EMPLOYMENT TRIBUNALS

Claimant: **Mrs Charlotte Parton**

Respondent: **The Newman Catholic Collegiate**

Heard at: **Birmingham** **20, 21 and 22 November 2023, and 29 November 2023 (Tribunal alone)**

Before: **Employment Judge Gilroy KC**
Members:
Mrs N Chavda
Mrs B H Astill

Representation

Claimant: **Ms M Aisha (Counsel)**
Respondent: **Mr S Gorton KC (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimant was subjected by the Respondent to detriment, contrary to s.44(1A) of the Employment Rights Act 1996, "ERA".

2. The Respondent treated the Claimant unfavourably, contrary to s.18(2)(a) of the Equality Act 2010, "EqA".

3. The Claimant was subjected by the Respondent to detriment contrary to Regulation 19(1) of the Maternity and Parental Leave etc. Regulations 1999, applying s.47C of the ERA.

4. The detriment the Respondent subjected the Claimant to (for the purposes of paragraphs 1 and 3 of this judgment) and the unfavourable treatment the Respondent subjected the Claimant to (for the purposes of paragraph 2 of this judgment), was treating her absence from work on 4 January 2021 as unauthorised, and deducting from her pay the sum of £122.95.

5. The Claimant suffered an unlawful deduction from her wages, contrary to s.13 of the ERA, namely the sum of £122.95, from her pay for January 2021.

REASONS

Introduction

1. The Claimant brings claims of detriment, contrary to s.44(1A) of the Employment Rights Act, "ERA", unfavourable treatment for the prescribed reason of pregnancy, contrary to s.18(2)(a) of the Equality Act 2010, detriment contrary to Regulation 19(1) of the Maternity and Parental Leave etc. Regulations 1999 (applying s.47C of the ERA), together with a claim of unlawful deduction from wages, contrary to s.13 of the ERA.

2. The Claimant is employed by the Respondent as a primary school teacher at St Peter's Catholic Academy in Stoke-on-Trent. The Respondent is a Multi-Academy Trust, consisting of one secondary school and 8 primary schools. St Peter's is one of those 8 primary schools.

3. The focus of the claims is the Claimant's absence from work on 4 January 2021 during the COVID-19 pandemic.

Evidence before the Tribunal

4. The Claimant gave oral evidence and the Tribunal heard oral evidence for the Respondent from Mrs Rossanna Snee, Headteacher of St Peter's, and Mr Ian Beardmore, Senior Executive Leader and Accounting Officer of the Respondent. The Employment Tribunal received signed witness statements from each of the witnesses who gave oral evidence.

5. The Tribunal was also provided with a bundle of documents running to over 400 pages. At the beginning of the hearing, Counsel for the Claimant provided written submissions, and Leading Counsel for the Respondent provided an Opening Note. Before the delivery of oral submissions at the conclusion of the evidence, Leading Counsel for the Respondent provided a Closing Note. Both Counsel spoke to their respective written submissions at the conclusion of the hearing. Counsel for the Claimant also provided a series of media articles relating to COVID-19. It transpired that the articles provided general background and specific case examples arising from the COVID-19 global pandemic, some of which were published at or about the time of the principal events with which the Tribunal was concerned, and some of which were published after those events. Counsel for the Claimant indicated that her client had read or was aware of the articles at the time of the material events. The Tribunal excluded the articles which clearly post-dated the material events. Counsel for the Claimant clarified that the remaining articles were relied upon for the purposes of establishing the reasonableness of the Claimant's belief as to the effect and potential impact of COVID-19 at the time of the material events. The Tribunal concluded that the articles would be of limited value for the purposes of determining that issue, particularly given that the Tribunal could take judicial notice of the impact and effect of COVID-19 as it was perceived by the general public at the time of the events with which the Tribunal was principally concerned (essentially from late December 2020 up to and including 4 January 2021).

The Legislation

6. The statutory provisions which are relevant to this case are as follows:

Employment Rights Act 1996

s.13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised -

> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

s.44 Health and safety cases

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that -

> *(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or*
>
> *(b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.*

(2) For the purposes of subsection 1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

s.47C Leave for family and domestic reasons

(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……..

The Maternity and Parental Leave etc. Regulations 1999

Protection from detriment

19(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…..”

Equality Act 2010

s.18 Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(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…..

The Issues

7. It was agreed between the parties that the issues the Tribunal had to determine were as follows:

<u>S.44(1A) Detriment on the Grounds of Health and Safety</u>

1. When did the Claimant decide that she was not returning to work:

    a. Was it when the Claimant sent her section 44 letter on 3 January 2021 at 22:24?

    b. Or was it some other time?

2. At the material time of the Claimant making her decision not to return to the workplace:

    a. Did the Claimant believe that there were circumstances of serious and imminent danger at her workplace? If so,

    b. Was that belief reasonable? If so

    c. Could the Claimant reasonably have averted that danger? If not

    d. Did the Claimant refuse to return to the workplace on 4 January 2021 because of the (perceived) serious and imminent danger? and/or

    e. Did the Claimant take appropriate steps to protect herself or other persons from the danger by working from home on 4 January 2021?

3. Did the Respondent subject the Claimant to any detriment done on the ground that the Claimant took such steps or proposed such steps as working from home during the perceived danger insofar as it did the acts set out at paragraph 8 below:

<u>EqA 2010, section 18: pregnancy & maternity discrimination</u>

4. Did the Respondent treat the Claimant unfavourably as set out in paragraph 8?

5. Was the unfavourable treatment because of her pregnancy contrary to s18(2)(a) EqA?

<u>ERA 1996, s 47(c) (MAPLE 1999 Reg 19) pregnancy & maternity detriment</u>

6. Did the Respondent treat the Claimant to a detriment as set out in paragraph 8?

7. Was the Claimant subjected to the detriments for the reason that she was pregnant?

8. Do the following acts count as detriments for the purpose of 44 Employment Rights Act 1996 and/or Regulation 19 (2) (a) Maternity and Paternity Leave Regulations 1999 and s47(c) Employment Rights Act 1996

    i. pressurised the 34 weeks' pregnant Claimant to attend the workplace despite serious health and safety concerns during 3 and 4 January 2021;

ii. failed to make adjustments to allow the Claimant to work from home on 4 January 2021 and/or until the risk assessment was amended approximately a week following the second lockdown;

iii. unreasonably advised, in a way that pressurised the Claimant, that, due to her anxieties on health and safety grounds, the Claimant could commence her maternity leave early;

iv. threatened that the Claimant may be subject to a disciplinary process for breach of contract by not attending the workplace when she had a reasonable belief that she and her unborn baby were at risk from COVID-19.

v. threatened that the Claimant would be treated as taking unauthorised absence if she failed to attend the workplace;

vi. failed to make adjustments to hold a meeting to discuss health and safety concerns virtually as opposed to in person in the workplace on 4 January 2021;

vii. failed to pay the Claimant in relation to 4th January 2021

viii. accused the Claimant of failing to raise any health and safety concerns prior to her working from home (rather than the workplace) on 4th January 2021.

ix. accused the Claimant of refusing to attend a meeting to discuss her health and safety concerns, though the Claimant had clearly requested the meeting to be held by Teams on Health and Safety grounds.

<u>ERA 1996 s 13: unlawful deduction of wages</u>

9. Has the Claimant suffered unlawful deductions from wages, contrary to s 13 Employment Rights Act 1996, insofar as her January 2021 pay was short of £122.95? This amounted to a day's pay relating to 4 January 2021 when she worked from home.

Findings of Fact

8. The Tribunal made the following findings of fact:

8.1. The Claimant commenced employment with the Respondent on 1 September 2011. She remains in the Respondent's employment. Throughout the course of her employment, she has been based at St Peter's Catholic Academy.

8.2. Under Clause 6.5 of her contract of employment dated 21 October 2015, the Claimant agreed that the Respondent may deduct from

any salary or other payment due to her any amount she owed to the Respondent, following prior notification to her.

8.3. In addition to her teaching responsibilities, the Claimant assumed the role of Special Educational Needs Coordinator, "SENCO", in September 2014. Accordingly, in addition to her teaching responsibilities, since that time the Claimant has assisted with the teaching of pupils with special educational needs and/or disabilities. Those duties include designing and delivering interventions and assessing and monitoring the progress of pupils with special educational needs. By their very nature, interventions are usually conducted with small groups of pupils.

8.4. In March 2020, the British Government determined that the country be placed into national lockdown as a result of the COVID-19 pandemic.

8.5. The Claimant found out in June 2020 that she was pregnant. This was her first pregnancy. At the time, she was working with the reception class (generally children aged 4 and 5). Notwithstanding the national lockdown and the closure of schools, nursery and early years provision were still available. The Claimant was not unduly worried about being at work at this stage due to her pregnancy as parents of the school's pupils preferred to keep their children at home.

8.6. The Headteacher of St Peter's Catholic Academy is Mrs Rossanna Snee. She has held that position since 2016. She has been a teacher since 2004 and has worked in education since 1981. In late June 2020, Mrs Snee began to encourage parents to return their children to school. The Claimant notified Mrs Snee that she was pregnant because she was concerned about social distancing and infection.

8.7. As matters transpired, parents kept their children at home until the start of the new academic year in September 2020. Mrs Snee also allowed the Claimant to work from home whilst she had morning sickness so she could work on an assignment.

8.8. Lockdown restrictions were eased nationally in September 2020, leading to a general re-opening of schools.

8.9. The Respondent conducted a pregnancy risk assessment in relation to the Claimant on or about 1 September 2020, which the Claimant received in October 2020. This contained the following relevant entries:

"How Could Exposure Take Place: Exposure to Coronavirus

When and How Often Could Exposure Occur: Daily if exposed to virus.

Possible Consequences of Exposure: Potential Harm herself and her unborn child".

In the section headed *"Methods used/Control Measures"*, the following was stated:

"Control measures will be in place for duration of pregnancy.

Exposure to Coronavirus

Charlotte is classed as clinically vulnerable and therefore should work from home wherever possible.

Where this is not possible she should be offered the safest available on-site role, staying 2 metres away from others wherever possible, therefore she is working in class with a group (15 max) of children and should remain socially distant from them at all times.

Although she may choose to take on a role that does not allow for this distance if she prefers to do so.

If she has to spend time within 2 metres of other people, Principal must carefully assess and discuss with her whether this involves an acceptable level of risk".

The risk assessment was signed off by Mrs Snee.

8.10. In or around July 2020, before the summer break, Mrs Snee told the Claimant that upon the school's return in September 2020, she would be out of class for 4 days of the week, working with small intervention groups, and that on the fifth day she would have half a day Planning, Preparation and Assessment ("PPA"), and would spend a further half day supporting a newly qualified teacher with her planning, etc.

8.11. After the first week back in school in September 2020, the Claimant's timetable was rearranged so that she was in class for 2 or 3 days per week. She started to work in the Year 2 classroom for 2 days of the week and spent the rest of the week providing support to children in intervention groups in her capacity as SENCO.

8.12. The Year 2 classroom accommodated 30 children and 4 members of staff. Proper social distancing was not possible particularly bearing in mind the age of the children and the physical dimensions of the classroom.

8.13. As far as her SENCO work was concerned, the Claimant had the option of working in the hall or library for small group work, but frequently found herself working in the meeting room adjacent to the school office. The meeting room is some 4 metres x 3 metres. The Claimant would see groups of up to 7 children working around an open table in that room. The presence of young primary school children generally militates against the efficacy of soclal distancing, a matter Mrs Snee freely conceded.

8.14. In October 2020, the government introduced a 3 tier system of restrictions as an alternative to a further national lockdown, and by the end of October 2020, the government announced a second lockdown but schools remained open.

8.15. Following the October 2020 half term break, the Claimant's timetable was changed and she taught a Year 2 class for the whole week. She was based in the library in the morning with half of the class and in the afternoon she taught the full class of 30 children covering the Year 2 teacher when she was not present. At other times the Claimant delivered interventions. It was not possible to maintain social distancing, either in class or when the Claimant was conducting her interventions work.

8.16. The second national lockdown ended in early December 2020, but Stoke on Trent was placed under Tier 4 restrictions. At this point, the Claimant was in the third trimester of her pregnancy (28+ weeks).

8.17. Schools were closed for a fortnight over the Christmas break and were due to return for the commencement of the spring term on Monday 4 January 2021.

8.18. On Wednesday 30 December 2020, the Government announced that secondary schools were to remain closed for a further week following the Christmas holidays while mass testing was being set up, and a third of primary schools were to remain closed on 4 January 2021.

8.19. The above factual background sets the context in which the Claimant and the Respondent (essentially Mrs Snee) communicated with each other from 30 December 2020 onwards with regard to the school's planned re-opening on Monday 4 January 2021. That series of communications was conducted entirely in writing (by e-mail and, in one instance, by letter). Given that the Claimant's absence from school on Monday 4 January 2021, and the reason(s) for that absence lie at the heart of this case, it is necessary to set out the full written dialogue between the Claimant and Mrs Snee between 30 December 2020 and 4 January 2021.

8.20. As of 30 December 2020, the Claimant was anxious about returning to school. The government was closing many schools. Her pregnancy was at an advanced stage. The guidance for pregnant mothers had changed over the course of the pandemic. At this stage, pregnant women were not being vaccinated and the Claimant was aware of stories in the media of serious complications which had occurred with certain mothers and babies as a result of the pandemic.

8.21. At 9.44 pm on Wednesday 30 December 2020, the Claimant e-mailed Mrs Snee, forwarding to her a number of hyperlinks containing COVID-19 guidance, including the government published document: *"Coronavirus (COVID-19): advice for pregnant employees"* published on 23 December 2020. That guidance, having set out the position concerning women who were less than 28 weeks pregnant with no underlying health conditions that placed them at a greater risk of severe illness from coronavirus, contained the following passage:

> *"**The following recommendations apply for pregnant women who are 28 weeks pregnant and beyond, or with underlying health conditions that place them at a greater risk of severe illness from coronavirus.***
>
> *If you are 28 weeks pregnant and beyond, or if you are pregnant and have an underlying health condition that puts you at a greater risk of severe illness from COVID-19 at any gestation, you should take a more precautionary approach[1].*
>
> *This is because although you are at no more risk of contracting the virus than any other non-pregnant person who is in similar health, you have an increased risk of becoming severely ill and of pre-term birth if you contract COVID-19.*
>
> *Your employer should ensure you are able to adhere to any active national guidance on social distancing and/or advice for pregnant women considered to be clinically extremely vulnerable (this group may previously have been advised to shield).*
>
> *For many workers, this may require working flexibly from home in a different capacity.*
>
> *All employers should consider both how to redeploy these staff and how to maximise the potential for homeworking, wherever possible.*

[1] In other words, a more precautionary approach than women who were less than 28 weeks pregnant with no underlying health conditions that placed them at a greater risk of severe illness from coronavirus.

Where adjustments to the working environment and role are not possible (e.g. manufacturing/retail industries) and alternative work cannot be found, you should be suspended on paid leave. Advice on suspension and pay can be found in HSE guidance."

(The link was provided).

8.22. The above guidance was clearly disjunctive. In other words, pregnant women were being warned that they were at greater risk if *either* they (a) were 28 weeks plus pregnant, *or* (b) had an underlying health condition that placed them at a greater risk of severe illness from coronavirus. The Claimant was in category (a).

8.23. In her e-mail of 30 December 2020, the Claimant said this:

"Obviously on return to work next week I am 34 weeks pregnant and do feel concerned that particularly at this point I need to be safe and make sure I aren't (sic) putting myself and my baby at risk. I don't want to make your life more difficult I understand that a lot will be going on behind the scenes with the change of tier.

I'll try and call my union tomorrow to see if that makes it all any clearer but if you do receive any further advice from the Mac/Ian[2], could you please let me know as soon as possible because I am unsure where I stand upon returning to work on Monday".

8.24. Mrs Snee replied to the Claimant by e-mail at 11.37 am on Sunday 3 January 2021, the day before the start of term, stating as follows:

"I understand your concerns but I have to follow the collegiate/government guidance so in response to your query, please see attached the most recently amended Risk Assessment in line with government guidance and Tier 4 restrictions. If you have any further queries, please let me know and I will forward them to HR".

Mrs Snee attached to her e-mail a school-wide risk assessment marked *"30/8/20 Reviewed 31/12/20"*.

8.25. At 1.09 pm on Sunday 3 January 2021, the Claimant e-mailed Mrs Snee again, attaching an annotated copy of the risk assessment she had sent through to her. The annotations included the Claimant's comments and concerns regarding the information on the risk assessment with regard to herself as a pregnant member of staff in the third trimester. The passages added by the Claimant included the following:

[2] Multi-Academy Collegiate/Ian Beardmore.

"Under Tier 4 restrictions staff who are clinically extremely vulnerable should work from home and where this is not possible they should not go into work.

Staff who are pregnant

Pregnant women are considered clinically vulnerable or in some cases clinically extremely vulnerable to coronavirus (COVID-19) and therefore require special consideration as set out in the guidance for pregnant employees.

Principals (or a person designated by them) will carry out a risk assessment to follow the Management of Health and Safety at Work Regulations 1999 (MHSW), information contained in the Royal College of Obstetricians and Gynaecologists, Royal College of Midwives guidance on coronavirus (COVID-19) in pregnancy will be used as the basis for a risk assessment.

Pregnant women of any gestation should not be required to continue working if this is not supported by the risk assessment.

Women who are 28 weeks pregnant and beyond, or are pregnant and have an underlying health condition that puts them at a greater risk of severe illness from COVID-19 at any gestation, should take a more precautionary approach. Employers should ensure pregnant women are able to adhere to any active national guidance on social distancing and or advice for pregnant women".

8.26. In her e-mail, the Claimant stated:

"As it can be seen from the comments and concerns I do not believe that I can continue in my current role whilst adhering to the Government guidance that I have previously emailed to you, and that has also been quoted in this risk assessment directly.

I assume these concerns will be forwarded to our HR Team and that my role and individual risk assessment will need to be updated accordingly.

I would like to make it clear that I am in no way refusing to work and will accept an updated role that meets Government guidance and the risk assessment.

I would appreciate if you could advise on my safe return to work tomorrow and if there are further issues that remain, please notify me as soon as possible so that I can contact my Union for further support and advice".

8.27. At this time, the claimant considered that she fell into the clinically extremely vulnerable category. She was mistaken in that regard.

Irrespective of whether she was clinically vulnerable or clinically extremely vulnerable, the guidance she quoted still said the following:

"Women who are 28 weeks pregnant and beyond, or are pregnant and have an underlying health condition that puts them at a greater risk of severe illness from COVID-19 at any gestation, should take a more precautionary approach. Employers should ensure pregnant women are able to adhere to any active national guidance on social distancing and or advice for pregnant women".

8.28. At 2.21 pm on Sunday 3 January 2021, Mrs Snee informed the Claimant by e-mail that she had forwarded her e-mail and attachment (presumably to HR of Mr Beardmore) and would keep her updated once she had received a response. Mrs Snee attached the risk assessment with the latest update for the Claimant's information.

8.29. The Claimant e-mailed Mrs Snee again at 3.13 pm on Sunday 3 January 2021, thanking her for sending over the risk assessment with the latest update, and stating:

"However, this still leaves me with little clarity for my return to work tomorrow and what is expected from me. If a response isn't received from HR today, my Union have advised me to forward a letter in relation to Section 44 of the H&S act as I don't believe returning to work in my current role is safe for myself or my baby or protects us in anyway (sic).

If you haven't received any further guidance by this evening I will send over a copy of the letter. They have also previously mentioned that my updated individual Risk Assessment should be in place before my return. I'm aware that this will need updating to match current guidance and tier information".

8.30. Mrs Snee e-mailed the Claimant again at 4.00 pm on Sunday 3 January 2021, stating that she had received the following guidance:

"Pregnant members of school staff fall under the clinically vulnerable category, not extremely critically vulnerable. The current government directive states that the clinically vulnerable are expected to attend work as normal from the 4th January 2021. I look forward to welcoming you back to school tomorrow where you will have the opportunity to discuss in person your Risk Assessment and how you feel this will need amending to enable you to carry out your teaching responsibilities in line with Government guidance moving forward".

Mrs Snee attached to her e-mail the most recently updated risk assessment.

8.31. The Claimant replied at 4.46 pm the same day in these terms:

"Could you let me know where this guidance is please? I feel that it is quite general and not specific to the fact that I am 34 weeks pregnant this week.

I have attached a link in (sic) the annotated version of the Risk Assessment with explicit guidance to pregnant staff who are 28 weeks and above. I have copied this information for your reference below".

The Claimant then quoted the passage of the government guidance issued on 23 December 2020 recited at paragraph 8.21 above, and provided Mrs Snee with the hyperlink to that advice, concluding her e-mail as follows:

"I am able to meet with you tomorrow but until adjustments have been made to meet national guidance on social distancing, I would like to stay out of the classroom. For this reason is there a suitable time for me to be in school to meet with you?"

8.32. Having not heard further from Mrs Snee, the Claimant sent her a further e-mail at 8.33 pm on the evening of Sunday 3 January 2021, stating the following:

"I'm sorry I know it's Sunday and it's inconvenient but as I mentioned in my previous email can you please let me know what time that is best to meet you tomorrow. Would it be more suitable to meet before the children come into school or after your gate duty?"

8.33. At 9.07 pm on 3 January 2021, Mrs Snee sent a further e-mail to the Claimant, stating as follows:

"Further to your email in which you conveyed your anxiety about the reopening of school to all pupils tomorrow and your concerns for your safety. I have discussed the matter with Ian Beardmore (Senior Executive Leader). In discussion, we have agreed that to reduce your anxiety we would be able to start your maternity leave early meaning if you are in agreement you would not be required to return to work on 04.01.2021. Alternatively, if you still intend to return to work and there is anything else you would like me to do to ensure you can continue in your role of class teacher, I can arrange to meet with you at 11:30 am to discuss this.

For your information, I have included the governments guidance below by which I am bound.

Staff who are pregnant

Pregnant women are in the 'clinically vulnerable' category and are generally advised to following the above advice, which applies to all staff in schools. All pregnant women should take particular care to practice frequent thorough handwashing, and cleaning of frequently touched areas in their home or workspace, and follow the measure set out in the system of controls section of this guidance to minimise the risks of transmission.

An employer's workplace risk assessment should already consider any risks to female employees of childbearing age and, in particular, risks to new and expectant mothers (for example, from working conditions, or the use of physical, chemical or biological agents). Any risks identified must be included and managed as part of the general workplace risk assessment. As part of their risk assessment, employers should consider whether adapting duties and/or facilitating home working maybe appropriate to mitigate risks.

If a school is notified that an employee is pregnant, breastfeeding, or has given birth within the last 6 months, the employer should check the workplace risk assessment to see if any new risks have arisen. If risks are identified during the pregnancy, in the first 6 months after birth, or while the employee is still breastfeeding, the employer must take appropriate sensible action to reduce, remove or control them.

Whilst it is a legal obligation for employers to regularly review general workplace risks, there is not necessarily a requirement to conduct a specific, separate risk assessment for new and expectant mothers. However, an assessment may help identify any additional action that needs to be taken to mitigate risks.

Employers should be aware that pregnant women from 28 weeks' gestation, or with underlying health conditions at any gestation, may be at greater risk of severe illness from coronavirus (COVID-19). This is because, although pregnant women of any gestation are at no more risk of contracting the virus than any other non-pregnant person who is in similar health, for those women who are 28 weeks pregnant and beyond there is an increased risk of becoming severely ill, and/or pre-term birth, should they contract coronavirus (COVID-19).

This is also the case for pregnant women with underlying health conditions that place them at greater risk of severe illness from coronavirus (COVID-19).

……."

8.34. Mrs Snee continued:

"As you can see being pregnant places you as clinically vulnerable and as such should be in school. We do acknowledge the increased risk and as such have put a number of mitigating factors in place. These are covered in your risk assessment. We have followed all the advice given and as I stated I am happy to meet with you tomorrow to discuss any further actions we can take so that you can continue in your role of class teacher.

I have taken the trouble to find the below advice that you may find useful. This is the advice we have used to support our Risk Assessment".

Below the above text, Mrs Snee inserted a hyperlink to an extensive guidance document published by the Royal College of Obstetricians and Gynaecologists ("RCOG"). The index to the Tribunal bundle of documents indicates that this document was published on 20 June 2021. Clearly, Mrs Snee was referring to an earlier iteration of this document and the parties proceeded on the basis that the document produced at the Tribunal hearing was current as of 3 January 2021. It contained the following:

*"**What is the main advice for pregnant women?***

Studies from the UK show that pregnant women are no more likely to get COVID-19 than other healthy adults, but they are at slightly increased risk of becoming severely unwell if they do catch COVID-19, and are more likely to have pregnancy complications like preterm birth or stillbirth.

