EMPLOYMENT TRIBUNALS

Claimant: Mrs J McArdle

Respondent: Asco Joucomatic Limited

HELD AT: Liverpool **ON:** 21 and 22 September 2017

BEFORE: Employment Judge T Vincent Ryan
Mr M Gelling
Mrs J Williams

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondent: Mr J Feeny, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The respondent discriminated against the claimant during the protected period in relation to a pregnancy of hers by treating her unfavourably contrary to section 18 Equality Act 2010 by:

    1.1 failing to consult with her regarding the engagement of pregnant workers;

    1.2 failing to provide a risk assessment on 3 October 2016 upon which the respondent claimed to rely, and failing to do so until 10 January 2017;

    1.3 failing to follow a procedure or give due consideration to finding an alternative safe place of work; and

    1.4 by terminating her assignment in the manner in which it was terminated.

2. The respondent did not contravene the provisions of the Equality Act 2010 because it was required to do so to comply with enactments of the relevant statutory provisions for the protection of women in accordance with the Equality Act 2010 schedule 22 paragraph 2.

3. The parties confirmed that they agreed in the light of this judgment the respondent would pay to the claimant £7,500, subject only to any appeal by the respondent; in those circumstances no remedy hearing is required and unless either party notifies the tribunal in writing of presentation of an appeal, with a copy of that appeal, within 7 days of the expiry of any time limit for such appeal (calculated by reference to the date on which this judgment is sent to the parties) then judgment will be entered in favour of the claimant in that sum without further hearing, deliberation or notice.

REASONS

1. **The Issues**

1.1 The issues were agreed at the outset of the hearing and committed to writing by the parties prior to their making submissions.

1.2 The claimant claims that she was discriminated against during the protected period in relation to her pregnancy because the respondent treated her unfavourably by failing to consult with her on a health and safety matter, and specifically whether there was a rule prohibiting pregnant workers from working on the respondent's site, in failing to provide her with a copy of a risk assessment conducted on 3 October 2016, failing to follow any procedure to consider alternative employment for her if she could not perform her principal duties, and terminating her assignment to work in the respondent's premises. The claimant maintains that this unfavourable treatment was because of her pregnancy and the respondent said it was not "because of the pregnancy". The Tribunal had to determine whether the claimant was subjected to the treatment alleged, whether it was unfavourable and whether it was "because of the pregnancy". The Tribunal also had to consider whether it could be said the respondent did not contravene the said provision of the Equality Act 2010 because it only did in relation to the claimant something it was required to do to comply with health and safety legislation for the protection of women.

1.3 The questions that respective counsel agreed between themselves to submit to the Tribunal and which were set out in written submissions prepared by Mr Mensah were as follows:

1.3.1 Was there sufficient consultation?

1.3.2 Was the claimant issued with an oral risk assessment on 3 October 2016?

1.3.3 Was there a process or consideration to find alternative work?

1.3.4 Was the claimant's assignment ended because the respondent had to comply with health and safety regulations?

1.4 Mr Feeny for the respondent confirmed the respondent's position in respect of the matters above such that the following were in issue, namely:

1.4.1 The respondent's denial that the treatment of which the claimant complains was unfavourable treatment.

1.4.2 The respondent's denial that the reason for any treatment was because of pregnancy.

1.4.3 The respondent's denial that it failed to provide a risk assessment for the claimant's benefit, and in any event that any delay or denial was unfavourable and in any event that the cause of any delay or failure was because of pregnancy.

1.4.4 An over-arching denial of the facts alleged by the claimant with regard to the events of 3 October 2016, or that the events which she describes were unfavourable or that the reason for any of the events of that day were because of pregnancy but rather they were driven by health and safety considerations and the protection of women.

1.4.5 The claimant was not "summarily dismissed" as alleged at the time but was rather returned to the agency, which again the respondent accepts could amount to unfavourable treatment but it was treatment that the respondent was required to administer in order to comply with health and safety legislation for the protection of pregnant women.

2. **The Facts**

2.1 The respondent makes industrial electrical coils, valves, cylinders and cabinets. The work involves the use of chemicals with some emission of fumes and the factory site at which the claimant worked is fitted with an extractor system. The production processes, those in which the claimant would have been engaged and others, include moulding, soldering and winding. The respondent uses agency workers amongst others to operate on those processes and they have some permanent staff.

2.2 The claimant was at all material times an agency worker provided by Response Recruitment; and the agency's manager was concerned is a Mr Davies. The claimant was engaged as a production operative with four years' experience working at the respondent's site at the time of these events. Immediately before these events she was working on moulding.

2.3 In February 2014 issues arose as to allegations that certain employees or agency workers had contracted asthma or had asthma that was exacerbated by working conditions, and there were three employees referred to throughout as A, B and C who were pursuing work related asthma personal injury claims, or at least intimating that that was their intention. On their behalf, but not as their representative, the matter was pursued by a respiratory consultant called Dr Hoyle. Occupational Health advisers, Peritus, were also involved in considering the allegations that were made. There was concern over occupational sensitizers such as solder fumes and phyllites. This was relevant to employee B and we were

referred repeatedly to documentation concerning B. The respondent was advised that it ought to report the circumstances around employee B under RIDDOR to protect the employee from exposure and not to allow employee B to return to work in the area of exposure.

2.4 The respondent convened a meeting on 22 April 2016 (the minutes are at pages 112-113 of the trial bundle to which all further page references refer unless otherwise stated) which included Dr Hoyle, another respiratory consultant, two Occupational Health consultants from Peritus, Carol Blackledge, HR Manager, and Colin Mannion, Production Manager, both the latter of whom appeared as witnesses at this hearing. They discussed the cluster of asthma incidences and they discussed the suspicion that had arisen as to whether these were caused by the work environment. They discussed sensitizers such as rosin acids, amines, aldehydes and colophony. It was suggested that there was a need for air monitoring. There was an acknowledgement that the known results at that time were low readings of the presence of these sensitizers in the air.

2.5 At page 113 paragraph 1.6 it was indicated that the outcome was that practical steps were to be taken to see if there was a problem, and if there was a problem to identify what it was. There was no mention of risks other than to those people who were susceptible to, prone to, likely to have, asthma. The investigation, that meeting, and the tests, were respiratory disease specific.

2.6 That said, the respondent appears from its evidence to have been dealing specifically with employees A, B and C who had intimated the possibility of personal injury claims in respect of occupational asthma. Employee L who had COPD was allowed to remain on site and in a production role.

2.7 The respondent commissioned Environmental Monitoring Consultants ("EMC") to investigate, and it examined the site and carried out tests on 19 and 20 July 2016 producing a comprehensive report at pages 118-156. Part of its conclusion, which is at page 121 paragraph 2.4, says that "the level of exposure detected was easily capable of being met if suitable controls were in place", and EMC made recommendations regarding controls of emissions.

2.8 As a consequence of that the respondent carried out improvements to its extraction system and instructed EMC again to inspect, and it inspected on 23 August 2016 and produced a report that appears at pages 165-170. At page 168 paragraph 4.5 EMC concluded that the problems that they had previously identified appeared to have been successfully rectified, and those problems were probably the cause of high exposure levels, they were properly identified and the problem had been solved by work done on the extraction system. The respondent was satisfied that in so far as it might have had a problem with emissions, which it would not admit, it was now resolved.

2.9 The respondent had no rule about the deployment of pregnant workers on site at any point prior to the events concerning the claimant, save that it

would treat each person in turn on her own facts and circumstances. The respondent has a standard risk assessment for pregnant employees (an example starts at page 179) where in respect of chemical handling, "All known harmful chemicals must not be used. The required action is to inform a supervisor". Subject to that the respondent was content to allow pregnant employees to perform moulding and winding but generally not soldering. That is not a criticism but insofar as there was any rule or practice regarding pregnant workers that was it, until 3 October 2016.

2.10 On 3 October 2016, the claimant made known at work to her supervisor that she was pregnant. She told her team leader, Simon Ashworth, at the commencement of her shift at 7.00am, and Mr Ashworth acknowledged that, congratulated the claimant, but said that she could proceed to work on moulding as she had been doing ion her previous shift, and that he would tell Mr Mannion.

