EMPLOYMENT TRIBUNALS

Claimant: **Ms C Fletcher**

Respondent: **Wilko Retail Limited**

Heard at: **Cardiff** **On: 5 & 6 December 2019**

Before: **Employment Judge Harfield**
Members **Mrs H Hinkin and Ms C Williams**

Representation:
Claimant: Mr Leong (Solicitor)
Respondent: Ms Kight (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that the claimant's complaints of automatic unfair dismissal and discrimination because of pregnancy or maternity pursuant to sections 18 and 13 of the Equality Act are not well found. The claim is therefore dismissed.

REASONS

Introduction

1. By way of a claim form presented on 21 May 2019 the claimant brought a claim of direct pregnancy discrimination and automatic unfair dismissal. She worked as a customer services assistant for the respondent in their Singleton Road, Swansea store from 5 November 2018 until her dismissal which took effect on 19 February 2019. The claim was defended by way of a response form presented on 25 June 2019. A case management preliminary hearing took place between Employment Judge Beard on 4 October 2019 at which the issues in the case were clarified and case management directions were made. The case management order at [43] makes clear that the complaint of discrimination/unfavourable treatment is the dismissal of the claimant.

2. The final hearing came before us on 5 and 6 December 2019. We heard evidence from the claimant and her mother, Elizabeth Fletcher. For the respondent we heard from Wendy Lanigan (Assistant Manager of the respondent's Singleton Street store in Swansea), Paul Weaver (Store Manager). We had a bundle of documents extending to 95 pages. We received oral submissions from both parties together with written submissions from the respondent. We took all submissions into account. The tribunal deliberations completed on 6 December 2019 but there was insufficient time to deliver an oral judgment. Judgment was reserved to be provided in writing.

The issues to be decided

3. The issues to be decided were summarised by Employment Judge Beard in his case management order of 4 October 2019 as:

Unfair Dismissal

(a) Was the principal reason for dismissal pregnancy and unfair in accordance with Section 99 of the Employment Rights Act 1996? The respondent asserts that it was a reason unconnected with pregnancy and was based on store profitability.

EQA, Section 13: direct discrimination because of pregnancy

(b) It is not in dispute that the respondent treated the claimant as follows:

(i) dismissing the claimant

(c) Was that treatment "less favourable treatment"?

(d) Was that treatment for a reason related to the claimant's pregnancy?

EQA, section 18: Pregnancy & Maternity discrimination

(e) Did the respondent treat the claimant unfavourably as follows:

(i) By dismissing the claimant?

(f) Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?

(g) Was any unfavourable treatment: because of the pregnancy or of illness suffered as a result of it; because the claimant was on

compulsory maternity leave; because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Relevant legal principles

Unfair Dismissal

4. The right not to be unfairly dismissed arises under Part X of the Employment Rights Act 1996. An employee must have been continuously employed for two years in order to acquire that right, save where the reason or principal reason for dismissal is one of a small number of prescribed reasons including pregnancy (section 108(3)(b)).

5. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

6. If the reason or principal reason is pregnancy then the dismissal is automatically unfair by virtue of section 99 which so far as material reads as follows:

> "(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
> (a)the reason or principal reason for the dismissal is of a prescribed kind, or
> (b)the dismissal takes place in prescribed circumstances.
> (2)In this section "prescribed" means prescribed by regulations made by the Secretary of State."

7. Those regulations are the Maternity and Parental Leave etc Regulations 1999 ("MAPLE") of which regulation 20 provides so far as material:

> "(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), ...
> (2)...
> (3)The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a)the pregnancy of the employee…
(d)the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave."

8. As the claimant had less than 2 years' continuous service the burden of proof, in relation to the unfair dismissal claim, is on the claimant to show that the reason for dismissal was connected to her pregnancy or that she was seeking to avail herself of the benefits of maternity leave.

Pregnancy Discrimination

9. Discrimination by way of dismissing an employee or subjecting her to any other detriment is rendered unlawful by Section 39(2)(c) and (d) of the Equality Act 2010.

10. Discrimination in this context is defined by Section 18(2)(a), which is headed "Pregnancy and maternity discrimination: work cases" and says:

"(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…

(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.

11. Section 18(6) defines the "protected period." It is not in dispute in this case that the claimant was in the protected period when she was dismissed.

12. Section 13 also prohibits direct discrimination where, because of a protected characteristic A treats B less favourably than A treats or would treat others. Pregnancy and maternity is a protected characteristic. Following Webb v EMO Air Cargo (UK) Limited [1994] QB 718 there is no requirement for an actual or hypothetical comparator in cases which involve pregnancy or maternity as the protected characteristic. That said Section 18(7) in effect disapplies Section 13 where there is a valid complaint under Section 18(2)(a) or (b),(3) or (4).

13. It is well established that 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 the 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 31-37 and the authorities there discussed.

14. Equality Act complaints must be approached in accordance with the burden of proof provision in section 136:

"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".

Section 136 goes on to provide that an Employment Tribunal is treated as a Court for these purposes.

15. Guidance as to the application of the burden of proof in direct discrimination cases was given by the Court of Appeal in Igen Limited v Wong [2005] IRLR 258, and in Madarassy v Nomura International PLC [2007] ICR 867, the Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. Although section 18 does not formally require any comparison of cases, the facts must still present a prima facie case on causation before the burden shifts to the respondent to show a different reason for the treatment. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question

Findings of Fact

16. As against those legal principles and identified issues in the case we make the following findings of fact, by applying the balance of probabilities. It has not been necessary for us to resolve all point of dispute between the parties for us to decide the issues in the case.

17. The claimant started working for the respondent on 5 November 2018. She was contracted to work 16 hours a week made up of four lots of 3 hour shifts and one 4 hour shift. The time of day she would work a shift was varied and subject to the needs of the respondent. There is a dispute between the parties as to the claimant's employment status when she started work. The claimant's case is that she was recruited to a permanent contract on a part time basis of 16 hours a week. The respondent's position is that the claimant was recruited as a temporary

Christmas employee and not as a permanent employee. The respondent relies upon a letter and statement of terms and conditions at [71-72] which refer to a job offer of temporary customer service assistant. The letter is dated 9 November 2018 and states that the position will terminate on 5 January 2019. The terms and conditions state that the company reserves the right to extend the temporary contract should it be considered necessary. The claimant denies receiving the letter and terms and conditions. At the time such correspondence and documents were sent out by head office direct to the employee's home. We were told that the system later changed with contractual documents being sent to the store so that managers could arrange signature because, in part, it would appear, there was a problem in some cases of signed documents not being returned. There is no signed version of the claimant's terms and conditions on the respondent's files. We accept it is likely that the claimant did not receive the letter and terms and conditions.

18. The claimant says she was told by Ms Lanigan that the position was permanent with a probationary period and that she made clear she needed a permanent position as she was leaving a permanent job with the DVLA and had financial commitments to meet. She said in evidence that a couple of days after starting work Ms Lanigan reassured her again that whilst they were recruiting temporary Christmas staff that was not her. She agreed she did not, however, chase up her letter of appointment and terms and conditions. Ms Lanigan denied telling the claimant that she had a permanent position. She did admit, however, to having thought that temporary staff were subject to the same 13 week probationary period that permanent staff are subject to. She did also admit that she would have said to the claimant in interview that a 13 week probationary period would apply and that there would be the potential to be made permanent.

19. The tribunal finds that from the respondent's perspective they considered the claimant was being recruited as temporary Christmas staff. However, the tribunal also accepts that there was scope, bearing in mind the lack of documentation received and Ms Lanigan's accepted comments in interview, for the claimant to have been initially confused about her employment status. That said it was not to such an extent the claimant chased up her contractual documents.

20. At around the time the claimant was recruited, 7 or 8 other temporary Christmas staff were recruited. They, together with the claimant, worked predominantly on the tills.

21. In the latter part of 2018 the Singleton Street store was also undergoing a restructuring. As an efficiency drive a decision was made to cut the night shift and introduce instead an early morning shift responsible for managing deliveries and placing stock on shelves. A period of

consultation took place with the affected night shift staff who had the option of redundancy or a transfer to an early morning shift. Mr Weaver told us that the situation was fluid for a while as the affected staff who chose to leave had differing notice periods and some left early if they found work before the expiry of their notice periods. He had a set number of budgeted permanent hours to fill on the new morning shift team and had some permanent vacancies to offer on that shift.

22. The claimant's mother successfully applied for one of those morning shift jobs, starting on 21 December 2018, albeit she stated that she did not know what her employment status was and she did not sign her terms and conditions until 27 February 2019 [95]. She said she did not chase up her contractual documents because she was only working to top up her pension and therefore her status did not really matter to her. The claimant's mother's contractual documentation [72a and 72b and 95] is different to the claimant; it states that she is a permanent member of staff subject to a 13 week probationary period. The letter is dated 11 January 2019 some weeks after the claimant's mother started work and, as stated, was not actually signed in store until 27 February 2019 [95].

23. Soon after the claimant started work with the respondent she discovered she was pregnant. There is a factual dispute as to who within the respondent organisation, and in what order, the claimant told that she was pregnant. The tribunal did not consider it necessary to resolve that factual dispute to decide the issues in this case. It is sufficient to find that on a date on or after 9 January 2019 and before 14 January 2019 both Mr Weaver and Ms Lanigan knew of the claimant's pregnancy.

24. Around 14 January 2019 Mr Weaver undertook a review of his temporary staffing. By that stage the temporary employees that were left were the claimant, SD, AB and JS. Mr Weaver made AB, JS and SD permanent members of staff albeit SD's paperwork was not signed off at the time as she was away on a period of holiday.

25. On 14 January 2019 Mr Weaver met with the claimant. There is a dispute as to what Mr Weaver told the claimant. The claimant says Mr Weaver told her that he was extending her probationary period until February 2019 and she would then receive a permanent contract in March. She states she told him she was confused as she thought she was already permanent and he told her it was nothing to worry about. She says she was rushed to sign the document at [73] and did so without reading it. She says she was not told about any alleged performance concerns.

26. Mr Weaver stated he told the claimant he was extending her fixed term contract until the end of March 2019 and that if her performance was satisfactory and the work was available he would then give her a

permanent contract. Mr Weaver said in evidence that at that time on 14 January 2019 he considered he had the permanent hours available to give the claimant a permanent contract but decided not to do so because he had held some performance concerns about the claimant. He said that he wanted a period of time for the claimant to show consistent performance before he signed her off as a permanent member of staff.

26. Mr Weaver's evidence was that his performance concerns about the claimant related to lateness, her going absent from work mid shift, and absence levels albeit he said his particular concern when deciding to extend the claimant's fixed term contract rather than making her permanent at that stage was her history of lateness for work more than anything else. Both Mr Weaver and Ms Lanigan confirmed there were no issues with the quality of the claimant's work itself; Ms Lanigan confirmed that the claimant was a quick learner and had been trained up early on the more complicated lottery till.

27. In relation to lateness Mr Weaver said that the claimant had been late for work on 3 or 4 occasions, with her being on one occasion half an hour late. He said that the issues with lateness had started straight away in the November. He said he had been made aware of this by supervisors (Rachel, Kevin and Deborah) and by Ms Lanigan. The claimant accepted that she had been late a few times but denied that it was ever half an hour. She said she had problems finding someone to park, having been given a ticket for overparking at a nearby Tesco store and that in the end the security at the respondent's store had said she could park there.

28. Mr Weaver said that this level of lateness was not a common issue with his staff. He said in evidence that the usual method of dealing with lateness is a discussion with the member of staff by a supervisor and that if it continued there would be a formal record kept. It could ultimately move to a formal process. Mr Weaver stated he thought he could recall at least 1 entry on the system for the claimant in relation to lateness. The records themselves are not available as we were told that once members of staff leave they are purged. Mr Weaver said in oral evidence he told the claimant this performance concern was why he was extending her contract together with her sickness record. The claimant said that no such reasons were given to her at the time. Mr Weaver's written witness statement simply says that the extension was due to the fact there was still a lot of post Christmas 2018 work to be completed.

28. In relation to absenteeism mid shift, Mr Weaver said that his issue was not with the claimant taking a toilet break but with the length of time she would take and also the fact she would sometimes go without telling a supervisor, leaving the till uncovered and staff not knowing where she was. The claimant denied taking a long time and said that she would try

to tell a supervisor but they were not always around and that she only took a toilet break if she could not hold on because the respondent made her feel so uncomfortable. She says that she was expected to do a whole shift without a toilet break and that she was told it had an unfair impact on other staff, despite it being known she was pregnant. Mr Weaver said in evidence he could recall two specific incidents. One where he heard a supervisor, Michelle, say "she's gone again" (referring to the claimant). The other was when he was told by Rachel that the claimant and left her till again and he went and spoke to the claimant on her way back from the toilet, telling her that going to the toilet was not a problem but that she did need to tell someone. (There is a dispute as to whether the claimant then told Mr Weaver that she was pregnant).

29. In relation to absence records Mr Weaver said he thought that the claimant had had 2 absence days in the period from 5 November to 14 January 2019. He said that from a temporary staff point of view hitting 3 days would generally be seen as unacceptable. The claimant said she had only had 1 day's sickness absence on 12 January which she said was pregnancy related. Again there were no documentary records available to us.

30. The contract variation document at [73] states "extend temp" i.e. that the claimant's temporary contract was being extended, albeit no end date is set out on the document. The claimant signed the document.

31. Applying the balance of probabilities the tribunal finds that Mr Weaver did tell the claimant that he was extending her fixed term contract. By that date it would have been clear to the claimant, notwithstanding as already found above she may have previously been confused about her employment status, that she was a temporary employee not a permanent one.

32. On the balance of probabilities the tribunal also finds it is likely that the claimant had been spoken to about lateness by Ms Lanigan and by other supervisors. The claimant herself accepted she had been late on a few occasions but denied it was ever in the region of half an hour. However, the tribunal is satisfied that the claimant was late enough that it was seen as having an impact on other members of staff in terms of having to cover and generating the need for staff to have conversations with the claimant, including by Ms Lanigan (as assistant store manager), including the car parking issue. Whilst it did not progress to any formal stage it was also of sufficient concern that it came to the attention of Mr Weaver as store manager. Likewise the issue of the claimant taking toilet breaks without saying where she was going came to Mr Weaver's attention and it was of a sufficient degree of concern that Mr Weaver stepped in and directly spoke to the claimant about it himself. We find on the balance of

probabilities, that he was not seeking to prevent the claimant taking a toilet break, but wanted to ensure that supervisors were aware and cover in place if needed.

33. In turn the tribunal accepted, applying the balance of probabilities, that Mr Weaver did decide to extend the claimant's fixed term contract because he wanted to see sustained improvement from the claimant before he gave her a permanent contract. We accept on the balance of probabilities that his main concern in that regard related to the claimant's history of lateness for work. We accept he wanted to be sure the claimant was a reliable employee before he gave her a permanent contract.

34. On 23 January 2019 the claimant was involved in a road traffic collision. She did not attend work as she went to the hospital to get checked out. She states that when she telephoned Ms Lanigan to stated that she would not be in work that Ms Lanigan showed no concern and was not pleased the claimant was going to be absent. Ms Lanigan denies this. In her claim form the claimant alleged that she was told if she did not come into work she could face disciplinary action. In her oral witness evidence she accepted she had not been threatened with disciplinary action but said that she was being asked when she would be coming back to work. The tribunal does not find on the balance of probabilities that there was a lack of concern about the claimant's accident or a threat of disciplinary action.

35. The claimant was signed off work from 28 January 2019 to 4 February 2019 with back pain [89].

36. The respondent's financial year starts on 1 February each year. On 28 January 2019 a list of temporary staff working within the region was circulated. There is a comment by LL at [74] of "Please see this week's temp report, another reduction this week. However still 136 past their contract end date." SB, who headed up the region, forwarded this on to her regional store managers with the very direct instruction of:

> *"please remove the temps from our business."*

37. The two Swansea staff on the list were the claimant with a recorded anticipated temporary contract end date of 31 March 2019 and SD. As set out above, SD had been a temporary member of staff, however, Mr Weaver had agreed to make her permanent. But the documents had not been signed off and SD was therefore still showing as a temporary employee on the spreadsheet. AB and JS did not feature on the spreadsheet at their conversion from temporary to permanent staff had already been signed off.

38. Later that day SB sent a further email to her region store managers at [86 – 87]. Amongst other things the email says:

> "*Contract base is challenging for us all this year and you must ensure that you are in line with it. All temps must exit the business at the end of this week so that we are clean for week 1. We are currently showing 1195 hours over the lowest point which is a huge concern. So I must stress no recruitment at all until you are achieving contract base."*

39. On 7 February 2019 SB sent a further email to her regional managers at [90-91] following a meeting that day. Amongst other things it says:

> "*PAYROLL – This is now a zero tolerance and no store can be overspent two weeks on the bounce, however I will take a view on the period. You must all be working to budget for this period. Sales are tough. If you are overspent at the end of the period this will lead to investigation and potential disciplinary action being taken. It is essential that you get your base (lowest point) contracted hours. If you are over contracted you must follow the 7 step process with your team members the first three steps can be taken…"*

40. On 8 February 2019 the claimant was signed off work again for the period 4th to 15 February 2019 with ongoing back pain.

41. On 11 February 2019 Ms Lanigan telephoned the claimant asking her if she was well enough to come in for an informal chat the next day. The claimant agreed to do so. Mr Weaver said that following SB's emails he considered that he had to act in accordance with SB's instruction and dismiss the claimant as she remained a temporary member of staff. He said he had not wished to contact the claimant about it by telephone whilst she was on sick leave and initially anticipated the claimant would return to work on 4 February. However, on 8 February the claimant was given the second backdated sicknote such that he did not consider he could let the matter continue to drift.

42. There are no minutes of the meeting available. The claimant states that in the meeting with Mr Weaver and Ms Lanigan, that Mr Weaver told her that he had had a meeting with the regional manager the previous day and was told by her they had to cut back on staff and on wages and that he could not afford to keep the claimant's position. She says he told her that her employment was being terminated for business reasons and profitability of the store. The claimant says she challenged Ms Lanigan saying she knew the claimant had left a permanent job and Ms Lanigan stated it was the regional manager's instructions.

43. In her claim form the claimant put it slightly differently, saying she was told that profitability over the business had been seriously impacted that year and that Wilko as a whole were making cut backs and trying to save money. Mr Lanigan similarly states that he told the claimant that a decision had been made by head office that the engagements of temporary staff were to come to an end and that the rationale was that the business had not performed particularly well and cut backs were being made across all stores, not just Singleton Street. The tribunal accepts it is likely that this is the gist of what he told the claimant and it accords with the claimant's account in her claim form.

43. The claimant understandably became upset and challenged Mr Weaver, stating that she considered she was being discriminated against because she was pregnant. Mr Weaver denied this stating that there was a blanket instruction at the end of the financial year to remove all temporary staff from the business and that the claimant was being treated the same as other temporary staff.

44. Mr Weaver then sent the claimant a letter [93] dated 13 February 2019 stating:

> "*With reference to our recent conversation I write to confirm your temporary contract will end due to the profitability of the business being significantly impacted this year. I have conducted a review across the store operation to see where improvements can be made. As a result of this it has been identified that by reducing the number of hours that are scheduled within the branch, overall efficiency can be significantly improved to bring the store in line with its targets. I have therefore had to review the temporary contracts within the store operation. The impact of this means that your employment with the Company will end on 19 February 2019"*

45. The claimant was offered the right of appeal. She says she exercised that right, sending her appeal to head office by recorded delivery. She says she heard nothing in response. The respondent state they can find no trace of receiving an appeal. We were not provided with a copy of the claimant's appeal or proof of the recorded delivery.

46. The claimant considers that she was dismissed because of her pregnancy and that the respondent was seeking to avoid the inconvenience and cost of having to pay and cover her maternity leave period. The claimant argues that hours in the store were still available and points to a text message she had with JS at [92a] in which the claimant asked JS on 12 February if she had had extra hours in the past week or two. JS

responded to say she'd had extra hours and had not worked her contract hours since she started employment.

47. The claimant's mother said that after the claimant was dismissed she and her colleagues on the morning shift were given till training to cover sickness and to cut down on early morning queues and that there were many occasions on which she and her colleagues were asked to work overtime. She said that till staff have also been brought into undertake work filling shelves.

48. The claimant's mother further said that there was an advert for morning staff on the internet just following her own employment as some of the morning team had left. The claimant's mother also said that shortly after the claimant's dismissal, and around 18 February 2019, two new employees LR and RT started work on the morning shift. The claimant says that this work could have been offered to her.

49. The claimant's mother also pointed out that AB had been transferred from tills to the morning team "some months ago" and that there were also other new employees taken on a few months ago of Fran, Mandy, Maisie, Dodie and Hero.

50. The claimant says that she told the respondent that she was willing to work any hours available but they did not give her the option of switching to the morning shift.

51. The claimant's mother went to speak with Ms Lanigan after the claimant left and asked her what had happened. Ms Lanigan stated she could not tell her due to data protection. The claimant's mother asked her as one mother talking to another mother. She states that she told Ms Lanigan they were struggling for staff on the morning team so why not offer the claimant that. She states that Ms Lanigan said "I cant answer that you will have to ask Paul."

52. Mr Weaver told us that he dismissed the claimant because he considered that he had to act in accordance with SB's clear direction to remove all temporary employees from the region. He said that SB would not have been aware that the claimant was pregnant. He said that SB saw the removal of temporary employees as an issue for the whole region irrespective of store circumstances, and managers had to remove temporary staff even if they were under contract base. Ms Lanigan also stated that SB had not been informed of the claimant's pregnancy.

53. Mr Weaver told us that he did not have any permanent posts available to offer the claimant when he dismissed her and therefore he did not discuss alternative positions with her. He said that the recruitment of LR and RT

to the morning team was already in place. He said recruitment to the morning team took place over a period of time starting at the end of November 2018 and ending shortly before the end of January 2019. He said it was a longer process because he needed decisions from the night shift team whether they were staying or going. He said that at the time of the claimant's dismissal LR and RT had already been interviewed and recruited and were waiting to start as they were replacing other night shift staff who were leaving, and that LR and RT were due to start when those other individuals left. He said that the hours he was giving LR and RT were already within his budgeted hours as part of the restructuring.

54. Mr Weaver also told us that by the time of the claimant's dismissal he had been given new financial budgets for the year. He said that in broad terms if a store makes more money it is given a budget for more staff hours. He said that in the case of his store his budgeted staff hours had been cut. He said that when he had previously extended the claimant's fixed term contract on 14 January 2019 he had not anticipated that he would get such a reduction in his budgets.

55. Mr Weaver said that he received his KPIs in mid to end of February 2019 and when he looked at his KPIs on a salary allocation model he had an excess of hours in the tills and that he was slightly short on the morning shift and therefore AB was moved to the morning shift (which she wanted to do in any event). He said that also fitted in with leavers coming and going as well as he had dismissed someone for absences off the morning team as well. He said that he could not have left AB on the tills and offered the claimant the morning shift as he did not have a vacancy on the morning shift at the time the claimant was dismissed.

56. Mr Weaver accepted there had been additional recruitment again to the morning team in April, as set out by the claimant's mother. But this was some months after the claimant's dismissal. He said the shift has unsocial hours and is one in which staff do leave as they do not always find it suitable.

57. Applying the balance of probabilities the tribunal was not satisfied we had sufficient evidence before us on which we could find as a matter of fact that Mr Weaver had a permanent vacancy he could have offered to the claimant as at 12 February 2019. We did not have sufficient evidence before us on which we could find that the morning shift permanent posts given to LR and RT had not already been filled by them, although they had not started, or that there was another live vacancy at that time. The evidence we had before us as to AB transferring to the morning team, or indeed other morning team positions becoming vacant related to the period of time after the claimant's dismissal.

58. Mr Weaver denied that there would be a cost and inconvenience in having to recruit maternity cover for the claimant and pay her maternity pay. He said that under the respondent's procedures only a very small percentage element of the cost of SMP is recharged back to the store and that with a high number of female employees, having a pregnant member of staff was not unusual.

Discussion and Conclusions

59. Whilst different burden of proof provisions apply, which we are mindful of, both the claimant's unfair dismissal claim and her Equality Act claim ask the same essential question of what was the reason for the claimant's dismissal. We found this was a case best analysed by deciding what was the reason for the claimant's dismissal.

60. The tribunal, in this regard, finds as a matter of fact that the decision to dismiss the claimant was undertaken by Mr Weaver. He made that decision because he believed the claimant to be a temporary employee and because he believed that he had to follow SB's instruction to dismiss all temporary employees. SB's instructions in that regard were sent in direct, trenchant terms and the tribunal were satisfied that Mr Weaver was acting in accordance with them. We were satisfied that he considered himself bound to follow that direction whatever he thought about the staffing circumstances of his own particular store as SB's diktat applied across the whole region. Mr Weaver was, in effect, acting in accordance with it to assist the whole region with hitting SB's requirements and goals. Whilst the reasonableness or logic behind SB's instruction may legitimately be open to question, the instruction itself was a non-discriminatory reason for Mr Weaver's decision to terminate the claimant's employment as a temporary employee. This is not a case where there is a freestanding ordinary unfair dismissal claim.

61. The claimant submitted to us that there can be mixed motives for a decision, that Mr Weaver was left with a residual discretion irrespective of SB's instruction, and that unconscious as well as conscious discrimination could be in play. The tribunal went on to consider whether Mr Weaver had any discretion to exercise that would have avoided the claimant being dismissed. If so, we would have to consider the reason why any such discretion was not exercised in the claimant's favour. We were satisfied that such discretion only existed if there was a permanent job that Mr Weaver could have transferred the claimant to which would have avoided her dismissal. We have found that as at the date Mr Weaver decided to dismiss the claimant, applying the balance of probabilities, we were not satisfied as a matter of fact that Mr Weaver did have a permanent vacancy that could have potentially avoided the claimant's dismissal. We therefore

did not find it established that he had a residual discretion to exercise that could have avoided the claimant's dismissal.

62. The claimant's unfair dismissal claim therefore does not succeed as the reason for the claimant's dismissal was not a reason connected with her pregnancy or indeed that she was intending to avail herself of the benefits of maternity leave. Likewise, the dismissal of the claimant was not unfavourable treatment because of pregnancy or because the claimant sought to exercise her right to take maternity leave and it was not unfavourable treatment because of pregnancy or maternity.

63. Whilst the tribunal could understand why from the claimant's perspective she had concerns about the circumstances of her dismissal, for the reasons given above, the tribunal concludes that the claimant's claim is not well founded and is dismissed.

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Employment Judge Harfield
Dated: 6 February 2020

JUDGMENT SENT TO THE PARTIES ON 10 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS