EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss L Marshall	**v**	Windrush Flooring Ltd

Heard at: Reading **On:** 4 and 5 January 2018

Before: Employment Judge George
Members: Miss SP Hughes and Mr MJ Selby

Appearances
For the Claimant: In person
For the Respondent: Mr L Faulkner (Director)

JUDGMENT

1. The claim of pregnancy discrimination is dismissed.

2. The claim of breach of contract in respect of failure to pay notice pay is well founded. The respondent shall pay to the claimant the sum of £136.00 as damages for breach of contract.

REASONS

1. The judgment and reasons were announced orally at the hearing on 5 January 2018. Written reasons were requested at the hearing, in accordance with rule 62(3) of the Employment Tribunal Rules of Procedure 2013. To the extent that these written reasons vary in expression from those announced at the hearing the written reasons shall take precedence.

Background and Issues

2. In this two day case, the claimant represented herself and the company was represented by Mr Luke Faulkner, a director (hereafter referred to as Mr Faulkner). We have also heard from a number of witnesses, all of whom relied upon witness statements prepared by or on behalf of them which they adopted in oral evidence. The claimant gave evidence on behalf of herself with reference to two statements and some notes that she had prepared on the documentation. For the respondent, in addition to Mr Luke Faulkner, we heard from Mr Alistair Barnard, Ms Carla Hatton and

Mrs Rebecca Faulkner. Mr Paul Faulkner attended on day 1 of the hearing but did not attend on day 2 and has therefore not been cross-examined on his witness statement. We also were given witness statements that had been prepared on behalf Liam Duncan, Martin Burbanks, Brenda Rippon and Carole Scott. The had prepared statements but were not called to be cross-examined on them. The claimant has not had the opportunity to challenge their evidence. We give little weight to the evidence of witnesses who have not been cross-examined on their statements.

3. A brief chronology of the claim is that the claimant started work for the respondent company on 20 October 2015 in sales and administration. She worked part time, working 16 hours a week. She brings this claim for pregnancy discrimination and breach of contract arising out of her summary dismissal on 14 February 2017. Following early conciliation, she presented a claim on 20 March 2017 and the respondent defended it by a response that was entered on 11 April 2017.

4. Following a preliminary hearing in front of Employment Judge Vowles on 22 June 2017, the case has been listed for two days before us. He identified the issue as being that of pregnancy discrimination where the alleged discriminatory act was the claimant's dismissal. However, on a fair reading of the claim form, the claimant also included within the compensation sought payment for her notice pay: despite not ticking the box for breach of contract. We have therefore considered both claims.

5. The parties disclosed their documents to each other in accordance with the order of Employment Judge Vowles. The claimant's understandable expectation, based upon the wording of the order, was that the respondent would prepare and send to her a composite bundle containing both sides' documents by 24 August 2017. This was not done. The respondent considered it to be unnecessary to duplicate work. This was due to them misunderstanding what was intended by the order. Consequently we had two bundles with some duplication of content.

6. In these reasons, the documents disclosed by the claimant are in a bundle that we will refer to as CB pages 1, 2, etc. Those that have been disclosed by the respondent, we refer to in the reasons as RB pages 1, 2, etc.

7. At the outset of the hearing, an application was made by the respondent to adduce additional documents to which the claimant objected. We rejected that application in respect of some documents but admitted a small number of documents primarily because they were relevant, and the balance of prejudice was in favour of admitting them. Those have been given letters A, B, C and E. There is one document at RB page 44 which the claimant said had not previously been in her bundle which we also agreed to admit. The reasons for that decision were given orally at the time; they are not recorded in this judgment.

8. We have taken into account all of the documents to which we were taken. The fact that we do not refer to a particular piece of evidence in these

reasons should not be taken to mean that we have not taken it into account.

9. The claimant's case is essentially that she was dismissed on 14 February within a short period of the respondent, through Mr Faulkner, finding out that she was pregnant and that the pregnancy was a significant influence on the reason for her dismissal. She did not have two years' continuous service and therefore an earlier application to add an ordinary unfair dismissal claim was rejected. She also claimed breach of contract on the basis that she had not been paid her notice pay.

