EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 8000473/2023

Held at Edinburgh on 5 and 6 February 2024

Employment Judge W A Meiklejohn
Tribunal Member Mrs Z Van Zwanenberg
Tribunal Member Mr S Cardownie

Ms C Rumsey	**Claimant** **Accompanied by:** **Mr M Rumsey -** **Claimant's Grandfather**
We Care for Children Ltd	**Respondent** **Represented by:** **Mrs S Fairley - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows -

(1) The claim of automatically unfair dismissal does not succeed and is dismissed.

(2) The claim of unlawful pregnancy discrimination does not succeed and is dismissed.

(3) The claim of detriment relating to pregnancy succeeds and the respondent is ordered to pay compensation to the claimant in the sum of **ONE THOUSAND ONE HUNDRED POUNDS (£1100.00).**

REASONS

1. This case came before us for a final hearing to deal with both liability and, if appropriate, remedy. The claimant appeared in person. She was accompanied by her grandfather, Mr M Rumsey. While Mr Rumsey was initially present to provide moral support to the claimant, he acted as her representative during the second day of the hearing. The respondent company was represented by Mrs Fairley, one of its directors.

Nature of claims

2. The claim brought by the claimant was initially understood as one of pregnancy and/or maternity discrimination under section 18 of the Equality Act 2010 ("EqA"). This was the focus at the preliminary hearing which took place on 14 November 2023 (before Employment Judge Kearns). It was clear from EJ Kearns' Note following that hearing that the claimant was complaining about the way she perceived she had been treated during her pregnancy, and about her dismissal on four weeks' notice on 18 July 2023.

3. As the case proceeded before us, it became apparent that the claimant was asserting that -

(a) her dismissal had been because of her pregnancy and was accordingly automatically unfair;

(b) she had been poorly treated during her pregnancy, amounting to unlawful pregnancy discrimination; and

(c) she had been subjected to detriment relating to her pregnancy, that detriment being said to have occurred in the sequence of events leading up to her dismissal.

4. The respondent's position, as set out in EJ Kearns' Note and expanded on in the evidence before us, was that -

(a) the claimant had failed to make sufficient progress with her course work resulting in a performance improvement plan ("PIP") being put in place;

(b) the claimant had failed to achieve the targets set out in the PIP; and

(c) it was these failures, and not her pregnancy or her exercise of her right to maternity leave, which resulted in the claimant's dismissal.

Procedural history

5. As mentioned above, there was one preliminary hearing which took place on 14 November 2023. Normal case management orders were issued relating to the arrangements for the final hearing, preparation of a joint bundle of documents and provision of a schedule of loss.

6. Within her Note, EJ Kearns identified the matters about which the claimant was complaining. In brief summary, these related to -

(i) Being told to take holidays to cover scan and midwife appointments in February 2023.

(ii) Being told in February 2023 that she could not expect to keep getting sent home.

(iii) An issue relating to the claimant's pay.

(iv) Being asked to change a midwife appointment in June 2023.

(v) Not being taken to hospital when she was in considerable pain in June 2023.

(vi) Her dismissal, including the events relating to her course work.

7. EJ Kearns noted that the issue in respect of the claimant's pay seemed to have been resolved. This related to a delay in implementing the claimant's entitlement to receive National Minimum Wage from March 2023. It was confirmed to us that this had indeed been resolved and was not a matter about which we required to be concerned.

Evidence

8. We agreed with the parties at the start of the hearing that we would hear from the claimant first, and we duly heard her oral evidence. We then heard oral evidence from Mrs Fairley and from Mrs S Tilley, the respondent's Operations Manager.

9. We understood that the respondent also intended to call as a witness Ms K Bain, the Manager of the respondent's Little Flyers Nursery in West Calder. However, Ms Bain was not available on the second day of the hearing and so did not give evidence. Mrs Fairley said that she had told the Tribunal that Ms Bain would not be available on that date. That information had not been conveyed to us. Our view of this was that the parties had received the Notice of Hearing and it was their responsibility to arrange for the attendance of witnesses.

10. We had a bundle of documents prepared by the respondent. There were some unfortunate omissions from that bundle, to which we refer below.

