EMPLOYMENT TRIBUNALS

Claimant: **Miss G Avon**

Respondent: **Andrew Peters T/A Green Park Express**

Heard at: **Bristol** **On: 7 & 8 October 2019**

Before: Employment Judge Maxwell
Mrs Howard
Ms Simmonds

Representation
Claimant: in person
Respondent: Mr Maratos, Consultant

REASONS

1. Judgment and oral reasons were given on 8 October 2019. Judgment in writing was sent to the parties on 23 October 2019.

2. The Claimant's email to the Tribunal of 10 October 2019 is construed as a request for written reasons and an application for reconsideration.

Preliminary

3. By a claim form presented on 15 November 2018, the Claimant brought complaints of:

    3.1. pregnancy discrimination - section 18 of the **Equality Act 2010** ("EqA");

    3.2. unfair dismissal for a pregnancy reason - section 99 of the **Employment Rights Act 1996** ("ERA").

Documents

4. The Tribunal was provided with the Respondent's bundle of documents, running to 55 pages.

Witness Evidence

5. The Tribunal received witness statements and heard evidence from

for the Claimant

5.1. Gemma Avon - the Claimant;

for the Respondent

5.2. Andrew Peters - the Respondent;

5.3. Sharon Morris - employee of Green Park Express;

5.4. Leo McAlroy - manager of the Green Park Brasserie.

Issues

6. The fact of dismissal being agreed, this amounting to unfavourable treatment and occurring within the protected period, the issues for the Tribunal were:

pregnancy discrimination

6.1. whether the decision to dismiss the Claimant was because of pregnancy:

unfair dismissal

6.2. whether the sole or principal reason for dismissal was pregnancy.

Facts

7. The Respondent, Andrew Peters, operates a business selling coffee and breakfast items from a wooden outbuilding, trading under the name Green Park Express. Mr Peters also runs the nearby Green Park Brasserie and two other businesses. Green Park Express and Green Park Brasserie are run separately and do not share managers or staff. Two full-time and two part-time staff were employed in Green Park Express.

8. The Claimant applied for the vacant position of Green Park Express Manager. She attended a first interview with Mr Peters on Friday 12 October 2018 and made a favourable impression, such that she was invited to a second interview to take place on Tuesday 16 October 2018 at 10am.

9. In the event the Claimant did not attend the second interview, but instead sent an email that day at 10.34am (i.e. after the time she was due to meet Mr

Peters) explaining there had been a family emergency. Mr Peters replied thanking the Claimant and asking when she would be able to come in.

10. Having received no other applications for this vacancy, Mr Peters decided to offer it to the Claimant without a second interview.

11. The Claimant arrived at 8am on Friday 19 October 2018 (Day 1) and worked until 3.30pm.

12. On Saturday 20 October 2018 (Day 2), the Claimant arrived as expected 7.30am. Whilst she had been due to work until 3.30pm, she left at 10.30am because her partner had to be taken to hospital. In her evidence at the Tribunal, the Claimant said the she had told Mr Peters she was going to the hospital on her way out. This was incorrect. Mr Peters was not present at Green Park Express that day and so she did not speak with him in person. Nor do we find she sent an immediate email to Mr Peters.

13. The Claimant next contacted Mr Peters on Monday 22 October 2018 (Day 3) at 7.29am by email. The Claimant agreed the content of this message read as though she was telling Mr Peters for the first time about her early departure: “I don’t know if you know but Saturday I done half day as my partner got referred to Bath RUH…”. We find that was the first communication she had with Mr Peters about what happened on Saturday. Mr Peters accepted the Claimant’s reason for leaving although, as she was the manager, he believed she ought to have informed him about this sooner.

