EMPLOYMENT TRIBUNALS

Claimant: Ms R Zakar

Respondent: OCS Group UK Ltd

Heard at: Manchester **On:** 8, 9 and 10 October 2019

Before: Employment Judge Feeney
Ms L Atkinson
Mr P Gates

REPRESENTATION:

Claimant: Ms S Malik, Solicitor
Respondent: Ms A Niaz-Dickinson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of pregnancy discrimination succeed.

REASONS

1. The claimant brings a claim of pregnancy discrimination when her agency role as a Customer Care Assistant was terminated following the claimant's pregnancy. She was put in a concierge role but that assignment was also terminated. The respondent says that the removal from the CCA role was because of a health and safety assessment and it was not unfavourable treatment because it was not safe for the claimant to undertake that role. The claimant was not allowed to continue in the concierge role because there was no vacancy and her assignment was terminated because there was no other work for her to do.

2. During the progress of the case the respondent was alerted to the fact that they could arguably rely on Schedule 22 to the Equality Act 2010 which in effect

provides a potential "exemption" on health and safety grounds to a claim of direct pregnancy discrimination under section 18 of the Equality Act 2010.

3. It was recorded in the case management discussion undertaken by Employment Judge Franey as follows:

> "An important dispute between the claimant and R2 appears to be whether R2 should have made adjustments to the CCA role to enable the claimant to continue with it. The claimant says she could have been asked to help passengers with difficulties other than physical disabilities thereby relieving her of the heavy physical work. The respondents say that adjustments of that kind are not practicable because there is not always advance notice of the issues passengers might have, and in any event the duty to avoid unfavourable treatment because of pregnancy does not extend to making adjustments."

4. However, as I have said, following the preliminary hearing case management the respondent amended their response form to include Schedule 22, which will be explained in more detail below.

The Issues

5. The issues for the Tribunal to determine are:

Pregnancy Discrimination – section 18 Equality Act 2010

(1) Are there facts such that the Tribunal could conclude that in any of the following respects the second respondent subjected the claimant to unfavourable treatment because of her pregnancy:

(a) In removing the claimant from the CCA role on 20 May 2018;

(b) In deciding not to offer the claimant alternative work as a concierge; and/or

(c) In terminating the claimant's assignment with R2?

(2) If so, can R2 nevertheless show that there was no contravention of section 18? For example by relying on Schedule 22

6. As noted above, it was explored at the preliminary hearing case management that one of the claimant's arguments was that adjustments could have been made to the role.

7. The matter was listed for a strike out application by the respondent on 3 April 2019. However, the Tribunal declined to strike out the claimant's claim as the Employment Judge felt that it could not be determined without hearing the evidence of the line manager of the second respondent who had carried out the health and safety assessment on the claimant's ability to carry out her role as a Customer Care Assistant following her announcement to the second respondent that she was

pregnant. The risk assessment the respondent relied on was not available at the hearing but also the Employment Judge took the view that witness evidence would also be required. However as will be made clear below there was no CCA risk assessment, at least not in writing, only a concierge one. Possibly the fact that it was implied a formal risk assessment had been done of the CCA role is the reason why no claim regarding the failure to do a risk assessment was pursued in this tribunal or indeed elsewhere.

8. Employment Judge Whittaker also noted that it was agreed that discrimination legislation did not just apply between an employer and employee but also between a worker and whoever engaged the worker. Accordingly, the claim against the second respondent was within the Tribunal's jurisdiction as it stood.

Witnesses

9. For the claimant we heard from the claimant herself and for the respondent from Susan Ives, Search Consultancy; and Karen Connolly, Omniserv Limited (previously employee of OCS UK Limited).

10. There was an agreed bundle of documents.

Findings of Fact

The Tribunal's findings of fact are as follows:

11. The claimant was a student at Manchester Metropolitan University when she decided to obtain some additional work to help subsidise her whilst studying for an undergraduate degree in criminology. She obtained work at Manchester Airport through an agency called Search Consultancy Limited.

12. At all times Search Consultancy Limited referred to the claimant as an employee. The claimant was placed at Manchester Airport working on a contract run by the respondent looking after individuals who needed assistance on arrival at the airport. Her role title was a Customer Care Agent ("CCA").

13. She began her work around 23 April 2018. The role was initially for eight weeks and she was advised, and Ms Ives agreed, that normally the respondent would decide within eight weeks whether they wished to keep the person on as a permanent employee. Ms Ives advised that the agency would be told by the seventh week whether this was the case or not. The role specification for a Customer Care Agent described the overall purpose as:

> "You will escort passengers through the terminal as directed by the company. The passengers will be of reduced mobility (PRM) or temporary impediment from check-in through the departure lounge and from arriving aircraft through immigration and baggage to their collection point."

14. One of the personal characteristics was "must be able to lift passengers in accordance with manual handling guidance".

15. The claimant obtained what was called a “white badge” or “white pass” which is issued to all workers initially, and the company begins the process of obtaining a blue pass for individuals. A blue pass requires significant vetting and depends on how many jobs a person has had previously. We ascertained from Ms Connolly’s evidence that if an individual had a “land side” job a white pass was sufficient, but for an “air side” job a blue pass was necessary. The claimant, however, functioned with a white pass throughout her employment.

16. The claimant also gave evidence, which we accepted, that in the four weeks she was employed she did not undertake any manual handling.

17. The claimant said she found out quite late that she was pregnant. She was virtually six months by the time she found out.

18. The claimant’s colleagues advised Karen Connolly on 20 May 2018 that the claimant was pregnant. Ms Connolly therefore undertook a risk assessment. The claimant’s side and previous Judges were under the impression that an actual risk assessment on paper had been done in respect of the CCA role, however it transpired at Tribunal that the risk assessment was undertaken in respect of the concierge role, although it was true that the concierge role would from time to time cover some similar duties to the CCA role if there was a shortage of CCAs, for example. Miss Connolly was clear there was no written risk assessment for the CCA role.

19. Ms Connolly immediately assessed the claimant as being unable to continue in the CCA role. The claimant said the conversation took ten minutes. Ms Connolly thought it was likely to 20 minutes. We prefer the claimant’s evidence as on the balance of probabilities its more likely she would remember the circumstances acutely due to how these events affected her.

20. Ms Connolly transferred the claimant to working with a concierge, Sania, in order that she could complete her shift. The concierge job is a permanent employee job, it is not filled by agency workers, and we had two “job descriptions” for them. The first one, which Ms Connolly did not recognise, did not refer to any manual handling. The second one, which was for a front desk host as Glasgow Airport so we are not sure it was exactly the same job, did refer to “complying with OCS Glasgow PRM check-in process”, although it was not clear what this would involve: it may just have been an administrative process, and the catch-all “to be prepared to carry out any other reasonable tasks as requested by the management team in support of other members of staff and the operation”. Accordingly it was submitted by Ms Connolly that the concierge role would require the concierge to sometimes assist in the CCA role if members were short-staffed or needed assistance. However there was nothing specific about manual handling or lifting.

21. The claimant worked with Sania quite happily and was given to understand that if she did well she would be kept on as a concierge, in fact she reported that Sania was asked to report back on her progress and was very positive about her. On the Friday the claimant was told by a Duty Manager that she was now to be rota’d

with Sania to continue the shadowing process, and the claimant was given the impression that she would be moved to a concierge role.

22. She was on her way home when Susan Ivers from Search Consultancy emailed her (25 May 2018) and said:

> "I hope this email finds you well. OCS have been in touch regarding a risk assessment that they have recently carried out with you. The outcome of this risk assessment was that you are unable to carry out the duties of the CCA anymore due to your pregnancy. Unfortunately OCS do not have any other roles available at the moment that they can put you in, and they have therefore asked me to end your assignment with them with immediate effect. If any other roles come up at the airport that would be suitable for you we will let you know."

23. The claimant immediately rang Ms Ives back because she had been told she was making excellent progress and had received good feedback from Sania Hassan. The claimant stated she had overheard a member of OCS management saying to Sania that she would be continuing in the job. The claimant also says she had not been referred to a risk assessment.

24. When the claimant called Ms Ives she said that she was disappointed as she felt she had been told she would be continuing in her job role as concierge. She was told there had been miscommunication between the management team and the operational team at OCS and there was no concierge role available as this would have been advertised on their portal. The claimant was under the impression that Karen Connolly was also the recruiting manager for the role but Ms Connolly said this was not correct, just that she sometimes helped out with interviewing. She had put the claimant in that role as a temporary measure to ensure that she got paid for the continuation of her shift and after that it was out of Ms Connolly's hands.

