EMPLOYMENT TRIBUNALS

Claimant: Miss J Roe

Respondents: Marblesea Ltd t/a Newton House Hotel (1)
Mr David Taylor (2)

REASONS

Following the Judgment promulgated orally to the parties on 18 October 2018 and the Claimant's request for Reasons

The Issues

1. The Claimant was employed by the First Respondent as a part-time bar tender in the Newton House Hotel from 1 September to 1 December 2016. She was, at that time, and still is, a foster parent. She suffers from fibromyalgia ("FMA"). The Respondents concede that the Claimant is a disabled person for the purposes of s.6 of the Equality Act 2010 ("EqA") by reason of this illness.

2. The Case Management Summary following the Preliminary Hearing before Employment Judge Wright on 22 September 2017 clearly sets out the claims and the issues between the parties. At that hearing the Claimant's claims for holiday pay, notice and failure to provide rest breaks under the Working Time Regulations 1998 were dismissed by the Tribunal on their withdrawal by the Claimant. The Claimant also withdrew her claims of unlawful deduction of wages and failure to pay the national minimum wage leading up to this hearing which were dismissed upon that withdrawal by the Claimant at the commencement of this hearing.

3. The Claimant relies upon the protected characteristics of disability, pregnancy and sex and the prohibited conduct alleged against the Respondents relied upon is her dismissal and/or being subjected to a detriment. The Claimant pursued the following claims at this hearing:

    - Unfair dismissal due to pregnancy contrary to s.99 Employment Rights Act 1996 ("ERA").

    - Unfavourable treatment due to her pregnancy contrary to s.18 EqA. The Claimant says that the unfavourable treatment was not allowing her to take regular rest breaks under the Working Time Regulations and in the alternative the Respondent's failure to let her take additional breaks required due to her pregnancy.

- The Claimant alleges she received no written reasons for her dismissal contrary to s.92(4)(b) ERA.

- The Claimant claims that she was subjected to indirect discrimination because of her sex contrary to s.19 EqA. The Claimant states that she was required to work on demand and at short notice which she could not do because she was a foster carer. Her hypothetical comparator is a man. She says that the majority of foster carers are female. The PCP she alleges is that she was required to work on demand and at short notice. She claims this put her at a particular disadvantage in comparison to men.

- The Claimant claims that the First Respondent failed to make reasonable adjustments contrary to s.20 EqA because its General Manager and Bar Supervisor would not let her take breaks and that making her work without a break placed her at a substantial disadvantage by exacerbating the effects of FMA. She asserts the reasonable adjustment would have been to make arrangements for her to take breaks when she required them.

- The Claimant claims discrimination from something arising from disability contrary to s.15 EqA. The unfavourable treatment she relies on is that she was not able to take breaks and the something arising from her disability she relies upon was the pain from her FMA which was exacerbated by the failure to provide breaks.

- The Claimant claims that she did not receive a written statement of terms and conditions of employment in breach of s.1 ERA. She does not seek a declaration in respect of her terms and conditions but seeks compensation for the failure to provide this written statement under s.38 Employment Act 2002.

4. There was an agreed bundle of documents (Exhibit R1). The Tribunal received oral evidence from the Claimant, Mrs Helen Smith, her mother; Ms Emily Roe-Stacey, her sister; Mrs Pamela McInnes a Supervisor at the Havant CAB and Mr Jason Pykett, a former Head Chief at the Newton House Hotel who gave their evidence in chief by written statements, read by the Tribunal: Exhibits C1, C2, C3, C4 and C5 respectively. The Tribunal received evidence on behalf of the Respondent from Mr David Taylor, the Second Respondent and the General Manager of Newton House Hotel; Ms Katie Crumpler, the Respondent's Accounts and HR Manager; Miss Rachael Simms a Receptionist at Newton House Hotel and Mr James Armstrong a former Supervisor at the Newton House Hotel who gave evidence in chief by written statements: Exhibits R1, R2, R3, R4 and R5 respectively. The Tribunal also received written submissions from Mr Downey (Exhibit C6) and written Skeleton Submissions from Mr Grey (Exhibit R6).

Findings of Fact

5. The Tribunal made the following findings of fact after considering all the evidence which had been referred to them and the oral and written submissions made by Mr Downey and Mr Grey. The Tribunal has made

findings of fact which it considers to be relevant to the issues on which it has to adjudicate in this case. The fact that it does not refer to any particular piece of evidence does not mean that that evidence has not been considered or taken into account in the Tribunal's deliberations when it made its findings of relevant facts.

6. The Tribunal also records, for reasons which will be outlined below, that after careful consideration of all the evidence placed before it, they have preferred the evidence of the Respondent's witnesses to the evidence given by the Claimant and her witnesses where disputes of fact have arisen.

