Case No: 2200110/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms K Kovacsova**

Respondent: **Clermont Leisure (UK) Limited**

Heard at: **London Central** **On: 16 & 17 January 2019**

Before: **Employment Judge Henderson**
Ms S Samek and Mr D Ross (Members)

Representation
Claimant: Mr A Casco (Claimant's Partner)
Respondent: Mr M Foster (Solicitor)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. **The claimant's complaints of discrimination on the grounds of pregnancy under section 18 of the Equality Act 2010 (EA) and also for detrimental treatment under section 47 C of the Employment Rights Act 1996 (ERA), again on the grounds of pregnancy do not succeed and are dismissed.**

2. **The Remedies Hearing scheduled for 29 March 2019 is vacated.**

REASONS

Background

1. This was a complaint of discrimination on the grounds of pregnancy under section 18 of the Equality Act 2010 (EA) and also for detrimental treatment under section 47C of the Employment Rights Act 1996 (ERA), again on the grounds of pregnancy. The claimant lodged the ET1 on 12 January

2018 at which time her employment was continuing. The claimant commenced the Early Conciliation process with ACAS on 13 November

2017 and a certificate was issued on 12 December 2017. The respondent defends the claims. The parties confirmed at the hearing that the respondent casino had closed down and all staff (including the claimant) were made redundant on 30 April 2018.

The Issues

2. The Tribunal confirmed with the parties at the commencement of the hearing the outstanding issues for determination in this case. These were:

    -Was the claimant treated unfavourably by the respondent because of her pregnancy or because of illness suffered by her as a result of it? (section 18 EA); and
    -Was the claimant subjected to any detriment (by any act or any deliberate failure to act) which relates to pregnancy (section 47C ERA).

The claimant confirmed that the unfavourable treatment which she complained of under section 18 and the detrimental treatment which was complained of under section 47 C was the same for both complaints, namely:

-that the respondent failed to properly understand/investigate the claimant's medical position before unilaterally requiring her to return to working night shifts. The claimant said this was during the period 4 July 2017 - 11 September 2017;
-that the respondent failed to obtain further advice from the claimant's GP/Occupational Health before taking the decision to require the claimant to work night shifts. The claimant said that this was during the period August 2017-the issue of the ET 1 (12 January 2018);
-the respondent failed to properly carry out risk assessments. The claimant said this was during the period 4 July 2017- the issue of the ET 1; and
-the respondent failed to make temporary adjustments while obtaining medical advice, such as paid suspension. The claimant said this was during the period 4 July 2017- the issue of the ET 1.

3. The claimant believed that her pregnancy began on 11 May 2017. Her maternity leave commenced on 6 January 2018 and her employment ceased on 30 April 2018. It was confirmed with both parties that the unfavourable treatment complained of by the claimant fell within the "protected period" set out in section 18 EA.

Conduct of the hearing

4. At the commencement of the hearing, the Employment Judge (EJ) explained (in lay terms) to the claimant and Mr Casco how the hearing would proceed; how evidence was given and cross-examination/re-examination were conducted and explained that the Issues referred to

above were the effectively the questions which the Tribunal had to answer to determine the claim, which they would do based on the evidence provided by the parties. The EJ also explained that the Tribunal would only wish to hear evidence which was relevant to the issues: that is, evidence which would assist the panel in determining the issues set out above.

5. The EJ also confirmed with the claimant that there was no formal application being made for witness orders for Andy Ganley or Laura Fahy to attend the hearing, both of whom had left the respondent's employment. The respondent and Ms Sullivan (who was also no longer employed by the respondent) confirmed that as General Manager at the relevant times, although she may not have instructed individuals to act in a certain way, she accepted responsibility for their actions on behalf the respondent company. It was agreed in the light of this acceptance that there would be no need to hear evidence from the other witnesses.

6. The Tribunal heard evidence from the claimant and on behalf of the respondent from Alison Sullivan. Both witnesses had prepared written statements which were taken as their evidence in chief. There was an agreed bundle of 302 pages, with some additions including the respondent's maternity policy. Page references are to that agreed bundle, unless otherwise indicated. The Tribunal also heard submissions from both parties' representatives and was also given written submissions. The submissions concluded at 11.30 am on 17 January.