14. With respect to whether or not the Claimant was due to attend for work on Monday 22 October 2018, in evidence she said that as manager it was for her to decide when her own attendance was required, there were already two members of staff on duty, she had decided not to schedule herself as working that day and, therefore, could not have failed to attend because she was not due to be in. Her email sent at 7.29am (Mr Peters said she was due to arrive by 7.30am) included “I did mention that I would maybe pop in today and do a few hours, but I’m guessing it’s a quiet day with 2 people already on and I’m doing tomorrow through to Saturday. Hope this is ok just to stick to the rota”. Mr Peters replied “No problem with today, I’m assuming you will be in at 7.30 tomorrow morning”. In light of this email exchange, which is consistent with there being an understanding the Claimant would be in, we are satisfied that Mr Peters recollection is correct. The Claimant had agreed she would attend for work on Monday, but changed her mind that morning and decided not to go in.

15. Mr Peters was somewhat annoyed by the Claimant’s behaviour, which he regarded as unprofessional. Given, however, the health concern she had raised regarding her partner, this still being very early in her employment, and his hope she would settle in, he decided not to make an issue of it.

16. The Claimant worked Tuesday (Day-4), Wednesday (Day-5) and Thursday (Day-6), arriving a leaving at the appropriate time. On the positive side, the

Claimant had accompanied Mr Peters to purchase a slow cooker, by way of him wishing follow-up on one of her ideas. Somewhat less successfully, the Claimant sought to redraw the rota, which had been settled for a considerable period of time and she did this without consulting the staff. Sharon Morris in particular objected, as the hours the Claimant allocated to her clashed with when she needed to collect her child from school.

17. On Thursday 25 October 2018, the Claimant informed Ms Morris of her pregnancy. Ms Morris was pleased for the Claimant. There was no challenge by the Claimant to the account Ms Morris gave of this exchange. The Claimant asked whether Ms Morris could tell Mr Peters of her pregnancy. Ms Morris replied that it "was not [her] place to do this", it was for the Claimant to tell him.

18. On Friday 26 October 2018 (Day-7) the Claimant left at 11.30am and did not inform Mr Peters. In cross-examination, after some debate about what hours were required if the Claimant was due to work the "morning shift", the Claimant said she had only been scheduled to work until 12pm that day and because there had been no prior opportunity to take a break, she took this at 11.30am. On that basis it was said her departure was not early. We were not satisfied by this account. The Claimant's evidence on the point was given in a rather hesitant manner. We noted this explanation was a new one and did not appear in her witness statement. The Claimant also referred in her evidence to the Tribunal of suffering with pregnancy sickness this day, which appeared to be put forward as a possible reason for leaving work when she did. This explanation seemed somewhat inconsistent with what she was now saying to the effect she did not leave early at all. The Claimant had not previously said she left because of a pregnancy-related illness and we do not find that was the case on this occasion. Our finding is simply that the Claimant decided to leave work early at 11.30am, without informing Mr Peters, it having been agreed and expected she would stay until 12.30pm.

19. Many of the Claimant's answers to questions about non-attendance or early departure were to the effect that as manager she could decide whether and when to attend for work. Importantly, we do not find that was Mr Peter's understanding. His expectation appears to have been for the Claimant to be hands-on (our expression rather than his) at work and given the small size of this business that is hardly surprising.

20. On Saturday 27 October 2018 (Day-8) the Claimant arrived at 8.30am. She told the Tribunal that she was not late, she had scheduled herself to start at 8.30am as there was no need for three people to be in any earlier. Contrary to the Claimant's evidence, we find she was late. The day before, 26 October, the Claimant sent a text message to Sharon saying "Hey alright? I left my keys at work so I'll wait for you at 7.30 in the morning, see you tomorrow XX". Then on 27 October, the Claimant sent another text to Sharon "Morning! Will be in bit later as you guys are there today… See you shortly". We find this was another case of the Claimant being due in work at a particular time and then, on the morning itself, changing her mind".

21. In cross examination it was suggested to Ms Morris by the Claimant that there was no need for her to be there so early. Mr Morris disagreed, saying this was a very busy farmers' market, the traders were there from 6.30am and the Claimant (still new to the business) ought to be getting to know the regulars. Ms Morris was most unimpressed by the Claimant's late arrival.