Roughly two-thirds of pregnant women with COVID-19 have no symptoms at all, and most pregnant women who do have symptoms only have mild cold or flu-like symptoms. However, a small number of pregnant women can become unwell with COVID-19. Pregnant women who catch COVID-19 or at slightly increased risk of becoming severely unwell compared to non-pregnant women, particularly in the third trimester. Pregnant women have been included in the list of people at moderate risk (clinically vulnerable) as a precaution.

***Key advice for pregnant women during the pandemic**:*

- *Follow the occupation health guidance from the government to ensure you are safe in their (sic) workplace. It remains a requirement for employers to carry out a Risk Assessment with pregnant employees to ensure a safe work environment".*

Why are pregnant women in a vulnerable group?

"Pregnant women have been included in the list of people at moderate risk (clinically vulnerable) as a precaution. This is

because in a small proportion of women pregnancy can alter how your body handles severe viral infections, and some viral infections such as flu, are worse in pregnant women. Amongst pregnant women, the highest risk of becoming severely unwell (should you contract the virus) appears to be for those who are 28 weeks pregnant or beyond. This is something that midwives and obstetricians have known for many years in relation to other similar infections (such as flu) and they are used to caring for pregnant women in this situation".

8.35. In her oral evidence to the Tribunal, Mrs Snee accepted that the Claimant could reasonably have interpreted her e-mail sent at 9.07 pm on 3 January 2021 as meaning that she needed to be at work the next day, as opposed to simply attending school for a meeting. Just over an hour later (see paragraph 8.36 below) the Claimant sent Mrs Snee her "section 44 letter".

8.36. At 10.24 pm on Sunday 3 January 2021, the Claimant sent the following by e-mail to Mrs Snee:

"There have been a lot of emails sent between us today with conflicting information.

I would like to confirm that I am fit and well and able to work from the safety of my own home. For this reason, I am forwarding a formal copy of the Section 44 letter as I believe the workplace is unsafe.

I will kindly meet with you via Teams tomorrow at 11.30 as mentioned in your previous email with my Union representative".

8.37. Attached to this e-mail was the Claimant's "section 44 letter", which is quoted here in full:

"Dear Rossanna Snee

Re: Health & Safety

I am writing to you following the increase in transmission and infection rates currently recorded across England.

You are, I am sure, aware that you have legal duties to protect the health, safety and welfare of your staff and pupils. Those duties arise under the following legislation: -

- *Sections 2 and 3 of the Health & Safety Act 1974.*
- *Regulations 3 and 8 of the Management of Health & Safety at Work Regulations 1999.*
- *Regulation 4 of the Personal Protective Equipment at Work Regulations 1992.*

- *Regulation 4 of the Workplace (Health, Safety & Welfare) Regulations 1992,*
- *Regulation 7 of the Control of Substances Hazardous to Health Regulations 2002.*

The most recent advice from SAGE[3] is that schools should not open in January other than for children of key workers and vulnerable children. This is because the scientific advice is that it is not safe for schools to open. There are new variants of Covid-19 that are highly infectious and infection rates have increased significantly since schools closed.

I appreciate that measures have been in place since September to allow the school to open but according to SAGE those measures may no longer be sufficient. They state in their most recent report:-

The introduction of Tier 4 measures in England combined with the school holidays will be informative of the strength of measures required to control the new variant but analysis of this will not be possible until mid-January.

Based on the above I do not believe that it is safe for me to return to teaching or supporting full classes at St Peter's Catholic Primary Academy.

*If I do attend St. Peter's Catholic Primary Academy I believe that this will present a **serious** and **imminent** danger to my health and safety.*

I am therefore writing to inform you that I am exercising my contractual right not to attend an unsafe place of work. I believe that not attending work in the current circumstances is an appropriate step for me to take for the following reasons:

1. *The **dangers** that are preventing me from attending work are the risk of contracting coronavirus and or spreading coronavirus to others.*

2. *The **person(s)** I am seeking to protect are myself, my family, our pupils, their families, my colleagues, their families and members of the public.*

3. *I believe that this danger is **serious** because coronavirus infection is potentially fatal and has already resulted in more than 73,512 deaths in the UK with a significant up surge in recent weeks.*

[3] Scientific Advisory Group for Emergencies.

4. *I believe that if I were to attend work, the danger would be **imminent** because before Christmas the highest infection rates were in children of school age, and the new variant may be more transmissible amongst students than previously.*

5. *I will be happy to return to the workplace once SAGE is satisfied that the R Rate has decreased, scientific advice has been produced on safety measures required to make schools more "Covid secure", risk assessments have been updated and any necessary further safety measures implemented.*

In the meantime, I am of course willing to carry out any of my duties that can be undertaken from my home, including planning, preparing and delivering on-line learning including supporting colleagues; and being in school supporting the learning of key worker and vulnerable children where necessary.

Yours sincerely

Charlotte Parton"

The Claimant duly copied in her representative from the National Education Union, "NEU", Ms Ruth Quigley.

8.38. The Tribunal finds as a fact that the Claimant decided that she would not be returning to her place of work on Monday 4 January 2021 when she sent the Respondent her section 44 letter at 10.24 pm on 3 January 2021. For the avoidance of doubt, the Tribunal determined (a) that this remained the Claimant's position for the remainder of 3 January 2021 and throughout the working day on 4 January 2021, and (b) that throughout that period the Respondent did not expressly clarify to the Claimant that all she was being asked (or instructed) to do on that date was attend a meeting (as opposed to being asked to attend work, on the basis that at some point during the working day she would be invited to attend a meeting). As the Claimant had said in her letter: *"I do not believe that it is safe for me to return to teaching or supporting full classes at St Peter's Catholic Primary Academy"*.

8.39. At 10.43 pm on Sunday 3 January 2021, Mrs Snee replied to the Claimant in the following terms:

"I am disappointed by your email. I kindly request that you send me a detailed report as to why you think our school environment is unsafe. I have supplied you with our full risk assessment which details the measures we have in place to mitigate any risk.

As I have stated I would gladly meet you in school to discuss any further changes you would like to your risk assessment and would still welcome the opportunity to do this.

If you are not in work tomorrow I shall treat this as an unauthorised absence and will follow school procedure to manage this.

As I have already stated, if your anxieties can not be managed in school, I would happily start your maternity leave early".

8.40. At 11.33 pm on Sunday 3 January 2021, the Claimant sent a further e-mail to Mrs Snee, stating as follows:

"Due to the time I am unable to consult further with Ruth[4] regarding your response. I will, of course, be in touch with them at the earliest possible opportunity tomorrow morning.

I would just like to clarify that I am not refusing nor unable to work tomorrow as is stated in my formal letter and so will seek further clarification regarding the day being treated as an unauthorised absence.

At your earliest convenience could you send over a copy of the most recent individual risk assessment you have for myself so I can reference this in my detailed report of school safety. I believe that 'mitigating' risk is not sufficient in the case of the Government advice I have shared with you today:

'Your employer should ensure you are able to adhere to any active national guidance on social distancing and/or advice for pregnant women considered to be clinically extremely vulnerable'."

8.41. In referring to *"the most recent advice from SAGE"*, the Claimant inserted a hyperlink in her letter to the 74th SAGE meeting on COVID-19 held on 22 December 2020.

8.42. At 8.41 am on Monday 4 January 2021, the Claimant sent a further e-mail to Mrs Snee, stating as follows:

"I have spoken with Ruth this morning and again would like to clarify that I am fit and well to work and there is no other reason other than the work environment that currently stops me from attending. Therefore, it is not feasible for me to start my maternity leave early.

I have tried to discuss reasonable adjustments with yourself within the workplace, however, I do not feel that continuing my normal role in class where the risk assessment clearly states social distancing is not possible, is supportive or safe for myself or my unborn baby

[4] The Claimant's union representative.

given the Tier 4 guidance and specific pregnancy advice supplied by the Government.

