



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Amanda Fong

**Respondent:** Caramel Limited

**Heard at:** London Central Employment Tribunal

**On:** 10, 11, 12 May 2017

**Before Judge:** Employment Judge Davidson

**Members:** Mr D Carter  
Mr L Tyler

**Representation:**

Claimant: Ms S Robertson of Counsel

Respondent: Mr D Grant of Counsel

## RESERVED JUDGMENT

**The unanimous Judgment of the Tribunal is that the Claimant's complaints of automatic unfair dismissal on grounds of pregnancy and pregnancy discrimination fail and are hereby dismissed.**

Employment Judge Davidson  
26 May 2017

# REASONS

## Issues

1. The issues (as agreed at a case management discussion on 16 February 2017) were as follows:
  - 1.1. Was the Claimant dismissed on the grounds of her pregnancy?
  - 1.2. Was the claimant directly discriminated against on the grounds of pregnancy in relation to:
    - 1.2.1. the manner and timing of the imposition of contract options;
    - 1.2.2. the jump from proposing options to dismissal without warning;
    - 1.2.3. the dismissal?

## Evidence

2. The tribunal heard evidence from the Claimant on her own behalf and from Ms Eva Karayiannis (director) and Mr Andrew Lee (consultant) on behalf of the Respondent. The tribunal also had a bundle of documents running to over 300 pages, some of which were substituted and others added during the course of the hearing.

## Facts

3. The tribunal found the following facts on the balance of probabilities:
  - 3.1. The Respondent operates a luxury baby, children's and womenswear retail business with three shops in the UK, a presence at Selfridges, overseas stores and an online shop and with its Head Office in King's Road. The founder and owner of the business is Eva Karayiannis, who is also the designer of the clothing ranges. She is supported by an external business consultant, Andrew Lee, who works in the business two days per week.
  - 3.2. The Respondent has a predominantly female workforce and is used to dealing with pregnancy among its staff. It has policies in place to deal with 'family friendly' issues.
  - 3.3. In late 2015 the Respondent decided to develop the e-commerce part of the business and invested in a new website build and instructed a recruitment agent to find an expert in digital marketing to head up and develop the e-commerce business. The Claimant was put forward and as she had an impressive cv displaying relevant skills, the Respondent decided to interview her. In her interview, she expressed confidence in her ability to deliver significant improvements to turnover and made a detailed presentation of her plans for the e-commerce business. On the strength of her cv and interview presentation, the Claimant was offered

the position of E-Commerce Manager on a salary of £50,000 with bonus incentives, subject to a four-month probationary period. She became the highest paid employee of the Respondent. The appointment incurred a fee of approximately £10k to the recruitment agent.

- 3.4. The Claimant's job description included responsibility for all aspects of E-commerce channels involving 'driving sales and customer service, overseeing the content and appearance, optimising website performance to ensure smooth operation, develop and manage promotional activities, providing analysis of performance, identifying and implementing strategies for increasing revenues and website improvements, and managing a team'. She was also expected to undertake other ad hoc duties and projects as reasonably directed by the Respondent.
- 3.5. The Claimant started work on 4 January 2015 and, at first, she worked with an assistant, Christos Sitaridis. Her initial role was to oversee the development and launch of the new website and to work with the website builders and designers.
- 3.6. During the period of her employment, the Claimant was also asked to help out in other parts of the business from time to time as there was a small team and everybody was expected to work together. By the same token, others also helped the Claimant from time to time. We do not find that this is unusual or unreasonable.
- 3.7. There was a regular staff meeting each Monday at which the sales and marketing was discussed across the various parts of the business. The Claimant stated in response to questioning that she mentioned at these meetings that she had too much to do, and that she was struggling as she did not have an assistant. We note that there is nothing in any of the written correspondence we have seen and no mention of this in the Claimant's witness statement. We find that, at most, the Claimant may have mentioned that she was busy but we find that she did not express a need for help.
- 3.8. The Claimant worked long hours in working towards the website launch before taking a pre-booked holiday in February. While she was on holiday, Christos Sitaridis resigned. She was given authority to recruit a replacement at around the £18,000 salary level but she was given no recruitment budget.
- 3.9. The Claimant attempted to find a replacement for Christos by using LinkedIn but she was unsuccessful. She continued to put in long hours or work herself, particularly in the build-up to the launch of the new website on 29 March 2016.
- 3.10. By March 2016, the Respondent began to show concern about the level of sales in e-commerce, which were decreasing rather than increasing as had been expected. This was in contrast to the rest of the business, where sales were growing.

