EMPLOYMENT TRIBUNALS

Claimant: **Miss M Poliakovaite**

Respondent: **Davita International Limited**

Heard at: **London Central** (remotely, by video)

On: **11, 12, 13, 14, 15 September 2023**
(and 27 November 2023 in chambers)

Before: **Employment Judge T Kenward**
Dr V Weerasinghe
Ms S Aslett

Representation
Claimant: **in person**
Respondent: **Ms S Tharoo (Counsel)**

RESERVED JUDGMENT

The following complaints are not well-founded and are dismissed:

(1) the complaint of unfair dismissal contrary to Employment Rights Act 1996 sections 99;
(2) the complaint of direct sex discrimination contrary to Equality Act 2010 section 13;
(3) the complaint of discrimination on the grounds of pregnancy contrary to Equality Act 2010 section 18.

REASONS

Introduction

1. The respondent is an international company that provides kidney dialysis services. The claimant was employed by the respondent as a Senior Director – International Accounting, from 10 May 2021 until 22 June 2022, when she was dismissed, shortly after telling her manager that she was pregnant. The

respondent's case is that the claimant was dismissed on the grounds of performance and decision had already been made before it knew of her pregnancy. The claimant was not required to work a notice period and received a payment in lieu of notice. The claimant brought proceedings in the employment tribunal arising out of the dismissal, including complaints of discrimination.

2. The final hearing took place over five days from 11 September 2023. The fifth and final day of the final hearing ended at 4.45 pm on 15 September 2023. The tribunal reserved its decision as there was insufficient time for deliberation. The case was further listed for deliberation to take place in chambers on 27 November 2023. I apologise for the delay thereafter in providing this Judgment and these written reasons which has been caused by pressure of work.

Proceedings and issues

3. Early conciliation commenced through notification being given to ACAS on 16 June 2022. The early conciliation certificate was issued on 14 July 2022. The ET1 form of claim was received by the tribunal on 4 September 2022.

4. In her ET1 form of claim, the claimant ticked the boxes at section 8.1 to indicate that she was claiming unfair dismissal, discrimination on the grounds of pregnancy as well as claiming that she was owed other payments. The claimant did not have the necessary qualifying service in order to bring an ordinary unfair dismissal complaint. The dismissal was stated to be automatically unfair on the basis of being a dismissal in relation to pregnancy or for pregnancy related reasons. Insofar as payments were being claimed (other than any losses arising from any alleged for dismissal discrimination) they were not identified in the ET1 form of Claim.

5. The issues to be determined were identified at a case management hearing on 19 January 2023 and were subsequently set out in the list of issues at the end of the resultant case management order. This list of issues was effectively amended as a result of a further case management hearing on 11 July 2023 which gave the claimant permission to add a complaint to the effect that her dismissal amounted to direct sex discrimination contrary to Equality Act 2010 section 13. The claimant was refused permission to amend her claim to add various other complaints.

6. It follows that the complaints have been identified as being unfair dismissal (under Employment Rights Act 1996 sections 99), and pregnancy discrimination (contrary to Equality Act 2010 section 18) and direct sex discrimination (contrary to Equality Act 2010 section 13) through the claimant's dismissal.

7. The original list of issues had also made reference to the claimant complaining about the claimant's line manager having previously made comments about female employees and pregnancy and had identified, as a preliminary issue, the issue as to whether these comments had been made, or whether there was an alternative explanation for them. The comments which were alleged to have been made by the Claimant's line manager, Vincent Jegou, were alleged to be that (1) another female employee, who was working from home to provide childcare, would not be promoted; and / or (2) another employee, who was

pregnant and taking time off for health reasons, was taking advantage of the system.

8. At the final hearing, it was agreed that these were background matters which were being relied upon by the claimant as evidence which she claimed tended to show that she had been subjected to discrimination but were not freestanding complaints. In any event, it can be seen that the allegation was that these were not comments about the claimant but were comments which had been made in her presence.

9. The claimant's schedule of loss did not seek to claim any other payments other than payment by way of compensation.

10. It should be noted that the schedule of loss (which was dated 3 March 2023) included a head of claim for two weeks' pay on the basis of not having been provided with sufficient reasons for the dismissal. Under section 92(4) of the Employment Rights Act 1996 ("ERA 1996"), a woman who is dismissed at any time and for any reason when pregnant (irrespective of her length of service) is given the right to receive a written statement of reasons for her dismissal. Under ERA 1996 section 93, there is the right to complain to the employment tribunal if the reasons given are inadequate or untrue. Such a complaint must be brought within three months of the effective date of termination unless it is not reasonably practicable for the complaint to be brought within that time. The tribunal was not satisfied that such a complaint was before the Tribunal. Although the claimant's claim statement attached to the ET1 form of claim made reference to "*my sudden poorly explained dismissal*", this was not identified as a separate freestanding complaint. The list of issues provided by the tribunal following the Preliminary hearing on 19 January 2023 listed the complaints to be determined and did not include such a complaint. It was made clear that if "*you think the list is wrong or incomplete, you must write to the Tribunal and the other side by 26 May 2023*" and if "*you do not, the list will be treated as final unless the Tribunal decides otherwise*". The claimant did subsequently make an application to amend her claim which was dealt with at a further preliminary hearing on 11 July 2023, but such a complaint does not seem to have been within the scope of that application. Tellingly, the written closing submissions of both the claimant and respondent did not seek to address any such complaint.