25. The claimant was extremely upset during this telephone call and could not continue with it. She sent an emailed response saying:

> "Sorry I could not continue speaking as this is very distressing for me as I am struggling financially already. I need to know where I stand please as I have been called into work tomorrow and Sunday so I need to know what is going on."

26. Susan Ives replied:

> "So sorry about this, but like I said a decision has been made by the management team at OCS to terminate your assignment with immediate effect. You will get paid for all the hours you have worked. Once again I apologise for any distress that this has caused but due to the physical aspect of the role you applied for it is not possible for OCS to allow you to continue."

27. The claimant also called OCS and spoke to Miss Sankster who advised her to speak to Ms Ives, and she was again told that there were no positions available.

28. It was confirmed that after the risk assessment it was agreed that the claimant could not do the role of CCA and there were no alternative roles for her. It was clear that the reason was because of the claimant's pregnancy.

29. The claimant could not believe there were no alternative roles even if a concierge role was not available, and she pointed out that in the respondent's ET3 they said the following:

> "The claimant was entitled to be considered for any of the various roles on these contracts subject to a risk assessment being carried out. The second respondent was willing for the claimant to be supplied by the first respondent in a role that was suitable to her and did not pose a health and safety risk."

30. They stated that the second respondent had a number of contracts with the client and worked directly with the first respondent to resource many of these contracts.

31. The claimant said that she had no discussion with OCS about the fact that her employment was being terminated because of her pregnancy due to a risk assessment.

32. The risk assessment that was carried out on 21 May was for the concierge job. In respect of manual handling, Karen Connolly had put "not applicable" as a response to the question. She said in questions from the panel that this meant manual handling was not applicable as the claimant could not do manual handling because she was pregnant, however the form is designed to say what can be done about this issue and so we would have expected it to say not "not applicable" but "claimant unable to undertake any manual handling because of pregnancy" and/or that she would require assistance with any lifting. The claimant was told to go to the concierge job and she would not be doing manual handling in the concierge job. We find that it said n/a because any manual handling was non-existent or negligible in the concierge role.

33. On 31 May Lucy McGlinchey from Search Consultancy emailed the claimant asking her if she was free to talk as there was some issue regarding the hours she had worked. The claimant replied, resubmitting the hours. The claimant ended up by saying:

> "I do not wish to speak to anyone due to unfair dismissal because of my pregnancy. I thought I was fired and no longer needed so what is the use now of speaking. This is [not] meant disrespect to anyone."

34. Ms McGlinchey replied regarding the hours and said it was fine if the claimant did not want to talk. There was further discussion about the hours.

35. In their response form to Tribunal proceedings Search Consultancy (who are no longer a party) alleged that the claimant failed to keep in touch with them about the possibility of working but by a letter of 31 July in response to the claimant's solicitor writing to them they said as follows:

> "Our client denies any knowledge that your client was pressurised by any staff members to inform them she was pregnant and stated that staff had recognised her pregnancy while she was conducting the role and informed their managers directly. Given this, under their duty of care towards her, they approached her to discuss her circumstances and she confirmed she was 26 weeks pregnant. Although our client has respected their duty of care towards your client I would highlight that she also has a duty of care towards herself to ensure she informs her employer and any hire issues on assignment via the appropriate notification requirements of her pregnancy in order for a risk assessment to be undertaken. When she confirmed to our client that she was pregnant our client conducted a full risk assessment and established that there were serious health and safety risks to her and her unborn child if she continued in the role. They have confirmed the position of a Customer Services Agent is a highly physical role with a demand for frequent heavy manual lifting. Our client was unable to introduce any reasonable adjustments which would remove the risk in the role.
>
> Given this assessment occurred over a weekend the supervisors in position decided they would seek to retain her in an alternative position as concierge to enable them to try and provide suitable alternative work. However, when the management team returned after the weekend they confirmed there were unfortunately no concierge positions available and therefore your client would be unable to move into this role. Other work was reviewed and considered to allow her to continue working under a temporary contract with the client, however no suitable roles were available and our client therefore requested that she did not conduct further temporary work until they had suitable and safe work available.
>
> Although you state your client has been dismissed this is not the case. Your client remains an employee of Search Consultancy Limited. It was only her temporary assignment with our client that was brought to an end at their request. As such she remains employed and our teams have confirmed that they are continuing to source alternative suitable work to provide to her. We are happy to continue to work with your client on this basis and will contact her once work becomes available."