7. The Tribunal gave consideration to the Respondent's submissions that some of the Claimant's claims had been submitted out of time. It had been determined at the Preliminary Hearing that because the ACAS Conciliation Procedure commenced on 20 February 2017 all claims which alleged discriminatory conduct by the Respondents up to and including 21 November 2016 were in time. The Claimant was dismissed from her employment on 1 December 2016. The allegations she pursues are all inextricably linked and to consider the claims made in time appropriately, the Tribunal had to consider all the evidence presented to it and take account of all circumstances leading up to 1 December 2016 and beyond as will be read below. Therefore, the Tribunal was satisfied that if it was necessary, it would be just and equitable to extend time to allow out of time claims pursued by the Claimant to be considered and, furthermore, that no prejudice would be caused to the Respondent by doing so.

8. The Claimant initiated an interview with Mr Taylor, the General Manager of the Hotel, on 25 July 2016. The Claimant applied to work on a zero hour's basis. She confirmed that she would prefer to work on evenings and weekends. She also explained to him that she was a foster parent and would not be able to work set hours for that reason and might not be able to work at short notice if she could not secure cover to look after her foster children. The Claimant was not available to work during August and commenced work on 1 September. The Claimant's evidence is that she also told Mr Taylor that she was suffering from FMA and explained the difficulties that this caused her. Mr Taylor disputes this and says that FMA was not mentioned during their discussion and the Tribunal accepts his evidence on this point for reasons that will be set out below. The work arrangements were confirmed in a New Employees Start-up Form signed by the Claimant on 22 September. The Respondent also prepared a Statement of Employment Particulars which the Claimant says that she was never given. This was left for her collection in the safe in the Reception area of the Hotel.

9. The basis of the Claimant's claim for indirect sex discrimination is that she was required to work shifts on demand and at short notice notwithstanding the difficulties this caused to her by reason of her fostering responsibilities. She also claims that she was dismissed by the First Respondent for failing to work at short notice when asked to do so. These allegations are unsustainable. This is because in answer to questions from Mr Grey the Claimant conceded that she was never told that she had to work at short notice when requested to do so and had never been forced to undertake work offered to her if she was unable to do so. She confirmed that

arrangements during her employment remained as she had discussed, and agreed, them with Mr Taylor. She was given the opportunity to work on the rotas fixed in advance and offered other opportunities in addition to those shifts but was not required to undertake all work offered to her and was not required to work on demand as she and her mother alleged, and therefore, had not been subjected to any criticism for not undertaking work offered to her at short notice.

10. The Claimant's evidence was that she worked two to four shifts per week and that the only shift on which she was able to take a break was worked on 18 September 2016. She alleges that on her other shifts she made many requests to Mr Armstrong, who supervised her work from late September onwards to take a break from her duties but that he did not allow her to do so. The Claimant informed Mr Armstrong that she suffered from FMA on or around 22 September when she attended a pain management appointment in respect of her FMA. During this discussion she was able to explain how this illness affected her. The Claimant could not confirm the date on which she found out she was pregnant. She thinks that it was in early October and told the Tribunal that her sister, Emily, had telephoned the Respondent to inform them that she was pregnant when she was unable to work a scheduled shift because of pregnancy related sickness. Emily's evidence to the Tribunal made no reference to such a call. Emily's evidence was that she had made calls to the Respondent on her sister's behalf but she could only recall one occasion when she made a call which was 27 November 2016.

11. The Claimant claims that she complained to Mr Armstrong on a number of occasions that she had been given no breaks when younger staff were being given cigarette breaks. She also told the Tribunal that she did not know there was a smoking area for staff on the Hotel's premises. She also claims that she was invited to go out for drinks with Mr Armstrong and other staff on or around Halloween and that she informed Mr Armstrong that she could not go out on that night because of her pregnancy. Her evidence was that on 26 November her mother, Mrs Smith, had spoken to Mr Armstrong on the telephone to inform him that she could not come into work because of morning sickness and her FMA was very bad on that day and that her mother had also phoned on another day about her morning sickness.

12. Mrs Smith's evidence to the Tribunal was that she had made a number of telephone calls to the Hotel on behalf of her daughter when she was sick due to her pregnancy and FMA and that she had spoken to a number of members of the Hotel staff who she could not identify. Furthermore, contrary to the Claimant's evidence she said that there were many occasions when the Claimant was not on duty and was telephoned at the last minute to ask if she could come into work and that she had faced pressure which forced her to do so on many occasions. She told the Tribunal: *"she was put on the spot and made to work"*. Mrs Smith also told the Tribunal that on the day of her son's memorial service, the Claimant had received several telephone calls from the Hotel to which she did not respond until she was travelling back from the service, in the company of her family, later on that day, and that when she did so, she was told she was going to be sacked for not coming into work.