Evidence

11. In terms of documentary evidence, the tribunal was provided with a bundle of 429 pages. Additional documentary evidence was provided in the course of the hearing in the form of a bonus notification sent to Mr Ted Bakken on or about 11 March 2022.

12. In terms of witness evidence, the tribunal was provided with a written statement of evidence from the claimant as well as a statement of evidence from her partner, Mr Bart Schmitz, both of whom gave evidence. The tribunal was also provided with five written statements of evidence being relied upon by the respondent with the statements being from Mr Vincent Jegou, Mr Derab Khan, Ms Michelle Hoban, Mr Ted Bakken and Mr Bo Crawford, all of whom gave oral evidence.

Findings of fact

13. The respondent employed the claimant as Senior Director – International Accounting. She was managed by Mr Vincent Jegou, Chief Financial Officer. She was in charge of the International Finance and Accounting Team which also included Ms Michelle Hoban (Senior Manager, International Accounting), Mr Ted Bakken (Senior Manager, International Accounting), Ms Sarah Dai (Manager, International Accounting) and Ms Izabela Palega-Kalek (International Financial Accountant). The team also had the services of Mr Bo Crawford (Director of Finance and Accounting), which were intended to be for 30% of his time. Mr Bakken and Mr Crawford) were based in the USA whilst the claimant and the other team members worked from the same office in London (as did Mr Jegou). The Claimant also had a dotted reporting line to Mr John Winstel, the Chief Accounting Officer of the respondent.

14. The above structure had come into place as a result of a restructuring decision which had been made by the respondent by which its international accounting work, which had previously been undertaken by employees based in the USA, would move to its UK office.

15. The claimant has made a number of allegations regarding comments alleged to have been made by Mr Jegou. The Tribunal notes that these were largely not matters which were raised or documented at the time. Essentially, the claimant has retrospectively sought to attach significance to comments or conversations. As the respondent has suggested, there does seem to be an element of seeking to do so in order to portray Mr Jegou in a negative light.

16. In relation to the alleged comments that Mr Jegou said that a certain female employee would never get promoted due to her preference to work from home to provide childcare, the Tribunal accepted that there were general conversations about working from home against the background of the pandemic. Comments as to the possible disadvantages of homeworking were made by Mr Jegou, although not about a particular individual.

17. In relation to the alleged comments of Mr Jegou supposedly implying that an employee in Germany, who was pregnant and had taken time off, was taking advantage of the system, the Tribunal accepted the explanation of Mr Jegou that any comments were in the context of seeking to give an explanation to his team as to the reason for accounting information required from the German team being late, with this involving Mr Jegou communicating the information that he had been provided by the German team which had been to the effect that a pregnant employee, who was aggrieved at being passed up for promotion ,was taking sick leave regularly during at the time of the month end closing date.

18. There was also an allegation that Mr Jegou had "*jokingly suggested that the whole team was made up of only women, and he felt in the minority*", the Tribunal found that Mr Jegou made a comment, which he intended to be light-hearted, about being the only male, but in the context of joining a communal lunch table where all of the eight to ten people seated around that table were female.

19. There was also an allegation that Mr Jegou had made comments to the effect that nurses "*earn quite a lot of money given their responsibilities*", which the claimant has suggested was a discriminatory comment on the basis that nurses are "*predominantly female*". The Tribunal was satisfied that these comments were not being made by Mr Jegou about nurses generally, but related to the differences in cost between recruiting salaried nurses and having to engage agency nurses under a contract, so that, if the respondent was unable to recruit sufficient salaried nurses to meet staffing ratios required by the NHS, it had to use contract nurses and the additional cost impacted the profitability of the contract.

20. The claimant has also sought place reliance upon Mr Jegou not appreciating the difficulties that members of the team had with the requirement to return to the office full-time. The Tribunal finds that the position was that the decision that employees needed to return was not made by Mr Jegou but was made at the CEO level. In the light of issues in respect of this having been raised with him by the claimant, Mr Jegou then spoke to the CEO, which resulted in members of Mr Jegou's team being permitted to work from home for three days per fortnight. The Tribunal accepted his evidence that he applied these rules fairly,

21. The claimant had also sought to attach significance to evidence which she claimed was evidence of less favourable treatment, in that concerns or performance issues regarding male colleagues were dealt with in a way which was in stark contrast to the way in which Mr Jegou ultimately dealt with the concerns about the claimant which were raised with him.

