**Case Number: 2402454/2019(V)**

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Ms T Donaldson | **v** | Helan Greenhalf trading as Roundhills Kennels & Cattery |

**Heard at:** Manchester Employment Tribunal **On**: 16 and 17 January 2021

**Before:** Employment Judge Johnson

**Members:** Ms B Hillon
Mr T D Wilson

**Appearances**
**For the Claimant:** Mr S Walker (solicitor)
**For the Respondent:** Mr J Brown (counsel)

# JUDGMENT

1. The claimant's effective date of termination was 15 October 2018.

2. The claimant did not have a qualifying period of employment to bring a complaint of ordinary unfair dismissal, because she had not been continuously employed for a period of not less than two years ending with the effective date of termination in accordance with section 108 of the Employment Rights Act 1996.

3. The claimant's complaint of ordinary unfair dismissal is therefore dismissed.

4. The claimant was automatically unfairly dismissed by reason connected with her pregnancy contrary to section 99(3) (a) Employment Rights Act 1996

.

5. The claimant's complaint that her dismissal was unfavourable treatment and that she was discriminated on grounds of the protected characteristic of pregnancy contrary to section 18(2) of the Equality Act 2010 is well-founded. This means that her claim succeeds.

6. As the complaint of discrimination contrary to section 18(2) of the Equality Act 2010 succeeds, (and in accordance with section 18(7)), the complaint of direct

sex discrimination contrary to section 13 of the Equality Act 2010, does not apply and that complaint is dismissed.

7. The Tribunal finds that the respondent failed to provide the claimant with itemised pay statements at the relevant time contrary to section 8 of the Employment Rights Act 1996 and in accordance with section 12(3)(a), a declaration is made to that effect.

8. The complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is dismissed because the claimant has now received her outstanding pay from the respondent.

9. The respondent failed to provide a written statement of terms and conditions of employment when the claimant began her employment, contrary to section 1 of the Employment Rights Act 1996

10. The case will now be listed for a remedy hearing to be heard at the Manchester Employment Tribunal ***on the first available date*** and with a hearing length of one day. It is likely that the case will be listed to be heard remotely using the tribunal's cloud video platform ('CVP'). Joining details will be provided to the parties together with the hearing date, in due course.

11. Any issues relating to questions of '*Polkey'* and any uplift for failures to comply with the ACAS code of practice concerning disciplinary and grievance procedures will be considered at the remedy hearing, when the Tribunal will hear submissions from the parties.

12. The claimant shall provide the respondent with an updated schedule of loss together with a paginated bundle of documents and witness statement dealing with all issues relating to remedy within 28 days of the parties receiving the judgment.

# REASONS

## Background

1. These proceedings arise from complaints which the claimant brought when she presented a claim to the employment tribunal on 1 March 2019. She brought complaints of ordinary unfair dismissal, automatic unfair dismissal by reason of her pregnancy, discrimination on grounds of her pregnancy (and also direct sex discrimination), unpaid wages, failure to provide itemised pay statements and a failure to provide a statement of particulars. There was a period of early conciliation before the proceedings began and the respondent presented a response resisting the claim.

2. The case was the subject of case management before Employment Judge Morris on 3 June 2019 and in addition to the usual case management orders, a two-day hearing was listed to take place in the Carlisle Employment Tribunal on 12 November 2019.

3. Unfortunately, this hearing was postponed and because of the Covid 19 pandemic, it has not been possible to list this case for a final hearing until the beginning of 2021. The case was listed by the Tribunal for a final hearing today and due to the restrictions placed on it because of Covid 19, it was heard by Cloud Video Platform ('CVP').

**The Evidence Used in the Hearing**

4. The parties had been ready to proceed with the hearing in 2019 and an agreed bundle of documents and witness evidence had been exchanged before that hearing took place.

5. The claimant relied upon her own witness evidence and the respondent was the sole witness in support her case.

6. The hearing bundle was broadly complete when the hearing began but a few additional documents were provided in advance of the hearing relating to the claimant's signature. This was a copy of her driving licence and a copy of the signed Citizens Advice Bureau *('CAB'),* authority to act. There was no dispute regarding the addition of these documents to the bundle by the respondent.

