EMPLOYMENT TRIBUNALS

Claimant: Holly Knowles

Respondent: The Inn at Whitewell Limited

HELD AT: Manchester **ON:** 29th and 30th November 2018
3rd December 2018
(in chambers)

BEFORE: Employment Judge Feeney
J Beards
J Ostrowski

REPRESENTATION:

Claimant: Lena Amartey, Counsel
Respondents: Paul Smith, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of

(1) Direct discrimination on the grounds of pregnancy s18 Equality Act 2010

(2) Victimisation under section 27 Equality Act 2010

(3) Failure to provide written particulars contrary to section 1 Employment Rights Act 1996

(4) Failure to comply with the ACAS code of practice on grievances contrary to section 207A Trade Union and Labour Relation Act (Consolidation)1992

is as follows:

(1) Succeeds in part

(2) fails

(3) Succeeds

(4) fails

REASONS

1. The claimant by a claim form issued on 3 May 2018 brought a claim of direct discrimination due to pregnancy, victimisation, a Section 1 Employment Rights Act 1996 claim in respect of receiving no statement of employment particulars and also requested an uplift, and a claim under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 that the grievance was not conducted in line with the ACAS Code of Practice, following her resignation from the respondent's employment on the basis that the respondent had failed to offer her shifts due to her pregnancy, and failed to deal with her grievance properly and had misrepresented her position vindictively to the HMRC.

Issues in the case

2. Section 18 of the Equality Act 2010 Direct Discrimination

   Did the respondents discriminate against the claimant on the basis of her pregnancy or her pregnancy related illness by not offering her any shifts after 19 November 2017.

3. Section 27 of the Equality Act 2010 Victimisation

   (a) Did they make a false declaration to HMRC that the claimant's engagement by the respondent had ended on 9 November 2017 because the claimant had complained of pregnancy discrimination. The protected act being her grievance of 29th January 2018.

4. Section 1 Employment Rights Act 1996 ("the 1996 Act")

   (1) It is accepted no statement of employment particulars was issued to the claimant;

   (2) Was the claimant an employee of the respondents within the meaning of Section 230 of the 1996 Act

   (3) If so, the claimant was entitled to a statement of employment particulars and should the claimant then be awarded compensation of two or four weeks' pay pursuant to Section 38 of the Employment Act 2002.

   (4) Compensation only being payable if the claimant succeeds with either her Section 18 or Section 27 Equality Act 2010 claims.

5. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992:

(1) As above, was the claimant an employee within the meaning of 295 of the 1992 Act;

(2) If so, was there an unreasonable failure by the respondent to comply with the ACAS code of practice, disciplinary and grievance procedures, the failures being that the claimant was not invited to a meeting or offered an appeal against the grievance outcome.

Witnesses and Bundle

6. The claimant gave evidence herself. For the respondents Mr Paul Brindle, Bar Manager, Mr Charles Bowman, Proprietor and Director, Mrs Ann Brandon, PA to Charles Bowman and Olga Duckworth, Administrative Assistant. There was an agreed bundle.

Tribunal's Findings of Fact

7. The respondent is a public house with accommodation which has a good reputation for the quality of its food. It is also a wedding venue. The claimant applied for a Bar Assistant position with the respondent in January 2017, there was an advert in the bundle which she said was the advert she responded to, Mr Brindle for the respondents was not sure - he could neither agree nor disagree. Accordingly we find this was the advertisement. This said: -

> "New full and part time positions for bar assistants have become available, salary approximately £15,000 for full time … this is a permanent position which must include weekends, Bank Holidays and other peak holiday times".

8. The claimant was interviewed in January 2017 by Mr Brindle, the Bar Manager (nicknamed Spud) and Robert Ezzard, Manager of the restaurant staff. The claimant had stated at the interview that she would be able to work 20 to 25 hours around her studies and it was her evidence Mr Brindle said he felt that could be accommodated. Mr Brindle said that he had no recollection of this discussion. He said it that it would not be possible to guarantee that number of hours and that indeed the claimant's hours of working showed she rarely worked over 20 hours. However, analysis of her shifts shows the claimant worked 16 hrs or over at least half of her time with the respondent and that in many weeks her low number of hours was agreed beforehand. The claimant at the time was studying for a Master's Degree in Contemporary Fine Art at the University of Cumbria and needed to attend the University approximately two afternoons a week although sometimes more.

9. The claimant at no time believed she was a worker on a zero-hour contract as contended by the respondent but that she was being offered a permanent part time position with a degree of flexibility in terms of hours. The new starter form stated it was "part time". Mr Brindle believed that they had discussed the claimant working two evenings and one day at the weekend. It was certainly the case that the claimant tended to work Monday and Fridays and one day at the weekend.