13. The First Respondent provided copies of its rotas to confirm the shifts worked

by the Claimant during her employment with it. The Claimant had also produced copies of the relevant pages of her diary. She confirmed that she recorded all occasions when she worked for the First Respondent in her diary and had made a note against each such entry when she was not provided with a break during a shift and that this meant that if no such entry had been made against a shift, she would have taken a break during that shift. This combination of documentation provided the Tribunal with confirmation of the shifts which the Claimant had worked and the hours which she had worked on each shift. The parties were agreed that the Claimant was only entitled, in accordance with the relevant Working Time Regulations, to a break if she worked a shift in excess of six hours.

14. The Claimant worked eleven shifts in September 2016. She worked over six hours on three of those shifts. Her diary indicates that she took no breaks on those shifts but also records that she was able to take breaks on two of the other shifts she worked in September. The Claimant worked five more shifts for the First Respondent before her dismissal. These shifts were worked on 2, 3, 5 and 7 October and 12 November. Her diary records that she was able to take breaks on all those shifts. She was not able to work for four shifts on 25 and 30 September, 8 October and 13 November and three of those shifts were cancelled by reason of illness. The Claimant did not work any shifts for the First Respondent between 8 October and 11 November, and after 12 November 2016.

15. The Hotel prepares staff rotas one to two weeks in advance. The number of guests, and events, will fluctuate from week to week and casual staff, employed on a flexible basis, as the Claimant was, provides helpful flexibility to meet business demand, cover for sickness absences and cancellation of bookings and other variables. Mr Taylor and Mr Armstrong use text messaging to contact staff to confirm rotas and make enquiries as to availability. They had provided copies of all their texts with the Claimant during her employment with the First Respondent for the Bundle. The Claimant could accept, or decline hours of work offered to her and could also request a variation to hours offered to her and such variations had been agreed with Mr Armstrong.

16. The First Respondent ensured that if staff worked for more than six hours they were given a break of thirty minutes. Its arrangements meant that they did not have to clock in and out for this break because the First Respondent automatically deducted half an hour from the hours submitted for payment. As already found the Claimant only worked three shifts in excess of six hours and all other shifts involved her working no more than five and a half hours. The Claimant worked only one shift in November on 12 November. This shift was for five and a half hours.

17. Mr Taylor knew that the Claimant took informal breaks which would not be recorded. The Claimant made no requests to him that she required any further breaks other than those which she took by arrangement with those she worked with. Mr Taylor had seen the Claimant in the smoking area and her presence there had been reported to him by others. He could not say whether she had been smoking or not when in that area. He also had cause to tell the Claimant not to carry her mobile phone in her back pocket or to

make calls on her mobile phone whilst she was in the bar area.

18. The Claimant submitted her hours worked to Miss Crumpler who arranged payment for her hours. The Claimant's first pay slip was given to her by Mr Armstrong and her other pay slips were then made available for her collection from the safe in the reception area which was the arrangement which the First Respondent operated for all its bar staff.

19. Mr Armstrong's evidence was supported, and fully corroborated, by the texts which he exchanged with the Claimant during her employment. The Claimant accepted that the content of these texts indicated that there was a good working relationship between them but said that this changed after she had turned down the opportunity to join him and others in a celebration of Halloween. Mr Armstrong had first learned of the Claimant's difficulties with FMA in a text which the Claimant sent to him. Thereafter, the texts confirm that he was sympathetic and supportive of the Claimant's difficulties with FMA when they arose. This resulted in the cancellation of some arranged shifts and also prevented the Claimant undertaking a small number of shifts offered to her. However, the texts confirm that this did not result in Mr Armstrong engaging in any aggressive or critical communications with her.

20. On Wednesday 26 October Mr Armstrong asked the Claimant if she was free to work on Saturday 29 October. The Claimant told him that she was out in fancy dress for Halloween on that night but then realised that they were talking at cross purposes because she thought Mr Armstrong had been inviting her to join him and others to go out for the evening when he had been asking her about her availability to work. When this confusion was cleared up Mr Armstrong asked the Claimant again whether she would be free to work on that Saturday to which the Claimant replied as follows:

    "No sorry You and Dave told me I'm not needed until November so I've made plans with the kids and friends are you that busy".

    Mr Armstrong replied:

    "No problem, just busy this weekend then dead for weeks".

21. The Claimant repeated that she would be in fancy dress with the kids. Mr Armstrong confirmed again that this was no problem. These texts between the Claimant and Mr Armstrong confirm that she was not asked out to join a social occasion celebrating Halloween with Mr Armstrong and others and that she did not tell them that she was turning down that opportunity because she was pregnant.

22. The Tribunal also accepts Mrs Armstrong's evidence that the Claimant was able to take rest breaks, and regular comfort breaks when required when she was working at the Hotel. Mr Armstrong, as did others, saw the Claimant go to the smoking area and also allowed her to take calls on her mobile. He also recalled seeing the Claimant smoking on several occasions during her shifts. He told the Tribunal that the Claimant did not indicate to him at any time when she was in work that she was in pain, or raise any issues, as to rest

breaks, or request any adjustment to her working arrangements. She did inform him of pain and difficulty with her FMA when she had to cancel shifts or could not accept an offer to work as a result of those difficulties.