22. In relation to Mr Bracken, the Claimant alleged that she was made aware that there had been some concerns about Mr Bakken being reluctant to share information with colleagues. She also sought to allege that Mr Bakken had managed Jaime Navarro, who reported to him, in a way which was inappropriate. The evidence which the tribunal had in respect of the management of Jaime Navarro (who was based in the Netherlands) arose from a number of e-mail exchanges, but, taken as a whole, the Tribunal accepted the way in which the respondent characterised these email exchanges as being correct, namely that they showed Mr Bakken seeking to raise issues with Mr Navarro in a way which was clear and provided advice and guidance in a supportive way. Ultimately, the tribunal was not satisfied that it had been provided with any evidence in relation to any issues regarding Mr Bakken which provided a basis for concluding that any such issues were significant or serious. There was no basis upon which the tribunal could conclude that any issues with regard to Mr Bakken were in any way comparable to the issues faced by Mr Jegou on or around 7 June 2022 with regard to the claimant.

23. The claimant also sought to place reliance upon evidence as to there having been performance issues regarding Jaime Navarro. Again, there was no basis upon which the tribunal could conclude that any such issues had any wider implications or consequences in the way that Mr Jegou concluded that those involving the claimant did.

24. The claimant also sought to place reliance upon there having been alleged issues with Mr Euan Peebles, on the basis that a number of members of the

compliance team left within a short space of time. However, the tribunal had no evidence before it from which to conclude that Mr Peebles was the reason for the departures. Thus, there was no basis for the tribunal to conclude that any situation involving Mr Peebles had been in any way comparable to that involving the claimant on or before 7 June 2022.

25. The claimant had become pregnant in March 2022. The Tribunal was satisfied that the respondent was not aware that the claimant was pregnant until a WhatsApp message was sent on 7 June 2022, immediately prior to a meeting at which the decision to terminate the claimant's employment was initially communicated to her. By this time, the decision had been made, and the claimant was on her way to the meeting at which it was intended to communicate it to her. In particular, the Tribunal notes that the wording of the message strongly suggests that the claimant was providing information which she knew would be new information to the recipient. Indeed, the Claimant's written statement of evidence was also to the effect that she had deliberately not told her line manager until 7 June 2022.

26. However, in the course of her evidence, the claimant sought to argue that colleagues working for the respondent would have previously known or suspected that she was pregnant from her appearance, actions or communications. Her written statement of evidence suggested that there were signs from which it might have been deduced that she was pregnant. The brief details provided were that she had been having to go to quite a few doctor appointments, she had left a full wine glass at a team dinner (which she says resulted in a "*teammate commenting in front of my direct manager*"), and she told Mr Jegou that she was unable to go on work trips later in the year. Clearly, these were matters which do not necessarily mean that someone is pregnant. In her written statement of evidence, the Claimant also suggested that she had a "*rounding belly that was getting visible (I was in my second trimester)*". However, there was no evidence of anyone else having noticed or even commented on this. In her oral evidence, the timeframe provided by the claimant was that she was possibly fourteen weeks pregnant at the time of the meeting with Mr Jegou on 7 June 2022. She described the position as being that, by that date, she was "*struggling to hide it*".

27. In relation to the suggestion that the claimant had told Mr Jegou "*that I was unable to go on work trips later in the year*", the claimant's evidence had been fairly vague in that her statement had not indicated when this comment had been made, how it had been communicated, or what Mr Jegou's response was. In his evidence, Mr Jegou was clear that if the claimant had said that she could not attend any business trips (plural), he would obviously have asked as to the reason given that her job involved business trips. Had he done so, and had the reason been given, there would have been no need for the claimant to be sending the WhatsApp message on 7 June 2022. This rather suggested that the exchange had either not happened or had not happened in a way which would cause Mr Jegou to attach any significance to it.

28. Mr Jegou could not recall an occasion when the claimant had left a glass of wine without drinking it. On its own, it would not necessarily be an occurrence to which significance would be attached.

29. As far as any doctors' appointments were concerned, he did not expect colleagues to give reasons for medical appointments or for taking holidays. Although she had referred to "*quite a few*" medical appointments, no details or dates or other evidence as to the appointments had been provided by the claimant. There was only one reference to an "*appointment*" in the messages between the claimant and Mr Jegou which were in the bundle, and it was not even clear from the message that this was a medical appointment.

30. The witnesses all denied knowing or suspecting that the claimant was pregnant. Ultimately, the Tribunal accepted their evidence. The idea that employees of the respondent, and in particular Mr Jegou, would have known or suspected that the claimant was pregnant prior to 7 June 2022 was not supported by any contemporaneous evidence, or the evidence of the witnesses, but seemed rather to arise more from an analysis of possible clues which the claimant retrospectively constructed.