7. The Tribunal indicated that it would be able to give its decision in the afternoon of 17 January and if necessary could deal with any compensation due to the claimant if she succeeded in her claims. The claimant had not prepared a schedule of loss and did not have available any of the relevant evidence which may be needed to support any compensation claim, if she succeeded on the liability issue. The EJ explained to Mr Casco and the claimant about the claim for injury to feelings and referred them to the **Vento** Guidelines (of which they were not aware) with regard to the relevant categories for compensation. Further, the claimant had childcare obligations and said she would find it difficult to return later on that day.

8. Given all these circumstances, it was agreed that the best course was for the Tribunal to reserve its decision, which would then be given in writing to the parties within the next 2 weeks. If the claimant succeeded in all/any of her claims, the parties and Tribunal agreed a provisional date for a Remedies Hearing on 29 March 2019 at 10 am (for 3 hours). If necessary relevant directions for that Remedies Hearing would be given in the Tribunal's Judgment. The EJ explained that the arrangements were made on a provisional basis and should not be seen as an indication of the Tribunal's eventual decision.

Findings of fact

9. The Tribunal will only make such findings of fact as are necessary to determine the issues set out above.

10. There was little factual dispute between the parties in this case. The following facts were agreed. The respondent is a company which ran a casino in Berkeley Square. The claimant commenced employment on 14 January 2008, worked as a Senior Croupier and was made redundant on 30 April 2018.

11. Ms Sullivan explained in her oral evidence that at the relevant time the respondent had 85 employees; 37 working in gaming (with a full-time equivalent of 28/29 employees). The casino was open for 7 days a week from 1pm to 4-6 am. There were 19-22 employees who worked on a 3-shift rota involving a day shift (1pm-9pm), a nightshift (9pm – 5am) and a mid-shift (7.30pm – 3.30 am).

<u>The claimant's first pregnancy</u>

12. This did not form part of the claims and was heard as background evidence.

13. The claimant commenced maternity leave for her first child on 12 May 2016. Prior to that date Mr Ganley (the respondent's Gaming Manager) had conducted a total of four risk assessments with the claimant on 14 November 2015, 26 December 2015, 25 January 2016 and 14 February 2016. This was not disputed by the claimant. It was accepted by the respondent that the claimant had medical issues connected with her pregnancy.

14. Prior to her return from maternity leave the claimant had submitted a flexible working request. This was initially refused in the form submitted by the claimant, but following submission of a further revised request by the claimant and further discussions between them, the parties were able to agree a different working pattern (page 106). This was implemented on the claimant's return from maternity leave on 28 April 2017. This was a mix of mid-shift (Sunday); day shift (Tuesday) and nightshift (Wednesday), with Monday Thursday Friday and Saturday off.

15. Ms Sullivan was asked in cross-examination about the delay in the respondent agreeing to the claimant's flexible working requests. She said that she believed this was a delay of some 3 weeks but not more than a month. The claimant said in her witness statement that she had to wait 24 days, so this evidence is consistent with that of Ms Sullivan. Ms Sullivan explained that she had been unable to deal with the claimant's request herself as she had had her own family issues (her mother's serious illness)

and so had asked for this to be dealt with by the managing director. She accepted that the delay was not ideal but did not feel that it was unreasonable in all the circumstances.

16. Ms Sullivan was referred in cross-examination to an email she had written in November 2015 (page 57) in which she referred to not wishing to set a precedent with the claimant "especially if the issue is not just dropping a shift but dropping the Saturday shift". This was put to her is indicative of her attitude with regards to the claimant's pregnancy. Ms Sullivan did not accept that this was the case. In any event, the Tribunal notes that the arrangement reached with the claimant (page 106) meant that she had Saturday off. This would contradict the comment put to Ms Sullivan about her November 2015 email.

17. The Tribunal heard from Ms Sullivan in her oral evidence that she had been the subject of a grievance raised by the claimant against her with regard to the claimant's first pregnancy and also with regard to a failure to obtain promotion. Ms Sullivan said that this made her wary of becoming too involved with the issues raised by the claimant in relation to her second pregnancy. This was why she had relied more heavily on Ms Fahy, who was an HR specialist employed by the respondent's sister company and who dedicated one day per week to supporting the respondent in HR matters. The Tribunal accepted Ms Sullivan's evidence on this matter.

