EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss S Bright	v	**UK Bowling Services Limited**

Heard at: **Leeds** **On:** **19 and 20 March 2020**

Before: **Employment Judge Cox**

Members: **Miss Y Fisher**

Mr K Lannaman

Appearances:

For the Claimant: **In person**

For the Respondent: **Mrs Ogbonson, owner**

REASONS

1. Miss Bright brought a claim to the Tribunal alleging that her former employer, UK Bowling Services Ltd ("the Company"), had treated her unfavourably because of her pregnancy or an illness that she suffered as a result of it. She also claimed that the Company had victimised her after she told the Company that she intended to bring a claim of discrimination to the Tribunal.

The law

2. Section 18 of the Equality Act 2010 (EqA) defines pregnancy discrimination as where an employer treats an employee unfavourably because she is pregnant or because of an illness she has suffered because of her pregnancy. Under Section 39 EqA, it is unlawful for an employer to treat an employee unfavourably because of her pregnancy or a related illness by putting her at some form of disadvantage in her employment (referred to in the legislation as "subjecting her to a detriment"). It is also unlawful to dismiss an employee because of her pregnancy or an illness connected with it.

3. Section 27 EqA defines victimisation as where an employer subjects an employee to a detriment because she has done a "protected act", which includes where she has alleged that the employer has discriminated against her. Section 39 EqA makes it unlawful for an employer to victimise an employee in this way.

4. Under Section 136 EqA, if there are facts from which the Tribunal could, in the absence of any other explanation, decide that the Claimant has been treated unfavourably because of her pregnancy or an illness connected with it or has been victimised, then the Tribunal must uphold the claim unless the employer can show that it did not discriminate or victimise the employee. In other words, if

the facts could be consistent with there having been pregnancy discrimination or victimisation, then there is a presumption that that is what happened, unless the employer can show otherwise.

5. The Company runs 10-pin bowling alleys at two venues. The one where Miss Bright worked is in Huddersfield. Miss Bright worked as a snack bar assistant. Her job involved serving at the bar and food bar and clearing up after customers.

6. At the Hearing, the Tribunal heard oral evidence from Miss Bright. For the Company, it heard oral evidence from Mrs Ogbonson, who is the owner of the Company, and Mr Johnson, who was the manager in overall charge of the Huddersfield venue. The Company also submitted a witness statement from Marcus Algar, a Company employee against whom one of Miss Bright's allegations was made. Because Mr Algar did not attend the Hearing and could not be questioned about his evidence, the Tribunal gave his witness statement less weight than it gave the evidence of the other witnesses. The Tribunal also referred to various documents and correspondence between the parties in a file prepared for the Hearing by the Company and some emails that were added to the file in the course of the Hearing.

Risk assessment

7. Miss Bright's first allegation was that the Company had discriminated against her by not carrying out a pregnancy risk assessment

8. Under Regulation 16 of the Management of Health and Safety at Work Regulations 1999, an employer that has women of childbearing age in its workforce must carry out a risk assessment in relation to hazards that might affect a new or expectant mother, even if none of its employees is currently pregnant.

9. In February 2019, when she was around five weeks' pregnant, Miss Bright informed Jackie, the deputy manager, that she was pregnant. The baby was due on 29 October 2019. From the document in the Hearing file to which the Tribunal was referred, it accepts that the Company had at some point drawn up a general risk assessment pro forma relating to hazards that might affect an employee who becomes pregnant.

10. Mrs Ogbonson's evidence was that she started to complete this risk assessment pro forma in relation in Miss Bright in particular at some point in March 2019, with no input from Mr Johnson or from Miss Bright. She said that she did not complete it because Miss Bright was off sick from the beginning of April onwards. The Tribunal does not accept Mrs Ogbonson's evidence that she started this task, because it is inconsistent with her other evidence and that of Mr Johnson. She said that her practice was to complete risk assessments for pregnant employees with Mr Johnson's input. Mr Johnson's evidence to the Tribunal was that he had never even seen this risk assessment form for Miss Bright or discussed it with Mrs Ogbonson. The Tribunal finds that no part of the risk assessment pro forma was completed for Miss Bright during the time she was employed by the Company. In any event, and more significantly, Mrs Ogbonson accepted that the risk assessment was never completed or acted upon.

11. In all the circumstances, the Tribunal finds it more likely than not that the reason the risk assessment was not even begun was the reason Mrs Ogbonson gave for not completing it, that is, because from the beginning of April Miss Bright was off work with hyperemesis gravida (severe morning sickness), a pregnancy-related

illness. The Tribunal is satisfied that this amounts to treating Miss Bright unfavourably because of an illness she suffered as a result of her pregnancy.

