EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mrs M Klimko		Montague Laundries Ltd

Heard at: London Central **On**: 5, 6 and 7 July 2017

Before: Employment Judge Grewal
Mr D Carter
Mr T Robinson

Representation
For the Claimant: Mr P Pem, Solicitor
For the Respondent: Mr J Heard, Counsel

JUDGMENT having been sent to the parties on 11 July 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided.

REASONS

1 In a claim form presented on 17 June 2016 the Claimant complained of unfair dismissal, race, sex and pregnancy discrimination and breach of contract in respect of notice. At a preliminary hearing on 5 August last year the complaints of race discrimination and victimisation were dismissed upon withdrawal and the issues to be determined in the remaining claims were clarified.

The Issues

2 We confirmed with the parties at the outset of this hearing that the issues that we had to determine were as follows.

Unfair Dismissal

2.1 Whether the reason or the principal reason for the dismissal was the Claimant's pregnancy;

2.2 If not, whether the Claimant had the requisite length of service to complain of ordinary unfair dismissal;

2.3 If she did, whether the reason for the dismissal was capability;

2.4 If it was, whether the dismissal was fair.

Pregnancy discrimination

2.5 Whether the Claimant was dismissed because of pregnancy or because of illness suffered by her as a result of it.

Harassment on the grounds of sex

2.6 Whether the Respondent harassed the Claimant within the meaning of section 26 of the Equality Act 2010 by engaging in unwanted conduct related to sex by her line manager asking her to work more quickly and asking her to lift more and heavier hangers than before.

Jurisdiction

2.7 Whether the Tribunal has jurisdiction to consider any complaints that were not presented within the primary time limit as extended in order to facilitate early conciliation.

Breach of contract

2.8 Whether the Claimant was entitled to one or three weeks' notice.

The Law

3 Section 18(2) of the Equality Act 2010 provides,

> "*A person (A) discriminates against a woman if, in the protected period in relation to pregnancy of hers, A treats her unfavourably –*
> *(a) because of the pregnancy, or*
> *(b) because of illness suffered by her as a result of it.*

4 Section 136(2) and (3) of the Equality Act 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of that Act, the Tribunal must hold that that contravention occurred unless A shows that he did not contravene that section. We had regard to the guidance given in **Igen Ltd v Wong [2005] IRLR258** and **Madarassy v Nomura International PLC [2007] IRLR 246** as to the application of the reversal of the burden in practice.

5 Section 99 of the Employment Rights Act 1996 ("ERA 1996"), read together with regulation 20 of the Maternity and Parental leave etc Regulations 1999, provides that an employee who is dismissed is to be regarded as unfairly dismissed if the reason or principal reason for her dismissal is connected with her pregnancy.

6 In **Ramdoolar v Bycity Ltd [2005] ICR 368** Mitting J in the EAT said,

> "*For a dismissal to be automatically unfair under regulation 20(3)(a) of the 1999 Regulations it is therefore necessary for the tribunal to be satisfied that the employer knew of, or believed in, the existence of the pregnancy. It is not enough that symptoms of pregnancy existed which arguably or in fact he ought to have realised meant that the employee was pregnant.*
>
> *To that bald statement of principle we add one possible qualification. It is conceivable that circumstances will arise in which an employer, detecting the symptoms of pregnancy and fearing the consequences, if the employer is in fact pregnant, but neither knowing nor believing that she is, simply suspecting that she might be, dismisses her before his suspicion can be proved right. In such circumstances it may well be that a dismissal would be automatically unfair."*

7 Section 108(1) ERA 1996 provides that the right not to be unfairly dismissed does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination. That section does not apply is section 99 applies (section 10893)(c)). Section 212(3)(c) ERA 1996 provides that any week during the whole or part of which an employee is absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose counts in computing the employee's period of employment.

8 Section 26(1) of the Equality Act 2010 provides,

> "*A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) The conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

Sex is a protected characteristic (section 26(5)).

The Evidence

9 The Claimant gave evidence with the assistance of an interpreter and Neil Delargy, Managing Director of the Respondent, gave evidence on behalf of the Respondent. Having considered all the oral and documentary evidence we make the following findings of fact.

Findings of Fact

10 The Respondent is a small business which provides dry-cleaning, laundry and shirt pressing services in Central and West London. It has 40 employees, the majority of whom are women and of Polish origin. A number of the female employees have become pregnant while working for the Respondent and have taken maternity leave.

11 The Claimant did some work for the Respondent in March and April 2013 shortly after she came to the United Kingdom from Poland. She was paid cash for that work. She was not given a contract of employment and processed through payroll until the beginning of June 2013 when she provided the Respondent with the relevant identity documents and details of her bank account. Her contract provided that she was employed as a Packing Operator and that she was to work 30-40 hours a week Monday-Friday. She was paid the national minimum wage for the number hours that she worked.

12 On the weekend of 1 and 2 August 2015 the Claimant learnt that her father-in-law in Poland was terminally ill and not expected to live much longer. She and her husband decided to travel immediately to Poland. She spoke to her friend Aneta who also worked for the Respondent. Aneta did not have authority to approve requests for annual leave. They decided that it would be a good idea for the Claimant to send somebody else in to do her work whilst she was away. The Claimant and her husband flew to Poland on the Sunday.

13 The Claimant did not contact her employers on the Monday and they had no information as to why she had not attended. They tried to call her on her mobile phone but there was no answer. The Claimant's friend Ania attended at the workplace on Tuesday or Wednesday and said that she was there to cover for the Claimant. She was told that it was not possible for her to do the Claimant's work because she had not been trained by the Respondent and was not employed by them.

14 On Wednesday, 5 August, the Claimant sent Mr Delargy an email explaining what had happened and apologising for not having contacted him before she left. She said that she did not want to lose her job and asked how long she could remain in Poland. Mr Delargy passed the email on to Soodesh Domun, the Accounts Manager, to respond to it. Mr Domun wrote to the Claimant that he sympathised with her position However, as the Respondent was short-staffed at that time because other employees were on holiday, it required her to attend work the following Monday on 10 August. He said that if she did not attend on the Monday the Respondent would have no option but to recruit someone else to replace her.

15 The Claimant responded that she could not return to work on Monday because there was no flight over the weekend but she could fly back on Tuesday and be back at work on the Wednesday. She asked if that would be acceptable.

Mr Domun asked her to consider whether it made sense economically for her to return to London only to have to return to Poland within a few days when her father-in-law died.
16 Around 10 August the Claimant spoke to Mr Delargy on the telephone and he explained to her that as she had not returned to work by the date instructed by the Respondent they would consider taking disciplinary action against her for her unauthorised absence from work. The Claimant said that she would resign rather than have to go through a disciplinary process.

17 On 11 August she sent Soodesh Domun an email saying that she had been forced to resign on 10 August. He that she had not been pressurised to resign but had done it over her accord. He also pointed out that in the two years in which she had been employed by the Respondent she had taken more annual leave than she was entitled to take.

18 On 11 August the Claimant sent an email to Mr Delargy resigning with effect from 3 August. She had been asked to give that particular date, the 3 August, by Mr Domunn. At the end of the month the Claimant was sent her P45 which gave her leaving date as 3 August.

19 On 8 September the Claimant sent Mr Delargy an email. She said that she had resigned for personal reasons but was returning to London on 23 September and wanted to know if the Respondent could employ her again as a packer or, if there was no vacancy for a packer, consider hiring her for a different position. She said that she understood the Respondent might be hesitant because of the circumstances in which she had left but she was prepared to give a commitment that she would stay with the Respondent for at least six months. She later clarified that what she meant by that was that she was not planning any holidays for the immediate future. The Respondent told her that there was no position in packing at that stage but if anything arose it would let her know.

20 At about that time Aneta, who was responsible for Quality Control and Order Assembly left and the Claimant was offered her role. She started in that role either in the last week of September or the beginning of October. The Claimant was paid a fixed salary for that role. As the Claimant was starting in a new role with a different start date and a different salary, a contract of employment was drafted for her around the end of October/beginning of November 2015. As there had been concerns about the Claimant's attendance and she was starting a different role, her contract provided that there would be probation period of six months during which her performance would be closely monitored. The contract also provided for a disciplinary process that would be followed if and when the employee was being disciplined or dismissed. That contract should have been given to the Claimant for her to sign but we accept that it was not given to her.