10. The issues for us therefore were whether the respondent treated the claimant unfavourably during her protected period by dismissing her because of her pregnancy contrary to section 18 and 39(2)(c) of the Equality Act 2010 and secondly, whether the claimant is entitled to any notice pay.

Findings of fact

11. The claimant started work for the respondent on 20 October 2015 in sales/administration/telesales. The respondent is a flooring sales and fitting business and the claimant worked in their shop two days a week: Monday and Tuesday. Her employment ended when she was dismissed on 14 February. The respondent company is a small, family-run business. At the time, it was run by Luke Faulkner and he appears to have made all the principal decisions in the company at the relevant time. We do not know whether he was a statutory director. His father, Paul, was also an employee at the relevant time as was his aunt, Rebecca Faulkner, who worked in the shop on the days which the claimant did not work – Wednesday to Friday. Mr Faulkner told us that he had never had to dismiss anyone and our impression is that the business was not run in a hierarchical way, possibly because most of those working in it were family members.

12. The claimant had her pregnancy confirmed on 12 January 2017 when she had a scan which has been exhibited at CB page 21. Her expected due date was estimated to be 18 August 2017 (CB page 23) and her daughter was born on 5 August 2017.

13. Mr Faulkner and the claimant knew each other prior to the start of her employment. He had fitted carpets for her and they seem to have known each other socially to some extent. He suggested that she come and work in the shop and there is evidence that initially he wanted her to work five days a week. She only wanted to work two days a week; she was then a single mother of two children.

14. According to Mr Faulkner, by October 2016, when she had been there for about a year, he had become dissatisfied with her performance. It was difficult for us to get a picture of what was in the forefront of Mr Faulkner's mind concerning the claimant's performance at any particular point in time.

When giving evidence, and in submissions, he tended to jump back and forth between events and had difficulty in presenting a consistent chronological account. However, concerns which he mentioned to us included that she did not wish to increase her hours (see his statement, paragraph 3). This was, of course, something that she was perfectly entitled to do. In general terms he considered that she was not very diligent when at work, appeared disinterested and did not approach her role with any dynamism but was rather passing time on non-work matters and chatting about her personal life.

15. One specific criticism of the claimant was that she had ordered carpet to be sold to Martin Burbanks, a friend of Mr Faulkner, but had she accepted Mr Burbanks' assertion that he was to be charged cost without checking with Mr Faulkner. Furthermore, she had ordered it on behalf of the company but paid for it using Mr Burbanks' credit card rather than by the company account. Those essential facts were not disputed by the claimant.

16. This was clearly wrong and seems to have meant that the respondent could not offset the VAT. When asked about this at the hearing, the claimant did not seem to understand why this was a problem, regarding it as sufficient that she relied upon Mr Burbanks' assertion that it was all right and his position as a friend of Mr Faulkner. She was challenged about it on 13 January 2017 so it seems to have happened sometime before then, possibly earlier that week, and cannot therefore have played any part in Mr Faulkner's concerns about her performance prior to then. His account was that he gave constant verbal warnings but the claimant disputes that and denies ever being criticised for her performance.

17. Mr Faulkner's evidence to us is that he had decided before Christmas that he wanted to dismiss the claimant. That was his account in his ET3 and it is also in paragraph 8 of his witness statement. This was corroborated by Paul Faulkner's written statement (although we give little weight to that, because he was not cross examined upon it although he attended on day 1) as well as that of Liam Duncan. However, it was also corroborated by Alistair Barnard, a contractor who does work for the respondent. He confirmed in oral evidence that he had had conversations with Mr Faulkner about his concerns about the claimant's performance before Christmas and had said words to Mr Faulkner to the effect that there is never a good time to do it (meaning dismiss someone) and to do it at Christmas compounds it. Rebecca Faulkner said that Mr Luke Faulkner had told her in December that he was going to dismiss the claimant and so did Carla Hatton. Her statement says that she did not think it was fair to dismiss the claimant at Christmas.