12. The Tribunal also accepts, however, Mr Johnson's evidence that he did speak to Miss Bright a couple of weeks after she first informed the Company that she was pregnant and asked her to raise with him any issues she had with her work as a result of her pregnancy as and when they arose. The Company was not, therefore, entirely ignoring its duty of care to Miss Bright, albeit that it did not carry out and implement a formal and systematic risk assessment. Until she went off on sick leave, Miss Bright did not know that the Company was under a legal obligation to carry out a risk assessment. In the light of the conversation she had with Mr Johnson, the Tribunal does not consider that she had any reasonable grounds to feel anxious that one had not been done. It was only when she began her period of sick leave at the beginning of April that she learnt from her partner that a risk assessment should be done for a pregnant employee, and by this stage she was on sick leave and remained on sick leave almost continuously until she was dismissed.

13. The Tribunal does not, therefore, accept that Miss Bright was put under any disadvantage simply from the fact that no risk assessment was done. The Tribunal does accept, however, that there were two obvious hazards that would have been assessed, had a risk assessment been done, in the context of the sort of work Miss Bright was doing. One was fatigue and the other was lifting. The Tribunal has considered whether the failure to assess these risks caused Miss Bright to be put under any disadvantage.

14. In relation to fatigue, both Miss Bright and the Company accepted that everybody in the workforce was expected to take their breaks during quiet periods. There was no provision for anybody being allowed a 20-minute uninterrupted rest break away from their workstation, as provided for in Regulation 12 of the Working Time Regulations 1998. The Tribunal accepts that some pregnant women experience higher than usual levels of fatigue, especially in the early stages of their pregnancy. If Miss Bright was such a woman, she might have been put under a disadvantage because this had not been addressed in a risk assessment and followed through by ensuring she had adequate breaks. The Tribunal did not, however, hear any evidence from Miss Bright to establish that that was in fact the situation in her case. Her evidence was that throughout her employment, and even before she became pregnant, she felt she was entitled to a break and was unhappy that she was not being given one.

15. In relation to lifting, the Tribunal accepts that there was a day in April, on the one occasion when Miss Bright came back to work after she first began her sick leave, when she was involved in lifting. She was clearing up the café area after a children's party. She moved about 15 to 20 chairs a few metres. These chairs were plastic and not heavy and Miss Bright chose to move them two at a time. She also dragged two tables about a metre square in size about two metres across a smooth floor surface. When moving a table, Miss Bright did not lift the whole thing off the floor but rather lifted two of its legs and dragged it across the floor on the remaining two legs. The Tribunal accepts that the tables were awkward to move but does not accept that moving them involved lifting any significant amount of weight.

16. In his witness statement Mr Algar stated that when Miss Bright queried with him whether she should be moving the furniture, he moved it for her. He was not at

the Hearing to be questioned about his evidence, however, and Miss Bright was. In those circumstances, the Tribunal accepted Miss Bright's evidence that she moved the furniture herself.

17. The Tribunal finds it more likely than not that Miss Bright would not have been moving this furniture if a risk assessment had been completed, because the people who worked with her, such as Mr Algar, would have been told that they must take over any such duties if she asked for assistance. On this one occasion, therefore, the Tribunal accepts that Miss Bright was put at a disadvantage as a result of the Company not having done a risk assessment.

18. To that extent, this allegation succeeds.

Mr Johnson's attitude

19. At the beginning of April, Miss Bright was admitted to hospital by her GP because of her hyperemesis. After a couple of weeks of sick leave, she came in to work to hand in a sick note. She alleged that when she did so Mr Johnson did not ask her when she would be coming back to work or how she was. She felt that he was generally unsympathetic and hostile towards her because of her pregnancy and illness.

20. The Tribunal accepts that Mr Johnson did accept Miss Bright's sick note without commenting on it and did not ask her when she was coming back to work. The Tribunal also accepts, however, that he did not ask her about her date of return because the sick note indicated when it was currently thought she would be fit to return to work. Further, the Tribunal accepts Mr Johnson's evidence that he does not usually ask an employee on sick leave how they are. Whilst the Tribunal accepts that Miss Bright perceived Mr Johnson as hostile towards her because of her pregnancy or her illness, the Tribunal had no evidence to establish that that was why he acted as he did.

21. This allegation therefore fails.

Mr Algar's comments

22. Miss Bright's next allegation related to comments she said were made by Mr Algar when he was working with Miss Bright on the day she was clearing up after the children's party. When Miss Bright asked Mr Algar whether she should be moving the tables and chairs since she was pregnant, his response was that there was no problem with her moving the tables because she was in the early stages of pregnancy and his wife could carry children when she was pregnant. In his witness statement, Mr Algar admitted that he had said something along those lines but said it was only in jest.