10. The claimant's hours of work from 22 January to 5 November 2017 were as follows:

Week commencing 22 January	2 days	10 hours
Week commencing 29 January	5 days	23.75 hours
Week commencing 5 February	4 days	25.05 hours
Week commencing 12 February	4 days	19.25 hours
Week commencing 19 February	4 days	23 ½ hours
Week commencing 26 February	2 days	9.75 hours
Week commencing 5 March	4 days	18 hours
Week commencing 12 March	3 days	17.75 hours
Week commencing 19 March	3 days	14.25 hours
Week commencing 26 March	4 days	16 hours
Week commencing 2 April	4 days	21.75 hours
Week commencing 9 April	2 days	12 hours
Week commencing 16 April	3 days	11.5 hours
Week commencing 23 April	4 days	20.25 hours
Week commencing 30 April	2 days	6.5 hours
Week commencing 7 May	1 day	7 hours
Week commencing 14 May	4 days	20 ½ hours
Week commencing 21 May	3 days	17 hours
Week commencing 27 May	3 days	18.25 hours
Week commencing 4 June	3 days	17 ½ hours
Week commencing 11 June	3 days	17.75 hours
Week commencing 18 June	3 days	19 hours
Week commencing 25 June	3 days	19.5 hours
Week commencing 2 July	2 days	9.25 hours
Week commencing 9 July	0	0
Week commencing 16 July	1 days	7 hours
Week commencing 23 July	3 days	13.5 hours
Week commencing 30 July	2 days	18.25 hours
Week commencing 6 August	3 days	17.75 hours
Week commencing 13 August	3 days	20 hours
Week commencing 20 August	3 days	21.75 hours
Week commencing 27 August	3 days	20 hours
Week commencing 3 September	1 day	9 hours
Week commencing 10 September	1 day	8.75 hours
Week commencing 17 September	1 day	3.25 hours
Week commencing 24 September	1 day	7.75 hours
Week commencing 1 October	1 day	5 hours
Week commencing 8 October	1 day	5 hours
Week commencing 15 October	2 days	8.5 hours
Week commencing 22 October	0	0
Week commencing 29 October	2 days	10.25 hours
Week commencing 5 November	1 day	2.5 hours

11. There were nine occasions then when the claimant worked over 20 hours and another 12 occasions when she worked 16 hours or over. The claimant said she felt she was averaging 15 hours plus a week. She did not complain about not receiving 20-25 hours.

12. The shifts were agreed at the start of each week with Mr Brindle via text messages. She said she did occasionally refuse shifts that were offered either because they were offered at last minute or on dates she had already notified the respondent she would not be available to work. From the email exchanges it was clear once she had agreed a shift unless she was ill she was expected to work it.

13. Mr Brindle said in preparing rotas he first inputted the hours for employees who were guaranteed a minimum number of hours which at the relevant time was Lucas, Dean and Amy, who were all contracted to work 37.5 hours a week and' Dave' who worked 15 hours a week. Mr Brindle himself also was on guaranteed hours and would put himself on the rota accordingly.

14. The casuals - as described by Mr Brindle - at the time were the claimant, Sofia, Rebecca, and Helen, and there were a number of other employees who would be asked to fill in as and when required. Mr Brindle then would fill in the gaps after the guaranteed hours staff with casual staff, and this would vary from week to week. He said he did try to offer the same shifts to the casual staff as this maximised the chances that they were available to carry out the work. Any further gaps he would fill with the as and when staff.

15. The claimant worked Monday and Tuesdays until September 2017, however on 21 August she had sent Mr Brindle a text message asking if she could drop her Monday and Tuesday evenings so she could concentrate on her degree exhibition. Mr Brindle alerted the claimant to the fact that on agreeing this the person who picked up those shifts might want to keep them going forward and he might find it difficult to give them back to her when she wanted them back. He explained this by text message and the claimant said "if I lose them I will deal gotta think about my degree at this point".

16. Mr Brindle suggested that the claimant had become increasingly unreliable and in his witness statement cited the matters he relied on however in cross examination he agreed that there was nothing unusual in any of the matters. The respondent also thought the claimant was finding it more difficult to work for them as she had moved to Preston whereas she had lived much nearer to the respondent, at Dunsop Bridge which was only three miles away. In particular she did not want to travel home late at night and would ask to clock off before the end of the shift. However, at the time the respondent accommodated this and did not complain.

17. The text messages exchange from the beginning of November were as follows: -

> B: What can you do next week there is a wedding Saturday.
>
> C. How bigs the wedding.
>
> B. Don't know still not sure not been able to check what can you do; can you do Saturday. Whys it matter how big it is.
>
> C Sorry no it doesn't matter, I've not been very well for a couple of weeks mm ok whose it with (2 November)

B. Sorry you've been ill but I didn't know that I was under pressure to do the rota so I had to assume you couldn't do anything so I haven't put you on.

C. No worries been a bit slow getting back to you as I am not feeling the best so it's my own fault.

B. *5th November,* Think you said Paul's parents were round but any chance you can do tonight, been properly screwed over.

C. Oh no what's happening I can't I'm really sorry.

B *8th November*. What can you do next week. Can you do anything.

C. Sorry yeah whatever just not Wednesday.

B. Tuesday 6 finish and Sunday 12 to 6 ok.

C. OK.

B. Thumbs up.

C. *14th November*. I wanted to text you early so you could get something sorted I have been up all night really sick I've been ill and run down catching all the bugs for a few weeks now. I am really sorry to let you down I've just found out I'm pregnant and I think that has something to do with me being so ill. I really want to come in but I thought it would be worse if I came in and then said I needed to leave.

B. Congrats hope you're ok. Shall I cover Sunday as well.

C. Thank you I'm sorry to let you down I really want to come in but I seem to be ill all the time, I seem to get really tired by teatime too. I am going to come in on Sunday during the day I'm not as tired and this bout of illness should hopefully be on its way out, I have been told after week twelve it gets better I hope.

B. OK.

B. How you doing, could you do tomorrow night instead.

C. I'm still in bed I am supposed to be driving up to Uni but if I am still the same I'll be staying here. Sorry Spud thanks for today.

B. Can you do owt next week.

C. *15th November*. Yes for a few weeks I will prefer to do a shift at the weekend as I am getting tired very quickly at the minute and find I am going to bed early, but I'm sure it won't last.

B. Sunday 12 to 6 again.

C. No worries thanks.

C. *19th November.* I've been being sick since 3 am can't keep anything down I know you won't get cover now so I'm still going to come in, it's just so you know I might have to keep running off.

B. No need I don't want you there if you are not 100% it doesn't look good.

C. I know but I don't want to let you down, will you manage I am so sorry.

B. We will cope, Alex is in, I hope you are going to be ok I understand your situation but please understand mine, Christmas is just around the corner and is extremely busy, I can't give you shifts with so much uncertainty as to whether you will be ok.