21 Sometime in late February or early March 2016 the Claimant discovered that she was pregnant having done a pregnancy test herself. The only person at work who knew that the Claimant was pregnant was another Polish woman who worked closely with her, who was also called Anneta. There was no obvious or dramatic change in the way in which the Claimant worked in March 2016 that would have indicated to any of her colleagues or management that she was pregnant.

She might well have used the clothes rail on wheels but that would not have caused anybody to think that she was pregnant.

22 The Claimant's case, as set out in her further particulars, was that Mr Delargy had harassed her on the grounds of sex by saying to her four occasions between 9 and 17 March the words "You are not working like before", "you are not fast", "quickly, quickly carry this load of hangers" and "you are no good". The Claimant accepted in cross-examination that Mr Delargy had not said those words to her.

23 There were occasions in the Claimant's second period of employment when she was a few minutes late for work. Mr Delargy spoke to her about it informally whenever it happened but he never said to her that timekeeping was an issue or that it might lead to her not being confirmed in post at the end of the probation.

24 On 21 March the Claimant did not attend work because she was unwell. She went to see a doctor in private practice on that date. She says that the doctor was a gynaecologist. He noted that she was 10 weeks pregnant and was complaining of fever, cough, chills and headache. He diagnosed her as having a viral infection. There is nothing in the doctor's notes to indicate that the viral infection was in anyway linked to the Claimant's pregnancy or that she was having a particularly difficult pregnancy. He gave her a medical certificate which said that she was unfit for work for four days from 22 to 25 March because of an infection – "catarrhalis". There was nothing on that medical certificate to indicate that he was a gynaecologist or that the Claimant was pregnant or that her illness was in any way connected with her pregnancy.

25 On 22 or 23 March the Claimant's friend Aneta gave that medical certificate to Clive Lesley, the Respondent's Operations Manager.

26 On 24 March Mr Domun sent the Claimant an email at 11.32 in which he said that her probation period was over and management had taken the decision to terminate her contract with immediate effect. The Claimant was subsequently paid one week's pay in lieu of notice.

27 The Claimant was understandably very upset to get that email out of the blue. She had not been aware that she was on probation and no one had warned her that she might not pass her probation. She thought that given the length of time she had worked for the Respondent it was wrong for her still to be on probation. She felt that she was being dismissed because she had submitted a sick note, and she thought that was unfair because it was the first time she had been off sick. She went to the office and spoke to Mr Delargy in the presence of Mr Domun and Viola, a Polish woman who worked in Accounts. The Claimant was crying and shouting and complained about the way she had been treated. Mr Delargy told her that her employment was being terminated because she had not been sufficiently engaged at work. The Claimant then told him that she was pregnant.

28 On 30 March the Claimant sent Mr Domunn appealing against the decision to dismiss her. She complained about having been dismissed while covered by a sick note, about being on probation although she had worked for the Respondent for over 2.5 years and about being dismissed without the Respondent following

any process of procedure. We think it significant that she did not say in that appeal letter that she believed that she had been dismissed because of her pregnancy. The Respondent did not process the Claimant's appeal or deal with her email.
29 At the preliminary hearing of this case on 5 August last year the Claimant was asked to provide further particulars of when she made it known to the Respondent that she was pregnant and how she made it known. In her response the Claimant said the Respondent knew that she was pregnant from the medical certificate from the gynaecologist which her friend had given to the Respondent on 22 March.

Conclusions

30 We considered first of all whether the Claimant had two years' continuous service to bring a complaint of ordinary unfair dismissal. It is clear to us that the Claimant's original employment with the Respondent terminated when she resigned unequivocally on 11 August. It was clear to both the Claimant and the Respondent that the effect of that was that her employment had been terminated. We can see that it was clear to the Respondent because it sent her a P45 at the end of that month. It is clear from the Claimant's emails in September 2015, when she asked to be re-engaged by the Respondent, that she knew her employment had been terminated and that she had to be hired again if there was a vacancy. There is nothing in the evidence to indicate that the parties agreed in August 2015 that the Claimant's employment would be treated as continuing between 3 August and whenever she returned to work. The Respondent had made it clear that if she did not return on 10 August it would recruit somebody else to replace her. Her second contract of employment had made it clear that her continuous employment started on 1 October. There was no contract of employment governing the relationship between the parties between 11 August and the end of September/beginning of October. We are satisfied that continuity was not preserved between the Claimant's employment terminating on 11 August at the latest and the end of September/beginning of October when she started her new job with the Respondent. Therefore, the Claimant does not have the requisite service to bring a complaint of ordinary unfair dismissal.