23. The Tribunal accepts that Mr Algar did tell Miss Bright that it was not a problem for her to move the tables and that his partner was pregnant and had no problem lifting children during her pregnancy. Mr Algar was being dismissive towards Miss Bright even if, as he says in his witness statement, his comments were made in jest. At the same time, however, he was mentioning his own partner's pregnancy and acknowledging that she remained physically capable during this time. The Tribunal also accepts and notes Mrs Ogbonson's evidence that she 'phoned the venue frequently throughout the time Miss Bright was employed there and spoke to staff, including Mr Algar, who often complained about Miss Bright not pulling her weight. These comments had been made from the beginning of Miss Bright's employment, not just after she told the Company she was pregnant.

24. Taking all these matters into account, the Tribunal finds that Mr Algar did not say what he did because of Miss Bright's pregnancy but because of his view that she was work-shy in general.

25. This allegation therefore fails.

Rest breaks

26. Miss Bright alleged that the Company had discriminated against her by not giving her breaks. It is clear from the evidence the Tribunal heard from both parties that the reason Miss Bright was not given breaks was not because of her pregnancy but because the Company's normal practice, which it applied to everybody, was to require staff to take time off in quiet periods rather than giving them guaranteed uninterrupted rest breaks.

27. This allegation therefore fails.

Moving tables and chairs

28. Miss Bright alleged that she had been discriminated against because of her pregnancy by being required to move tables and chairs without help when clearing up after a children's party.

29. This allegation has effectively been upheld in a different context in the Tribunal's finding, set out above, that Miss Bright was put at a disadvantage by the Company's failure to carry out a risk assessment, which would have resulted in her not being required to move the tables and chairs.

Dismissal

30. Miss Bright alleged that she was dismissed because of her pregnancy or her pregnancy-related illness.

31. Miss Bright was on sick leave because of her hyperemesis almost continuously from the beginning of April until the day she was dismissed on 17 June. Before going off on long-term sick leave she had also taken sick leave on odd days in March when she had not come in to work or had had to go home because she had been sick, or felt sick, at work.

32. On 11 or 12 June, Miss Bright telephoned Mr Johnson to tell him that she was coming back to work when her most recent sick note expired on 14 June. He said that he would move things around to find some shifts for her. He telephoned her later in the week and told her that she would be on shift the following Monday and Friday, 17 and 21 June. Jackie, the assistant manager, had also been off on sick leave for several weeks after a knee operation. By this time Mr Johnson was aware that Jackie was also due to be returning to work, her return date being 20 June. Jackie is a longstanding employee of the Company and works full time.

33. When Miss Bright turned up for her shift on 17 June Mr Johnson informed her that she was dismissed because the Company had reviewed the business and found that changes were "crucial". This was confirmed in writing in a letter of the same date from Mrs Ogbonson, which said that Miss Bright's position in the Company had been made redundant.

34. The Tribunal accepts Mr Johnson's evidence that whilst Jackie and Miss Bright were away he had found staffing levels at the venue to be adequate. The Tribunal also accepts the evidence of Mr Johnson and Mrs Ogbonson that the normal pattern is for the venue to become quieter each year from Easter onwards, as the weather improves and people want to be outside more. Further,

the Tribunal accepts Mrs Ogbonson's evidence that the Company's normal practice is to reduce all the staff's hours in line with the seasonal fall-off in trade and that Jackie warns all staff when they are recruited that this is likely to happen.

35. The Tribunal is not, however, convinced by Mr Johnson's evidence that the venue's business was down at this point in 2019 even when compared with the same period in the previous year. He did not say that it was in his witness statement and when he made this assertion in response to questions from the Tribunal he gave no detail. The Tribunal was provided with no documentary evidence to confirm it either. Further, there was no evidence before the Tribunal that the venue was overstaff before Miss Bright and Jackie started their sick leave or that in previous years the downturn in trade after Easter had led to anyone being made redundant, rather than just having their hours reduced. Mrs Ogbonson, who made the decision to dismiss Miss Bright, also accepted in evidence that she had discussed Miss Bright's case with Mr Johnson and he had mentioned that she was having problems with her pregnancy and that she was having to go off on sick leave or go home sick during her shift because she had been sick at work.

36. From these facts, the Tribunal considers that it could conclude that Miss Bright's pregnancy or her pregnancy-related illness was the reason why she was dismissed, at a point when she was saying that she was fit to return to work.

37. Applying Section 136 EqA, the Tribunal needs to be satisfied that the Company has shown that Miss Bright's pregnancy and related illness played no part in its decision to dismiss her.

38. Mrs Ogbonson's evidence to the Tribunal about why she dismissed Miss Bright was confusing and inconsistent. In its response to the claim the Company said that it had decided to dismiss Miss Bright because of redundancy arising from lack of trade. In her evidence, on the other hand, Mrs Ogbonson was far from clear that redundancy was the reason for Miss Bright's dismissal. In her witness statement she said that she decided to dismiss Miss Bright because Miss Bright was neither capable nor interested, that she was a bad time-keeper and lazy. Mrs Ogbonson does not work at the premises so the Tribunal asked her what evidence she based these views upon. In response, Mrs Ogbonson told us that she had based this assessment on the complaints she had had from other employees that Miss Bright was lazy when she telephoned the venue from time to time. In her witness statement Mrs Ogbonson also said that she had made Miss Bright redundant because it would then be easier for Miss Bright to find other employment than if she had been dismissed. The Tribunal tried to ascertain from Mrs Ogbonson what she meant by this but Mrs Ogbonson's responses did not clarify matters. On the face of it, Mrs Ogbonson appeared to mean that the Company had decided to dismiss Miss Bright because she was no good at her job but felt that if it said that was the reason she was being dismissed it might make it difficult for her to find another job so it had decided to dress the dismissal up as a redundancy.

39. In summary, there was no documentary evidence to confirm the fall off in trade being more significant in 2019 than in previous years, when cutting staff hours had been sufficient to address the issue, and the evidence of the person who made the decision to dismiss Miss Bright was confusing and appeared to contradict the Company's position in its response to the claim. The Tribunal

concludes that the Company has not shown that it did not dismiss Miss Bright because of her pregnancy or her pregnancy-related illness. The Tribunal must, therefore, conclude that the decision to dismiss Miss Bright was because of her pregnancy or her pregnancy-related illness.

40. As a result, this allegation succeeds.

Victimisation in payment of wages

41. Miss Bright's final allegation was that the Company had decided not to pay her wages on the due date of 18 June and then paid her wages late because she had said she intended to bring a claim to the Tribunal.

42. After Miss Bright was dismissed on 17 June, she sent Mrs Ogbonson an email saying that she felt she had been discriminated against due to her pregnancy. That was clearly a protected act within Section 27(2) EqA.

43. Miss Bright checked her bank account at around 8am or 9am on 18 June, the date on which she was due to be paid. Her wages had not yet reached her account. A former colleague, Jade, had told her that her wages had already arrived in her account. Miss Bright emailed Mrs Ogbonson querying why she had not yet been paid. Later that day, her wages appeared in her bank account.

44. Mrs Ogbonson is responsible for setting up the bank transfers to pay staff wages. The Tribunal accepts her evidence that she at no point decided not to pay Miss Bright on 18 June. As Mrs Ogbonson said in evidence, she had given the instruction to her bank to make the transfers to pay staff wages and she had no way of controlling the time at which the payment reached Miss Bright's bank account. The Tribunal does not accept that the fact that Miss Bright's wages reached her bank account later than Jade's wages is sufficient to indicate that Mrs Ogbonson had ever decided not to pay Miss Bright her wages on time or had delayed in paying them.

45. This allegation of victimisation therefore fails.

Summary of conclusions on the allegations

46. To summarise, the Tribunal dismisses all the allegations other than the claims that Miss Bright was put at a disadvantage by being expected to move tables and chairs on one occasion and the claim that she was dismissed because of her pregnancy or her pregnancy-related illness.

Compensation: loss of earnings

47. Miss Bright claimed compensation for the discrimination.

48. The Tribunal has considered what financial loss Miss Bright has suffered as a result of the discrimination. Miss Bright moved home during her sick leave from the Company. As a result, her journey to work at the venue changed from a 10-minute journey to a time-consuming commute involving two or more hours' travelling time a day, either by two buses or, if her partner could take her and still be at work on time, by car. If travelling by bus, her fares would have amounted to around £20 a week. Miss Bright had a very difficult pregnancy and was ill throughout.

49. Bearing these facts in mind, the Tribunal considers that if Miss Bright had not been discriminated against by being dismissed she would have come back to work on 17 June but would have gone on maternity leave at the earliest date she could. As her due date was 29 October, that would have been 12 August 2019,

the beginning of the eleventh week before her expected week of childbirth (Regulation 4(2)(b) of the Maternity and Parental Leave etc. Regulations 1999).

50. The Tribunal also finds that between returning to work on 17 June and going on maternity leave on 12 August Miss Bright would have had a significant amount of sickness absence, particularly since she would have had to deal with the commute to work as well as her advancing pregnancy. Miss Bright was given notice of her dismissal and was paid until 24 June 2019. The Tribunal considers it safe to assume that in three of the remaining 7 weeks until 12 August Miss Bright would have been receiving Statutory Sick Pay only at £94.25 per week, totalling £282.75. The remaining 4 weeks would have been at reduced hours, because all staff were having their hours cut at this time due to the seasonal fall-off in trade. Miss Bright was working 3 days a week, with occasional extra days, before she went on sick leave, but the Tribunal accepts that her hours would have reduced to 2 days or 14 hours a week on her return to work. 4 weeks at 14 hours a week at £7.85 an hour results in a total of £439.60. Taking into account that there may have been tax and national insurance to pay on that sum, the Tribunal finds that Miss Bright's loss of earnings resulting from the discrimination was around £700 to the date she would have gone off on maternity leave.

51. Because of the lower weekly pay Miss Bright would have been receiving because of her reduced hours, she would not have qualified for Statutory Maternity Pay and so would not have received any income from the Company during her maternity leave. She has in any event received maternity allowance during this period.

52. In her statement of what she is claiming in compensation, Miss Bright has said that she would have been likely to have taken 8 months' maternity leave. She would therefore have been due to be returning to work a month or so after the date of the Tribunal Hearing. The Tribunal finds, however, that Miss Bright would not have been able to return to work with the Company even if she had not been dismissed, because of the difficult commute and because she now has a very young baby. In her evidence she explained that she has not been able to find childcare, either paid or unpaid, for her son. The Tribunal does not, therefore, award Miss Bright any further loss of earnings.

Compensation: injury to feelings

53. The Tribunal has considered what compensation to award Miss Bright for the injury to her feelings caused by the discrimination. In Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 the Court of Appeal gave guidance on how this type of compensation should be assessed and laid down three bands (which have subsequently been amended under joint Presidential Guidance by the Presidents of the Employment Tribunals of England and Wales and Scotland). The lower band of £900 to £8,800 applies in less serious cases; the middle band of £8,800 to £26,300 applies in serious cases that do not merit an award in the upper band; and the upper band of £26,300 to £44,000 applies in the most serious cases. Awards must reflect the injury to feelings actually suffered by the Claimant, as established on the evidence presented to the Tribunal.

54. Miss Bright gave some indication of the injury to her feelings in the statement she sent the Tribunal on the compensation she was claiming. She said that she was upset from the first day of her pregnancy. The Tribunal has found, however, that there were only two acts that amounted to discrimination and they did not occur

until later in Miss Bright's pregnancy. She also said that she was unwell throughout her pregnancy. Her illness was not, however, the result of the discrimination by the Company. She claims that she had to leave her home and move in with friends as a result of her loss of earnings because of her dismissal. This is not in fact the case: she confirmed in evidence that she moved home before she was dismissed and that cannot therefore have been a result of the discrimination by the Company.

55. Although Miss Bright gave scant evidence on the issue, the Tribunal nevertheless accepts that she must have been upset to have lost her job. She knew she would be unlikely to get another job in the immediate future because she was not only pregnant but also ill. The Tribunal also accepts that Miss Bright would have suffered some anxiety as a result of being expected to move the tables and chairs, even though the Tribunal does not consider that that task was overly onerous. Miss Bright's weekly earnings with the Company had she not been dismissed would have been around £110 a week

56. Bearing all these matters in mind, the Tribunal considers that an award in the lower band of the Vento guidelines is appropriate. It awards Miss Bright £2,000 by way of compensation for injury to her feelings, which represents over 18 weeks' pay.

57. Under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, the Tribunal is required to add interest at 8% per annum to the compensation it awards. In relation to loss of earnings, interest is awarded from the mid-point of the period covered by the award. There are 35 weeks from the mid-point between 24 June and 12 August and the date of the Tribunal Hearing. That results an award of interest in the sum of £700 x 35/52 x 8% = £37.69. In relation to injury to feelings, interest is awarded from the date of the discrimination to the date of the Hearing. The Tribunal therefore awards interest from the date of the decision to dismiss Miss Bright, which was 17 June 2019, to the date of the Tribunal's Hearing on 20 March 2020, totalling 40 weeks. That results in the sum of £2,000 x 40/52 x 8% = £123.07.

Summary of conclusions on compensation

58. In summary, the Tribunal awards Miss Bright £700 for loss of earnings plus £39.69 interest on that figure and £2,000 for injury to feelings plus £123.07 interest on that figure. The total amount of compensation that the Tribunal awards is therefore £2,860.76.

Employment Judge Cox

Date: 1st April 2020