EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms J Guray	**V**	**William Hill Organisation Limited**

Heard at: London Central **On**: 2 and 3 October 2019

Before: Employment Judge Joffe
Mrs M B Pilfold
Ms E Ali

Representation

For the Claimant: In person

For the Respondent: Ms G Hicks, counsel

RESERVED JUDGMENT

1. The claim for automatically unfair dismissal under s 99 ERA 1996 is dismissed.
2. The claims of discrimination under s 18 Equality Act 2010 are dismissed.

REASONS

Claims and issues

1. The claimant brings claims for automatically unfair dismissal (on the grounds of pregnancy / maternity leave) and direct discrimination because of pregnancy or maternity leave. The issues were agreed at a case management hearing on 15 May 2019 and are as follows (we do not recite those issues which were no longer live at the hearing):

   Automatically unfair dismissal

   1.1. Was the reason or principal reason for the claimant's dismissal connected with: (a) her pregnancy; or (b) the fact that she sought to take ordinary maternity leave (maternity and parental leave etc ("MAPLE") regulations 1999, re 20(30(a) and (d)), thus making the dismissal automatically unfair pursuant to s 99(1)(a) and (3)(a) Employment Rights Act ("ERA")? In particular:

      1.1.1. has the claimant adduced evidence to raise the issue as to whether her dismissal for was for a reason related to her pregnancy? The claimant relies on the fact that Angel Rasavi-Nematollahi was given a warning for the same conduct.

      1.1.2. If so, has the respondent established that the reason for dismissal was unrelated to her pregnancy? The respondent said that the claimant was dismissed for reasons related to her conduct.

Pregnancy discrimination: dismissal

1.2.1 By dismissing the claimant, did the respondent treat her unfavourably (s 18(2)(a) and 18(4)EQA 2010)?

1.2.2 Has the claimant established facts from which, in the absence of an explanation, the Tribunal could conclude that the unfavourable treatment was because of the claimant's pregnancy or her intention to exercise her right to take ordinary maternity leave?

1.2.3 If so, is the respondent able show a non-discriminatory reason for the treatment in question?

Pregnancy discrimination: Risk assessment

1.2.4 It was not in dispute at the hearing that no pregnancy risk assessment had been conducted.

1.2.5 Was the respondent under an obligation to conduct a risk assessment? In particular:

1.2.6 Did the claimant inform the respondent in writing that she was pregnant? If so, when?

1.2.7 Did the claimant's work give rise to a risk to her health or that of her unborn baby?

1.2.8 Did any such risk arise from processes, working conditions, or exposure to physical, chemical or biological agents.

Remedy

2. Other issues of remedy were left until after the decision on liability.

Findings of fact

3. The tribunal heard evidence from the claimant and, on behalf of the respondent, Philip Privitera, business performance manager ('BPM'), Andrew Lennox, BPM, and Adam Weafer, area manager. There was an agreed bundle of over 300 pages and we received additional documents from the parties. We watched a short segment of CCTV footage of the respondent's South Kensington shop from 1 October 2018.

4. The claimant was employed by the respondent as a customer experience adviser ('CEA') from 16 December 2016. She worked at the respondent's South Kensington licensed betting shop. Her line manager was Mr Privitera, who was responsible for eight betting shops within his 'cluster'. The South Kensington shop was busier than some shops within the cluster but was also considered to be 'prestigious' because the location and customer base were considered to be 'better', by which we understood the respondent to mean wealthier and/or unlikely to create trouble. The claimant was trained to be a 2.5 CEA which meant that she was able to act as the duty manager of the shop. The shop was able to be run by one employee alone and was designated as suitable to be opened and closed by a single employee, unlike some shops which required two employees as they were considered more of a security risk. There were two tills and the shop was at times staffed by two employees.