The claimant's second pregnancy

18. The claimant accepted that the respondent first knew of this pregnancy around 7 June 2017. On 14 June 2017 the claimant had visited her doctor and on the same date a Fit for Work (FtW) note (page 115) was sent to the respondent which noted pregnancy-induced complications, but said that the claimant would be fit for work with altered hours: namely daytime shifts "for the moment" -this would be the case for one month (i.e. up to 14 July 2017).

19. On 25 June 2017 Mr Ganley conducted a risk assessment for expectant mothers with the claimant (page 121) and the doctor's recommendation for day shifts for one month was noted. This was signed by the claimant.

20. The claimant accepted in cross-examination that it may be correct that the last nightshift she had worked had been on 7 June 2017. She said she could not remember exactly. However, she could confirm that she had never worked another nightshift following the FtW note of 14 June 2017. The claimant had self-certified sickness absence on 9 July 2017 (cold symptoms) this was page 141 and she accepted that she had not returned to work until 21 October 2017. Mr Ganley had carried out a further risk assessment with the claimant on 28 October 2017 (page 211-220). At page 219 this stated that the claimant would only work day shifts for the duration of pregnancy.

21. The claimant also accepted in her evidence that she had worked only day shifts from mid-June 2017 until the commencement of her maternity leave on 6 January 2018.

The meeting of 4 July 2017

22. The key area of dispute between the parties relates to the content of this meeting which was carried out by Ms Fahy and Mr Ganley with the claimant. Ms Sullivan was not present at this meeting. The claimant believes that prior to this meeting Ms Sullivan had made a decision (without any discussion with the claimant) that the claimant would have to return to working night shifts as per her previous arrangement with the respondent.

23. Ms Sullivan said in her oral evidence that she had not made such a decision. She had discussed the claimant's situation with Ms Fahy, which had centred on the need to obtain an occupational health (OH) report, which would either support or disagree with the FtW from the claimant's doctor.

24. Ms Fahy's summary of the note of the meeting on 4 July with Mr Ganley and the claimant is at page 125 and was sent to the claimant on 6 July 2017. The claimant's interpretation of what was said at that meeting was that the respondent did not regard the FtW as a recommendation but only as "a suggestion which the company was not obliged to follow if it affects our business in a negative way". The quotes are from Ms Fahy's summary. This also contained a reference to obtaining the 0H report to assess whether the FtW was correct in its requirements for day shifts. The summary concluded by saying that the temporary work arrangement for day shifts would end on 30 July, which was nearly 2 weeks after the time specified in the FtW, as it was not working successfully for the business. The summary said that it had been a temporary arrangement to support the claimant whilst she experienced complications with her pregnancy but it was expected that she would revert to her chosen hours as agreed in the previous flexible working request which would be effective from 31 July 2017.

25. The claimant replied to Miss Fahy on 8 July 2017 and complained that the company were not paying proper regard to her GP's assessment or to her well-being or that of her unborn child. She referred to the problems experienced with her first pregnancy and also referred to the problem she had experience with Ms Sullivan during that pregnancy. Ms Sullivan accepted in her oral evidence that all emails were copied to her on this matter so she was aware of the claimant's comments.

26. The claimant also raised in her response of 8 July and in subsequent emails, that all relevant decisions were made by Ms Sullivan and that no evidence had been provided with regard to the company's business

needs. Ms Fahy had responded by suggesting a follow-up meeting once the 0H report had been received.

27. On 12 July 2017 Ms Fahy responded to the claimant's reference to documentary evidence of the company's business needs, by repeating that this could all be discussed in the follow-up meeting once the 0H report had been received. Ms Fahy concluded this letter by saying that she did not intend to enter into further lengthy email discussions prior to such a health review meeting. (page 140). The Tribunal was referred to a paragraph in this letter which said "nothing has changed from our end with regard to our decision on your hours and we have not received an informal request from you to propose a change, therefore we deem this issue is closed". This appears to be a reference to the claimant's working pattern agreed following the flexible working requests and not to the arrangement during her pregnancy, which would be subject to the outcome of the 0H report.

