Reserved Judgment
Combined Proceedings **Case Numbers: 2500598/2017 & 2500602/2017**

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondent*
(1) Ms E Trzecinska **(2) Ms P Giedo**	**AND**	**Mr Jan Papp** **t/a Papps Convenient Store**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **30 October-2 November 2017**

Before: **Employment Judge A M Buchanan** **Members:** **Ms L Georgeson**
Ms E Wiles

Appearances

For the Claimants: **Ms M Inkin – lay representative**
For the Respondent: **Mr R Owen – Gateshead CAB**

JUDGMENT

It is the unanimous judgment of the Tribunal that:-

Claim number 2500598/2017 – the first claimant

1. The dismissal of the first claimant was an act of pregnancy discrimination and the claim advanced by reference to sections 18 and 39(2)(c) of the Equality Act 2010 ("the 2010 Act") is well-founded and the first claimant is entitled to a remedy.
2. The claim of pregnancy discrimination in respect of a failure to carry out a risk assessment is well-founded and the first claimant is entitled to a remedy.
3. The claim of automatic unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 ("the 1996 Act") is well founded and the first claimant is entitled to a remedy.
4. The claim for wrongful dismissal is well-founded and the first claimant is entitled to a remedy.

5. The claim in respect of unpaid holiday pay advanced pursuant to the Working Time Regulations 1998 ("the 1998 Regulations") is well-founded and the first claimant is entitled to a remedy.
6. The claim in respect of the failure to allow rest breaks advanced pursuant to the 1998 Regulations is not well-founded and is dismissed.
7. The application for a declaration of unauthorised deductions from wages by reason of a failure to pay the national minimum wage is well-founded and the first claimant is entitled to a remedy.
8. The claim of harassment related to race advanced pursuant to section 26 of the 2010 Act is not well-founded and is dismissed.
9. The respondent was in breach of his obligations pursuant to sections 1 and 4 of the 1996 Act when these proceedings were commenced and the Tribunal will make an award pursuant to section 38 of the 2002 Act when dealing with remedy.

Claim number 2500602/2017 – the second claimant

1. The dismissal of the second claimant by the respondent was an act of pregnancy discrimination in the protected period and the claim advanced by reference to sections 18 and 39(2)(c) of the 2010 Act is well founded and the second claimant is entitled to a remedy.
2. The claim of pregnancy discrimination in respect of the failure by the respondent to carry out a risk assessment is well-founded and the second claimant is entitled to a remedy.
3. The claim of automatic unfair dismissal pursuant to section 99 of the 1996 Act is well-founded and the second claimant is entitled to a remedy.
4. The claim that the respondent unreasonably failed to provide a written statement of the reasons for dismissal pursuant to section 92 of the 1996 Act is well-founded and the second claimant is entitled to a remedy.
5. The claim in respect of unpaid holiday pay advanced pursuant to the 1998 Regulations is well-founded and the second claimant is entitled to a remedy.
6. The claim in respect of the failure to allow rest breaks advanced pursuant to the 1998 Regulations is not well-founded and is dismissed.
7. The application for a declaration of unauthorised deductions from wages by reason of a failure to pay the national minimum wage is well-founded and the second claimant is entitled to a remedy.
8. The respondent was in breach of his obligations pursuant to sections 1 and 4 of the 1996 Act when these proceedings were commenced and the Tribunal will make an award pursuant to section 38 of the 2002 Act when dealing with remedy.

9. The remedy hearing in respect of both claimants will take place on **Thursday 18 January 2018 at 10:00am** at the Newcastle Employment Tribunal sitting at North Shields.

REASONS

Preliminary matters

1 By a claim form filed with the Tribunal on 25 May 2017 the first claimant brought various claims to the Tribunal as detailed below. The proceedings were initially

instituted against the respondent and against Papps Convenient Store as second respondent. In relation to the respondent an early conciliation certificate showing Day A as 24 March 2017 and Day B as 24 April 2017 was referred to.

2 On 10 July 2017 the respondent filed a response to the claim of the first claimant. That response included at paragraph 5 a statement that the respondent had given the claimant two weeks notice of termination of her employment on 28 February 2017 "*as a result of the claimant allowing her partner Adam Ryba to take beer from the shop without payment*". It was further asserted that there had been no meeting between the claimant and the respondent and Renata Papova (the respondent's wife) on 8 March 2017 as referred to at paragraph 8 of the particulars of claim. It was averred that the events set out at paragraph 5 of the particulars of claim took place on 6 March 2017 and not 8 March 2017 as pleaded and the details of those events were not accepted.

3 By a claim form filed on 11 May 2017 the second claimant advanced various claims against the respondent and also Papps Convenient Store. So far as the respondent is concerned the claim form was supported by an early conciliation certificate on which Day A was shown as 18 March 2017 and Day B as 18 April 2017.

4 On 10 July 2017 the respondent filed a response in which it was asserted that the second claimant was dismissed in December 2016 by reason of "u*nsatisfactory performance at work*". It was denied that the termination of the employment of the second claimant was in any way related to her pregnancy of which the respondent asserted he was unaware in any event.

5 On 14 July 2017 the Tribunal issued a letter indicating that consideration was being given to the combination of the claims issued by the first claimant and the second claimant and comments were requested.

6 On 8 August 2017 a telephone private preliminary hearing took place before Employment Judge Garnon which resulted in orders sent to the parties on 25 August 2017. As a result of that hearing the name of the respondent was amended as set out above and any other respondent was dismissed from the proceedings. The claims of the first claimant were amended to include on the same facts as pleaded a claim of direct sex discrimination and harassment related to race. The parties were instructed to file with the Tribunal a final agreed list of issues by 23 October 2017 and other orders were made. It was noted in those orders that the stark difference in facts pleaded by the parties made it appear that one or other party was simply not telling the truth.

7 On 21 July 2017 the Tribunal issued an order combining the claims of the first claimant and the second claimant and that they be heard together.

The issues

8 The parties had filed with the Tribunal the following agreed list of issues. The Tribunal made various amendments to reflect the issues in all the claims advanced.

The first claimant

8.1 Was the respondent aware of the first claimant's pregnancy and subsequent miscarriage at the time of dismissal?

8.2 What was the reason for dismissal –

(a) was it one of the potentially fair reasons set out in section 98 of the Employment Rights Act 1996 ("the 1996 Act"); or

(b) was it because of her pregnancy (section 99(3) of the 1996 Act) and section 18(2)(a) of the Equality Act 2010 ("the 2010 Act"); or

(c) alternatively if dismissed outside the protected period was it because of her sex (section 13 of the 2010 Act)?

8.3 Did the respondent pay the outstanding annual leave entitlement on dismissal? Did the respondent pay notice pay to the first claimant on her dismissal? If not, was the respondent entitled not to make such payment? Did the respondent permit the first claimant to take daily breaks as required by Regulation 12 of the Working Time Regulations 1998 ("the 1998 Regulations")?

8.4 Did the respondent provide written particulars of employment to the first claimant?

8.5 Has the first claimant taken steps to mitigate her loss?

8.6 Did the first claimant work a 30 hour week or did she work a higher number of hours?

8.7 If the first claimant worked a higher number of hours, did the respondent pay appropriate wages to the first claimant?

8.8 Did the respondent fail to carry out a risk assessment for the first claimant when pregnancy became known?

8.9 Did the comments of the witness Renata Papova on 25 March 2017 amount to an act of harassment related to the race of the first claimant? If so, is the respondent responsible for the actions of Renata Papova?

The second claimant

8.10 Was the respondent aware of the second claimant's pregnancy at the time of dismissal?

8.11 What was the reason for dismissal –

(a) was it one of the potentially fair reasons set out in section 98 of the 1996 Act; or

(b) was it because of her pregnancy (section 99(3) of the 1996 Act and section 18(2)(a) of the 2010 Act)?

8.12 Did the respondent provide written reasons for dismissal?

8.13 Did the respondent pay the outstanding annual leave entitlement on dismissal? Did the respondent permit the second claimant to take daily breaks as required by Regulation 12 of the 1998 Regulations?

8.14 Did the respondent provide written particulars of employment?

8.15 Has the second claimant taken steps to mitigate her loss?

8.16 Did the second claim work a 35 hour week or did she work a higher number of hours?

8.17 If the second claimant worked a higher number of hours, did the respondent pay appropriate wages to the second claimant?