5. On 1 April 2018, the claimant telephoned Mr Privitera in a distressed state and asked to see him. She drove over to see him at the Wilcox shop in Vauxhall. She said that her boyfriend had beaten her up and that she was scared of him. Mr Privitera arranged for the claimant to work in other shops for a period so as to avoid her boyfriend. In late April 2018, the claimant had a period of absence due to stress and anxiety following a domestic incident. In about July 2018 she informed her line manager, Mr Privitera, that she was pregnant but asked him to

keep it a secret as she had not yet told her family and she was unsure if she was going to keep her baby. She asked Mr Privitera not to tell anyone.

6. In early August 2018 the claimant informed Mr Privitera that she was intending to keep her baby. She subsequently told him that she had informed her partner's family and her own family. At that stage in August 2018, Mr Privitera gave the claimant a pack of company policies on maternity pay and leave. He also suggested to the claimant that she might like to increase her contracted hours from part-time in order to help increase her maternity pay. The claimant was contracted to do 18 hours but in fact worked significant overtime. The claimant agreed and her contract was varied from 1 September 2018 to 30 hours. An additional benefit was that her increased hours meant she was entitled to a travel card paid for by the respondent, which she could also use for her personal travel.

7. At some stage in August, the claimant discussed with Mr Privitera the fact that she was short of money; Mr Privitera went to the area manager to arrange for the claimant to be paid for overtime earlier than would usually be the case.

8. On another date in August, the claimant spoke to Mr Privitera about her antenatal appointments and scans. She says that she showed him a letter dated 8 August 2019 about an antenatal appointment and a report of an ultrasound scan dated 13 August 2018. Mr Privitera could not recall seeing these documents but did not dispute the claimant's account so we accepted that the claimant did present the documents to Mr Privitera when discussing her appointments. The Tribunal also saw text messages between the claimant and Mr Privitera which made some reference to the claimant's pregnancy .

9. Mr Privitera did not conduct a pregnancy risk assessment, although the respondent has a standard form to be filled in which covers assessment of risk in a number of areas including hours of work, manual handling, extremes of heat or cold and display screen equipment. He told the Tribunal that he wanted to ensure the claimant's contractual hours had been increased and to sort out the earlier payment of overtime before he told HR she was pregnant in case there was resistance to increasing her hours and he therefore delayed the formal risk assessment. He also told the Tribunal that he did consider the sort of issues raised in the pro forma risk assessment and considered that the South Kensington shop was 'immaculate' and 'perfect for [the claimant]'. There were no issues for example with temperature or manual handling.

10. There was a discussion at around this time between the claimant and Mr Privitera about whether she wished to remain at the South Kensington shop. Mr Privitera offered her a move to a different shop within his cluster. The claimant said that she was fine to stay at South Kensington if she had a cashier and her evidence to us was that she wanted to stay because she knew the shop and knew the customers. Mr Privitera said he spoke to her every day they were both in to keep a close eye on the claimant's welfare.

11. Mr Weafer was the area manager for the area including Mr Privitera's cluster from early September 2018 and was based in the offices beneath the South

Kensington shop. He would speak with the claimant to ask her how she was. The claimant indicated on several occasions that she was content with her working arrangements.

12. There was a further discussion between the claimant and Mr Privitera during this period about whether the claimant should work as a cashier only rather than as a CEA 2.5 / duty manager as this would mean she could work a 12 – 6 pm shift and would not be required to close the shop. Mr Privitera apparently told the claimant that he would investigate whether she could work as a cashier without losing her enhanced CEA 2.5 pay rate. It appears that this issue was not resolved either way before Mr Privitera went on leave in October 2018.

13. Mr Privitera was on annual leave from 8 October 2018 to 22 October 2018.

14. The Tribunal heard much evidence about whether there was an additional employee provided at the South Kensington shop during the period of the claimant's pregnancy prior to her dismissal. Mr Privitera said that a cashier was generally provided until at least 7 pm, at which stage the cashier might be required by a 'double-manned' shop, i.e. a shop which required two employees to close for security reasons. The busiest part of the day was usually 12 noon to 3 pm. His evidence seemed to tally with the claimant's evidence that the cashier would be taken away for a two-manned shop and we accepted that the claimant generally had a cashier in the shop up until about 7 pm during the period from August 2018 onwards, although there may have been a limited number of occasions when no additional cashier was available for the claimant's whole shift.