C. I understand. Is that only until the morning sickness stops.

B. Yes, for your benefit too. Also, if you are being sick you shouldn't serve drinks. Let me know how you get on and take care.

C. OK. Thanks.

C. *19th December*. Can I come back to work, not been sick for a few weeks.

B. I've done the rota until the beginning of next year now but if anything happens I'll call you.

C. OK Ta.

C. *4th January 2018.* Hey, hope you had a nice Christmas can I come back to work now.

B. As soon as there are any shifts I'll let you know, pretty quiet now.

C. When is it likely to be that I will get shifts.

C. *22nd January 2018* So I take it you aren't going to give me any more shifts.

B. *21st February 2018* Hey, we have our first wedding 3rd March in the Marquee are you still wanting shifts.

18. The claimant relies on the following text exchange concerning when the claimant was ill in July that year also:

C. *12 July* Hey just wanted to let you know just in case I don't plan on missing Friday but I have a really bad sickness/stomach bug, had it since Monday night and it's getting worse. If it hasn't gone before Friday I won't be able to come in – might be worth getting a back-up.

B. Ok I had you in Friday and Saturday.

C. Yeah, Friday, Saturday, Sunday I'll let you know if it gets any better by tomorrow.

B. *13th July.* You ok.

C. No, I'm really sorry I'm no better if anything worse than yesterday I feel so ill and I am in so much pain, I doubt I'll be able to come to work tomorrow, may be even Saturday and Sunday. I really hope I can I don't want to let you down as I know you are short this week end.

B. Oh dear.

B. *14th July.* How are you feeling.

C. Not good I'm sorry I'll message you tomorrow if it's any better, have you managed to find backup.

B. Thanks, kind of.

B. How you doing?

C. I'm feeling a lot better than yesterday. Still have quite bad stomach cramps, hopefully should be ok to come into work tomorrow if it doesn't get any worse. How are you doing without me.

B. OK today, not that big.

C. I'm not 100% but I'm coming in (15/7/18). Do I need to be there at 3 or can I come in a little later?

B. Sweet that's good but only if you can manage it probably come in at 5 if you want.

C. Thank you. That would be better. I'll monitor it for today but I think I'll be ok to come in. Paul wants me to go and see a doctor as he says I am not right. They aren't open today anyway. Only concern is it could be something contagious. Still got bad stomach cramps and am really bloated but it's the best it's been so far.

B. OK that's nice of you but unless you are fit to work it is best you stay at home.

C. OK I'll see how I get on today and text you. I would prefer to come in. Is it a big wedding?

B. 90 straight through I think.

C. Oh, that's not too bad then I'll text you in a few hours.

B. What's the verdict, in or out.

C. Sorry yes, I think I'll come in and see how I get on. Need the money.

B. Nice.

C. Ah fuck sorry I overslept. I'll be there as soon as I can.

B. OK no need to rush everything ok.

C. Thank you. Hey spud on Sunday night I signed electronically but not on the paper sheet … (19/7).

19. Mr Brindle prepared the Christmas rotas in mid-December. Mr Brindle maintains that following Christmas the business was extremely quiet and therefore they had no need for the claimant to work, and that guaranteed members of staff tended to work throughout January leaving less shifts available. Guaranteed hours staff generally did not take holiday in January and at the same time most of the casual staff also wanted hours because they have returned to University. Mr Brindle, in addition said that in effect the claimant had lost her usual shifts through asking not to work during the week whilst she prepared for her exhibition, and therefore she was just working weddings mainly at the weekend and there were no weddings booked in until March.

20. Mr Brindle said he did not reply to the claimant's text message on 4 January as he had already said he would offer her shifts when they became available, however, the pattern of communication between the two had been such that it was unusual for there not to be any response. He said he had also done the rota for the next week by that date. He did not respond to the claimant on 22 January because he said that he found her text quite rude, he intended to but simply forgot. He maintains he still did not have any shifts he was able to offer to the claimant. However, in response to the panel's questions about the rotas in the bundle he told us that another member of staff Sofia had asked for more hours after Christmas and he had given them to her. However, this had not been mentioned in the respondent's response to the claimant's claim, her grievance response or in Mr Brindle's witness statement.

21. On 4 January the claimant was coming to the view that she was not being offered shifts because she was pregnant, which was reinforced by Mr Brindle not responding to her 22 January text either. She raised a formal grievance on 29 January, she directed this to Mr Bowman, the owner of the respondent business. She said the circumstances are as follows: -

(1) I have been employed with The Inn at Whitewell since January 2017 and I have received weekly wage slips and payments from them until November 2017 but I remained continuously in your employment.

(2) I have requested a copy of my contract on 16 January your Olga Duckworth advised there was no contract and I believe this to be a breach of my statutory rights.

(3) After notifying you that I am pregnant and dealing with the usual symptoms of the first trimester of a pregnancy your Paul Brindle advised that you would reduce my hours to 0 "for my benefit". He also advised that the hours would be increased when the morning sickness stopped of which I have text messages confirming the same.

(4) This has transpired to be untrue as I advised him that my morning sickness had completely subsided on 19 December and since then I have received no shifts from the business contrary to the agreement mentioned above. I have contacted your Paul Brindle on multiple occasions since this time without success.

(5) Currently this has left me in a position of financial hardship as it had substantially reduced my income, furthermore, it has impacted my eligibility to receive Statutory Maternity Pay as it has meant my income has fallen below the required weekly amount to qualify. Given the above it is apparent that the business has chosen to discriminate against me since the news of my pregnancy was announced and accordingly I raise formal grievance and seek remedy in respect of this.

She said she expected a decision within 14 days.

22. Mr Bowman responded and said could she leave it with me, he would speak to relevant people and get back to her. The claimant did not object to this**.** He replied on February 6th as follows:

"Dear Holly

Many thanks for your email, firstly I hope you are well and the pregnancy is progressing nicely. I have had time to look through all the facts now and have properly looked at the hours you have worked. You are absolutely correct there is no existing written contract, in effect there will be a verbal one. We have never agreed to offer you a minimum number of hours per week or indeed insist you work on any specific amount of shift conversely you have been able to choose the work you have wanted from what was offered. This very much defines your role as a casual worker and indeed this is very important, both for us as a business and for a number of our workers like you, who enjoy flexibility. We would very much like to keep using you on some shifts but as I am sure you are aware our business is very seasonal, and it is especially quiet post – Christmas and we have to try and use our full timers effectively. I can assure you this is absolutely nothing to do with your pregnancy, it is simply the natural ebb and flow of a rural inn's trade. Let me know if you would like to be offered some shifts, the half term week after next promises to be busier and we would very much enjoy seeing you back here, alternatively if you would like to meet more formally to discuss the grievance we can diarise this but I very much hope that can be avoided".

23. The claimant replied on 16 February. She said that there had been an omission to respond to some key elements of her grievance: -

(1) Whilst you are correct in the assertion that you and your representatives have never provided a contract there is a statutory obligation to provide this;

(2) The role I had applied for was originally advertised as full/ part time and when hours were discussed it had been agreed I could work approximately 20 to 25 hours with you, Paul Brindle and Robin Ezzard which at this time they said would be achievable;

(3) You state we would very much like to keep using you on some shifts but as I am sure you are aware our business is very seasonal. However, prior to choosing to raise a grievance I have contacted your Paul Brindle on several occasions requesting shifts and did not receive a response.

(4) While I appreciate the seasonal nature of the institution my shifts were stopped mid-November which is a busy period for the inn and the majority of hospitality business, this was also within a week of me advising you of my pregnancy. Prior to which I had received shifts every week since the beginning of my employment with you other than weeks I have requested leave.

(5) You have proposed no remedy to the hours I have not received nor the financial detriment I have been placed in as a result of the above. I would welcome your prompt response".

24. Mr Bowman replied on 20 February stating: -

"I am sorry that this is the tone in which we seem to be progressing. In response as your numbering then:

(1) I am informed if there is no physical contract a verbal contract is assumed to be in place therefore in effect we have a zero hours contract. Written contracts are not obligatory.

(2) There was no explicit guarantee of a minimum number of hours looking historically at the hours you worked and were paid for there was in fact considerable variance between each week.

(3) Looking through a sample of the communications I can see there has always been the ability for you to decline hours that were offered. Lastly, we have not offered hours because we are less busy.

(4) Contrary to your view it is a fact that November and early December are some of the quietest weeks of the year.

(5) I shan't be offering you compensation for shifts you haven't worked as there is no substantiation to your claim.

I re-iterate that if you would like shifts we can once again offer you work going into Spring, I have absolutely no bias towards pregnancy and in fact have

always offered more than the statutory minimum for those employees who were entitled to maternity pay.

Should the above not satisfy you I suggest we convene a meeting to discuss more fully and formally".

On the 21st February the claimant was offered a wedding shift for 3rd March however in her view this was only offered because she had raised a grievance**.**

25. The claimant rang HMRC on 28 March to see if she was due a tax refund as she was in financial difficulties and was told that the respondent had informed them retrospectively on 6 March 2018 that the claimant's employment had ended with them on 9 November 2017. This prompted the claimant to resign**.**

26. On 5 April the claimant sent the respondent a resignation letter, stating as follows:

"I have been employed continuously since January 2017 having answered an advert for permanent bar staff and being offered a part time role with variable hours which I was told at the time would give me in the region of 20 to 25 hours per week. I worked regularly up to November averaging a little under 20 hours per week during that time however since I notified Paul Brindle of my pregnancy on 14 November 2017 I have not worked a single shift, Paul even admitted that he had stopped giving me work by reason of my pregnancy related sickness. I raised a grievance with you and the fact that I had not been given a contract was not satisfied at all with the way you handled my grievance or the outcome. The final straw came when I spoke to HMRC who told me that the business had, without my knowledge, informed them retrospectively on 6 March 2018 that my employment had ceased on 9 November 2017. As you are aware this is completely untrue and there is more than sufficient evidence to demonstrate this. I have been forced to resign due to the following factors:-

(1) Not working a single shift after I had informed the business of my pregnancy on 14 November 2017.

(2) The unsatisfactory handling of my grievance and its outcome.

(3) The discovery that behind my back the business lied to HMRC about retrospectively telling them that my employment had ended on 9 November 2017".

27. The respondent's witnesses, the two-staff working in administration, Ms Brandon and Ms Duckworth both said they had never spoken to HMRC and that a P45 would be generated if somebody had left and that had not occurred in the case of the claimant, as she had never been processed as a leaver. The other staff witnesses Mr Bowman and Mr Brindle also said they had never spoken to HMRC, Mr Bowman said he had spoken to Susan Brandon who was in charge of payroll matters in respect of the claimant's grievance and that she had told him that this was the position.

28. We also heard evidence that the respondent had not paid the claimant her outstanding holiday pay and had no explanation for why they had not done this once the claimant had resigned.

The Law

Direct Discrimination – section 18 Equality Act 2010

29. Section 18 of the Equality Act 2010 sets out that pregnancy and maternity are protected characteristics and describes direct discrimination in relation to them as follows:

(1) A woman will suffer unlawful discrimination if she is treated unfavourably during the protected period of her pregnancy because of the pregnancy or any illness resulting from the pregnancy.

