EMPLOYMENT TRIBUNALS

Claimant: Miss F Clow

Respondent: Goslings Farm Ltd

HEARD AT: HUNTINGDON ET **ON:** 19th April 2017
10th January 2017
24th & 25th October 2016

BEFORE: **Employment Judge D Moore**

MEMBERS: Mr R Leslie
Ms SB Hills

REPRESENTATION

For the Claimant: Miss Venkata (Counsel)

For the Respondent: Mrs Huggins (Counsel)

RESERVED JUDGMENT

1. The Claimant was dismissed on grounds of redundancy and not because she made a flexible working request or for a reason related to maternity or pregnancy.

2. She did not suffer indirect discrimination on grounds of sex.

3. She was not discriminated against on grounds of sex.

4. Her monetary claims in respect of notice pay, holiday pay and arrears of wages fail. Accordingly this claim is dismissed

REASONS

1. This case arises from the Claimant's employment as an Assistant Café Manager. She commenced that employment on the 22nd August 2014 and it ended with her dismissal on the 14th February 2016. Dismissal is admitted and the Respondent avers that the Reason was redundancy.

2. Box 8.1 of the Claim Form indicates claims of unfair dismissal, discrimination on grounds of pregnancy or maternity, discrimination on grounds of sex and claims for notice pay, holiday pay and arrears of pay. We take the opportunity to remind the parties that the issues before us are those set out in the Claim Form and particularised. There has not been an application to amend. The Claims are defined in the particulars provided in Box 8.2 as follows:-

    '1. *Unfair dismissal for making a flexible working request;*

    2. Unfair dismissal for a reason that relates to her pregnancy;

    3. Indirect Sex Discrimination; and

    4. Direct Discrimination because of pregnancy and maternity.'

3. The Claims for outstanding pay are expressed in these terms:-

    'Outstanding pay for the period 25th January 2016 to 14th February 2016; outstanding pay in respect of accrued but untaken holiday; and outstanding notice pay.'

4. On the 11th August 2016 there was a preliminary hearing at Bury St Edmunds (as we understand it the case is now before us because there are limited judicial resources in this region. One of the principal matters for that hearing was to clarify the issues). Order 1994. The claims as set out in the Claimant's completed agenda were:-

    4.1 Indirect sex discrimination, S:19 Equality Act 2010 ("EqA").
    4.2 Pregnancy and maternity discrimination, S:18 and 39 EqA.
    4.3 Automatic unfair dismissal for a reason related to pregnancy or additional maternity leave, S:99(1), S:99(3)(a) and S:99(3)(b) Employment Rights Act 1996 ("ERA").
    4.4 Alternatively, automatic unfair dismissal for a reason related to a flexible working request, S:104C ERA.
    4.5 Unlawful deduction from wages, S:13 ERA.
    4.6 Breach of contract, Article 3 Employment Tribunals Extension of Jurisdiction (England &Wales) Order 1994.

    This list accords with what is pleaded.

5. At the outset of this hearing Ms Venkata applied to amend by adding a claim under S:80G(1)a of the Employment Rights Act 1996 of failure to deal with a flexible working request in a reasonable manner. That application was opposed and we refused it. It was palpably outside of the statutory time limit and this was not disputed. Selkent Bus v Moore (1996) ICR 836 EAT provides that in respect of applications to amend to include out of time complaints it is essential that we examine the question of whether there are grounds to extend the time limit. S:80H(5) is a mandatory provision and it provides that a Tribunal shall not consider a complaint submitted outside of the time limit unless we are satisfied that it was not reasonably practicable for the complaint to be presented in time and it was presented within such further period as we consider reasonable. No evidence has been adduced upon which it would be possible to conclude that it was not reasonably practicable to have complied with the time limit and given that the matter of clarification of the claims was considered by the Claimant's representatives when preparing the agenda, when attending the preliminary hearing and when responding to requests for further particulars there is no basis upon which we could conclude that the outset of this hearing was the measure of a reasonable period. Ms Venkata has suggested that this change is a mere 're-labeling exercise' but we do not find that to be right. There is nothing in the particulars that is critical of the refusal, there is nothing beyond the mere factual averment that the request was declined. We did not grant the application to amend.

