Case No: 2202154/2020[V]

EMPLOYMENT TRIBUNALS

Claimant: Mrs R Chamas

Respondent: Villa Di Geggiano (UK) Ltd

Heard at: London Central (by CVP) **On:** 30, 31 March, 1 April 2021, 6 April (in chambers)

Before: Employment Judge H Grewal
Mr L Tyler and Ms C Buckland

Representation

Claimant: Mr R Wayman, Counsel

Respondent: Mr M Salter, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaints of pregnancy/maternity discrimination are not well-founded; and

3 The complaints of harassment related to sex are not well-founded.

REASONS

1 In a claim form presented on 8 April 2020 the Claimant complained of unfair dismissal, pregnancy/maternity discrimination and sex harassment. The Claimant had also claimed that she was entitled to notice and redundancy pay but those claims were not pursued. The Claimant commenced Early Conciliation ("EC") on 19 February 2021 and the EC certificate was granted on 20 February 2020.

The Issues

2 The issues to be determined had been identified at a preliminary hearing on 21 September 2020. Subject to a couple of minor amendments, the parties confirmed at the outset of the hearing that they were the issues that we had to determine. They are as follows.

Unfair Dismissal

2.1 What was the reason or principal reason for the dismissal? The Claimant contends that it was her pregnancy, the Respondent's case is that she was redundant.

2.2 If it was redundancy, whether the circumstances relating to redundancy applied equally to other employees who held similar positions and the Claimant was selected for redundancy because she was pregnant.

2.3 If it was redundancy and the Claimant was not selected for redundancy because she was pregnant, whether the dismissal was fair.

2.4 If there was any procedural unfairness, what would the outcome have been if a fair process had been followed.

Pregnancy/Maternity Discrimination

2.5 Whether the Respondent subjected the Claimant to the following treatment:

(a) In January 2020 reduced her shifts from 4-5 days per week to 2-3 days per week;

(b) In or about January/February 2020 required he Claimant to sign a document confirming that she was working a 3 or a maximum of 4 shifts per week;

(c) On or about 19 January 2020 changed the shift rota without informing the Claimant in advance;

(d) Failed to consider and address the Claimant's grievance dated 29 January 2020;

(e) Failed to reschedule a redundancy consultation meeting on 14 February 2020 for five days to allow the Claimant to be accompanied and conducted a meeting in her absence;

(f) Dismissed her on 14 February 2020;

(g) Failed to offer the Claimant an appeal hearing for a period of six weeks after the dismissal.

2.6 If it did, whether it constituted unfavourable treatment;

2.7 If it did, whether the Respondent treated her unfavourably because she was pregnant or seeking to exercise her right to maternity leave.

Harassment related to sex

2.8 Whether the Claimant was subjected to the following conduct:

(a) When she informed Mr Conboy that she was pregnant on or about 17 January 2020, he responded by saying "Oh fuck";

(b) At a meeting Ms Pacia and Mr Conboy said to the Claimant in a horrible and aggressive manner that "selfish", "not a team player", "troublemaker" and to "stop feeling sorry for yourself".

2.9 If she was, whether the conduct related to her sex;

2.10 If it did, whether it had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

The Law

3 An employee who is dismissed shall be treated as unfairly dismissed if the reason or principal reason for the dismissal is the pregnancy of the employee – section 99(1) Employment Rights Act 1996 ("ERA 1996) and Regulation 20(1)(a) Maternity and Parental Leave etc Regulations 1999 ("MAPLE Regs 1999).

4 It is for the employer to show that the reason or principal reason for the dismissal is that the employee was redundant – section 98(1)(a) and (2)(c) ERA 1996.

5 Section 139(1) ERA 1996 provides,

> "*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
> *…*
> *(b) the fact that the requirements of the business –*
> *(i) for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish."*

6 Regulation 20(2) MAPLE Regs 1999 provides,

> "*An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if –*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;*
> *(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and*
> *(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for redundancy was* [connected with the pregnancy]*."*

7 Where the employer has shown that the principal reason for the dismissal was that the employee was redundant, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case (section 98(4) ERA 1996).