18. We have considered carefully whether we can accept this evidence. Mr Faulkner himself was not always a reliable witness; he had a tendency to state as fact that which he had deduced and was somewhat confused about dates and the order of events. There is also a particular matter that we will come to in which we reject his evidence which causes us to have

concerns about him as a reliable witness of truth. However, just because a witness is unreliable about one matter (or even lying about one matter) does not mean that they are unreliable or lying in relation to all of their evidence. It is not necessarily a reason to reject their evidence in its entirety. We found Rebecca Faulkner to be a persuasive witness and Alistair Barnard to be a straightforward witness, both of whom were genuinely trying to assist the tribunal with their evidence. We therefore accept that the conversations took place in December when Mr Faulkner expressed his view to the two of them that he was dissatisfied with the claimant's performance and he was going to have to dismiss her. He was persuaded to wait until after Christmas. We also accept Ms Hatton's evidence of the pre-Christmas conversations.

19. We pause there to comment but we are not saying that Mr Faulkner would have had fair reasons to dismiss the claimant before Christmas but that is not the issue that is before us. His change of heart is an example of his decision-making process which appears to be easily influenced and he is not always consistent or steadfast in his decisions.

20. Mr Faulkner's evidence and that of his partner, Carla Hatton, was that instead of dismissing the claimant before Christmas, he decided to administer a final written warning which he did by posting and leaving at work a letter which he produced at RB page 3. It is dated 6 January 2017. The claimant denies ever seeing that until the respondent's disclosure within these proceedings. Mr Faulkner does not mention giving a warning in his ET3 and he could not explain that omission.

21. There is another letter which he said that he both posted and left in the shop for the claimant. That is at RB page 44 and it bears the date 1 February 2017. By it, it is stated that Mr Faulkner is cutting the claimant's hours and refers to the earlier final warning letter. The claimant also denies receiving this letter at the time.

22. In an attempt to corroborate having sent RB page 44, Mr Faulkner referred us to a text which both parties agree that he sent on 1 February 2017 (page CB page 30) The claimant says this was how she discovered that he was reducing her hours from 16 to 8 a week, which would take her down to one day a week. In that text, Mr Faulker told the claimant that he had put the reduction in hours in writing and that it should be with her ASAP. However, he does not say in that text that he is leaving it for her in the shop. She texted him on 10 February (see CB page 41) saying that she had not yet received the letter.

23. Mr Faulkner's unexplained failure to mention the final written warning either in the ET3 or in his first account of the reasons for dismissal (his email letter dated 20 February at CB page 60) causes us to conclude that the purported letter of 6 January 2017 was neither written nor sent as alleged by Mr Faulkner and Ms Hatton and we reject their evidence to that extent. Our conclusion is that the story of a final written warning has been created because the respondent belatedly realised that, whether or not the

concerns about the claimant's performance were genuine, the respondent had followed no formal process in managing it prior to deciding to dismiss her.

24. We also conclude that the claimant's text of 10 February shows that she had not received the letter of 1 February and that that letter also is not a genuine contemporaneous document. Mr Faulkner may have drafted a letter of some kind but RB page 44 refers to a warning which we find was never sent so we cannot accept that that letter was sent.

25. Against the background of Mr Faulkner being dissatisfied with the claimant to a point where he had discussed dismissing her with his family members and business contacts but where any warnings expressed by him were not expressed in a way which the claimant took to be an admonishment by her boss, the key series of events took place in January and February 2017. Mr Faulkner's account to us was that he had decided over Christmas to give her a final written warning, gave it on 6 January, but then for reasons which he could not articulate, decided by 23 January to dismiss her instead. As evidence of that, he pointed to text exchanges with the claimant but also with Mr Barnard. RB page 53 is a text from Mr Faulkner to Mr Barnard, who was due to attend to install CCTV footage on 23 January. He was not due to install it on 30 January and that date in Mr Faulkner's timeline of events is an error. It is true that in his ET3, Mr Faulkner initially said that the installation was on 2 February but he corrected that and we accept that he was just mistaken in his response. This is an illustration of his unreliability about the precise dates on which things happened.