31. On 27 May 2022, Mr Jegou had received a call from Mr Bakken which raised his concerns about the way in which the claimant was undertaking her management role which was having an adverse impact on working relationships between the claimant and other team members. Mr Bakken explained that he was close to resigning because he felt as though he could no longer work with the claimant. Mr Jegou had been aware of some problems previously, but it was the first time that Mr Jegou was aware of the possible severity of the issue.

32. After this call, on the same day, Mr Jegou sent a text message to Mr Winstel saying that they had a problem with the claimant and said that he would be looking into the matter. He also spoke individually with the other members of the claimant's team including Mr Crawford and Ms Palega-Kalek.

33. The impression formed by Mr Jegou was that there was a consensus to the effect that the claimant had a poor management style and they could not work with her anymore. Issues raised were that she lacked empathy towards her team, that she would not trust individuals to exercise their own judgment, that she was defensive and not willing to have open discussion with them and that this was preventing the UK team from interacting with Mr Crawford. There were also some specific complaints made by way of seeking to illustrate these concerns.

34. On the same date, Mr Jegou spoke with Mr Darab Khan, who was the head of Employment Law and Director of Employment Affairs. It was agreed that he would meet with members of the International Finance and Accounting Team to get feedback. Mr Khan duly did so on 30 and 31 May 2022.

35. Mr Khan took notes of the various interviews. Various issues emerged from the interviews, including those set out below.:
    (1) concerns that the claimant was preventing her team from collaborating with Mr Crawford and the US team;
    (2) advice from the US team being challenged by the claimant;
    (3) a lack of support from the claimant with workload;

(4) a lack of accountability when the claimant had provided Mr Jegou with information that ultimately proved to be inaccurate;
(5) friction within the claimant's team due to the claimant and low morale;
(6) Ms Hoban feeling that her voice was "*being strangled and being stagnated*";
(7) Ms Hoban feeling unsupported when faced with needing to work from home at short notice;
(8) comments to Mr Bakken about being overpaid;
(9) the claimant's team being required by her to work on one of the days of the Jubilee bank holiday.

36. When interviewed, Mr Bakken suggested that, if the situation was unchecked, then the respondent was going to lose the whole team, although he had been biting his tongue for some time. He was aware that Ms Hoban had wanted to put her notice in for some time. Ms Hoban said that the "*straw is close to breaking the camel's back*" and there was "*only so much of this I can take*", which was implying that she might leave. Ms Dai said that the claimant was difficult to work for and described a lack of trust towards her. Mr Crawford said that the situation would be bad if it was left unchecked and eventually he would ask to be "*disengaged*". He said that Ms Hoban was not likely to last much longer and he was worried about Mr Bakken leaving.

37. The Tribunal is satisfied that all of this was not being said simply for effect. Ms Hoban booked an extended trip of over three weeks in April 2022 having decided in December 2021 that she would resign in July 2022 and travel after the completion of her three-month notice period. Mr Bracken had begun considering other roles and undertook a telephone interview for another role in January 2022.

38. It was clear that Ms Hoban, Mr Bracken and Mr Crawford had discussed the situation amongst themselves and so were aware of the dissatisfaction of each other.

39. In cross-examination, the claimant sought to challenge the accuracy of the perception, which it was being suggested that these individuals had formed, regarding the claimant's management of the team. The Tribunal formed the view that there were probably aspects of their perception which were unfair or involved overstating the position. On the other hand, insofar as the claimant put to these individuals evidence from documents which gave the impression of there being a functioning work relationship, the tribunal also accepted the point which was made in response, namely that these individuals had little choice, until the issue was raised with Mr Jegou, other than to try and make the situation of being managed by the claimant work, and had been seeking to do so in a professional way. However, various WhatsApp messages sent between members of the team were in the bundle and showed that there was a level of critical comments being made about the claimant behind her back which provided some corroboration for the level of dissatisfaction which was ultimately raised with Mr Jegou and Mr Khan.

40. Following these interviews, there was a discussion between Mr Jegou and Mr Khan as to the way to proceed. This resulted in Mr Jegou taking the decision

that the claimant's employment would be terminated. He felt compelled to act so as to avoid the very real possibility, as he saw it, that a significant number of the members of the claimant's team would leave. He was particularly concerned about the respondent missing its reporting deadlines if members of the team left. He considered that there was no benefit in speaking to the claimant, as regardless of what she said, he did not believe that, with the weight of views against her, this would provide any material benefit.

41. It was arranged for the claimant to attend a "*P&C*" meeting with Mr Jegou on 7 June 2022, with Mr Khan also in attendance. The decision had already been made by this point in time. This is consistent with the contemporaneous documentation such as a communication by Mr Jegou to Mr Joel Ackerman, the Chief Financial Officer based in the US.