23. The Claimant sent a text to Mr Armstrong on 18 November to see if she was needed on the 19th. The following morning Mr Armstrong asked if she could work on that evening. The Claimant confirmed that she could but later that day sent a text to Mr Armstrong to say she could not work because of difficulties in standing. He replied to say this cancellation was not a problem.

24. On Wednesday 23 November the Claimant texted Mr Armstrong to say she had new medication and asked if she was needed to work that week. He asked if she could work on 26 November. She agreed to do so but then had to cancel that shift. On 27 November Mr Armstrong asked by text if the Claimant wanted to work on 3 December. She replied that she was unwell with her tablets and that if she stopped being sick she could do so. Mr Armstrong sent his best wishes and asked the Claimant to text in mid-week, and the Claimant confirmed she would and needed to get her FMA on track.

25. On or around 1 December 2016 Mr Taylor had asked the First Respondent's accountants to issue a P45 for the Claimant. He had concluded that with other staff leaving a sharp drop in booking and events and his dissatisfaction with the Claimant's attitude and approach he would end her employment. He had expected the P45 to come back to him when he would have attended on the Claimant but what happened was that the accountants sent the P45 direct to the Claimant who did not receive it until 21 December. Mr Taylor had not informed Mr Armstrong of his intentions until sometime after making his decision and instructing the accountants in respect of it.

26. Mr Taylor's failure to inform Mr Armstrong of his decision for some days meant that Mr Armstrong remained in contact with the Claimant by text after 1 December. On 2 December the Claimant sent a text to Mr Armstrong to say that she could not work and asked if she was needed during that week. Mr Armstrong confirmed that there was no problem in respect of the cancellation and that he would only be able to offer shifts at weekends.

27. The continuing text communications confirm that there was a misunderstanding between them about the Claimant's availability to work on 10 December. This was a date which the Claimant had told Mr Taylor she would not be able to work during the job interview he held with her. This was because, sadly, she would be attending a memorial service for her brother in London on that day.

28. Mr Armstrong sent a further text to the Claimant on 2 December asking if she could help out on the evening of 10 December. The Claimant indicated that she probably could. However, when she did so, she had not realised the date on which she had indicated her availability. Therefore, she was expected to work on that evening which was the day on which she attended the memorial service. Mr Armstrong made a couple of calls to the Claimant when she did not attend to work on the evening shift on that day. At 20.25 that day the Claimant sent a text to Mr Armstrong as follows:

"What's up, you rang? My phones been off I've just got home from the murder memorial service for my brother and other victims".

Mr Armstrong replied:

"No problem, I thought you were working this evening?"

29. Mrs Smith's evidence was that the Claimant made contact with the First Respondent while travelling back from the memorial service, and in her presence, and that she was told she would be sacked. The text sent by the Claimant on that day about her non-attendance and Mr Armstrong's reply confirm that Mrs Smith's evidence is incorrect.

30. Mr Armstrong's evidence does potentially conflict with that of Mr Taylor in one respect. This is that Mr Armstrong is sure that he did inform Mr Taylor that the Claimant suffered from FMA after the Claimant discussed this with him. Mr Taylor does not recall being informed about this medical condition by Mr Armstrong. The Tribunal concludes that Mr Armstrong did tell Mr Taylor about the Claimant's FMA at some point but it is clear that when he did so he was not raising any issues or concerns about the Claimant's medical condition and was not requesting Mr Taylor to take any action in respect of it. Indeed, Mr Armstrong told the Tribunal that he did not keep Mr Taylor updated on rotas and hours worked in respect of the Claimant or when shifts had had to be cancelled. Mr Taylor was also content to leave the supervision of bar staff to Mr Armstrong who he obviously appreciated for the work he was doing. The Tribunal accepts that although Mr Taylor was told in passing by Mr Armstrong about the Claimant's FMA he does not recall that conversation and that the Claimant's FMA could not have played any part in his decision to dismiss her.

31. Miss Crumpler confirmed that the Claimant was paid for the hours of work she submitted to her and that she had been unaware that the Claimant was pregnant until after her dismissal. She also confirmed that the First Respondent did not issue written reasons for dismissal to staff who had been working for them for less than two years when they departed.

32. Miss Simms, one of the Hotel's receptionists during the Claimant's employment, also knew the Claimant outside of work. She told the Tribunal that she was not aware that the Claimant suffered from FMA and did not know about the Claimant's pregnancy until January 2017. She did not take any call from either the Claimant or any member of her family where pregnancy was mentioned. She recalled one telephone call from the Claimant when she called in sick. Miss Simms often saw the Claimant taking breaks during her shift. She would go outside and also make, and take, calls on her mobile phone. Miss Simms confirmed that she had been in the smoking area with the Claimant and others on two or three occasions when the Claimant was on a break.

