concerned. The Tribunal reminded itself that the established authorities demonstrate there is a 2-stage process in a direct discrimination case. These authorities include Wong v Igen Ltd 2005 3 All ER 812 and Madarassy v Nomura International plc 2007 IRLR 246 and Efobi v Royal Mail Group Ltd 2019 2 All ER 917.

76. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof. There must be "something more". See Mummery LJ in Madarrassy v Nomura International plc.

77. We also reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We took into account Lord Nicholl's guidance in that bias may be unconscious. See Nagarajan v London Regional Transport 1999 ICR 87

Application of Law to Facts

78. The Tribunal turned first to deal with the claimant's claim for direct pregnancy discrimination. We turned to the first allegation of unfavourable treatment:

(1) Not arranging a risk assessment for the claimant after the claimant had informed the respondent that she was pregnant.

79. The Tribunal finds that the claimant informed the respondent she was pregnant by the end of July 2022.The Tribunal has found it was 24 July 2022. It is not disputed that the respondent failed to arrange a risk assessment. The claimant was engaged in a job which required manual handling. It is not disputed that the claimant was at work on 31 July 2022, according to the WhatsApp messages. The Tribunal are therefore satisfied that it was unfavourable treatment not to arrange a risk assessment for the claimant when she was pregnant and she was engaged in work which could require manual handling.

80. The next question is: did the unfavourable treatment take place in the protected period? The protected period includes the period when the claimant was pregnant and the answer to the question is therefore yes.

81. We turn to the last question: was the unfavourable treatment because of pregnancy? The Tribunal finds the failure to carry out a risk assessment was because of the pregnancy.

82. The reason advanced by the respondent was that they did not carry out a risk assessment because they did not know until 8 August that the claimant was pregnant and after that date there was no further date when the claimant was in work so there was no opportunity to carry out a risk assessment.

83. However, this does not deal with the time prior to the claimant's absence from work when the Tribunal has found, preferring the claimant's evidence, that the respondent was aware the claimant was pregnant.

84. The Tribunal considers whether the reason for the failure was pregnancy. The Tribunal is satisfied there is evidence to shift the burden of proof. The Tribunal relies on the following evidence. The Tribunal has had regard to Mrs Higham's reaction to the claimant informing her she was pregnant. Mrs Higham does not accept that the claimant informed her in July but says when she was informed (which she says was on 8 August) she did not did not offer congratulations and did not discuss or ask about form MAT B, both of which might have been a more conventional response to being informed of an employee's pregnancy.

85. The Tribunal relies on other evidence in particularly the change in the tone of the WhatsApp messages and the extreme haste in pursuing the failure to complete training as a disciplinary matter once the respondent knew the claimant was pregnant as additional evidence which shifted the burden of proof.

86. The Tribunal turns to consider whether the respondent's explanation for the failure to conduct a risk assessment. The respondent does not have a non-discriminatory explanation because its explanation is that it did not know the claimant was pregnant until 8 August and the Tribunal has found that to be factually incorrect. It has no explanation for why a risk assessment was not conducted after 24 July 2022. Therefore we find this allegation succeeds.

87. The Tribunal turn to the next allegation, which is:

> (2) On 19 August 2022 cancelling the claimant's training arranged for 21 August 2022.

88. The Tribunal find that this amounts to unfavourable treatment because it prevented the claimant from having the opportunity to attend the training at work, during "ring fenced" time when she was not required to carry out other duties.

89. We turn to the next question: did the unfavourable treatment take place in the protected period? The answer to that is yes because it occurred when the claimant was pregnant.

90. The next question is: was the unfavourable treatment because of the pregnancy?

91. We turn to the burden of proof. We rely on the factors set out below at paragraphs 97-103 to find the burden of proof has shifted to the respondent.

92. We turn to the respondent's explanation. The respondent says it had terminated the claimant's employment and simply cancelled her shift after that. We are not satisfied that that explanation is correct. The WhatsApp messages show that

Mrs Higham at 12:56 on 19 August 2022 informed the claimant she had cancelled her shift to attend the training and a letter would follow. Mrs Higham did not inform the claimant she was dismissed and then say she had cancelled the training. Furthermore, the Tribunal find the claimant was not informed of the reason for her dismissal until she received the letter by email on 2 September.

93. Accordingly, the Tribunal find the burden of proof has shifted and the respondent has not shown a non-discriminatory explanation. Even if we are wrong about that and Mrs Higham cancelled the shift after she had decided to terminate the claimant's employment (but before she informed her), we have found (see below) that the reason for dismissal was pregnancy related and cancelling the shift was intertwined with that decision and so for that reason also it was a pregnancy related decision.

94. We turn to the next allegation:

> (3) Dismissing the claimant on 19 August 2022 for failing her probationary period; not completing her training (which the respondent had itself cancelled).

95. We find this is the heart of the case. We find that to dismiss an employee is unfavourable treatment. There is no dispute that the treatment took place in the protected period so the answer to that question is yes. The key question is: was the unfavourable treatment because of the pregnancy?

96. We find the burden of proof has shifted. We rely on the following facts to shift the burden.

97. We find that the claimant had informed the respondent in or around 24 July 2022 that she was pregnant. We find that before that the claimant was never informed that she had failed a probationary review or that there was to be any disciplinary action or other action against her for not completing her training. The probationary period was agreed to have been 6 months and that had expired in April 2022 without the claimant being told there was any issue.

98. The claimant accepts she had not completed her training but had explained to Mrs Higham that she needed some allocated time at work to do it because she was unable to do it due to her family commitments outside working hours, and that the shift was too busy for her to complete it during working hours. There was no dispute from Mrs Higham or anyone else that the claimant was a very conscientious and well-regarded worker.

99. It was not until after the claimant had informed the respondent that she was pregnant that the tone of the WhatsApp messages changed and very swiftly the claimant was dismissed for a matter never previously raised formally.

100. The claimant was given only one opportunity to do the training on days at work where she was allocated only training and had no other duties. The two days by agreement were 14 and 21 August, arranged on 9 August 2022.p79.

101. We find the claimant was unable to attend on that first date , 14 August, for a pregnancy related reason (morning sickness). The respondent then moved

immediately to what was effectively a disciplinary meeting without giving the claimant an opportunity to attend any training and in breach of its own previous document stating that there would be no further action in relation to the failure to complete training and (in a contradiction within the same letter) in breach of their decision that the claimant's probationary period was extended by a month to 9 September 2022.

102. Despite this the claimant was dismissed effectively by WhatsApp message before the end of the new probationary period due to expire 9 September 2022 without an opportunity to complete the training which she was unable to attend on 14 August.

103. The respondent specifically failed to arrange a new date for the training when the claimant did not attend on 14 August. Although Mrs Higham initially said it was rearranged to 19 August, when the claimant could not attend that date (a non-working day) Mrs Higham never rearranged that training. She moved immediately to the probationary meeting which she brought forward to 18 August and fixed it for a telephone meeting. It goes without saying that the claimant could not attend training at a telephone appointment.

104. Finally the reason why the claimant could not attend the training was a pregnancy related reason, morning sickness. For all these reasons we are satisfied that the burden of proof has shifted to the respondent.

105. The respondent was unable to satisfy us that the real reason the claimant was dismissed was her failure to complete the training. There is nothing in any documentation supplied by the respondent to say the claimant had to complete her training during any probationary period nor is there any document to give a specific timeframe to complete training. The respondent's own guidance obliged it to support the claimant to complete her training and yet it dismissed her before she had an opportunity to do the training, within work time, on a day when she was not rostered on other duties. There was no explanation by the respondent as to why there was such extreme haste to dismiss the claimant, a good employee, without even having an opportunity to attend an in-person meeting. The Tribunal reminds itself that discrimination may be unconscious.

106. Furthermore, the very reason relied upon by the respondent-failure to complete training during the probationary period- is tainted by discrimination because the reason the claimant could not attend on the agreed training date of 14 August was for a pregnancy related reason (morning sickness)

107. The Tribunal finds there is no non-discriminatory explanation for the termination of the claimant's employment and we find the reason for dismissal was pregnancy.

108. We turn to the next allegation:

(4) Not complying with the ACAS Code of Practice, not informing the claimant in writing that the respondent was considering dismissing her on 19 August 2022, not providing written confirmation of the matters to be considered on 19 August 2022 and not providing any supporting documents.

109. The Tribunal has found that these allegations are not well-founded because the letter (p80) sent to the claimant informed her that she was at risk of dismissal and identify the nature of the matters to be considered at the meeting originally scheduled for 15 August 2022 and accordingly that allegation is factually incorrect and must fail.

110. Likewise, the part of allegation (4) that states "not offering her the opportunity to be accompanied to that meeting" is factually incorrect and accordingly that claim fails.