(2) Because she is compulsory maternity leave or

(3) Because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary and additional maternity leave.

30. We are concerned with 18(1) here. The word unfavourable is used i.e. not less favourable treatment which requires a comparator. Protection is accorded to those who are pregnant or who have a pregnancy related illness during the protected period and the approach to be taken outside the protected period is different however here we are concerned only with the protected period. The protected period begins at the start of the woman's pregnancy and expires at the end of additional maternity leave if she is entitled to it or when she returns to work after the pregnancy if that is earlier. For those without the right to maternity leave the protected period ends two weeks after the end of the pregnancy. This protection arises as a result of two ECJ cases **Dekker vs Stichting Vormingscentrum Voor Jonge Volwassenen 1992 a**nd **HKFD -v- Dansk Arbejdsgiveforening** (Hertz vs Aldi Marked KS)**1988.**

31. Unfavourable treatment is to be measured against an objective sense of what is adverse as compared with that which is beneficial. "Treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous …. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be, see the **Trustees of Swansea University Pension and Assurance Scheme -v- Williams 2015 EAT.** This case however was brought under section 15 of the Equality Act 2010 - the claimant had reduced his hours because of his disability then took ill health retirement. He argued that his ill health retirement pension should be based on his full-time salary as the only reason he reduced his hours was because of his disability. He had compared his situation with someone who had a sudden non-fatal heart attack which rendered them unable to work – that employee would have received a full pension as there was no period of part-time working. However, he was receiving a benefit ie ill health retirement and the court opined he could not complain that that benefit was unfavourable because it could have been even more advantageous.

32. It has to be established that the reason for the unfavourable treatment corresponds to pregnancy or maternity, it is not sufficient for pregnancy or maternity to be simply part of the background context. In **Interserve FM Limited -v- Tuleikyte 2017 EAT** Mrs Tuleikyte was absent from work due to maternity but was not entitled to SMP. This meant that when her employer applied its standard policy of removing employees from the books once they had been absent without pay for three months without taking into account the reason for that absence Mrs Tulkeyte lost her job, the Employment Tribunal found this automatically amounted to maternity discrimination but the EAT disagreed. Simler P observed that given that the employer had not applied a blanket policy or criteria that was inherently based on or necessarily linked to pregnancy or maternity accordingly it was not open to the Tribunal to conclude that this was a criterion type case(the courts description) where the act or omission in question is per se discriminatory; any discrimination could only arise from a finding that the claimant's maternity leave was the reason (conscious or unconscious) for the treatment "the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination". The Tribunal should consider whether the pregnancy was "the effective cause of the treatment complained of (**O'Neill -v- The Governors of St Thomas Moore Roman Catholic Voluntary Aided Upper School and Another 1996 EAT).**

33. We had additional discussion about the Sofia issue – did the respondent prefer to employ her over the claimant? - and did this raise the issue in **Rees -v- Apollo Watches Repairs Plc** where a pregnant worker was replaced and the respondents preferred to continue with the replacement. However, the respondent argues the situation was not as clear cut as in **Rees -v- Apollo Watches** and their submissions are referred to below.

34. In relation to pregnancy there is also of some relevance the statutory regime namely the Management of Health and Safety at Work Regulations 1999, and the related provisions at Section 67 and 68 Employment Rights Act 1996. Regulation 16 of the 1999 regulation refers to persons working in the undertaking and is therefore not necessarily limited to employees (the provisions also apply to temporary and agency workers). If there are risks the employer should adapt the worker's job or hours, if that is not possible offer then alternative suitable work, if that is unavailable suspend the worker on full pay (Section 68 Employment Rights Act 1996). Under that regime if an individual is too ill to work due to for example 'morning sickness' there is provision that they could be suspended on full pay rather than treated akin to a sick employee who would or wouldn't, depending on the individuals contract or employment status, receive sick pay either at their normal rate of pay or SSP.

Victimisation: Section 27 Equality Act 2010

35. Under Section 27(1) of the Equality Act 2020 victimisation is defined as follows:

> "a person (A) victimises another person (B) if A subjects B to a detriment because
>
> (a) B does a protected act or
>
> (b) A believes that B has done or may do a protected act".

36. A protected act is conceded in this case.

37. The detriment is the respondents allegedly informing HMRC that the claimant had left on 9 November. In this case the issues are mainly factual rather than legal.

Employment Status

Definition of Employee

38. There is no definitive definition of employee, it is expressed in the Employment rights Act 1996 as "an individual who has entered into or works under a contract of employment" Section 230(1) of the same act defines contract of employment as "a contract of service or apprenticeship, whether express or implied, and whether (if it is express) oral or in writing". The employed are distinguished on the basis an employee operates under a contract of service, a self-employed person under a contract for services.

39. Where there is a dispute as to employment status there are a number of approaches which can be used as guidance and a body of caselaw.

40. In **Ready Mix Concrete South East Limited -v- Ministry of Pensions and National Insurance 1968 QB**. It was said that "a contract of service" exists if these three conditions are fulfilled: -

(i) The servant agrees that in consideration of the wage or other remuneration he would provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master.

(iii) The other provision of the contract is consistent with it being a contract of service".

41. As there was no contract here we did not have to consider whether it was a sham or not .The other issues that have to be considered in determining whether someone has employee status are whether there was an obligation to provide personal service, whether there was mutuality of obligation i.e. an obligation to offer work and an obligation to take work, this is complicated by a further question of whether if there is a succession of engagements whether the obligation subsists with the gaps between those engagements. Thirdly, is there sufficient control by the putative employer over the putative employee. In some cases, the economic reality test suggests that the Tribunal should consider whether the person is an independent contractor and if not, then consider whether the individual is an employee and the multiple test is to weigh all these factors as follows:-

(1) Did the worker undertake to provide his own work and skill in return for remuneration?