15. Mr Privitera said that there would usually be managers in the offices of the respondent downstairs from the betting shop (which were used as a base by two BPMs and an area manager) and that if an employee was alone in the South Kensington shop, he or she could telephone a manager to cover. That evidence was borne out by evidence for 1 and 8 October 2018 (the dates of the alleged misconduct) which showed other employees logging on to a till to cover the claimant's breaks. In the rare case where an employee was completely alone in the evening, he said it would be acceptable for him or her to go to the toilet at an appropriate moment. Mr Privitera said, and the claimant did not dispute, that the claimant never raised with him any difficulty about taking toilet breaks. The claimant did not raise any issues with Mr Weafer about breaks or lack of cashiers when Mr Privitera went on leave.

16. The Tribunal also heard some evidence about food breaks. There was a rule that employees could not eat behind the counter and there was an occasion when the claimant was told by Mr Weafer that she should not be eating behind the counter, but he offered to cover for her whilst she ate her food in the back of the shop. The claimant said that sometimes she had to ask people from outside work to bring her food and drink. Mr Privitera said, and we accepted, that this was not an issue the claimant raised with him.

17. In her oral evidence, the claimant also said that she had not been provided with a more comfortable chair. We were told by the respondent that there is an

alternative style of chair for pregnant employees which is a bit wider and which has arm rests.

18. The Tribunal heard evidence about the processes for taking or 'striking' bets. Handwritten betting slips are scanned into the till after being handed over by the customer at the time the money for the bet is taken. The employee checks any ambiguity with the customer and inputs the amount of the bet. Employees have to 'translate' the slips as soon as possible after the bet is taken, although there can be delays if there has been a flurry of betting activity. Amongst other things, the employee checks that the stake recorded for the bet is correct and amends it if necessary.

19. At the end of the day the cash in the till is checked against cash recorded as having been taken. If there is not a match, investigations are made as to how the discrepancy has arisen. If a shortage is unresolved, it is declared. It appears that Mr Privitera had raised with the claimant at some stage the number of shortages she was declaring and emphasised the need to investigate and resolve shortages if possible.

20. On 1 October 2018, two losing stakes, each for £40 were reduced to £20 at the South Kensington shop with no till surplus declared. The bets were amended on the claimant's till. At the time the claimant was working with Angel Rasavi-Nematollahi ('Angel'), a CEA who was not trained to be a duty manager.

21. On 8 October 2018, towards the end of the working day, the claimant amended the stakes on six losing bets. The combined amount of the stake reductions was £417. The surplus declared on the till was £140.06.

22. On 11 October 2018 there was a central security investigation, the report of which was included in the bundle. This was a report into the reduction of stakes on both 1 October 2018 and 8 October 2018.

23. On 14 October 2018 Colin Humphreys, BPM, held a fact-finding meeting with the claimant and she was suspended on full pay pending an investigation into allegations of fraudulent activity. Notes of the fact-finding meeting were also included in the bundle.

24. On 15 October 2018 Jamie Moynihan, a security investigator, conducted an investigation with the claimant and Mr Moynihan produced an investigation summary report. The claimant admitted reducing six bets on 8 October 2018. She said that she had found a till shortage at the end of the day and had concluded those six bets were over-staked (i.e. the amount recorded as having been bet was more than the customer had in fact bet / paid) and had accordingly reduced them. On 1 October 2018, the CCTV footage showed another employee, ('Angel') amending the stakes on the claimant's till whilst the claimant was standing next to her. Mr Moynihan invited the claimant to sign an agreement to repay the sum involved in the 8 October 2018 stake reductions to the respondent and the claimant did so. The agreement said: "I confirm that I will repay the sum of £417 taken from William Hill during fraudulent activity."

25. On 19 October 2018, Mr Lennox invited the claimant to a disciplinary meeting to be held on 22 October 2018. The claimant was offered the right to be accompanied by a colleague or trade union representative, the charges were set out and the claimant was told that dismissal was a possible outcome.

26. Mr Lennox held a disciplinary hearing on 22 October 2018 and notes of this hearing were included in the bundle. The CCTV footage was shown to the claimant and the incidents were discussed in some detail.

27. Looking at the events of 8 October 2018, the claimant admitted that she had reduced the value of the six stakes a number of hours after the bets were made. The process of taking a bet was explored with the claimant; it involves several opportunities to check the amount of a stake, including when the bet is 'translated', i.e. the amount of the stake is manually input by the employee. In the case of the six bets where the stake had been reduced, all had been correctly translated close to the time the bets were taken. Mr Lennox considered it was not credible for the claimant to say that she thought she had mis-struck the bets hours after she had translated them. His evidence was that it is usually on translation of the bet that mistakes would be picked up. The claimant seemed to accept in cross-examination that it would be very difficult if not impossible to remember what sums had been staked on individual bets hours later.

28. There were in particular two large bets (for £100 and £200) which the claimant had reduced to £1.00 and £2.00 respectively. CCTV footage showed that the sums placed had in fact been £100 and £200. Mr Lennox considered it to be implausible that the claimant could have misremembered the large bets in the way she claimed.

29. The context was that, on each occasion, there was a till shortage which the claimant was seeking to correct. The evidence we heard was that till shortages did occur and usually, but not always, could be corrected after investigation of how the discrepancy arose. The claimant had declared till shortages in the past swithout any disciplinary action being taken and she said at the disciplinary hearing, "I have no problem declaring shortages'; there was therefore no evidence that the claimant had felt compelled to correct an honestly occurring till shortage in a misguided but honest fashion.

30. Mr Lennox took into account the number of bets which were changed, the time lag and the fact that all were losing bets (only losing bets would be unquestioned by clients if they were subsequently amended). He concluded that on 8 October 2018, the claimant had fraudulently amended bets to disguise a till shortage, which he found to be gross misconduct in itself. He found that on 1 October 2018 the claimant as duty manager was responsible for the stake changes made by Angel.

31. At the end of the hearing, Mr Lennox summarily dismissed the claimant for gross misconduct and a letter confirming the dismissal was sent on the same date.

32. After the claimant was dismissed, on an unspecified date, Mr Lennox questioned Angel about her role in the events of 1 October 2018. Angel told Mr Lennox that she had been looking for the source of a shortage on 1 October 2018. On looking through the betting slips which had been scanned, she found two which appeared to be ambiguous and raised them with the claimant as the claimant had taken both bets. The claimant told her that she had only taken £20 for each of the bets although they had been translated on the till as for £40 each and Angel had then reduced the stakes. Mr Lennox concluded that Angel was acting in accordance with the respondent's policy and he took no action against Angel.

33. The claimant submitted an appeal against her dismissal on 7 November 2018. She was invited to an appeal hearing by Mr Weafer by a letter dated 16 November 2018.

34. The appeal was heard 20 November 2018. The claimant raised issues about her dismissal:

    34.1 That she was treated inconsistently from the way Angel was treated;

    34.2 That she genuinely thought the bets she corrected on 8 October 2018 had been incorrectly recorded on what had been a busy day in the shop;

    34.3 That there had been no pregnancy risk assessment. She had been sitting for long periods without adequate breaks and had not consistently been provided with a cashier. Because of the lack of breaks and the fact that the toilet was downstairs she had been straining her bladder.

35. The claimant said in respect in respect of the events of 1 October 2018 that what happened was that Angel said there was a shortage and she would look for what had caused it. The claimant at the time was out on the shop floor to clean up. Angel told her she had found what caused the shortage and the claimant went behind the counter to see the bets. Angel showed her the two bets which were amended and said that it must be these bets as it looked like a £20 stake rather than £40. The claimant asked her if she was sure and Angel said yes.

36. Mr Weafer considered the claimant's complaint about the lack of pregnancy risk assessment but concluded that the claimant had had such support as she had asked for. He agreed with Mr Lennox's conclusion that the claimant's explanations for amending the stakes were not credible and that her actions were dishonest and fraudulent. By a letter dated 22 November 2018, Mr Weaver dismissed the claimant's appeal.

Risk assessments

37. We were told that each shop has a risk assessment although we did not see the risk assessment for the South Kensington shop. We were shown a workstation /

DSE risk assessment and a Health and Safety Inspection checklist for the respondent's Lincoln's Inn shop.

Submissions

38. The claimant and Ms Hicks made oral submissions and Ms Hicks provided us with written submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Law

Automatically unfair dismissal

39. If the reason or principal reason for dismissal is one of a number of prescribed reasons, including the facts that the employee is pregnant or is seeking to take maternity leave, the dismissal will be automatically unfair under s 99 ERA 1996.

40. Where a claimant asserts that a dismissal is automatically unfair but lacks sufficient service to bring a claim of ordinary unfair dismissal, the claimant will bear the burden of establishing that the reason for the dismissal is the automatically unfair reason: Ross v Eddie Stobart Ltd EAT 0068/13.

41. It is, however, arguable that s 99 cases should be treated differently from other types of automatic unfair dismissal since the protection against pregnancy dismissal derives from Art 10 of Directive 92/85/EEC to which the Burden of Proof Directive applies. If that is correct, the Tribunal should apply the same burden of proof to the unfair dismissal claim as it would to the discrimination claim.

Pregancy discrimination

42. Under s 18 Equality Act 2010, an employer discriminates against a worker if during the protected period in relation to a pregnancy of the worker's, it treats her unfavourably because of her pregnancy, a pregnancy related illness, because she is on compulsory maternity leave or because of the exercise of the right to maternity leave. The protected period begins when the pregnancy begins, and ends, if the employee 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; if she does not have that right it ends at the end of the period of two weeks beginning with the end of the pregnancy.

43. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause' O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

44. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. "

45. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

> *(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*
>
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
>
> *(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
>
> *(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

46. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

Pregnancy risk assessments

47. The obligation to conduct a risk assessment is found in regulation 3 of the Management of Health and Safety at Work Regulations 1999:

"(1) Every employer shall make a suitable and sufficient assessment of –

(a) the risks to the health and safety of its employees to which they are exposed whilst they are at work…

For the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions."

48. The obligation under regulation 3 is extended to risks for new and expectant mothers by regulation 16 (1):

"(1) Where –-

(a) the persons working in an undertaking include women of childbearing age; and

(b) the work is of the kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in safety and health at work pregnant workers and workers who have recently given birth or are breastfeeding the assessment required by regulation 3(1) shall also include an assessment of such risk.

(2) Where, in the case of an individual employee, the taking of any other action employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risk, alter her working conditions or hours of work.

(3) If it is not reasonable to alter the working conditions and hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk…."

49. In Page v Gala Leisure and ors EAT 1398/99 the EAT indicated that there are two types of risk assessment. The first is a generic assessment of the risks for pregnant employees required by regulation 3 when read with regulation 16(1). The obligation to carry out such a risk assessment arises where there are female employees of childbearing age and the work is of a kind which could involve the types of risk specified.

50. The second type of risk assessment is specific to a pregnant individual and is implicitly required by reg 16(2) and (3). The employer is required to consider whether the action it proposes to take under the generic risk assessment will avoid the risk for the individual, and, if not, must consider further action.

51. The obligation to conduct an individual risk assessment only arises if regulation 18 (1) is satisfied:

> "Nothing in paragraph (2) or (3) of regulation 16 shall require the employer to take any action in relation to an employee until she has notified the employer in writing that she is pregnant…"

52. In O'Neill v Buckinghamshire County Council [2010] IRLR 384, the EAT considered that three conditions had to be met before an obligation to conduct an individual risk assessment would arise:

> '(a) that the employee notifies the employer that she is pregnant in writing (clearly satisfied in this case), (b) the work is of a kind which could involve the risk of harm or danger to the health and safety of a new or expectant mother or to that of her baby, (c) the risk arises from either processes or working conditions or physical biological chemical agents in the workplace at the time specified in a non-existent exhaustive list at Annexes I and II of Directive 92/85/EEC.'

53. Although an issue had been identified at the case management hearing as to whether the claimant's pregnancy was an effective cause of any failure to conduct a pregnancy risk assessment, the respondent accepted, when the Tribunal raised the issue, that failure to conduct a pregnancy risk assessment would amount to unfavourable treatment because of pregnancy contrary to section 18 Equality Act 2010, irrespective of the mental processes of the decision-maker: Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516.

54. In order for the obligation to conduct a risk assessment to arise, there must be a potential risk to the health and safety of the expectant mother or her baby arising from the working conditions as defined. The tribunal must have evidence of such a risk. Assertions that particular working conditions cause some pain or discomfort will not be sufficient: Madarassy v Nomura International Ltd [2007] IRLR 246.

55. Where there is an obligation to carry out a pregnancy risk assessment and a failure to carry out such an assessment, proof of detriment to the individual employee is not necessary: O'Neill v Buckinghamshire County Council [2010] IRLR 384.

56. So far as the written notification under reg 18(1) of the Management of Health and Safety at Work Regulations 1999 is concerned, documents such as a doctor's certificates indicating pregnancy may suffice: Day v T Pickles Farms Ltd [1999] IRLR 217.

Conclusions

57. We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Dismissal: s 99 ERA 1996, s 18 Equality Act 2010

58. There was no dispute that the dismissal of the claimant was unfavourable treatment and a detriment. We were required to consider whether the sole or principal reason for the dismissal was the claimant's pregnancy / intention to take maternity leave and/or whether the pregnancy / intention to take maternity leave were an effective cause of the claimant's dismissal. In doing so we considered whether the claimant had established facts from which we could reasonably conclude in the absence of any other explanation that she had been dismissed because of her pregnancy, thus shifting the burden to the respondent to prove that the claimant had not been discriminated against.

59. We found that the burden of proof had not shifted for the reasons we explain below and we accepted the respondent's evidence that the reason for the claimant's dismissal was gross misconduct.

60. The investigation into the bets arose because of a report by the respondent's central security department. There was no evidence to suggest that the investigation was provoked by anything other than the unusual pattern of amended bets.

61. Although this was not an ordinary unfair dismissal claim, unreasonableness in the conduct of the disciplinary or in the conclusions or sanction might have been material from which we drew inferences adverse to the respondent as to the reasons for the dismissal; unexplained unreasonableness might have caused the burden to shift.

62. We considered that the respondent had followed a reasonable procedure and that the investigation and the conclusions reached were reasonable and credible.

63. We found that Mr Lennox had reasonable grounds for his conclusion that the claimant was guilty of the conduct alleged. The investigation, which included the original central security investigation, two fact-finding interviews and the disciplinary hearing, itself seemed to us to be reasonable and the evidence before Mr Lennox as outlined above in our Findings of Fact seemed to us to be cogent and to lead to the conclusions which Mr Lennox drew.

64. We considered that it was also reasonable for Mr Lennox to regard the conduct on 8 October 2018 as gross misconduct and we accepted that he did so regard it. In her role as CEA 2.5, the claimant worked at times on her own and was entrusted with significant amounts of cash.

65. At the appeal stage, Mr Weafer considered the claimant's explanations but agreed with Mr Lennox's conclusions. Again we were satisfied that his explanation for his conclusions was a credible one.