7. An issue arose at the end of the first day of the hearing during the cross-examination of the respondent. There was some confusion on her part as to whether the correct copy of The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 ('The Regulations') was included within the bundle. The respondent was asked to look into this matter overnight and she provided her counsel with a number of documents relating to government guidance from 2018 produced in connection with these regulations and related to her licence issued under those regulations from Barrow in Furness Borough Council and accompanying letters relating to inspection and a provisional licence.

8. It appeared that the respondent during her cross-examination on the second day had not provided a complete disclosure of the relevant documents. There was a short adjournment during the hearing to enable the parties to share this information and to determine whether it was relevant to the case and where it should be added to the bundle. It transpired that this documentation post-dated the relevant date of dismissal in 2018. Accordingly, the parties agreed that these documents

need not be the subject of an application that they be added to the hearing bundle.

## The Issues

9. The issues remained broadly the same as those identified by Employment Judge Morris at the preliminary hearing on 3 June 2019, subject to discussions with representatives at the beginning of this hearing and which were established as being as follows:

*Discrimination on grounds of pregnancy: section 18(2) of the Equality Act 2010 (EQA)*

a) Did the respondent discriminate against the claimant in the protected period in relation to her pregnancy by treating her unfavourably (in respect of which the claimant relies solely on dismissal because of her pregnancy)? Thus:

i) Was the claimant subjected to unfavourable treatment?

ii) If so, was she subjected to unfavourable treatment during the protected period?

iii) If so, was that unfavourable treatment because of her pregnancy?

*Direct discrimination because of sex: section 13 and 39 of the EQA?*

a) Did the respondent dismiss the claimant as provided in section 39 of the EQA?

b) Has the respondent treated the claimant as alleged less favourably than it would have treated hypothetical comparators?

c) If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of sex?

d) If so, what is the respondent's explanation? Does she prove a non-discriminatory reason for any proven treatment?

e) Note: the complaint of direct discrimination would *not* proceed (and would be dismissed), in the event that the claimant is successful with her complaint of pregnancy-related discrimination in accordance with section 18(7) of the EQA.

*Unfair dismissal claim: sections 94,98 & 99 of the Employment Rights Act 1996 (ERA)*

a) Did the claimant have qualifying service in accordance with section 108 of the ERA in order that a complaint of ordinary unfair dismissal could be brought?

b) What was the reason (or if more than one, the principal reason) for the dismissal?

   i) The respondent asserts that the claimant was redundant, which is a potentially fair reason under section 98(2) of the ERA.

   ii) The respondent must prove the claimant's dismissal was wholly or mainly attributable to circumstances of redundancy as detailed in section 139(1) of the ERA.

c) If there was such a redundancy situation, did the respondent act reasonably or unreasonably in treating that as a sufficient reason for dismissing the claimant, including in relation to discussions with the claimant?

   i) In this regard the respondent admits that there was no proper consultation but contends that any such consultation would have been futile because the claimant was the only employee at the time of her dismissal.

d) If there was such a redundancy situation, was the respondent's decision to dismiss the claimant within the range of reasonable responses of a reasonable employer?

e) In the alternative, the respondent contends that if the circumstances giving rise to the dismissal did not amount to redundancy as defined, they amount to a substantial reason of a kind such as to justify the dismissal of an employee (as referred to in under section 98(1) of the ERA), in that there was a business reorganisation carried out in the interests of economy and efficiency.

f) The claimant asserts that the reason for her dismissal related to her pregnancy and, therefore, that her dismissal was automatically unfair by reference to section 99 of the ERA. In this respect, therefore was the reason (or if more than one the principal reason), for the claimant's dismissal relating to her pregnancy?

*Unauthorised deduction from wages sections 13 and 23 of the ERA.*

a) Did the respondent make unauthorised deductions from the wages of the claimant; including whether any deductions that were made were accepted deductions as that term is used in section 14 of the ERA?

   i) In this respect the representatives confirm that the claimant had not been provided with copies of itemised pay statements.

*Failure to provide itemised pay statements: sections 8 and 12 of the ERA*

a) Did the respondent at or before the time at which any payment of wages was made to the claimant provide her with a written itemised pay statement containing the particulars set out in section 8(2) of the ERA?

b) If not, the Tribunal shall make a declaration that the respondent failed to give the claimant one or more pay statements to which she was entitled.

c) The Tribunal will not have jurisdiction to make any award to the claimant in that it was conceded on her behalf that any unnotified deductions made from their pay were not made during the period of 13 weeks immediately preceding the date of her application for the reference to the tribunal.

   i) In this respect, the representatives confirmed that the claimant had now been provided with copies of itemised pay statements, but requests a declaration that they were not provided at the relevant time.