Findings in fact

11. The respondent company, of which Mrs Fairley and her husband are directors, operates a number of children's nurseries and out of school clubs

across West Lothian. These include Little Flyers in West Calder. These businesses are regulated by the Care Inspectorate. The respondent has around 120 staff across its various locations.

12. Mrs Fairley was in overall charge of the respondent's business. She has some 25 years' experience in the sector. Mrs Tilley as Operations Manager had oversight of the business and supported the individual managers in each setting. When the claimant started the Manager at West Calder was Ms E Holt. Ms P Stein was then Interim Manager between October 2022 and February 2023, when Ms Bain was appointed as Manager.

13. The claimant joined the respondent as a Trainee Nursery Practitioner at West Calder on 24 June 2022. She had previously worked in a similar capacity at another nursery, where she started her modern apprenticeship with a view to gaining her SVQ2 in Childcare Practice. The claimant continued her apprenticeship with the respondent. The claimant accepted that she had been provided with a contract of employment by the respondent but regrettably a copy of this was not included in the bundle of documents.

14. The claimant was contracted to work 30 hours per week. Initially she had a recurring hospital appointment each Friday and because of this her hours were worked between Monday and Thursday. From around October 2022 the claimant reduced the frequency of her hospital appointments and began to work alternate Fridays. She subsequently further reduced the frequency of her hospital appointments to once a month, and would work additional hours on Fridays. We found that the respondent was supportive of the claimant in relation to the flexibility of her working pattern.

Training

15. The training element of the claimant's apprenticeship was provided by a company called Azilo Training ("Azilo"). Funding for this training was provided to Azilo by Skills Development Scotland ("SDS"). Normally the

funding would be for a period of 18 months during which time the apprentice would be expected to complete their course of study.

16. The claimant was assigned an Assessor by Azilo. At the relevant time for the purpose of this case, the claimant's Assessor was Ms C Pattullo, who had taken over from the claimant's original Azilo Assessor. The Assessor assigned course work which the claimant was expected to complete in her own time and then submit. The Assessor would then review the submitted work and record the apprentice's progress.

17. Reports on the apprentice's progress had to be submitted to SDS on a quarterly basis. These confirmed that the claimant was not making good progress. By November 2022 she had completed between 10 and 20% of her course. She was struggling to complete parts of her course work, notably child protection. She found it difficult to absorb information during Teams calls with her Assessor. She was using her mobile phone as she did not have access to a laptop, although we were satisfied that the respondent had tried to assist her by making an office laptop available.

Claimant becomes pregnant

18. The claimant discovered that she was pregnant in December 2022. She reported this immediately to the respondent. She was advised to consult her GP to arrange scans and midwife appointments.

19. The claimant did not keep well during her pregnancy. She experienced sickness and was prescribed medication from which she did not derive much benefit. She found it difficult to keep food down. She also suffered from back pain, and had *"a lot of hospital appointments".* The claimant described being *"always tired"* and said that she had to sleep when she could, which affected her ability to undertake her course work.

First appointments

20. The claimant had appointments for her first scan on 7 February 2023 (at St John Hospital, Bathgate) and for her first midwife appointment on 9 February 2023 (at her GP surgery in Livingston). She was told she could take limited time off for these appointments and that, if she wanted longer, she would need to use her holiday entitlement. The claimant was unsure how long the appointments would take, and elected to take three days of holiday on 7, 8 and 9 February 2023.

Sickness at work

21. Later in February 2023, the claimant was finding it difficult to keep food down. Her anti-sick pills were not providing relief. She burst out crying and asked Ms Stein if she could go home. According to the claimant, Ms Stein told her that her sickness was *"just part of being pregnant"* and that she *"could not expect to be sent home every time* [she] *felt sick".*

22. The respondent was required by its regulator to maintain a specified ratio of staff to children. This related both to the number of staff on duty and their competencies. The respondent could be inspected without notice and so complying with this requirement was a significant matter for them.

23. The claimant accepted in evidence that, if she had been allowed to go home immediately, this would have affected the respondent's staff/children ratio. She told us that she was able to go home *"a couple of hours later".*

Midwife appointment

24. On a date in June 2023 the claimant was asked by Ms Bain to change a midwife appointment. The date of the appointment was known to the respondent as it was *"in the diary".* Ms Bain asked the claimant to change the appointment as she had no-one to cover for the claimant. The claimant

agreed to contact her midwife and the appointment was changed to a Friday when the claimant was not to be working.

Claimant attends hospital

25. On a different date in June 2023 the claimant was in considerable back pain. She telephoned the hospital and was advised to go to the maternity ward to be checked over. She spoke to Ms Bain who asked if she had a way of getting to the hospital (a journey of some 20/25 minutes). The claimant said she would try to contact a member of her family. She told us that she could not afford a taxi.

26. The claimant had difficulty in making an arrangement for a family member to take her to hospital. She had to wait for around ninety minutes for her aunt to pick her up. The claimant said that she was *"panicking and emotional".* She said *"it would have been nice if someone had offered to drop me off at the hospital"* but she accepted that she had not asked the respondent that she be taken to hospital.

Performance improvement plan

27. On 6 June 2023 there was a call in which Ms Bain, Ms Pattullo and the claimant participated. In advance of this Ms Pattullo sent Ms Bain the quarterly SDS review documentation. This indicated that the claimant had still not achieved more than the 10-20% of her course work recorded in November 2022.

28. Following this call, Ms Bain sent an email to Ms Pattullo on 6 June 2023 which included the following -

"*Thank you for taking the time to speak to me today.*

We *are disappointed with the progress that Courtney has made in the time she has been with us. I wasn't aware it was only 10-20% that she had completed.*

I will be arranging a Performance review meeting with her tomorrow and set targets for her to complete and have more progress with her coursework before she goes off in maternity . . ."

29. Ms Pattullo replied on the same date -

"*.... That would be great if you could let me know her targets. She does have some time in between finishing work and when the baby comes, so I can do whole morning/afternoon calls with her if she is willing to put in the work. Please let me know if she is willing to put aside the time, she could achieve a large chunk of her award before the baby comes, but that will be up to her . . .*"

30. Ms Pattullo also emailed the claimant on 6 June 2023 -

"*Thanks for speaking with me today. As you have seen, I have sent you a Teams invite for next Friday. I have also arranged a face-to-face meeting at the nursery on 26th June at 2pm.*

Please note, if you are willing to put in the time, we could also do extra work when you come off from work before the baby comes but that will be up to you as this is ultimately your responsibility ...."

31. The performance review meeting took place on 13 June 2023. It was conducted by Ms Bain and Mrs Tilley. The outcome was a performance improvement plan ("PIP") dated 13 June 2023. The goals set for the claimant and the timescales for compliance were expressed as follows -

• *To complete at least 40% of course work before finishing up for maternity* *7.07.23*

• *To have calls and visits within nursery hours*	*Ongoing until 10.07.23*
• *To ensure Child Protection and mealtime work is completed*	*by 23.06.23*

The claimant accepted in evidence that she understood at this point that her job was at risk. Ms Bain emailed Ms Pattullo on 13 June 2023 to advise her of the targets set for the claimant.

32. Ms Pattullo emailed Ms Bain on 27 June 2023 to report on the claimant's progress -

"*…. I thought I'd send an update on Courtney. She has finished her Child Protection Project and Mealtimes account. She is 29% fully complete and an additional 12% partially met. I have issued her another piece of work as she wants to do work before the baby comes. I have asked her to let me know when she has her baby as I will need to take her off the system at that point.*

I know there have been issues with her practice, so I am not sure if it is an option for her to return but if she does, I can then sign her back up on her return …."

Review meeting

33. Mrs Tilley conducted a review meeting with the claimant on 3 July 2023. Ms Bain did not attend this. Mrs Tilley recorded the outcome on the claimant's PIP in terms which reflected the update from Ms Pattullo on 27 June 2023. Mrs Tilley added an additional goal to be achieved by the claimant -*"New piece of work to be completed by CR on communication with children". A.* further review meeting was scheduled for 17 July 2023.