42. On the way to the meeting, the Claimant sent Mr Jegou a WhatsApp message informing him that she was pregnant. Having regard to the timing of this communication, the Tribunal formed the view that this was because the claimant had concerns about the meeting and was seeking to protect her position. It was to no avail. The respondent had already decided upon a course of action which was ruthless in terms of putting the perceived interests of the business (as Mr Jegou saw them) first, regardless of any considerations of human decency.

43. In relation to the claimant's pregnancy, Mr Jegou had a very short period of time to consider this information, in conjunction with Mr Khan, and decided that this information did not alter the decision that he had made. Accordingly, when the meeting duly took place, the Claimant was informed that her employment would be terminated.

44. In giving further consideration to the position, and effectively rejecting the possibility that the claimant's pregnancy may have been a factor in the issues which had arisen, Mr Jegou and Mr Khan took account of the fact that the issues that had been raised with them by Ms Hoban, Mr Bakken and Ms Crawford effectively went as far back as the beginning of the claimant's employment. It was not being suggested that these were purely recent developments.

45. Following the meeting on 7 June 2022, the termination of employment was eventually confirmed by letter dated 22 June 2022. In the period between 7 June 2022 and 22 June 2022, there had been unsuccessful attempts to try and negotiate that the claimant's termination of employment would be subject to a settlement agreement. The relevant paragraph of the letter as to the reasons for terminating the claimant's employment was as set out below.

"*Further to discussions with a number of your colleagues and your line manager, we have become aware that there are significant issues with your management of your team and your interactions with them. In summary, the team has not felt respected or heard and this has created an uncomfortable environment. Unfortunately, this has directly resulted in a scenario where the members of your team feel that they are no longer able to work with you and there is a genuine risk of multiple resignations. As a result, we have had to take the decision to terminate your employment to avoid this risk*".

46. The claimant received a payment in lieu of notice of £56,500 as well as a payment of £3,911.54 in respect of her outstanding holiday pay.

Relevant law

Direct discrimination

47. Equality Act 2010 section 13 provides that a "*person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

48. Thus, direct discrimination takes place where a claimant is treated less favourably, because of the relevant protected characteristic, than the employer treats or would treat others. This can involve comparing the treatment of a claimant with that received by an actual comparator, or comparing the claimant's treatment with that which would have been received by a hypothetical comparator.

49. Section 23(1) of the Equality Act 2010 provides that on a comparison for the purpose of establishing direct discrimination there must be "*no material difference between the circumstances relating to each case*". In the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL*, Lord Scott explained that this means that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class*".

50. It is not a requirement that the situations have to be precisely the same. The existence of a different decision maker does not prevent the comparison being a valid one (see *Olalekan v Serco Limited [2019] IRLR 314*).

51. In *JP Morgan Limited v Chweidan [2012] ICR 268*, Elias LJ gave the guidance (at paragraph 5) set out below.

    "*In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment*".

52. In every case the Tribunal has to determine the reason for the Claimant having been treated as he or she was. In *Nagarajan v London Regional Transport [1999] IRLR 572*, Lord Nicholls observed that "*this is the crucial question*". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

53. In *Gould v St John's Downshire Hill [2021] ICR 1, EAT*, Linden J made it clear that the Tribunal must consider the reason for the actions of the alleged discriminator, as set out below.

    "The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has

therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious".

54. The focus is on the mental processes of the person that took the impugned decisions. In a direct discrimination claim, the Tribunal should consider whether that person was influenced consciously or unconsciously to a significant extent by the claimant's relevant protected characteristic. The decision makers' motives are irrelevant.

55. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial (see *Nagarajan v London Regional Transport [1999]* and *Igen v Wong [2005] ICR 931, CA*).

Pregnancy and maternity discrimination

56. Equality Act 2010 section 18 is in the terms set out below.

"*(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of the pregnancy ….
(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5) For the purpose of subsection (2), if the treatment of a women is 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 women'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 ….
(7) Section 13, 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), or
(b) it is for a reason mentioned in subsection (3) or (4)".

57. The references in Equality Act 2010 section 18 (4) and (6) to "*ordinary and additional maternity leave*" are to the statutory leave entitlement under MAPLE 1999.