111. The part of allegation (4) which succeeds is "not complying with the ACAS Code of Practice by not providing any supporting documents and not giving her the opportunity to attend a meeting before the decision to dismiss was taken". We find that is factually correct and amounts to unfavourable treatment. The claimant was only given the opportunity to attend a telephone appointment not an "in person" meeting. She was not sent any documentation relevant to the disciplinary meeting.

112. At this stage in August 2022 there was no reason why the meeting should not be in person, rather than by telephone particularly as the claimant was working in a care home and any Covid-related reasons would no longer be relevant as the claimant attended work in person.

113. We have found that not giving the claimant the opportunity to attend a meeting in person (which is in breach of the ACAS Code) was unfavourable treatment. We turn to consider whether it occurred in the protected period, which it did.

114. We turn to the last question: was the unfavourable treatment because of the pregnancy? We rely on the facts set out above at paragraphs 97-103 as evidence to shift the burden.

115. We turn to the explanation. We are not satisfied the respondent showed a non-discriminatory explanation for requiring the claimant to attend a telephone meeting and not an "in person" meeting before deciding to dismiss. The respondent did not explain why the need for urgency so that when the claimant explained she could not attend on 19 August they could not have arranged the meeting to take place in person on another date for example on 21 August or indeed on another date after the claimant had been given the opportunity to complete both training days at work when she was rostered not to do other tasks. Neither was there any explanation why the respondent had not supplied documents relevant to a disciplinary meeting where the possible outcome was dismissal. Accordingly, the claim succeeds.

<u>Automatic unfair dismissal – section 99 Employment Rights Act 1996</u>

116. We turn to the first question: was the principal reason for the claimant's dismissal because of her pregnancy and/or by reason of a pregnancy related reason, namely her pregnancy related illness (morning sickness) and associated sickness absences?

117. The Tribunal find that the claimant has been able to adduce sufficient evidence as set out above to suggest that the real reason for her dismissal was pregnancy.

118. We rely on our findings above that the respondent has not been able to show that the real reason for dismissal was the claimant's failure to complete her probationary period and accordingly this claim succeeds.

Indirect discrimination related to sex

119. We turn to consider the following:

(1) Did the respondent have the following provision, criterion or practice ("PCP") – employees must attend training sessions/work-related meetings on their non-working days and/or in their own time?

120. The Tribunal find that the PCP was employees must attend work-related meetings on their non-working days and/or in their own time.

121. The Tribunal found that although Mrs Higham encouraged staff to complete training which they had not done at work, online in their own time, she did not require them to do so. However, the Tribunal find that there was a requirement for employees to attend work-related meetings on their non-working days and/or in their own time. This is evidenced by the expectation that the claimant would attend probationary review meetings as she was required to do in the run-up to her dismissal on non working days, often at very short notice.

122. The next question is: did the PCP apply to all employees? In fact, on reflection, this issue is incorrectly drawn. When considering s19 Equality Act 2010, there is no requirement to apply the PCP to all employees. The issue is whether the PCP was applied to the claimant, which it clearly was.

123. We turn to the next question: did the PCP put persons of one group at a particular disadvantage, namely female workers who are more likely to have childcare responsibilities? The Tribunal relies on its industrial knowledge that although things are changing in society, women still predominately have primary childcare responsibility. They are therefore likely to be placed at a disadvantage if required to attend work meetings on a non-working day.

124. We turn to the next question: did the claimant suffer a disadvantage because of the respondent applying the above PCP? We find that she did. It was difficult for the claimant to arrange childcare on non-working days and the claimant said she found it stressful being placed under pressure to do so.

125. We turn to the last issue: can the respondent show the PCP was a proportionate means of achieving a legitimate aim? The Tribunal accepts there was a legitimate aim in ensuring training was completed to ensure the clients at the care home were being looked after by professionally trained employees. (Paragraph 35 ET3 p30)

126. However no specific legitimate aim was identified in relation to requiring the claimant to attend meetings on a non-working day.

127. The Tribunal must go on to the next issue: was the PCP a proportionate and reasonably necessary way to achieve the aim? We must also consider whether something less discriminatory have been done instead.

128. Considering the legitimate aim relied upon by the respondent, namely ensuring training was completed to ensure the clients at the care home were being looked after by professionally trained employees, the Tribunal is not satisfied that requiring the claimant to attend meetings on non-working days was proportionate means of achieving that aim. The respondent could have arranged meetings with the claimant on her working days.

129. Therefore this claim succeeds.

130. The case will proceed to a remedy hearing on 8 October 2024.

Employment Judge KM Ross
Date: 10 September 2024

REASONS SENT TO THE PARTIES ON
10 September 2024

FOR THE TRIBUNAL OFFICE