2.11 A little later in the morning the claimant, having noticed labelling on a chemical compound that she was using, asked Mr Ashworth about it. The labelling said that the compound was potentially harmful to the environment. It did not say it was potentially harmful to personal health and it did not refer to pregnant employees or workers. Mr Ashworth told the claimant that Mr Mannion was doing a risk assessment.

2.12 Meanwhile the claimant carried on working and completed about five hours' work on that shift, on moulding, using the compound, awaiting consultation and an explanation in due course concerning what she believed to be a risk assessment. She did not think at that point that her engagement or assignment with the respondent was at risk, but she was looking for reassurance about the use of the compound.

2.13 When Mr Ashworth informed Mr Mannion of the claimant's news, Mr Mannion was then aware that she was the second of the agency workers working on site at that time who were pregnant, and he turned to his HR Manager, Mrs Blackledge, for advice on what to do in that situation asking how to manage the fact that they had two pregnant agency workers on site. He did not approach the matter as one of conducting a routine risk assessment on the facts and circumstances of the claimant or her agency colleague.

2.14 Mrs Blackledge contacted the agency to see what it proposed, and we are told on behalf of the agency and Mr Davies, from whom we have not heard evidence but we have no reason to doubt this, that Mr Davies sought advice from the Federation of Small Businesses and ACAS. Whatever Mr Davies reported back consequently upon it, Mr Mannion started to prepare a risk assessment. The standard forms are at pages 71 and 72. Mr Mannion did not address the questions on page 72 but instead he informed Mrs Blackledge that he was going to report that there was ongoing sampling of air, there was no guarantee of the safety of pregnant employees and that the respondent was not in a position to offer suitable alternative work; that is the respondent was not prepared to engage pregnant workers on site. He confirmed that subsequently in writing in

respect of the claimant at page 182, but before that written risk assessment such as it was completed Mrs Blackledge invited Mr Davies onto the site to terminate the claimant's assignment with the respondent, or in the respondent's words "to offer her back to the agency".

2.15 The claimant met at least with Mr Davies at 12.30pm when Mr Davies congratulated her on being pregnant and ended her assignment on the spot. He informed her that there was no need for a risk assessment. He did not consult the claimant on what was advisable or possible or preferred. The respondent did not contribute to this meeting. Mr Davies took the lead. The claimant was confused as she had believed that a risk assessment was being done. She had not anticipated the end of her assignment. The assignment was terminated with immediate effect, although she was paid one week's wages in lieu of notice.

2.16 Mr Mannion had been concerned to hear that there were two agency workers who were pregnant and he sought HR advice as to how to deal with that situation. Following advice received from the agency he then approached the matter from a health and safety perspective. Mr Mannion relied on a respiratory consultant's opinion that was specific to asthma in conducting a risk assessment of the pregnant workers. He did not have any medical or chemical opinion on the effect of the chemicals in use on a pregnant woman. At the time that the risk assessment was prepared, and since Dr Hoyle's involvement, the extraction system had been improved and a clear report had been obtained by the respondent who considered that it did not have a problem. The respondent was not taking any further action or awaiting anything further from EMC. There was no ongoing air sampling.

2.17 The claimant's assignment was terminated before the risk assessment paperwork had been completed and Mr Mannion did not complete the full risk assessment nor consider the matters set out on the second page of the standard form. There was no discussion or consultation with the claimant. She was told the outcome of the respondent's deliberations. The result was that neither the claimant nor her colleague, but for our purposes we only find in respect of the claimant, had their facts and circumstances treated on their merits, but both had their assignments terminated immediately and neither had the benefit of a completed risk assessment or a discussion about one. Both left the premises before the risk assessment, such as it was, had been completed.

2.18 The claimant then submitted written questions to the respondent which were not immediately answered but attempts were made to arrange a meeting where the claimant could be represented by her trade union. For various reasons that meeting took place in the following January, and only then was an incomplete risk assessment (page 180) given to the claimant, but no detailed answers to the questions that she raised. The respondent had no evidence to support the conclusion that it was required, or that the claimant was required, to leave the site for her protection, and the assignment ended because of her pregnancy.