58. Unfavourable treatment cannot be "*because of*" pregnancy if the employer is unaware of the pregnancy (see *Really Easy Car Credit Limited v Thompson [2018] UKEAT/0197/17/DA*). In that case, the decision to dismiss the claimant was made on 3 August 2016) when the respondent was aware that the Claimant was pregnant. On 4 August 2016, when arranging a meeting with the claimant to tell her of this decision, the respondent learned of the Claimant's pregnancy. The meeting went ahead on 5 August 2016, when the Claimant was informed of the decision reached two days earlier and provided with a letter confirming the reasons for it. The Employment Appeal Tribunal held that the correct legal test to be applied was to ask whether the Claimant's pregnancy itself had been the reason, or principal reason, for her dismissal or whether the decision to dismiss had been because of her pregnancy. That required the employer to know of the pregnancy when it took the relevant decision; it imposed no positive obligation on the employer to then revisit its decision after it learnt of her pregnancy.

Relationship between direct discrimination and pregnancy discrimination

59. Outside the protected period, it remains open to a woman to argue that any treatment meted out to her because of her pregnancy or maternity amounted to less favourable treatment because of sex contrary to Equality Act 2010 section 13.

60. The main difference between the protection from pregnancy and maternity discrimination afforded by Equality Act 2010 section 18 and the general protection from direct discrimination under Equality Act 2010 section 13 is that section 18 does not require a claimant to compare the way she has been treated with the way a male comparator has been or would have been treated. For the purposes of a complaint under section 13, a comparator, who may be an actual or hypothetical comparator, must be in circumstances that are not materially different from those of the complainant (see Equality Act 2010 section 23). By contrast, section 18 simply requires the claimant to show she has been treated "*unfavourably*" so that no question of comparison arises.

61. However, it should be noted that Equality Act 2010 section 13(1) refers to less favourable treatment "*because of a protected characteristic*", and pregnancy and maternity appears in the list of protected characteristics in Equality Act 2010 section 4. Thus, as well as prohibiting direct sex discrimination, Equality Act 2020 section 13 covers direct discrimination because of the protected characteristic of pregnancy and maternity. It is further to be noted that Equality Act 2010 section 18(7) disapplies section 13 only "*so far as relating to sex discrimination*". Thus, it does not expressly preclude a complaint under section 13 based on the protected characteristic of pregnancy and maternity, even where such a complaint could be brought under section 18. Therefore, there is nothing to prevent a claimant who is bringing a complaint under section 18 from also bringing a complaint under section 13 complaining of direct discrimination because of pregnancy or maternity, as distinct from sex, although it not clear that there be any reason to do so if the complaint fell within the scope of section 18.

62. Thus, it can be seen that a complaint of direct discrimination under section 13 remains available for pregnancy and maternity cases that fall outside the scope

of section 18, for example, because the alleged pregnancy discrimination takes place outside the protected period. In such cases, it may be arguable that no comparator is needed, particularly where the treatment complained of is based on pregnancy as distinct from the consequences of pregnancy (such as a pregnancy-related illness). This is on the basis of the case law emanating from the European Court of Justice, to the effect that pregnancy is a condition unique to women and it therefore makes no sense for a claimant to be required to compare her treatment with the treatment that would have been accorded to a man in similar circumstances (see *Webb v EMO Air Cargo (UK) Limited [1994] ICR 770, ECJ*, and *Commissioner of the City of London Police v Geldart [2021] ICR 1329, CA*).

Burden of proof in discrimination cases

63. Equality Act 2010 section 136 provides for a shifting burden of proof, as set out below.

    "*(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".

64. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong [2005] ICR 931*. This guidance has subsequently been approved by the Court of Appeal in *Madarassy v Nomura International plc [2007] ICR 867*, and by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054* (at paragraphs 25-32). In *Efobi v Royal Mail Group Limited [2021] ICR 1263*, at paragraph 26, Lord Leggatt made it clear that Equality Act 2010 section 136 had not made any substantive change to the previous law.

65. The burden of proof starts with the claimant. It is for the claimant to prove facts from which the tribunal could infer, in the absence of any other explanation, that the treatment was at least in part the result of the claimant's relevant protected characteristic. At the first stage, when considering what inferences can be drawn from the primary facts, the tribunal must ignore any explanation for those facts given by the respondent and assume that there is no explanation for them. It can, however, take into account evidence adduced by the respondent insofar as it is relevant in deciding whether the burden of proof has moved to the respondent. If such facts are established, then the burden of proof transfers to the respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the impugned decisions or treatment.

66. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy the first stage of the shifting burden of proof. It may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race or sex or age or other protected characteristics of the employee and will not, by itself,

be enough to shift the burden of proof (see *Bahl v The Law Society [2004] IRLR 799*, and *Zafar v Glasgow City Council [1998] IRLR 36*).

67. In *Madarassy v Nomura International plc [2007] ICR 867*, the Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the Respondent. Mummery LJ gave the guidance set out below.

68. "*The bare facts of a difference in status and a difference in treatment 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 an unlawful act of discrimination*".

69. *Madarassy v Nomura International plc [2007]* was approved by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054*, where Lord Hope stated that it was important not to make too much of the role of the burden of proof provisions as set out below.

    "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*" (paragraph 32).