8.18 Did the respondent fail to carry out a risk assessment for the second claimant when her pregnancy became known?

The claims

9 Accordingly the claims before the Tribunal were these:-

9.1 A claim by both claimants of automatic unfair dismissal pursuant to section 99 of the 1996 Act.

9.2 A claim by the second claimant of dismissal because of pregnancy being an act of pregnancy discrimination under section 18 of the 2010 Act.

9.3 A claim by the first claimant that the act of dismissal was an act of pregnancy discrimination or sex discrimination if the dismissal occurred outside the protected period.

9.4 A claim from both claimants for unpaid annual leave.

9.5 A claim from both claimants in respect of not being allowed daily rest breaks.

9.6 A claim from both claimants for a declaration in respect of unauthorised deductions from wages based on a failure by the respondent to pay the national minimum wage/national living wage.

9.7 A claim from the second claimant in respect of failure to provide written reasons for dismissal.

9.8 Consideration of whether or not written terms and conditions of employment had been provided to the claimants so as to give rise to the Tribunal's duty under section 38 of the Employment Act 2002.

9.9 A claim of wrongful dismissal – failure to pay notice pay – in respect of the first claimant.

9.10 A claim of harassment related to race in brought by the first claimant in respect of an incident on 25 March 2017.

9.11 A claim of detriment from both claimants in respect of the alleged failure by the respondent to carry out a risk assessment in respect of the pregnancy of both the first claimant and the second claimant.

Witnesses

10 During the course of the hearing the Tribunal heard from witnesses for the claimants as follows:-

10.1 Grazyna Betcher;

10.2 Karolina Swiadek;

10.3 Marta Filipczak;

10.4 Teresa Raburska;

10.5 Szymon Leper;

10.6 Malgorzata Kieras;

10.7 Adam Ryba ("AR");

10.8 The second claimant;

10.9 The first claimant.

11 For the respondent evidence was heard from:-

11.1 The respondent himself;

11.2 Renata Papova ("RP") – the wife of the respondent.

12 In addition the claimants tendered a statement from Lenka Kokyova. This witness did not attend and the witness statement was not signed. In those circumstances the Tribunal took no regard of that statement.

Documents

13 The Tribunal had before it an agreed bundle of documents extending to 96 pages. Any reference to a page number in this judgment is a reference to the corresponding page within the bundle.

Submissions

14 The representatives made oral submissions to the Tribunal which are briefly summarised.

15 **The respondent**

15.1 The legal position in respect of these claims is straightforward. The matter will stand and fall on findings of fact.

15.2 This is a small local business which serves the Polish community. The respondent is not well versed in employment law and relies heavily on his accountant.

15.3 It is clear that one or other of the parties is not telling the truth. The respondent asserts that that is the claimants and that they are motivated to gain money from him. It is for the Tribunal to decide on the balance of probabilities where the truth lies. The documents at pages 69-73 support the respondent's position.

15.4 The letter of dismissal at page 68 supports the respondent's position. The claimants have not produced any evidence to support their contention that they worked more hours than they were paid for.

15.5 Account should be taken of the fact that RP is the mother of four children herself and would not treat pregnant employees of her husband as it has been asserted she did.

15.6 It is agreed that written particulars of employment were not provided to either claimant and it is agreed that holiday pay accrued at the time of termination of employment was not paid. It is agreed that no risk assessment was carried out for either claimant but the reason for that is of course that the respondent did not have knowledge of the pregnancy of either claimant. It is not agreed that the claimants were not allowed breaks from their work. Whilst there were no formal break periods the claimants were allowed to take breaks as and when they wished during the course of their employment. It is accepted that written reasons for dismissal were not given. None were requested and none were given because the respondent did not know of the pregnancy of either claimant.

15.7 In respect of the claims for unpaid wages the documents show that the first claimant worked 30 hours per week and the second claimant 35 hours per week. It is accepted that the method of payment was in cash but four weekly wage slips were produced by the respondent's accountant and provided. It is submitted that the wage slips were accurate. When either claimant worked additional hours this is reflected on the wage slips which are before the Tribunal. Both claimants accept that they did not complain to the respondent about the underpayment of hours. It is inconceivable they would not have done so if the situation was as they now assert it to be. It is submitted that the hours and wages should be accepted pursuant to the respondent's version of events.

15.8 In respect of the pregnancy of the claimants the respondent simply did not have knowledge of either pregnancy. The Tribunal was asked to accept the respondent's evidence on that point.

15.9 The reason for dismissal in relation to the second claimant was her unsatisfactory performance and the fact that it had been agreed that her employment would not last beyond Christmas 2016. The dismissal of the second claimant was nothing whatever to do with her pregnancy.

15.10 In respect of the first claimant, the respondent was not aware of her pregnancy. The respondent says that he dismissed the first claimant on 28 February 2017 but he did not follow that through because on 6 March 2017 the first claimant began sick leave. There is a mistake in the claimant's claim that a meeting took place on the 8 March 2017 whereas it should have referred to the 6 March 2017 and the Tribunal must take that into account when assessing credibility. There is a dispute in relation to the events of 6 March 2017 and the respondent's version should be preferred. If the situation was as bad as the first claimant expresses it to be, it is not credible that she would have waited four hours in the workplace before going to hospital.

15.11 In relation to the meeting of 8 March 2017, it was submitted that the remarks of the first claimant's boyfriend Adam were inflammatory and it is clear that emotions were running high.

15.12 In relation to the incident on 25 March 2017, there is a dispute as to how that matter came about but the evidence of RP should be preferred to that of the first claimant and her boyfriend. In any event the words which were said were not related to the first claimant's race. Words which were spoken related to the fact that the first claimant should return and look after her children, whether those children were in Poland or any other part of the world. The words were not related to race.

16 **Claimants**

16.1 It was submitted that the evidence of the claimants and their witnesses and that of the respondent and his wife were so starkly different that one version simply must not be correct.

16.2 It was submitted that the first claimant worked more than the 30 hours per week shown on the documents and the second claimant worked more than the 35 hours a week shown on the documents. In both cases it is their evidence that they worked not less than 48 hours in any given week. Both claimants assert that they would begin work in the morning and work a full day between four and six days in any one week. They worked a total of 48 hours each week and in some weeks considerably longer up to 70 hours. The respondent has not shown the contrary. The respondent has produced no CCTV recordings or schedules or diaries or rotas evidencing the hours which the claimants are said to have worked. The documents speak against the respondent's version of events.

16.3 Under the National Minimum Wage Regulations 2015 the respondent has a duty to maintain wage records for three years and to give the claimants access to those records – section 10 of the National Minimum Wage Act 1998. The respondent has

failed to produce any evidence to show that the claimants were paid in accordance with the national minimum wage.

16.4 It was submitted that the Tribunal should accept the evidence of the claimants that in fact there were 146 hours each week to be worked between three employees which gives an average of 49 hours per employee per week and that does not take account of holidays or illness or any other matter. There is a minimum hours worked of 49 per week in the case of each claimant throughout their employment. The burden lies with the respondent under section 28 of the 1998 Act and the respondent has not discharged that burden.

16.5 The claimants cannot prove the number of hours which they worked but they are not obliged so to do. They had to work long hours for low pay in circumstances of economic duress. They are in a foreign country and have little or no English and would not easily find employment elsewhere and so could not afford to upset the respondent or to lose their employment. The Tribunal should take those factors into account.

16.6 In relation to the claims for unpaid annual leave both claimants were told that they would not be paid for any holidays they took. The first claimant took a holiday from 15 to 22 August 2016 but the second claimant took no holidays. The claim for unpaid holiday pay has been accepted.

16.7 In relation to the second claimant it is submitted that the reason she was dismissed was because of her pregnancy. It is agreed that she was dismissed but the reason provided by the respondent is not accepted. There is extensive evidence that the respondent knew about the second claimant's pregnancy before he dismissed her and therefore the dismissal was related to the pregnancy. The second claimant denied that she was told she would only work until Christmas and she was never told that her work was of a poor standard.