36. We learned at Tribunal that in fact a concierge role became available on 3 August, however there was no contact from Search Consultancy, who were given this job to fill, to the claimant. Whilst it was obliquely suggested that because the claimant was so near her due date this would be inappropriate, this is clearly not the case legally as it would have been no bar to the claimant applying for the job, accepting an offer of the job and beginning it at the end of a period of maternity leave.

37. We explored the issue of what the jobs required and whether they could be adjusted in Tribunal. In respect of the CCA job and manual handling, as referred to before, the claimant's evidence was that she had not undertaken any in her four weeks. Ms Connolly was sceptical about this and spent a large part of her witness

statement explaining the amount of manual handling that a CCA would have to do. She explained to us the different code for the passengers with mobility difficulties:

(1) WCHR (wheelchair ramp) – passengers who can ascend and descend steps and move in the aircraft cabin but who require a wheelchair for distance to and from the aircraft, therefore they require a wheelchair and assistance with their hold luggage and hand luggage.

(2) WCHS (wheelchair step) – passengers who cannot ascend and descend steps where the wheelchair is required to and from the aircraft and the passenger must be carried up and down steps but is able to make their own way to and from the cabin seat.

(3) WCHC (wheelchair carry) – passengers who are completely immobile and require a wheelchair to and from the aircraft and their seat.

38. In addition, there are some passengers who not book in assistance beforehand and present at the airport with difficulties who also need to be accommodated.

39. In respect of steps, it is generally the case that an ambilift is used to transport passengers with mobility difficulties up to the aircraft and then the situation depends on whether they can walk to their own seat or not, but there will be cases from time to time of passengers who have to be carried using an aisle chair to their actual seat. All workers were trained in manual handling techniques.

40. In addition, the other matter would be luggage: that there would be passengers who needed their luggage being checked in or their luggage collected from the baggage reclaim carousel.

41. In respect of check-in the claimant's experience was that normally a mobility restricted person would be accompanied by a non restricted person who would assist with the baggage whilst the CCA used the wheelchair or vice-versa. In respect of hand luggage the person would carry on their lap and then whoever was accompanying them would put in the overhead locker. In a situation where the person was travelling in their own obviously this could not happen.

42. It was asserted by Miss Connolly that a CCA would have to manage this by themselves, however from our own experience which is extensive of mobility restricted family members and general observation it seems impossible that one person could deal with luggage whilst manoeuvring a wheelchair. It is more likely that two people will assist or more than one trip will be undertaken, separating out the check-in process from any other process. Obviously lifting a 23 kilogram bag onto the check-in conveyor belt whilst it does not take long does require considerable effort.

43. It is also the case that at different stages different people will take over and we now assume this is because of the different types of pass i.e. whether it was white or blue that individuals had.

44. Miss Connolly in her evidence reverted on a number of occasions to the example of a 30 stone passenger as there is no limit on the weight of a passenger: if a passenger presents of that weight then they have to be conveyed to their seat. However, my panel member pointed out that it was highly unlikely the claimant could have manually handled a 30 stone man even without being pregnant, and it was highly unlikely that one CCA, whatever their level of fitness, would be able to manage this and it would require at least two or some equipment. Miss Connolly however would not agree to this proposition and stated that she would expect the CCA to handle it, however we cannot accept that evidence. She did say that the CCA would have to look for assistance. She stated that it was no longer possible just to recruit fireman types, big burley men; clearly many CCAs would not meet that description. She believed with manual handling techniques CCAs could manage on their own. However, we find that is highly unlikely and that even if the claimant was not pregnant there would be difficulties with manoeuvring somebody of that weight, or even somebody of slightly more than average weight it is unlikely that a CCA would be able to do this by themselves. Accordingly, putting pregnancy to one side, the respondent would have to have some arrangements to deal with that situation which was beyond the norm. However, Miss Connolly was reluctant to agree that proposition. She agreed that assistance could be sought but not that it would necessarily be available.