(2) Was there a sufficient degree of control to enable the worker fairly to be called an employee (including mutuality of obligation).

(3) Whether any other factors in consistent with the existence of a contract of employment.

42. In this case we are concerned with a situation of a casual worker and how that fits with the definition of employee, and the lead case in relation to that is the case of Carmichael. In **Carmichael -v- National Power PLC 1999 House of Lords** the House of Lords rejected the Court of Appeal's process in this case implying into an agreement that two casual workers who were employed to show parties around a power station on a casual as and when required basis a term to the effect that the employer would provide a reasonable share of the work available to the guide in return for which the guide would perform a reasonable amount of work offered and in doing so, their finding that this created the relationship of employer and employee. Instead they approved of the' irreducible minimum' approach first referred to in **Ready Mix.** The irreducible minimum being control, mutuality of obligation and personal performance.

43. In addition, the Court of Appeal in **Clark -v- Oxfordshire Health Authority 1998** Court of Appeal said that a bank nurse was not an employee even though she had been engaged by only one authority over a period of three years with only 14 weeks off. The lack of mutuality (no obligation on the employer to offer work and none on the individual to take it) was held to be fatal as it was a year later in Carmichael.

44. In **Hafel Limited -v- Layne-Angell EAT 2018** it was held that a person working under a bank system was not an employee particular emphasis being placed on an unambiguous contractual provision that there was no mutual obligation to provide or undertake work, as other provisions cast doubt on the bona fides of that. As always there is a balance to be struck depending on all the circumstances of the case. In **Wilson -v- Circular Distributors Limited EAT 2006** where a Relief Area Manager was not entitled to any set amount of work but when called on was contractually obliged to undertake work. He was held to be an employee of the basis that the lack of mutuality defence only defeats employment status if it applies to both sides.

45. The claimant in particular referred to **St Ives Plymouth Limited -v- Haggerty EAT 2008** unreported but cited with approval in Addison Lee Limited -v- Gascoigne EAT 2018. The head note of that case says "the employee, a casual worker initiated a claim for unfair dismissal, the issue arose whether she had requisite continuity of employment, the Tribunal found there was sufficient mutuality of obligation and in relation to the gaps where no work was performed inferred the existence of an umbrella or overarching contract. " This gave the Tribunal jurisdiction to determine her claim and the EAT by a majority held the Tribunal had been entitled to reach that view.

46. In Haggerty if any casuals were offered work and accepted it it was expected and understood that the individual would honour the arrangement and turn up for work and that they would be paid for it, if the casual was unable to accept the work the booker would telephone other casuals on the list to see if they were available.

Once an offer had been made and accepted it was expected that an individual would turn up for work, it was part of the arrangement. However, casuals were free to decline particular offers if she or he wished to do so, there would ordinarily be no come back or action taken against that individual. The court commented "It is explained to me that it was perfectly in order for her or one of her casual colleagues to notify the respondent of any periods when they would be unavailable through holidays or some other reason, sickness absence if notified in advance or when it arose was again something to which the respondents did not object. Equally, the casuals had no expectation of being offered a set minimum amount of work, it was accepted there were days outside sickness and holidays when the claimant chose not to work." It was imperative in Hagerty that the claimant established there was an overarching contract in the period when she was not at work, in order to establish the requisite service for an unfair dismissal case.

47. In this case the Tribunal concluded mutual obligations did exist. The judge stated as follows "I accept that there was no obligation upon her to accept any particular offer but I am satisfied that if she had persistently declined offers of work her name would be removed from the list of casuals, equally, although there was no guaranteed minimum amount of work the claimant had an expectation that she would be offered a reasonable amount of work. If the flow of work had dried up she would undoubtedly have sought work elsewhere. I think that those circumstances are sufficient – just sufficient – to amount to the minimum of mutual obligation between the parties to enable me to find there was an overarching contract of employment. I am supported in this conclusion by the fact that the respondents took disciplinary action against the claimant (although it was only one incident)." The respondents appealed, submitting that the Tribunal had confused the expectations of a reasonable man to have work offered and undertaken, with a binding legal obligation. Further "the parties incurred no obligation to provide or accept work, but at best assumed moral obligations of loyalty, in a context where both recognised that the best interests of each lay in accommodating the other".

48. The EAT said that a crucial feature of the case is this: may the expectation of being given work, resulting from the practice over a period of time, of itself constitute a legal obligation to provide some work, or to perform the work provided even where there is no duty to undertake any particular work offered or a minimum amount of work.

49. The majority of the EAT said "in our judgment it follows that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift may in principle be capable of giving rise to mutual legal obligations in the period when no work is provided. "

50. The issue for the Tribunal is when a practice, initially based on convenience and mutual co-operation can take on a legally binding nature. Thus, was there a proper basis for saying that the explanation for the conduct was the existence of a legal obligation and not simply good will and mutual benefit. The court in Haggerty opined that "there was sufficient basis in this case when other factors were taken into account, a lengthy period of employment, the fact that the work was important to the employers, the work was regular even if the hours varied, that the employers felt under an obligation to distribute the casual work fairly".

Section 1 of the Employment Rights Act 1996.

51. Section 1 states that: -

> (1) Where an employee begins employment with an employer the employer shall give to the employee a written statement of particulars of employment …

Under Section 38 of the Employment Act 2002 the employee is entitled to compensation of 2 or 4 weeks pay where the respondent has failed to provide written particulars.