Meeting on 18 July 2023

34. The review meeting originally set for 17 July 2023 was rescheduled to 18 July 2023. Mrs Tilley said that Ms Bain had written to the claimant inviting her to the review meeting but unfortunately there was not a copy of this letter in the bundle. The claimant told us that not been offered the right to be accompanied at the review meeting. She was uncertain as to whether she had been told that her job was at risk. She said "*I thought I was coming in on 18 July for a review of my work".* We believed this indicated that it was unlikely that the claimant was told in advance of the meeting that a possible outcome was the termination of her employment.

35. On 17 July 2023 Ms Bain emailed Ms Pattullo referring to *"my final review meeting with Courtney tomorrow"* and seeking Ms Pattullo's input on the PIP targets set for the claimant. Ms Pattullo responded in two emails sent to Ms Bain on 18 July 2023, as follows:

(a) Sent at 09.59 -

"She has now added to the communication account, which I am going to mark today, so I can let you know what percentage that takes her up to. She has increased her percentage to 29%. She has completed the mealtimes and child protection project. The Teams call benefitted her with this as we were able to complete her child protection project on this call.

I will be in touch once I have marked her communication account."

(b) Sent at 10.12-

"I have just looked at Courtney's assignment, she has added to this from my feedback, but I had told her to add all the remaining standards in from the assessment plan to ensure she meets her percentage target but unfortunately this has not been done.

I would like to say that Courtney's writing has really progressed and the fact that she has been submitting on time and doing the Teams calls is a massive improvement from where we were even a month ago, so I would like to give her credit for that …."

36. There was then some discussion amongst Mrs Fairley, Mrs Tilley and Ms Bain prior to the meeting with the claimant on 18 July 2023. That discussion included termination of the claimant's employment as a possible outcome of the meeting.

37. The review meeting started around 12.00 on 18 July 2023. It was attended by Mrs Tilley, Ms Bain and the claimant. The note of the meeting was taken by Ms Bain and recorded on the claimant's PIP. This included some annotations on the record of the meeting on 3 July 2023 -

(a) In relation to the target of 40% of coursework, Ms Bain wrote *"Not achieved".*

(b) In relation to completion of the child protection and mealtimes work, Ms Bain wrote *"Met".*

(c) In relation to the new piece of work on communication with children, Ms Bain wrote *"Not been marked add PC's, KU's"and "Not achieved".*

(d) In relation to a second section referring to the 40% target, Ms Bain wrote *"Not achieved currently sitting at 29% with 12°/o pending on 18/07/23".*

38. Ms Bain's note of the meeting recorded that the three goals set for the claimant, and her progress towards achieving these, were discussed. Mrs Tilley was recorded as telling the claimant that to be currently sitting at 20-29% mean that she *"was not progressing enough".* The claimant told us that Mrs Tilley said *"Too little, too late".* Mrs Tilley did not recall using those words but we noted that they reflected what Ms Pattullo had said in her second

email (see paragraph 35 above) and we found that, on the balance of probability, Mrs Tilley had used this language.

39. Ms Bain recorded the outcome of the meeting in these terms -

"Her modern apprentice contract will be terminate[d] effectively from 18/07/23 and we will pay 4 weeks notice. Final pay 15th of August up to and including 15th of August."

40. The claimant said that she was not offered a right of appeal. Mrs Tilley said that when the claimant's employment was terminated *"I did not verbalise her right of appeal".* Mrs Tilley thought that a letter had been posted to the claimant after the meeting on 18 July 2023 but this was not included in the bundle. We were not persuaded that a right of appeal was offered.

41. The claimant told us that she had spoken with her manager about her (as yet unborn) child attending the respondent's nursery when she returned to work. That was what she expected to do. She had *"burst out crying"* when Mrs Tilley said "'Too *little, too late".* The claimant said that she *"felt discriminated against" due* to her health. Her pregnancy had not been easy.

42. The claimant said that she felt *"a wee bit embarrassed"* when her apprenticeship was terminated. She felt she had let herself down. She worried about how she would provide for her child.