3. **The Law**

3.1 Section 136 of the Equality Act 2010 provides that if there are facts from which a court could decide in the absence of any other explanation that a person, in this case the respondent, contravened the Equality Act 2010, that is if it acted in a discriminatory way, then we must find that a contravention did occur. That only does not apply if the respondent shows that it did not contravene the Equality Act 2010. We must look at all the facts, ascertain if there are facts from which discrimination could be found, and see if there is an innocent explanation; it is for the respondent to show it did not contravene the Equality Act 2010 if facts are found that could lead to such a conclusion. Unless we can find a non-discriminatory explanation then there was discrimination. Section 18 Equality Act 2010 ("EA") refers to pregnancy as a protected characteristic and provides that a person discriminates against a woman if in the protected period in relation to a pregnancy of hers it treats her unfavourably because of pregnancy (section 18(2) (a) EA) (or because of illness suffered by her as a result of it).

3.2 By virtue of paragraph 2 to schedule 22 EA a person does not contravene the specified provision (such as section 18 EA) only by doing in relation to a woman anything which it is required to do to comply with variously described health and safety legislation for the protection of women set out in paragraph 2(1)(a)-(c). The references to the protection of women are references to protecting women in relation to pregnancy or maternity or other circumstances giving rise to risk specifically affecting women. Paragraph 2 applies only to the protected characteristics of pregnancy, maternity and sex.

3.3 The Management of Health and Safety at Work Regulations 1999 ("MHSWR") is a statutory provision within the meaning of the Health and Safety at Work Etc Act 1974, and amongst other things those Regulations provide:

3.3.1 At regulation 3, that every employer shall make a suitable and sufficient risk assessment of the risks to health and safety of employees to which they are exposed whilst at work, and such risk of persons not in his employment arising out of or in connection with the conduct by him of his undertaking. Any such assessment shall be reviewed if there is reason to suspect that it is no longer valid or there has been a significant change in circumstances.

3.3.2 Regulation 16 regards risk assessments in respect of new or expectant mothers where the work could involve risk to the health and safety or a new or expectant mother or that of her baby from any process or working condition or physical, biological or chemical agents. Where other required action would not avoid a particular risk, if it is reasonable to do so the employer may have to alter the woman's working conditions or hours of work to avoid such risk, and where that is not possible the employer may

suspend the employee from work for as long as it is necessary to avoid such risk.

3.3.3 Regulation 16(a) provides in respect of the alteration of working conditions for new or expectant mothers (agency workers) that again consideration may have to be given to the altering of working conditions or hours if other action would not avoid the risk but such alterations would do so, and that if such steps are ineffective in avoiding the risk then "the hirer shall without delay inform the temporary work agency, who shall then end the supply of that agency worker to the hirer".

3.4 Both counsel made submissions on the facts and law and neither took issue with the other's interpretation and references to appropriate case law. The cited case law was taken into account by the tribunal and applied to the facts where necessary although primacy was given to the application of statutory provisions.

3.5 On behalf of the respondent Mr Feeney set out the appropriate legal principles to be taken into account with which Mr Mensah for the claimant did not take exception, and the Tribunal therefore took due cognisance of these submissions, namely:

3.5.1 That a detriment constituting unfavourable treatment is an act that a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UK HL 11**).

3.5.2 The EAT in the **Commissioner of the Police for the Metropolis v Keohane [2014] ICR 1073** confirmed that the usual authorities on causation and discrimination apply to maternity related discrimination; the Tribunal must consider the reason why the employer acted as it did (as per **Amnesty International v Ahmed [2009] ICR 1450**).

3.5.3 Risk assessments do not have to be in writing and such an assessment is a matter of judgment, evaluation and examination of all the circumstances which whilst best conducted with the affected employee does not create a legal requirement for consultation or disclosure to the employee (**Stevenson v J M Skinner & Co UKEAT/0584/07/DA** at paragraphs 34 and 36).