- 3.11. The new website launched successfully on 29 March 2016, with no glitches.
- 3.12. Concerns grew during April and Eva Karayiannis made some suggestions to the Claimant, requesting daily sales reports instead of weekly reports, and asking her to use newsletters and blogs more to increase online presence.
- 3.13. Eva Karayiannis became further concerned at some of the marketing decisions made by the Claimant which she did not agree with, such as only sending a newsletter about a Sample Sale to 600 people instead of the 11,000 on the mailing list. The attendance at the Sample Sale had been disappointing which prompted Eva Karayiannis to look into how it had been marketed. A subsequent Sample Sale was marketed to the entire mailing list and the attendance was much better.
- 3.14. Eva Karayiannis also had concerns about the way the products had been displayed and classified on the website, which she thought would confuse shoppers.
- 3.15. In April 2016, the Claimant found out she was pregnant. She experienced severe morning sickness and tiredness. She did not bring these symptoms to the attention of the Respondent and did not take any time off work. She continued to work long hours during this period.
- 3.16. The sales figures from the website business continued to disappoint in April, which should have seen an improvement due to the launch of the new website. Eva Karayiannis identified some defects in the presentation of the website which she asked the Claimant to resolve.
- 3.17. The website designers had put together a feature known as 'Shop the Look' which was due to be added in the second phase, once the new website was up and running. The purpose of this product was to encourage shoppers to buy a number of items together, rather than single items. Eva Karayiannis challenged the Claimant when she realised it had not been put up on the website yet but the Claimant did not think it was important and did not prioritise it. The Respondent thought it was important and should have gone live as soon as possible. The Claimant maintains that this is not an important aspect of the website. The Respondent takes a different view.
- 3.18. In May, the Claimant tried more ways to recruit including advertising at the University of the Arts and continuing to use LinkedIn. On 10 May, a new assistant started working with the Claimant, Gina, who had been recruited from the University of the Arts.
- 3.19. Also on 10 May, the Claimant informed Andrew Lee that she was 10 weeks pregnant and Eva Karayiannis found out the following day 11 May, when she returned to the office from abroad.
- 3.20. On 15 May Eva Karayiannis wrote to Amanda expressing disappointment in her results, referring to her pregnancy, the cost of her recruitment and the lack of capability of her assistant, particularly in the

light of the Claimant's upcoming maternity leave. We find that this letter has as its underlying assumption that the Claimant would continue to work with the Respondent as it refers to her maternity leave in the future. We find that this letter refers to the pregnancy as a factual matter to be taken into account in planning, rather than a negative issue.

- 3.21. Shortly after this, the Claimant's probationary period was due to end and Andrew Lee and Eva Karayiannis had to decide whether or not to confirm her employment. They considered extending the probationary period but Andrew Lee thought it would be better to confirm her completion of the probationary period but identify areas which required improvement. These were 1) to suggest, implement and monitor tactics to improve website visits and conversion rates in order to increase sales revenues, 2) to improve general communication and keeping the executive team updated and 3) the recruitment of an assistant. This was confirmed by letter dated 18 May 2016. The Respondents' witnesses stated that they wanted to make this appointment work as they had invested in the Claimant and wanted her to succeed. We accept this evidence.
- 3.22. Later in May, Eva Karayiannis took a closer look at the website and identified a number of problems which needed to be fixed. She instructed the Claimant to make various changes to the website before her holiday. Eva Karayiannis continued to be concerned about the sales figures and she had heard from the merchandiser that the Claimant had a negative attitude to the product, expressing the view that this was the explanation for poor sales. However, Eva Karayiannis did not accept this explanation as sales in the stores were doing well. The Claimant's attitude to the products was of particular concern to Eva Karayiannis who operates the business as her passion and expects her team to share her enthusiasm for the products.
- 3.23. As the Claimant was due to go on holiday for a week from 6 June, Andrew Lee and Eva Karayiannis met with her prior to her holiday on 31 May to present three options to her as they had taken the view that matters could not go on as they were. The options were 1) for the Claimant to come up with a plan for growth over the following four weeks, 2) for a consultant to be recruited to help the Claimant, with her moving to 3 days a week or 3) for the Claimant to work her notice period and leave if she did not think she could achieve the performance required.
- 3.24. The Claimant replied to Andrew Lee on 2 June agreeing that online performance was not where 'any of us want it to be' and expressing the view that option two was the way forward. She engaged in the dialogue and raised a number of matters which would flow from that option. She did not express any objection to being presented with the options.
- 3.25. Shortly after sending that email to Andrew Lee, the Claimant told the Respondent that she had a pregnancy-related medical emergency and had to attend a GP appointment. She was then referred to the hospital