22. The Claimant said there was a change in attitude toward her, which she said followed on from Mr Andrews having a meeting with staff behind her back. Her suggestion was that Ms Morris must have told Mr Peters about her pregnancy. In her witness statement, she said this change was on the Friday, although in her oral evidence she said it occurred on Saturday. Ms Morris denied having told Mr Peters about the pregnancy, or saying to the Claimant there had been a meeting, or that any particular discussion with Mr Peters had taken place. We accepted the evidence of Ms Morris. There was no need for Ms Morris to act as a go-between, she said as much immediately and we see no reason for her to have changed her mind about this. To the extent the Claimant detected any change in the atmosphere on Saturday, the obvious explanation for that is her being late for work and Ms Morris' dim view of that.

23. Also on Saturday, the Claimant went into Green Park Brasserie and introduced herself to Leo McAlroy, the Brasserie manager. She asked if Mr Peters was in and Mr McAlroy said he was not. The Claimant then told Mr McAlroy that she was pregnant but had not yet told Mr Peters about that. She asked Mr McAlroy to treat this as a private conversation. At the Tribunal, the Claimant repeatedly described Mr McAlroy as the "highest level of management", the inference being that her speaking with him was as good as telling Mr Peters himself. Quite plainly, Mr McAlroy was not the Claimant's manager. He worked in a separate (albeit neighbouring) business run by Mr Peters and had never even met the Claimant before. Moreover, we accepted Mr McAlroy's evidence that he did not tell Mr Peters about the Claimant's pregnancy and did not speak to him at all until the following Tuesday, which was after the Claimant's dismissal.

24. The Claimant wanted to speak with Mr Peters. She explained that she had previously tried to tell him about her pregnancy but he had been too busy. She also, in her evidence to the Tribunal, said she wished to raise various concerns about unsafe or otherwise unsatisfactory practices at Park Express. The Claimant telephoned Mr Peters and asked for a meeting. Initially, it appears he was reluctant, her account being that he said he was out "jogging" and did not want to come in to Bath. In any event, a short time later there was a text message exchange: Mr Peters said "I'll be down after lunch and we can have a meeting then"; the Claimant replied "Great thanks".

25. By the time Mr Peters arrived, however, at 2pm the Claimant had gone. Ms Morris said the Claimant appeared to be somewhat quiet after lunch, she went to the "ladies" and did not return. The Claimant said she was feeling stressed and unwell. This was not the explanation she gave to Mr Peters at the time. The Claimant sent a text message saying "it's gone quiet this afternoon so I'm going to shoot slightly early, can we set up a meeting poss

Monday? I have lots of things I need to discuss with you?" Mr Peters replied "Monday no good for me and you are off according to the rota so we'll go for Tuesday at 9". The Claimant then asked if she could see Mr Peters "tomorrow" (i.e. Sunday) and he replied he could not see her before Tuesday because he was in Oxford on Sunday and London on Monday.

26. Whilst he was in on the Saturday, Mr Peters spoke to Ms Morris and we find that she disclosed her concerns about some aspects of the Claimant's food handling practice relating to nuts and meat.

27. Despite his placid replies, we find that Mr Peters was incensed by the Claimant's early departure, in circumstances where, at her request, he had come into work on his day off at short notice to meet her. He believed her behaviour was deeply unprofessional and it is not difficult to see why.

28. Mr Peters thought about matters over the weekend. By Monday morning he had decided to terminate the Claimant's employment. He sent an email at 10.41am, which included:

> **After thinking about how things have gone over your first week, it is with great regret that I have to inform you that I am terminating your employment at Green Park Express with immediate effect.**
>
> **The principal reasons for my decision are as follows:**
>
> **Time keeping and attendance: you have been unable to work agreed shifts twice and have left early without requesting permission also on two occasions.**
>
> **As a consequence of you leaving early, you were not present to attend a meeting this Saturday that you had requested.**
>
> **Environmental health standards; concerns were raised concerning your food handling practice and the consequent risk of cross contamination and also end of day cleaning standards.**
>
> **[…]**
>
> **I am sorry it hasn't worked out."**