Section 207A Trade Union and Labour Relations (Consolidation) Act 1992

52. This concerns the effect of a failure to comply with the code and adjustment of awards. The claimant alleges that the respondent did not follow the ACAS code of practice in relation to her grievance. The section states:

> (1) This section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If in the case of proceedings to which this section applies it appears to the Employment Tribunal that:
>
> (a) The claim to which the proceedings relate concerns a matter to which a relevant code of practice applies;
>
> (b) The employer has failed to comply with that code in relation to that matter and
>
> (c) The failure was unreasonable the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so increase any award it makes to the employee by no more than 25%.

53. The code of practice that is relevant in this case is the ACAS Code of Practice Disciplinary and Grievance procedure, and the failure was that the claimant was not invited to a meeting or offered an appeal against the grievance outcome.

54. Paragraph 33 of the code says that “Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received”. Para 40 says “the employee should be informed that they can appeal if they are not content with the action taken”

Conclusions

Re the failure to provide the claimant with shifts

55. By the end of the case we had identified three different tranches of absence,

(i) 19 November to 19 December;

(ii) 19 December to 4 January 2018;

(iii) 4 January 2018 to 21 February;

56. Part of this issue arose because we raised the possibility that the claimant in effect had been replaced by Sofia and she was never given those shifts back

Respondent's submissions

57. The respondents submit as follows:-

(i) In the first period there was pregnancy related illness but the claimant accepted she would not have been fit for work and agreed with Mr Brindle's suggested course of action. The respondent relies on the Williams case to say she was not in a disadvantageous position as anyone else would have been in the same position.

(ii) The second period the reason here for her not getting shifts was because there were none available.

(iii) The third period Mr Brindle's evidence was that around January 2018 Sofia made a request to him that she would like essentially to go full time and he accommodated that. Considering the rotas available in the first period Sofia worked erratic shifts which did not correspond to the claimant's previously expected shifts. In the second period into the third she did not work at all but from January onwards Sofia was essentially working full time albeit with a somewhat irregular shift pattern. Therefore, Rees doesn't apply as she was not the claimant's replacement, as she worked different shifts.

(iv) The fact that the claimant was pregnant or had had incidents of pregnancy related illness the respondents submitted had no bearing on Mr Brindle's decision making in all three periods and indeed the claimant was offered a shift at the end of the third period.

Claimant's Submissions

58. That following the text message on 19 November PB's response was that he couldn't give her shifts with so much uncertainty as to "whether you will be ok." He then made no further enquiry as to whether she was any better in stark contrast to his behaviour when she was off sick in July, and even allows her to attend when she might be contagious and inference should be drawn from this.

59. That it is incredible that PB did not have any work for the claimant over the Christmas period, inference should be drawn from the contrast between the claimant often being offered shifts at short notice and always being offered shifts regularly per week, plus the fact that Mr Brindle ignored the claimant's text messages in January.

60. An inference should be drawn of the pregnancy discrimination in addition because the respondent's submission that it was quiet between 1 January and 23 February cannot be maintained as the claimant was recruited in the same period the previous year and between 19 January and 21 February worked 101 hours and was requested to cover shifts at short notice on at least two occasions. It is clear from the rotas that other staff described as casual i.e. Sofia were offered shifts which C was not even asked about.

Conclusions

61. We find that by a majority the reason the claimant was not offered shifts in the first period were for pregnancy related reasons, and unanimously in relation to the third period.

62. In relation to the first period the majority (Judge Feeney and Mrs Beards) the claimant was not offered shifts because she had morning sickness. We also find that it was not a case of the claimant agreeing that she would not be offered shifts until she was well but this was presented as a statement, not a proposal to be agreed with, by the respondent. We find the claimant had no choice but to go along with that arrangement as in fact a decision had already been made by the respondent.

63. In our view the statutory language is clear she was treated unfavourably because of an illness connected with pregnancy and to compare the claimant with someone who was off sick but not pregnant is to resurrect the pre Dekker and Hertz heresy of adopting a comparative approach within the protected period.

64. In so far as we can reconcile Williams with this position we would say that although the term unfavourable treatment is common to both Section 15 and section 18 it cannot be said that the claimant was put in any sort of advantageous position when she was unable to work because of morning sickness.

65. In respect of Interserve we cannot see how this applies when the statute specifically refers to pregnancy related illness. In addition, her absence was wholly related to her pregnancy whereas in Interserve the treatment was not so intrinsically linked as there was the intervening factor of not being eligible for SMP which was due to unrelated factors. We have struggled to reconcile Interserve with the long-established case law on pregnancy related discrimination but in our view the specificity of section 18 with its reference to pregnancy related illness establishes the pregnancy related criterion without more being necessary.

66. We draw an inference from the situation in July 2017 when Mr Brindle was initially happy for her to attend work even when sick. Then she had been 'badgered' to work when she was off with what could possibly have been a contagious gastric condition there was no badgering here, there was no chasing up whether the claimant was well enough to work even though her illness was not contagious, given that this was a busy period this is highly unusual behaviour, and we find that the claimant was simply side-lined on the basis that the respondent through Mr Brindle assumed that she would be sick for a while, and they would continue without factoring her in to anything.

67. The majority also draw an inference from the fact that the respondent completely failed to address its mind to undertaking a risk assessment or considering the paid 'medical' suspension provisions referred to above.

68. The minority (Mr Ostrowski) find that the claimant was not offered shifts because she agreed to contact Mr Brindle when she was well and she did not do so in this period. Further she agreed with the respondent that they would not offer her shifts because of her sickness and that it was for the benefit of her health. Accordingly, the situation was consensual and there was no unfavourable treatment particularly in the light of Williams and Interserve.

69. The second period we accept that Mr Brindle had done the rotas and that no shifts arose at short notice that he could give her.