70. In *Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865*, Elias J said (at paragraph 15) that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof, a Claimant must also prove something more. That is, the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristics and the detrimental treatment, in the absence of a non-discriminatory explanation.

71. It is not necessary in every case for a Tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the shifting burden of proof (see *Brown v Croydon LBC [2007] IRLR 259, CA*, at paragraphs 28 to 39).

Pregnancy and maternity dismissal

72. Section 99 of the Employment Rights Act 1996 ("ERA 1996") is in the terms set out below.

    "*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if —*
    (a) the reason or principal reason for the dismissal is of a prescribed kind, or
    (b) the dismissal takes place in prescribed circumstances.

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

73. The Regulations made by the Secretary of State under ERA 1996 are the Maternity and Parental Leave etc Regulations 1999 ("MAPLE 1999") of which regulation 20 provides, in so far as is relevant, is in the terms set out below.

"*(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if —*
(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3) ….
(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with —
(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child ….
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;
(4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period".

74. It follows that if the reason or principal reason for the claimant's dismissal was a reason connected with her pregnancy or the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave, then she will be regarded as unfairly dismissed contrary to ERA 1996 section 99.

75. For these purposes, the of being "*connected with*" means causally connected with, rather than some vaguer, less stringent connection (see *Atkins v Coyle Personnel plc [2008] IRLR 420, EAT*).

76. Where the claimant lacks the two years' continuous service required to claim ordinary unfair dismissal, the effect of an employee having less than two years' continuous service is that the employee bears the burden of proof in showing that the reason for dismissal was a prescribed reason within the meaning of ERA 1996 section 99 (see *Smith v Hayle Town Council [1978[ICR 996, CA*).

Conclusions

77. The main issue in the case is that of whether the dismissal was "*because of*" the claimant's pregnancy pursuant to Equality Act 2010 section18(2)(a).

78. The Tribunal is satisfied that the decision was essentially made by Mr Jegou, albeit having consulted an employment law adviser. The Tribunal accepts that he made the decision because he genuinely believed, as a result of the concerns which had been reported to him and investigated by Mr Khan, that the claimant's leadership of her team was not working. He was particularly concerned about the respondent missing its reporting deadlines if members of the team left. Ultimately, he made the judgement call that he perceived it to be in the interests of the respondent to get rid of the claimant. This was the bigger picture, as he saw it, so he would have had rather less concern with the precise detail of the

matters being raised by the members of the claimant's team. However, the Tribunal accepts that he made that judgement call on the basis that he believed that there was substance to the matters being raised. This was further demonstrated by the fact that he also considered that there was no benefit in speaking to the claimant, as regardless of what she said, he did not believe that, with the weight of views against her, this would provide any material benefit.

79. The reality was that the respondent was deciding to get rid of the claimant, without any kind of process, or more thorough investigation of the issues which had been raised, and without giving the claimant any chance to respond to the issues, because it believed that it could do so with impunity, because she had less than two years' service. This decision had been made without knowing the claimant was pregnant and, as far as the respondent was concerned, the rationale for the decision, and the business imperatives for the decision, remained unchanged once it had that knowledge.

80. Ultimately, the tribunal was not satisfied that the issues which had been raised were related to the claimant's pregnancy. In her statement of evidence, the claimant had not sought to suggest that her pregnancy, or the symptoms of her pregnancy, had affected any of the issues that the other members of the team had raised about her, in so far as these related to the period after the commencement of her pregnancy in March 2022. The broad thrust of her case, and her evidence, was that the way in which she had managed the team had been entirely appropriate, rather than having been impacted by her pregnancy or the symptoms of pregnancy.

81. In the Claimant's oral evidence, she had largely not sought to suggest that any of the matters being raised by the other team members related to her pregnancy. When the claimant was cross-examined, Ms Tharoo took the claimant through the evidence regarding the various concerns which had been raised, and having examined the evidence as to each such concern or issue with the claimant, had asked the claimant whether her actions or decisions had been impacted by her pregnancy. The claimant had denied that her actions or decisions had been impacted in this way. As stated, this was consistent with her case that her actions and decisions had been appropriate. It was only when she was asked about not having told Ms Dai and Ms Palega-Kalek about the need to work one of the Jubilee bank holidays, rather than delegating the task to Ms Hoban, that the claimant suggested that this may have been impacted by her pregnancy. It seemed strange to the Tribunal that, having denied that there was any connection in relation to the rather more substantial issues that she had earlier been asked about, the claimant now took the position of suggesting a connection between this matter and her pregnancy.

