EMPLOYMENT TRIBUNALS

Claimant: **Mrs O Fjerza**

Respondent: **Tesco Family Dining Limited**

Heard at: **Croydon** **On: 18/3/2020 and 19/3/2020**

Before: **Employment Judge Wright**
Ms H Bharadia
Mr G Henderson

Representation:
Claimant: **In person**
Respondent: **Mr T Welch - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claim of: a failure to provide a risk assessment contrary to Regulation 16 of the Management of Health and Safety at Work Regulations 1999; a failure to offer alternative work contrary to s. 67 of the Employment Rights Act 1996; pregnancy discrimination contrary to s. 18 Equality Act 2010; and constructive dismissal contrary to s.95 of the Employment Rights Act 1996 all fail and are dismissed.

REASONS

1. On 9/10/2019 the claimant presented a claim to the Tribunal. At that time, she was legally represented. Her claim form records she is claiming unfair dismissal and pregnancy or maternity discrimination.

2. The respondent operates the cafés in Tesco stores. The claimant was employed initially as a Team Member at the respondent's Osterley store and subsequently as a Team Leader.

3. The Tribunal heard evidence from the claimant and she also relied upon witness statements from Ms Sadowska and Mr Barnes; although they did not attend the hearing to give their evidence. For the respondent, the Tribunal heard from: Mr Jailty (Café Manager); Mr James (at the relevant time, Café Manager) and Mr Draper (Operations Manager). The respondent had a witness, Ms Mascrarenhas (Café Manager); who was under a witness order to attend the hearing on 19/3/2020. In breach of that order, Ms Mascrarenhas did not attend. Finally, the respondent produced a witness statement from Mr Bloor (Café Manager) who also did not attend the hearing. Neither of the statements for the witnesses who did not attend for the respondent were signed. In respect of the witnesses who produced witness statements but did not attend the hearing, the Tribunal gave little weight to their evidence. The reason for this was that if the witness did not attend, their evidence could not be tested in cross-examination, unlike the witnesses who did attend.

4. The Tribunal had before it a bundle of approximately 300-pages. Only the pages in the bundle referred to were considered.

5. At a preliminary hearing on 16/10/2018 the claims were identified as constructive unfair dismissal (even though the claimant did not have two years' service), automatic unfair dismissal relating to pregnancy, childbirth or maternity, pregnancy and maternity discrimination, a failure to offer alternative work and a failure to conduct a risk assessment.

6. The relevant law is under s. 99 (3)(a) of the Employment Rights Act 1996 (ERA), leave for family reasons:

   (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.

   (3) A reason or set of circumstances prescribed under this section must relate to—

   (a) pregnancy, childbirth or maternity,

7. The claimant also brings a claim under s. 18 of the Equality Act 2010 (EQA), Pregnancy and maternity discrimination: work cases

(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.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a)if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b)if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a)it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b)it is for a reason mentioned in subsection (3) or (4).

8. The pleading of the claimant's claims was quite limited. Her claims were:

failure to complete a risk assessment within the workplace upon being notified the claimant was pregnant in a timely manner, relying upon

O'Neill v Buckingham County Council [2010] IRLR 384 EAT and Regulation 16 Management of Health and Safety at work (MHSW) Regulations 1999 (SI 1999/3242);

failure to offer alternative work s. 67 ERA;

unlawful pregnancy discrimination contrary to s. 18 EQA (the claimant relies upon the protected characteristic of pregnancy[1]); and

constructive unfair dismissal ERA.

9. The respondent complains that the claimant's case consistently changed and new allegations were raised at each opportunity.

10. By an order dated 7/8/2018 the claimant was required to give reasons why her complaint for unfair dismissal should not be struck out as she had less than two years' service. The claimant's reply to that went beyond what the order required.

11. Similarly, at the case management hearing on 16/10/2018 the claimant was directed to provide full details of the conduct which she relied upon as breaching the implied term of trust and confidence; and to set out the full details of each allegation of unfavourable treatment with the dates and names of the perpetrators. In response, the claimant made further allegations.

12. In addition, when witness statements were exchanged, the claimant's statement contained additional allegations.

13. Whilst the claimant was legally represented initially, she was a litigant in person by the time of the case management hearing. That said, she was in the case management hearing outcome referred to the Presidential Guidance on General Case Management and provided with a copy of the link to that guidance on the internet. That guidance deals with applications to amend a claim and has 14 paragraphs covering making an application to amend a claim or response.

14. The EAT, in the case Chandhok v Tirkey (UKEAT/0190/14/KN), set out at paragraphs 16, 17 and 18:

> 'The claim, as set out in the ET1, is not something just to set the ball rolling...

[1] and it seems she relies upon s. 39 (2)(d) detriment

> ... the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it.
>
> ...It requires each party to know in essence what the other is saying, so they can properly meet it; so they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and the Tribunal itself, and enable care to be taken that any one case does not deprive other of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.'

15. In that case, the EAT were particularly critical of finding that the pleaded case was contained within the witness statement or from what the claimant had said. In this case, the Tribunal has only concerned itself with the pleaded case and not the added allegations.

Findings of fact

16. It is the claimant's claim that she was 'promised' promotion to a Team Leader role, by Mr Jailty within a month of her employment commencing. That is denied by Mr Jailty.

17. The claimant was on a 12-week notice period, her contract make no reference to a promotion and the Tribunal finds that it would be counter to the objective of a probationary period; had Mr Jailty 'promised' the claimant a promotion after one month. It may have been the case that the claimant and Mr Jailty had a conversation about advancement and Mr Jailty may well have encouraged the claimant and referred to colleagues who were promoted after a short period of service; however the Tribunal finds that the was no 'promise' of promotion made to the claimant, which failed to materialise.

18. The claimant was transferred from Osterley to Twickenham on 1/8/2017 and transferred back to Osterley on 24/11/2017. The claimant alleges the transfer back to Osterley was against her will. In fact, on the 22/11/2017 the claimant sent a WhatsApp message to her manager to say:

> 'I just received a call from [Mr Draper] … he proposes me to go to Osterley as team leader. I really appreciate his proposal…' (page 99)

19. This more contemporaneous recounting of the situation is preferred and accepted and the Tribunal finds that Mr Draper did not move the claimant against her will and the transfer back to Osterley was coupled with a promotion to Team Leader, which the claimant was pleased to accept. It is also noted that the claimant was promoted within approximately five months of the start of her employment with the respondent.

20. The claimant complains that her working conditions were akin to those of a Victorian workhouse. She claims to have been made to work in a freezer for long periods of time, to carry heavy items and to use dangerous chemicals. Mr Jailty (the claimant's line manager at this time) said that she was told not to lift heavy weights and two chairs were put out for her to sit on whilst working at the till or the salad bar.

21. The Tribunal was told that the first thing Mr Draper did when he arrived on site in November 2017 was to ask why a team member was sitting on a chair in the Twickenham café. This indicated to the Tribunal that it was unusual for a team member to be seated in the café and that it was remarkable enough for Mr Draper to have noted and questioned it. It also indicates to the Tribunal that some form of risk assessment had been carried out and that one of the adjustments made for the claimant was the provision of a chair so that she could be seated at some points during her shift. In addition, Mr Draper informed the claimant in a WhatsApp message not to wait until a colleague arrived before she began to serve breakfast (page 106 – she was not to serve breakfast on her own and was to wait for a colleague to arrive).

22. On 8/12/2017 the claimant slipped whilst working in the pot wash as the floor was wet. She did not appear to be injured (pages 130A-130B) and an exchange of messages when she finished work did not indicate that there was anything wrong (page 130c). The respondent does not deny that the claimant fell, although it does say that if she was washing up and the floor became slippery, then some of the responsibility must be hers. The respondent does deny that it prevented the claimant from reporting the fall or told her not to tell her colleagues about it.

23. On the same day, the claimant had a telephone consultation with her GP and there is no record of the fall in the GP's note. The GP did record that the claimant 'works in a café and spends all day standing', notwithstanding the fact that a chair had been provided for the claimant (pages 131 and 271). The Tribunal is in no doubt that if the fall had been of significance, the claimant would have mentioned it to her GP and that the GP would have recorded it. It finds that the claimant did not mention the slip to her GP as it was inconsequential. The respondent highlights that the claimant similarly failed to mention to her GP her claim that she was forced to work

in the freezer for long periods of time, lift heavy items or to use dangerous chemicals.

24. The Tribunal finds that the respondent did not prevent the claimant from reporting her fall or prevent her from talking about it. The fall appears to have been of low consequence, such that it was not mentioned to the GP later the same day. The claimant was not particularly injured and she recorded in the report form:

> 'Little injury in knees' (page 130B)

25. There was no reason why the respondent would prevent the claimant from reporting a minor incident. There is no evidence show that the respondent was anything other than a caring and concerned employer who made any adjustments it could to assist the claimant (including the provision of a chair and restrictions on what duties she could carry out when working alone). Furthermore, as the claimant had told the Tribunal she had unfortunately previously suffered two miscarriages, it finds she was particularly concerned about her health and that of her unborn child; and having been forthcoming in the past, would have been on this occasion.

26. The claimant claims that on 21/12/2017 she collapsed after being forced to work for 8 hours without a break. This was not reported at the time and the first time it was raised was in January 2019. The claimant did not mention this to her GP. This was surprising in view of the two miscarriages before this pregnancy and the claimant was therefore extra vigilant in respect of her health. There was also no mention of this in the text messages which were exchanged.

27. The claimant furthermore did not raise a grievance about her allegations regarding her mistreatment. She said this was because she was told by a Team Leader that she could not raise a grievance. This is not accepted and the claimant had access to a Team Leader via the text messaging (the Tribunal was told that was not an authorised method of communicating by the respondent) and to Mr Draper the Operations Manager and Mr James the Regional Operations Manager. As the respondent submitted, the claimant did not hold back putting her concerns into text messages when she felt aggrieved about something and the Tribunal finds that had the matters of which the claimant complains actually happened, that she would have taken matters further.

28. The claimant also alleges that she repeatedly requested a risk assessment both at Twickenham and upon her return to Osterley.

29. The respondent responds that there was simply no 'repeated' request for a risk assessment. The text messages upon which the claimant relies do

not support her claim (pages 95-96 and 98-99). Ms Mascrarenhas told Mr Draper that she had done a risk assessment, however when Mr Draper could not find a written record, he asked Mr Jailty to conduct one, which he did (pages 134-135).

30. A risk assessment had been carried out as was evidenced by the chair provided for the claimant.

31. The respondent has in place a Maternity Policy and the Tribunal finds that the claimant would have been quick to highlight any perceived risk to her health or that of her unborn child, in view of her particular circumstances.

32. The claimant also said that she was expected to use dangerous chemicals. The Tribunal finds that there was no requirement for her to use dangerous chemicals. All she was asked to do was to use cleaning products in the café. Again, had the claimant been required to use products which were potentially harmful to her or to her unborn baby, she would have raised this as an issue with the respondent.

33. A written risk assessment was carried out and recorded on 10/1/2018 (pages 134-135), no additional risks were identified. The risk assessment was annotated – '25 hours pw can do closing and opening need 10 minute break to sit during shift'. The claimant signed the risk assessment on 10/1/2018. The claimant was told to only do the work she could manage and not to work alone (pages 96 and 106). Finally, the claimant's GP did not identify any other risk(s) other than the provision for her to sit down and rest during the day (page 131).

34. It seems the claimant's case is that the action taken under the disciplinary process was less favourable treatment contrary to s. 18 EQA.

35. The Tribunal finds that the respondent had a reasonable suspicion of theft, when a colleague of the claimant's raised concerns with the Store Manager. Besides the report from the colleague, the Store Manager reviewed the CCTV footage and was of the view this supported there was a need to investigate. Mr Draper was appointed to investigate. Mr Draper arranged for stills to be taken from the CCTV footage which was not preserved (although the claimant did view it on one occasion). Mr Draper reviewed the case reports and obtained copies of the receipts (pages 187-198). The receipts showed the refunds which had been processed. He used the timings from the CCTV to match the timings and to see who had processed them. The footage showed that it was the claimant and that there was no customer present. Mr Draper arranged to meet the claimant as part of the investigation. The meeting took place on the 14/2/2018 and the claimant viewed the CCTV footage. After further investigation, Mr Draper took the decision to suspend the claimant on 16/2/2018.

36. As the claimant does not have two years' service in order to claim unfair dismissal, the claimant is relying upon disciplinary process in respect of her claim that it is unfavourable treatment to consider the allegation against her and to investigate the situation. Her objection to this led to her resignation, which was accepted with effect from 3/3/2018.

37. The Tribunal finds that pregnancy is not a shield which protects the claimant from the respondent taking disciplinary action. The respondent had a reasonable suspicion of theft from the moment the claimant's colleague made the report of their suspicions. Irrespective of the claimant's pregnancy, an allegation was made, which required investigation.

38. The Tribunal is not required to make any finding as to what the outcome of the respondent's investigation would have been and it does not intend to do so.

39. As it was, the claimant resigned on 23/2/2018 (pages 233-236). She was asked to reconsider her decision to resign and to confirm if she wished to proceed by 2/3/2018. As there was no response from the claimant, she was processed as a leaver on 3/3/2018.

Conclusions

40. The claimant had pleaded the failure to carry out a risk assessment as a freestanding claim. She has not pleaded that any failure was unfavourable treatment under s. 18 EQA. The Tribunal agrees that it does not have jurisdiction under Regulation 16 of the MHSW. In any event, it also agrees that on the facts in this case, there is no failure and therefore no breach of Regulation 16. This claim fails and is dismissed.

41. The claim that the respondent failed to offer alternative work contrary to s.67 of the ERA similarly has no application on the facts of this case and this was not a claim which was particularly advanced by the claimant. There was no suspension on maternity grounds. If the claimant was referring to her suspension from work as part of the disciplinary process, this was not a suspension on maternity grounds and if the claimant seeks to advance that proposition, then not only was it not advanced effectively, but it was misconceived. This claim fails and is dismissed.

42. Any action which the respondent took under the disciplinary procedure was entirely reasonable. An allegation was raised, which the respondent was entitled to investigate and upon investigation, it was entitled to take matters further in respect of calling the claimant to investigation meetings and suspending her. The respondent had a reasonable suspicion in the

claimant's wrongdoing and was following a reasonable investigation process. The respondent was taking reasonable steps under its disciplinary process and this was not unfavourable treatment because of her pregnancy. This claim fails and is dismissed.

43. Turning to whether the claimant was constructively unfairly dismissed, the claimant relies upon the respondent's conduct as repudiating the implied term of mutual trust and confidence. The burden is on the claimant to show that without reasonable and proper cause, the parties must not conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between the employer and employee as per Malik v Bank of Credit Commerce International SA [1997] IRLR 462.

44. The respondent referred to Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 and the five questions which should be sufficient to ask in most constructive dismissal cases:

> What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> Has he or she affirmed the contract since the last act?
>
> If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
>
> Did the employee resign in response (or partly in response) to that breach?

45. If the act which triggered the claimant's resignation was the respondent investigating the alleged misconduct and the claimant resigned as a result of that act, the Tribunal finds that the respondent taking disciplinary action was not a repudiatory breach of the contract. The respondent was not seeking to destroy or seriously damage the trust and confidence between the parties. The claimant did not raise a grievance about the respondent's conduct; she simply resigned. She did not therefore put the respondent on notice that she was dissatisfied. She did not follow the Acas code and she did not take advantage of the respondent's offer to her to reconsider her resignation.

46. The principal reason for the dismissal was the claimant's objection to the respondent instigating disciplinary action; which was completely unrelated to her pregnancy. The claimant seeks to link it as such, but based upon the findings of fact, the Tribunal finds that not to be the case. There is no correlation between the claimant's pregnancy and the allegation being reported to the respondent and it investigating the allegation under its disciplinary procedure. It is a fact that the claimant was pregnant at the time, that however had no bearing upon the respondent proceeding under its disciplinary policy.

47. The claimant's decision to resign was due to her objection to the respondent investigating the allegation made against her. That was completely unrelated to the fact of the claimant's pregnancy and the dismissal was not related to her pregnancy. The claim therefore fails under s. 99 ERA and is also dismissed.

48. In conclusion, all of the claimant's claims fail and are dismissed. As a result, the remedy hearing provisionally listed for 18/5/2020 is vacated and will not now take place.

11/4/2020

Employment Judge Wright