33. There is no reference to the Claimant's pregnancy in any of the texts between her and Mr Taylor and Mr Armstrong until a text which she sent to Mr Armstrong on 7 January. This stated as follows:

"I'd just like you to know I'm going to a small claims court against the newtown, for you sacking me without notice or reason I explained to you I'd be in and out of doctor's appointments, I've been diagnosed with Fibromyalgia, which you knew, polycystic ovaries and I'm pregnant, by law you can't just sack someone for those reasons which you and Dave did so Thanks".

The Claimant had not informed Mr Armstrong that she was pregnant up to that time. He learned of her pregnancy on receipt of this text. Mr Taylor was also unaware of the pregnancy until Mr Armstrong reported his receipt of this text to him.

34. Havant CAB, acting on behalf of the Claimant, wrote to the First Respondent on 11 January 2017. Mr Taylor telephoned the CAB on 16 January to discuss this letter when he spoke to Mrs McInnes, a Supervisor at the office. Mrs McInnes was not advising the Claimant but had signed the letter sent to the First Respondent. After she had spoken to Mr Taylor she typed up an attendance note, a copy of which was in the Bundle. This recorded that Mr Taylor had informed Mrs McInnes that the Claimant had been wasting his time because she had not been undertaking shifts offered to her recently and he had decided to let her go. It also records that he wanted the CAB to know that he had not known that she was pregnant until after the dismissal. Mr Taylor said that he had wanted to make it clear to the CAB that he had not known the Claimant was pregnant and that he wanted to impress on the CAB he did not want them and him to waste time in respect of this matter when the claim being made had no merit. He agreed with Mrs McInnes' note that he had also conceded that to have dismissed the Claimant by sending her her P45 was not appropriate.

35. The Tribunal found the content of the CAB's letter of 11 January instructive. Essentially, it was a letter before action giving the Respondent the opportunity to respond to the claim made by the Claimant. This was that she had been dismissed because she was pregnant and had informed the First Respondent of her pregnancy on 20 October and 27 November 2016. Mr Taylor wrote to Havant CAB on 17 January to confirm that the Claimant had been employed on a zero hours casual contract and that he had checked with the Claimant's line manager (Mr Armstrong) and HR who had both informed him that they had not been informed of the Claimant's pregnancy during her employment with the First Respondent.

36. On 9 February 2017 Havant CAB wrote to the Respondent raising twelve grievances on behalf of the Claimant. This letter states, inter alia, as follows:

"Miss Roe notified her line manager, supervisor James, that she was pregnant on or about 20 October 2016. She exchanged text messages with both him and you, the manager, in which she made reference to her pregnancy and her inability to work shifts because of medical appointments. She has a record of those text messages".

It also alleges that Miss Roe was subjected to harassment by Mr Armstrong who it was alleged shouted at her because she could not work particular shifts because of her pregnancy. It then states as follows:

"Miss Roe was expected to work long shifts of up to nine hours without a break. On a date in November 2016, towards the end of a nine hour shift, Miss Roe told other employees that she was desperate to use the toilet and would need to leave the bar area. She was encouraged to do so by other employees. When she returned to the bar area, James shouted at her for leaving the bar. This was the first break away from work that Miss Roe had had all shift and was no longer than five minutes in length".

The letter further states as follows:

"You were the person who interviewed Miss Roe for the job in August 2016. At the interview Miss Roe told you that she would be unable to work certain days because she also worked as a foster carer and may have small children placed with her at short notice. You accepted this and offered Miss Roe the job in full knowledge of this".

"Miss Roe was regularly expected to work for longer than six hours without the benefit of the rest break to which she was entitled. Even when you became aware that she was pregnant, this did not change".

37. Mr Taylor replied to this email setting out the Respondents' position in some considerable detail. The Tribunal does not have to summarise this reply. However in this letter Mr Taylor confirmed that he retained all text messages sent and received between him and the Claimant and states that Mr Armstrong has confirmed that he did not receive any text messages from the Claimant that stated she was pregnant. He asked Havant CAB to provide any available proof to the contrary to him as a matter of priority. He received no reply to this letter. The Claimant's record of text messages that the CAB's letter confirmed the Claimant held at the time were not sent to him and has not been disclosed in these proceedings. The Claimant said that although she had kept the same number, she had changed telephone providers twice since leaving the First Respondent's employment. She said that Vodafone had informed her that she could not retrieve her text messages unless this was a criminal matter, and that it was too long ago. Mr Taylor also provided the payslips and the Statement of Terms and Conditions of Employment to the CAB in his letter of 24 February 2017 which the Claimant had not collected from the reception area.

38. In the context of these proceedings, and the claims made by the Claimant in them, the contents of the letter of 9 February from Havant CAB raise a number of concerns for the Tribunal. The grievances pursued by the Claimant make no mention of FMA. They also raise no complaints about the Respondent's conduct in respect of the Claimant's FMA. The grievances and the complaints of discriminatory conduct relate to the Claimant's pregnancy. Furthermore, when referring to the interview held in August 2016 between the Claimant and Mr Taylor, what is relied upon is the undisputed conversation that took place between them as to her work as a foster carer and the difficulties this could cause in taking up offers of work at short notice.

39. The Claimant, as already indicated, worked a total of sixteen shifts for the First Respondent. The Claimant worked only one shift of nine and a quarter hours (on 1 September 2016) and only two further shifts (eight hours and

seven and a half hours in September) in excess of six hours. Furthermore, the Claimant worked only one shift in November and as her own records confirm she worked five and a half hours on that shift. Therefore, the claims made in support of the grievances in Havant CAB's letter, and made again within these proceedings are unsustainable by reference to the unchallenged documentation as to the shifts and hours worked by the Claimant which includes her diary.

40. The Tribunal found Mr Pykett to be an unreliable witness. His evidence was not credible in a number of respects. Mr Pykett had been employed by the First Respondent as the Hotel's head chef from 3 to 19 September 2018 when his employment ended in acrimonious circumstances. He told the Tribunal that Mr Taylor had informed him at some time during his employment on a date he could not confirm when he was working in the office that he had dismissed a girl he did not name who had claimed he had done so because she was pregnant and that although she had known she was pregnant she could not prove it. Mr Pykett could not explain to the Tribunal the circumstances, and context, in which this conversation had arisen. Mr Taylor and Miss Crumpler's evidence was that they had attended on Mr Pykett to discuss a complaint of bullying which a female member of staff had made against him. Mr Taylor had read the letter of complaint to Mr Pykett and they had then sought to reassure him and in doing so had spoken to him about the ongoing case with the Claimant explaining that this was still continuing although there was no evidence to support a claim that Mr Taylor had known that the Claimant in that case was pregnant when she had been dismissed.

41. Mr Pykett's evidence was unsatisfactory both in its content and delivery. After initially denying that a complaint had been made against him he then accepted a letter of complaint had been read to him but still denied that he had attended a meeting with Mr Taylor and Miss Crumpler. Their evidence explained how the Claimant received information to enable him to contact the CAB and make the allegation against Mr Taylor which his own version of events could not explain. Mr Pykett was not employed at the time of the Claimant's employment and her dismissal and the Tribunal are satisfied that he misrepresented the information given to him by Mr Taylor, in Miss Crumpler's presence in the interview held with him about the allegations of bullying made against him.

Submissions

42. The Tribunal briefly summarises the submissions it received below.

43. Mr Grey relied on his skeleton submissions and during the course of his oral and written submissions made a number of representations to argue that a number of the Claimant's claims had been submitted out of time. The Tribunal has already indicated the determination it made in respect of the time points raised by the Respondents and makes no summary of those submissions made by Mr Grey for that reason.

44. Mr Grey submits that Mr Taylor provided a verbal explanation of the reason for the Claimant's dismissal in the call he made to the CAB on 16 January

2017 and then in the letter which he sent to the CAB on 17 January 2017. There was no prima facie case of discrimination identifiable from the evidence presented to the Tribunal. Furthermore, there was no evidence given by the Claimant to support a claim that she had made a request for rest breaks, over and above the requirements of the relevant Working Time Regulations. The Claimant's diary notes contradicted the claims she had made to the Tribunal. There was no evidence to support the alleged PCP on which the Claimant relied. The Claimant had also accepted that she had given no notification to the Respondent of any proposed adjustments she wanted to be made to work arrangements by reason of her FMA.

45. As to the Claimant's allegations in respect of her pregnancy, Mr Grey submitted that the Respondent's witnesses had been consistent and credible in demonstrating that the Claimant had given no notification of her pregnancy prior to her dismissal and the documentation before the Tribunal supported their evidence. Mr Grey also submitted that Mr Pykett had been a disgruntled and unsatisfactory witness but in any event, the evidence of the relevant meeting relied upon by the Claimant confirmed that Mr Taylor had not said that he knew the Claimant was pregnant. Finally, the Claimant had provided no particulars of the unfair treatment she alleged had arisen as a result of her pregnancy.

46. Mr Downey also relied on his written submissions. Mr Downey submitted that there had been acts of discrimination carried out by the Respondents up to the agreed date of dismissal on 21 December 2016. He further submitted that Mr Armstrong's evidence as to his working relationship with the Claimant contradicted Mr Taylor's evidence which criticised the Claimant's attitude and approach to her work.

47. Mr Downey maintained that Mr Armstrong's evidence that the Claimant had been smoking while at work completely undermined his credibility. This is because the Claimant had stated in medical examinations relating to her fostering duties that she had never smoked and her medical conditions would make it undesirable for her to smoke. Mr Downey submitted the Tribunal should accept the evidence from the Claimant, her mother and sister which established that the Respondents had been aware of her pregnancy which was supported by the conversation between Mr Taylor and Mrs McInnes. He further submitted that the Claimant had established that she had been indirectly discriminated against because of her sex not because the First Respondent could demand that she worked at short notice but because Mr Taylor and Mr Armstrong had asked her to work at short notice. This placed her at a disadvantage because she was a single parent undertaking foster care.

48. He further submitted that the evidence of the Claimant should be preferred to that of Mr Armstrong and that the Tribunal should accept that the Claimant had asked Mr Armstrong for breaks when she was feeling unwell due to her FMA and that he had not been prepared to allow her to take breaks or to make adjustments to work arrangements for her to do so. There had been a failure to make reasonable adjustments and the First Respondent had discriminated against the Claimant by subjecting her to unfavourable treatment. Finally, Mr Downey submitted that the Respondent had failed to

provide the Claimant with a written statement of terms and conditions of employment in breach of its legal obligation to do so.

Conclusions

49. The Tribunal's findings of fact confirm that the evidence given by the Claimant, Mrs Smith, her mother, and, Emily, her sister was exaggerated and inaccurate to such an extent as to cast substantial doubt on their truthfulness. It is not necessary for the Tribunal to provide a detailed summary of the law in this case when the facts found by the Tribunal make the Claimant's claims unsustainable.

50. Indirect discrimination may occur when an employer applies an apparently neutral provision, criterion or practice ("PCP") which puts workers sharing a protected characteristic at a particular disadvantage. The first stage in establishing indirect discrimination is to identify the relevant PCP. This phrase is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions. It is a requirement of the Act that the PCP puts or would put people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic.

51. Employees who are dismissed for reasons connected with pregnancy are given special protection by the ERA. Section 99 provides that an employee will be regarded as unfairly dismissed if the reason or principal reason for the dismissal is related to her pregnancy. The general rule is that an employee is not required to prove his or her case. He or she only has to produce some evidence to the Tribunal to create a presumption in law that the dismissal was for an inadmissible reason under s.99. However there is no qualifying period to claim automatically unfair dismissal under s.99 and the effect of an employee having less than two years' continuous service is that the employee bears the burden of proof in showing that the reason for dismissal was for a prescribed reason within the meaning of s.99 and the applicable regulations. In this case it is for the Claimant to prove that she was dismissed because she was pregnant. Once it is found that the reason for dismissal was an inadmissible reason, there is no room for the employer to argue that the dismissal was nonetheless reasonable in all the circumstances and therefore fair. A woman's dismissal is unfair where the principal reason for it is connected with her pregnancy and the protection under this provision is very wide and the phrase "connected with her pregnancy" would cover pregnancy – related illnesses.

52. Section 92(4) ERA provides that an employee is entitled to a written statement of the reasons for her dismissal if she is dismissed at any time while she is pregnant. This entitlement applies irrespective of the employee's length of service and without her having to request it. If an employer unreasonably fails to provide an employee with written reasons under these provisions, or if it supplies the employer with inadequate or untrue reasons, the employee may make a complaint to an employment tribunal.

53. The Claimant's evidence confirms, firstly, that the Respondent did not require

her to work on demand and at short notice (which is the PCP which the Claimant alleges applied to her employment) and, secondly, that her mother's evidence that she faced pressure to work at short notice on many occasions and was put on the spot and made to work is not true.

54. Mr Taylor's and Mr Armstrong's evidence was fully corroborated by their disclosure of their texts to and from the Claimant during her employment. The Claimant disclosed no other texts notwithstanding the indication given by the CAB to the Respondents that she had retained texts in support of her case at a time when the Claimant would have had the opportunity to retain them if she had wanted to do so. Mr Taylor's reasonable request to have sight of those texts remained unanswered. Those texts that were in the Agreed Bundle substantially compromise the credibility of the Claimant, Mrs Smith, her mother and Emily, her sister. The Claimant was not invited out to celebrate Halloween as she claims and did not tell Mr Armstrong that she was pregnant when turning down that invitation as she alleged. Therefore, the one particularised alleged disclosure of her pregnancy within these proceedings did not happen. The texts between them after that date also give no indication that Mr Armstrong was behaving differently towards her and, furthermore, the Claimant only worked one more shift for the First Respondent after this.

55. Emily's evidence about the telephone call she made to the First Respondent on 27 November is also shown to be incorrect by the texts exchanged between the Claimant and Mr Armstrong at that time. Mrs Smith's evidence as to what happened on 10 December is also shown to be incorrect; the Claimant's text on that day confirms that she made no calls as alleged by Mrs Smith and Mr Armstrong's reply confirms that she was not threatened with the sack.