28. Ms Sullivan's interpretation of the 4 July meeting was that it was all about the need for a 0H report to ascertain the claimant's medical condition. She said that she had made no final decision at that stage as to whether the claimant should revert to working some night shifts during her pregnancy.

29. Having been referred to Ms Fahy's summary of the meeting on 4 July several times during the hearing, the Tribunal can understand why the claimant reached her interpretation of that meeting at that time. The Tribunal heard no evidence from Ms Fahy. The Tribunal notes the concluding paragraph of that summary which refers to the termination of the temporary arrangement to work day shifts as from 30 July 2017. There is no qualification in that final paragraph that such a decision would be subject to the 0H report.

30. Ms Sullivan was asked in Tribunal questions if she had made a decision prior to the 4 July meeting, that the claimant must return to night work. She said that initially she would have expected the claimant to return to her normal working pattern after the expiry of the FtW, but that any requirement to return to night work would always be subject to medical advice, which is why she had waited for the outcome of the 0H report. Ms Sullivan stressed that her focus was on the conclusion of the 0H report, which she followed once it had been obtained.

31. However, she accepted that the emphasis of Ms Fahy summary of the meeting did not properly reflect this. She also accepted in her oral evidence that the way in which the note was written meant that it was possible for the claimant to reach her interpretation of that note, even though that had not been Ms Sullivan's intention. Ms Sullivan said that she had not gone back to Miss Fahy to ask her to revise or change the note.

32. The Tribunal accepts Ms Sullivan's evidence that she had not made any final decision to require the claimant to return to nightshift work prior to 4 July and was waiting for the 0H report. This is supported by the actual events, namely that the claimant was not required to work any nightshifts and did not actually work any nightshift after mid-June 2017. However, the Tribunal does have sympathy with the claimant, as the respondent's intentions (via Ms Sullivan's decision as the General Manager) were not clearly conveyed to the claimant by Ms Fahy's correspondence.

The OH Referral

33. Following the meeting on 4 July the respondent referred the matter to 0H on 8/9 July. A telephone assessment was initially arranged with the claimant for 27 July 2017 but was cancelled by 0H and was rescheduled for 17 August. The 0H report was issued on the same day. The report is at pages 161-162 and recommends that the claimant works day shifts during her pregnancy.

34. On 11 September 2017 Mr Ganley wrote to the claimant (at page 168) confirming that following the recommendations in the 0H report appropriate adjustments would be made to the claimant's working pattern for 3 day shifts on Tuesday, Saturday and Sunday, commencing on 13 September 2017, when the claimant's current FtW (at page 165) expired. The arrangement would be subject to a 4-weekly review to ensure that the shifts were working for all parties including the claimant's colleagues who would have to cover for the night shifts. The Tribunal notes that Mr Ganley records the claimant's refusal to attend any follow-up meetings with Ms Fahy to discuss the OH Report. This indicates that communications between the parties were not working well on either side.

35. The Tribunal finds that at this point the claimant had clear confirmation of the respondent's position that she would not be required to work nights during her pregnancy. In fact, the claimant did not return from sick leave until 21 October 2017 and then continued to work under this arrangement for day shifts until 6 January 2018 when she commenced her maternity.

Conclusions

36. Was the claimant subjected to the following unfavourable treatment/detriments?

That the respondent failed to properly understand/investigate the claimant's medical position before unilaterally requiring her to return to working night shifts.

37. The Tribunal finds that the respondent had taken steps to properly understand the claimant's medical position: this was done by the request for the 0H report, and by complying with its recommendations once it was

obtained. The Tribunal also finds that the respondent complied with the FtW issued by the claimant's GP. Further, the Tribunal has accepted Ms Sullivan's evidence that she had not made a decision (unilateral or otherwise) that the claimant would be required to return to nightshifts prior to the OH Report being issued. The Tribunal also notes that, in fact, the claimant did not work any nightshifts after the issue of the FtW of 14 June 2017. The claimant says that this was because she had been signed off sick over this period and if she had not been ill, she would have been required to work nights after 31 July 2017. However, the Tribunal have seen no evidence to support this assertion.