31 It follows from that that the Claimant was only entitled to one week's notice. She has been paid in lieu of that notice. The claimant was not entitled to three weeks' notice.

32 As far as the complaints of harassment are concerned we have found that Mr Delargy did not make the comments set out in the Claimant's further particulars. That was a relatively straightforward decision because the Claimant accepted in cross-examination that he had not made those comments.

33 We then considered whether the Claimant had been dismissed because of her pregnancy or pregnancy related illness. We do not find that the viral infection that the Claimant had in March was a pregnancy related illness. There is no medical evidence before us to that effect. We considered whether the Claimant was dismissed because she was pregnant. We were aware that we were considering that claim both under section 99 of the Employment Rights Act 1996 and section 18 of the Equality Act 2010. As far as the Equality Act complaint is concerned section 136 of that Act which provides for the reversal of the burden of proof

applies. That section provides that where there are facts from which we could, in the absence of any other explanation, decide that the Respondent contravened section 18 then we must decide that unless the Respondent satisfies us that it did not.

34 It is not in dispute that the Claimant was pregnant and that she was dismissed. However, those facts without more are not sufficient to establish pregnancy discrimination under section 18. A crucial element to establish a claim under section 18 is the causal link between the two. The Claimant has to establish that she was dismissed because she was pregnant. In order to establish the causal link she has to prove that Mr Delargy, who made the decision to dismiss her, knew or believed that she was pregnant. In her further particulars the evidence on which the Claimant relied to establish that he had that knowledge or belief was the medical certificate that Aneta delivered to the Respondent. However, as we have found, there was nothing in that certificate to indicate that the Claimant was pregnant. In the course of this hearing the Claimant's case appeared to be that Mr Delargy knew or believed that she was pregnant because of the impact that the pregnancy had on her ability to carry out her work. We have found that there was no obvious or dramatic change in the way she carried out her work. Therefore, there was no evidence before us from which we could conclude that Mr Delargy knew or believed that the Claimant was pregnant. It follows from that that there was no evidence of the causal link that is required under section 18. In those circumstances we did not consider that the Claimant had established a prima facie case of pregnancy discrimination. There are no facts before us from which we could, in the absence of an explanation, conclude that the Claimant was dismissed because she was pregnant.

35 That would ordinarily be the end of her pregnancy discrimination or automatic unfair dismissal claim on the grounds of pregnancy. However, we considered the reason given by Mr Delargy for the dismissal to see whether our conclusions on that would have any impact on our decision that he did not have the necessary knowledge of belief. We did not accept that the Claimant was dismissed purely because she had occasionally been late in the morning or left early in the afternoon. If that in itself was sufficiently serious not to confirm her probation and to terminate her employment, Mr Delargy would have made her aware of it earlier. We accept that it was a source of irritation and that he did speak to her about it informally. However, the trigger for the decision to dismiss the Claimant on 24 March was her unexpected absence for the whole of that week. The Respondent is a small business and any unexpected absence has an impact on its business. We find that that absence, coupled with the issues about her timekeeping and the concerns about her attendance that arose from her first period of employment, led Mr Delargy to conclude that her attendance was, and was likely to remain, unreliable and that that was the reason why her employment was terminated at that time.

36 That conclusion does not change the position and that there was no evidence that Mr Delargy knew or believed that the Claimant was pregnant, and it does not change our conclusion that pregnancy did not play a part in the decision to dismiss her. We think it is significant that when the Claimant was dismissed she did not, either on 24 March or in her appeal of 30 March, allege that the reason for her

dismissal was her pregnancy. She did not believe at the time that pregnancy was a reason for her dismissal and we think that that was because she knew that he was not aware of her pregnancy.

Employment Judge Grewal on 7 December 2017