*Failure to provide a statement of particulars: sections 1 and 12 of the ERA*

a) Did the respondent provide the claimant with a written statement of particulars of employment when she began her employment in accordance with section 1 of the ERA?

b) If not, the Tribunal shall make a declaration to that effect in accordance with section 12 of the ERA.

*Remedies*

a) If the claimant succeeds, in whole or part, the Tribunal will be concerned of with??? issues of remedy.

b) If so, consideration will be given to orders for reinstatement, re-engagement, a declaration regarding the failure to provide a statement

and/or in respect of any unproven unlawful discrimination, recommendations and/or compensation for loss of injury to feelings and/or the award of interest

## Findings of fact

10. The respondent is the sole proprietor of Roundhill's Bespoke Boarding Kennels which formerly traded as Roundhill's Kennels and Cattery. The respondent purchased the kennels in April 2014 and explained in her evidence that the business had been on sale for a period of some six years before she bought it. She described the kennels as having both their trading accounts and the animal accommodation in a very poor state.

11. It was not disputed that the respondent had ambitious plans for the development of the kennels (and at that time the cattery), and to create what she would regard as a premium business attracting increased business. She explained that she began development work as soon as she obtained the business in 2014 and by the summer of 2018 when the claimant joined the business, the works were approximately 40% complete.

12. The claimant was employed as a part-time kennel cleaner in June 2018. It is understood that the respondent's mother is friends with the claimant's mother and was aware that she was interested in working at a kennels. She commenced employment on 4 June 2018 and was 22 years old at the time.

13. There was some dispute as to whether the claimant received a statement of particulars in written form from the respondent. In the respondent's witness evidence, she explained that she had not been able to find the signed statement of particulars but was sure that such a document existed as she recalled the claimant signing this document. The claimant, however gave evidence asserting that she never received such a document and would recall seeing it if it had been passed to her by the respondent.

14. Witness statements were exchanged in October 2019. Shortly after this date the respondent located a written statement of particulars dated 4 June 2018 and which included signatures from both her and the claimant. The claimant disputed that this document was created when she started employment and questioned whether it had been generated by the respondent in response to her claim.

15. The respondent strongly resisted this argument, asserting that the statement of particulars had been provided at the date of employment in June 2018, or shortly afterwards.

16. There were no handwriting experts relied upon by either party and as a consequence, the Tribunal was asked to look at the available signatures in the documents provided, to see whether it could be determined that this was a document which contained a genuine signature from the claimant.

17. The Tribunal did not consist of any handwriting experts and does not consider itself to be able to make any definitive finding regarding the veracity of the signature attributed to the claimant in the statement of particulars. It noted that the statement of particulars produced by the respondent was something which she downloaded from the Internet. Consequently, it contained sections which were perhaps unnecessary, and which contained blank spaces where less relevant sections had not been completed. The Tribunal has no reason to believe that this document was not downloaded in this way, nor that the signature provided by the respondent belonged to her.

18. However, an ongoing theme in this case was the question of credibility and reliability of witnesses. It is the Tribunal's view that the claimant gave more consistent, reliable, and therefore credible evidence. As a consequence, it is satisfied that the claimant did not receive this document and indeed had never seen this document until it was produced in the bundle. Accordingly, the Tribunal is not satisfied that the claimant received a written statement of particulars when she commenced employment. It does not need to make any findings concerning the question of who was responsible for producing a signature which could be attributed to the claimant. While the signature bears a strong resemblance to the claimant's signature contained in her witness statement and indeed in the form of authority which she provided to the CAB, it is unable to arrive at any view as to how that signature was inserted. All that needs to be said however, is that as the claimant did not see this document until it was produced for the hearing bundle, it was not she who produced the signature and therefore somebody else must have inserted it. As our findings enable us to determine that the claimant did not receive a written statement of particulars at the material time, there is no need to make any further findings concerning the provenance of signatures.

19. The claimant's employment continued through the summer of 2018 and it was noted that the number of conduct and capability issues arose including her arriving late to work, causing a minor injury to a dog and her failing to wash dogs and clean their water bowls. The tribunal is satisfied that these occurrences were treated as minor incidents during the claimant's probation period and the respondent confirmed that although her partner Mr Robert Rose, was unhappy with the claimant's behaviour concerning these matters, she as the claimant's employer, did not feel it necessary to take any formal disciplinary action. Instead, she was keen to

give the claimant a chance to improve and to monitor her progress within the probation period provided.

20. It is accepted by both parties that during August 2018 the respondent received a visit from Sue Carey who is a licensing officer at Barrow in Furness Borough Council. This local authority regulates the respondent as kennels and cattery and provide relevant licences, which allow the business to lawfully operate. The tribunal accepts that Ms Carey telephoned the respondent during August 2018 and asked to visit the premises in order that she could discuss a matter arising from the introduction of The Animal Welfare (Licensing of animals) (England) Regulations 2018 ('*The Regulations').* It also accepts that the respondent did carry out some investigations during this period and found documentation relating to this forthcoming legislation which would not be introduced until 1 October 2018. It does not accept that the guidance which was produced by the respondent dated October 2018 and 2019 would have been available in August 2018. However, it is likely that something was available, either from a local authority website or from the Department for Environment Food and Rural Affairs ('DEFRA'), explaining to interested parties what the implications were of the new legislation.

21. Ms Carey attended the respondent's premises as promised and it certainly appeared to be the case that the respondent became aware that the forthcoming legislation would produce an additional burden upon kennels and catteries. This was because the regulations would become more stringent with the introduction of a star rating system using a specific matrix. Consequently, this would put pressure on kennels and catteries to ensure that their premises were as fit for purpose as possible.

22. However, the respondent initially continued with her plans to produce a series of '*kennel chalets'* at her premises and the Tribunal finds that she would have believed at that time, that this development would have assisted her in achieving the desired five-star rating (being the highest rating) under the Regulations. This is evidenced by a Facebook post which shows the chalet's building work in progress and which suggested that they would be available for rent later that month.

23. However, later in September or in early October 2018, the respondent became aware that to achieve the necessary five stars rating she would have to carry out some specific work to the existing kennels to ensure that they complied with the Regulations. Work was therefore stopped upon the chalet kennels. There is also evidence that at around this time the respondent was in the process of instructing builders to carry out the necessary work. This understandably created additional expense for the business and would have no doubt placed the respondent and her partner under a great deal of stress.

24. As the claimant was the sole employee at the site, the Tribunal acknowledges that from time to time the respondent would mention to her, what was going on at the business. There appears to have been some discussion which left the claimant believing that she was being earmarked for management. However, the Tribunal accepts that the claimant had no interest in assuming management responsibilities and in any event, the respondent did not see her as becoming a manager. The claimant clearly wished to remain as a part-time employee, in the capacity as kennel cleaner and did not want to progress any further than that. A more relevant issue however, involved the respondent's consideration that the claimant would be able to reach a point where she could look after the kennels by herself for short periods to allow the respondent and her partner, to have a holiday. This would not necessarily require the claimant to aspire to a management role, simply that she would become willing to look after the kennels single-handed for relatively short periods of time and the Tribunal finds that this was an expectation of the respondents during the summer of 2018.

25. The Tribunal accepts that a meeting took place between the respondent and the claimant on 12 October 2018, but does not accept that during this meeting, the respondent warned the claimant that she was at risk of redundancy due to the need to close a cattery and the ongoing business concerns regarding the expense of refurbishing the kennels and the impact that might help on a short-term in retaining customers. Had Mr Rose been present at this meeting, the respondent would no doubt have provided a witness statement from him confirming his attendance. No such statement was produced in these proceedings and the Tribunal does not accept that he was present at this meeting.

26. In relation to this meeting, the Tribunal prefers the evidence of the claimant. It accepts that the respondent had a general discussion with the claimant at the end of the shift concerning what had caused water bowls to become dirty. It is at this point that the claimant told the R that she was pregnant??? – not sure she announced rather she was asked by R if there was something she wanted to say or words to that effect announced to the she had become pregnant. The claimant was upset when she told the respondent because she was only 10 weeks pregnant at the time of the meeting.

27. It was understood that the respondent said she would have to have a conversation with her partner over the weekend and that no decisions are made regarding the claimant's employment on 12 October 2018. The Tribunal accepts that the respondent may well be anxious about what to do following the claimant's announcement and her initial intentions may have been to look at ways in which she could stay in the business.