Maternity leave start date

43. The evidence we heard about when the claimant's maternity leave started, and whether she used holiday entitlement prior to starting her maternity leave, was inconsistent -

(a) The claimant said that she took a week's holiday at the end of June 2023 and finished work on 7 July 2023. She said that was told this was *"early*

maternity leave". She had not agreed to use holidays prior to her maternity leave starting.

(b) Mrs Fairley said that the claimant's maternity leave started on 20 July 2023, and prior to that she was on annual leave. However, Mrs Fairley indicated that she was not involved in this and Mrs Tilley would be able to confirm the position.

(c) Mrs Tilley said that the claimant's maternity leave started on 17 August 2023. Prior to that the respondent paid her four weeks' notice pay. Prior to the four weeks of notice pay, the claimant was on annual leave. We noted that this was not what Mrs Tilley had said at the preliminary hearing on 14 November 2023 (at which she represented the respondent). EJ Kearns recorded Mrs Tilley as saying that the claimant *"had 85 hours of annual leave to take and that it was agreed that she would start annual leave on* 5 *July and begin maternity leave around 24 July".*

44. The start date of the claimant's annual leave was significant because the PIP target of completing at least 40% of her coursework was linked to *"finishing up for maternity"* with a compliance date of 7 July 2023. When Ms Bain emailed Ms Pattullo on 13 June 2013 (see paragraph 31 above) she stated *"40% to be completed before finishing for maternity leave 10.07.23".*

45. The record of the meeting on 18 July 2023 referred to the information provided by Ms Pattullo earlier on that date. That information related to work the claimant had submitted on 17 July 2023. The implication of this was that the deadline for the claimant attaining the target of 40% had not already passed as at 17/18 July 2023.

Information from Ms Pattullo

46. Mrs Fairley referred during her evidence to two emails from Ms Pattullo dated 8 January 2024. We understood these had been sent at Mrs Fairley's request. In her first email Ms Pattullo stated -

7 can confirm Courtney had submitted work on 17th July, however there were still some amendments to be made, so it was not officially signed off until 25th, where she progressed to 43%."

47. In her second email Ms Pattullo stated -

"Courtney submitted her first draught (sic) of the final piece on the 10th of July, and I gave feedback on the 13th. Her next submission was 17th, and I gave feedback on 18th. Courtney messaged me on the 18th to say she needed support with the final amendments, which we then arranged a call for the 24th as my diary was fully booked until then. She submitted it on the 24th and I signed it off on the 25th."

48. These mails were useful in determining the timeline of the claimant submitting work to Ms Pattullo. We found no reason to doubt the accuracy of the information provided by Ms Pattullo to Mrs Fairley in these emails.

Statutory maternity pay

49. It emerged in the course of the hearing that the claimant had not received SMP from the respondent. This seemed to be due to a misunderstanding as to whether the respondent was responsible for payment. Mrs Fairley told us that she had been in contact with HM Revenue and Customs and now understood that SMP should be paid. She confirmed to us that the respondent would deal with this.

Claimant gives birth

50. For the sake of completeness we record that the claimant gave birth to her daughter on 24 August 2023. The claimant told us that she had suffered from post-natal depression since then. We had no evidence to link this with the circumstances in which the claimant's employment came to an end.

Comments on evidence

51. It is not the function of the Employment Tribunal to record every piece of evidence presented to it, and we have not attempted to do so. When making our findings in fact, we have focussed on those parts of the evidence which we found to have the closest bearing on the matters we had to decide.

52. The claimant's recollection of events was not always accurate. For example, she believed there had been a delay in reviewing the final piece of work she submitted because Ms Pattullo was on holiday in the period immediately prior to 24 July 2023, whereas the reason given by Ms Pattullo was different (see paragraph 47 above). However, the claimant was prepared to concede when she might have been wrong, and was in general a credible witness.

53. Mrs Fairley gave her evidence confidently and displayed an excellent understanding of the sector in which the respondent operates. She accepted that she had *"limited involvement"* in the claimant's case. She was aware of issues with the claimant's health and attendance but, quite properly, was not involved in the detail.