70. In the third period Mr Brindle suddenly in evidence told us that Sofia had asked to work full time and he had agreed to this. We draw an inference from this as firstly we note that this was not in his witness statement and it has never been pleaded by the respondent, the reason given by the respondent was that they were quiet in this period. Neither was this referred to in the response to the claimant's grievance. Therefore, the distance between the evidence given off the cuff at Tribunal compared to the response to the claimant's grievance and the pleaded case is a matter from which we could draw an inference.

71. In addition, the respondent's contention that they were quiet after Christmas was unsustainable in the light of the number of shifts given to Sofia and the fact that the year before in January and February the claimant had done 21 shifts. The respondent elaborated and amended this contention to explain that following when the claimant dropped her shifts to prepare for her exhibition she only did weddings. However, this did not help them in relation to January when she was not even asked if she could do any of the shifts offered to other staff including Sofia. The claimant had realised she might struggle to get her shift pattern back after the hiatus to prepare for her degree show but in fact the shifts going to Sofia in January did not arise from that hiatus.

72. In addition, another inference arises in respect of the fact that during this period Mr Brindle did not enquire as to whether the claimant was fit to return to work and therefore chose to give Sofia the work without checking with the claimant whether she was fit enough to return to work.

73. Additionally, we take into account that he failed to contact the claimant at all until her grievance prompted him to. She texted him on at least two occasions and he failed to reply and in the past, he had been extremely keen to text her offering her shifts.

74. Accordingly, we feel these matters are sufficient to draw an inference that the real reason for him not offering the claimant the shifts was because of her pregnancy.

Victimisation

75. We have accepted the respondent's evidence in respect of this - that no one did give such information to HMRC. There was nothing the claimant could bring forward to corroborate her story, regarding HMRC it is not that we do not believe the claimant, we are sure she was told something along these lines however she did not have a note from HMRC or anything to establish this. It is inherently likely to have been a misunderstanding given the evidence of the respondent. It also seemed unlikely to us with our experience that such a matter would be decided by telephone, it is much more likely it would require written communication.

76. We have considered whether to draw an inference because of the failure to pay holiday pay however we accepted this was an oversight rather than any sort of retaliation and trust it has now been rectified

Employment Status

77. There was evidence in the text messages between the claimant and Mr Brindle that the respondent did have the power to refuse the claimant a night off in the situation where she had already accepted an engagement. It is also clear she could refuse an engagement if she so wished.

78. However, when she asked for her hours to be temporarily reduced she was clearly told she ran the risk of losing her hours so it appeared to us there was a negative consequence to not accepting shifts from the respondent that made the arrangement more than just a moral arrangement and similar to Hagerty.

79. Further she did have to ask for time off but on the other hand it would be agreed. The fact that her hours were very varied militates to some extent against employee status but it not determinative where the parties have no expectation of exactly fixed hours or shifts.

80. We have taken into consideration the advert the claimant has produced which suggested that the jobs were permanent and the only distinction was whether full time or part time. Again, there is a nuance - whilst a permanent part time employee would expect to work a set number of hours it was clear the claimant was not guaranteed hours in the same way as the permanent employees, but permanent employees also did not necessarily work the same shifts every week. Therefore that was not a distinguishing factor.

81. We accept that the claimant was told by the respondent that they would be able to provide her with 20 to 25 hours although they did not manage to do this every week. There was never a week when the claimant was on zero hours unless she herself had indicated she did not want to work. In effect she was the second layer of worker after the guaranteed full-time hours workers and the Chef who had guaranteed part time hours, and above the purely bank type workers - the as and when workers- who would only come in for emergencies.

82. In light of the St Ives case we find there was sufficient dealings over the year and sufficient expectation to establish a contract of employment. It was certainly a

case of personal service, there was a sufficient element of mutuality and of course once the claimant was at work there was control of what she did.

83. Accordingly, we find that she was an employee.

Written Particulars

84. As the claimant has succeeded in part on her discrimination claim she can proceed with her Section 1 claim as it was agreed no written particulars were provided.

Section 207A TULRCA 1992

85. The failure to offer a meeting – The respondent clearly did not offer the claimant a meeting before making a decision on the claimant's grievance. Whilst the claimant did not ask for a meeting and did not complain when the respondent on 31 January said that they would look into it and get back to her, simply saying in reply she looked forward to hearing from them in due course, that still leaves no meeting being arranged and there was no positive agreement to not having a meeting.

86. The respondent did offer a meeting on 6th February after giving a view on her grievance. Although at the same time they hoped that could be avoided. The claimant replied making no comment on the meeting point but stating the errors in the previous email.

87. The failure to offer an appeal; On 20 February the respondent replied to her concerns and offered a meeting but did not refer to an appeal.

88. The respondent was in breach of the ACAS code as they did not offer a meeting before making a decision, and because they made clear they did not really want a meeting – 'avoided if possible' - and that the word appeal was not used.

89. However, we accept the respondent's position that they were always ready to meet and discuss the matter more formally and that in effect they had offered an appeal accordingly we do not find their conduct was unreasonable.

90. However, we would point out that one of the purposes of the ACAS Code is to ensure matters are dealt with in an orderly fashion and this grievance was not. Had the respondent's dealt with it in a more in depth manner they might have avoided this litigation by for example paying the claimant some compensation for the shifts she missed due to pregnancy related sickness and offering an apology for not replying to her texts. The respondent was adamant that the claimant was not entitled to compensation however it is arguable that she should have been on paid suspension during her period of pregnancy related sickness.

Remedy

91. As a result of our findings a Remedy Hearing is necessary. The respondent and the claimant need to agree the issues for that remedies hearing. Clearly the matters pleaded regarding employment particulars, can now be argued as we found the claimant was an employee.

92. The parties are to agree a bundle, serve witness statements and exchange skeleton arguments by 2nd October.

_____
Employment Judge Feeney

Date: 28TH May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 May 2019

FOR THE TRIBUNAL OFFICE

[JE]