16.8 In relation to the first claimant it was submitted that the decision to dismiss the first claimant was made before her subsequent miscarriage sometime in February 2017 and before 8 March 2017 and therefore the decision to dismiss made at that time is an act of maternity discrimination. If the decision to dismiss however was taken after 8 March 2017 and before 13 April 2017, then it is outside the protected period and becomes an act of sex discrimination and no comparator is required.

16.9 In relation to the incident on 25 March 2017, it was submitted that RP is an employee of the respondent but even if not in the circumstances of the case she is an agent of the respondent. She had a bank account in her name from which wages were paid to the claimants. She was very much involved in the business. She worked in a business next door to the Convenient Store and therefore the respondent is responsible for the actions of RP. The conduct in question did violate the dignity of the first claimant or it created for her the prohibited environment and it was intended so to do. It is submitted that it was related to the race of the claimant in the way that the words were spoken.

16.10 The dismissal of the first claimant was wrongful and she is entitled to one week's notice pay.

16.11 The allegation of blackmail on the part of the witness on 10 March 2017 is not accepted. That event did not take place. No report has been made to the police about it.

The Law

17.1 We reminded ourselves of the relevant statutory provisions in this case as follows:-

Section 13 of the 2010 Act

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.....

(6) If the protected characteristic is sex--

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 11 of the 2010 Act

11 Sex

In relation to the protected characteristic of sex--

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

Section 18 – Pregnancy and maternity discrimination: work cases

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

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably--

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends--

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as--

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

Section 39 of the 2010 Act

(2) An employer (A) must not discriminate against an employee of A's (B)--

(c) by dismissing her; or

(d) by subjecting B to any other detriment.

We reminded ourselves of the definition of harassment contained in section 26 of the 2010 Act.

Employment Rights Act 1996

99 Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if--

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to--

(a) pregnancy, childbirth or maternity …

Maternity and Parental Leave etc Regulations 1999

Regulation 20

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if –

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with –

(a) the pregnancy of the employee.

17.2 We note that the burden of proof to establish the reason for dismissal of an employee lies with an employer except where an employee lacks the qualifying service to advance a claim of ordinary unfair dismissal in which circumstance the burden lies with the employee – **Smith –v- Hayle Town Council 1978 ICR 996.**

17.3 We have noted the guidance of the EAT in **Atkins –v- Coyle Personnel plc 2008 IRLR 420** that the words "connected with" in the Maternity and Parental Leave etc Regulations 1999 means causally connected with rather than merely associated with. It is a matter for the Tribunal to consider as a matter of fact whether there is a connection between the pregnancy of an employee and the dismissal.

18 We have reminded ourselves of the provisions of the Working Time Regulations 1998 in respect of daily breaks and annual leave and in particular the provisions of regulations 12-17 of the 1998 Regulations.

19 We have reminded ourselves of the provisions of Part II of the 1996 Act in respect of the right not to suffer unauthorised deduction from wages.

20.1 We have reminded ourselves of the National Minimum Wage Act 1998 ("the 1998 Act") in particular section 28 which reads:-

(1) Where in any civil proceedings any question arises as to whether any individual qualifies or qualified at any time for the national minimum wage it shall be presumed that the individual qualifies or as the case may be qualified at that time for the national minimum wage unless the contrary is established.

(2) Where –

(a) a complaint is made –

(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deduction from wages),or
(ii) … and

(b) the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above,

it shall be presumed for the purposes of the complaint so far as relating to the deduction of that amount that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.

20.2 We have reminded ourselves of the National Minimum Wage Regulations 2015 ("the 2015 Regulations") and regulation 59 which reads:-

(1) The employer of a worker who qualifies for the national minimum wage must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at the rate at least equal to the national minimum wage.

(2) The records required to be kept in paragraph (1) are to be in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document.

(8) The records required to be kept by this regulation must be kept by the employer for a period of three years beginning with the day upon which the pay reference period immediately following that to which they relate ends.

(9) The records required to be kept by this regulation may be kept my means of a computer.

21.1 We have reminded ourselves of the provisions of the Management of Health and Safety at Work Regulations 1999 and in particular the general obligation to make a suitable and sufficient risk assessment under Regulation 3 and the specific duty to carry out a risk assessment in respect of new or expectant mothers under Regulation 16. We have noted the provisions of Regulation 18 in respect of the requirement for notification in writing before any duty in respect of Regulation 16(2) or (3) arises.

21.2 We have noted that the general duty to make a risk assessment under Regulation 3 taken with Regulation 16(1) arises not by reason of any particular pregnancy being notified but simply because an employer employs one or more women of childbearing age. We note that an employee who has not provided any form of written notice of pregnancy cannot complain about the lack of an individual risk assessment. We have reminded ourselves of the decision of the EAT in **Hardman –v- Mallon 2002 IRLR 516** where Lindsay J stated that a failure to carry out a Regulation 3 general risk assessment had a disparate impact on pregnant workers and thus a failure to carry out the general risk assessment constituted sex discrimination.

21.3 We have reminded ourselves of the decision of the EAT in **Indigo Design Build and Management Limited –v- Martinez EAT 0020/2014** and the guidance of HH Judge Richardson that a failure to carry out an individual risk assessment still requires consideration of the mental processes of the alleged discriminator and the Tribunal should apply the same process of reasoning to that question as to any other discrimination claim.

22 The witnesses

Because we need to make findings of fact in this case which are dependent on our assessment of the credibility of the witnesses, we set out briefly our comments in respect of the witnesses who were called before us:-

22.1 Graznya Betcher – We found this witness credible. The witness told us that she did not receive a written contract from the respondent and the respondent accepts that that was so. Her evidence in relation to the working hours and the failure to pay the national minimum wage by the respondent at the Convenient Store was accepted by us.

22.2 Karolina Swiadek – We accepted that this witness gave credible evidence although it was of limited assistance to the Tribunal. We accepted her evidence that there was a conversation between her and the second claimant in December 2016 to the effect that her employment was coming to an end because of her pregnancy and the fact that the respondent was not happy about that.

22.3 Marta Filipczak – The Tribunal was not assisted by the limited evidence from this witness.

22.4 Teresa Raburska – It was clear that this witness had had a friendly relationship with RP but that relationship had broken down. To that extent we were cautious with the evidence from this witness. However we were satisfied that this witness attempted to act as peacemaker between the respondent and the second claimant and we are satisfied that she did approach the respondent in December 2016 to seek to preserve the employment of the second respondent. To that extent we consider this witness to give us corroborative evidence that the reason for the dismissal of the second claimant was related to her pregnancy. We are satisfied that this witness mentioned a figure of £6,000 when discussing matters but it is not clear to us where that figure came from.

22.5 Szymon Leper – This witness is the partner of the second claimant and the father of her child. We accepted the evidence of this witness that there were no performance issues raised by the respondent with her so far as he was aware and that the second claimant had made the respondent aware of her pregnancy before she was dismissed. We accept that this witness was not present when the second claimant told the respondent of her pregnancy.

22.6 Malgorzata Kieras – We found this witness to be credible and were assisted by her evidence that the second claimant did not seek to hide knowledge of her pregnancy in December 2016 which was widely known in the local community. We accept that she was told by the second claimant that pregnancy was the reason she would be leaving at Christmas 2016.

22.7 Adam Ryba ("AR") – We noted this witness to be the partner of the first claimant and treated his evidence with some caution. We accepted the evidence of this witness that the pregnancy of the first claimant was made known to RP in January or early February 2017 and that RP expressed some surprise at the fact of the first claimant's pregnancy. We considered the events of 6 and 8 March 2017 and preferred the version provided by this witness and the first claimant to that provided by the respondent and RP. There was consistency in the evidence given by this witness and the first claimant.

22.8 The second claimant – We found this witness to be credible. Her evidence was not damaged in cross-examination. We accepted that she had made the respondent aware of her pregnancy in December 2016 and that the respondent had said that he would effectively make her redundant in December 2016 and that her pregnancy put the respondent in an unfavourable position.

22.9 The first claimant – We assessed the first claimant as a credible and reliable witness. There was an error in her claim form which referred to the difficulties she had with her pregnancy on 8 March 2017 rather than 6 March 2017 but other than that matter she gave evidence which we found reliable and credible and her evidence was not damaged in cross-examination.