I would appreciate you providing me with a list of tasks that I could complete from home today or until this issue can be resolved as was clear from the letter last night I have requested to work from home due to the health and safety concerns I have. I have numerous SEN, Computing and class based preparation tasks I can complete and so if I do not hear from you I will continue with these during my working hours.

I am still able to meet with you but wish to have a representative present and so I can only see that the safest way for this to take place is via Teams so that the correct social distancing can be adhered to by all. I am sure given the current Tier 4 guidance it is likely schools are being advised to hold meetings in this way."

8.43. Mrs Snee replied to the Claimant by e-mail at 9.41 am on Monday 4 January 2021, stating as follows:

"I am pleased to hear you are fit and well and therefore see no reason why you are not able to come into school. School as I know you are aware from the time spent in school last term is as safe as we can possibly make it. As long as you adhere to all the guidance, wash hands regularly, wear a mask and where possible keep to the social distancing expectations then there is no reason why you cannot carry out the role in which you are employed here in school.

I am more than happy as previously discussed to meet with you (socially distanced of course) to discuss further and make any reasonable adjustments to your individual RA but this needs to take place in school. Of course you can bring (your) representative into school where we can discuss your concerns in a socially (distanced) way. To be clear, you have stated you are well enough to work and so your absence will be recorded as unauthorised.

I am unclear why you have stated that because you are well, you are unable to start your maternity leave? I have recognised your anxiety and wished to give this as an option and felt this would be supportive towards you. This option remains.

Please let me know when you are able to meet so that I can arrange with my representative to attend also".

8.44. At 1.13 pm on Monday 4 January 2021, the Claimant sent the following by e-mail to Mrs Snee:

"As you are aware by sending in my Section 44 letter I am not withdrawing my labour I am asking for it to be done in a safe manner.

Could you please clarify the following:

- *By requesting a meeting in school, is it your opinion that having a face to face meeting in the school building with at least 2 external persons and 4 persons in total, that this is safer than a meeting over Teams?*

- *At what point was anxiety raised as a reason for not attending the workplace and how is this maternity leave related? As you have a duty of care towards your staff, if you feel you are concerned for my wellbeing, could I ask that you refer me for an Occupational Health Appointment as this will also feed into my individual risk assessments.*

- *In regards to unauthorised absence, I am not in the workplace but still working from home therefore I have been advised that the school will be in breach of the Health & Safety Act if you deduct pay for an unauthorised absence. In previous correspondence I have asked for tasks to complete at home, I have also listed tasks I will continue with. I will be keeping a daily record of my work at home. Please clarify any effect my absence will have on my pay.*

I have had an emergency appointment with my midwife. My midwife has shared guidance with me that reflects the guidance I have shared with yourself. She is in agreement that the guidance updated on 23rd December 2020 clearly states that I should be working in an area that fully removes risk, working from home or suspended from work with pay as stated clearly in the document. I ama ware that you have sent RCog guidance previously, but the most recently updated document that I refer to is fully supported by the Government, HSE, Royal College of (Midwives) and RCog themselves. Although pregnant staff are deemed CV rather than CEV this document clearly states women in their third trimester of pregnancy have to adhere to distancing and follow CEV guidance. (Paragraph 3 of 3rd trimester guidance)".

The Claimant again inserted a hyperlink to the government guidance of 23 December 2020, and continued:

"As I am approaching the end of my lunch break, I will respond to any further emails at the end of the school day."

8.45. At 9.06 pm on 4 January 2021, Mrs Snee e-mailed the Claimant again, stating the following:

"I am sorry to hear that you feel the school is unsafe and obviously can only reiterate that the school is as safe as we can possibly make it adhering to the guidance set out by the government.

I am puzzled as to why you think a meeting in school is unsafe, as we can easily maintain social distancing. The meeting is to be held in school as you should be in school. By doing this we would be able to physically see the areas that you see as unsafe. I will not be making an occupational health appointment as at this moment in time, you have not stated you are unwell. It is my understanding that you are refusing to follow a reasonable management instruction and failure to comply will be a breach of contract and so has the potential for …. me to take disciplinary action, implement a deduction in pay, or … refuse to pay you. As I have made clear, this is an unauthorised absence.

I have read the guidance you have referred to which states: If you are unable to work from home, you can work in a public-facing world provided that your employer conducts the risk assessment and is able to make appropriate arrangements to sufficiently minimise your exposure to the virus. I have repeatedly stated I am happy to meet you to discuss the risk assessment that we created together. Coincidentally, the cases prior to Christmas were far higher in Stoke than they actually are now.

The work I have directed for you is in school and hope you will be present tomorrow. Until this has been resolved, I shall continue to record your absence as unauthorised.

I have no need to further communicate with you through Email and look forward to the opportunity to meet face-to-face to address your concerns fully".

8.46. On the evening of Monday 4 January 2021, the Prime Minister made an announcement that, given that schools were seen, essentially, as transmission centres, and due to the then severity of the pandemic, all schools would close to pupils with the exception of the children of key workers, and vulnerable children.

8.47. At 9.44 pm on that date, the Claimant e-mailed Mrs Snee stating that in the light of the Prime Minister's announcement she would be in school the next day as the main risk that had existed, namely the inability to socially distance, had been removed.

8.48. On 22 January 2021, the Claimant wrote to Mr Beardmore, stating that she had received her payslip for January and that her pay had been deducted by 6.5 hours in the sum of £122.95. This obviously represented a day's pay in respect of 4 January 2021.

8.49. Mr Beardmore replied to the Claimant by letter dated 29 January 2021, stating, amongst other things, the following:

"I can confirm that the deduction in your pay relates to Monday 4th January 2021 when you did not attend work and you were not absent due to sickness. As you are aware, there was an expectation that all staff attend work and continue with their normal working hours to teach the children who were present in our schools. This was communicated clearly to you."

Mr Beardmore referred to the risk assessments which had been undertaken to identify the measures needed to reduce the risks from coronavirus so far as was reasonably practicable, stating

"these Risk Assessments have been followed very diligently by both staff and pupils in school. We have continued to follow the government guidance throughout the pandemic, and we believe the school is a Covid safe environment.

At no point in the immediate lead up to Monday 4th January 2021 did you raise any Covid related concerns, or make any suggestions to make amendments to the risk assessments in order to further mitigate risk to ensure you attend work to teach the children entrusted to you.

As you failed to attend work on this day and were not instructed or given permission to work from home, your pay has been updated to reflect this".

8.50. In her evidence to the Tribunal, Mrs Snee said that if the meeting with the Claimant had taken place on Monday 4 January 2021, the venue of that meeting would have been either her office, the library, or an empty classroom.

8.51. There was an exchange of correspondence between Mr Josh Jones (Regional Support Officer of the NEU) and Mr Beardmore concerning this matter in March 2021. In a letter dated 17 March 2021, Mr Jones maintained the position (incorrectly) that at the relevant time the Claimant had been clinically extremely vulnerable. In his reply dated 30 March 2021, Mr Beardmore corrected Mr Jones, but in doing so referred to the guidance to schools from the Department for Education and the guidance from the Royal College of Gynaecologists. The guidance was in the Tribunal bundle and contained the following:

"Pregnant women should follow the latest government guidance on staying alert and safe (social distancing) and avoid anyone who has symptoms suggestive of Coronavirus. <u>If you are in the third trimester (more than 28 weeks' pregnant) you should be particularly attentive to social distancing</u>" (emphasis added).

8.52. As stated above, the Claimant is a member of the National Education ("NEU"). In the course of the Tribunal hearing, the

Respondent referred to guidance given by the National Association of Schoolmasters Union of Women Teachers ("NASUWT"), and in particular a "member update" from that union dated January 2021. It was not suggested by either party that reference was made to this guidance contemporaneously with the events the Tribunal is principally concerned with. Mr Beardmore certainly referred to it in his letter of 30 March 2021 to Mr Jones but that letter obviously postdated the material events by some considerable time. For obvious reasons the Tribunal did not place significant weight on the NASUWT member update but noted that the advice given by that union to its members was that a direction to employees to attend work would be regarded as a reasonable management instruction, and a failure to comply with such an instruction would be considered to be a breach of contract by the employees involved, with the potential for the employer to take disciplinary action, implement a deduction in pay, or a refuse to pay. The NASUWT also warned its members as to the consequences of sending letters to employers claiming serious and imminent danger without being aware of what mitigations had been put in place. The guidance also distinguished between those to be regarded a clinically vulnerable and clinically extremely vulnerable.