28. What did happen however, with that on 15 October 2018 both the respondent and Mr Rose met with the claimant. They told her that they were going to have to cancel a lot of dogs in the next few weeks and that consequently they would be able to deal with this work alone. Tribunal finds that on the balance of probabilities they also said that they will be not able to retain the claimant as an employee because of her pregnancy and their belief that it was too dangerous for her to continue working due to the dangers caused by slippery surfaces and other health and safety concerns. This is a surprising reaction given that the claimant was only 10 weeks pregnant when she informed the respondent. But whatever was going through the mind of the respondent and her partner at this time, the Tribunal finds that the respondent did not mention the possibility of her employment being terminated (whether by reason of redundancy or for other reasons), until after she and her partner became aware of the claimant's pregnancy.

29. The claimant's evidence was consistent throughout this case and the Tribunal accepts that the claimant was dismissed primarily because she announced her pregnancy to the respondent. The respondent and her partner may well have considered the impact that this might have upon their refurbishment plans to the kennels, the overall impact upon the business and their intention to ask the claimant to look after the kennels while they were away on leave. But whatever their concerns were, the Tribunal finds that these issues were not raised before the claimant announced her pregnancy and it was this issue which led to their decision to terminate her employment on 15 October 2018. While the claimant was not given clear notice of dismissal by the respondent or Mr Rose on this date and it appears no process took place at all or a letter of dismissal was provided, the Tribunal finds that the Claimant accepted she was dismissed on this date and ceased working for the respondent.

30. The claimant did not receive a letter of dismissal following her dismissal and on 6 November 2018, was forced to write to the respondent seeking confirmation from her as to the reasons for her dismissal. The respondent eventually replied on 21 November 2018 and simply described her as being 'no longer required'. No mention of redundancy was made, but she clearly did not dispute that the claimant had not been dismissed on 15 October 2018. The respondent did suggest that the claimant had failed to provide a P45 from her previous employer Tesco and this was why they could not instruct their accountants to pay outstanding wages to her. While this might be the case, the Tribunal is surprised that the respondent and/or their accountant did not simply provide an emergency tax code when processing her pay and until this matter had been resolved with HMRC or the claimant's former employer.

31. The claimant then obtained support from South Lakes Citizens Advice Bureau (CAB) and they sent a letter to the respondent seeking her unpaid wages, notice pay and annual leave on 6 December 2018. The respondent replied on 16 December 2018, explaining that the P45 issues remained to be resolved and that once the claimant provided this document, they could ensure all outstanding issues were completed.

32. The claimant then notified ACAS and following early conciliation proceedings commenced. It is understood that since then, the claimant has been provided with the necessary pay slips and outstanding pay by the respondent.

## The Law

Pregnancy discrimination

33. Pregnancy and maternity are protected characteristics under the Equality Act 2010 ('EQA'). Under section 39 an employer must not discriminate against an employee by, among other things, dismissing the employee or subjecting her to any other detriment. Detriment means putting the employee under a disadvantage.

34. Section 18 provides, among other things, that a person discriminates against a woman if, during the protected period in relation to a pregnancy, that person treats her unfavourably because of her pregnancy. The protected period begins when the pregnancy begins and ends at the end of the maternity leave period or when the woman returns to work, if earlier. Unfavourable treatment means the employee must have been put at a disadvantage, such as being denied a work opportunity or being dismissed.

35. In considering whether there has been pregnancy or maternity discrimination, it is necessary to look at why the employer treated the employee unfavourably. The employer's motive or intention is not relevant. The Tribunal must look for the operative or effective cause – why the alleged discriminator acted as he or she did. The Tribunal must consider what consciously or unconsciously was his or her reason. This is a subjective test and is a question of fact. It is enough that the pregnancy had a "significant influence" on the reason for the employer's treatment.

36. Section 136 of the EQA sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

37. At the first stage, the Tribunal has to make findings of primary fact based on the evidence from both the claimant and the respondent. It involves consideration of all material facts. The onus lies on the employee to show potentially unfavourable treatment from which an inference of discrimination could properly be drawn. If the employee does not prove such facts, her claim will fail.

38. It is important for Tribunals to bear in mind in deciding whether the employee has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

39. If, on the other hand, the employee does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed the act of discrimination, unless the employer is able to prove on the balance of probabilities that the treatment of the employee was in no sense whatsoever because of her pregnancy, then the employee will succeed.