22.10 The respondent – gave evidence which was internally inconsistent and inconsistent with documents produced. The respondent had given one reason for the dismissal of the second claimant in his form of response which was not carried through to his witness statement. We did not accept that the respondent was unaware of the pregnancy of the second claimant when he moved to dismiss her. The same was true of the first claimant. The respondent stated in his response that the first claimant was dismissed for allowing her partner to take beer from the shop whereas that and other reasons were referred to in the respondent's witness evidence but that reason was not referred to in documents issued by him at the time of the dismissal of the first claimant. We did not accept the evidence of the respondent that he was unaware of the pregnancy of the second claimant when he allegedly dismissed her in February 2017. There was ample evidence to the contrary. In any event, we do not accept that the respondent dismissed the first claimant at all in February 2017. In addition the documents provided by the respondent were concerning. The documents in respect of the income of the second claimant at page 77 showed no tax paid in the period up to the date of dismissal whereas payslips provided to the second claimant at page 72 showed tax paid in November 2016 totalling in that year £106.00. Those documents caused us concern. The respondent was evasive in cross-examination and we found him generally to be an unreliable witness.

22.11 Renata Papova ("RP") – this witness gave evidence in a forceful way and denied having any knowledge of the pregnancy of either claimant and claimed to have limited knowledge of the events of 6 March 2017. The Tribunal did not accept that that evidence was reliable or credible.

23 The respondent accepted that he did not make payment of holiday pay to the claimants. The respondent did not appreciate that he had a duty under the Working Time Regulations 1998 to pay minimum holidays to the claimants or to allow daily breaks. The respondent did not appreciate he had a duty to issue terms and conditions of employment. The respondent denied not having paid the minimum wage/living wage

to the claimants but his lack of knowledge in respect of his obligations in respect of holiday and contractual documents gave us cause to consider that he equally disregarded the law or was ignorant of the law in respect of payment of the national minimum wage. We accept that the claimants were paid in cash but we do not accept that the pay advices provided to us were accurate or were provided to the claimants at the time they were prepared. Those documents are internally inconsistent in some regard and gave us cause for very serious concern about the way the respondent conducts his business and his duties towards his employees.

Findings of fact

24 Against that background and our assessment of credibility and having considered all the evidence given to us both documentary and oral we make the following findings of fact on the balance of probabilities:-

General Matters

24.1 The convenience store ("the Store") in which the claimants worked was owned by the respondent. His wife RP owned a Food Takeaway next door to the Store at all material times. Adam Ryba – the partner of the first claimant – worked in the Takeaway until he was dismissed by RP on 7 March 2017. He had worked there for a matter of a few months only.

24.2 Besides family members, the respondent had other employees working for him in the Store at various times. The Store opened seven days per week and only closed on Christmas Day and Boxing Day. The opening hours were 9am until 9pm Monday – Thursday inclusive, 9am until 10pm on Fridays, 10am until 10pm on Saturdays and 1pm - 8pm on Sundays. There were not less than two employees in the Store at any one time. The respondent and his family would cover the opening on Sundays. Thus on the other six days of the week the Store was open for 73 hours per week. This meant 146 hours of work were available to the counter assistant employees serving in the Store. We accept that those working hours were covered by three employees and the three employees included the claimants during the respective periods of their employment. Thus the claimants worked not less than 48.66 hours per week on average but from week to week this could be more and we accept the evidence of the claimants that they worked more than 48.66 hours in most weeks.

24.3 The respondent did not maintain written records of hours worked by his various members of staff. Such weekly rotas as were prepared were destroyed at the end of the week. The staff were paid in cash on a weekly basis. At the end of each four week period, the accountant of the respondent would produce a salary slip for each employee from information provided to him by the respondent. That exercise resulted in the production of monthly payslips which were sometimes but not invariably given to the employees. The monthly amounts shown due on the payslips often bore no relation to the cash sums which the employees had by that time received. The hours worked by the individual claimant as shown on the payslips bore no resemblance to the hours that claimant had worked but were constructed in such a way as to seek to evidence that the employees had been paid at the rate of the national minimum wage. The number of hours worked as shown on the payslips in the bundle is not reliable.

24.4 We accept the second claimant's evidence that she worked a rota which meant she worked either four or more days per week for which she received in cash £55 per day: if she worked on a Friday she would receive £60 for that day. The resulting amount was received weekly and net. The payslips produced for the second claimant (pages 72 and 73) indicated that on 12 November 2016 she had paid £106 in income tax but that figure was not carried through to the P45 relating to her (page 77) dated 3 July 2017 (seven months after her employment ended) which showed no income tax paid in the tax year ended 5 April 2017. On her last payslip dated 23 December 2016, the second claimant was shown as having paid employee national insurance contributions of £157.08. No evidence of the payment over to the appropriate authorities was before us of either income tax or national insurance contributions in respect of either claimant. The payslips produced for the second claimant show the rate of her pay to be £6.95 per hour throughout. Given the age of the second claimant this was the amount of the national minimum wage at all relevant times. The P45 produced on 3 July 2017 for the second claimant shows a total gross payment to her of £3475 which divided by £6.95 produces exactly 500 hours worked. We are satisfied that the second claimant worked considerably more hours than that for the respondent during the period of her employment. It is not plausible that the second claimant worked exactly 500 hours for the respondent given the type of shifts she undertook.

24.5 We accept the first claimant's evidence that she worked a rota which meant she worked either four or more days per week for which she received in cash £55 per day but that sum increased to £65 per day when she was appointed a manager in January 2017. We prefer her evidence to that of the respondent to the effect that she remained paid at that level until her sickness absence began on 6 March 2017. The payslips produced in respect of the first claimant (pages 69-71 with the exception of page 71a when she was paid sick pay) show her being paid at the rate of the national living wage namely £7.20 in respect of either 30 or 40 hours worked each week. We are satisfied that the first claimant worked considerably more hours each week. We were shown various receipts said to have been signed by the first claimant at page 74. We accept that those receipts were not signed by the first claimant when she received her weekly wage in cash but rather were produced every few months for her signature and that she signed them because she was required to do so by the respondent. Without any payslips to match the dates on those receipts, we are unable to draw conclusions from them. We were shown a P60 (page 76) produced for the first claimant at the end of the tax year 5 April 2017. That showed the first claimant had received £8040.67 gross in that tax year. She had been ill from 6 March 2017 and had received statutory sick pay from that date until 5 April 2017. If the gross amount of £8040.67 is divided by the period of 48 weeks from 6 April 2016 until 6 March 2017 that equates to a weekly gross sum of £167.51 which if divided by £7.20 produces 23.26 hours worked each week. We find that the first claimant worked hours much in excess of that amount each week. The P45 for the first claimant (page 75) covering as it does only the period from 6 April 2017 until 13 April 2017 namely a period when the first claimant was receiving only statutory sick pay does not assist us.

24.6 The respondent's wife RP was closely involved with the running of the business in which the claimants were employed. The business used a bank account in her name as evidenced at page 85. She ran a business next door and was a frequent visitor to the Store and would often check on stock and the activities of employees. Whilst the respondent was the owner of the business and had the final say on business decisions,

he was greatly influenced by the views of RP who to the employees and customers using the Store appeared as much an owner as did the respondent.

The employment and dismissal of the second claimant.

24.7 The second claimant was born on 5 December 1994. She began work for the respondent on 16 August 2016 and was dismissed effective from 23 December 2016. In evidence the respondent sought to say that her employment began on 19 September 2016 after a training day on 16 August 2016. We reject that evidence. First, because in his form of response the respondent accepted those dates were correct and secondly, because it is inherently unlikely that a training day for employment would occur so long before the employment began.

24.8 The second claimant became aware that she was pregnant with her first child in December 2016. She shared the news with her partner on or around 11 December 2016 and then two or three days later shared the news with the respondent. A conversation took place in the Store between the second claimant and the respondent when the second claimant told the respondent she was pregnant and the respondent told the second claimant that he must now dismiss the second claimant because her pregnancy had put him in an unfavourable position. The respondent noted that the second claimant would not be able to carry heavier loads and that others would not agree to complete her duties. The respondent at first advised that the second claimant could work until the end of the month but then decided that she would have to leave at Christmas. The second claimant therefore was dismissed by the respondent with effect from 23 December 2016. In the period from the day she was given notice of dismissal until 23 December 2017, the second claimant worked fewer hours and only worked between 6 to 8 hours per day in order not to push herself. No risk assessment was carried out by the respondent: the second claimant did not ask for one to be carried out. The second claimant did not advise the respondent of her pregnancy in writing – the notification was oral.

