EMPLOYMENT TRIBUNALS

Claimant: **Miss C Godley**

Respondent: **Apex International UK Limited**

Heard at: **Nottingham**

On: **Monday 8 July, Tuesday 9 July and Wednesday 10 July 2019**

Before: **Employment Judge P Britton**

Members: **Mrs J M Bonser**
Mr A Kabal

Representatives

Claimant: **Mr S Roberts, Barrister**
Respondent: **Mr M Rudd, Barrister**

RESERVED JUDGMENT

The claim is dismissed.

REASONS

Introduction

1. This claim as clarified by Counsel for the Claimant is based upon Section 18 of the Equality Act 2010 (the EQA) that is to say:

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

2. Put at its simplest the claim is based upon that when the Claimant was dismissed from the employment on 28 June 2018 it was for that prescribed reason, namely that the reason or a principle reason for her dismissal was that she was pregnant.

3. The response to that is that the Claimant was not dismissed because she was pregnant and because the principle shareholder and Managing Director of the Respondent, John Stacey, in fact already knew that the Claimant was pregnant and did so when he offered her the job of production manager and that therefore the pregnancy played no part in the decision to dismiss the Claimant which was on the basis of her poor performance. If he was unwilling to employ her because of her pregnancy, then why would he have employed her knowing that she was.

Procedural

4. The claim (ET1) was presented to this Tribunal on 6 July 2018. At that stage the Claimant was unrepresented. It also included claims for unfair dismissal which would be pursuant to s98 of the Employment Rights Act 1996 (the ERA) and direct discrimination pursuant to Section 13 of the EQA but covering the same territory. But first s18(7) precludes a s13 claim doubtless because it is unnecessary in a pregnancy based scenario pursuant to s18 which requires no comparators. An unfair dismissal claim pursuant to the ERA cannot in itself be brought because of course the Claimant lacks the necessary two years qualifying service in this case. But dismissal is of course part of s18 and thus unfair if a reason for the dismissal is pregnancy related. That is why the claim has focussed on s18.

5. A first response was provided on 18 September 18 (Bp23-31). Post the TCMPH held on 4 December 2018 at which the Claimant was legally presented further particulars of the claim were provided (Bp 43-45). In turn the Response was further particularised (Bp 49-54).

6. The Tribunal has heard sworn evidence, in each case in chief by way of witness statements. First from the Claimant, then Mr Stacey, followed by Emma Ashworth who is the Sales Office Manager; finally from Craig Palmer who is the Production Manager

Findings of Fact

7. The Tribunal makes the following findings of fact having heard all the evidence. This of course is the first stage in determining whether or not there was pregnancy discrimination pursuant to the well-known principles inter alia set out in **Igen Limited v Wong** [2005] IRLR 258CA; and of course the Tribunal reminds itself that if on the facts there is an inference to be drawn of pregnancy related discrimination then the burden of proof reverses so that the Respondent must rebut that inference to show that no part of the decision was by reason of the pregnancy.

8. The Respondent is a small business which puts together double glazing for end suppliers. It works on the just in time principle in terms of the supplies that it purchases for the manufacturing of the double glazing. Principally of course that would be glass and aluminium products. The business has expanded rapidly over the years and there are now about 30 employees; at the time we are dealing with there were about 15. There was at the material time a small office based staff consisting of Emma Ashworth to whom we have referred; Jeremy who was undertaking sales and marketing and was dismissed about 3 months after the Claimant; Mark Tucker, an assistant to the sales team; and finally Sharon who did the accounts. Upstairs sat Mr Stacey who is very much the driving force of this business. Coming to and fro from the assembly workshop

was Craig Palmer to discuss obviously production, check on the whereabouts of supplies and matters of that nature. The business is highly computerised and indeed had invested some £120,000 in a new IT software system shortly before the Claimant was employed. Although the Claimant may say that the system was problematical, the overwhelming evidence before us is that it was not and that all the staff in the office had access to scanners as of course this system was paperless.

9. There is, and was at the material time, a high turnover of staff; doubtless this is because it is a fast driven business in which Mr Stacey dispenses with the services of new recruits if he evaluates that they are not coming up to the standards and requirements that he expects. On the other hand he has some long standing employees such as Emma, Craig and one of the persons in the fabrication department.