Direct discrimination

40. Section 39 of the EQA provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

41. Section 13 of the EQA sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (sex in this case), A treats B less favourably than A treats or would treat others.

Unfair dismissal contrary to sections 98 & 99 Employment Rights Act 1996

42. Under section 98(1) of the Employment Rights Act 1996 ('ERA'), it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to redundancy is a potentially fair reason falling within section 98(2).

43. The reason for the dismissal is the set of facts or the beliefs held by the employeewhich caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

44. Under section 98(4) of the ERA, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the

employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

45. Under section 99 of the ERA, an employee who is dismissed shall be regarded as unfairly dismissed if the reason, or principal reason for the dismissal or the dismissal takes place in 'prescribed' circumstances, which includes pregnancy, childbirth or maternity.

46. Although, section 108 of the ERA, requires the claimant to have been continuously employed for a period of not less than two years ending with the effective date of termination for an 'ordinary' complaint of unfair dismissal to be brought (section 94 etc), this section does not apply to complaints arising from section 99.

Failure by an employer to provide an employee with itemised pay statements contrary to section 8 of the Employment Rights Act 1996

47. Section 8 of the ERA provides that a worker has a right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written pay statement.

48. Where an employer does not give a worker a statement as required by section 8, section 11 provides that the worker may refer the matter to the Employment Tribunal. This is providing that the application is made to the Tribunal before the end of the period of 3 months beginning with the date when the employment ceased or should such further period as the Tribunal considers reasonable if it is satisfied that it was not reasonably practicable for an application to be made within the 3 month period.

49. Where a Tribunal finds that the employer failed to give a worker any pay statement in accordance with section 8, section 12(3)(a) provides that the Tribunal shall make a declaration to that effect.

Failure by an employer to provide a written statement of terms and conditions contrary to section 1 of the Employment Rights Act 1996

50. Section 1 of the ERA provides that where an employee begins a period of employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

51. Where an employer does not give a worker a statement as required by section 1, section 11 provides that the worker may refer the matter to the Employment Tribunal. This is providing that the application is made to the Tribunal before the end of the period of 3 months beginning with the date when the employment ceased or should such further period as the Tribunal considers reasonable if it is satisfied that it was not reasonably practicable for an application to be made within the 3 month period.

52. Where a Tribunal finds that the employer failed to give a worker any pay statement in accordance with section 1 of the ERA, section 12(2)(a) of the ERA provides that the Tribunal shall make a declaration to that effect.

Unauthorised deductions from wages contrary to section 13 of the Employment Rights Act 1996

53. Section 13(1) of the ERA provides that an employer shall not make a deduction from wages of a worker employed by him.

54. A complaint may be presented to the Employment Tribunal in accordance with section 23, that among other things, the worker's employer has made a deduction of wages in contravention of section 13. Section 23(2) requires that such a complaint must be presented before the end of 3 months beginning with the date of the payment of wages from which the deduction was made. section 23(3) provides where there is a series of deductions, time will be calculated from the last deduction of that series.

55. If the Employment Tribunal finds that the complaint is well founded, section 24 provides that it may make a declaration and order that the employer pay the worker the amount of deductions made.

## Discussion and Analysis

Unfair dismissal

56. The claimant commenced her employment with the respondent on 4 June 2018. Her effective date of termination was 15 October 2018.

57. The claimant was not continuously employed by the respondent and did not have a qualifying period of employment to bring a complaint of ordinary unfair dismissal, because she had not been continuously employed for a period of not less than two years ending with the effective date of termination in accordance with section 108 of the ERA.

58. The claimants complained of ordinary unfair dismissal must therefore be dismissed.

59. However, the claimant has also presented a complaint of dismissal by reason connected with her pregnancy contrary to section 99(3) of the ERA. This is known as an 'automatic' unfair dismissal and is not subject to the qualifying period of employment required by section 108 for an 'ordinary' unfair dismissal complaint.

60. There was no dispute that the claim was presented within 3 months of the effective date of termination, subject to the additional time allowed by the early conciliation period while the claim was being dealt with by ACAS.

Accordingly, the claim was presented in time in accordance with section 111 of the ERA.