66. The claimant's theory that the respondent dismissed her in order to avoid paying her maternity pay did not seem to us to be reflected in any of the evidence we heard. In particular we noted that Mr Privitera had ensured that the claimant was under a contract for an increased number of hours to increase her maternity pay and to provide her with the valuable benefit of the travel card both before and during her maternity leave. We found that the claimant had a very good relationship with Mr Privitera, to the extent that she turned to him at times of difficulty in her life, and that he in turn provided her with both professional and personal support. It seemed to us that it was a relationship which was both mutually respectful and trusting. The claimant accepted in evidence that Mr Privitera had her best interests at heart.

67. Mr Privitera of course did not play a role in the disciplinary process but but there was nothing in any of the evidence we heard which suggested that any other manager took a negative view of the claimant's pregnancy and impending maternity leave or that the motive put forward by the claimant was operative. We also take notice of the fact that the respondent is a very large organisation and the sums involved in paying the claimant maternity pay would been relatively insignificant to the respondent. We could well see how a small business might find the requirement to pay maternity pay onerous.

68. We considered carefully whether Mr Privitera's failure to conduct a formal pregnancy risk assessment was evidence from which we could draw an adverse inference but we accepted his evidence that at least part of his delay in carrying out such an assessment was based on his benign desire to keep the claimant's pregnancy under wraps whilst he sorted out her increased contractual hours and overtime payment; additionally, he identified no relevant risk to the claimant. In any event Mr Privitera was not involved in the events leading to the claimant's dismissal.

69. Looking more widely at the evidence before us, we could find no facts which would cause the burden of proof to shift to the respondent, including facts relating to the treatment of Angel, which we consider in more detail below.

Comparison with Angel

70. It was a central plank of the claimant's case that her dismissal must be connected with her pregnancy because Angel (who was not pregnant) was involved in changing the stakes in respect of the two bets on 1 October 2018 and was not dismissed by the respondent. The claimant does not require a comparator for a claim of pregnancy discrimination but the existence of such a comparator would be evidence which would be likely to cause the burden of proof to shift. The

evidence in front of the respondent was the CCTV evidence described above, the reports on the stakes and copies of the betting slips for which the stakes were changed, and the evidence provided by the two employees.

71. Angel's account to Mr Lennox (after the claimant's disciplinary) was that she was looking for the cause of a shortage on 1 October 2018. She found two slips which she felt were not clearly written, both struck on the claimant's till. She therefore asked the claimant what each bet should be and the claimant told her that she had only taken £20 in respect of each bet. Angel then carried out the stake reduction on the claimant's till whilst the claimant was present.

72. We found that the Angel's circumstances were materially different from those of the claimant:

72.1 The claimant was involved in both the 1 October 2018 incident and the incident on 8 October 2018 when a larger number of bets were altered. The respondent concluded that this was the more serious matter and gross misconduct in itself;

72.2 Looking at the 1 October 2018 bet alteration, the claimant was the duty manager at the time and responsible both for the money in the shop and for supervising Angel, the bets had initially been struck by her and so she was the person who should have known whether they were correct or incorrect, and it appeared from the CCTV that the claimant authorised Angel's alteration of the bets. Mr Lennox reasonably concluded that Angel had not been guilty of a disciplinary offence.

73. Had we found the burden of proof passed we would have found that the respondent's explanation for the difference in treatment between the claimant and Angel was a complete and cogent one, which was in no way influenced by the claimant's pregnancy.

74. We concluded, however, that there was no evidence from which we could conclude that the respondent had treated the claimant unfavourably because of her pregnancy or intention to take maternity leave in dismissing her. It follows from that conclusion that we also could not conclude that the main or principal reason for dismissal was the claimant's pregnancy. We therefore did not have to resolve the legal issue of whether, in looking at an alleged s 99 dismissal where an employee does not have two years' service, the burden was on the claimant to establish the reason for the dismissal, or whether we should have regard to the Burden of Proof Directive, since the claimant's claim of automatically unfair dismissal failed whichever approach we took.

75. It follows that the claimant's complaints of automatically unfair dismissal and pregnancy discrimination in relation to her dismissal fail and are dismissed.

Pregnancy risk assessments

76. The respondent did not produce for the Tribunal any generic risk assessment for pregnant workers.

77. It was common ground that there was no specific pregnancy risk assessment for the claimant.

78. It follows that the issue for us in relation to both a generic risk assessment and a specific risk assessment for the claimant was whether a risk of the relevant kind existed, giving rise to an obligation on the respondent to carry out a risk assessment.

Generic risk assessment

79. We were surprised that the respondent did not appear to have any generic pregnancy risk assessment. Even in preparing its evidence for the Tribunal, the respondent appeared oblivious to the possibility that it might be required to have such a risk assessment. We would repeat what has been said in authorities we have looked at that it would seem prudent for any employer to conduct such an assessment.

80. We had to consider, however, whether there was evidence before us that the work was of a kind which could involve the risk of harm, by reason of the condition of pregnancy or recent childbirth, to the health and safety of new or expectant mothers or their babies from processes, working conditions or physical, biological or chemical agents such as to give rise to an obligation on the respondent to have a generic risk assessment.

81. There was simply no such evidence before us. Whilst we could speculate that in some circumstances betting shops may attract clientele who engage in antisocial behaviour or become physically challenging, we had no actual evidence to that effect nor, for example, that there were ever requirements for employees to perform manual handling which might present a risk to a pregnant employee.

82. In the circumstances we were unable to conclude that an obligation to conduct a generic pregnancy risk assessment arose.

Individual risk assessment

83. We concluded that the claimant gave the respondent written notice of her pregnancy when she showed Mr Privitera the appointment letter for an antenatal appointment dated 8 August 2018 and the report about her ultrasound dated 13 August 2018. We took the view, having regard to Day v T Pickles Farms that the

Management of Health and Safety at Work Regulations 1999 do not stipulate that the written notice of pregnancy should take any particular form nor that such notification has to be left with the employer rather than being shown to the employer and retained by the employee.

84. The question therefore was whether there was a potential risk to the claimant or her unborn baby. It was important therefore that we scrutinised with care what the claimant said to us about such risk.

85. The main issue she raised was an alleged inability to have breaks, because, she said, she was often working alone at the South Kensington shop. She said that the lack of breaks combined with the fact that the toilet was down some steep stairs meant that she had to hold her bladder or strain her bladder. Our findings, as set out above, were that the claimant was able to take toilet breaks, although there may have been occasions when she had to contact a manager to come and cover for her before taking such a break or notify a manager that she was proposing to take such a break.

86. In any event, put at its highest, the claimant's evidence went no further than that she suffered discomfort as a result of having to delay going to the toilet. She did not assert or put forward evidence that there were any risks or consequences to her health or that of her baby in such delays.

87. So far as access to food was concerned, it seemed to us that the evidence showed that the claimant was able to take breaks to eat during most or all of her shifts and there was no evidence in any event that she or her baby were likely to be put at risk if the claimant did not on occasion eat for a seven hour period.

88. We took into account the fact that the claimant never raised with management any issue about being unable to take toilet breaks or food breaks.

89. As we set out in our Findings of Fact, the claimant raised an issue about the chair she was provided with. Again there was no evidence that using the chair provided in the South Kensington shop created any risk to the claimant or her unborn baby. The claimant did not refer in evidence to any other perceived risks.

90. In her submissions the claimant referred to a risk of violence or abuse in the store but she had given no evidence of any such risk, and as set out above, the evidence we heard suggested that the South Kensington store did not have difficult clientele. There was accordingly no evidence on the basis of which we could conclude that there was a risk to the claimant or her unborn baby from violence or abuse.

91. The claimant also referred in submissions to working long hours but the evidence we had was that she worked seven hour shifts and we heard no evidence that these might pose a risk to her or her unborn baby.

92. For these reasons, we concluded that the respondent had not discriminated against the claimant in failing to carry out a pregnancy risk assessment.

Employment Judge Joffe
London Central Region
22 Oct 2019

Sent to the parties on:
23/10/2019

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For the Tribunals Office