10. Against that background the following applies.

11. On 30 May 2018 the Claimant applied for the job of Purchasing Administrator. She provided a letter of application together with her CV. The application is to be found at Bp 58 and the CV between 69 and 72. As is to be expected she sold herself hard for this job making plain that she considered that she had all the necessary skills to undertake the required role. But close scrutiny of her CV in particular shows that in fact her primary function in her current employment was as the PA to the Health and Safety Manager in what was a large company. Inter alia her duties would have required some purchasing. She set out her previous history which included that she had gained a degree in business from Lincoln University.

12. She attended interview on the 4th June. She clearly impressed Mr Stacey to such an extent that he decided that he would give her a higher level post as a Purchasing Manager. He had not got one at the time. This would mean a higher salary. The point then becomes did he unconditionally offer the job on 4 June or was it provisional and that he would confirm. On this issue we can only say that in our experience most employers will want to carry out some checks before confirming for definite the employment; and in this particular case he would want to discuss it with his wife who was the Finance Director particularly if he was proposing to pay more salary than was originally envisaged. There is a confirmatory letter of this appointment so to speak in our bundle at Bp104 which starts with ("I have pleasure in confirming my offer…"). The Claimant submits that the use of the word confirming shows that he had already unconditionally offered the post the day before. The Respondent counters that this is common parlance to use the word confirming. The experience of the Employment Tribunal as an industrial jury is the latter is more usual. Thus we are not persuaded that the word confirmatory means that the appointment was unconditionally made on the 4th.

13. The next point is this. Did Mr Stacey go home that night and inter alia apart from discussing matters with his wife, check the Claimant out on Facebook. The Claimant pours scorn on that proposition essentially saying "what reasonable employer would want to go and do such a thing". Mr Stacey's stance is that he has undertaken Facebook checks for some time, particularly because it shows more about somebody than a anodyne reference from an employer might. We are well aware that most references from employers these days are indeed anodyne and give little other than start date, finish date, salary and job role.

14. The Tribunal's experience as an industrial jury is that the use of Facebook to check out a candidate for appointment is not unusual.

15. One of the reasons Mr Stacey does so is because on another occasion he had been very impressed by somebody in interview but when he went on Facebook he had found that the candidate expressed racist and fascist sympathies.

16. This is issue of checking on Facebook is crucial in this case. Mr Stacey's position is clear namely that he went on Facebook that night and he was able to establish that the Claimant was pregnant. The Facebook entries are at Bp56. In her amended claim the Claimant has sought to argue, having suggested she had made no such entries, that even if she did, which she elaborated upon in her evidence before us, it would not have established that somebody could reasonably conclude she was pregnant. We do not accept that proposition. Those texts speak for themselves. A relative had come on Facebook on 24 May 2018, obviously having learned something with a question for the Claimant "what baby?" and she had replied in the context of a second text from a friend/relative as to "when is baby due": "September" with three crosses for kisses and a love heart symbol. Therefore we have no doubt that a reasonable person reading those Facebook entries would have concluded that the Claimant was pregnant as indeed she was. There is no evidence to contradict that Mr Stacey looked at the entries on 4 June. The Claimant suggests his credibility is questionable because he amended at the start of his evidence paragraph 41 of his witness statement where he had originally put that he looked on Facebook " a day or so before sending … the formal offer letter" to "the day before". But cross referenced to paragraphs 11 and 12 of the statement there is no material inconstancy; it is clear that his evidence is that he looked on Facebook and found the entries to the pregnancy before offering the job. He was credible and consistent thus we are persuaded by his evidence.

17. It therefore follows that the contention that he has fabricated looking at Facebook by downloading entries over Christmas 2018/19 because he had a case to meet, is not proven on the evidence. He downloaded at that stage because of the litigation. He had not done so when offering the job because he then anticipated no litigation: it was not in his mind.