8 Section 18(2) EA 2010 provides that a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it. Section 18(4) provides that a person (A) discriminates against a woman if A treats her unfavourably because she is seeking to exercise her right to maternity leave. Section 39(2) EA 2010 provides that an employer (A) must not discriminate against an employee of A's (B) by dismissing B or subjecting B to any other detriment.

9 Section 26 EA 2010 provides,

> "*(1) A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to* [sex], *and*
> *(b) The conduct has the purpose or effect of -*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *…*
>
> *(4) In deciding whether the conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect."*

10 If there are facts form which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a section of the Equality Act 2010, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene that section – section 136(2) and (3) EA 2010. We have had regard to the

guidance given in the decisions of the higher courts on the application of this provision.

The Evidence

11 The Claimant gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent – Stephen Conboy and Ilona Pacia (directors and owners), Lukasz Borowski (General Manager), Agnieszka Galicka (Operations Manager), Jacopo Luis Nunes (sous chef and IT Manager), Emanuele Morisi (Sous Chef) and Rosemary Darby-Jenkins (HR Consultant). The documents in this case comprised a little over 300 pages. Having considered all the oral and documentary evidence, the Tribunal makes the following findings of fact.

Findings of fact

12 The Respondent is a small company that owns and runs an Italian restaurant in West London. Ms Pacia and Mr Conboy (who are a couple) are the directors and shareholders of the company. There is a third director who lives in Italy. At the relevant time it had about twenty employees.

13 The Claimant commenced employment with the Respondent as a waitress on 11 September 2017 at an annual salary of £22,000 She worked full-time which meant she worked 5 shifts from 4 p.m. to when the restaurant closed and one weekend shift from 11 a.m. to closing time. At that time the restaurant opened only in the evenings during the week and at lunch-times and in the evenings during the weekend. The Claimant was not given any written particulars of employment. In February 2018 she was promoted to Floor Supervisor and her salary was increased to £24,000 per year. As Floor Supervisor she was responsible for supervising and training the Front of House staff (the waiters). On some occasions in 2018 the Claimant was paid less than £2,000 a month. The reason for that was not clear to us. The Claimant did not complain about it at the time and it did not feature as a claim before us.

14 The Claimant was on maternity leave from 17 September 2018 to 16 June 2019. During her maternity leave the Claimant kept in touch with Lukasz Borowski, the General Manager, and they had a good relationship. She was paid maternity pay during her maternity leave.

15 On 20 March 2019 the restaurant started opening at lunch-times during the week.

16 Guiseppe Mafrica was promoted to Floor Supervisor while the Claimant was on maternity leave. He worked full-time.

17 On 7 May 2019 the Claimant met with Messrs Conboy and Borowski to discuss her return to work. The Claimant said that she wanted to return to work on reduced hours and did not want to work evenings or weekends. It was agreed that she would work the weekday lunch-time shifts from 11 a.m. to 3 p.m. The Claimant said that she wanted to be paid £15 per hour, and although that worked out to a higher hourly rate than her monthly wage, the Respondent agreed to that. Working 4 hour shifts from 11 a.m. to 3 p.m. on weekdays at £15 per hour was a change from the Claimant's previous terms and conditions. It amounted to a variation of her contract.

18 On 16 May 2019 Mr Conboy wrote to the Claimant. He said,

> "*In line with your wishes and our requirements, I would like to offer you future employment on the basis of five shifts 11.00 – 15.00 Monday to Friday. This will be paid at an hourly rate of £15/hour gross."*

He asked her to respond within four days to confirm her acceptance of the offer.

19 The Claimant responded on 18 May 2019 that the goal was to work five shifts a week but she would not be able to do that when she started. She said that for a short period of time she would be able to work 3-4 shifts from 11 a.m. to 3p.m. That was acceptable to the Respondent. Neither party clarified what the Claimant meant by "a short period of time". In the absence of any certainty as to when the Claimant would start working 5 lunch-time shifts a week, it cannot be said that there was any legally binding agreement about her working 5 lunch-time shifts per week. The binding legal agreement made at that time was that the Claimant would work 3-4 lunch-time shifts a week with a view to increasing it to 5 shifts later.

20 The Claimant returned to work on 17 June 2019. Although she retained the job title Floor Supervisor when she returned to work she barely carried out any supervisor duties. On most days there was no staff to supervise or train on the lunch-time shift. Her role when she returned to work was essentially that of a waitress. There were two other full-time members of staff who were also present at the restaurant during the day - Mr Borowski, the General Manager, and Valeria Gurinovics, the Events Manager.

21 At the end of each week the Claimant informed Mr Borowski of the days when she was available to work the following week and he accommodated her requests. From about the middle of July the Claimant normally offered to work five lunch-time shifts a week (she normally offered to work 3 or 4 days during the week and 1 or 2 lunch-time shifts over the weekend). Mr Borowski allocated her shifts on the days she had asked to work. She hardly ever worked five lunch-time shifts between Monday and Friday. The Claimant offered to work two evening shifts at the beginning of November and one or two in December. On occasions the Claimant's plans changed and she changed her shifts at the last minute. Mr Borowski was always understanding and accommodated those changes.

22 On 19 December the Claimant was unwell and unable to work the evening shift that day and her shift on the following day. She notified Mr Borowski and he asked her to inform Ewa Rybacka in Operations. On 20 December the Claimant sent Ms Rybacka an email in which she said that she had not been well and had gone to the hospital and that, after a few tests, the hospital had confirmed that she had a "risky pregnancy."

23 The restaurant was closed from just before Christmas until 6 January 2020. Ms Rybacka responded to the Claimant's email on 6 January 2020. She said that she understood that the Claimant was well and had returned to work and asked her to confirm whether she was pregnant. The Claimant responded on 17 January (a Friday) and confirmed that she was pregnant. The Claimant was sick with a sore throat and fever on 17 and 18 January and informed Mr Borowski that she could not work the shifts that she was meant to be working on those days.

24 The Respondent had been monitoring its lunch-time covers ever since it started the service. It was clear to it from its day to day to monitoring that the lunch-time service attracted a very small number of diners and generated very little revenue. The Respondent produced for this hearing a document (compiled by Ms Galicka from its records) which sets out the number of lunch covers from Monday to Friday and the takings each day from the lunch-time sitting for the period between 20 March and the end of November 2019. The document shows that during that period on 15 to 17 days each month the Respondent had 10 or less covers at lunch-time. Frequently there were no covers or 5 or less covers. The Respondent has a maximum seating capacity of 160.

25 On 19 January (a Sunday) Mr Borowski sent the Claimant a message saying that he would not require her to attend the following day as they had 0 diners (no bookings for lunch) but that he would let her know as he might need her later in the week or over the weekend. The Claimant responded,

> "*My contract is from Monday till Friday based on 4 hour shift as signed and agreed to Stephen. If anything, I should be informed and give my consent for any changes."*

26 On 20 January the Claimant sent a text message to Mr Conboy in which she said "*Lukasz is cutting my shifts."* Mr Conboy was away from the office. He sent an email to Mr Borowski. He said that his understanding was that the Claimant had agreed to do 3-4 lunch sessions per week and he asked him whether he was cutting her shifts to less than 3-4 shifts per week. Mr Borowski responded that he was not and that the Claimant sometimes worked up to 5 shifts per week. He said that as there had been no covers that day he had asked her not to come in but if he could use her later in the week he would do so. Mr Conboy said that they needed to talk to the Claimant to find out why she believed that he was cutting her shifts and they agreed that they would speak to her the following day at 11.30.

27 Mr Conboy asked Ms Piaca whether she had changed the agreement with the Claimant to work 3-4 shifts a week and she responded that that was what she had agreed but that sometimes she was asked to do more shifts. Mr Conboy also contacted Ms Galicka. He said that his recollection was that the Claimant had sent an email saying that she wanted to work 3-4 shifts per week and he asked her to find it. Ms Galicka forwarded to him the Claimant's email of 18 May 2019. Later that day Mr Conboy invited the Claimant to a meeting with him and Mr Borowski at 11.15 the following morning to discuss her text message to him.

28 The Claimant's evidence in her witness statement (dated 15 March 2021) was that that when she returned to work after she had confirmed her pregnancy to Ms Rybacka on 17 January Mr Conboy had approached her and asked her why she had not been at work for a few days. The Claimant returned to work on 21 January 2021. She said that she had told him that she was pregnant and that he had gotten angry and said "Oh fuck". Mr Conboy denied that he had ever said that. The Claimant complained to the Respondent on 29 January 2021 about a number of comments that she said Mr Conboy and Ms Pacia had made at the meeting with her on 21 January. She did not say anything in that letter about Mr Conboy having said "Oh fuck" in response to her telling him that she was pregnant. She did not say anything about it in the formal grievance she raised on 3 February 2020. There was no reference to that comment in the Claimant's claim form presented on 8 April 2020.

The first time that the Claimant said that Mr Conboy had made that comment was in a list of issues prepared for a preliminary hearing on 21 September 2020. At that stage she said that the comment had been made between 1 and 6 January 2020. On the Claimant's own account, her absence in January had not been for a pregnancy-related reason. She had a fever and sore throat. Having considered all that evidence, we concluded that Mr Conboy had not said that and that the Claimant had made it up after the event to bolster her case of pregnancy discrimination.

29 Mr Conboy and Mr Borowski met with the Claimant on 21 January. Mr Conboy said that the agreement when she returned from maternity leave had been that she would work 3-4 lunch-time shifts during the week, and showed her her letter of 18 May. The Claimant said that she had a letter in which he had told her that she would be working 5 lunch-time shifts a week and wanted to get a copy of that from her husband. The meeting was adjourned and the Claimant sent Mr Borowski by telephone a picture of Mr Conboy's letter of 16 May.

30 There was a second meeting later that day which Ms Pacia attended as well. The Claimant maintained that the agreement had been for her to work 5 lunch-time shifts Monday to Friday and that the Respondent was cutting her shifts by offering her any less. Mr Conboy and Ms Pacia disagreed with her interpretation of what had been agreed. Furthermore, having been flexible and accommodated the Claimant's wishes, they felt that she was being unreasonable and inflexible in demanding that she be given 5 lunch-time shifts during the week even when there were no diners. They felt that her allegations of Mr Borowski cutting her shifts were unjustified. In the context of that discussion they said that she was being selfish and was not a team player. The reality was that the Claimant had hardly ever worked 5 shifts between Monday and Friday. She had normally worker 3-4 shifts between Monday and Friday and an extra 1-2 lunch-time shifts over the weekend.

31 Following the meeting Mr Conboy wrote to the Claimant that they did not agree with her assertion that she had an employment contract to work 5 shifts from Monday to Friday. He said that the only contract between them was that she would work 3-4 shifts per week. He said that they were disappointed with her accusation that Mr Borowski was cutting her shifts.

32 It was the Claimant's insistence that the Respondent was contractually obliged to give her five lunch-time shifts Monday to Friday when there were in fact very few, and occasionally no, diners at those times that led Mr Conboy and Ms Pacia to question whether the business in fact needed a dedicated employee to work just those shifts. The very limited number of lunch-time diners could be served by the two full-time members of staff who were in the restaurant at lunch-times – Mr Borowski and the Events Manager. On the rare occasions when there might be more diners another one of the waiting staff could be rostered to work on that shift. Their view was that the Claimant's work could be undertaken by existing staff at no extra cost and that they did not need an employee to work just those shifts. They contacted Rosemary Darby-Jenkins, an HR consultant, and instructed her to advise on them whether the Claimant's role was redundant and what procedures they needed to follow.

33 On 24 January Mr Borowski said to the Claimant as she had only worked three shifts that week, he could offer her a shift that Saturday evening. The Claimant responded, "*Like I explained you before Lucasz I can't work evenings. Hope you understand."* In January the Claimant was paid for working 62.5 hours. That equates

to 15.5 four-hour shifts – nearly four shifts a week (the restaurant opened on 6 January after the Christmas break).

34 Ms Darby-Jenkins advised the Respondent and helped them draft a letter that was sent to the Claimant on 27 January 2020. The letter was from Ms Pacia. It said that the lunch-time business was running at a significant loss and the company had taken a view that the number of employees required to carry out the lunch-time service was too high. It informed her that the lunchtime cover position was at risk of redundancy. She was invited to a consultation meeting on 30 January to discuss any suggestions that she might have on how redundancy might be avoided and was advised of her right to be accompanied. She was advised that if she were to be made redundant she would have the right to be considered for any vacant roles and that they only alternative role available at that time was for evening cover 6 – 10 pm three evenings per week. A copy of a redundancy procedure which had been drafted by Ms Darby-Jenkins was attached to the letter.

35 With reference to "unique roles" the procedure stated,

> "*If a particular job is no longer required and only one person currently does that job, we will consult solely with the individual involved, meeting with them to explore alternatives."*

The procedure also stated that there would normally be three individual consultation meetings.

36 A similar letter was sent to Daniele, the Chef de Partie. Ms Darby-Jenkins played no part in his redundancy process. Ms Pacia said that her services were not necessary because he agreed to it and the process was very smooth. We did not have before us any notes of a meeting with him or his termination letter. It might well have been the position that he wished to leave in any event and was agreeable to his employment being terminated.

37 On 29 January the Claimant sent a letter to the Respondent. She had said in her witness statement that she sent that letter before she received the letter telling her that she was at risk of redundancy. She corrected that when she gave evidence. She had no choice but to correct it because in the last paragraph of her letter she referred to the redundancy letter. The Claimant said that she had not appreciated being called "a trouble maker", "not a team player" and "selfish" at the meeting on 21 January. She said that she had been thought of very highly previously but everything had changed after she informed the Respondent of her second pregnancy and she was now being treated unfairly. She repeated her position as to her contractual entitlement to five lunch-time shifts per week. She said that she would not be able to attend the meeting on 30 January due to the short notice and the unavailability of her legal representative.

38 The meeting was postponed to 5 February. The Claimant was advised that she had the right to be accompanied by a work colleague or a trade union representative but not a legal representative.

39 On 3 February the Claimant raised a formal grievance in which she complained of pregnancy discrimination and harassment. She said that since she had informed the company of her pregnancy her shifts had been reduced, she had been called names

and intimidated at the meeting on 21 January and had suddenly been informed that her position was at risk of redundancy.

40 The consultation meeting took place on 5 February. It was conducted by Ms Pacia and she was accompanied by Ms Darby-Jenkins. Ms Galicka took notes at the meeting. The Claimant attended with her son but was not accompanied by anyone. Ms Pacia explained why the Monday to Friday lunch-time position was not viable and said that the options for the Claimant were to work over weekends or in the evenings. The Claimant said that she could not do that because her husband worked evening and weekend shifts. They asked the Claimant if she had any suggestions or proposals about working alternative shifts so as to avoid dismissal and the Claimant did not respond. They suggested that she thought about it and reverted to them with any suggestions. The Claimant asked about redundancy pay and she was given information about that. There was a discussion about what the Respondent could do to facilitate the Claimant's attempts to find work elsewhere. They said that they planned to arrange another meeting unless the Claimant did not wish to have another meeting. The Claimant said that she wanted to think about it. A further meeting was scheduled for 12 February.

41 On 6 February Ms Pacia wrote to the Claimant summarising what had been discussed at the meeting. She noted in that letter that having discussed alternatives with the Claimant, they understood that she would not be able to switch to evening shifts. She said that they would welcome any suggestions from her that would prevent the need for redundancy. She said that the next meeting would potentially be the final opportunity for the Claimant to make any suggestions and that if between them they were unable to find a suitable alternative the meeting might result in her being made redundant. She said that Ms Darby-Jenkins would attend that meeting via Skype.

42 On 6 February Mr Conboy invited the Claimant to a meeting on 13 February at 2pm to discuss her grievance. He stated that Ms Darby-Jenkins would be present at the meeting and advised the Claimant of her right to be accompanied.

43 On 10 Feb at 10.39 p.m. the Claimant sent the Respondent an email and asked for both meetings to be rescheduled to 19 February at 11 a.m. She said that she would attend with trade union representative. There was no evidence before us that showed that the Claimant had been in contact with a trade union and that a representative was only available to attend at that time. She also asked for the notes that had been taken at the meeting on 5 February and for the contact details for Ms Darby-Jenkins.

44 Ms Pacia responded the following day. She agreed to reschedule the meeting to give the Claimant more time to find a companion. She said that she was going to be away from 18 February for 3-4 weeks and said that the meeting would take place on 14 February at 4 p.m. She did not provide the notes of the meeting of 5 February; she said that her letter of 6 February had set out what had been discussed at the meeting.

45 On 13 February the Claimant sent Ms Pacia and Mr Conboy an email. She said that the letter of 6 February had said that they had discussed with her on numerous occasions "*about the evening full-time position*" (that is not an accurate record of what the letter had said – it had referred to *"evening sessions"*). She said that she

had never discussed or received "*an official full time offer"* and that "*would have truthfully considered it as this may be an option with the right offering."* She said that as her grievance was about the redundancy process she wanted that to be addressed before she had any more meetings about the redundancy. She said that her trade union representative was only available from 19 February onwards. If the Claimant was being advised or represented by a trade union at that time, it is surprising that the trade union did not write any letter to the Respondent asking for the meeting to be adjourned.

46 On 13 February Mr Conboy sent the Claimant an email that the redundancy consultation meeting would go ahead at 4 p.m. on 14 February or at a different time if the Claimant could not attend at 4 p.m. or on 17 February at 3 p.m. He reminded her that that would be the final opportunity to discuss the redundancy and alternative positions.

47 The Claimant responded on 14 February that she would not be able to attend any formal meeting without the presence of her trade union representative and he would be available on 19 February at 11 a.m. If the meeting could not take place on that date, she would have to check his availability to confirm any other date.

48 On 14 February Ms Pacia wrote to the Claimant. She said that they had informed her that the process could not be delayed any longer. She confirmed that her role would be made redundant as from that date. She informed the Claimant of her statutory redundancy pay and said that she would be paid for two weeks in lieu of notice. She was advised of what she was entitled to for accrued holiday. She was advised that if she wished to appeal she should do so in writing within five working days. At the end of February, in addition to her wages, the Claimant was paid holiday pay, notice pay and redundancy pay.

49 The Claimant appealed on 17 February 2020. She said that she believed that the decision to make her redundant had been made because she had informed the company of her second pregnancy.

50 On 17 February Mr Conboy invited the Claimant to an appeal hearing on 8 April 2020. He explained that the delay was due to the fact that he and Ms Pacia were going to be out of the country for the next 4-5 weeks. He said that he would like to meet with her separately after that meeting to discuss her grievance.

51 On 19 February the Claimant commenced Early Conciliation ("EC") and the EC certificate was granted on 20 February 2020.

52 On 6 April 2020 Mr Conboy wrote to the Claimant. He said that as a result of the lockdown that the Government had put in place the restaurant was closed and that the appeal hearing would take place via Skype. He reminded her that after that meeting he would have a separate meeting with her to hear her grievance. On 8 April he sent the Claimant at text at 10.58 asking her to confirm whether she would be taking part in the appeal hearing at 12 noon. The Claimant did not respond and as a result the hearing was cancelled.

53 On 8 April the Claimant presented her claim to the Employment Tribunal. It was not processed by the Tribunal until August.

54 On 18 May 2020 Mr Conboy wrote to the Claimant. He said that the Claimant had not responded to their recent letters and as a result the meetings on 8 April had been cancelled. They did not know whether she still wished to pursue the matters. He asked her to contact them by 25 May and said that if she did they would arrange further meetings. If she did not, they would regard the matter as closed. The Claimant did not respond.

55 On 10 August 2020 the Tribunal served the claim on the Respondent.

Conclusions

Harassment related to sex

56 We have found that the conversation in which Mr Conboy is alleged to have said "oh fuck" in response to the Claimant telling him that she was pregnant did not take place. We have found that at the meeting on 21 January Ms Pacia and Mr Conboy did say that the Claimant was being selfish and not a team player. That comment was not related to her gender or her pregnancy. It was related to her maintaining that they had agreed something which they were clear they had not agreed and her demanding what she knew was very difficult for the business to accommodate. The making of those remarks in that context did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Pregnancy/maternity discrimination

57 It was not in dispute that the Claimant first told the Respondent of her second pregnancy on 19 December 2019 and that she confirmed it on 17 January 2020.

58 The evidence before us did not show that in January 2020 the Respondent reduced the Claimant's shifts from 4-5 days per week to 2-3 days per week. The evidence was that the Claimant did not attend work on 17 and 18 January 2020 (Friday and Saturday) because she was not well (she had fever and a sore throat). On 19 January Mr Borowski told her that he did not need her the following day as they did not have any diners for lunch. She did three shifts the following week and was offered a fourth evening shift. She worked 15.5 shifts in January. Taking into account the days when the restaurant was closed and when the Claimant was off sick, that equates to about four shifts a week. The Claimant was not subjected to the unfavourable treatment about which she has complained.

59 The Claimant was not asked to sign a document confirming that she was working 3, or a maximum of 4, shifts per week. There was a dispute as to what the contractual entitlement was and the Respondent's position, which was confirmed in writing, was that it was that she would work 3-4 shifts per week. The unfavourable treatment alleged by the Claimant did not occur.

60 On 19 January 2020 Mr Borowoski informed the Claimant that she would not be working the following day although she was on the rota to do so. He did, however, indicate that he might be able to make that up by offering her another shift later in the week. If the Respondent treated the Claimant unfavouably by cancelling that shift, it did so because it did not need her services as it was not expecting any diners. It did not do so because she was pregnant. The Claimant did not state in her evidence that

the Respondent treated her unfavourably because she was seeking to exercise her right to maternity leave. There was no evidence that she had had any discussions with the Respondent about maternity leave.

61 The Respondent did not respond to the Claimant's letter of 29 January 2020 as soon as it received that letter. However, within a matter of days (on 3 February) the Claimant raised a formal grievance. Mr Conboy invited the Claimant to meetings (on 13 February and 8 April) to discuss her grievance. The Claimant did not attend either of those meetings. On 18 May 2020 she was given another opportunity to indicate whether she wished to pursue the grievance. The Claimant did not indicate that she still wished to pursue it. The Respondent did not fail to consider and address the Claimant's grievance. The Claimant did not engage with the process.

62 The second redundancy consultation meeting was initially scheduled for 12 February 2020. At the Claimant's request it was postponed from that date to 14 February. It could not be postponed to 19 February, as the Claimant had requested, because Ms Pacia was going abroad on 18 February for 3-4 weeks. On 13 February the Claimant was given the option of attending at a different time on 14 February or on 17 February. The Claimant's response was that she could only attend on 19 February at 11 a.m. because that was when her trade union representative was available. The Respondent showed some flexibility in respect of the date of that meeting, the Claimant did not. We do not consider that the Respondent treated the Claimant unfavourably by refusing to adjourn it to 19 February. If it did, it had nothing to do with the Claimant's pregnancy or her seeking to exercise her right to maternity leave. It could not adjourn it to 19 February because Mr Conboy and Ms Pacia were going abroad on 18 February. Similarly, the delay in the appeal hearing was largely due to the fact that they were going to be abroad for a period of time. It had nothing to do with the Claimant's pregnancy or any future maternity leave.

<u>The dismissal (unfair dismissal and pregnancy/maternity discrimination)</u>

63 When the Claimant returned to work from maternity leave on 17 June 2019 her contract was varied and the terms of her contract were that she would work 3-4 weekday lunch-time shifts from 11 a.m. to 3 p.m.. Although she retained the title Floor Supervisor, she no longer performed that role; it could not be performed by someone working the shifts that she worked. The Claimant was the only person who was contracted to work those shifts. It was clear to the Respondent in January 2020 that the business did not require an employee to work in that role. The number of diners attending at lunch-times on weekdays meant that they did not need an employee who was dedicated to working those shifts. The role was redundant.

64 The decision to make the role redundant was made soon after the Claimant told the Respondent that she was pregnant. We considered carefully whether the Claimant's pregnancy had played any part in the decision to make the role redundant. We have found that the trigger for starting the redundancy process was the Claimant's assertion on 19 January and thereafter that she was contractually entitled to work five lunch-time shifts from Monday to Friday. We also took into account how the Respondent had treated the Claimant in the course of her first pregnancy. She had taken nine months' maternity leave and been paid maternity pay. She had been allowed to return to work at the end of her maternity leave and to work the hours and times that she wanted. She and Mr Borowski had a good relationship and he had been accommodating and flexible about the shifts that she

wanted to work. We concluded that redundancy was the sole reason for the Claimant's dismissal and that her pregnancy had not played any part in the decision to make her role redundant or to dismiss her.

65 The Claimant's role was unique and the circumstances relating to redundancy did not apply to any other employee. The Claimant and Mr Mafrica were not in the same position. He was working full-time and carrying out the duties of a Floor Supervisor, the Claimant was not. Nor was she in the same position as the other two employees who were at the restaurant at lunch-times. They were in different roles and worked different hours. She was not in the same position as the other waiting staff who worked in the evenings and weekend lunch-time shifts. The Claimant had a unique role and that role was redundant.

66 Finally, we considered whether, having regard to all the circumstances, the Respondent had acted reasonably in treating that as sufficient reason for dismissing the Claimant on 14 April 2020. The Respondent had warned the Claimant as soon as it could that her role was at risk of redundancy. It had given her the reasons for it and had suggested an alternative role. It had held one consultation meeting with her and had tried to hold a second consultation meeting with her. It had been flexible in trying to agree a date for the second meeting. The Claimant was offered an appeal hearing on two occasions, and she did not engage with the process. She did not respond to the invitations to the appeal hearing. The Respondent had told the Claimant what alternative role it might be able to offer her. The Claimant had not shown any interest in that and had not at any stage put forward any positive proposals about working some evening shifts. She had said in her email on 13 February that she had never received an "official full time offer" to work evening shifts and that she would "have truthfully considered it" as it might have been "an option with the right offering." She could very easily have set out in that email, or elsewhere, what the "right offering" would be. If the Claimant had genuinely wanted to work some evening shifts, all she had to do was to say that to the Respondent and then they could have had a discussion about days and hours. All the evidence in the case indicates that the Claimant did not want to and/or could not work evening shifts because her husband worked most evenings. The Respondent did not deal with the Claimant's grievance about her role being made redundant because of her pregnancy before the final consultation meeting, but she had the opportunity to address the same matter at the appeal hearing. Mr Conboy might well not have been the ideal person to hear the grievance or the appeal hearing, but there were only two directors in London. We also took into account that the Respondent is a small business with limited resources financially and in terms of human resources available to it. Having considered all the circumstances, we concluded that the Respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant.

67 In case we are wrong in reaching that conclusion, and there was any procedural flaw that rendered the dismissal unfair, our conclusion is that a fair process would have led to the same outcome.

Employment Judge - Grewal

Date: 14th June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

14/06/2021.

FOR THE TRIBUNAL OFFICE