45. In response to enquiries as to whether luggage could be dealt with separately, Miss Connolly stated that “everyone has to do everything” and that it was not possible to allocate people to specific tasks: they had to do the full range of duties.

46. We had a discussion about reasonable adjustments in disability cases Miss Connolly had only come across this once where after a some discussion about adapting the job the candidate, who only had one arm, agreed he would not be able to do the job and did not pursue his application..

47. In respect of the concierge job, Miss Connolly stated that because the concierge might have to cover for CCA on occasions then again this was not a role suitable for someone who was pregnant, and again that as a concierge would have to do the full range of duties if someone could not do part of the job then it was not suitable. The evidence on paper was there were no vacancies for concierge roles however the respondent’s witness Miss Connolly had no actual knowledge of that. It was not put to her that a concierge could have temporarily undertaken a CCA role until the claimant was in a position to continue in the CCA role but, as she maintained that concierges had to be able to do everything a CCA would do, she did not deem the concierge job suitable for the claimant anyway.

48. The claimant following this had to drop out of her university course and consequently lost her student accommodation. She had to live in a woman’s refuge just before and around the time she gave birth to her son, obtaining more permanent housing following presenting as homeless to Manchester City Council.

49. We also had statistics regarding the number of passengers requiring assistance at the three terminals at Manchester Airport. These statistics were from September 2018 to March 2019 and therefore were not the ones relevant at the time

of the termination of the claimant's engagement. However, they gave a significant insight into the number of passengers involved. We have taken March 2019 as an average month as we were told September was particularly busy. The number of passengers ranged from the lowest of just under 25,000 to the highest of 42,316 in Sep4embe 2018. The average we have taken from March was 31,656. Of these 16,224 were WCHR, 12,110 were WCHS and 1,705 were WCHC. 209 passengers were deaf; 361 were blind; 647 had hidden disabilities; 299 were MAAS (which was not explained to us), and 40 were MEDA. Therefore the most severest affected passengers were WCHC who comprised 1,705. These figures are for the whole of the month, i.e. 31 days.

50. We were also told that the number of CCAs was 250, however Miss Connolly refined this later on to say that was all of the employees at Manchester Airport: the number of CCAs was approximately comprised as follows. There would be three terminals with 15 at two terminals and 18 at the third terminal for two shifts during the day. At night time the numbers would be reduced, however she did not tell us reduced by how many. Presuming that night time shifts were reduced from what appeared to be 48 during the day to say 30, that would result in an average number of passengers to cater for per CCA of between 7 and 8 roughly. As shifts were between 8-9 hours this is roughly one an hour although of course it would not necessarily occur in this way and the numbers would also include passengers who had not initially booked, as far as we are aware anyway.

51. When Miss Connolly was asked how she had assessed the claimant's risk given that here was no risk assessment form she said, "on the basis of her 38 years' experience". She also, by her evidence, confirmed that anybody pregnant who had a CCA job would immediately be removed from that job. If the CCA person was an employee, as some were, they then of course would be either provided with alternative work (and there would be an incentive to do so even if they were supernumerary due to what the next stage was), or they would be put on leave on full pay until their maternity leave began. However, the claimant was not an employee and therefore this is not what happened.

52. In addition Miss Connolly stated, and we accept her evidence, that she had no knowledge of the claimant's status when she made this decision and no further involvement with the claimant's situation so whoever gave the claimant the impression she was being kept on as a concierge she had no knowledge of, and whoever made the ultimate decision that the claimant was not going to be kept on in that position she also had no knowledge of.

53. There was no evidence regarding any alternative work available provided by the respondent from anyone with actual knowledge of that situation, although there was some documentary evidence of the jobs that were referred to Search and the jobs on the respondent's portal.

54. The details provided by Search Consultancy of a printout of the jobs referred to them did show the concierge job coming up on 3 August 2018.

The Law

55. Section 18 of the Equality Act 2010 states 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…

56. Schedule 22 of the Equality Act 2010 says as follows:

"22(2) Protection of Women

(1) A person (P) does not contravene a specified provision only by doing in relation to a woman (W) anything P is required to do to comply with –

(a) A pre 1975 Act enactment concerning the protection of women;

(b) A relevant statutory provision (within the meaning of Part 1 of the Health and Safety at Work Etc Act 1974) if it is done for the purpose of the protection of W (or a description of women which includes W);

(c) A requirement of a provision specified in Schedule 1 to the Employment Act 1989 (provision concerned with protection of women at work).

(2) The references to the protection of women are references to protecting women in relation to –

(a) Pregnancy or maternity; or

(b) Any other circumstances giving rise to risks specifically affecting women.

(3) …

(4) These are the specified provisions:

(a) Part 5, Work; and

(b) Part 6, Education so far as relating to vocational training.

(5) A pre 1975 Act enactment is an enactment contained in:

(a) An Act passed before the Sex Discrimination Act 1975; and

(b) An instrument approved or made by or under such an Act, including one approved or made after the passing of the 1975 Act.

(6) …

(7) …

(8) This paragraph applies only to the following protected characteristics:

(a) Pregnancy and maternity; and

(b) Sex.

57. Section 3 of the Health and Safety at Work Etc Act 1974 (HSWA 1974) states:

"General duties of employers and self-employer to persons other than their employees

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety."

58. Regulation 16(1) and regulation 16A of the Management of Health and Safety at Work Regulations 1999 (MHSWR 1999) which were introduced to implement the Pregnant Workers Directive (PWD) state as follows:

"16. Risk assessment in respect of new or expectant mothers

(1) Where –

(a) a person working in an undertaking including women of childbearing age; and

(b) the work is of a 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…

The assessment required by regulation 3(1) shall also include an assessment of such risk.

16A. Alteration of working conditions in respect of new or expectant mothers (agency workers)

(1) Where in the case of an individual agency worker the taken of any other action the hirer is required to take under the relevant statutory provisions would not avoid the risk referred to in regulation 16(1) the hirer shall, if it is reasonable to do so and would avoid such risk, alter her working condition or hours of work.

(2) If it is not reasonable to alter the working conditions or hours of work or if it would not avoid such risk the hirer shall without delay inform the temporary work agency who shall then end the supply of that agency worker to the hirer."

Pregnant Workers Directive

59. We also considered the Pregnant Workers Directive, directive 92/85/EEC, the full title of which is "On the introduction of measures to encourage improvements to the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding". One of the "whereas recitals" states that:

> "Whereas a protection of the safety and health of pregnant workers, workers who have recently given birth or are breastfeeding should not treat women on the labour market unfavourably nor work to the work to the detriment of directives concerning the equal treatment for men and women.
>
> Further, whereas measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payments and/or entitlement to an adequate allowance."

60. Article 4 headed "Assessment and Information" states that:

(1) For all activities liable to involve the specific risk of exposure to ……. processes or working conditions of which a non exhaustive list is given in Annex 1, the employer shall assess the nature, degree and duration of exposure in the undertaking and/or establishment concerned or workers within the meaning of Article 2 either directly or by way of the protective and preventative services referred to in Article 7 of the directive 89/391/EEC in order to –

- Assess any risk to the safety or health and any possible effect on the pregnancies or health of workers within the meaning of Article 2; and
- Decide what measures should be taken.

(2) Without prejudice to Article 10 of directive 89/391/EEC workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned

and/or the representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all the measures to be taken concerning health and safety at work."

Article 2 refers to pregnant workers, workers who have recently given birth and a worker who is breastfeeding.

61. Article 5 "Action further to the results of the assessment":

"(1) Without prejudice to Article 6 of directive 89/391/EEC if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or in effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure by temporarily adjusting the working conditions and/or the working hours of the worker concerned the exposure of that worker to such risks is avoided.

(2) If the adjustment of her working conditions and/or working hours is not technically or objectively feasible or cannot reasonably be required on duly substantiated grounds the employer shall take the necessary measures to move the worker concerned to another job.

(3) If moving her to another job is not technically and/or objectively be feasible or cannot reasonably be required on duly substantiated grounds the worker concerned shall be granted leave in accordance with national legislation and/or practice for the whole of the period necessary to protect her safety or health."

62. The claimant referred to the following European cases: C-116/06 Kiiski, where the CJEU held as follows:

"(24) It follows that the community legislature with a view of the implementation of directive 92/85 intended to give the concept to pregnant worker a community meaning even if in respect of one element of that definition, namely that relating to the method of communication of her condition to employer, it refers back to national legislation and/or practice.

(25) As to the concept of 'worker' it must be borne in mind that accordingly to settled case law it may not be interpreted differently according to each national law that has a community meaning. That concept must be defined in accordance with objective criteria which distinguishes the employment relationship by reference to the rights and duties of the person concerned. The essential feature of an employment relationship is that for a certain of time a person performed services for and under the direction of another person in return for which he received remuneration.

> (26) Moreover the court has held that the sui generis nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of community law."

63. Further, the claimant pointed out in **Allonby v Accrington and Rossendale College [2004] C-256/01** where the ECJ considered that a teacher was supplied to the college by a third party agency (and even formally classified as self-employed) was a worker of the college for the purposes of EC law.

64. The claimant also stated if the Tribunal found there was a failure to properly implement Article 5 of the Pregnant Workers Directive in the light of schedule 22 the Tribunal had the power to disapply any provision of national legislation that was contrary to the principle of equal treatment following **Mangold v Helm [2005] C-144/04 and Kucukdeveci v Swedex GmbH & Co KG [2010] C-555/07.**

65. The following cases were also referred to: **Haberman-Beltermann v ABN [1994] ECJ.** The ECJ ruled that an employer could not rely on German laws preventing pregnant women from performing night work in order to dismiss a woman from her job. In **Malhberg v LMV [2001] ECJ,** the ECJ ruled that another German health and safety law, this time prohibiting pregnant women from being employed where they be exposed to dangerous substances, was incompatible with the equal treatment directive, the court opining that the protection of pregnant women must not result in unfavourable treatment regarding their access to employment, therefore it was not permissible for an employer to take on a pregnant woman on the ground that a prohibition on employment would prevent her being employed from the outset and for the duration of the pregnancy in a post of unlimited duration.

66. In **Iske v P & O European Ferries (Dover) [1997] EAT** an employer was held liable for direct sex discrimination (under the Sex Discrimination Act 1975) for refusing to offer a pregnant woman working on a ferry a transfer to available suitable shore based work in circumstances where merchant shipping regulations precluded pregnant women from working at sea after their 28th week of pregnancy. (This was before the regulations requiring women to be suspended and paid in full in these circumstances).

67. In **Busch v Klinikum Neustadt GmbH & Co [2003]** the ECJ stated that:

> "Where there is a risk to the health and safety of a worker or a negative effect on her pregnancy or breastfeeding the employer should temporarily adjust the worker's working condition or hours or if that is not possible move the worker to another job or as a last resort grant the worker leave."

Submissions

Claimants submissions

68. The claimant submitted that the respondent had plainly removed the claimant from the CCA role, not transferred her to a concierge role and ended the claimant's

engagement because of her pregnancy. They could not rely on the Schedule 22 'exemption' because they had not addressed their mind to altering her working conditions and they were required to do so to bring themselves with 22. Further that domestic legislation was not compliant with the pregnant workers directive (PWD) if workers could be terminated in this way rather than be provided with leave whilst the risks persisted in a situation where no alterations could be made (although it was not accepted that was the case).

Respondent's submissions

69. The respondent submitted that Schedule 22 did apply as there were no feasible alterations to the CCA role which could be made, she would always have to handle luggage and the fact that not all assistance was requested beforehand made it impractical to delineated specific tasks to some CCAs and not others. Further the PWD allowed leave to granted in accordance with national practice and in the claimant's situation under the MHSWA the respondent hirer was 'allowed' to terminate the engagement.

Conclusions

70. We find that in terms of first of all domestic legislation the respondent has discriminated against the claimant because of her pregnancy in relation to all three matters she relies on- removing her from the CCA role, not deemeing the concierge role suitable and terminating her assignment .

71. The respondent has failed to bring themselves within the provisions of Schedule 22 which they rely on to defend the section 18 claims as they have not considered any alteration to the claimant's working conditions . The effect of the legal provisions HSWA1974 and MHSWR 1999 are not entirely clear as schedule 22 could refer to both.

72. We have decided that although the HSWA 1974,unlike the MHSWR 1999 does not specifically say that alternatives must be considered it is implicit in the legislation as protecting someone from health and safety risk has to include considering alternatives in terms of tasks and/or full job roles.