26. In the text, Mr Faulkner asked Mr Barnard not to arrive until 9.30 because he had some business "to take care of with Laura" to which Mr Barnard, who knew of Mr Faulkner's concerns vis the earlier conversation before Christmas, said "Oh, not fun". There are then texts to the claimant (RB page 57) where she texts Mr Faulkner at 07:28 am on 23 January saying that she is unwell and will not be at work. Mr Faulkner says "I do need to speak to you, please pop in later" to which she replied "Am I getting the sack?".

27. We accept Mr Faulkner's evidence on this point, despite rejecting what he says about the final written warning, that the reason why he postponed Mr Barnard's start time was in order to give himself time alone in the shop with the claimant in order to dismiss her. That was why he encouraged her to attend if she could on that day. We find that he had made up his mind to dismiss her on 23 January and that she would have been dismissed had she attended work. That is the only reasonable interpretation of those texts which Mr Barnard confirmed receiving.

28. Prior to this exchange of texts with Mr Faulkner (set out in paragraph 26 above), the claimant had discovered that she was pregnant. She had spoken to Rebecca Faulkner on about 20 January at the latest, or possibly a day or two earlier, in which she told Rebecca Faulkner that she was

expecting. We accept Rebecca Faulkner's evidence that she did not tell Luke Faulkner, she seemed to us to understand that discretion is important and that it was a personal matter for the claimant and her evidence was credible on this point.

29. We have considered the inference that Mr Luke Faulkner would like us to draw from the text of the claimant on 23 January where she says "Are you going to sack me?". He wishes us to infer that she knew full well that he was unhappy. We consider that the fact that the claimant's explanation for these words has been somewhat inconsistent. In oral evidence, she linked them to telling Rebecca Faulkner that she was pregnant and said that they reflected her anxiety that Mr Luke Faulkner might dismiss her. However, in her letter of 22 February 2017, which is at CB page 18, she linked it to sickness absence.

30. Our conclusion is that she was not as ignorant as she professes to be about Mr Faulkner's dissatisfaction with her performance but it had not been formally expressed and indeed had not been clearly and unequivocally expressed. We have had no explanation about why Mr Faulkner did not meet with the claimant on the next day of work which was 24 January. However, he seems very changeable in his thinking. We have seen at RB page 17 one of the texts from 10 February 2017 in which Mr Faulkner explains that after not dismissing the claimant on 23 January, he "lost the heart because she booked a big job". Our conclusion is that he got cold feet about dismissing her but still did not grasp the nettle about managing his and her expectations of her performance.

31. Her next working day was 30 January and she says that on that day, she had a conversation with Mr Faulkner where he asked her whether she was pregnant. His account of discovering that she was pregnant was that it was on the 31 January (and not 7 February as he says in his ET3) and that she volunteered the information. To the extent that it is important we prefer the claimant's evidence on specific dates. Too frequently, Mr Faulkner's recollection is at fault about the precise date of events and we are reluctant to accept his evidence about the date of an event without corroborative evidence such as a text. However, we are not persuaded that Mr Faulkner asked the claimant whether she was pregnant or, if he did, that it indicated that he regarded that as problematic.

32. Mr Faulkner's very frank account to us about his reaction to the news that the claimant was pregnant was that he first asked her whether she was going to keep the child, which she recorded in her ET1 as being asked whether she was going to have an abortion. Mr Faulkner's explanation for that was that it was said in the context that he believed her to have split up with her former boyfriend. The words that he says he used were "Are you going to keep this with a bloke who beats you up?". Furthermore, that individual, even on the claimant's account, was abusive and unstable and had attended at work on at least one occasion behaving in a way which made the claimant concerned for her safety such that Ms Hatton had had to ask Mr Paul Faulkner to go over to accompany her when she locked up.

33. What Mr Faulkner said, even on his version of events, was a potentially very hurtful thing to say and we have considered carefully whether we should infer from that comment that the claimant's pregnancy was a matter of concern to Mr Faulkner as her employer. On the face of it, it is an outrageous thing to say, but in the context of what Mr Faulkner knew about the claimant's former boyfriend who had caused problems to the claimant and at the workplace we accept his explanation for it and we do not think that it shows that his attitude was against pregnant women at work in principle.

34. The other part of his reaction to the news was to go home in despair, not because the news of the pregnancy meant that he would have to manage her absence or anything connected with the pregnancy but because he realised that he could not dismiss her as he had intended to because of her protected status. He decided instead to reduce her hours. The contemporaneous evidence of the reason for that decision is in his text by which he notified the claimant of it (see CB page 30). The reason he gives is that of the reduction in work.

35. Objectively, his decision to reduce hours is illogical. He had put in place no measures to encourage improvement but seems to have thought that reducing the claimant's hours would alleviate the problem. He had not clearly outlined to the claimant what it was that he expected her to do and how she could improve. If the problem was lack of cold calling, then beyond saving her wages for one day, reducing the manpower would not have improved the situation.

36. Understandably, the claimant was aggrieved and upset when Mr Faulkner reduced her hours. She went to the Citizens Advice Bureau and we comment that to the extent that Mr Faulkner thinks it unreasonable for her have taken advice about her position, he is quite wrong to do so. She started to collect evidence to refute the claim that Mr Faulkner seemed to be advancing that there was insufficient work. We do not have sufficient evidence before us from which to judge whether there was or was not a downturn in work.

37. On 10 February, see CB page 41, the claimant asked Mr Faulkner whether she could discuss the reduction in her hours when she next expected to see him at the shop on Tuesday 14 February, her hours having been reduced to only Tuesday working. She expressed confusion that her hours had been reduced when Rebecca Faulkner had been given a £1.00 an hour pay rise and she said that she needed to work 16 hours and not eight.

38. There is then an exchange of texts which is at RB pages 11 to 17 but the order is very difficult to follow. Mr Faulkner's clear evidence, which we accept, was that it was the claimant's attitude, as expressed in these texts which caused him to think that he had to dismiss her. In these texts, Mr Faulkner raises various complaints about the claimant's performance

which the claimant refutes. At the same time, the claimant is arguing that her employment rights have not been respected, her hours have been cut without consultation and that she has not had a written statement of terms and conditions. The respondent, who is ill informed about his responsibilities as an employer, has an absolute obligation to provide that and it should have been volunteered within a month of her starting work, regardless of the claimant's views at the time.

39. Among other things, the claimant said in the texts that Becky Faulkner's pay rise "has got something to do with me when you're cutting my hours down after two days of you asking if I was pregnant". His response is not to address the legitimacy of her complaints but is defensive. He says "I don't understand why you're arguing with me. I've not sacked you. Don't make things awkward". His evidence to us was that it was this exchange of texts and others on the same day which he has not produced and therefore which we cannot take into account which caused him to think that things had gone too far and that the employment relationship should be ended. He complains that the claimant should have told them earlier that she was pregnant and he would have understood.

40. In a particular passage which we note in the part of the text at RB page 17 Mr Faulkner seems to us to be obviously angry that the claimant is accusing him of seeking to entrap her. This is a reference to the claimant's defence to his accusation that she had left carpet outside the shop. He sets out perceived complaints about her work and he is clearly cross with her.

41. At some point between the reduction of the claimant's hours and this exchange of texts, Mr Faulkner had asked his father to ask the claimant for her keys to the shop because, on his account, he no longer trusted her locking up. He said that this was because of an occasion when it had been reported to him that items were left outside the store after she had left for the day.

42. The claimant denies that she had done that and Mr Faulkner, viewed objectively, had made no attempt to investigate whether she had been negligent or not but had jumped to conclusions in his usual way. However, Paul Faulkner did not tell the claimant that that was the reason for removing the keys, simply saying that more keys needed to be cut. This lack of communication causes us to think that, although the claimant probably knew more than she expresses to us, she would not have thought that the depth of Mr Luke Faulkner's displeasure was as great as it was. Therefore, when the claimant attended for work on 14 February, she had to wait for Mr Faulkner to let her in. On her statement account, she said that she wanted to talk about her hours and he behaved aggressively to her and told her that she was sacked saying "to get the fuck out of his shop" (see supplemental statement paragraph 7). In her oral evidence to the tribunal she said that, before she said anything, he told her not to put her things down, that she was shit at her job and again "to get the fuck out of my shop".

43. Mr Faulkner's account does not necessarily conflict with hers because he accepts that he got angry but he described her as going mental. We therefore accept her account that there was no preamble to him dismissing her and that he did so using the swear words alleged. His behaviour to an employee was completely unacceptable. There was no justification for using foul language. If in response she did get angry, then that seems to us to be both reasonable and justifiable.

44. There was then an exchange of letters between 17 and 22 February. This exchange is at CB page 15 (a letter which Mr Faulkner now accepts he did receive) and CB page 20. The letter in which Mr Faulkner set out his reasons for dismissal (CB page 16) includes a statement that "the nail in the coffin" was the claimant leaving things outside the shop and blaming him. However unreasonable his conclusion that she had left the carpet outside the shop, and that this was misconduct on her part, it was, we find an important reason for the breakdown in her relationship. Our conclusion on this is reinforced by the fact that the claimant does appear to have accused Mr Faulkner of leaving the carpet there himself and then of blaming her for it. In other words, whether or not she was culpable for leaving stock outside the shop after locking up, she did accuse him of trying to frame her.

The Law applicable to the Issues

45. Direct pregnancy discrimination is prohibited by section 18 of the EqA 2010
which, so far as is relevant to the present case, reads as follows:

> "18. **Pregnancy and maternity discrimination: work cases**
> (1) ...
> (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 it.
> (3) …
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
> (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
> (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
> (7) …"

46. It is accepted by the respondent that they dismissed the claimant. There is no doubt but that, as at 14 February 2017, she was pregnant and therefore her dismissal took place within the protected period, as defined in s.18(6) EqA 2010. See paragraph 12 above. If an employer dismisses an employee because of her pregnancy then that is unlawful discrimination under section 39 EqA 2010.

47. There is no need for a comparator when considering whether the unfavourable treatment is pregnancy discrimination. It is not a question of whether the employer would have or did treat anyone else more favourably, although if they did that might be admissible evidence of the reason why the employer acted as they did. However, in order to be unlawful discrimination, the grounds of the employer's actions must be the employee's pregnancy.

48. The degree of causal connection required between the pregnancy and the action complained of in order for the act to be said to be because of the pregnancy was considered in Commissioner of Police for the Metropolis v Keohane [2014] I.C.R. 1073 EAT where the then President of the EAT said this,

> "Pregnancy, sex, race, disability, age and the other characteristics identified as protected in the Equality Act 2010 are an inherent part of the identity of a person. They are thus always liable to be present when any decision is made or act is done in respect of that person. Often, and perhaps almost inevitably, those characteristics will shape the context and the circumstances within which that decision or act is taken or done. The purpose of the Equality Act put generally is to proscribe criteria or behaviour which are responsive, not to the context generally, but specifically to the characteristic concerned. Thus, in Martin v Lancehawk Ltd (trading as European Telecom Solutions) [2004] All ER (D) 400 an employee was dismissed because her affair with the manager had broken down. If he had not been male, and she female, the relationship, and consequently its breakdown, would not have occurred. But the fact that they were of different gender did not cause the breakdown; it was merely part of the background circumstances. A difference in sex was not the real, or "activating" cause of the dismissal. It was upon cause in that sense that a tribunal had to focus…"

49. Although the pregnancy must be an effective cause of the unfavourable treatment (rather than part of the context) it does not have to be the only effective cause. It is sufficient that the protected characteristic had a significant influence upon the on the decision which is impuned. A significant influence is one which is more than trivial: Igen Ltd v Wong [2005] I.R.L.R. 258 CA. Although it is possible for an employer not to be conscious that pregnancy is a significant influence upon their action, a conclusion that they have been subconsciously influenced must be evidentially based.