24.9 In reaching our conclusion as to the events set out in 24.8 above we prefer the evidence of the second claimant to that of the respondent. We do so for several reasons. First, in his response to this claim the respondent asserted that he had had a conversation with the second claimant in mid-December 2016 about the unsatisfactory performance of her duties and that he would employ her to Christmas but no longer. That alleged conversation was nowhere evidenced in writing and there was simply no corroborative evidence of it. Secondly, in his witness statement the respondent did not assert that he dismissed the second claimant because of her performance. Thirdly we accept the evidence of the second claimant that she did not keep her pregnancy a secret and we accept she was delighted to share the news of it and did so with various customers from whom we heard in evidence. We refer to and accept the evidence of Karolina Swiadek and Teresa Raburska in this regard.

24.10 The second claimant took no holidays during her brief period of employment and no holiday pay was paid to her on termination of her employment. The second claimant was not given written reasons for her dismissal. The second claimant was not given a statement of terms and conditions of her employment by the respondent at any time.

24.11 In common with all other employees in the Store, the claimant was allowed to take breaks during quiet periods in the working day. The breaks were not formally arranged but were taken. The second claimant instituted proceedings against the respondent on 11 May 2017.

The employment and dismissal of the first claimant

24.12 The first claimant was born on 29 March 1971 and worked for the respondent from 1 March 2016 until 13 April 2017. She was aged 46 years at date of dismissal.

24.13 The first claimant became aware that she was pregnant in late January 2017 and her partner AR, who was at that time working for RP in the Takeaway, told RP of the pregnancy. The first claimant herself also told RP of the pregnancy some days later whilst RP was spending time in the Store. We accept the evidence of the first claimant that RP was not pleased to hear the news and indeed expressed some scepticism about the fact of the pregnancy when first hearing of it. On or around 7 February 2017 we accept that the first claimant had a conversation with the respondent and told him of her pregnancy: it was clear to the first claimant that the respondent already knew of the matter. The respondent was not pleased to hear the news and asked the first claimant what she was going to do as she was earning more than her partner was earning from the Takeaway run by RP.

24.14. No risk assessment was carried out by the respondent for the first claimant at any time in light of the pregnancy. At no time did the first claimant advise the respondent of the pregnancy in writing.

24.15 In late February 2017 the respondent and RP returned to the Czech Republic for a family funeral and were absent for some six days between 19 and 25 February 2017. At that time the first claimant was in charge of the Store and she and other employees worked additional hours to cover the work ordinarily undertaken by the respondent. The respondent had appointed the first claimant to act as manager of the Store in January 2017 and this remained her role until her dismissal.

24.16 It was the case of the respondent that at the end of February 2017, in a conversation, he dismissed the first claimant by reason of misconduct and gave her two weeks' notice. In his witness statement the respondent stated that the reason for dismissal was the unsatisfactory timekeeping of the first claimant, her drinking alcohol in the Store whilst on duty and allowing her partner to take alcohol from the Store without paying for it. In the form of response the respondent had stated only that the reason for dismissal was allowing AR to take beer from the shop without paying for it. The first claimant stated that that conversation simply did not happen and that it was made up by the respondent to explain later events. We prefer the evidence of the first claimant for three reasons. First, there was no written evidence of the dismissal of the claimant on 28 February 2017 produced by the respondent. The respondent did put the later dismissal of the claimant in writing on 13 April 2017 and we therefore wonder why he did not do the same in February 2017. Secondly, the matters the respondent stated were his reason for dismissal in February 2017 were serious matters and included the claimant effectively stealing from the respondent. Is it likely that the respondent would effectively ignore that act of gross misconduct and leave the first claimant in post for two weeks without restriction on her? We think not. Thirdly, the respondent did not require

the first claimant to leave at the end of her notice period namely on 14 March 2017 but continued to pay her sick pay until he did dismiss on 13 April 2017. Thus we conclude that event did not happen and there was no dismissal of the claimant on 28 February 2017: that event was made up by the respondent.

24.16 On 6 March 2017 the first claimant attended at the Store as usual to open it. It was a Monday. The claimant was lifting the heavy roller shutters outside the Store when she felt unwell and felt a strong pain in her stomach area. The first claimant at first ignored the pain but it did not abate. The first claimant telephoned the respondent to report that she felt unwell and he came to the Store at around 12.15pm and stated that there was no one else he could call to take over from her and that she must remain in post. The first claimant then called her partner who came to the Store to see her. He tried to call the respondent without success and so he telephoned RP who was at home as it was her day off from the Takeaway. She did not take kindly to being disturbed and said that she needed to rest. The first claimant was in pain and had started to lose blood and so AR telephoned the respondent and he came to the Store at around 3pm.. The respondent arranged for his son to come to the Store to cover for the first claimant and he arrived at around 3.50pm and then the first claimant left with her partner and went to hospital. The first claimant was seen in hospital for around 4 hours but then released and told to rest. On 7 March 2017 the first claimant felt unwell again and returned to the hospital. She was then told she had miscarried her pregnancy and was required to stay in hospital overnight and was released around 1pm on Wednesday 8 March 2017. In making these findings, we prefer the version of events of the first claimant and her partner to the respondent and RP. We were asked to consider by Mr Owen whether it was likely that a woman in danger of losing her child would wait in a shop for some 6 hours before leaving for the hospital. We have considered that submission. Like the second claimant, the first claimant is a person who speaks little English and is vulnerable to the loss of employment. We accept that the first claimant did not want to jeopardise her continued employment with the respondent and indeed did not fully realise the gravity of her situation on 6 March 2017 when she waited for cover to arrive before leaving for the hospital.

24.17 In the meantime, whilst AR was at the hospital with the first claimant on 6 March 2017, he received a call from RP asking him to return to her a computer which he had taken away to repair for her. He took the computer to the Takeaway on 7 March 2017 and spoke to RP. Having returned the computer, he was dismissed from that employment by RP. They did not part on good terms. The reasons given were that he had had no right to telephone RP on the day before asking her or her son to cover for the first claimant and that he had not come into work at the Takeaway on 6 March 2017 and should have done so.

24.18 Having been released from hospital with a sick note, the first claimant went with her partner to the Store to hand it over and to make arrangements for her absence. When she arrived the respondent asked her to go into the store room at the rear of the Store. The first claimant handed over a statement of fitness for work (page 64) which indicated that she would not be able to work for 10 days by reason of miscarriage. At the same time a heated exchange took place in the front part of the Store between RP and AR. AR told RP (who was filling shelves) that she had killed their baby and an unpleasant scene ensued. RP was angry and went to find the respondent and the first claimant in the stock room. RP told the respondent that the first claimant would not be

able to work for at least six weeks and she told the respondent to dismiss the first claimant. The conversation was heated on all sides and so the first claimant and AR left the Store. When she left the Store the first claimant was unsure whether or not she was still employed.

24.19 The first claimant received a fitness note (page 65) which stated unfitness for work until 26 March 2017 and then a further note (page 66) which gave unfitness until 7 April 2017. The respondent refused to accept the second note and the first claimant had to seek advice from the Citizens Advice Bureau on that matter. The respondent subsequently accepted the notes and the claimant was paid sick pay from 8 March 2017 until 7 April 2017. On 24 March 2017 the claimant contacted ACAS in relation to this matter for early conciliation.

24.20 On 25 March 2017 the first claimant and AR were outside the Store speaking to some people whom they knew. RP was made aware that they were there and she left the Takeaway and challenged them in the street. RP thought that the first claimant and AR were seeking to dissuade customers from entering the Store and a heated and unpleasant exchange took place. RP accused the first claimant of having sat on the respondent's knee at a party and that she was a bitch and a whore and was behaving like a prostitute. RP told the first claimant to get back to Poland to look after her disabled child whom she had left there. A crowd gathered and the parties were separated.