18. That then leads us on to what happened on 25 June 2018. There is a conflict. The Claimant who of course has maintained that he could not have looked on Facebook, and which we have now dealt with, says that she came into see Mr Stacey sometime in the morning and explained that she had to go early that afternoon because she was pregnant and had f an antenatal appointment with a consultant. This was either met with "*silence"*, which is her evidence under oath; or " *he went very pale, then he just said " ok then" … then followed a deathly silence…"* , which is her witness statement. Mr Stacey's competing version of what happened on that day is that the Claimant came in and announced that she needed the time off but did not say why. He asked her why and she said it was for an antenatal appointment:
"so now you know I am pregnant" and he said "*I know that already*".

19. Before we resolve that conflict, we will factor in the performance issue and because findings in respect thereof will assist us. Put simply the evidence is that there were problems. The Claimant was expected to hit the ground running on this job because of what she had held herself out to be in terms of her covering letter to her job application, her CV, and what she said in interview. There was

little or no induction. That is of course a shortcoming but it is the nature of this particular business. She was being relatively well paid for what she was doing in terms of local wage rates, and it is clear that Mr Stacey was expecting that she could do the job with very few problems particularly as purchasing one product may not be very different from purchasing another which is the point made by Craig before us in particular; and there was the state of the art IT system and the Claimant was highly IT literate. Thus in this very small team she would have to learn very fast and just get on with it. As it is from the e-mail trail (Bp106-132) that we saw and the cross examination of her, there were occasions despite her denials before us, which clearly showed that she had made mistakes; for instance not ordering a product by the deadline or by 25 June having failed to provide Mr Stacey with an intelligent and proficient early stage review of supply issues which he had asked for. The document before us (Bp125-125A) is singularly lacking in such detail and does show a lack of competency in that respect and which was not to be expected given her stated competencies.

20. In passing we disregard the evidence of Emma Ashworth who embellished it. She told us that there were problems in particular with falling down on getting supplies in on time by failing to take account of non deliveries over a bank holiday. This could not have occurred. There was no bank holiday during the short period of the Claimant's employment. But that does not undermine the documented evidence of shortcomings; and the evidence of Mr Palmer, who we found credible and consistent, which provides corroboration for Mr Stacey .

21. So the Claimant was not performing to the level that Mr Stacey had expected. So the next issue becomes, was she made aware of this? The Claimant says she was not.

22. However first there is the evidence of Mr Stacey that he was pointing out to her what she needed to do on a regular basis; second that of Craig Palmer who was doing the same, pointing out what she needed to do but needing her to get on with it because he expected her to be able to do that hence why she had been employed. However it was not happening. And we have a Claimant whose evidence before us, and in her preceding pleadings and statement was always "I was not doing anything wrong" or "I would have" when asked specifics by the tribunal rather than giving a detailed rebuttal. The suggestion floated before us that she might have been failing because of pregnancy related issues that should therefore have been addressed with her simply does not engage. She has never maintained this was an issue in the pleadings. Her case simply is that she was dismissed because she was pregnant and the rest of it is trumped up. It follows that we prefer the Respondent evidence supported by the e-mails. Thus not only does this resolve this conflict but it also provides the weight to enable us to resolve the conflict viz the 25th. Thus we prefer the evidence of Mr Stacey: he made plain to the Claimant he was aware she was pregnant and that had known so before he employed her. He did not thereafter go cold.

23. That takes us to what happened on 28 June and the dismissal of the Claimant from the employment.

24. In passing what happened on 28 June was unfair. But that an employer might act unfairly, and bearing in mind there was no two years qualifying service here to give protection from unfair dismissal, it does not follow that a Tribunal can therefore conclude that this is a discriminatory dismissal as to which see the clear authority of **The Law Society and Others v Bahl** per Mr Justice Elias as then was and as reported at [2003] IRLR 640 onward. Incidentally this authority has

been most helpful to the Tribunal as it sets out the burden of proof[1] to which we have referred and the way in which the Tribunal should approach cases such as this.

25. So going to the 28th June, Mr Stacey by now having considerable disquiet over performance, and an example being the lack of content in the report which he had asked for, he asked to see the Claimant early in the morning after she had arrived at work. He did not say why and he did not invite her to have a fellow work colleague present. That something serious was going to happen unless the Claimant really convinced him to the contrary is obvious in that he had Craig in the room as a witness. The upshot of that meeting is that the Claimant was dismissed. Craig can remember little about the meeting other than being there. We share the view of the Claimant's Counsel that it is on the face of it very difficult to believe that somebody sitting in a disciplinary meeting of that nature would not remember detail. He does however remember that the Claimant was being told of her performance failings and was red faced and upset. No more than that does he remember. It has never been put to Craig that this was a deliberate memory loss because he is in fact about deliberately supporting the Respondent. That is an inference that has been raised by Counsel for the Claimant but it was not actually put to him. Similarly it was never suggested that Mr Stacey be recalled to deal with the Emma point and on the basis that Emma had been put up to it so to speak, to lie on her witness statement and then lie before the Tribunal until found out on the bank holiday issue. So the conspiracy point has never been put to Mr Stacey and all we can say is that Craig came across as an honest young man who did not embellish his evidence ie over shortcomings and therefore we are not persuaded that there is something sinister about his lack of recall. So what are we left with?

26. There are no notes of that meeting. It is good practice apropos ACAS code of practice to take notes of such an interview. Is there anything therefore in that shortcoming from which an inference can be drawn? Well we have already referred to the fact that Mr Stacey is an employer who runs his business in a way which gives new employees little time to show they can do a job. He is a hire and fire man in that respect. If they make the grade quickly then they survive. If they do not they go. He is not somebody who certainly up to now has paid much attention to employment procedures; probably because the 2 year qualifying rule for unfair dismissal protection never came in to play. So there are shortcomings, but again it is back to **Bahl v The Law Society** because we bear in mind that of course with the two year qualifying service rule for protection from unfair dismissal an employer is not obliged at law to undertake a fair process within that two year period. Of course in a scenario such as this he runs the risk of litigation as the 2 year rule doesn't apply if the dismissal was discriminatory. But again it is back to the point that if he knew she was already pregnant yet had given her the job and had made plain he knew she was pregnant as we have now found on the balance of probabilities on the 25th, then it does not point towards him dismissing her because she is pregnant because he knows that already and he has no evidence to suggest that she is failing because she is pregnant.

27. So put simply that meeting was clearly difficult. The Claimant says that Mr Stacey did not give her any specifics of why she was failing. On the other hand we know that she became very upset very quickly within that meeting and in fact she showed signs of emotional distress during this hearing. So it may well be that a lot of it went over her head: her repeated stance being *"you are doing this because I am pregnant".* Was Mr Stacey of a view when she initially went in

[1] Albeit **Igen** came after it essentially confirmed the jurisprudence as referred to in **Bahl**.

that if he got positivism so to speak out of that meeting then he might not have dismissed her? On that point we think that the nature of the way in which the meeting was handled; namely the lack of forewarning and Craig sat in, was not conducive to a constructive meeting. But It was not conducted in a hostile and aggressive way: there is no suggestion of any shouting or something like that. Suffice it to say that the meeting ended with Mr Stacey dismissing the Claimant because he was not satisfied she would in fact improve so as to pass muster.

28. A letter of dismissal (Bp132) was sent to the Claimant the following day. The reasons set out therein are consistent with performance failures. But the Claimant did not get it. She therefore suggests that it is a concoction for the purposes of the justification of the dismissal by implication created post the commencement of proceedings We will accept she did not get that letter as there is no evidence to prove that she did. But we equally accept that Mr Stacey wrote it himself on his laptop, printed it out, put it in an envelope with the correct address on it and gave it to his then secretary/accounts person Sharon, who is no longer with the employment, and either she did not send it or as it was only going by ordinary post unfortunately it never got to the Claimant having been lost in the Royal Mail or misdelivered. The Tribunal is aware from the many instances when such issues are brought up that post can get lost. On this issue we accept Mr Stacey's explanation and we equally accept that the Claimant did not get the letter. So it takes us nowhere other than that the credibility of Mr Stacey is not undermined.

Closing submissions

29. Both Counsel agreed this case centred on findings of fact and which they helpfully rehearsed in terms of the scenario.

Conclusion

29. For the reasons that we have given we have concluded that we are not satisfied on the balance of probabilities, taking all the evidence in the round[2] that this was a pregnancy based dismissal and thus the claim must fail.

Employment Judge Britton

Date: 2 September 2019

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

[2] See Laing v Manchester City Council (2006) IRLR 748 ETA again per Mr justice Elias.