54. Mrs Tilley gave her evidence in a straightforward manner and was generally credible. She had been more closely involved with the claimant than Mrs Fairley. In particular, she had been involved in the claimant's PIP and in the decision taken during the meeting on 18 July 2023 to terminate the claimant's employment. Her evidence that the claimant's maternity leave started on 17 August 2023 was surprising, given what she had said at the preliminary hearing, but she did provide her rationale for this. Given the extent of Mrs Tilley's involvement in the course of events which led to the claimant's dismissal, we did not believe that the respondent was significantly disadvantaged by the absence of Ms Bain as a witness.

Submissions for the claimant

55. Mr Rumsey said that the respondent had (a) only stepped up pressure on the claimant to improve her progress through her coursework while she was pregnant and (b) tied that progress in with her maternity leave starting. This, he submitted, indicated that the respondent's treatment of the claimant was linked to her pregnancy. Mr Rumsey highlighted the *"anomalies"* regarding the start date of the claimant's maternity leave.

56. Mr Rumsey submitted that it had not been communicated to the claimant that a failure to reach the required percentage of her coursework would result in her dismissal. If the original date of 10 July 2023 had been adhered to, the respondent would have been unable to dismiss the claimant on 18 July 2023 because she would already have been on maternity leave.

57. The fact that the claimant had been given four weeks' notice meant, Mr Rumsey argued, that she had still been employed at the point when she reached the target 40% of her coursework (on 25 July 2023).

58. Mr Rumsey reminded us that the claimant had suffered a difficult time while she was pregnant. This had affected her ability to attain the level of progression asked of her. The respondent had not put the claimant under pressure until June 2023, just as her maternity leave approached.

Submissions for the respondent

59. Mrs Fairley argued that the respondent had not dismissed the claimant for a pregnancy related reason. The respondent had dealt with the claimant in the same way as anyone else who had not achieved the required level of progression through their coursework. She criticised the claimant for not taking responsibility.

60. Mrs Fairley said that the claimant was using her pregnancy as a reason to claim unfair dismissal. The reality was that her apprenticeship could not go

on forever. The 18 month stage was approaching. The termination of the claimant's apprenticeship had nothing to do with pressure from the respondent.

61. Mrs Fairley submitted that it was normal to discuss the start date of maternity leave nearer the time. It could have been 10 July 2023. However, the claimant became more tired and it transpired that she had annual leave to use. It was the claimant's responsibility to keep track of that. It had been a *"good resolution"* for the claimant to use her accrued annual leave as she got paid for that.

62. Mrs Fairley said it had not helped that there had been a change of Assessor in the claimant's case. However, the percentage of coursework completed by the claimant was clearly unacceptable. The claimant, she submitted, was using her pregnancy as an excuse.

63. Mrs Fairley sought to dissociate the respondent from the maternity leave start date given by Mrs Tilley. She said that Mrs Tilley *"got the maternity leave date wrong".*

Applicable law

64. Section 18 of the Equality Act 2010 **(Pregnancy and maternity discrimination: work cases)** provides, so far as relevant, as follows -

d) - . .

(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 her pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) ….

(4) ….

(5) ….

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

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

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

65. Section 99 of the Employment Rights Act 1996 ("ERA") **(Leave for family reasons)** provides, so far as relevant, as follows -

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

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

(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity ….

66. Section 47C ERA **(Leave for family and domestic reasons)** provides, so far as relevant, as follows -

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to -

(a) pregnancy, childbirth or maternity ….

67. The applicable regulations for the purposes of sections 47C and 99 ERA are the Maternity and Parental Leave etc Regulations 1999 ("MPL Regs"). The MPL Regs provide, so far as relevant, as follows -

19 Protection from detriment

(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee -

(a) is pregnant ….

(3) ….

(4) Paragraph (1) does not apply in a case where the detriment in question amounts to dismissal within the meaning of Part X of the 1996 Act ….

20 Unfair dismissal

(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) ….

(2) ….

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with -

(a) the pregnancy of the employee ….

Discussion and disposal

68. We approached matters by looking at -

(a) whether the claimant had been treated unfavourably for the purposes of section 18 EqA,

(b) whether the claimant's dismissal was automatically unfair in terms of section 99 ERA, and

(c) whether the claimant had been subjected to detriment in terms of section 47C ERA.