24.21 On 13 April 2017 (page 68) the respondent sent the first claimant a letter of dismissal effective from that day. The reason given for the dismissal was that the first claimant had allegedly behaved badly whilst at work by *"blaming and talking bad about other workers at the shop.... in addition you regularly turn up late and don't start work at 9:00am as you were supposed to and have not been able to perform your duties properly...The grounds of dismissal are primarily due to your behaviour and coming to work later very often".* In addition the respondent referred to the first claimant speaking very ill of the Store and that as a result many customers had avoided coming to the Store. The first claimant was asked to desist. The letter ended – *"Many thanks for working at my shop and I hope you are able to get better soon but I write to confirm for the avoidance of doubt that you are no longer employed by me".* The claimant was dismissed without any opportunity to discuss matters with the respondent and no appeal was offered.

24.22 Proceedings were instituted by the first claimant on 25 May 2017 and by the second claimant on 11 May 2017.

Discussion and Conclusions

The claims of the first claimant

The claim of pregnancy/sex discrimination in respect of dismissal and the failure to carry out a risk assessment

25.1 We have first considered the claim of pregnancy/sex discrimination pursuant to the provisions of sections 18/13 of the 2010 Act in respect of the dismissal of the first claimant.

25.2 We conclude that the decision to dismiss the claimant was taken by the respondent on 8 March 2017. We reject the evidence of the respondent that he had dismissed the first claimant for reasons related to her conduct on 28 February 2017. That did not happen. However, on 8 March 2017 a heated discussion took place between the first claimant and the respondent and in which RP joined. We are satisfied that RP told the respondent that the first claimant would not be able to give regular service as a result of her illness but that illness was related to her failed pregnancy. The respondent accepted that he was advised not to dismiss the first claimant whilst she was ill but as soon as the illness was at an end, he moved to dismiss her on 13 April 2017. By then the protected period in respect of the first claimant's pregnancy had come to an end.

25.3 We have considered whether the decision to dismiss was taken in the protected period in respect of the first claimant's pregnancy by reference to the definition in section 18(6) of the 2010 Act. The pregnancy of the first claimant ended on 7 March 2017 and therefore the protected period ended on 21 March 2017. We conclude that the decision to dismiss the first claimant was taken by the respondent – encouraged by RP – immediately after the meeting on 8 March 2017. We are satisfied that the respondent was concerned that the first claimant would not be able to provide regular service to him by reason of illness suffered by her as a result of her failed pregnancy and he decided to bring the employment of the first claimant to an end. Thus we conclude the decision was made in the protected period and, even though not implemented until 13 April 2017 outside the protected period, we are satisfied that the decision was an act decided on in the protected period and thus potentially an act of pregnancy discrimination pursuant to sections 18(2) and 18(5) of the 2010 Act.

25.4 We have considered whether the decision to dismiss was because of the first claimant's pregnancy or because of illness suffered by her as a result of the pregnancy. Clearly the decision to dismiss the first claimant was unfavourable treatment of her by the respondent: no comparator is required. We have considered what was the reason why the respondent dismissed the first claimant? Was the decision to dismiss materially influenced or put another way significantly influenced by the pregnancy or an illness suffered by her as a result of the pregnancy?

25.5 We note that the dismissal followed immediately after the end of an illness which was due to miscarriage and thus clearly related to the pregnancy. The dismissal, when it came, was for reasons said to relate to the conduct of the first claimant and for matters which had not been discussed with her. The first claimant had received no warnings of any type in respect of her alleged misconduct of blaming and talking about other workers and of poor timekeeping. The dismissal letter (page 68) made no reference to the earlier dismissal which the respondent stated had occurred at the end of February 2017. We find that there was no such dismissal in any event. The letter of dismissal offers no appeal against dismissal and makes no payments of notice pay even though the acts of misconduct relied on are not stated to be acts of gross misconduct. All those factors could lead us to conclude that the dismissal was an act of pregnancy discrimination and thus there is sufficient there for the burden of proof to pass to the respondent to explain why he dismissed the first claimant.

25.6 The explanation is contained in the letter of 13 April 2017. That letter refers to allegations of misconduct which had not been discussed with the first claimant at any time and for which she had received no warnings of any kind. The allegations of misconduct lack specific detail and smack of being hastily put together to seek to justify an unjustifiable dismissal. We reject the explanation as lacking cogency and credibility. We therefore conclude that the dismissal of the first claimant was related to her illness which was a result of her pregnancy and thus an act of pregnancy discrimination. The claim is well-founded and the claimant is entitled to a remedy.

25.7 In case that conclusion should be wrong for any reason, we have considered the matter in the context of the alternative claim of direct sex discrimination. We conclude as before that the reason for the dismissal was because of an illness resulting from the pregnancy and thus related to the sex of the first claimant. A comparator is generally required for a claim of direct sex discrimination but where the treatment of the first claimant is for the reason we have concluded it was, then a man could never be in that position and thus the dismissal does not require a comparator exercise to amount to less favourable treatment which must be because of the sex of the first claimant. Thus if, contrary to our above finding, the decision to dismiss was taken outside the protected period it nonetheless was actionable as an act of direct sex discrimination to which the first claimant would have been entitled to a remedy.

25.8 We turn to the question of the risk assessment. We find that the respondent knew that the first claimant was pregnant as a result of the conversation between them in mid-February 2017. The respondent did not carry out any risk assessment. The claimant left his employ on 13 April 2017 but did not work after 6 March 2017. At no time during her employment – or indeed after it – did the first claimant advise the respondent in writing that she was pregnant. The only notification in writing were the fit notes which advised the respondent that the first claimant had miscarried and was ill as a result of that miscarriage. We are satisfied that there was evidence before us from which we could infer that the Store was an environment where pregnant employees were potentially at risk. The work of the first claimant involved lifting stock and moving stock - some of which was heavy. In addition the work of the first claimant involved the raising and lowering of the security shutters outside the Store and that was a heavy task and it was whilst carrying out that task that the first claimant first experienced pains which caused her to go later to hospital. A risk assessment was therefore relevant and necessary and the failure to carry it out was a detriment to the first claimant.

25.9 Given that there was no written notification of pregnancy, the only relevant risk assessment was the general risk assessment required by reference to Regulations 3 and 16(1) of the 1999 Health and Safety Regulations. The duty to carry out such a risk assessment arose on the respondent by reason of his employment of women of child bearing age and not by reference to any individual notification from the first claimant. It was accepted by the respondent that no such risk assessment had been carried out. We note that unfavourable treatment under section 18(2) of the 2010 Act must arise because of the pregnancy of the first claimant and in the protected period. The first claimant miscarried her pregnancy on 7 March 2017 and thus the protected period came to an end 14 days later on 21 March 2017. Can it be said that the failure to carry out a general risk assessment was because of the first claimant's pregnancy if there was a general failure by the respondent to carry out any risk assessment? In **Hardman** (above) the EAT stated that even though an employer is obliged to carry out a risk

assessment in respect of all employees, a failure to do so has a disparate impact on pregnant workers. Thus any such failure amounted to sex discrimination – as it then was. It was confirmed by the EAT in **Stevenson –v- J M Skinner and Co 0584/2007** that that remained the position even with the introduction of specific maternity/pregnancy discrimination contained in what is now section 18 of the 2010 Act. We therefore conclude that in failing to make the general risk assessment required by Regulations 3 and 16(1) of the 1999 Health and Safety Regulations, the respondent treated the first claimant unfavourably and that unfavourable treatment was because of her pregnancy.

25.10 In case the decision in **Stevenson** (which has been criticised) should be wrong and the analysis required by **Martinez** (above) is relevant then we have carried out that exercise. The failure to carry out the risk assessment for the work carried out by the first claimant in the Store was unfavourable treatment of her. The first claimant found herself dismissed on 13 April 2017 when an illness clearly related to her having been pregnant came to an end and for what we conclude were spurious reasons. That is sufficient to shift the burden of proof to the respondent to explain why no risk assessment was carried out. What was that explanation? It was that the respondent simply did not know that the first claimant was pregnant and the first he knew of it was on 8 March 2017 when he says the first claimant told him she had had a miscarriage. We reject that explanation for we find that he did know of her pregnancy in February 2017 – and in any event the duty to make the general assessment arises when the respondent employs women of child bearing age and not by reference to a specific pregnancy. The claim of detriment because of failure to carry out the general risk assessment succeeds and the first claimant is entitled to a remedy.