61. The Tribunal found that the claimant informed the respondent of her pregnancy on 12 October 2018 and that she was not informed of their decision to dismiss her until 15 October 2018. While the respondent relied upon the argument that the claimant was dismissed by reason of redundancy or some other substantial reason, both of which are potentially fair reasons for dismissal, the Tribunal is primarily concerned with the question of whether the reason or principle reason for her dismissal is connected with her pregnancy.

62. The respondent was clearly facing financial uncertainty arising from the 2018 Regulations coming into force. But it was also clear that at the time the claimant announced her pregnancy, the respondent was also keen to have the claimant available to look after the kennels, as she and her husband planned to take a holiday during the 2018 Christmas period. Similarly, the claimant while making a number of mistakes during her probationary period, was not subject to any disciplinary or capability process and it is commendable that the respondent was keen to allow the claimant to learn from her mistakes.

63. However, the decision to dismiss only arose following the announcement by the claimant of her pregnancy and the discussions which the respondent said she would have with her partner Mr Rose during the weekend of 13 and 14 October 2018. The Tribunal noted that the respondent's initial thoughts were that she would look at ways in which the claimant could continue to work for the business. This again is commendable, although quite clearly, pregnancy should not be reason to consider whether or not an employer can continue to employ a woman.

64. The Tribunal did not hear any evidence from Mr Rose during the hearing, but he clearly played a role in the decision to dismiss the claimant, given that the respondent discussed the matter with him during that weekend and he attended the meeting on Monday 15 October 2018, when the claimant was informed that she would be dismissed.

65. For the avoidance of doubt, while the respondent asserted that the reason for the claimant's dismissal was the potentially fair reason of redundancy, there was no convincing evidence available at the time of the dismissal to indicate that this was genuinely in the mind of the respondent.

66. The respondent appeared to have concerns regarding the health and safety of the claimant's continued employment while pregnant, there was no evidence that this could in any way be a justifiable reason to be a legitimate concern and it was certainly not a valid defence to this

complaint. A reasonable employer would of course have been keen to ensure that a pregnant employee would be kept safe and well while working, but at 10 weeks pregnant, the claimant should have simply been asked whether she was aware of any health and safety issues and a discussion could have then taken place regarding an appropriate risk assessment to manage these issues.

67. Whether redundancy or health and safety issues are considered as being relevant to the decision to dismiss, reliable evidence was not available to support these beliefs, especially as no dismissal letter was provided to the claimant at the meeting on 15 October 2018 or shortly afterwards.

68. What the alleged health and safety reasons do show however, is that the respondent was clearly motivated by the claimant's pregnancy when deciding to dismiss her on 15 October 2018. The timing of the decision to dismiss and the arguments raised by the respondent relating to health and safety illustrate how significant the claimant's announcement of her pregnancy was from 12 October 2018 onwards. Consequently, the claimant was dismissed for the reason, or principal reason of her pregnancy and was therefore unfairly dismissed.

69. The Tribunal does not make any findings as part of this decision on liability on the part of the respondent concerning any issues relating to questions of '*Polkey'* and any uplift for failures to comply with the ACAS code of practice concerning disciplinary and grievance procedures. These matters will be considered at the remedy hearing, when the Tribunal will hear submissions from the parties.

<u>Discrimination by reason of the protected characteristic of pregnancy</u>

.

70. This complaint was presented to the Tribunal in time in accordance with section 123 of the EQA, which was 3 months from the date of the discriminatory act taking place, namely the decision to dismiss on 15 October 2018 and allowing for the additional time provided by the early conciliation period.

71. Pregnancy and maternity are protected characteristics under section 4 of the EQA and a person will discriminate against a woman contrary to section 18 if they treat her unfavourably because of her pregnancy.

72. The respondent was informed that the claimant was 10 weeks pregnant on 12 October 2018 and following discussions with Mr Rose, decided to dismiss her. The Tribunal finds for the same reasons given above in relation to section 99 ERA unfair dismissal, that the claimant was dismissed for the reason or principal reason of her pregnancy and it is not

necessary to repeat its discussion of these matters in relation to the complaint of pregnancy and maternity discrimination. Dismissal can amount to unfavourable treatment and consequently, the respondent discriminated against the claimant contrary to section 18 of the EQA. This means that the claimant's complaint under this section succeeds.

Direct sex discrimination

73. For the reasons given above in relation to the complaint of pregnancy and maternity discrimination, it is certainly the case that the respondent treated the claimant less favourably than it would have treated others by reason of her sex. A man (or indeed a woman who was not pregnant), would not have been treated in the way which the respondent treated the claimant.