50. When considering whether or not the respondent dismissed the claimant because of her pregnancy we bear in mind that, by s.136 EqA 2010 the claimant bears the burden of proof which she can satisfy by proving "facts from which the court could decide, in the absence of any other explanation, that" the respondent dismissed her because of her pregnancy. If we find that there are facts from which we might infer discrimination, in the absence of any other explanation, then we must find that she suffered discrimination unless the respondent proves that the reason for dismissal was not, in any way, that of pregnancy.

Conclusions

51. We have concluded that Mr Luke Faulkner did not know that the claimant was pregnant until 30 or 31 January 2017. We have also concluded that he had decided to dismiss her by no later than 23 January 2017, after equivocating about his decision over the Christmas period. He had intended to tell her of his decision on 23 January 2017 but had been unable to see her. He then reversed his decision to dismiss her, deciding instead to reduce her hours. So, what then was in his mind at the time when he did decide to dismiss eventually because what we have to consider is whether her pregnancy was a significant influence on that decision in the sense that it was a more than trivial influence on the decision?

52. Mr Faulkner's oral evidence was that what the claimant communicated in the texts that she sent on the 10 February was what changed his mind from thinking that a solution for what he saw as the problem of her performance at work was a reduction in hours to deciding to dismiss. We accept that evidence. Our conclusion is that the texts which he produces at RB pages 11 to 17 (see paragraphs 38 to 40 above) were the proximate trigger meaning the immediate trigger for the decision to dismiss but his reasons went beyond what was in those texts. His reasons were set out in his letter of 20 February which is at CB page 16.

53. Given that, was her pregnancy a significant influence on that decision?

54. The claimant has clearly done enough to transfer the burden of disproving discrimination to the respondent and we have to look to Mr Luke Faulkner for an explanation for his behaviour. He has shown himself to be an unsatisfactory witness who has created two documents to bolster the respondent's case. His recollection of dates is poor; his performance management was non-existent; he took no legal or specialist advice about the situation. All of those are reasons for us to treat the explanations which he puts forward with scepticism. We are acutely aware that for Mr Faulkner to take umbrage at many of the criticisms expressed by the claimant in those texts was unjust.

55. That being the case, we look again at the texts. There are references to the claimant being pregnant within those texts where the claimant contrasts her reduced hours to Becky Faulkner's payrise within two days of being asked whether she was pregnant. However, having given full weight to the unsatisfactory nature of the respondent's evidence and the poor treatment of the claimant, our conclusion is that her pregnancy was merely part of the context within which Mr Faulkner made his decision and not a causative factor of it. We are quite satisfied that Mr Faulkner had decided to dismiss the claimant before he found out that she was pregnant and that his crass comment on hearing the news of her pregnancy does not indicate a subconscious attitude that it was bad for the business that the claimant was expecting. We are also persuaded by him that, having heard

that the claimant was pregnant, he realised that he could not dismiss her. We do not think that had he been even subconsciously motivated by the consequences to the business of the claimant being pregnant he would so frankly have admitted that he was dismayed by her news.

56. Had the claimant had two years' continuous service, the outcome to the complaint would have been very different. Mr Luke Faulkner urgently needs to take advice from a suitably qualified source about his responsibilities as an employer and we recommend that he contact ACAS so that they may direct him to their publications on a range of issues. However, we have reached the conclusion that the claimant was not subjected to unlawful pregnancy discrimination by being dismissed as alleged.

57. In relation to the breach of contract claim, the only possible defence to that is for the respondent to succeed in an argument that the claimant had committed gross misconduct. We have looked at such evidence there is in relation to the claimant's performance. Mr Faulkner's concerns do not get anywhere near high enough to prove that the claimant had committed gross misconduct as he himself realistically accepts and therefore the breach of contract claim for notice pay succeeds. The respondent shall pay to the claimant the sum of £136.00.

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Employment Judge George

Date: 25 January 2018……..

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office