25.11 Clearly the fact that the first claimant arguably suffered harm when raising the shutters at the Store on 6 March 2017 is a factor which will concern the Tribunal when moving to consider remedy in respect of this act of pregnancy discrimination. The Tribunal will take account also in assessing remedy of the fact that the first claimant worked only from mid- February 2017 until 6 March 2017 in the Store whilst pregnant without the benefit of a risk assessment and the fact that she did not request sight of any risk assessment.

The claim of automatic unfair dismissal

25.12 The burden of proof in respect of this claim lies with the first claimant given she does not have sufficient service to advance a claim of ordinary unfair dismissal pursuant to sections 94/98 of the 1996 Act.

25.13 We conclude for the reasons set out above that the first claimant has established on the balance of probabilities that the reason for her dismissal was connected with her pregnancy and more particularly an illness arising because of it. The dismissal followed immediately after the end of that illness and the respondent accepted that he had held off dismissing earlier only because he had been advised not to dismiss the first claimant whilst she was ill. The reason for the dismissal advanced by the respondent as relating to the conduct of the first claimant was spurious. There had been no dismissal of the first claimant at the end of February 2017 as the respondent had asserted. All that leads us to conclude that the reason for the dismissal of the first claimant was connected with her pregnancy and the first claimant has discharged the burden of proof on her. The

claim of automatic unfair dismissal is well-founded and the first claimant is entitled to a remedy.

The claim in respect of unpaid annual leave

25.14 This claim was accepted by the respondent. Accordingly it is well founded and the first claimant is entitled to a remedy. The claim is advanced by reference to the 1998 Regulations and outstanding holiday pay will be calculated by reference to Regulation 14.

25.15 Nothing was agreed in respect of holidays save only that the respondent told the first claimant that he did not pay holiday pay. We are satisfied and conclude that the first claimant took one weeks leave during her employment in August 2016 for which she was not paid.

The claim in respect of not being allowed to take rest breaks

25.16 The claim in relation to an alleged failure by the respondent to permit the first claimant to take a rest break pursuant to Regulation 12 of the 1998 Regulations is not well-founded and is dismissed.

25.17 We accept the evidence from the respondent and from RP that rest breaks were permitted and that they were taken during quiet periods in the Store.

25.18 The evidence from the first claimant lacked any detail of when there had been any alleged failure in this regard. The allegation was made in only the broadest terms and we do not accept it. This claim is dismissed.

The claim for a declaration in respect of unauthorised deductions from wages.

25.19 We refer to our findings of fact at 24.1 - 24.6 above. We conclude that the first claimant worked a minimum average of 48.66 hours per week generally over 4 days but sometimes more.

25.20 The respondent was unable to produce to us any record of the actual hours worked by the first claimant.

25.21 We have examined the pay slips provided in respect of the first claimant and note that they indicate the hours worked each week ranged from 30-40. We accept the evidence of the first claimant to the effect that she worked considerably longer hours than that throughout her employment. In any event the pay slips produced only covered the period from January 2017.

25.22 The burden therefore shifted to the respondent to prove that the first claimant had been paid at least at the rate of the national living wage in respect of each pay reference period throughout her employment. We noted the requirement of Regulation 59 of the 2015 Regulations to the effect that the respondent has a duty to maintain

records sufficient to establish that he remunerated the first claimant at least at the rate of the national living wage. The respondent was unable to produce any records showing the hours worked by the first claimant. The respondent has therefore failed to discharge the burden which lies on him pursuant to section 28 of the 1998 Act.

25.23 We conclude that the complaint advanced pursuant to section 23 of the 1996 Act that the respondent has made unauthorised deductions from the wages of the first claimant is well founded and the first claimant is entitled to a remedy. The remedy will be determined at the remedy hearing referred to above.

The claim of wrongful dismissal

25.24 We have considered whether the respondent had reason to dismiss the claimant summarily as he did on 13 April 2017.

25.25 We have considered whether the respondent has proved on balance of probabilities that the first claimant had committed acts of gross misconduct.

25.26 We do not accept that the respondent has done so. The matters set out in the letter of 13 April 2017 as being the reasons for the dismissal were generalised and lacked any specific detail. The respondent did not give any clear evidence in respect of the matters which were his stated reasons for dismissal.

25.27 The respondent has failed to establish that he had grounds to summarily dismiss the first claimant.

25.28 In the circumstances the claim of wrongful dismissal is well-founded and the first claimant is entitled to notice pay. In accordance with the provisions of section 86 of the 1996 Act the award will be of one weeks net pay and will be assessed at the remedy hearing.

The claim of harassment related to race

25.29 This claim relates to the incident outside the Store on 25 March 2017.

25.30 We are satisfied that RP was heavily involved in the business carried on by the respondent in the Store for the reasons set out above. RP ran the bank account from which payments were made to employees in the business and was a regular presence in the Store working, as she did, next door. We conclude without difficulty that for the purposes of the provisions of the 2010 Act, RP acted as the agent of the respondent and thus anything done by RP which was with the express or implied authority of the respondent is to be treated as done by the respondent pursuant to the provisions of section 109(2) of the 2010 Act.

25.31 The words used to the first claimant outside the Store on 25 March 2017 were unwanted conduct by the first claimant. The words used towards the first claimant of whore, bitch and prostitute clearly violated the dignity of the first claimant or created for her an intimidating, hostile, degrading, humiliating and offensive environment. We are not satisfied that that was the intention of RP but we are satisfied that that was the

effect of those words used and that it was reasonable taking account of all the circumstances and the perception of the first claimant that that should be so.

25.32 Accordingly we have considered whether the words used related to the race of the first claimant. We are satisfied that RP told the first claimant to get back to Poland and look after her children. We are not satisfied that the remark was related to the first claimant's race. The reference to going to Poland was secondary to going back to look after the children. We are satisfied that had the children been in another country, RP would have referred to that other country and not to Poland. The remark was therefore not related to the race of the first claimant. That said the remark was clearly upsetting to the first claimant but it was not an act of race harassment. This claim fails and is dismissed.

The claim in respect of the alleged failure to provide written terms and conditions of employment

25.33 The respondent accepted that he had failed to provide to the first claimant a written statement of employment particulars and that he was in breach of his obligations pursuant to sections 1 and 4 of the 1996 Act when these proceedings were commenced.

25.34 Accordingly when dealing with remedy in this matter, the Tribunal will give consideration to section 38 of the Employment Act 2002 and make such award as it considers appropriate by reference to that provision.

The claims of the second claimant

The claim of pregnancy discrimination in respect of dismissal and the failure to carry out a risk assessment

25.35 We deal first with the allegation in respect of the dismissal of the second claimant.

25.36 We are satisfied that the second claimant told the respondent of her pregnancy in the circumstances we set out at paragraph 24.8 above. Given that is our finding of fact, we conclude without difficulty that the dismissal of the claimant was significantly influenced by the pregnancy of the second claimant which she reported to the respondent in that same conversation. The reason why the respondent acted as he did in dismissing the second claimant is stark and obvious. It amounted to an act of pregnancy discrimination. Put another way, there is more than sufficient in the manner and timing of the dismissal of the second claimant for us to conclude that the burden of proof has passed to the respondent to show that the dismissal of the second claimant was not because of her pregnancy. How does the respondent seek to explain that matter? First, he says he did not know the second claimant was pregnant – we reject that explanation as we find that he did know. Secondly, he says he dismissed the second claimant because of her capability. We reject that explanation. We do not accept that the respondent had any concerns relating to the capability of the second claimant nor do we accept that he told the second claimant that was the case. We find that evidence from the second respondent in that regard is fabricated. We reject the explanations offered by the respondent for the dismissal of the second claimant.

25.37 We have considered whether it is likely that the respondent would so overtly dismiss an employee because of pregnancy. We conclude that the respondent did. The respondent showed blatant disregard of the law in respect of the necessity to give a written statement of terms and conditions of employment and in respect of the rights of employees to holiday pay. It is therefore just as likely that he adopted the same approach to the question of dismissal because of pregnancy.