Case Law

9. The Tribunal was referred to two reported authorities, ***Rodgers v Leeds Laser Cutting Limited [2023] ICR 356***, a decision of the Court of Appeal, and ***Darrell Miles v the Driver and Vehicle Standards Agency [2023] EAT 62, 2023 WL 03184443***, a decision of the Employment Appeal Tribunal.

10. In ***Rodgers***, the Court of Appeal considered a case involving a complaint of unfair dismissal contrary to s.100(1)(d) of the ERA, namely a claim of automatic unfair dismissal for health and safety reasons. S.100 of the ERA shares some of the language of s.44, namely the references at s.100(1)(d) and (e) to *"serious and imminent danger"*. The Court of Appeal's observations in relation to s.100(1)(d) are therefore germane for the purposes of the instant case.

11. ***Rodgers*** concerned a laser operator who decided to stay off work until COVID-19 lockdown had eased as he had a child who was at high risk and a young baby. He left his place of work after a colleague displayed symptoms of COVID-19 a week before the first national lockdown and was sent home to self-isolate. The claimant was dismissed and made a complaint of unfair dismissal under s.100(1)(d) of the ERA, claiming that the reason for his dismissal was that he had left his place of work because he reasonably believed there were circumstances of danger, which he believed to be serious and imminent and which he could not reasonably have been expected to avert. The employment tribunal found that the claimant had worked in a large warehouse type space, with typically five employees working there, and that it was possible for them to maintain a social

distance, that the claimant had not raised any concerns about circumstances of imminent danger within the workplace, and that his decision to stay off work was linked to general concerns about the virus in the community at large, rather than to concerns which were directly attributable to the workplace. The tribunal also noted that, while self-isolating, the claimant had driven a friend to hospital and, during the pandemic, had worked in a pub. Dismissing the complaint, the tribunal found that whilst, in principle, conditions pertaining to COVID-19 could amount to circumstances of serious and imminent danger, it was not a case where the claimant had refused to return to his place of work, or any dangerous part of his place of work, due to the conditions in that environment, and further, that the claimant could reasonably have been expected to avert any danger by abiding by the guidance at the time and refusing to undertake any specific tasks he felt would remove his ability to do so. The EAT dismissed the claimant's appeal.

12. Giving the principal judgment of the Court of Appeal, Underhill LJ said this:

"16. I should record that section 100 was introduced in order to give effect to Counsel Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work…. Article 8.4 of the Directive reads:

> *"Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices".*

However, neither party suggested the terms of the Directive added anything to what could be understood from the statute itself, and we were not referred to any case law of the European Court of Justice.

17. Second, on a literal reading the opening words - "in circumstances of danger which the employee reasonably believed to be serious and imminent" - can be read as requiring a Tribunal to decide, first, whether (objectively) there was a danger and then, separately, whether the employee reasonably believed that danger to be serious and imminent (which involves both subjective and objective elements). At paras 30-32 of his judgment in the Employment Appeal Tribunal Judge James Tayler questioned whether that two-stage approach was correct. In para 30 he said:

> *"assume that a green gas starts escaping at a place of work. Unbeknown to the employees the gas is inert and entirely harmless. The employees leave, reasonably believing that there are circumstances of danger that are serious and imminent. They are dismissed for so doing, even though it is accepted that they acted reasonably by leaving the premises because at the time it seemed likely that the gas was dangerous, and the risk of injury appeared to*

> *be serious and imminent. In such circumstances, should the employees fall outside of the protection of section 100(1)(d) of the 1996 Act because, objectively speaking, although not appreciated by the employees at the time they left the workplace, there was no circumstance of danger because the gas was harmless. That would be surprising. It would be surprising if employees are protected for reasonably but erroneously believing in the seriousness and imminence of a threat to their health and safety, but not for a reasonable but erroneous belief in the underlying circumstances of danger".*

I agree that it would be surprising if employees were not protected in the circumstances posited. Since on the employment tribunal's reasoning in this case the point did not in fact have to be decided Judge James Tayler expressed no concluded view. However, I think I should say that in my view the subsection should indeed be construed purposively rather than literally and that it is sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence".

13. Underhill LJ outlined the test an employment tribunal should apply when dealing with a case under s.100(1)(d):

"21….. the questions which the employment tribunal has to decide in a case under section 100(1)(d) can be analysed as follows:

(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:
(2) Was that belief reasonable? If so,
(3) Could they reasonably have averted that danger? If not:
(4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:
(5) Was that the reason (or principal reason) for the dismissal?

Questions (1) and (2) Could in theory be broken down into 2 questions, addressing separately whether there was a reasonable belief in the existence of the danger and in its seriousness and imminence; but in most cases that is likely to be an unnecessary refinement".

14. Underhill LJ went on to indicate that although the paradigm case covered by s.100(1)(d) is evidently where a serious and imminent danger arises at the workplace by reason of some problem with the premises or the equipment or the system of working, there is no reason in principle why the relevant statutory protection should not apply where the danger relied upon is the risk of employees infecting each other with a disease. It is for the tribunal to decide whether on the particular facts of each case the risk amounts to a serious and imminent danger.

15. In ***Miles***, a case decided before the Court of Appeal's decision in ***Rodgers***, the claimant, a driving test examiner, brought claims of health & safety

detriment and dismissal. He had been told by his GP that he had Stage IV chronic kidney disease ("CKD"), an extremely serious diagnosis pointing to *"end stage kidney failure"*. However, this diagnosis was erroneous. His proper diagnosis was of Stage 2 CKD, namely mildly reduced kidney function. The employment tribunal found that the claimant did not discover this diagnosis until after he had commenced his tribunal claims, and that he had not known the difference between the stages of CKD whilst still employed by the respondent. He raised concerns with his employer about his diagnosis and how he might be affected by the COVID-19 pandemic.

16. In the spring and early summer of 2020, driving tests ceased, and on 5 June 2020 the claimant attended an individual assessment meeting to discuss a proposed return to work. He said that he believed that he fell within the clinically vulnerable category and was worried about catching the virus. He stated that it was not safe for him to return to work. He was told that people who fell within the clinically vulnerable category would be expected to return to work in line with Government guidance, when driving tests recommenced. Discussions between employer and employee continued. The claimant's position was that he did not consider it was possible to comply with government guidance about social distancing in a car. He contacted his GP practice and was told that he should speak to an Occupational Health Worker. His union representative contacted the respondent, stating that the claimant had serious concerns about a return due to his *"serious kidney condition"* and the fact that his wife had been diagnosed with a heart condition. The union representative asked that the claimant be placed on special leave on full pay until *"the Covid situation improved*". Again, the Respondent's position was that those in the clinically vulnerable category were expected to return to work and that this was in accordance with government guidelines and advice from Public Health England. It was explained to the claimant that safety measures were to be put in place and he was asked if there were any further adjustments that might benefit him. It was suggested that the claimant could take annual or special unpaid leave if he chose not to return. The claimant confirmed that he would not be returning to work because he did not think it was safe to do so. He resigned and pursued claims of, amongst other things, s.44 detriment and constructive (automatic) unfair dismissal. His claims were dismissed.

17. The EAT held that it had been open to the employment tribunal to determine that the claimant did not hold a reasonable belief in a serious and imminent danger to himself for the purposes of both ss.44 and 100 of the ERA.

18. Mr Gorton KC for the Respondent referred to the case of ***Miles*** not by way of reliance on any point of legal principle, but simply to demonstrate the resonance of the tribunal's findings of fact in that case with the factual matrix in the instant case, as an illustration of a case where it was held that a claimant did not hold a reasonable belief in a serious and imminent danger to himself for the purposes of s.44.

19. Analysing the decision of the employment tribunal, the EAT observed that the tribunal had correctly concluded that the time at which the claimant's reasonable belief had to be evaluated was the time at which he removed himself from the workplace, or more pertinently in this case, refused to return. The EAT observed that the employment tribunal carefully considered the government guidance and legislation in place at the time, together with the contemporaneous material produced by Public Health England, noted that the employment tribunal took into account the steps that the respondent had taken to minimise risks, recorded that the employment tribunal was somewhat critical of what it saw as a "blinkered" approach on the part of the Claimant, and observed that the employment tribunal had noted that the claimant did not take steps to obtain Occupational Health advice.