That the respondent failed to obtain further advice from the claimant's GP/Occupational Health before taking the decision to require the claimant to work night shifts.

38. Again, the Tribunal have found that the respondent did seek 0H advice, upon which it acted. The respondent did not seek further advice from the claimant's GP, however, it had complied with the first FtW and it was reasonable for the respondent to seek independent clarification of the claimant's medical condition via the 0H report. The Tribunal have found that Ms Sullivan had not taken a decision requiring the claimant to work night shifts.

39. However, the Tribunal does have sympathy with why the claimant may have formed the view that she was being required to work nights after 30 July 2017 due to the wording of Ms Fahy's summary of the 4 July meeting and her letter of 12 July 2017. That said, the Tribunal has found that the respondent did not require the claimant to work nights after mid-June 2017 and Mr Ganley's letter of 11 September 2017 makes it clear and confirms in writing that the claimant will work day shifts during her pregnancy, which arrangement would be subject to 4-weekly reviews.

40. Therefore, despite the lack of clarity in Ms Fahy's communications, the claimant should have appreciated as at 11 September 2017 that she was allowed to work day shifts during her pregnancy. As the claimant was on sickness absence as at 31 July 2017 and did not return to work till 21 October 2017, there is no evidence to show that she would have been made to work nightshifts by the respondent from 31 July 2017 till 11 September 2017.

The respondent failed to properly carry out risk assessments.

41. The Tribunal finds that the respondent had carried out four risk assessments during the claimant's first pregnancy (on 14 November 2015, 26 December 2015, 25 January 2016 and 14 February 2016). On 9 May 2017 there was a new mother risk assessment following her return to work from her first maternity leave on 28 April 2017. There were two risk assessments during the claimant's second pregnancy (25 June and 28 October 2017). All the risk assessments were carried out by Mr Ganley and all were countersigned by the claimant. Further, the claimant did

Not present any evidence to the Tribunal to show that there were any deficiencies with these risk assessments.

42. The claimant believed that the respondent should have carried out a further risk assessment after 25 June 2017 to assess whether she could carry out night work after 30 July 2017. Following the 4 July meeting the respondent was waiting for the outcome of the 0H report on this point and once that was available (on 17 August 2017) and it confirmed the medical advice of the claimant's GP, that OH report was complied with.

43. The 0H report also suggested risk assessments should be carried out every trimester during the claimant's pregnancy; however, the claimant was absent due to illness until 21 October 2017 and so those risk assessments were not necessary as she was not working. Once she returned to work on 21 October a further risk assessment was carried out on 28 October 2017.

44. The claimant has not shown that the respondent failed to carry out proper risk assessments.

The respondent failed to make temporary adjustments while obtaining medical advice, such as paid suspension.

45. Based on the findings of fact above, the respondent did make adjustments to allow the claimant work day shifts while she was fit for work, but as the claimant was on sick leave from 14 June to 20 October 2017, the respondent did not have to make such adjustments over that period. Ms Sullivan was asked in re-examination about what the respondent would have done if they could not have accommodated the claimant working on day shifts, but she said that the respondent would always make the necessary adjustments to allow this to happen, which it had done.

46. The Tribunal finds that the claimant is not been able to show on a balance of probabilities (which is the requisite standard of proof) that she has suffered the unfavourable treatment and/or detriments complained of. Therefore, her claims under Section 18 EA and Section 47C ERA cannot succeed.

47. The Tribunal also notes that if the outcome had been different in this case, it would nevertheless have found that any injury to feelings suffered by the claimant could only have been for a limited period from 4 July 2017 (being the date of the meeting with Ms Fahy) up to 11 September 2017 when Mr Ganley's letter confirmed the arrangement for the claimant to work day shifts.

48. The provisional date set for the Remedies Hearing on 29 March 2019 is vacated.

_____

Employment Judge Henderson

Date_ 18 January 2019

JUDGMENT SENT TO THE PARTIES ON

22 January 2019

.....

FOR THE TRIBUNAL OFFICE