74. However, as the complaint of discrimination contrary to section 18(2) of the EQA succeeds, section 18(7) of the EQA is triggered. This provides that a section 13 complaint of sex discrimination does not apply when a woman is treated unfavourably by reason of her pregnancy contrary to section 18 EQA. This means that the complaint of direct sex discrimination contrary to section 13 of the Equality Act 2010, is dismissed.

The complaint relating to a failure to provide itemised pay statements.

75. The Tribunal was satisfied from the evidence that it heard and from the parties' submissions, that the claimant was not provided with itemised pay statements. The respondent's accountant appeared to rely upon the failure of the claimant's former employer to provide a P45, but the Tribunal does not accept that this was a genuine reason, nor could it be used as a defence to the complaint brought. A diligent employer would have simply made arrangements for an emergency tax code with HMRC, notified the claimant and requested that she seek the P45 when this emergency tax code was used. There was no evidence that this was done, and the claimant did not receive itemised pay statements throughout her employment with the respondent.

76. The Tribunal acknowledges that the claimant was eventually provided with the necessary pay statements but agrees with the claimant's representative Mr Walker that it is still necessary to make a declaration that they were not provided at the material time contrary to section 8 and in accordance with section 12(3)(a) of the ERA.

The complaint of unlawful deduction from wages

77. The claimant complained of an unlawful deduction from wages contrary to section 13 ERA arising from unpaid wages due upon the termination of her employment. In particular, it was understood that the claimant believed

she had not been paid in respect of accrued, but untaken annual leave entitlement.

78. Mr Walker confirmed that the claimant had not received her outstanding payments when her claim was presented. However, since then she has received all outstanding payments that were due to her and accordingly this complaint is dismissed.

Failure to provide written statement of terms and conditions of employment.

79. The Tribunal accepted that the claimant had not been provided with a written statement of terms and conditions of employment when she began her employment and refers to the findings of fact above, concerning this matter.

80. As discussed, the respondent did provide a document purporting to be the relevant statement of particulars as part of disclosure during the proceedings and shortly before the original final hearing date in 2019. It appeared to contain signatures by both the respondent and the claimant, but the Tribunal did not accept that the signature purporting to be the claimant's was actually hers. The claimant gave credible evidence throughout the hearing and in the absence of any other convincing documentary or witness evidence, the Tribunal accepted that no statement of particulars was provided to the claimant when she commenced her employment.

81. For these reasons, the Tribunal finds that the respondent failed to provide a written statement of terms and conditions of employment when the claimant began her employment, contrary to section 1 of the ERA.

## Conclusion

82. The claimants complaint of ordinary unfair dismissal is dismissed.

83. The claimant was automatically unfairly dismissed by reason connected with her pregnancy contrary to section 99(3)(a) of the ERA

.

84. The claimant's complaint that her dismissal was unfavourable treatment and that she was discriminated on grounds of the protected characteristic of pregnancy contrary to section 18(2) of the EQA is well-founded. This means that her claim succeeds.

85. As the complaint of discrimination contrary to section 18(2) of the EQA succeeds, (and in accordance with section 18(7)), the complaint of direct sex discrimination contrary to section 13 of the EQA, does not apply and that complaint is dismissed.

86. The Tribunal finds that the respondent failed to provide the claimant with itemised pay statements at the relevant time contrary to section 8 of the ERA and in accordance with section 12(3)(a), a declaration is made to that effect.

87. The complaint of unlawful deduction from wages contrary to section 13 ERA is dismissed because the claimant has now received her outstanding pay from the respondent.

88. The Tribunal makes a declaration that the respondent failed to provide the claimant with a written statement of terms and conditions of employment when she began her employment, contrary to section 1 of the ERA.

89. The case will now be listed for a remedy hearing to be heard at the Manchester Employment Tribunal ***on the first available date*** and with a hearing length of one day. It is likely that the case will be listed to be heard remotely using the tribunal's cloud video platform ('CVP'). Joining details will be provided to the parties together with the hearing date, in due course.

90. The claimant shall provide the respondent with an updated schedule of loss together with a paginated bundle of documents and witness statement dealing with all issues relating to remedy within 28 days of the parties receiving the judgment.

_____

Employment Judge Johnson

Date: 22 February 2021

Sent to the parties on 23 February 2021

For the Tribunal Office