where some tests were done but the doctors had not identified the cause of her feeling unwell. The Claimant confirmed what had happened to the Respondent. She continued to work as normal and took no additional time off.

- 3.26. While the Claimant was away on holiday, the Respondent noticed that the simple amendments to the website had not been done and Gina did not have the skills to do this. The errors were rectified by other staff who then found more errors which need to be fixed and it took five people 2-3 days to put right. After these changes were made, the website showed an immediate improvement. As a result of this the Respondent further lost confidence in the Claimant. The Claimant accepted in evidence that she had failed to make the corrections to the website before her holiday and she explained that this was because it had slipped her mind.
- 3.27. We heard evidence that the Claimant had been looking at pregnancy blogs and buying sandals online which the Respondent discovered in her absence by seeing her browsing history. She claimed that she was looking at websites of competitors to see how they were describing products she was having to describe herself for the Respondent's website. We accept that the Respondent had no objection in itself to the Claimant using her work computer for these activities but we find that the Respondent was exasperated that simple tasks had not been done while the Claimant had time to buy sandals online. We find that the Claimant may well have been researching online although it appears that she did purchase the sandals. We find that the only significance of this evidence was that whatever she was doing online and for whatever purpose, it was not as important as the tasks the Claimant needed to be doing to correct the website.
- 3.28. The Respondent continued to review the sales figures and found the levels of sales were unsustainable, particularly after a 'zero day', the first time that no sales at all had been recorded. In summary, the figures before the tribunal showed that, in the period from 3 January to 18 June 2016, the online sales were down 36% on the plan and down 13% from the previous year. By contrast, the figures for the second part of the year (19 June to 31 December) showed online sales 43% above plan and 95% increase on the previous year.
- 3.29. We were also taken to a graph showing the conversion rate (the percentage of website visitors who go on to place orders) from October 2015 to July 2016. In our view, this is only of marginal significance as it is only one measure of performance. This graph shows a slight improvement in the first few months of 2016 over the last few months of 2015 and a marked increase after the Claimant left.
- 3.30. The Claimant returned from holiday on 13 June 2016. In the light of her failure to make the necessary changes before her holiday and the poor performance of the e-commerce business, the Respondent took the decision to dismiss the Claimant and called her in to inform her of this. The dismissal and reasons for it was confirmed by letter dated 13 June.

- 3.31. The Claimant was given a month's notice but did not work this out as she was on sick leave with pregnancy-related symptoms.
- 3.32. Immediately after the termination of the Claimant's employment, the website performance improved significantly.

Law

4. The relevant law is as follows:

*Automatic unfair dismissal*

- 4.1. It is automatically unfair to dismiss a woman on the grounds that she is pregnant (Section 99 Employment Rights Act 1996).
- 4.2. It is for the Claimant to show that the reason for dismissal was pregnancy.

*Pregnancy discrimination*

- 4.3. It is discriminatory to treat a woman unfavourably because she is pregnant or because of illness suffered as a result of the pregnancy (Section 18 Equality Act 2010).
- 4.4. If there are facts from which the tribunal could decide in the absence of any other explanation that a person contravened the discrimination provisions, the tribunal must hold that there has been a contravention unless that person can show that they have not contravened the provision

Determination of the Issues

5. We unanimously determine the issues as follows:
  - 5.1. We find that the dismissal was not automatically unfair dismissal on grounds of pregnancy. We heard compelling evidence that dismissal was due to lack of competence but little to show that the performance problems were due to pregnancy. The issues with the Claimant's performance pre-date the pregnancy although, after the Claimant found out she was pregnant, the Respondent showed more frustration but we find that this was because the performance was getting worse and not because of the pregnancy.
  - 5.2. We find that the three options were put to the Claimant because of the performance of online sales, not because of her pregnancy. Although the pregnancy was in the mind of the Respondent, this was not as a negative mark against the Claimant but a fact to be taken account in planning the future. We note that the Claimant engaged in this process and acknowledged the problems with online sales and agreed that hiring a consultant was the best way forward. We heard no evidence to suggest that the Claimant felt intimidated or pressured by this exchange.
  - 5.3. As regards the content, manner and timing of the three options, we find no reason to criticise the Respondent. At the time, the Claimant did not resist, object or suggest a fourth option.

- 5.4. As regards the reasons for the change in the Respondent's approach from offering three options to dismissal, this is explained by the Respondent by the discovery, while the Claimant was on holiday, that she had not made relatively simple changes to the website a week after being asked to do so. This was reinforced by the immediate improvement in takings once the website had been updated. This resulted in a loss of confidence in the Claimant's ability to deliver, resulting from the poor figures, the errors on website not being fixed and the Claimant's negative attitude towards products. We note that the dismissal meeting did not address these issues in detail or ask the Claimant for an explanation but the Claimant's complaint does not relate to the dismissal process. The reasons for the dismissal were set out in the dismissal letter which the Claimant received subsequently. We find that the reason for the change in the Respondent's attitude was not the Claimant's pregnancy but the other factors. We have taken into account that the Claimant was suffering from a pregnancy-related illness and that the Respondent was aware that she had needed to visit the GP and hospital on one occasion for a pregnancy-related emergency but we do not find that this was a factor in the decision. The Respondent is used to dealing with pregnancy and the pregnancy would not have been an issue if the Claimant's performance had been better.
- 5.5. We find that the dismissal was not on grounds of pregnancy or pregnancy-related sickness but on grounds of poor performance.
- 5.6. The Claimant argues that any poor performance can be attributed to the pregnancy symptoms she experienced because it is not possible to dissociate a pregnant woman from anything that happens while she is pregnant. We do not accept that the pregnancy symptoms are an explanation for the most serious shortcomings of her performance, in particular her poor decision making. For example, in relation to the marketing strategy for the Sample Sale, the Claimant's decision only to send the email newsletter to 600 recipients was not because she was pregnant but because she did not understand the business. Similarly, the failure to make the corrections to the website was not because the Claimant was unwell but because it slipped her mind. We also note that the performance issues had manifested themselves prior to the pregnancy. In relation to some issues of judgment, such as her opinion questioning the usefulness of 'Shop the Look', the Claimant takes the same view now as she did at the time, which indicates that the pregnancy was not the reason for the way in which she carried out her duties. Further, the pregnancy does not explain why the Claimant only wanted to give weekly sales figures instead of daily sales figures. The Respondent employed the Claimant for her expertise in the area of E-commerce and her performance both before and during the pregnancy was below what the Respondent expected from someone at her level.
- 5.7. The Claimant has also said that errors were made because she had too much to do and felt unwell and unable to perform at her best. We find, particularly in relation to the failure to update the website, that it was not because she had too many things to do but because she failed to prioritise correctly. We find that the Claimant did not bring to the attention of the Respondent that she was too unwell to work effectively, nor did she take time



off or ask for help. She alleges that she was overworked because she had no assistant but the Respondent was pressing her to recruit an assistant but she does not appear to have prioritised this.

5.8. In conclusion, we find that the reason for the Respondent's treatment of the Claimant was her performance. We do not accept that her pregnancy or her pregnancy-related sickness explains her poor performance.

5.9. The Claimant's claims therefore fail and are dismissed.

Employment Judge Davidson  
26 May 2017