29. The Claimant replied:

> **Can we have a meeting about this as there are things I want to discuss on my behalf as well. I think this decision is unfair? Obviously in regards to not following procedures with other members of staff I felt it was necessary to speak to you asap, because no I feel the staff currently are not just taking the piss out of you but not following health and safety or making any effort when at work and I left an hour early sat because of the way things are currently I needed your second opinion, I felt it was important because you didn't call me back. The other time I left because my partner was in hospital, I let everyone know and didn't leave anyone in the shit. There was staff in place to cover. As employed as a manager,**

> **I thought you expected me to make formal decisions to which none so far have been detrimental to the business. Also it's obvious that the news has come back to you about me find out im pregnant, I told everyone if the cafe and Saturday the brasserie manager and was hoping to tell you but you werent available. Very co incidental that this happened a couple of days later after you seemed happy with everything.**

30. In response, Mr Peters said:

> **Congratulations on your pregnancy. I can assure that your email is the first I have heard of this.**
>
> **I only came into the brasserie on Saturday to have our scheduled meeting, which you decided not to attend. I can assure you that none of the Brasserie or Express staff has told me of your pregnancy.**
>
> **I do find it a huge breach of trust that you should think to relay the news to your work colleagues and not your employer.**
>
> **If I felt you were the right person for the job, who could affect the change I want to see in the Express, I would be very happy to continue your employment. Your pregnancy has nothing to do with it.**
>
> **I have been pleased to support three members of management recently in the Brasserie, who worked very capably through their pregnancies. Pregnancy is not an issue for me.**
>
> **However, within a week of starting you had lost the support of your work colleagues and more importantly, my confidence in your ability to manage the business and liaise with me.**
>
> **Accordingly, as you were in an initial probationary period, I took the decision to end your employment.**

31. In a further email the Claimant made various allegations against the Respondent, in addition to health and safety, she alleged "tax dodg[ing]".

Law

Pregnancy and Maternity Discrimination

32. Section 18(1) of the **Equality Act 2010** ("EqA") provides, so far as material:

> **[…]**
>
> **(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 […]**
>
> **(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).**

33. The main difference between discrimination under EqA section 18 and a claim of direct discrimination under section 13, is the absence of any requirement for a comparator. Accordingly, we must consider:

    33.1. whether the claimant received unfavourable treatment;

    33.2. if so, whether that was because of her pregnancy, or illness suffered as a result of that.

34. The meaning of because of was considered in **Indigo Design Build & Management Limited, Mr B Tank v Mrs M Martinez UKEAT/0020/14/DM**, per HHJ David Richardson"

> **29. The Tribunal was required by section 13(1) and sections 18(2) and thereafter to consider whether the alleged treatment of Mrs Martinez was "because of" the protected characteristic in question or "because of" pregnancy or maternity leave. The use of the term "because of" is a change from terms used in earlier discrimination legislation, but it is now well-established that no change of legal approach is required: see Onu v Akwiwu [2014] ICR 571 at paragraph 40, Underhill LJ. The law requires consideration of the "grounds" for the treatment.**
>
> **30. Onu also contains a concise statement of the law concerning what will constitute the "grounds" for a directly discriminatory act. In that**

case the worker concerned had no proper immigration status. She was subjected to ill-treatment at work. Underhill J said:

> **"42. What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in Nagarajan called his 'mental processes' (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in Nagarajan : see pp. 885–6.**
>
> **43. The distinction between the two kinds of case is most authoritatively made in the judgment of Lady Hale in R (E) v Governors of the JFS [2010] 2 AC 728 , at paras. 61-64 (pp. 759–760), though it is to be found in the earlier case-law: I would venture to refer to my own judgment, sitting in the EAT, in Amnesty International v Ahmed [2009] ICR 1450 , at paras. 32-35 (pp. 1469–70).**
>
> **44. The present case is plainly not of the 'criterion' type. Mr Robottom in his skeleton argument contended otherwise, but the contention is, with all respect to him, unsustainable. The various acts of which Ms Onu complains – underpayment, being required to work excessive hours etc. – are not inherently based on her immigration status. If her immigration status was (part of) the grounds for those acts it is only because, in the mental processes which led to their doing them, Mr and Mrs Akwiwu were significantly influenced by it."**

31. It was not in dispute before me that this approach is appropriate in a direct discrimination claim under section 18 just as under section 13 . I am sure that this is the case. There is, in fact, authority in the Employment Appeal Tribunal following this general approach: see Johal v Commissioner for Equality and Human Rights [2010] UKEAT/0541/09 , HHJ Peter Clark. The question is whether the tribunal applied this approach.

35. We remind ourselves:

35.1. direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

35.2. if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason.

36. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a 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 occurred.**

37. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; see **Laing v Manchester City Council [2006] IRLR 748 EAT**.

38. Furthermore, a simple difference in treatment as between the claimant and her comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

39. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent!s motivation and what is in issue is its correct characterisation in law […]**

<u>Unfair Dismissal - Pregnancy & Maternity</u>

40. In so far as material, section 99 of the **Employment Rights Act 1996** ("ERA") provides:

> **(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, […]**

41. Reasons within ERA section 99(1) are prescribed by regulation 20 of the **Maternity and Parental Leave etc. Regulations 1999** ("MAPLE"):

> **(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**
> >
> > **[…]**
>
> **(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—**
>
> > **(a) the pregnancy of the employee […]**

42. Where the claimant lacks sufficient qualifying employment to bring an ordinary unfair dismissal claim under ERA Section 98, and asserts instead that they were dismissed for an inadmissible reason, they have the burden of proving that dismissal was on automatically unfair ground so as to confer jurisdiction on the employment tribunal; see **Maund v Penwith District Council [1984] IRLR 24 CA** and **Ross v Eddie Stobart Limited [2013] UKEAT 0068/13**.

Conclusion

Discrimination

43. Plainly, dismissal was unfavourable treatment and we turn, therefore, to whether the Claimant was dismissed because of her pregnancy.

44. We ask ourselves whether the Claimant has discharged the initial burden upon her under EqA section 136. Although the Claimant does not need a comparator, it was she who was dismissed and not another employee of the Respondent, it is she who was pregnant and her colleagues were not. So there is at least a difference in both status and treatment. Furthermore, the Claimant can point to having recently told two colleagues of her pregnancy and the close proximity of her dismissal to such disclosure. Those points do not, however, reflect the entirety of the evidence which it is proper to consider at the first stage. Other relevant matters are that within a very short period of employment, 8 days, there were 5 incidents of non-attendance, late arrival or early departure, without seeking permission from or giving notice to her employer in a timely way. Even without an explanation from the Respondent, the dismissal of a recently appointed manager in such circumstances is unsurprising. Accordingly, looking at all the evidence relevant to the first stage, we are not satisfied there are facts from which we could decide the Claimant had been dismissed because of her pregnancy.

45. In case we are wrong about the first stage question, we have gone on in any event to address the stage 2 question. We are satisfied the Respondent has shown that the Claimant's pregnancy played no part in the decision to

dismiss. We accept Mr Peters' evidence. The reason he decided to dismiss the Claimant was the poor pattern of attendance and timekeeping referred to above coupled with her not asking him for permission or failing to tell him what she was doing until after the event. We think the last straw (to borrow that expression from another context) for him was the Claimant asking him to come in to work on his day off for a meeting, him agreeing to do so and then the Claimant deciding to leave before he arrived. Mr Peters was very annoyed about this, in his witness statement he described being angry, and his reaction was unsurprising. There were also some concerns about food handling, although we think these made a relatively small contribution to the decision to dismiss. We also accept that he did not know the Claimant was pregnant at this time, neither Ms Morris or Mr McAlroy having told him, and he only found that out when she replied to the dismissal email.

Unfair Dismissal

46. We turn then to the Claimant's unfair dismissal claim. The burden is upon her to satisfy us that he pregnancy was the sole or principal reason for dismissal. For the reasons set out above, we are not satisfied. On the contrary, we find the principal reason was the timekeeping and attendance issue.

_____

Employment Judge Maxwell

Date: 5 November 2019