The parties' submissions

20. The Tribunal had the benefit of the written and oral submissions referred to at paragraph 5 above. Those submissions are not recited here, but certain of the points taken by the parties are addressed in the Discussion section of this judgment at paragraphs 21 to 45 below.

Discussion

21. Given that the Claimant's belief, and the reasonableness or otherwise of that belief, lies at the heart of her health and safety detriment claim, it is important to ascertain first of all what it was the Claimant believed she was being instructed to do and which she refused to do. In terms of her belief, there are two possibilities. Either she believed that she was being asked (or instructed) to attend school on 4 January 2021 for work purposes generally, on the basis that there would be a meeting at some point that day, or she believed that she was being asked (or instructed) simply to attend a meeting. Attending work for work purposes generally would have entailed classroom working and conducting interventions. Neither classroom working nor interventions could have taken place in observance of social distancing. If the Claimant was only being asked or instructed to attend a meeting, given the options available for the venue thereof (Mrs Snee's office, the library, or an empty classroom) it is feasible that social distancing could have been maintained for such purposes. It was the Respondent's case that all it had asked the Claimant to do was attend a meeting at the school so as to assuage her concerns and focus on any further reasonable adjustments that she might need and/or reasonably require in order to perform her duties.

22. As recorded in the Tribunal's findings of fact, Mrs Snee accepted that the Claimant could reasonably have interpreted her e-mail sent at 9.07 pm on 3 January 2021 as meaning that she needed to be at work the next day, as opposed to simply attending school for a meeting. Rather than simply focus on that e-mail, the Tribunal reviewed the entirety of the exchange between the Claimant and Mrs Snee and concluded that nowhere in that exchange was it made clear to the Claimant that all she was being required to do on

Monday 4 January 2021 was to attend a meeting. The Tribunal concluded that the Claimant could reasonably have understood from the communications received from Mrs Snee as a whole, and not only the e-mail sent at 9.07 pm on 3 January 2021, that she was being asked (or instructed) to attend school for work purposes and not simply to attend a meeting.

23. It is clear that as the exchanges between Mrs Snee and the Claimant developed throughout the course of Sunday 3 January 2021, Mrs Snee looked to Mr Beardmore for guidance and instruction. It is the Respondent's case that on that Sunday Mrs Snee and Mr Beardmore discussed what the Claimant would be required to do the next day. In his witness statement (at paragraph 5) Mr Beardmore stated that he spoke to Mrs Snee following the Claimant's e-mails *"and we agreed that there should be a meeting at school in order to discuss the Risk Assessment in more detail and for the Claimant to be able to set out any concerns that she had. The Claimant did not come into school for the meeting and I took the decision that this was an unauthorised absence and a day's pay should be deducted"*.

24. It is instructive that in his letter of 29 January 2021, explaining to the Claimant why a day's pay had been deducted from her wages, Mr Beardmore did not say that all she had been asked or instructed to do on Monday 4 January 2021 was to attend a meeting. Instead, he confirmed that the deduction related to that date was *"when you did not attend work and you were not absent due to sickness"* (emphasis added). He continued: *"As you are aware, there was an expectation that all staff attend work and continue with their normal working hours to teach the children who were present in our schools. This was communicated clearly to you"* (again, emphasis added). The passage where Mr Beardmore commented on the Claimant not having previously raised Covid-related concerns is also worthy of note, given that Mr Beardmore referred to her not having made any suggestions to make amendments to the risk assessments in order to further mitigate risk *"to ensure you attend work to teach the children entrusted to you"* (again, emphasis added). Mr Beardmore continued: *"As you failed to attend work on this day and were not instructed or given permission to work from home, your pay has been updated to reflect this"* (again, emphasis added).

25. It is also to be remembered (a) that in her e-mail sent at 10.43 pm on Sunday 3 January 2021, Mrs Snee said: *"If you are not in work tomorrow I shall treat this as an unauthorised absence and will follow school procedure to manage this"* (emphasis added), and (b) that when the Claimant e-mailed Mrs Snee at 8.41 am on Monday 4 January 2021, stating: *"I do not feel that continuing my normal role in class where the risk assessment clearly states social distancing is not possible, is supportive or safe for myself or my unborn baby"* (emphasis again added), Mrs Snee did not correct her, to clarify that all she was being asked (or instructed) to do was attend a meeting.

26. The observation made by Mr Beardmore in his letter of 29 January 2021 that at no point in the immediate lead up to Monday 4 January 2021 had the Claimant raised any Covid-related concerns, or make any suggestions to make amendments to the risk assessments, was simply not correct, given the extensive exchanges between the Claimant and Mrs Snee set out above.

27. The final paragraph of Mr Beardmore's letter of 29 January 2021, where he stated: *"You…..were not instructed or given permission to work from home…."* is somewhat at odds with paragraph 16 of the Grounds of Resistance, where it is stated that *"the Respondent did not refuse the Claimant to work from home…"*.

28. Once the option of a meeting was canvassed in the e-mail exchange between the Claimant and Mrs Snee, it remained a feature of the ongoing dialogue, but the mere fact that it continued to be mentioned did not mean that the Respondent was giving out the message that the Claimant was *only* required to attend a meeting on the Monday. The repeated reference to the possibility of a meeting was equally consistent with the Claimant being required to work that day, and to attend a meeting in the middle of the morning before returning to her normal duties.

29. The Respondent queried whether the Claimant was seriously concerned about social distancing in the way she maintained before the Tribunal, asserting that she never made any complaint about this when she entered her third trimester in November 2020 and no concerns were raised by her at all until 30 December 2020. In short, the Tribunal was entirely satisfied that the Claimant was being truthful about her concerns in relation to social distancing in the period immediately preceding her intended return to work on Monday 4 January 2021.

30. The Respondent's case is that to trigger the protection of s.44 of the ERA, it is not enough to have a fear that something adverse might happen because this cannot pass the s.44(1A) threshold. There must be a reasonable belief that there was such a danger that was serious and imminent. The Respondent contended that there was here no serious and imminent danger at the Claimant's workplace, in that there was no suggestion of any Covid-19 outbreak at the school, and the school was fully risk assessed and following all relevant guidelines. It was the Respondent's case that there may have been a risk of Covid-19 infection on the school re-opening, but that was a *"radically different state of affairs"* to there being any serious and imminent danger that justified the Claimant *"absenting herself from her duties at the workplace"*. The Respondent argued that the Claimant's case fell at the first hurdle because she did not hold the reasonable belief necessary to exercise her s.44 right not to attend.

31. The Tribunal agreed that all of these points would be well made if all the Claimant was being asked to do was to attend a meeting at school, but the Respondent accepted that if and when the Claimant was required to

undertake classroom working and interventions work, it would not be possible to observe social distancing.

32. The Respondent placed considerable store on the fact that the Claimant held a mistaken belief that she was clinically *extremely* vulnerable as opposed to clinically vulnerable. This, contended the Respondent, informed her comments on the Respondent's risk assessment, and her approach generally. The Claimant was not at any stage clinically extremely vulnerable. She was not being asked to attend work as a clinically extremely vulnerable person. Pregnancy, at whatever stage, was never synonymous with being clinically extremely vulnerable.

33. For the purposes of the Claimant's s.44 claim, however, the key question is not whether she was clinically vulnerable or clinically extremely vulnerable, or whether her belief that she was clinically extremely vulnerable was reasonable. The key questions for the Tribunal were whether the Claimant believed that there were circumstances of serious and imminent danger at the workplace, and, if so, whether that belief was reasonable. At the material time, and whatever other guidance was available (from the NEU, NASUWT or otherwise) the government guidance was to the effect that if an individual was either (criterion (a)) 28 weeks pregnant and beyond, or (criterion (b)) pregnant, with an underlying health condition, this put that individual at a greater risk of severe illness from COVID-19, justifying or requiring *"a more precautionary approach*". A more precautionary approach may have been achievable if all the Claimant was being asked to do was to attend the school for the purposes of a meeting, but it is not possible to see how such an approach could have been achieved if the Claimant was being required to perform her normal duties, even if for only part of the working day, given the impossibility of enforcing social distancing in such circumstances.

34. The Respondent suggested that something changed with the Claimant's approach. It was said that she had been in favour of a meeting and pressed for the same on two occasions, only to then change her mind and seek a remote meeting by Microsoft Teams. As recorded in the Tribunal's findings of fact, the Claimant stated to Mrs Snee *"I am able to meet with you tomorrow but until adjustments have been made to meet national guidance on social distancing I would like to stay out of the classroom"*. She then enquired of Mrs Snee whether she could meet her *"before the children come into school or after your gate duty"*, but in her response to that e-mail, whilst Mrs Snee stated *"I can arrange to meet with you at 11.30 am"*, she did not clarify that all the Claimant was required to do the next day was to attend a meeting.

35. The Respondent maintained that the Claimant was requiring a complete removal of risk rather than a reduction. The Tribunal disagreed.

36. The Respondent maintained that the only effective way a risk assessment could have been carried out in respect of the Claimant would have been in her physical presence, and that of her union representative so that the

Claimant and/or her union representative could make specific observations about the physical layout of the school premises. That proposition must be seen against the background (a) that since the inset of the pandemic, the school had created an established system of conducting meetings remotely; (b) that the Claimant had worked at the school for 9 years and could be assumed to have had a sufficiently good understanding of the layout of the premises to convey her concerns and to understand the points being made by other attendees at the meeting, and (c) that if there was a concern that the Claimant's union representative did not share her member's familiarity with the layout of the school, there would have been nothing to prevent arrangements being made for the union representative to attend a remote meeting with the Claimant, and then to physically attend the school to get a full understanding of the relevant physical features of the premises.

37. The Tribunal cautioned itself against falling into the trap of determining what would have been the most effective way of the Claimant attending a meeting on the day in question. That was not a matter for the Tribunal. The Tribunal had to apply the legislation.

38. The Tribunal concluded that the offer of the early commencement of maternity leave was essentially a neutral point. It did not help or harm the Claimant's case, and equally it did not help or harm the Respondent's case. The Claimant was fully entitled to refuse the offer and the Respondent is not to be criticised for making the proposal, given the lack of alternative possible solutions.

39. The absence of the Claimant taking any medical advice or guidance before she took the decision not to attend school on 4 January 2021 goes to the objective assessment of risk. It is but one factor to be placed in the scales when assessing the reasonableness or otherwise of the Claimant's belief.

40. The midwifery guidance obtained by the Claimant was obtained after the event. Accordingly, whatever that guidance contained is irrelevant to the issue of the reasonableness or otherwise of the Claimant's belief.

41. As stated at paragraph 8.38 above, the Claimant decided that she was not returning to her place of work on Monday 4 January 20201 when she sent the Respondent her s.44 letter at 10.24 pm on 3 January 2021.

42. Applying the test articulated by Underhill LJ in ***Rodgers***, and adapting that test to cater for the fact that the instant case concerns a claim under s.44 of the ERA as opposed to s.100, the Tribunal drew the following conclusions:

    (1) The Claimant did believe that there were circumstances of serious and imminent danger at the workplace.
    (2) That belief was reasonable.
    (3) The Claimant could not have reasonably averted that danger had she complied with the instruction she had been given by the Respondent.
    (4) The Claimant refused to return to the workplace because of the (perceived) serious and imminent danger.

(5) That was the reason for the detriment to which the Respondent subjected the Claimant, namely treating her absence on 4 January 2021 as being unauthorised and failing to pay the Claimant in relation to 4 January 2021.

43. The Tribunal concluded that, applying s.18(2)(a) of the EqA, the detriment referred to at paragraph 42(5) above also constituted unfavourable treatment and that the Claimant was subjected to that treatment by reason of her pregnancy.

44. The Tribunal further concluded that the Claimant was subjected to the detriment referred to at paragraph 42(5) above amounted to pregnancy-related detriment within the meaning of s.47C of the ERA and Regulation 19 of the MAPLE 1999 Regulations.

45. As far as the unlawful deductions claim is concerned, the Respondent argued that in respect of the non-payment of wages for Monday 4 January 2021, the Claimant had to establish that she was entitled to the sum in question because it was "properly payable" as a day's pay (ERA s.13(3)), in other words she would have to prove that she worked the equivalent of a day from home. Insofar as the Respondent was suggesting that the Claimant would have to establish, as a qualitative or quantitative exercise, that she completed a specific amount of work on the relevant date, the Tribunal disagreed with that proposition. The issue is whether the wages paid to the Claimant were less than the total amount of wages which were properly payable to her in respect of the relevant date. The pleaded claim is in respect of a deduction relating to *"working from home on 4 January 2021"*. In her e-mail of 8.41 am on Monday 4 January 2021, the Claimant stated to Mrs Snee that she had numerous SEN, Computing and class based preparation tasks she could complete, and therefore if she did not hear from her she would continue with these tasks during her working hours. In the e-mail she sent to Mrs Snee at 1.13 pm that day, the Claimant stated that as she was approaching the end of her *"lunch break"*, she would respond to any further e-mails at the end of the school day. The Claimant plainly worked from home on 4 January 2021. The sum of £122.95 was "properly payable" to her in respect of the work she did that day.

Conclusions

46. For all of the above reasons, the Tribunal concluded as follows;

Issue 1

The Claimant decided that she was not returning to her place of work on Monday 4 January 20201 when she sent the Respondent her s.44 letter at 10.24 pm on 3 January 2021. As stated at paragraph 8.38 above, the Tribunal determined (a) that this remained the Claimant's position for the remainder of 3 January 2021 and throughout the working day on 4 January 2021, and (b) that throughout that period (ie before and after the Claimant sent her section 44 letter) the Respondent did not expressly clarify to the

Claimant that all she was being asked (or instructed) to do on that date was attend a meeting (as opposed to being asked to attend work, on the basis that at some point during the working day she would be invited to attend a meeting).

Issue 2

At the material time of the Claimant making her decision not to return to the workplace (a) the Claimant believed that there would be circumstances of serious and imminent danger at her workplace; (b) that belief was reasonable; (c) the Claimant could not have reasonably averted that danger other than by refusing to attend work that day; (d) her refusal to return to the workplace on 4 January 2021 was because of the (perceived) serious and imminent danger, and (e) the Claimant took appropriate steps to protect herself from the danger by working from home on 4 January 2021.

Issue 3 (read in conjunction with Issue 8)

The Respondent subjected the Claimant to a detriment on the ground that the Claimant took such steps or proposed such steps as working from home during the perceived danger insofar as it treated her absence on 4 January 2021 as being unauthorised and failed to pay the Claimant in relation to 4 January 2021.

Issues 4 and 5 (read in conjunction with Issue 8)

The Respondent treated the Claimant unfavourably because of her pregnancy, contrary to s.18 of the EqA,

The unfavourable treatment was the treatment referred to above in the Tribunal's conclusion on Issue 3.

Issues 6 and 7 (read in conjunction with Issue 8)

The Respondent subjected the Claimant to detriment for the reason that she was pregnant, contrary to Regulation 19 of MAPLE 1999, read in conjunction with s.47C of the ERA.

The unfavourable treatment was the treatment referred to above in the Tribunal's conclusion on Issue 3.

Issue 8

The Tribunal concluded that save for the Respondent treating the Claimant's absence on 4 January 2021 as being unauthorised, and failing to pay her in relation to that date, none of the other matters itemised under Issue 8 (paragraph 7 above refers) added anything to the Claimant's claims of unlawful detriment and unfavourable treatment.

Issue 9

The Claimant suffered an unlawful deduction from her wages, contrary to s.13 of the ERA, insofar as her January 2021 pay was short of £122.95, amounting to a day's pay (gross) relating to 4 January 2021 when she worked from home.

47. This matter will now be listed for a remedy hearing with a time estimate of one day. In this regard, the Tribunal will issue a Notice of Hearing. The parties shall have 7 days from the date of receipt of the Notice of Hearing to make representations to the Tribunal in the event that the date specified in the Notice of Hearing is inconvenient. The parties shall exchange documents relevant to remedy no later than 28 days prior to the date listed for the remedy hearing and any witness statements to be relied upon for the purposes of that hearing no later than 21 days prior to the hearing. The parties shall agree a bundle of documents no later than 14 days prior to the hearing. The parties are at liberty to file skeleton arguments for the purposes of the remedy hearing no later than 7 days prior to that hearing.

48. If the matter settles in the meantime, the parties shall inform the Tribunal accordingly as soon as reasonably practicable.

Employment Judge Gilroy KC

Date 12/12/2023