56. The Claimant did inform Mr Armstrong that she suffered from FMA. The exchange of texts between them after that disclosure shows that Mr Armstrong was concerned and sympathetic as to the Claimant's illness. He raised no difficulties with her in respect of it. The Tribunal found Mr Armstrong to be a reliable and helpful witness. He had not worked for the First Respondent for some time but had a clear memory of what had happened and what he told the Tribunal was consistent with, and fully corroborated by, the texts he had disclosed. His evidence confirmed that when the Claimant was not well she did not come into work and that she was able to take breaks when in work, and did so and made no request for any adjustment to her work arrangements. Mr Armstrong's evidence as to the breaks taken by the Claimant were supported by Mr Taylor's and Miss Simm's (who also knew the Claimant outside work) evidence. The Tribunal does not have to determine if the Claimant smoked while working for the First Respondent and does not do so. The relevant fact is that she was able to take breaks and did so, and, at times, went to the smoking area during her breaks contradicting her evidence that she was not aware that a smoking area was available to staff at the Hotel.

57. The Tribunal are also satisfied that the Claimant did not inform Mr Taylor that she suffered from FMA at her job interview with him. This is because Mr Taylor did not tell Mr Armstrong that the Claimant suffered from FMA and

Mr Armstrong was informed of her illness by the Claimant. Finally, the CAB's letter makes no reference at all to the Claimant's FMA and no complaint is raised in respect of that matter in her grievances. These rely on Mr Taylor having been informed of the Claimant's responsibilities as a foster carer. There is no allegation that he was informed that the Claimant was suffering from FMA at that time. The CAB's letter of 9 February 2017 was a lengthy and detailed letter on which the CAB must have taken detailed instructions from the Claimant. It sets out twelve particularised grievances. The Tribunal has already indicated its concerns about the content of this letter. These can be summarised as follows and substantially undermine the Claimant's credibility.

58. The allegation that the Claimant notified Mr Armstrong and Mr Taylor that she was pregnant on or about 20 October 2016 by text and that she had a record of those text messages is unsupported by any documentation and it is particularly significant that Mr Taylor asked for copies of those text messages to be sent to him when responding to the correspondence from the CAB and no such disclosure was made.

59. The letter further states that the Claimant was expected to work long shifts of up to nine hours without a break and then refers to an incident that occurred on a date in November 2016 towards the end of a nine hour shift. The undisputed evidence confirms that the Claimant only worked one shift over nine hours which was on her first day of work with the First Respondent. She only worked one shift in November 2016 for five and a half hours. The letter goes on to state that the Claimant was regularly expected to work for longer than six hours without the benefit of the rest break to which she was entitled. The Claimant worked over six hours for the First Respondent on only three occasions. Furthermore, she withdrew her claim that the First Respondent had failed to provide her with rest breaks under the Working Time Regulations 1998. These allegations are unfounded.

60. After considering all the evidence in the round the Tribunal have accepted that the Claimant did not inform the First Respondent that she was pregnant until she sent the text of 7 January 2017 to Mr Armstrong. The Tribunal also note that in that text the Claimant refers to the fact that Mr Armstrong already knew about her FMA but makes no allegation or suggestion that he was aware that she was pregnant.

61. The Tribunal are satisfied that the Claimant was dismissed by Mr Taylor for the pragmatic reasons he has explained. The Tribunal was impressed by the fact that Mr Taylor took immediate action to try and address the issues raised by the CAB by direct contact with them and in the course of the correspondence which followed he set out the Respondents' position very fully and invited the CAB to make disclosure of those documents which were said to contradict that position which the CAB did not do. Mr Taylor made no admission of liability in respect of any of the claims the Claimant pursued against the Respondents in his conversation with Mrs McInnes. Furthermore, the Tribunal attaches no weight to Mr Pykett's evidence for the reasons set out above.

62. Mr Taylor did not dismiss the Claimant by reason of her pregnancy or any

matter connected to it. He was not aware that the Claimant was pregnant when he made that decision. The Claimant withdrew her complaint that she was not provided with rest breaks under the Working Time Regulations and the evidence before the Tribunal confirms that she was allowed to take breaks and made no request to either Mr Taylor or Mr Armstrong for reasonable adjustments to her work arrangements during the course of her employment. The Claimant's own evidence confirms that the PCP on which she relies did not exist. There were no such demands made on her. Her claim for indirect discrimination because of her sex must fail because of the evidence which she herself provided to the Tribunal. The Tribunal has found that she was not unfavourably treated either by reference to her FMA or her pregnancy. Furthermore, in a number of areas where facts have been disputed documentary evidence made available to the Tribunal has confirmed that the evidence given by the Claimant and her witnesses was incorrect irreparably damaging their credibility before the Tribunal.

63. The Tribunal is also satisfied that, on the evidence before it, and the correspondence between Mr Taylor and the CAB, and the fact that he had no knowledge of the Claimant's pregnancy at the time of her dismissal, the First Respondent did not unreasonably fail to provide the Claimant with written reasons for her dismissal.

64. The Tribunal's findings and the conclusions set out above mean that all the Claimant's claims against the Respondents fail and are dismissed. Therefore there are no grounds on which the Claimant could pursue a claim under s.38 Employment Act 2002.

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Employment Judge Craft

Date: 13th March 2019