25.38 We are further supported in our conclusion in relation to the dismissal when we consider that the respondent sought to explain his actions by saying the second claimant was dismissed by reason of capability. There was no evidence of any lack of capability on the part of the second claimant and the inconsistency of the respondent in that regard and the complete absence of documentary evidence to support any such claim confirms us in our conclusion that the dismissal of the second claimant was not only significantly influenced by her pregnancy but that the pregnancy was actually the only reason for the dismissal.

25.39 The dismissal of the second claimant was an act of pregnancy discrimination and the second claimant is entitled to a remedy.

25.40 We turn to the question of the risk assessment. We find that the respondent knew that the second claimant was pregnant as a result of the conversation between them in mid-December 2016. The respondent did not carry out any risk assessment. The claimant left his employ on 23 December 2016 some two weeks later. However, at no time during her employment – or indeed after it – did the second claimant advise the respondent in writing that she was pregnant. We are satisfied that there was evidence before us from which we could infer that the Store was an environment where pregnant employees were potentially at risk. The work of the second claimant involved lifting stock and moving stock - some of which was heavy. A risk assessment was therefore relevant and necessary and the failure to carry it out was a detriment to the second claimant.

25.41 Given that there was no written notification of pregnancy, the only relevant risk assessment was the general risk assessment required by reference to Regulations 3 and 16(1) of the 1999 Health and Safety Regulations. The duty to carry out such a risk assessment arose on the respondent by reason of his employment of women of child bearing age and not by reference to any individual notification from the second claimant. It was accepted by the respondent that no such risk assessment had been carried out. We note that unfavourable treatment under section 18(2) of the 2010 Act must arise because of the pregnancy of the second claimant. Can it be said to be so if there was a general failure by the respondent to carry out any risk assessment? In Hardman (above) the EAT stated that even though an employer is obliged to carry out a risk assessment in respect of all employees, a failure to do so has a disparate impact on pregnant workers. Thus any such failure amounted to sex discrimination – as it then was. It was confirmed by the EAT in **Stevenson –v- J M Skinner and Co 0584/2007** that that remained the position even with the introduction of specific maternity/pregnancy discrimination contained in what is now section 18 of the 2010 Act. WE therefore conclude that in failing to make the general risk assessment required by Regulations 3 and 16(1) of the 1999 Health and Safety Regulations, the respondent treated the second claimant unfavourably and that unfavourable treatment was because of her pregnancy.

25.42 In case the decision in **Stevenson** (which has been criticised) should be wrong and the analysis required by **Martinez** (above) is relevant then we have carried out that exercise. The failure to carry out the risk assessment for the work carried out by the second claimant in the Store was unfavourable treatment of her. The second claimant found herself dismissed when she told the respondent of her pregnancy and that is sufficient to shift the burden of proof to the respondent to explain why no assessment was carried out. What was that explanation? It was that he simply did not know that the second claimant was pregnant. We reject that explanation for we find that he did know of her pregnancy – and in any event the duty to make the general assessment arises when the respondent employs women of child bearing age and not by reference to a specific pregnancy. The claim of detriment because of failure to carry out the general risk assessment succeeds and the second claimant is entitled to a remedy.

25.43 Clearly the fact that the second claimant evidently suffered no physical harm by reason of the absence of the risk assessment and the fact that she worked in the Store for only a short time whilst pregnant and the fact that she did not request sight of any risk assessment are all factors which the Tribunal will bear in mind when coming to assess any remedy due to the second claimant in this regard.

The claim of automatic unfair dismissal

25.44 The burden of proof to establish the reason for the dismissal lies with the second claimant. The second claimant had not established sufficient service to be able to advance a claim of ordinary unfair dismissal and thus the burden to prove the reason for dismissal lies with her. We are satisfied that the second claimant has proved the reason for her dismissal was related to her pregnancy. The respondent was told of the pregnancy and made it clear to the second claimant that he proposed to dismiss her as a result of that pregnancy. The reason for the dismissal is clear and the second claimant has discharged the burden of proof which lies on her so to do. The claim of automatic unfair dismissal pursuant to section 99 of the 1996 Act is well founded and the claimant is entitled to a remedy.

The claim in respect of unpaid annual leave

25.45 This claim was accepted by the respondent. Accordingly it is well founded and the claimant is entitled to a remedy. The claim is advanced by reference to the 1998 Regulations and outstanding holiday pay will be calculated by reference to Regulation 14.

25.46 We are satisfied and conclude that the second claimant took no holidays in the brief period for which she worked for the respondent.

The claim in respect of not being allowed to take rest breaks

25.47 The claim in relation to an alleged failure by the respondent to permit the first claimant to take a rest break pursuant to Regulation 12 of the 1998 Regulations is not well-founded and is dismissed.

25.48 We accept the evidence from the respondent and from RP that rest breaks were permitted and that they were taken during quiet periods in the Store.

25.49 The evidence from the second claimant lacked any detail of when there had been any alleged failure in this regard. The allegation was made in only the broadest terms and we do not accept it. This claim is dismissed.

The claim for a declaration in respect of unauthorised deductions from wages

25.50 We refer to our findings of fact at 24.1 - 24.6 above. We conclude that the second claimant worked a minimum average of 48.66 hours per week generally over 4 days but sometimes more. The number of hours reduced somewhat in the last two weeks of her employment.

25.51 The respondent was unable to produce to us any record of the actual hours worked by the second claimant.

25.52 We have examined the pay slips provided in respect of the second claimant and note that they indicate the hours worked each week ranged from 30-40. We accept the evidence of the second claimant to the effect that she worked considerably longer hours than that throughout her employment. In any event the pay slips produced only covered the period beginning in September 2016 and ending on 23 December 2016.

25.53 The burden therefore shifted to the respondent to prove that the second claimant had been paid at least at the rate of the national minimum wage in respect of each pay reference period throughout her employment. We note the requirements of Regulation 59 of the 2015 Regulations to the effect that the respondent has a duty to maintain records sufficient to establish that he remunerated the second claimant at least at the rate of the national minimum wage. The respondent was unable to produce any records showing the hours worked by the second claimant. The respondent has therefore failed to discharge the burden which lies on him pursuant to section 28 of the 1998 Act.

25.54 We conclude that the complaint advanced pursuant to section 23 of the 1996 Act that the respondent has made unauthorised deductions from the wages of the second claimant is well founded and we so declare. The second claimant is entitled to a remedy. The remedy will be determined at the remedy hearing referred to above.

The claim in respect of the alleged failure to provide written terms and conditions of employment

25.55 The respondent accepted that he had failed to provide to the second claimant a written statement of employment particulars and that he was in breach of his obligations pursuant to sections 1 and 4 of the 1996 Act when these proceedings were commenced.

25.56 Accordingly when dealing with remedy in this matter, the Tribunal will give consideration to section 38 of the Employment Act 2002 and make such award as it considers appropriate by reference to that provision.

The claim in respect of an alleged failure to provide a written statement of the reasons for dismissal.

25.57 The respondent accepted that he had not set out in writing to the second claimant the reason for her dismissal. His reason was that he had no obligation to do so as he did not know that the second claimant was pregnant when he dismissed her and thus had no duty to provide such a statement pursuant to section 92(4) of the 1996 Act.

25.58 We conclude that not only did the respondent know of the pregnancy when he dismissed the second claimant but also that the pregnancy was the reason for dismissal. Thus the obligation on the respondent to provide a written statement of the reasons for dismissal had arisen and was not fulfilled. Accordingly this claim by the second claimant is well-founded and the second claimant is entitled to a remedy.

Remedy Hearing

26.1 At the conclusion of the liability hearing, it was apparent that a remedy hearing would be required given that the respondent had conceded liability in respect of two aspects of the claims. Accordingly a remedy hearing was arranged for 18 January 2018 with the agreement of both parties and the Tribunal. Accordingly the remedy hearing will proceed on that day as arranged and no further notification need be or will be issued by the Tribunal.

26.2 In readiness for that hearing the claimants should prepare and serve on the respondent and file with the Tribunal updated schedules of loss.

26.3 The parties are to liaise and submit supplementary witness statements in respect of remedy if they so decide. Any additional documentation in respect of remedy should be placed in an agreed supplementary bundle. Five copies of any supplementary bundle and supplementary witness statements should be brought to the remedy hearing.

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EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 December 2017