Unfavourable treatment

69. We considered each of the instances of alleged unfavourable treatment referred to by the claimant. The first of these was that, according to the claimant, she had been told she could only take limited time off for the first appointments and that, if she wanted longer, she would need to use her holiday entitlement.

70. The right to time off for ante-natal care is contained in section 55 ERA. It is an entitlement to be permitted by the employer to take time off during the employee's normal working hours in order to enable her to keep the appointment. That means sufficient time to attend for the appointment and for travel to and from the appointment.

71. In a remote area that might well involve a full day for each appointment. However, that was not the position in the claimant's case. The respondent was correct in telling her that she would be allowed limited time off, so long as the time allowed was sufficient for attendance at the appointment and for travel to and from the appointment. There was nothing in the evidence before us to indicate that the claimant was not permitted to take adequate time off for her first appointments.

72. Our only comment about the claimant being told that she would need to use holidays if she wanted longer than the limited time off is that this was not necessarily the only option. The claimant might have been allowed to take additional time off without pay, although the respondent might reasonably have believed that this would not be an attractive option for the claimant. In any event we found nothing here which was unfavourable treatment because of the claimant's pregnancy.

73. The next matter was the claimant being told that her sickness was just part of being pregnant and that she could not expect to be sent home every time she felt sick. We could understand the claimant's negative view of this. However, we noted that on the day in question the claimant was allowed to go home a couple of hours later.

74. We believed that this had to be judged in context. Part of that context was the staff to children ratio which the respondent had to maintain. This meant that cover might well have to be organised if the claimant went home. In these circumstances we did not believe that the delay in allowing the claimant to go home amounted to unfavourable treatment because of her pregnancy.

75. The next matter was the request made of the claimant by Ms Bain in June 2023 to change a midwife appointment. We did not regard the making of the request as unfavourable treatment because of pregnancy. The claimant contacted her midwife and was able to rearrange the appointment. There was no prejudice to the claimant.

76. The next matter was the claimant having to attend hospital, also in June 2023. The claimant's complaint was that no-one from the respondent offered to take her to hospital. The claimant said in evidence that *"it would have been nice"* if someone had offered. She accepted that she had not asked to be taken.

77. We understood that the advice which the claimant was given by the hospital was to attend the maternity ward to be checked. There was nothing to suggest this was a medical emergency (although in saying that we recognise it must have been distressing for the claimant). There was no obligation on the respondent to take the claimant to hospital, and the failure to offer to do so was not unfavourable treatment because of her pregnancy.

78. The final act complained of by the claimant as being unfavourable treatment because of her pregnancy was her dismissal. We will deal with the dismissal in the next section of our decision before returning to whether it amounted to unfavourable treatment because of pregnancy.

Dismissal

79. We reminded ourselves that, in considering whether the claimant's dismissal was automatically unfair in terms of section 99 ERA, the only issue we required to determine was the reason or principal reason for that dismissal. Whether or not the respondent acted reasonably in treating that reason as sufficient grounds for dismissal was not relevant.

80. We found that the reason for dismissal was not the claimant's pregnancy but the respondent's view that she had failed to make sufficient progress with her coursework. We believed this was clear from -

(a) the steps the respondent took in advance of the meeting on 18 July 2023 to ascertain what progress the claimant had made, and

(b) the fact that the meeting on 18 July 2023 focussed on the claimant's attainment of the goals set for her in the PIP, as recorded in the note of the meeting taken by Ms Bain.

81. That finding was fatal to the claimant's automatically unfair dismissal claim. It was also fatal to the claimant's argument that her dismissal was unfavourable treatment because of her pregnancy. The reason for the treatment (ie the dismissal) was not the pregnancy.

Detriment

82. There is no definition of detriment in section 47C ERA. In the context of other statutory provisions detriment has been given a wide meaning. A detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment, but it must be more than an unjustified sense of grievance - see ***Ministry of Defence v Jeremiah 1980 ICR 13*** and ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337.***

83. To engage section 47C ERA in the context of pregnancy, there must be an act, or failure to act, done by the employer which relates to the employee's pregnancy. When we looked at the sequence of events leading up to the claimant's dismissal we found that, although her pregnancy was not the reason for the dismissal, there was a link between the respondent's treatment of the claimant and her pregnancy. That link was the requirement of the claimant to make sufficient progress in her coursework before *'"finishing up for maternity".*

84. Within that sequence of events, we identified a number of matters which involved detriment to the claimant -

(a) She was not told that a possible outcome of the meeting on 18 July 2023 was the termination of her employment.