3.5.4 Failure to consult which caused the loss of an opportunity to effect the outcome of a proposal could amount to a detriment (**Blundell v The Governing Body of St Andrew's Catholic Primary School & another [2007] ICR 1451**).

3.6 The Tribunal read Mr Feeny's skeleton argument and heard his oral submissions thereon.

3.7 Mr Mensah for the claimant confirmed all of the above principles but did not refer specifically in his written or oral submissions to authorities. The Tribunal read Mr Mensah's closing submissions on behalf of the claimant and heard his oral address thereon.

4. **Application of Law to Facts**

4.1 With that in mind we addressed the questions that were agreed by both counsel and set out, by their agreement, in Mr Mensah's submissions:

Was there sufficient consultation?

4.1.1 There was none. The claimant said she was pregnant. Her team leader said that he would inform Mr Mannion. The claimant queried the use of a compound and was told a risk assessment was being done. The claimant had her assignment terminated. She was given no information and no opportunity to say or ask more. Without information and that opportunity, she cannot really know what difference either party could have made to the situation. There was no immediate rush or urgency to deal with the matter at midday on 3 October. We cannot speculate what disclosure of information, time to think and an opportunity to address the information would have made, especially if the claimant and/or her trade union representative was made aware of the deficiencies in the risk assessment that had been partially completed after the event, and that the respondent was relying on asthma specific information. Alternative roles, personal protective equipment, altered shifts or whatever other measures were not considered.

Was the claimant given an oral risk assessment on 3 October 2016?

4.1.2 No. She was told none was needed, just the blanket prohibition on pregnant women working on site. That is not an assessment. Mr Mannion said in evidence that he acted as he did because someone had alleged that there was "something floating about in the air". That was in the context of employees A to C. That is not an assessment under the health and safety regulations, and in fact we noted that the respondent was contesting the allegation that there was "something floating about in the air" and felt it had a clean bill of health from EMC. The respondent decided to terminate the claimant's assignment without relevant evidence and with inadequate analysis. The respondent considered the fact of pregnancy as sufficient to justify termination of the assignment. In the circumstances, this was unfavourable to the claimant, who was taken by surprise, given no opportunity to question, contribute or to understand. That was unfavourable treatment. The reason for that treatment was the fact of her pregnancy.

Was there a process to find alternative work?

4.1.3 No. The respondent adopted a peremptory and blanket approach. Pregnancy meant "you cannot work on site". The respondent's aim was to remove the claimant from site because of her pregnancy and there was no process to find alternative work. HR asked the agency how to manage the two pregnant agency workers. The agency queried with the FSB and ACAS presumably, we did not hear much evidence on it, but presumably on what it could do and how it could do it.

4.1.4 Whatever those discussions were, the result was the swift termination of the assignment without further procedure or consideration. There was no evidence that the claimant was at risk elsewhere on the site or indeed working on any process (albeit the respondent acknowledged that there was a potential risk on soldering). Mr Mannion made a statement in his late risk assessment to the effect that pregnant women could not work on site. That was not a process to find alternative work.

Was the assignment ended because the respondent had to comply with health and safety regulations?

4.1.5 No. The respondent did not seek to comply with the regulations. It applied a blanket ban on pregnant women. This contrasts with its approach to L who may, for all we know, have been at risk of something floating in the air. EMC reports and Dr Hoyle did not indicate the need to exclude pregnant women for their protection. The EMC report was effectively a clean bill of health. Dr Hoyle made no reference to pregnancy and confined her opinions to her speciality; appropriately she confined her opinions to respiratory illness. We did not hear any evidence to suggest that the claimant had a respiratory illness and therefore Dr Hoyle's opinion was not relevant.

4.1.6 The respondent terminated the assignment because the claimant was pregnant without justification and not because it was required for her protection and not in compliance with health and safety regulations. Termination was a detriment, unfavourable treatment. There are facts from which we could find that the respondent has contravened section 18. The respondent has not shown it did not. We have not found any other explanation based on our findings of fact, and therefore we find that it contravened section 18 of the Equality Act 2010 and discriminated against the claimant.

Employment Judge T Vincent Ryan

Date: 22.10.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 October 2017

FOR THE TRIBUNAL OFFICE