73. There was some discussion at the tribunal of alterations top the job role. In relation to the possibility the claimant could just deal with outbound passengers Miss Connolly had replied that CCA workers had to do the full range of duties not just deal with outbound passengers. This is clearly one way in which the job could have been altered and it would have been reasonable to do so. There are a myriad of other ways in which it is possible it would be reasonable to have altered the claimant's working conditions, but the failure of the respondent to consider any of them means that they have not complied with the requirements of the regulations in order to claim the benefit of Schedule 22.

74. Whilst Ms Niaz-Dickinson suggested that the panel could not consider the alternatives because none had been put to the witnesses by either the claimant nor the panel (save for outbound passengers issue) we do not accept this premise as

the evidence was that the respondent through Miss Connolly did not consider this in any event – we base this obviously on her comment that CCAs had to do the full range of duties, and on other factors such as that it was ludicrous to suggest the claimant when not pregnant could move a 30 stone man without assistance, that there must have been many occasions when assistance was required to protect the well-being of non pregnant workers .

75. That there was room to manoeuvre is suggested by the no of passengers requiring assistance as calculated suggests duties could be redesigned; that if protecting the claimant required more assistance than was usual that is what the legislation envisaged – the fact it might affect the respondent's profitability (an unspoken but obvious consideration) was not a valid consideration ; that the claimant could have been moved to a concierge job (which we find had clearly less if any manual handling involved) and a concierge moved to a CCA role was never considered. Whilst some of these points were not put to Miss Connolly it was not necessary as it was clear she did not and was not intending to consider these options.

76. Further, these matters can be considered at the remedy hearing.

77. In respect specifically of Regulation 16 MHSW 1999 the respondent has failed to bring themselves within those provisions, as far as they come with schedule 22 by reason of 2(1)(b), as again they did not consider altering the claimant's working conditions.

78. In addition, considering the position under the Pregnant Workers Directive, as it seemed to be agreed that the claimant would qualify as a worker under the Pregnant Workers Directive, and for the avoidance of doubt if that was a wrong impression we find that on the case law cited to us by the claimant's representative (Kiiski), the claimant would qualify as a worker for the purposes of the directive.

79. In relation to Article 5(3) we find that the respondent could not avail themselves of (3) because they have not fulfilled the requirements of Article 5(1) "that the employer shall take the necessary measures to ensure that by temporarily adjusting the working conditions the exposure of that worker to such risk is avoided". While the respondent appeared to argue that it was not technically or objectively feasible or not reasonably to adjust the job, there was no evidence of this as the respondent had not considered it. Miss Connolly by saying that each CCA had to do every part of the job was clearly turning her mind against going through that exercise. Accordingly, the respondent cannot avail themselves of Article 5(3).

80. Further, the claimant argued that Schedule 22 was not compliant with Article 5(3). The respondent stated if we were thinking of making such a finding we should invite further submissions, and had we not made the finding in respect of Schedule 22 already then we would have done so as in our view there is a cogent argument that Schedule 22 is not compliant with Article 5(3).

81. Although Article 5(3) ends by saying "the worker concerned shall be granted leave in accordance with national legislation or national practice for the whole of the

period necessary to protect her safety or health", in view of the recitals at the beginning of the Pregnant Workers Act this cannot mean that the worker ends up unemployed as suggested by the respondent on the basis that if the hirer complied with Schedule 22 that it is lawful to simply send an agency worker 'back' to the agency (whilst obviously the agency has its own obligations – although these are limited if no suitable work is available which again may be an imperfect implementation of the PWD but that was not an issue here as the agency were no longer a party - there is nothing to establish that means the hirer has no obligations where it fails to comply with Schedule 22) .

82. Therefore we would have found that the reference to national legislation or national practice relates only to the parameters of the leave to be granted and cannot possibly mean that no leave should be granted as this is completely inimical with the aims of the directive. Accordingly we would have found that the respondent should have afforded the claimant leave until the risk, engendered by the role, to her and her baby's health had ended. It is succinctly summed up in **Busch**.

83. However, as we have said above, at this stage there was no need to make a decision in this respect as the claimant had succeeded on other grounds.

84. The matter will now be listed for remedy.

Employment Judge Feeney

Date: 31 October 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

5 November 2019

FOR THE TRIBUNAL OFFICE