6. The Claimant has insufficient service to bring a claim of 'ordinary' (unfair dismissal under S:98 of the Employment Rights Act 1996, S:108 of that Act restricts the right to pursue such a claim to those who have at least two years continuous service. Her claims of Pregnancy/Maternity discrimination are also fettered to an extent. It is clear on the basis of undisputed facts the Claimant's protected period ended on the on the 9th January 2016 at which time she had returned from maternity leave and had resumed working for the Respondent (S:18(6)a Equality Act 2010). This is pertinent since the protection afforded to the Claimant under S:18 ends at the conclusion of the protected period unless a decision was taken during the protected period which resulted in her being subjected to unfavourable treatment S:18(5) or if the treatment is because she exercised or sought to exercise her right to ordinary or additional maternity leave S:18(4).

THE FACTS

7. This case has a relatively straightforward and uncomplicated factual matrix. Mr Blythe is a farmer and also the sole Director of the Respondent Company. He had the opportunity to acquire the tenancy of a farm shop and small garden centre at Goslings Farm and he did so on the 11th April 2014. One of Mr Blythe's plans to develop it into a viable business was to open a café in a wooden building which he erected for the purpose in the hope that it would draw customers in. It was an entirely speculative venture. Mr Blythe is a member of the same rugby

club as the Claimant's partner and he persuaded Mr Blythe that the Claimant would be good at setting up and developing the café project. We understand that she did not have experience of running a café. Mr Blythe arranged for her to get some experience at another café attached to another farm shop (not we understand in the ownership of the respondent Company). The café at Goslings Farm opened on the 8th December 2014. The Claimant commenced her employment with the respondent prior to the opening date on the 22nd August 2014. The terms are set out in the Statement of terms and conditions which were issued in September 2014 and which appear at pages 70–76 of the bundle. It is material to note the clause pertaining to hours of work (Clause 10.1 Page 72):-

> *'You will be expected to be flexible in your hours of work and are employed for up to 40 hours per week over 5 working days. The business works across a 7 day week and you are therefore required to work as part of a rota system and will be expected to work on any of these 7 days.'*

8. The Claimant has referred to herself in her witness statement as 'Mr Blythe's assistant' and we find this to not be a wholly accurate description. Her Job Title was Assistant Café Manager (there was not a Café Manager the reference to 'Assistant' was a reference to the fact that Mr Blythe as the sole Director managed the whole business). There is however no doubt that the day to day operation of the Café was the responsibility of the Claimant and that there was a hope and expectation that she would develop it into a viable profit centre.

9. On the 15th August 2014 Ms Clow discovered that she was pregnant. She did not tell Mr Blythe immediately but she did tell him sometime after she commenced work. He recalls that it was on the 25th August 2014. He tells us that he was not surprised as he was already aware of the fact from 'social media' he being a friend of the Claimant's partner. He had no concerns or problems with this on the business front as he concluded that there was sufficient time before the Claimant's maternity leave to get the new venture up and running. It is right to say that there is no evidence before us of any acrimony, dispute or difficulty throughout this period. The Claimant commenced her maternity leave on the 9th April 2015 and her daughter was born on the 26th April 2015.

10. Unfortunately the café did not flourish during her absence. Mr Blythe did not hire a replacement to cover her absence, he indicates that it was not economically viable to do so and gave the café what attention he could in addition to his other work. We have heard that the period between January and April is neither busy nor profitable for farm shops and garden centres and we accept as a matter of common sense that new businesses require more and different attention to established ones. In the period prior to the Claimant's maternity leave staffing costs were absorbing some 60–80% of the turnover against a necessary 40% in order to show a profit.

11. In order remedy the situation Mr Blythe put in a number of measures. Staff who resigned were not replaced staff hours were reduced, overtime ceased, supplier costs were reduced and the remaining staff worked more flexibly and each took on a little more responsibility. A Mrs Conroy who managed staff in the other parts of the site took on the management of the café staff and Mr Blythe took over the financial aspects of the day to day running of the café. This archived sufficient viability for the Café not to close but it still was falling short, in terms of profitability, of the hopes and expectations that existed at the outset. We have been reminded in submissions that it had a purpose of bringing customers in to the farm shop as well as being a hoped for profit centre. We are satisfied that there was a diminution in the need for employees to do work of the kind formerly carried by the Claimant.

12. In September Mrs Blythe (Mr Blythe's wife - then Ms Morton) (who has other employment) was recruited for half a day a week to provide administrative support under the title of Operations/HR and it was she who was the recipient of a flexible working request from the Claimant on the 18th December 2015 (Pages 81 to 83). Ms Clow wanted to change her hours to four days a week and no weekends. Mr Blythe (who on his account had been mistakenly led to believe this was an issue of great complexity and felt it to be beyond him, turned to Ms Morton and she in turn sought the aid of an acquaintance Ms Lennard (an HR Consultant). We do not have a claim under S:80G(1)b and therefore it is not necessary to relate in detail this aspect of the Claim but insofar as it is pertinent to later matters we have found it to be a sham. Ms Morton and Ms Lennard informed her that the business could not sustain the requested working pattern and to allow it would have a detrimental effect on the business. Having heard evidence from Mr Blythe whom we have found to be a candid and reliable witness the truth of the matter was that the business in fact had a substantially reduced need for the Claimant's services. She returned to work on a full time basis on or about the 8th January 2016 and three days later on the 11th Mesdames Morton and Lennard put her at risk of redundancy. It is right to say and we find not surprising given the self evident conflict between these two positions that the ensuing consultation was treated with suspicion on the part of the Claimant and it resulted in acrimony. Procedures in employment matters are not 'rituals' they have the purpose of achieving frank and transparent discussion of the workplace situation.

13. We are not however concerned with issues of procedural unfairness since the Claimant is not entitled to pursue a claim of ordinary unfair dismissal. The focus of our attention is whether the Reason for the dismissal was one of the pleaded proscribed reasons. There was a consultation process; it was conducted by Ms Morton and by Ms Lennard in three meetings, the 16th January 2016, the 7th February 2016 and the 12th February 2016. The Claimant was given paid leave throughout the consultation period. The atmosphere of suspicion and acrimony prevailed on both sides. Albeit not a shining

example of good industrial relations practice we do not find it to have been a sham. The true issue was put to the Claimant for comment and we are satisfied on Mr Blythe's evidence that the Café could not afford and did not need a dedicated assistant manager.

14. Consideration was given to the Clamant taking up alternate employment in a non managerial role and working shifts in the café. It is not clear from the evidence whether there was in fact a vacancy and on a balance of probabilities we conclude that the Respondent was willing to create an opportunity for the Claimant. The Claimant was willing to consider such a move but she reverted to her position of not wanting to work weekends. The Respondents position was that weekends were by far the busiest time and that the opportunity on offer was to absorb the Claimant into the existing rota system worked by other and this would entail some weekend working. The parties were unable to agree terms and on the 14th February 2016 the Claimant was dismissed with one months pay in lieu of notice. The Claimant has not been replaced. She was paid £3113.32 net (£3446.44 Gross) which was outstanding pay, accrued holiday 26 days holiday pay and her payment in lieu of notice.

15. The monetary claims referred to in the Claim form are expressly limited to:-

    i) The period between the 25th January 2016 and the 14th February 2014 that being the period she was given paid leave for the duration of the consultation process. She was not suspended, on her own evidence she was asked if she would like to take the time off with pay and she agreed (Paragraph 27 of her statement).

    ii) Holiday pay.

    iii) A shortfall in respect of pay in lieu of notice

16. In common with the usual practice the Claimant has given her evidence in chief by confirming on oath the content of a witness statement. Ms Venkata was given leave to ask supplementary questions but they did not relate to this point. The submission made by Ms Huggins for the respondent that she has not given evidence in respect of these claims is well made save for the following reference she does not address any of the points at all. She refers to her e-mail exchange at pages 133–135 but beyond stating that she queried the amount does not give any further evidence about it. At page 133 she asks for a breakdown of her final payslip and stating incorrectly that her contractual hours were 40 per week. As we have recorded in paragraph 5 above her contract clearly states 'up to 40 hours per week'. She repeats the same assertion in at page 135 and avers that she accrued 22 days holiday on annual leave. It is not clear on what basis this assertion was made and it has not been addressed in evidence. In cross examination she stated 'I couldn't say what Winter hours were. The Respondent takes the point that the Claimant has not supported these claims in evidence and suggested that

they have only been pursued in schedules produced by Ms Venkata in her written submissions. We invited her to address this point in further submissions and her only response was that the Claimant produced her pay slips. There are pay slips in the bundle but the did not in fact refer to them in her evidence.

CONCLUSIONS

17. Turning first to the matter of the dismissal. In cases of dismissal for a proscribed reason it is the Claimant who shoulders the evidential burden of establishing that reason. As we have indicated in our recitation of facts we have found on compelling and largely unchallenged evidence that a redundancy situation existed. The Café where the Claimant worked was a speculative venture. It did not flourish as was hoped. By the time of the Claimants return it had been trading for just over a year and its level of profitability was a known quantity. The Definition of Redundancy is found at S:139 of the Employment Rights Act 1996.

> *For the purposes of this Act an Employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to*
>
> *(Subsection a) is not applicable in this case)*
>
> *b) The fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.*

18. The Claimant was the only person employed to manage the café as a discreet entity. The lack of profitability of the business had resulted in a need to reorganize the way it was operated. The question of whether it would have developed as a business if the Claimant had been able to stay at the helm during its infancy is wholly speculative and irrelevant. The reality of the point was that it was performing along the line between profit and loss and was a known quantity. The level of profitability and success hoped for at the outset had not materialised. These were facts known to the employer at the time and were the reason for the dismissal. Whilst we recognise the foundation of the Claimants suspicion, and have been invited to infer from the conduct of the flexible working request that there was no redundancy situation we find this to have arisen from way that matter was conducted. It was the flexible working request that was a sham and not the redundancy process. We have not found thee to be anything that either directly or by inference detracts from our findings on this point based on Mr Blythe's evidence. Our finding that the reason for the dismissal was redundancy results in a finding that the reason for the dismissal was not that she had made a flexible working request nor because of pregnancy or maternity leave. Given that the detriment relied upon in respect of the Claim of Direct Discrimination is dismissal it

follows that this claim must also fail. There is in respect of the latter no evidence to show that the decision to dismiss was made during the protected period.

19. We turn then to the complaint of indirect discrimination. The definition is at S:19 of the Equality Act 2010:-

> *A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a protected characteristic of B's if:-*
>
> *(a) Applies it to persons with whom B does not share the characteristic*
>
> *(b) It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom BN does not share it*
>
> *(c) It puts be at that disadvantage and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

20. The protected characteristic is sex and the provision criterion or practice relied upon is not specified in the Claim form. This is another point where we find there to be a variance between the claims as it appears from the Claimants evidence and Counsels written submissions. The point has been raised in further and better particulars. Claims cannot be raised or altered in responses to requests for further an better particulars, lists of issues or indeed in any other document they can only serve to inform claims that as a matter of fact have been pleaded in the Claim, form. We have had some concerns given the decision in Ali v Office of National Statistics (2005) IRLR 201 CA, (which provides that it is necessary for Claimants to set out the specific acts complained of. Employment Tribunals are only able to adjudicate on specific complaints. A general description of a complaint (in an ET1) will not suffice.) as to whether this claim is properly before us however since each of the contentions which appear only in the response to further and better particulars fail on their facts we address them albeit that they may be considered obiter.

21. The first alleged PCP is said to be a requirement that Café assistant Managers work 5 days a week including weekends and bank holidays. The second is a refusal to permit Café Assistant Managers to work 2-4 days a week (In essence we find to be the same point) and third is said to be the practice of failing to assist Café Assistant Managers to return to work after Maternity leave.

22. The Claimant has failed to identify a comparator although since there was none we can assume she means a hypothetical comparator. We entirely accord with Ms Huggins submission in respect of the first PCP.

There was no such PCP. The requirement in the Claimant's contract was to work up to 40 hours per week over 7 days. The point which exercised her greatly was weekends (although she did raise the subject of a four day week) In respect of the group disadvantage We quite clearly indicated that the proposition that women with child care responsibilities are less able to work at weekends and on bank holidays is not a point we felt able to take on judicial notice. All three of us have sat on Tribunals for a number of years and each of us can recall a significant number of cases concerning supermarkets, DIY superstores and so fort where ladies with children seek and secure weekend work because they have the support of Husbands and Partners at that time. Despite this indication The Claimant has neither given nor adduced evidence on the point.

23. With regard to the second point we can find no distinction between it and the first. The third point is not substantiated the Claimant did return to work after her maternity leave. In fact of course none of these provisions were in fact applied to the Claimant they were nominal only and existed only as features of the approach taken by Ms Morton and Ms Lennard. On her return from work the Claimant picked the shift she was allowed to work (and in fact was allowed to alter it) thereafter took paid leave and was then made redundant. The Claimant has not establish facts from which we could conclude discrimination and we dismiss these claims.

24. In respect of the monetary claims. We are bound to accept Ms Huggins point that they were not addressed in evidence and such detail as there was came from Ms Vakarta's submissions. It is of course our function to try cases on the evidence before us. The only evidence we have is the email exchange referred to by the Claimant and of themselves the figures she refers to are not probative of any award that we could make. We have raised this point with the parties and invited further submissions and adjourned our discussion for the purpose. We have turned our minds to the question of whether we should of our own motion re-open the case. Having regard to the fact that the Claimant has been represented by solicitors and counsel throughout, the dictates of cost and proportionality in the overriding objective and the fact that the sums in question are undoubtedly small. We have concluded that we should not do so. We dismiss these complaints on the ground the Claimant having failed to discharge her burden of proof.

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Employment Judge D Moore, Huntingdon.
Date: 29 June 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS