EMPLOYMENT TRIBUNALS

Claimants: 1. Ms B Gibson
2. Ms K Adams

Respondents: Mr Steven Burridge and Mrs Candice Burridge
t/a Mrs Ogden's Tea Rooms

Heard at: Manchester **On:** 28-31 May 2019
15 August 2019
(in Chambers)

Before: Employment Judge Sherratt
Mr R W Harrison
Ms J A Beards

REPRESENTATION:

Claimants: Mr N Flanagan, Counsel
Respondents: Ms R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The respondents treated the claimants unfavourably because of pregnancy on 16 February 2018 when they notified them of the new rota.

2. The claimants were unfairly dismissed under section 98 of the Employment Rights Act 1996.

3. The claimants were wrongfully dismissed.

4. All other claims are dismissed.

5. Remedy issues will be considered on 24 January 2020.

REASONS

1. The claimants' claims were the subject of a preliminary hearing before Employment Judge Franey on 22 August 2018, when he set out the complaints and issues to be determined by the Tribunal. In the light of the Tribunal accepting an

amendment application on behalf of the first claimant the list which follows is as amended:

Pregnancy discrimination – section 18 Equality Act 2010

(1) Are the facts such that the Tribunal could conclude that:

(a) Either claimant was treated unfavourably by the respondent in:

(i) the notification on 16 February 2018 of changes to the rota and the implementation of the new rota on 19 March 2018;

(ii) the issue of a formal warning regarding performance to each claimant on 18 February 2018; and/or

(iii) the dismissal of the claimants; and that

(b) Any such unfavourable treatment was because of pregnancy?

(2) If so, can the respondent nevertheless show that there was no contravention of section 18?

"Automatic" unfair dismissal – section 99 Employment Rights Act 1996 and regulation 20 Maternity and Parental Leave Etc Regulations 1999

(3) Was the reason or principal reason for the dismissal of either claimant a reason connected with her pregnancy, meaning that the dismissal was unfair?

"Ordinary" unfair dismissal – section 98 Employment Rights Act 1996

(4) Was there a transfer of the employment of the claimants to the employment of the respondents under regulation 3 of TUPE so as to preserve their continuity of employment in October 2017? The respondent conceded that there was such a transfer.

(5) If so, can the respondent show that the reason or principal reason for the dismissal of the claimants was a potentially fair reason relating to their conduct?

(6) If so, was that dismissal fair or unfair?

Breach of Contract – Notice Pay

(7) Can the respondent establish that either of the claimants was guilty of a repudiatory breach of contract in the form of gross misconduct which entitled the respondent to dismiss that claimant without notice?

Remedy Issues

(8) If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include the following:

(a) An award for injury to feelings and financial losses, taking account of any state benefits;

(b) Whether the claimants had taken reasonable steps to minimise their losses;

(c) The basic and compensatory award for unfair dismissal;

(d) Whether the compensatory award should be reduced on the basis that if the respondents had acted fairly dismissal would have ensued in any event, pursuant to **Polkey v A E Dayton Services Limited [1988] ICR 142**;

(e) Should there be any reduction in the basic or compensatory award for unfair dismissal by reason of contributory fault?

(f) Should there be any increase or reduction to compensation on the basis of an unreasonable failure by any party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015?

(g) Should the claimants receive an award of two or four weeks' pay because of a failure by the respondents to provide a written statement of the main terms of employment?

The Evidence

2. The claimants gave evidence and called Yvonne Taylor, the mother of Ms Adams, who was also employed by the respondents until she too was dismissed.

3. The respondents gave evidence and called Kirsty Holden, daughter of the second respondent, and Jade Cowsill who started to work for the respondents shortly before the claimants were dismissed.

4. There was one bundle of documents containing around 300 pages and a second bundle with a further 75 pages.

The Facts

5. Beth Gibson started to work at Mrs Ogden's Tea Rooms as what she described as "a Saturday girl" in June/July 2013 when the business was run by Antonietta Holland. Leonard Pilling took over the business and Ms Gibson's position did not change but when she left college she started to work for Mr Leonard Pilling full-time on 1 July 2016. She was so employed when the respondents took over the business from Mr Pilling in October 2017.

6. It was known to the respondents at the time they acquired the business undertaking that the first claimant was pregnant and so for the purposes of section 18 of the Equality Act 2010 Ms Gibson has been in the protected period throughout her employment by the respondents.

7. Kirsty Adams started working for Ms Holland on 1 February 2009 then worked for Mr Pilling from around 2015 until the respondents took over in October 2017. When the ownership changed her employment carried over.

8. The respondents confirmed that they acquired the business trading as Mrs Ogden's Tea Rooms from Mr Pilling in October 2017, doing so without taking any legal advice. They were at the time trading together in partnership as Mrs Ogden's Deli in an adjacent stall in Bury Market. Mr Pilling offered the business to them and they purchased it, seemingly oblivious to the implications of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on their relationship with the claimants, believing that their employment had been terminated by Mr Pilling and presuming that they came to the respondents as new employees.

9. No statement of terms and conditions of employment or of any change in the identity of the employer was ever provided by the respondents to the claimants.

10. Also employed at the time of the takeover were Yvonne Taylor and Jess, a Saturday assistant.

11. Both claimants were employed in the capacity of Cook/Waitress.

12. When Mr Pilling owned the business, he would be responsible for deep cleaning in the café and the lock-up in the cellar. The claimants were responsible for the day-to-day cleanliness of the kitchen and the café.

13. When the respondents took over they did a deep clean of the café but the claimants carried on running it as they did before save that they no longer were responsible for doing a weekly supermarket shop and some of the ordering was taken from them as was the obligation to slice meat which was done by the respondents in their adjacent deli.

14. The café business was busy in November and December 2017 but quieter in January 2018. Mr and Mrs Burridge were away for a week in January. On Friday 26 January Mr Burridge inspected the premises and took photographs. The pictures he took were of matters of concern to him in connection with the cleanliness of the business premises. Ms Adams was on annual leave on this day and so he decided that he would speak to both claimants on the following Monday when they both normally worked together.

15. According to Mr Burridge, he raised with the claimants his concerns regarding cleanliness and he reiterated to them that on a daily, weekly and monthly basis cleaning needed to be undertaken. According to his statement, "in view of these discussions a verbal warning was given". According to him, the claimants raised no issues with having to carry out cleaning duties.

16. No cleaning rota was provided to the claimants as to what might be cleaned on a daily, weekly or monthly basis.

17. The claimants in cross examination accepted that Mr Burridge had a discussion with them as to the standard of cleaning on 29 January 2018. They agreed to keep the premises clean but they do not accept that they were given verbal warnings.

18. The alleged verbal warning was not confirmed in writing and is not mentioned in warning letters subsequently sent by Mr Burridge to the claimants. The Tribunal prefers the evidence of the claimants to the effect that no verbal or oral warning was given to them on 29 January 2018.

19. The parties were questioned about when the atmosphere between them seemed to deteriorate. Mrs Burridge seemed to think it stated to deteriorate around the end of January. According to the claimants, it was from 15 February 2018.

20. On Thursday 15 February 2018 Ms Adams spoke to Mr Burridge and said that she would like to speak with him and Mrs Burridge. Mrs Burridge was downstairs in the deli lock-up and was called upstairs. Both respondents and both claimants met together at a table in the café around 9 o'clock.

21. Kirsty Adams told them that she was pregnant. She also provided them with information in writing saying that from her MATB1 certificate her baby was due on 3 July 2018. She understood she qualified for 39 weeks' statutory maternity pay and she asked them to confirm what she would receive. She wanted to start her maternity leave on 4 June 2018 and although her maternity leave would finish on 1 March 2019 she would be back at work on 4 March 2019.

22. There were further discussions that day between the claimants and Mrs Burridge. According to Mrs Burridge, she went back to see the claimants around 9.30am, having spoken to her husband about a matter which will become apparent. According to the claimants she did not go back to them until around 15:00 but there is no doubt that there was a second meeting on that day.

23. The subject of the meeting was a proposed change in the rota involving all staff.

24. Although Mrs Burridge's initial witness statement was signed on 19 December 2018 she provided a second witness statement dated 18 April 2018 which referred to two new pages inserted into the hearing bundle as 93A and 93B. The evidence refers to messages between Mrs Burridge and her daughter and the Tribunal and both counsel saw the mobile phone and the messages on the screen.

25. On Sunday 11 February 2018 Mrs Burridge wrote:

> "Just checked on ACAS and we have to give a mths notice if we want to change their hrs. So we are going to do that soon. Probably put a letter together on Tuesday. Also checked and we can claim back 90% back of the maternity leave that Beth gets but the way things are going I doubt she'll be there by then. I checked the café yesterday and I opened the white fridge door and the handle was all greasy and had crap on it from food. The small toaster had toast underneath it and the drawers were covered in crumbs. XXXXXXXXXX

Y do u doubt she will be there XXXXXXXXXX

> Because they aren't keeping up with their cleaning duties already."

26. Then some 20 or so minutes later a photo message was sent showing a handwritten note made by Mrs Burridge which had a proposed new rota and some other matters as follows:

Sat - Beth, Kirsty, Jess/Yvonne

Mon - Kirsty or Beth alternate

Wed - Beth/Kirsty/Yvonne

Thurs - Beth/Kirsty

Fri - Beth, Kirsty/Yvonne

Meals/payments/admin, book in place

Breaks – eating in café

Drinks

Mobile phones

A/L documented

27. Underneath the picture were the words:

"Excuse the scruffy writing but we are making a start. The list will probably get bigger. They're in for a shock 😂 XXXXXXXXXX"

28. In cross examination Mrs Burridge confirmed that she had prepared the rota and that on her list maybe she should have referred to cleaning as well. As to the comment "they're in for a shock" it was not just about the rota but also the other issues.

29. Mrs Burridge said that after the first meeting with the claimants on the morning of Thursday 15 February she went back to the deli and said to Mr Burridge that it was a good time now to tell the girls about the new rotas. It was a good time because Beth was pregnant and Kirsty was too. She thought they could support each other on the busiest days when there would be two cooks present. She was asked if there was any discussion with the staff in advance of the proposed changes, and she said there was not because they never got round to it. Their daughter said it was not working. She accepted she did not give the opportunity to the claimants to express their views. She did not really think about it. It was solely what was best for the business. When asked if it was "tough" when the claimants expressed concerns she said, "no it was what was best for the business".

30. The preparation of the new rota was a business decision but Mrs Burridge did not know how it would be welcomed. She accepted that people do not like change. She did not know how difficult it would be for the claimants to work every Saturday but they could support each other on the busiest day with two cooks present. It would be for ten Saturdays until they left to have their babies. According to her, the claimants did not raise any issues when she spoke to them but she had not given

them the details of the new rota. She put it to the claimants they could start the new rotas immediately or they could be given notice of them. The claimants wanted notice and so they would get a letter the following day.

31. There appears to be some confusion as to exactly what happened thereafter, but on the morning of Friday 16 February the claimants and Yvonne Taylor were given letters. The letter was said to be a Formal Notice of intention to change staff working hours and read:

> "In order to improve business performance and productivity there is clear need to make a number of changes in the way the tea room is currently operating. After careful consideration, we have decided that the first adjustment needs to be in staff working rotas.
>
> This letter provides you with notice of our intention to make the required changes from week commencing Monday 19 March 2018. Please refer to the attached document that highlights the new staff working rota, for all current employees.
>
> Whilst we appreciate that these changes may not be welcomed, we have deliberated for a number of weeks regarding this matter, and see that these are now required for a more improved customer service."

32. The rota from 19 March was as set out above at 26 but with the addition of start and finish times and the number of hours to be worked each day. For the claimants it meant they would be working alternate weeks of four days (30 hours) and five days (39 hours) with both of them working Saturdays from the week commencing 19 March.

33. Yvonne Taylor's new Monday shift was not on the original draft. She would still be working on three days but on Monday, Wednesday and Friday instead of Wednesday, Friday and Saturday with 14 hours in all, involving a reduction of one hour for her.

34. According to Mrs Burridge, she saw the claimants on Friday afternoon and they raised issues with her. Ms Adams was going on holiday starting on 19 March and Ms Gibson was to be on holiday from 26 March. There would be problems with doing the ordering if Ms Adams, who usually did the ordering on a Monday, was not there on alternate Mondays. Mrs Burridge said that she listened to what they said to her and then told them that the rota would go ahead on 19 March. She would tell Mr Burridge of their discussions but she did not say that she would discuss their issues with him and get back to them should there be any change. She did discuss matters with her husband and there was to be no change to the rotas. Neither Mr nor Mrs Burridge went back to the claimants to tell them this.

35. According to the claimants, Mrs Burridge came over around 3.00pm on the Thursday after the announcement of the pregnancy in the morning to say they were thinking of changing the hours or the rota. The claimants' view is that such changes were never hinted at before the second pregnancy was announced. They accept that the letters were provided the next day, and according to Ms Adams:

> "Beth and I were not happy with the proposed changes and we both met with Candice Burridge the same day. We told her we were not happy with the proposed changes and didn't agree with them. We outlined out objections to the proposed changes. We pointed out that the proposed date for the changes to start was 19 March 2018 and that was unworkable because it coincided with the already agreed and booked holidays for me and Beth. I was due to go on holiday from 19 March until 26 March 2018 and Beth was due to go on holiday from 26 March for a week. In addition, we objected to both of us now having to work every Saturday (we worked alternate Saturdays) not least because we wanted to spend our Saturdays with our partners preparing and looking forward to our babies being born. The proposed hours also meant that there would be a problem with ordering which I did on Mondays and I would only be in work every other Monday under the proposed new rota. Mrs Burridge told us that she couldn't make a decision on her own and that she would need to speak with Mr Burridge about it. She told us that she would get back to us when she had done so. She did not tell us that the proposed changes would definitely come in on 19 March 2018 or at all. She said she would get back to us with a decision. Neither Mr nor Mrs Burridge spoke to me or Beth again about these proposed rota changes and I assumed the proposals had been dropped."

36. In cross examination Ms Adams accepted that the proposed changes seemed sensible for the respondents (but not for the claimants). She accepted that it was stressful working on a Saturday. She did not agree to the changes. She contacted suppliers on a Monday and a Thursday. She agreed that Beth could have been taught to do the ordering. She accepted that annual leave was a matter for the employer to resolve. She did not see the proposed changes as an improvement. Mrs Burridge did say she would get back to her having spoken to Mr Burridge. It would be put in writing. She agreed that the Burridges were looking at staffing levels early in February when they were looking as discontinuing the employment of one of the Saturday assistants.

37. Ms Gibson's answers in cross examination were along the same lines as those of Ms Adams.

38. In our judgment there is no doubt that Mrs Burridge was going to discuss with her husband the issues raised by the claimants. In such circumstances it does not appear to us to be unreasonable for the claimants to expect that there would be a response from Mrs Burridge on the matters that they had raised after she had spoken with her husband.

39. As to the reason for the change to the rotas, according to Mr Burridge by the beginning of February 2018 they had been in the business for almost three months and had been reviewing the staffing levels to ensure it was working at the appropriate level of efficiency. In a conversation on 10 February with Kirsty Holden, who worked at the deli and also within the Tea Rooms as required, she stated that there was insufficient cooking staff on Saturdays and customers were kept waiting for long periods to receive their food:

> "All staff were working under very stressful conditions. Kirsty Holden also stated that Kirsty Adams on busy Saturdays would still take her breaks (paid)

> and customers would have to wait. This was our busiest trading day and we started to review more closely the staffing levels as only one cook working that day was not manageable and affected all the staff as well as the business reputation and turnover. Over the next few days we came to the conclusion that it made no business sense to have two cooks working on Monday, which is our quietest day, and one cook working Saturdays, being the busiest day and also a full market day. We came to the conclusion that a change in the rota could result in both cooks working three full market days, Wednesday, Friday and Saturday. We explained the difference in turnover between Wednesday, Friday and Saturday and other days. During the period of time the claimants were employed the average turnover for Wednesday, Friday and Saturday was 79% of the weekly total. The change in rota would also mean that the claimants would both work Thursdays and alternate Mondays. Alternate Mondays would also give both cooks three days off in a row every other week as the business is closed every Tuesday and the whole Market Hall was closed on a Sunday. To us this made perfect business sense."

40. In answer to questions from the Tribunal Mr Burridge said that they were going to do the changes to the rota before they knew that Ms Adams was pregnant. If they had not been told of the pregnancy they probably would have done it the following week but "let's do it to help the girls".

41. Mr Burridge undertook a further inspection, with photographs, on Friday 16 February, when he found work surfaces, fridge and equipment were left with food debris and the fridges in the kitchen and basement still appeared not to have been cleaned since the concerns were raised by him on 29 January.

42. On 19 February Mr Burridge said he met with the claimants and showed them areas where nothing had been done since 29 January. He reminded them that they were expecting a food hygiene inspection and said he was disappointed that instructions had not been taken seriously. If they needed any assistance to move any equipment they should ask for help. Because of his concerns regarding cleanliness and the importance of it to the business and the seeming lack of understanding on the part of the claimants, they were provided with a formal written warning.

43. According to Ms Adams, she and Beth were not responsible for deep cleaning. They did light cleaning and it was for the owners to do heavier or deep cleaning.

44. It was on 18 February, three days after her announcement of her pregnancy, that Mr Burridge came into the Tea Rooms to say that he had a letter for each claimant and he left them on the counter without saying anything else.

45. The letter, a copy of which was provided for each claimant, was stated to be a warning letter regarding kitchen equipment and equipment cleanliness. It referred to their discussion on Monday 29 January regarding the poor cleanliness of the Tea Rooms' kitchen area and they had been inspected on Saturday 17 February and Mr and Mrs Burridge had serious concerns regarding the total lack of cleaning of a number of vital pieces of equipment. They appreciated some work surfaces had been cleaned but food debris and obvious spillages had been left with ground floor

fridges not appearing to have been cleaned since 29 January nor had the basement fridge been attended to. They were concerned that a food hygiene inspection might be occurring at any time and were disappointed that the cleaning did not appear to have taken priority. In view of the above the letter was to serve as a formal warning regarding their performance, which had unfortunately failed to adhere to the required standards of their expectations. Should they have any issues regarding the letter or want further clarification they should speak to either Mr or Mrs Burridge.

46. Ms Adams did speak to them, explaining that she had not been at work on 17 February and she was not accepting the warning. She was appealing it. Nothing however seemed to come of this.

47. In cross examination Ms Adams did not accept that there was an ongoing failure to keep the premises clean. She did not accept it was their job to clean up under a heavy counter.

48. The evidence of Ms Gibson was similar to that of Ms Adams. She was not accepting the warning. It was obvious to her that the warning letter was issued solely because Kirsty Adams had told the respondent she was pregnant. The two members of staff who were not pregnant were not warned. She believed the respondents wanted to get her and Kirsty out of the business as they faced the prospect of two members of staff going on maternity leave at the same time. They were just trying to build a case and if they were not both pregnant they would not have been treated in that way.

49. Mr Burridge raised an issue whereby on 10 March he believed Ms Adams did not arrive at work until 07:55 although she should have been there for 07:30. He discussed this with her on Wednesday 14 March when she stated she was a few minutes late and had been working downstairs in the storage unit. He asked her to be honest and to tell the truth, and she was adamant she was working in the basement until he told her he was there, and she gave no further response. He did not understand why she would lie and he would have been happy to have accepted an apology and move on but as this was not forthcoming he gave her a verbal warning for being late, and there was no comment.

50. In cross examination the claimant, Ms Adams, accepted she was late to work. She had been in the basement. She admitted she was a few minutes late.

51. On 14 March a letter from Mr Burridge informed Kirsty Adams that her maternity leave period was approved but that she did not qualify for SMP because she had not been employed for long enough.

52. There was a further inspection by Mr Burridge, with photographs, on Thursday 15 March. Whilst work surfaces were found to be reasonably clean the fridge was covered in debris and spillages and the top surface was covered in food debris and vermin faeces.

53. Mr and Mrs Burridge prepared a letter for the claimants on 15 March with a view to giving it to them on Friday 16 March.

54. The letter was stated to be a Final Warning letter regarding kitchen cleanliness. It referred to the inspection as a follow-up to the serious concerns previously raised regarding the cleanliness of the kitchen area. They felt extremely let down by the current unacceptable condition of the kitchen. It referred to the meeting on 29 January then the formal warning issued on 19 February. There was still the prospect of a food hygiene inspection in the near future and they felt that their employees' lack of commitment to keeping the premises to an acceptable standard would most likely cause serious harm to the business. In view of their serious concerns the letter was to be a formal final warning regarding their performance. They expected cleaning standards to improve with immediate effect and most items required daily attention but weekly and monthly cleaning cycles would also be taken into account (as discussed). The letter said that food hygiene and cleanliness were of paramount importance and any further substandard performance could lead to dismissal. The final warning would remain active until 16 September and should they have any issues they should seek clarification.

55. The letters when presented were in envelopes. It would appear that Ms Adams did not open hers and although Ms Gibson did not open hers at the time she did open it later that day.

56. At the meeting Ms Adams put it to Mr Burridge that they were doing their best and he kept asking them to do more. He wanted them to lift and clean under a large and heavy unit top but he knew they struggled to lift it especially when pregnant. They had never been asked to lift and clean under it before. It had been done by Mr Pilling as part of his deep clean. They pointed out it was very hard to clean behind the fridge. The gap was too narrow behind it and it was too heavy for them to move. He also seemed to expect them to get on their hands and knees and clean under the sink and clean low shelves with cups and plates, which was very difficult for them when they were pregnant. The amount of cleaning required by Mr Burridge seemed to be impossible within their normal working hours. The envelopes were brought later in the day. Ms Adams took her letter back to him in the deli and left it there unopened.

57. We note that the claimants' pleaded case does not include an allegation that the Final Warning amounted to unfavourable treatment because of pregnancy.

58. Ms Adams oversaw allocating the weekly hours for each member of staff and gave the respondents a list of the rota and hours. If she was going to be away on holiday she would hand the information over on the previous Thursday. If she was going to go away on holiday she would normally arrange for other staff members to cover her hours. According to Ms Adams she reminded Mr Burridge that she was going to be on holiday and asked if he wanted her to arrange cover but he told her not to organise any cover as Kirsty Holden would cover her hours. Kirsty Holden confirmed to Kirsty Adams that this would be the case. Kirsty Adams allocated staff hours, told the staff and handed a copy to Mr Burridge and there was no challenge about the hours or any proposed change of rota.

59. Ms Adams does not appear to have been challenged in respect of this evidence and Mr Burridge did not have the document.

60. Before leaving work on Friday 16 March Ms Adams went to see Mr Burridge. Mrs Burridge did not join the discussion. Ms Adams refers to this in a letter sent to the respondents on 26 March 2018 referring to having been issued with a warning on 16 March for something that she explained would be difficult for herself to do and had never been expected to do in the nine years of working there, and she would not be accepting the warning as she felt it was unfair. She wished to make a grievance regarding the warnings. She spoke to him after 5.00pm on 16 March at length as she was going to be off for a week of annual leave and although she did not agree with some of his comments she thought things had been left amicable with a chance to sort things out on her return.

61. Ms Gibson was to be working on Monday 19 March. According to her, Kirsty Adams was in charge of allocating the weekly hours and Kirsty Adams gave to the respondents a list of the hours as to who was working when and for how long so that they could organise payment of wages. She was aware that Mr Burridge had told Kirsty not to organise cover for their hours whilst they were on holiday because Kirsty Holden would cover the holiday absences of both Kirsty Adams and Beth Gibson over two successive weeks. As far as Ms Gibson was aware, Kirsty Adams gave the respondents the details before she went away so they clearly knew about them, and certainly nothing was mentioned to her about the hours until 19 March.

62. In answer to a question from the Tribunal Ms Gibson stated that she went to work on Monday 19 March under the old rota rather than the new one.

63. Ms Gibson went to work on 19 March and she expected that Kirsty Holden would be there but Kirsty Holden did not attend. Kirsty eventually came in and helped out.

64. Mrs Burridge contacted Yvonne Taylor by telephone on the morning of 19 March as Mrs Taylor should have been at work had she been working to the new rota.

65. After speaking to Mrs Burridge on the telephone, Yvonne Taylor sent a message to her:

> "Hiya Candice, sorry about this morning, but Beth told me that your Kirsty was covering. I would do any hours going as I am struggling for money and Beth knows this. Because my Kirsty and Beth said that they wasn't doing the hours on the letter as it wouldn't work but I thought the letter did not stand anymore. See you on Wednesday. Yvonne."

66. Kirsty Adams was asked about the message sent by her mother to Candice Burridge and she said that she and Beth had explained to her mother that they had not heard back from the Burridges in respect of the rota so it was assumed they had decided not to go ahead with it. Mrs Burridge would get back to her after discussing matters with Mr Burridge but she did not. She had not heard anything more in the past four weeks. She was aware, however, that her mother was informed of the proposed changes. She agreed that not all staff affected by the rota changes were pregnant – in particular her mother.

67. According to Mr Burridge he spoke to Ms Gibson in respect of the non-attendance of Yvonne Taylor and she claimed there was some confusion and they thought that Ms Holden was covering.

68. According to Mr Burridge, he and his wife decided not to challenge Beth Gibson that day although Mrs Burridge was greatly affected by what she considered to be insubordination with the staff completely ignoring their instructions. They deemed non-compliance to the formal written notification of changes to be insubordination and gross misconduct, which they would discuss with Beth Gibson and Yvonne Taylor the following day, leaving Ms Adams until she returned from leave.

69. On 20 March by telephone Beth Gibson was asked by Mr Burridge why she had not adhered to the new rota and said she had discussed it with Kirsty Adams and did not think it should change for the reasons given earlier. Beth Gibson was informed by Mr Burridge that this was no reason or excuse to ignore the instructions of management and as she could not provide any explanation she was immediately dismissed for gross misconduct for refusing to accept the rota change as this was deemed to be serious insubordination.

70. Ms Taylor, who has not brought a claim of unfair dismissal, was thereafter also dismissed with immediate effect for gross misconduct.

71. Beth Gibson's version of this is that she was called on 20 March by Mr Burridge on her day off. She explained that Kirsty Holden should have been covering Kirsty Adams's hours. She told him nothing had been said about the proposed new rota since their meeting with Mrs Burridge and he knew about the arrangements for holiday cover anyway; and even under the proposed new rota she was due in work on that day anyway. According to her he said he had no choice and he had to dismiss her. She was distressed and rang Kirsty Adams and later that day she found out that Yvonne Taylor had been sacked by telephone.

72. A letter was sent on 1 April confirming the dismissal and no right of appeal was offered. The only reason given in the telephone call and the letter was insubordination relating to the rota. There was no mention of cleanliness issues. She believed she was dismissed because she was pregnant and in her mind there could be no other explanation for the decision.

73. Ms Adams was apparently left voicemail messages by Mr Burridge to call him but she did not. She was on holiday.

74. According to Mr Burridge he met with Kirsty Adams on 24 March and she raised the same reasons mentioned above regarding non-compliance with the rota, and stated that because she was pregnant they were not allowed to enforce any changes should she disagree. According to Mr Burridge he explained his justification to the changes and with no further response being provided by Ms Adams she was informed she was being dismissed for gross misconduct with immediate effect. After this a sick note mentioned by Ms Adams.

75. According to Ms Adams she went to meet Mr Burridge on 24 March in the tearoom. At the meeting she was sacked for serious insubordination for failing to

accept the rota changes. She pointed out that the changes were not in place as Mrs Burridge had not come back to them following their 16 February discussion and that as she had been on holiday she could not have worked the new rota. Also that Mr Burridge knew before she went away what hours were being worked and by whom and that he told her not to arrange any cover.

76. Ms Adams wrote to Mr Burridge as did Ms Gibson and he responded in writing to Ms Gibson on 1 April and to Ms Adams on 5 April.

77. The letter to Beth Gibson states:

> "Further to our conversation on 20 March regarding the new staff rota system, and your failure to accept these changes without any genuine reason, I confirm that you were dismissed without notice for serious insubordination, that day."

78. The letter went on to refer to the reviewing of the staff rota and the proposed changes that were discussed on Thursday 15 February:

> "Explaining that Saturdays would be less stressful for you both (particularly in your current condition), as you would work less hours that day, and also be able to support one another through the busy period, rather than having less experienced staff (and no cook) working with you. You would also be able to take necessary breaks, without stress, and customers would still receive the level of service expected."

79. It continued saying that formal notice of the changes was given in writing on Friday 16 February with a view to the changes coming into effect on Monday 19 March, and notwithstanding their objections Candice Burridge stated the new rota would come into effect on that date but she would let him know what had been said. It was obvious that on 19 March she was the only member of staff who came in to work and it was obvious that all staff had chosen not to adhere to the formal written notice of the new changes. She provided no plausible reason as to why she had not done so and this was a refusal to accept the new staff rota system and serious insubordination and this was the reason she was dismissed on Tuesday 20 March.

80. The letter to Ms Adams dated 5 April referred to their meeting on 24 March but otherwise followed the same lines until the last paragraph, which noted that in their conversation she had openly admitted that the main reason for her not wishing to work Saturdays was that both she and Beth wanted to spend weekends with their partners, and this admission clearly vindicated the decision to dismiss.

81. Neither claimant was offered the right of appeal against the decision to dismiss them.

82. The Tea Rooms remained closed until 5 April during which time a further deep clean was done and new staff were advertised for.

Submissions

83. Both counsel provided written submissions and each spoke to us for approximately one hour.

Respondents' Submissions

84. For the respondents, Ms Levene stated that the claims were denied in their entirety.

85. For pregnancy discrimination under section 18 of the Equality Act 2010 there was required to be unfavourable treatment because of the pregnancy. Section 99 of the Employment Rights Act 1996 states that an employee shall be regarded as unfairly dismissed if the reason or principal reason is of a prescribed kind which must relate to pregnancy, childbirth or maternity. The respondents denied any discrimination.

86. The claimants must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the claimants. The claimants had to set up a prima facie case and the burden of proof will only shift to the employer where the claimant shows a prima facie case of discrimination. In this case it is submitted that the claimants have failed to prove relevant facts such as would shift the burden of proof. In the alternative, if the burden has shifted then the respondents have given an adequate explanation as to why the claimants were treated as they were and there was no discrimination. The Tribunal is not compelled to take a two stage approach if, for instance, the Tribunal were to be satisfied that the employer had offered a genuine reason for the treatment which was not consciously or unconsciously discriminatory.

87. As to the facts, Ms Gibson's pregnancy was known to the respondents when they took over the business in October 2017 and neither claimant suggests any unfavourable treatment towards Ms Gibson until after Ms Adams announced her pregnancy in February. It does not make sense for an employer to go from being kindly and supportive to taking against pregnant staff. For example, they were relaxed in their response to the need for Ms Gibson to have an appointment with her midwife. Neither claimant pointed to anything until after 15 February to indicate any unfavourable treatment on the grounds of pregnancy. With respect to Ms Gibson, there is a lack of plausibility and a lack of evidence of causation given their knowledge from October onwards. The allegedly unfavourable treatment was not done because of pregnancy but rather against a history of:

(1) attempts at increased efficiency;

(2) attempts at increased cleanliness; and

(3) evidence of a refusal to follow the new rota and insubordination.

88. As to the notification on 16 February of changes to the rota, it is denied that this amounted to unfavourable treatment whether because of pregnancy or at all.

89. The meaning of treating someone "unfavourably" has been considered by the Supreme Court in the context of discrimination arising from disability cases, holding that the concept is broadly analogous to the concepts of disadvantage and detriment found elsewhere in the Equality Act. Advantageous treatment was not held to be "unfavourable" just because it could have been more advantageous. The "reason

why" question should be correctly asked and the response properly applied as to why the unfavourable treatment took place. It is not for the Tribunal to apply a "but for" test.

90. The respondents made a business decision to ensure that the claimants were able to take breaks by having the two cooks working together on a Saturday. This also served business productivity and the claimants' interests. It was a business decision. The claimants' objections being concerns over annual leave and ordering were also business matters and the claimants conceded this.

91. Just because the claimants did not welcome the changes did not make them unfavourable on the grounds of pregnancy or at all. In the view of the respondents, it was clear that the claimants were determined not to support the proposed changes being convinced that they would not work, meaning that they would not work *for the staff.* It cannot, in the submission of the respondents, be pregnancy discrimination for a business to become more efficient and objectively more supportive to pregnant staff just because an employee is reluctant.

92. As to causation, the respondents submit that the changes were not because of the pregnancy, because they were already underway prior to being notified of the second pregnancy with mention of an intention to write a letter on Tuesday 13 February within the WhatsApp message. It was sensible to make changes to the rota at this time in the light of the observations of Kirsty Holden and because this was a quieter time.

93. As to the issue of a formal warning on 18 February, the respondents concede this was unfavourable treatment but deny it was because of pregnancy. The respondents rely upon the history of their efforts to restore and maintain cleanliness. The claimants accepted that there was time to clean particularly on Mondays and Thursdays, which could be quieter.

94. From the timing it is clear that the announcement of Ms Adams' pregnancy did not cause the respondents to deal with the cleaning issues more formally and to start to issue warnings. The management of their performance with regard to cleaning was in full swing well before Ms Adams announced her pregnancy. There was a verbal warning issued on 29 January. The lack of mention of it in subsequent documentation does not mean it was not said. The letters do, however, refer to a discussion taking place on 29 January, and the claimants admit that a discussion about cleanliness did take place with the claimants accepting they knew they were expected to keep on top of cleanliness.

95. The respondents' concerns were apparent to the claimants well in advance of the pregnancy, such as the message on 11 February about the fridge door handle.

96. As the premises remaining substandard with regard to cleanliness it was appropriate for a formal written warning to follow. Looking at the "reason why", pregnancy played no part.

97. The photographs provided in the bundle confirm what was raised with the claimants. The respondents looked at things on a monthly basis. This was nothing to do with the pregnancy. The claimants had ample support to keep the premises clean

with Mr Burridge offering to move heavy items if asked. It was in the interests of Mr and Mrs Burridge to assist as necessary to take steps to keep the premises clean.

98. In respect of their dismissal, it is for the employer to show the reason or principal reason. There may be more than one reason but it is based upon a set of facts that operated on the mind of the employer when dismissing the employee. It is for the Tribunal to identify the set of facts operating on the mind of the employer at the time of the dismissal and to apply the correct legal label.

99. The respondents aver that the factual matrix is clear evidence that the reason for dismissal was gross misconduct. The claimants were both on final written warnings which are not argued as being acts of discrimination or having been given unreasonably. The letter stated that further substandard performance would lead to close scrutiny and could lead to dismissal. The dismissals followed the decision of the claimants not to work the new rota and influencing Yvonne Taylor not to work it either. The letters make clear the changes would happen whether or not welcomed. The claimants' position that they thought it was not going ahead lacks plausibility against the contents of the letter and the clear evidence of the respondents, Mrs Burridge in particular.

100. Yvonne Taylor's evidence and her apologetic text message was solid evidence to the respondents that the claimants were having none of it and holding out on the respondents. They had directed Ms Taylor not to work the rota, with the claimants taking the view they knew best, that they would not be told, and having decided to refuse to work the new rota directed other staff not to work it either.

101. The dismissals came about due to a belief in gross misconduct and insubordination and were nothing to do with the pregnancies. The respondents believed they had been conspired against. Pregnancy was not a factor. There were ongoing performance issues over hygiene. There was the issue with regard to Ms Adams of dishonesty regarding her timekeeping, and the insubordination came as the final straw and was also an act of gross misconduct.

102. The fact that Ms Adams was only given a verbal warning in respect of the late arrival/dishonesty on 10 March reinforces the view that the respondents were not trying to dismiss the claimants for pregnancy reasons. The escalated warnings in respect of cleanliness show a tolerant approach, with the respondents seeking improvement from the claimants.

103. Had the respondents been motivated by pregnancy to dismiss then surely they would have done so following the cleanliness inspection in mid February after Ms Adams announced her pregnancy. Their continuing measured approach reflected a lack of such ulterior motives.

104. The respondents dismissed Yvonne Taylor who was not pregnant but who did refuse to work the rota. This reinforces that pregnancy played no part in the decision making and the reasons given on the dismissal letters were genuine. The claimants may have a belief that they were dismissed for pregnancy related reasons but there is no evidence.

105. As to unfair dismissal, the respondents admit they failed to follow the ACAS Code but when looking at the question of fairness under section 98(4) Tribunals must take into account all the circumstances including the size and administrative resources of the employer's undertaking in determining whether the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee, and this shall be determined in accordance with equity and the substantial merits of the case.

106. As to size and administrative resources, the respondents did their best without legal or HR support and whilst working long hours themselves. The EAT has recognised that in a small firm there is no need for an elaborate disciplinary or appeals procedure, and in a small family company it is not necessarily practicable for an employee to have a right of appeal. The size of the labour force can be relevant when considering the question of fairness.

107. In the submission of Ms Levene there was a genuine belief in gross misconduct following what was a reasonable investigation when taking into account the size and resources of the respondents. Mrs Burridge spoke to Ms Gibson and Ms Taylor who said that the claimants had told her not to go in to work on the Monday and the text message confirmed this. Ms Gibson confirmed that she did not think the rota should change. Ms Adams was aware before she met the respondents that Ms Gibson had been dismissed so she had an appropriate warning of the content of the meeting. Her ability to say her piece when she felt it necessary made procedural formalities unnecessary.

108. The attitude of Ms Adams was that she was above management reach. Because she was pregnant they could not enforce any changes. She could not be dismissed because she was sick.

109. That the respondents are a tiny organisation reinforces that it was reasonable for the insubordination to be deemed gross misconduct. Mrs Burridge was greatly affected and upset. Trust had gone. Within a small organisation this was entirely understandable. It is submitted that the dismissal fell within the band of reasonable responses following a final written warning and a series of warnings making clear that further disciplinary action could be taken.

110. There was no right of appeal offered but it would have made no difference given the small size of the respondents' business.

111. As to Polkey, the chances of the actual employer dismissing the employee have to be assessed, which requires consideration of the employer's likely thought processes and evidence that would have been available to it. Even if the respondents had gone through the ACAS approved procedures it is submitted the claimants would still have been dismissed at the same time for misconduct after final written warnings. The claimants showed no remorse at their attitude or their refusal to work the new rota. Properly convened meetings would have made no difference, neither would an appeal. It is submitted a 100% reduction ought to be made to any awards.

112. The claimants contributed to their dismissal to the extent of 100% by refusing a reasonable management instruction and directing Yvonne Taylor not to do the new

rota. Any basic or compensatory awards ought to be reduced by 100% to reflect their blameworthy conduct. Further, both claimants were on final written warnings and then committed further acts of misconduct. Even if not gross misconduct it tipped the balance given that they were on final written warnings. Refusing to follow a clear instruction was clearly misconduct.

113. As to notice pay, the respondents say the claimants each committed an act of gross misconduct and a repudiatory breach so they had no right to notice. The respondents dispute unfair dismissal so argue there should be no compensation under section 38 of the Employment Act 2002 and no uplift for failure to follow the ACAS procedures in the light of the submissions already made above.

Claimants' Submissions

114. In his submissions on behalf of the claimants Mr Flanagan summarises the claims and then refers to the legal position. In the unfair dismissal claim the burden is upon the respondent to demonstrate that there was a potentially fair reason which was preceded by a fair process itself involving a reasonable investigation, with the claimants having the opportunity to respond to the allegation. The decision to dismiss must be within the band of reasonable responses.

115. In relation to the claim under section 18 of the Equality Act 2010 Mr Flanagan reminds us that the unfavourable treatment relied upon is firstly the notification on 16 February 2018 of the changes to the rota and the implementation thereof on 19 March; secondly, the issuing of a formal warning to the claimants on 18 February 2018 and thirdly their dismissal. The claimants further contend that the dismissal was for an automatically unfair reason – that it was connected to the pregnancy for the purposes of section 99 of the Employment Rights Act 1996 and regulation 20 of the Maternity and Parental Leave Regulations 1999.

116. As to unfair dismissal, Ms Gibson was dismissed on 20 March and Ms Adams on 24 March 2018. The respondents admit there were no investigations, that the claimants were not informed of any allegations, there was no invitation to a meeting to discuss the allegations (despite the respondents referring to there having been "an interview" in their response); and that no opportunity was given to be represented at the meeting nor was there any warning of the potential disciplinary sanction. It is accepted that there was no opportunity to dispute the allegation or to appeal the outcome.

117. The dismissal letters came some time after the dismissals and following correspondence between the parties. The letters to the claimants are identical save for names and dates, with the reason relied upon as a potentially fair reason for dismissal, being gross misconduct based on "serious insubordination". No other reasons are given in the letter of dismissal nor is there any reference to any other previous conduct or performance.

118. Mr Flanagan submits that the reason relied upon by the respondents is artifice, where the documentation and explanation provided by the respondents simply undermines the allegation of gross insubordination. In the respondents' explanation for the dismissal they state that in a discussion on Thursday 15 February the new rota was discussed and a request was made by the claimants for notice of

the change. Notice was provided on 16 February informing the staff that the new rota would come into effect on 19 March, and continues:

> "…You stated to Candice that you did not want the hours/days to change, offering upcoming annual leave and stock ordering on Mondays as your reason".

119. In Mr Burridge's witness statement there is a difference chronology because he states that:

> "…On 15 February after close of business both claimants spoke to Mrs Burridge regarding the new rota. They stated that they had a chat and did not believe the rota would work due to annual leave and Kirsty Adams ordering stock on Mondays and therefore did not want it to change."

The following paragraph then states:

> "We reviewed the position but felt it was invalid as annual leave could be covered by other members of staff, on Mondays we would have one cook and one part-time staff and stock ordering is easily manageable with four weeks' notice…"

120. The claimants' case is that whilst they were informed of a possible rota change on 15 February, no information was given to them about what the change would be. This was only provided in the letters received on 16 February after which they spoke to Mrs Burridge as confirmed in the letters giving the written reasons for the dismissal.

121. Mr Flanagan notes that it appears to be agreed that there was no further discussion or written confirmation of the position regarding the new rota between the parties following receipt of the notification and the discussion on 16 February.

122. For the claimants, a number of issues arise from this:

(a) If they had been verbally informed of the actual new rota on 15 February then came and discussed the matter at close of business the same day then what review was required following the written notification on 16 February? Why did the written notification state this took place on Friday 16 February?

(b) If the claimants were informed of the new rota on 15 February but no objection was made and there is a mistake as to the date in paragraph 23 of the witness statement and in the oral evidence then why, after what is described as a review, was no clarification provided? The respondents provided detailed reasons why they rejected the concerns raised by the claimants but do not seek to convey this response to any member of staff.

(c) The changes were due to commence on 19 March, the day of Ms Adams' annual leave beginning. The respondents accept that she was informed not to provide cover for the week when she was away and that this would be arranged by them. The first time that the rota would have

impacted on her working days, due to annual leave, would have been 31 March, some two weeks later. The message from Yvonne Taylor to Candice Burrows relied upon by the respondents belies the confusion about the issue – it is accepted evidence that Ms Taylor would have done any hours that were available.

(d) If, as the respondents suggest, the claimants were wilfully ignoring an instruction, why would they do so leaving Ms Gibson working alone on Monday and removing hours from Ms Adams's mother? There is no rational explanation for the claimants to instruct Yvonne Taylor not to attend, thus knowing that Ms Gibson would be working alone on 19 March. The only plausible explanation is that there was at least some uncertainty or confusion about the situation because the claimants were awaiting the response from the respondents regarding the concerns they had raised over the operation of the new rota.

(e) The respondents apparently expected the new rota to be instigated without further comment or guidance. Ms Adams was told she need not provide cover for her annual leave. No training or even the provision of basic information was given to Beth Gibson to complete the ordering task in advance of her working alone on 19 March.

(f) The respondents had given notice of the rota change in writing, prepared two separate written warnings, they had maintained photographic evidence of the apparent state of the kitchen yet they did not give clarification of if and when the rota was to operate, either orally or in writing.

(g) The respondents failed to consider, or even retain, the written note of the hours prepared by Kirsty Adams before she went on holiday that would have indicated when Yvonne Taylor was expected to work and under which rota. This does not appear to have been viewed in advance of 19 March 2018 or analysed when serious insubordination was alleged against the two claimants.

123. The respondents continue to submit that the rota change was a supportive gesture intended to reduce the stress and difficulty to the claimants, yet their correspondence belies the reality of the position with the note between Mrs Burridge and her daughter that "they are in for a shock" and in the letter notifying them of the changes, "we appreciate these changes may not be welcomed", which clearly indicated knowledge of the claimants' concerns.

124. The respondents knew Ms Adams was on annual leave on 19 March and that Ms Gibson had attended for work. The decision to dismiss the claimants when the factual position was extremely opaque, without any opportunity to discuss the matter or to seek clarification from anyone, indicates a simple disregard for the claimants and their employment. To dismiss employees who themselves cannot be said to have worked contrary to a rota, without establishing any facts, cannot amount to a reasonable investigation or ground for dismissing an employee. The respondents have not established a reasonable belief in the claimants' guilt and there were no reasonable grounds upon which any such belief could be sustained.

125. The sanction of dismissal was wholly outside the band of reasonable responses for the mischief complained of, which at its height could be said to be erroneously informing an employee that she was not working on Monday 19 March which itself was contrary to anyone's interests. This against the background of Ms Adams with nine years' service and Ms Gibson with four, and no reliance being placed on any prior warnings.

126. No fair process or procedure was undertaken in respect of the dismissal, with complete disregard of the ACAS Code, thus the Tribunal should uplift any award by 25% to reflect the failures on the part of the respondents.

127. Further, the claimants submit that there are no grounds for any findings of contributory fault or a **Polkey** reduction. The claimants cannot be said to have undertaken blameworthy conduct or that otherwise they would have been dismissed for the same reason following a fair procedure. A simpler enquiry would have revealed the position and the absence of insubordination as alleged.

128. As to pregnancy discrimination, the claimants aver that the dismissal was the culmination of discriminatory conduct by the respondents and no other satisfactory explanation has been provided.

129. The respondents accept there is no documentary evidence of any warnings or of any issues with the claimants' work in advance of the 15 February announcement by Ms Adams. The 29 January discussion now referred to as an oral warning had never previously been stated to be such. The question of cleaning was not raised in the list prepared by Candice Burridge and shared with her daughter yet several other issues were raised.

130. The cordial and friendly attitude between the employers and the employees altered around the time of Ms Adams announcing her pregnancy, thus the balance of the evidence suggests that the atmosphere only altered because of her announcement of her pregnancy.

131. In the submission of Mr Flanagan, the cleanliness issue was instigated in order to expedite the departure of the claimants from the business. The respondents were aware of the issue of mouse droppings from the outset when they took over the business, and their explanation that they were allowing things to remain the same during the busy Christmas period is inconsistent with their behaviour following the 16 February written warning and the essential nature of cleanliness to a food business. No inspections took place between 24 October 2017 and 29 January 2018 despite the basement store being condemned and a deep clean being necessary. The assertion of the importance of cleanliness is further undermined by the changes that were made in the business including the alteration of the duties and the removal of a Saturday member of staff.

132. The 11 February message between Mrs Burridge and her daughter had Mrs Burridge already doubting that Ms Gibson would be present long enough to receive her maternity pay in the light of the other matters set out on the note.

133. On 10 February, a Saturday, only one of the claimants would have been working. There were no photographs on this occasion and nothing was said until

after Ms Adams announced her pregnancy, notwithstanding the quieter days in the market occurring in between.

134. The respondents admit that the "trigger" to the rota change was the announcement of the pregnancy by Ms Adams. The claimants submit that this was not a supportive or helpful act for the claimants in their condition, but it was less favourable treatment as a result of their pregnancies. The respondents accepted that the changes would be unwelcome, undermining the basic premise of the exercise. The claimants raised concerns with the proposals as set out above, including going on annual leave, and that they would be working every Saturday, the most stressful day, without the opportunity to prepare for their babies with their partners. The respondents were aware of these issues but ignored them and failed even to provide a response. As to the impact the changes would have, following annual leave there were around eight Saturdays, four per claimant, that would be impacted by the changes.

135. The imposition of a rota because of the pregnancies requiring the claimants to work additional unsocial and busy days, providing them with less free time at the weekend and less time together to clean and prepare during the week, clearly amounts to unfavourable treatment.

136. The imposition of the warning on 18 February was unreasonable and there was a failure to follow basic procedure. The letter was prepared in advance and did not reflect on who had been working on the day of inspection. The imposition of a formal written warning in such circumstances in the absence of any evidence of a prior oral warning being given cannot be justified. No additional training, supervision, guidance or help was provided in advance of the sanction. The escalation from an informal discussion to a written warning to both claimants can only be explained as less favourable treatment due to the pregnancies.

137. The claimants further submit that the warning coupled with the negative atmosphere and placing increased obligations upon them was engineered to ensure their departure from the business. There is no evidence that the respondents took account of the physical restrictions their pregnancies were causing them and no risk assessments or health and safety considerations were ever made.

138. The claimants submit that the only satisfactory explanation for their dismissal in the circumstances before the Tribunal is because of their pregnancies. The respondents demonstrated insight into the cost of maternity leave before ensuring that the claimants did not receive it (by saying that they had not been employed for long enough). The paucity of the investigation into the alleged misconduct and lack of any reasonable grounds to justify the dismissal point to the conclusion that there must be another motive, with the logical inference being that the respondents had wished for Kirsty Holden to undertake Ms Gibson's role during her maternity leave and sought to ensure it was permanent.

139. The dismissal letters do not refer to any of the alleged warnings previously given even though Mr Burridge suggests Ms Adams was under both a final written and an oral warning at the time.

140. The respondents were aware of the allegations that the claimants considered they were discriminated against because of their pregnancies via social media but the respondents failed to respond to grievances raised.

141. As to breach of contract, there was no evidence of repudiatory breach of contract such as to warrant dismissal of either claimant for gross misconduct thus entitling them to notice pay. Furthermore, there was no evidence that any particulars of employment were provided to the claimants.

142. In conclusion the claimants' claims are well-founded and they are entitled to be compensated for unfair dismissal, discrimination, breach of contract and the failure to provide written terms and conditions of employment.

The Relevant Law

143. Section 18 of the Equality Act 2010 deals with pregnancy and maternity discrimination: work cases, and provides that:

> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered by her as a result of it.
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
>
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends –
>
> (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
>
> (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
>
> (7) Section 13, so far as relating to sex discrimination, does not apply to

treatment of a woman in so far as –

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

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

144. Section 98 of the Employment Rights Act 1996 provides that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

145. Section 99 of the Employment Rights Act 1996 deals with leave for family reasons and provides that:

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

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity,

(b) ordinary, compulsory or additional maternity leave.

146. The Maternity and Parental Leave Etc Regulations 1999 at regulation 20 deal with unfair dismissal and provide that:

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

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

(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if –

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason (or, if more than one, the principal reason for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

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

(a) the pregnancy of the employee…

Discussion and Conclusions

147. We shall first consider the allegations of pregnancy discrimination and whether either claimant was treated unfavourably by the respondent in the notification on 16 February 2018 of changes to the rota, the implementation of the new rota on 19 March 2018, the issuing of formal warnings and by dismissal.

148. The evidence is that the notification of the changes to the rota came without any prior discussion or consultation shortly after Ms Adams gave the respondents notice of her pregnancy. The claimants considered that their treatment under the new rotas was unfavourable and would put them at a disadvantage because instead of working alternate Saturdays they would be expected to work every Saturday preventing them from spending alternate Saturdays with their partners making preparations for the new babies.

149. In the EHRC Code of Practice on Employment (2011) paragraphs 8.21-23 deal with unfavourable treatment in connection with pregnancy and maternity. At 8.23 failure to consult a woman on maternity leave about changes to her work is given as an example of unlawful discrimination. In our judgment the treatment of the claimants when they were told of the changes was analogous to this. We find that they were treated unfavourably.

150. As to the implementation of the new rota we find that it would have amounted to unfavourable treatment of the claimants because they would have been expected to work every Saturday rather than alternate Saturdays thus depriving them of spending every other Saturday with their partners.

151. We have no doubt that to be issued with a formal warning and/or to be dismissed amounts to unfavourable treatment for any employee whether or not they are pregnant.

<u>Was the unfavourable treatment because of the pregnancy?</u>

152. The issue set out at 1(a)(i) refers to “the notification on 16 February 2018 of the changes to the rota and the implementation of the new rota on 19 March 2018”. In our judgment there is distinction to be drawn between the notification on 16 February and the implementation of the new rota on 19 March 2018.

153. From the evidence of Mr and Mrs Burridge set out above at 29 and 40 we have no doubt that the decision to notify the claimants of the proposed changes was made on 16 February because Ms Adams had earlier on that day notified them of her pregnancy, and of course Ms Gibson was in the protected period throughout her employment with the respondents. We therefore find that the notification of the

proposed changes, the unfavourable treatment, was done on 16 February because of the pregnancies.

154. As to the implementation of the new rota, we are satisfied that Mr and Mrs Burridge had discussed and considered this prior to 16 February as evidenced by the messaging between Mrs Burridge and her daughter on Sunday 11 February in which the new rota was set out and there was a reference to having to give a month's notice based on a check made with ACAS.

155. In such circumstances and given the evidence of what we accept are sound business reasons put forward by Mr and Mrs Burridge for the changes, we do not find that the implementation of the new rota was because of the pregnancy of either claimant.

156. Ideally, Mr and Mrs Burridge would have consulted with the claimants in respect of the new rota rather than imposing it upon them without consultation.

Was the issue of formal warnings to each claimant on 18 February because of the pregnancy?

157. We note that there was a discussion between Mr Burridge and the claimants concerning cleanliness on 29 January 2018. We note that on Sunday 11 February Mrs Burridge messaged her daughter concerning a lack of cleanliness with regard to the white fridge and the toaster. Given the confirmation of the lack of cleanliness from the photographs within the bundle we find that the issuing of warnings to the claimants on 18 February 2018 was because of the state and condition of the premises in relation to food hygiene and not because of their pregnancies.

158. We shall come back to the question of whether the dismissals were acts of pregnancy discrimination when we have considered them in more detail.

What was the reason or principal reason for the dismissal of the claimants?

159. It is apparent from the evidence of Mr Burridge that he dismissed Beth Gibson in a telephone call on Tuesday 20 March and that he dismissed Kirsty Adams at a meeting on 24 March.

160. According to Mr Burridge, he dismissed both claimants for gross misconduct for refusing to accept the rota changes and this was deemed serious insubordination. This was confirmed in the letters sent to the claimants some days later, on 1 April for Ms Gibson and 5 April for Ms Adams.

161. That Mr and Mrs Burridge believed that the new rota had come into effect and that the claimants were not going to work to it is in our judgment evidenced by Yvonne Taylor's message to Mrs Burridge on the morning of 19 March set out above at 65.

162. We accept the evidence of Mr Burridge that the reason for the dismissals was serious insubordination in connection with the claimants failing to accept the new rotas. Having made this finding we do not conclude that the dismissal of the claimants was because of pregnancy or for a reason connected with pregnancy.

Unfair Dismissal

163. Turning to the question of unfair dismissal, the respondents have conceded that the claimants transferred to their employment under regulation 3 of TUPE so at the time of their dismissal the claimants had been employed for more than two years and had the right to bring unfair dismissal claims.

164. We have found that the principal reason for the dismissals related to the conduct of the claimants.

165. We note the submission on behalf of the respondents that in the disciplinary process they should not be held to the same standard as a larger organisation might be.

166. The Tribunal must consider all the circumstances including the size and administrative resources of the employer's undertaking. The respondent is a small enterprise with limited resources but we know that Mrs Burridge had previously consulted ACAS for advice either in person or through the ACAS website. As such the ACAS Code of Practice on Disciplinary and Grievance Procedures was available to the respondents.

167. Employment Tribunals will take the Code into account when considering relevant cases. Looking at the Code and what happened to these claimants:

(a) The claimants were not invited to meetings to seek to establish the facts.

(b) The claimants were not notified in writing of the alleged misconduct and its possible consequences. No written or other evidence that might have been collated by the employer was provided to them.

(c) The claimants were not invited to attend disciplinary meetings and were not advised of their right to be accompanied.

(d) No meeting was held with Ms Gibson. Ms Adams only met with Mr Burrows because she decided to go to see him.

(e) They were not provided with the opportunity to appeal.

168. The decisions to dismiss the claimants seem to have been taken without regard to:

(a) Mrs Burridge had not come back to the claimants following her discussion with Mr Burridge with confirmation as to whether or not the new rota was to be implemented;

(b) Ms Adams had provided Mr Burridge with a rota before she left which did not take into account the proposed changes;

(c) Ms Gibson was in work on the day the new rota was in the view of the respondents due to be implemented;

(d) Ms Adams was on holiday and therefore had not failed to work in accordance with the new rota;

(e) Any alternative to dismissal being considered.

169. Given the almost complete disregard for the following of any process with regard to these dismissals, the dismissals were in our judgment unfair even for a small undertaking such as that operated by the respondents.

Breach of Contract

170. Had the respondents established that either of the claimants was guilty of a repudiatory breach of contract in the form of gross misconduct which entitled them to dismiss the claimants without notice?

171. According to Mr Burridge, non-compliance with the formal written notification of changes was regarded as insubordination and therefore gross misconduct.

172. We have noted that Mrs Burridge did not get back to the claimants following her discussion with her husband when the claimants had raised with her various issues concerning the new rotas. Ms Adams had provided a rota to Mr Burridge before her annual leave started and it was received without comment. At the time of her dismissal Ms Gibson had been at work on a day when she was due to be there under the new rota. Ms Adams had not attended work because she was on annual leave by agreement with the respondents.

173. In these circumstances we are not satisfied that the respondents have established that either claimant was guilty of a repudiatory breach of contract which entitled them to dismiss the claimants.

Remedy

174. There will be a remedy hearing on **Friday 24 January 2020** starting at **10:00am** when the Remedy Issues set out above will be considered. The parties shall ensure that the Tribunal is provided with schedules of loss and any relevant documents for use at the hearing.

Employment Judge Sherratt

27 August 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

04 September 2019

FOR THE TRIBUNAL OFFICE

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