(b) She was not afforded the opportunity to be accompanied at the meeting.

(c) She was unclear as to the start date of her maternity leave.

85. The first two of these matters were self-explanatory. They related to a meeting arranged by the respondent to discuss the claimant's progress with her coursework. In terms of the PIP, that progress was to be achieved before the claimant started her maternity leave. There was accordingly a connection between these matters, which were to the claimant's detriment, and her pregnancy.

86. The third matter was in our view the most significant. If the claimant was unclear as to when her maternity leave started, she could not be certain as to the deadline for achieving the 40% target in her PIP. We were in no doubt that this was to the claimant's detriment. Indeed, if Mrs Tilley's understanding of the dates was correct, the claimant did in fact reach that target before her maternity leave began.

87. We found that the lack of clarity as to when the claimant's maternity leave started was the respondent's fault. They needed to know the relevant date so that they could process the claimant's SMP. There should not have been any uncertainty. Indeed, the fact that the claimant did not receive SMP at the time when she was entitled to it served to confirm the lack of clarity, and was a further detriment.

88. We reminded ourselves that, in a case such as this, section 48(2) ERA places the onus on the employer to show the ground on which any act, or

deliberate failure to act, is done. The evidence from the respondent did not explain why (a) the claimant was not told that the outcome of the meeting on 18 July 2023 might be the termination of her employment, (b) the claimant was not offered the opportunity to be accompanied at the meeting and (c) there was uncertainty as to the date upon which the claimant's maternity leave began. That meant that the respondent failed to discharge the onus placed upon it by section 48(2).

89. We were satisfied that the detriments suffered by the claimant were related to her pregnancy for the purposes of section 47C(2) ERA. Her detriment claim therefore succeeded. We next considered the issue of remedy.

Remedy

90. Section 48(1) ERA confers jurisdiction on the Tribunal to determine a complaint of detriment under section 47C (1) ERA. Section 49(1) ERA provides that where the Tribunal finds the complaint under section 48(1) well founded, the Tribunal may make an award of compensation. Section 49(2) ERA provides that -

…. the amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to -

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

91. We believed that the respondent's treatment of the claimant, in relation to the matters we found to be to her detriment, caused injury to the claimant's feelings. She felt that there was discrimination due to her health. She was upset at the use of insensitive language at the meeting on 18 July 2023. She was entitled to compensation for the detriments she suffered.

92. In a discrimination case the Tribunal will normally have regard to the Vento bands. This is a reference to the case of ***Vento v Chief Constable of* W*Yorkshire Police (No 2) 2003 IRLR 318*** in which the Court of Appeal set out three broad bands of compensation for injury to feelings awards. This has been the subject of Presidential Guidance since 2017, most recently in the Sixth Addendum to Presidential Guidance originally issued on 5 September 2017. This Addendum is dated 24 March 2023 and applies to claims presented on or after 6 April 2023. It therefore applies in this case.

93. In ***Virgo Fidelis Senior School v Boyle 2004 ICR 1210*** the Employment Appeal Tribunal held that the guidelines on compensation in ***Vento*** should be applied in a detriment claim (in that case whistleblowing detriment). We considered that it was appropriate to take the same approach here.

94. We believed that the injury to feelings suffered by the claimant was at the lower end of the lower band in ***Vento.*** She had been upset at her treatment but we had no medical evidence as to how this had affected her. The claimant told us that she suffered from post-natal depression and it seemed to us more likely than not that this had superceded the injury to her feelings caused by the respondent.

95. In terms of the Sixth Addendum the lower band is £1,100 to £11,200. We decided that the award to the claimant should be at bottom of that range, ie £1,100.

Employment Judge
EJ Meiklejohn

Dated 13/02/2024

Date sent to parties 15/02/2024