82. Since, as a litigant in person who was representing herself, she was not in the position of being re-examined as to her evidence by a representative, the tribunal provided the claimant with the opportunity, at the end of her evidence, to clarify any aspects of her earlier evidence. At this point, the claimant's position changed, and she now sought to suggest that all her actions and decisions from March 2022 were influenced by her pregnancy. The tribunal ended up concluding that, as a result of Ms Tharoo repeatedly asking questions as to whether each matter had been influenced by a pregnancy, the claimant had

finally realised that her previous answers might not have been helping her case, and had accordingly completely changed her position. The tribunal considered that it was more likely that the earlier answers were genuinely believed by the claimant to be true and that the change in her position was opportunistic.

83. In any event, the tribunal was not persuaded, on the balance of probability, that the concerns raised by the claimant's colleagues were influenced by the Claimant's pregnancy and / or its effects. There was a lack of specificity in the claimant's evidence about the impact that her pregnancy may have had upon her. The tribunal was effectively being asked to make assumptions to the effect that there would have been a connection between the concerns raised and the claimant's pregnancy. The claimant failed to provide any real evidence to show that there was a connection, or what that connection was, and any resultant impact upon her and the way in which she had dealt with her colleagues.

84. in the circumstances, the tribunal was not satisfied that the claimant had raised a *prima facie* case that her dismissal was because of her pregnancy or was because of illness suffered by her as a result of it. In any event, the respondent's explanation for the unfavourable treatment of the claimant satisfied the tribunal that the reason for that treatment was not because of her pregnancy, but because of Mr Jegou's assessment of the best decision to make in the interests of the respondent in the light of the concerns raised.

85. For the purposes of any separate complaint of an automatically unfair dismissal contrary to what Employment Rights Act 1996 section 99, the effect of an employee having less than two years' continuous service is that the employee bears the burden of proof in showing that the reason for dismissal was the prohibited reason of pregnancy. For the reasons set out above, the claimant has not satisfied any such burden of proof.

86. The tribunal considered that the claimant's complaint, unfounded though it was, came within the scope of the Equality Act 2010 section 18. This meant that, pursuant to Equality Act 2010 section 18(7), she was precluded from pursuing the same complaint as a complaint of sex discrimination. Alternatively, the tribunal was not satisfied that the claimant had proved facts from which the tribunal could conclude that the reason for the difference in treatment was that of the claimant's sex (or pregnancy). The claimant had sought to rely upon evidence of Mr Jegou having allegedly made comments which it was suggested were indicative of a discriminatory mindset. She pointed to evidence allegedly showing that issues as to performance or working relationships involving male employees had not resulted in the same Draconian outcome. However, on the analyses above, the tribunal was not satisfied that this was evidence from which it could conclude that the reason for the treatment of the claimant was that of her sex. In any event, whilst recognising that there was much about the respondent's treatment of the claimant which was unsatisfactory, the tribunal nevertheless concluded that the respondent's explanation for its treatment of the claimant, as accepted by the tribunal, had satisfied the tribunal that the reason for that treatment was not that of her sex.

87. On the basis of the conclusion set out above, the tribunal was not satisfied that the reason or principal reason for the claimant's dismissal was a reason

connected with the claimant's pregnancy. As such, the tribunal was also satisfied that the claimant's dismissal did not give rise to an automatically unfair dismissal for the purposes of Employment Rights Act 1996 section 99. As the claimant otherwise had no jurisdictional basis to bring a complaint of unfair dismissal, as she had less than two years' service, the complaint fell to be dismissed.

88. As stated above, the Tribunal was not satisfied that there was a complaint before the tribunal which fell to be determined as to any statement as to the reasons for the dismissal being either inadequate or untrue. However, further alternatively, the tribunal was not satisfied that any such complaint was well-founded. It is clear from the wording of ERA 1996 sections 92 and 93, that the scope of any such complaint is limited. The written reasons given by the employer have to be adequate and true in the sense that they must be the reasons which the employer actually relied on in dismissing the employee. It is clear that the scope of any such complaint does not extend to being able to complain that the factual content of the reasons was untrue or that the employer was mistaken in believing those reasons to be true or that those reasons did not justify dismissal. Those would be matter which would potentially come within the scope of a complaint of unfair dismissal itself. The tribunal as set out the relevant paragraph from the dismissal letter which gives the respondent reasons for dismissing the claimant. On the basis of the conclusions of the tribunal in relation to the claimant's other complaints, the Tribunal clearly accepts that the reasons given were the genuine reasons (rather than, for example, patient set of reasons designed to cover up a dismissal on the grounds of pregnancy). The reasons given also sufficiently to meet the requirement for adequate reasons to be provided.

89. For the sake of completeness, in so far as there was any separate complaint as to sums being owed to the claimant, the tribunal was not provided with any evidence or material from which it could conclude that any such sums were due to the claimant.

Outcome

90. It follows that the decision of the Tribunal is that the complaints of the Claimant should be dismissed.

Approved by

Employment Judge Kenward
7 February 2025

Judgment & Reasons sent to the parties on

18 February 2025

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