EMPLOYMENT TRIBUNALS

Claimant: **Ms K Kozak**

Respondent: **Baltyk International Ltd**

Heard at: **Leeds (via CVP)**
On: **18th to 20th May 2021, 8th and 9th June 2021 and 27th August 2021 (in Chambers).**

Before: **Employment Judge Eeley**
Mr D Dorman-Smith
Mr M Taj

Representation
Claimant: Ms E Stockdale, solicitor
Respondent: Mr R Mackenzie, solicitor

RESERVED JUDGMENT

1. The claimant was wrongfully dismissed and is entitled to be paid notice pay.

2. The claimant's claim of automatic unfair dismissal fails and is dismissed.

3. The claimant's claim of pregnancy/maternity discrimination fails and is dismissed.

4. By consent, the claimant's claimed for unpaid holiday pay on termination of employment is upheld.

REASONS

Background

1. By a claim form presented to the Tribunal on 18th November 2020 the claimant brought several claims against her former employer, the respondent. The claims were identified by Employment Judge Wade in her case management order of 4th February 2021 thus:

    1.1 Unpaid holiday on termination of employment.
    1.2 Wrongful dismissal.
    1.3 S99 ERA automatically unfair dismissal- principal reason being connected with pregnancy and the taking of maternity leave.
    1.4 Equality Act s18(4) dismissal as unfavourable treatment because of having exercised the right to maternity leave.

2. The Tribunal were referred to the contents of an agreed bundle of documents which ran to 48 pages together with some additional emails which were submitted part way through the hearing. The Tribunal received witness statements and heard oral evidence from:
    2.1 The claimant.
    2.2 Mr Soran Tawfik- the respondent's sole director.
    2.3 Agnieszka Bachwak- Store Assistant.
    2.4 Liliana Bolovan- store assistant.
    2.5 Graham Ellis- respondent's accountant.
    2.6 Marta Olejarczyk- respondent's store manager.

    Part way through the case the hearing was adjourned to ensure that an interpreter could be provided for Mr Tawfik for the purposes of him giving his witness evidence. Submissions were received on behalf of both parties. In these reasons numbers in square brackets refer to pages in the agreed trial bundle unless otherwise indicated.

Findings of fact

3. The respondent runs a number of grocery stores selling international groceries. The claimant worked in the respondent's Scarborough store as a shop assistant. She started work on 26th November 2018. She received no written terms and conditions. She worked 24 hours per week for £8.21 per hour. Her days of work were Monday to Friday and weekends if the need arose to cover for another member of staff. The claimant was initially told by the respondent that she was only allowed a holiday entitlement of 2 weeks at 24 hours per week. The Scarborough shop ran a shift system. The morning shift ran from 8am to 3pm and the afternoon/evening shift was 3pm to 9pm. The employees in the shop fitted their working patterns within this shift system.

4. In January 2019 the claimant told Mr Tawfik that she was pregnant. From 30th June 2019 the claimant took maternity leave and received statutory maternity pay.

5. In January 2020 Mr Tawfik texted the claimant to find out when her maternity leave was due to finish and when she would return to work [23]. She responded to say that she would find out and let him know. Later in the text exchange she indicated that she would like to come back to work. In a text at [24] she confirmed that her maternity leave will finish on 30th June 2020 and she could come back to work from 1st July 2020. Mr Tawfik asked how long she had been on maternity leave and she confirmed it was one year. The claimant's statutory maternity pay lasted until 29th March 2020 at which point she was on unpaid maternity leave which lasted until 30th June 2020.

6. There was a text exchange in May [25] between Mr Tawfik and his accountant in which Mr Tawfik said: "*Good morning Graham Dana Sharif and Raman Salih stopped working and Kamila Kozak never came back to work."* Mr Ellis did not respond to this. Mr Tawfik followed up with "*Hi graham I did send you Monika details by email."*

7. On 3rd June the claimant contacted Mr Tawfik by text [26]:
"*Good morning Soran how are you? ….I just want ask you about parental leave. Can I take 8 weeks of parental leave please? I really want to back to work but my little Klara is not ready. I have hope that you can understand me because you are parent too. She still needs me and she do not want to stay with anyone longer than few minutes. Please check it and let me know what is your decision."*
Mr Tawfik's response was [27]: *"Hi Kamila we all good thanks I hope you and your family safe and well Kamila to be honest my accountant is berly working and I don't know if I can help you rite know. Let's see what I can do but I don't promise because he don't answer me at all."*

8. At some point (probably 15th June) there was a telephone conversation between the claimant and Mr Tawfik whilst Graham Ellis (the accountant) was in the same room as Mr Tawfik. There was some dispute between the parties as to precisely what was said during that conversation. The Tribunal has concluded that during this conversation the claimant was told that she could have the additional 8 weeks away from work and that it would be unpaid. That was the basis on which the claimant decided to take the additional 8 weeks away from work. On that basis she intended to come back to work on 31st August or 1st September. During the conversation the respondent made some comments that there might be changes in staffing needs in the Autumn. The implication was that the business's need for employees might fluctuate over time. However, the Tribunal finds that the claimant was <u>not</u> told in terms that if she did not come back to work immediately (i.e., before the additional requested 8 weeks of leave) she would be taken to have resigned from her existing contract. She was not told explicitly that if she did not come back to work straight away her existing contract would end or that she would have to reapply for a job in the Autumn at which point there might be no work available for her to do.

9. The claimant chased a response from Mr Tawfik on 23rd June [28]:
"*Hi Boss. Did you finde any information about my parental leave?"*

Mr Tawfik's response is: "*to be honest not yet because you know still corona and he's not working."*
The claimant's further text was as follows: [28-29] *"Ohhh ok do you know what is in contract? That this parental leave is payed or not payed? Because with Klara is still nothing changed. She is still next to me all the time so I can not left her at all with no one."*
Mr Tawfik then asks her to remind him on 28th June because he is going to see his accountants and he will see what he can do for the claimant.

10. On 29th June there was a further exchange by text. Mr Tawfik to the claimant [30]: *"…Graham said you take full payment he can't do any things else sorry my dear."*
The claimant responded: *"Well so left no pay parental leave. I never use it. Because I take full maternity leave."*
Mr Tawfik responded :*"I know you didn't that's what he said you take full payment. Yes."*
Claimant: *"so can I take this 8 weeks non pay parental leave?"*

11. The next day there was a further message from the claimant to Mr Tawfik stating [31]: *"Hi do you know anything because I have to update changes in universal credit."*
Mr Tawfik's response was *"Yes you can my love but you not get any money like you said."* To which the claimant responded *"Thank you".*

12. There was then a gap in the text correspondence until 14th August when the claimant messaged Mr Tawfik: *"Good evening. Can we talk someday morning in next week about my back to work?"* He says he will get back to her. The claimant chased again on 20th August [33]. She said: *"You asked me yesterday to remind myself today after 12."* His response was *"Yes but I think you speak with Marta. Please send your availability time so we can look at it and start from there please."* The claimant responded *"For first two weeks can I work 2 days, 2 hours per day to see how Klara will be without me? I can be Monday to Friday till 12.30. And then after two weeks if Klara will be ok without me but still till 12.30 and one weekend day. Do you want me to talk with Marta?"* Tawfik's response was *"Yes please. Better sort out with her. She been speaking with different Kamilla."*

13. The Tribunal was shown a series of messages between Mr Tawfik and Marta [35]. Mr Tawfik said: *"Speak with Kamila Kozak for what I said about working."* Marta's response was: *"You want to take her to the work??"* Mr Tawfik's response was: *"She ask for a few hours in the week if we need her but I think we don't need anyone at the moment."* Marta replied *"Next week probably Lili leaving but I think we can split her hours between us. Is better if we will don't take her for now."* Mr Tawfik's response was *"I think yes but let's have a better day and look at the time shifts."*

14. The Tribunal was shown a series of text messages between the claimant and Marta in Polish on 20th August. A handwritten English translation was provided which the parties accepted as accurate:

    Claimant 17.29 : "*Hi Soran told me to contact with you about my return to work."*

18.00: telephone call between the parties lasting 20 minutes and 57 seconds.

Claimant 18.27:	*"I'm thinking about that Oh (zero hours) contract. It may be the best solution because I would be a staff in the paperwork and he could pay me money into hand as on that Oh contract its not obligated to pay money to the account. I would be a back up worker who is called when is needed but for real I will work on weekends with money into my hand."*
Marta:	*"I think it is the best option."*
Claimant:	"*Yes. Maybe yes."*
Marta:	*"Think and let me know."*
Claimant:	*"Because he would has a sub-tab for revenue and I would had money paid into my hand without telling UC (universal credit). Because I could be employed on this contract but working my way."*
Marta:	"*Well and you have paperwork that you working and it can be different hours."*
Claimant:	*"Exactly!"*
Marta:	*"And you are entitled to holiday break also, little- but it is."*
Claimant:	*"Yes. About that holiday break you know it's funny in the shop with it but whatever. You are right, that contract without obligations is the best option."*
Marta:	*"Well, now is much better, I remember that it was worse at times."*
Claimant:	"☺"
Marta:	"*I will speak with him tomorrow"*
Claimant:	"*Good, talk to him and let him knows."*

15. On 20th August Marta messaged Mr Tawfik [35-36]: *"I spoke with her she don't want work more than 10 h a week. Monday til Friday she can work max till 12.30. I told her if she want I can speak with you about the weekend 5 h on Saturday and 5 on Sunday and she agree with this. So you have to just say if this is ok for you and then I will let her know.*"

16. On 22nd August there was a further exchange of texts between the claimant and Marta [42]:
Claimant: *"Hi, Did you speak with Soran?"*

Marta: *"Hey, yes I spoke and he said that we don't need anybody at the moment."*

17. On 26th August the claimant emailed Mr Tawfik:
"Dear Soran, I hope this email fine You well. I am writing in connection with our last conversation about my back to work. I was spoke with Marta as you asked me to do. I told her about my availability to work. She told me that you do not need anyone to work. To be honest I do not understand that. In June we decide that after my maternity leave I will go for 8 weeks of parental leave and then I will back to work. I am ready to back to work for less hours then I had in contact with breaks for breast feeding. I would be grateful if you could make shift rota with me on it. I look forward to hearing from you…"

18. After this there was a gap in the texts between the claimant and Mr Tawfik and on 31st August [34] the claimant messaged: *"Hi When did my contract starts? Can you check that for me please?"* The claimant then sent an email to Mr Tawfik attaching a letter dated 1st September [44]:
"Dear Soran I would like to raise grievance with regards to how I have been treated over the past few days. I have been employed by you for nearly two years working a minimum of 24 hours per week until my maternity leave. I struggle to understand how there are no hours for me on my return to work. I have never indicated that I would not be returning to work. You authorised me to have an additional eight weeks of parental leave and our agreement was that I would be back at work after this period. I feel that I am being discriminated and I urge you to change your decision regarding my hours. I want to and I need to return to work. I look forward to your response…."

19. Mr Tawfik's response was at [45]: *"Hi Kamila please understand that you ask me for work we was speaking before I have 2 shift I cannot guarantee you witch hours you have time in the main time Kamila you have been off work for 15 month and you been speaking with Graham allies when you asked him and he said not Kamila if my shifts witch one is worked for you and I told you to let me know staffs coming and going like yours but if you thinking after 15 month off work your contract is still there I think you are wrong know very well knows we not closed for 1 mint let me know which shift is good with you and I will see ok."*

20. The claimant sent a further email to Mr Tawfik on 2nd September: *"Dear Soran, I feel that we are going in circle. I have already given you the information regarding my availability and I explained why I cannot do longer shifts. I also explained that I will need a break to breast feed my daughter until she is weened off. Just to summarise it on weekdays I can work until 12.30pm and several hours on weekends."*

21. On 14th September the claimant texted Mr Tawfik asking for her P45 [46]. She chased it on 22nd September and Mr Tawfik said that he had sent it to his accountant who was on holiday but would be back soon. The claimant referred to the fact that she needed to update her Universal Credit. She chased it again on 8th October and Mr Tawfik said that the accountant would send it the following Monday. The P45 was apparently sent to the claimant although it was not produced in evidence to the Tribunal. The parties agreed

that the P45 in fact recorded the date of termination of the claimant's employment as 29th March 2020.

22. On 19th November there was a further text message from Marta to the claimant: *"Hey Kamila I writes on the boss's recommendation. He ask you to do not coming to the shop until clarify the matter. I'm sorry ." The claimant replied: "Why he can't tell it to me himself?"* and Marta responded: *"He asked for it, about the rest, ask him."*

23. The claimant returned to Poland permanently on 30th November 2020 for family and employment reasons [19].

The law

Termination of contract

24. A contract of employment may be terminated in several ways including by resignation, by agreement and by dismissal. In order to pursue a claim for unfair dismissal the claimant must establish that she was dismissed within the meaning of section 95 of the Employment Rights Act 1996 ("ERA") which states:

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> (b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
> (c) the employer terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

25. In this case the claimant does not assert that she was constructively dismissed, rather she says it was an express dismissal. The burden of proof is on the claimant to prove that there was a dismissal. Was it more likely than not that the contract was terminated by dismissal rather than, for example, by resignation or by mutual agreement between employer and employee?

26. The test as to whether ostensibly ambiguous words amount to a dismissal or a resignation is an objective one. All the surrounding circumstances must be considered. If the words are still ambiguous the Tribunal must ask itself how a reasonable employer or employee would have understood them in the circumstances. Any ambiguity is likely to be constructed against the person seeking to rely on it. The Tribunal will look at the events prior to and subsequent to the alleged dismissal and take into account the nature of the workplace in which any misunderstanding took place. Where an employee has received an ambiguous letter the EAT has said that the interpretation should not be a technical one but should reflect what an ordinary, reasonable employee in the claimant's position would understand by the

words used. Further, the letter must be construed in the light of the facts known to the employee at the date he received the letter. (Chapman v Letheby and Christopher Ltd [1981] IRLR 440 EAT).

27. Unambiguous words of dismissal or resignation may be taken at their face value without the need for analysis of the surrounding circumstances although there may be circumstances where it is appropriate to investigate the context in which the words were spoken to ascertain what was really intended and understood.

28. Sometimes there are no direct words used but it is argued that a dismissal or resignation can be inferred from the actions of the parties. The question is whether dismissal or resignation be inferred from the party's actions?

29. Sometimes the employee is pressured, persuaded or cajoled into resigning or accepting that the employment will terminate mutually (e.g. where the employee is given an ultimatum such as 'go or be pushed' or is given some form of incentive to resign.) In such circumstances it may be possible to show that there has been a dismissal rather than a resignation. If an employee is told that they have no future with an employer and is expressly invited to resign that employee is to be regarded as having been dismissed. The question is who *really* terminated the contract of employment? If the answer is the employer then there was a dismissal (Martin v Glynwed Distribution Ltd [1983] ICR 511).The invitation to resign need not amount to a threat or coercion but the more heavy handed it is then the more likely it is that a dismissal will be established.

30. A resignation is the termination of a contract of employment by the employee. It need not be expressed in a formal way and may be inferred from the employee's conduct and the surrounding circumstances. Alternatively, the parties to a contract may agree between themselves to terminate it. Both sides are then released from further performance of their obligations under the contract and the contract is discharged by mutual consent. In such circumstances there is no dismissal.

Automatic unfair dismissal

31. Where the employee lacks two years' continuous service they have the legal burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (Smith v Hayle Town Council 1978] ICR 996).

32. The claimant in this case relies upon section 99 ERA in relation to her claim for automatically unfair dismissal. This states (so far as relevant):

> "(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,
(b) ordinary, compulsory or additional maternity leave,
…..
(c) parental leave,
….
and it may also relate to redundancy or other factors."

The prescribed reason must be the reason or principal reason for dismissal.

33. The Maternity and Parental Leave etc Regulations 1999 ("MAPLE") set out the detailed reasons referred to in s99 ERA. Regulation 20, so far as relevant, provides:

"(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if-
(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

……

(3) The kinds of reasons referred to in paragraph (1) and (2) are reasons connected with-
(a) the pregnancy if the employee;
(b) the fact that the employee has given birth to a child;
…
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave [or additional maternity leave];
(e) the fact that she took or sought to take-
….
(ii) parental leave"

34. Parental leave is defined at regulation 2 as leave under regulation 13(1). Regulation 13(1) provides entitlement (where an employee has been continuously employed for not less than a year) to a period of 18 weeks leave. In this case, as there was no specifically agreed parental leave scheme, the claimant would have to rely upon the default scheme under the regulations. The details of the default scheme are set out in Schedule 2 to the 1999 regulations.

35. Regulation 18 of MAPLE 1999 sets out the right to return after maternity or parental leave. It states, so far as relevant:

"(2) An employee who returns to work after-
(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, …

is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances."

36. Regulation 18A sets out the details of the right to return and what this means in practice. A right to return is a right to return with her seniority, pension rights and similar rights as they would have been if she had not been absent and on terms and conditions not less favourable than those which would've applied if she had not been absent. There is no statutory right to return to a different job or a job with different hours. The right is to return on terms and conditions which are not less favourable. The regulations do not appear to oblige an employer to grant a flexible working request or amend the role so that it suits the employee's requirements better on her return to work than her pre-existing role or arrangements.

37. The protection applies where the employee was dismissed *for a reason connected with* her taking of the leave. The meaning of "connected with" was considered in relation to paternity leave by the EAT in Atkins v Coyle Personnel plc [2008] IRLR 420. The EAT's obiter view was that the fact that the words "connected with" might, on the dictionary definition, be taken to mean "associated with" does not mean that a causal connection between the dismissal and the paternity leave is unnecessary. It is not sufficient that the dismissal was associated with the paternity leave, since that is a very vague concept and so wide that it would be enough for the employee merely to establish that he was on paternity leave when he was dismissed. Such an interpretation cannot have been intended, and for the same reasons nor can a "but for" test. "Connected with" in regulation 29 means causally connected with rather than some vaguer, less stringent connection. The case of Clayton v Vigers [1989] ICR 713 was referred to in Atkins and the EAT took the view that Clayton supported the need for a causal test. The EAT did not accept that Clayton is authority for the proposition that "connected with" is synonymous with "associated with". Rather, it held that the words "any other reason connected with her pregnancy" ought to be read widely so as to give full effect to the purpose of the statutory protection. It is for the Tribunal to determine, as a matter of fact, whether there is a connection between the taking of leave and the dismissal.

Relevant provisions of the Equality Act 2010

38. The Equality Act 2010 contains relevant in provisions in relation to various forms of sex and pregnancy related discrimination. Section 13 prohibits direct discrimination which occurs when A treats B less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics include sex and "pregnancy and maternity". Section 18 creates a specific form of pregnancy and maternity discrimination. It provides that:

"(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."

The protected period in relation to a pregnancy starts when the pregnancy begins and, if the employee has the right to ordinary and additional maternity leave, ends either at the end of additional maternity leave or when she returns to work, if earlier (section 18(6)(a)). If the woman does not have the right to ordinary and additional maternity leave, then the protected period lasts until the end of the period of two weeks beginning with the end of the pregnancy (section 18(6)(b)).

39. Section 18 goes on to provide that:

"(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."

In s18(4) cases there is no limitation to treatment occurring during the protected period. Section 18 does not require the use of a comparator in the same way as section 13 direct discrimination. The claimant need only show that she has been treated "unfavourably". Section 18(7) stipulates that no claim of direct sex discrimination may be pursued under section 13 based on treatment of a woman if it falls within section 18(2), (3) or (4). A claim for direct sex discrimination under section 13 will still be available for pregnancy/maternity cases that fall outside the scope of the special protection in section 18.

40. For a discrimination claim under section 18 to succeed the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave etc. The law requires a consideration of the 'grounds' for the treatment. In cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mindset so as to lead him to act in the way complained of, it does not have to be the only such factor. It is enough if it has had "a significant influence" on or is "an effective" cause of the discriminator's actions. The discriminatory motivation need not be conscious: subconscious motivation, if proved, will suffice (Nagarajan v London Regional Transport 1999 ICR 877; R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136 SC); Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14; Onu v Akwiwu and anor 2014 ICR 571.)The Tribunal must focus on the "reason why" the employee has been treated as she has but motive or the intention behind the treatment complained of is irrelevant.

41. In a discrimination claim it may be necessary to refer to the statutory provisions regarding the burden of proof. Section 136 states:

"(1) This section relates to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contraventions occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Guidance on the proper application of s136 is given in Igen v Wong [2005] ICR 931; Laing v Manchester City Council and anor [2006] ICR 1519; Madarassy v Nomura International Plc [2007] ICR 867 and Hewage v Grampian Health Board [2012] ICR 1054. There is a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove, on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground. Depending on the circumstances of any given case it may not be necessary to rely on the shifting burden of proof provisions. Section 136 will be important in cases where there is room for doubt as to the facts necessary to establish discrimination, generally facts about the respondent's motivation. It may have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another or where there is no real dispute about the respondent's motivation. If the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination then that is the end of the matter.

Conclusions

42. This case has been somewhat complicated by the fact that both the claimant and Mr Tawfik were communicating in English, which is neither party's first language. It seems to us that this may have led to some misunderstandings and miscommunication between the parties during the period of time we examined. It has fallen to the Tribunal to consider what each party said, what they meant and what was reasonably understood by the other party to the communications.

43. It is apparent that the claimant should, in the absence of any agreement to the contrary, have returned to work after her ordinary and additional maternity leave on 1st July 2020. She asked for 8 weeks of unpaid parental leave. Mr Tawfik agreed to this. He did not communicate to her that this would terminate her existing contract of employment and that she would have to return to work on a new contract. Thus, her original contract of employment continued in existence during July and August 2020 even though the claimant was on leave and was not paid for these 8 weeks.

44. In the normal course of events, once the parental leave was over the claimant would have returned to her pre-existing job working the same hours and shift patterns as she had prior to her maternity leave. However, the claimant did not wish to do this at the end of the parental leave. She indicated that she would only be prepared to work a couple of hours a day and possibly some hours at the weekend. This did not fit within the established shift patterns at the shop and would not be of any real benefit to the business. Other employees would have to pick up the remainder of the claimant's partial shifts or she would effectively be acting supernumerary on the roster.

45. The parties entered into a series of negotiations, both directly (between the claimant and Mr Tawfik) and via Marta as a sort of intermediary. The upshot

of those discussions was that the job which the claimant could return to was her previous job working her old hours. The claimant would not return on those terms. She sought to reduce her hours. The option of a zero hours contract was proposed by Marta but not accepted by Mr Tawfik. It was evident from everything which was said that the claimant would not come back on her old 24 hours per week and that the respondent could not or would not accommodate a reduction in her hours. Thus, the attempts by the parties to negotiate a mutually acceptable variation to the contract came to nothing.

46. It is evident that the contract came to an end at this point. The Tribunal has to determine the mechanism by which it ended and the date on which it ended. Was there a dismissal or did the claimant actually resign when she could not negotiate the hours she wanted? On balance, the Tribunal has concluded that the claimant was indeed dismissed. Mr Tawfik came to the conclusion that the claimant would not return on her old hours and that he would not be offering her anything else which she would be prepared to accept. This situation could not go on indefinitely. The conversations on 20th August indicate that the contract was still in existence at that point in time. It is on 22nd August that Marta informs the claimant that the respondent will not give her a zero hours contract and that "we don't need anybody at the moment". This can reasonably be construed as indicating that no new terms will be offered. The claimant must return on her own hours or not at all. The claimant's own letter of 1st September recognizes that she has been told that there are no hours for her albeit she does not seem willing to accept that her employment has come to an end. During the further communication between the parties Mr Tawfik becomes frustrated at the claimant's refusal to accept his position. Hence his comment in the email [45] that "if you thinking after 15 months off work your contract is still there I think you are wrong." He says that "he will see" if she chooses one of the existing shift patterns.

47. Taking all the evidence in the round the Tribunal finds that, by 2nd September 2020 at the latest, the respondent has communicated to the claimant that he will not be offering reduced hours or a zero hours contract. Given that she has made it clear she will not return on full hours the respondent has effectively communicated to the claimant that he is terminating her employment. Given the preconditions she has set for a return to work the respondent is dismissing her, without notice.

48. In the circumstances there is nothing in the evidence before the Tribunal to indicate that the respondent was entitled to dismiss the claimant summarily, without notice. On that basis the claimant is entitled to notice pay. The parties did not agree or give evidence as to what the appropriate sum of notice pay should be. On that basis, in default of agreement between the parties, the amount of notice pay will have to be determined by the Tribunal at a remedy hearing.

49. As the claimant had less than two years' service with the respondent she could not pursue a claim for so-called "ordinary" unfair dismissal. Rather, she pursued a claim for automatic unfair dismissal. In such circumstances she bears the burden of proving that the reason for dismissal was one of the prohibited reasons.

50. By the time the claimant was dismissed she had taken her full maternity leave period without difficulty and without any suggestion that she would be dismissed. As a matter of fact we find that her pregnancy and maternity leave had nothing to do with her dismissal. Any claim relying on regulations 20(3)(a)-(d) MAPLE 1999 as the reason for dismissal must fail on the facts. The claimant says that her case falls within regulation 20(3)(e) of MAPLE 1999. She asserts that the reason or principal reason for her dismissal was connected with the fact that she took or sought to take parental leave. The Tribunal does not accept this. On the facts of this case, it is apparent that the problem (so far as the respondent was concerned) was not that the claimant wanted to take parental leave. Indeed, the respondent agreed to this. Nor was it a problem that the claimant wanted to return to her job after the end of parental leave. The respondent wanted this too. The problem was that the claimant wanted to force the respondent to alter her hours to something she found more manageable or acceptable. The taking of or attempting to take parental leave had no causal impact on the decision to dismiss. The Tribunal finds that if the respondent had been faced with another employee who wanted to force agreement to a reduction in hours against the respondent's wishes, that other employee would also have been dismissed. The claimant's history of maternity and parental leave was irrelevant. It was the fact that she would not return on her old hours but demanded a change in hours which was important. Of course, the claimant's maternity leave and parental leave forms part of the factual matrix and context of the case. But that is not enough to make it into the reason for dismissal. The Tribunal also recognizes that the case law indicates that the claimant need not show she was dismissed "because of" the maternity/parental leave and that a looser causation is indicated. The claimant must show that she was dismissed for a reason "connected with" the maternity/parental leave. However, the claimant's case does not pass even this looser test of causation in the Tribunal's view. It is not enough that the parental leave is part of the factual context. There must be some degree of causal link between it and the dismissal. The Tribunal finds that this is absent from the claimant's case. On that basis the claimant's claim for unfair dismissal must fail and be dismissed.

51. Furthermore, the respondent was under no obligation to offer the claimant flexible working or reduced hours pursuant to regulation 18 MAPLE. It offered her the opportunity to come back to her old job and had therefore complied with its statutory obligations. So, this regulation does not assist the claimant in showing that she was automatically unfairly dismissed.

52. The claimant pursues a claim under the Equality Act 2010 in addition to her unfair dismissal claim. The case management order indicates that the Tribunal should consider whether the claimant was unfavourably treated (in this case dismissed) because of having exercised the right to maternity leave pursuant to s18(4) Equality Act 2010. The Tribunal is mindful of the different causation test to be applied in Equality Act cases (as compared to unfair dismissal cases) as set out in paragraphs above. As a matter of fact, the Tribunal finds that the claimant was not dismissed because of having exercised the right to maternity leave. The maternity leave was not an effective cause of the dismissal or a significant influence on the respondent's actions. Indeed, it appears that this summary of the Equality Act complaint does not accurately reflect the way the claimant put her claim at trial. The claimant had been allowed to take maternity leave and this had

expired by 1st July 2020. There was no suggestion that the respondent was considering a dismissal at this point. It had no difficulty with the claimant taking full maternity leave and then coming back to work. Taking maternity leave simply was not the issue. During the tribunal hearing the claimant focused more on the unpaid parental leave. It was that which she said formed the basis of the claim of discrimination. She said that it was because she sought to exercise a right to parental leave that she was dismissed/discriminated against. As a matter of fact, we conclude, as stated above, that this was not the cause of the dismissal. Nor, applying the Equality Act test, was it an effective cause of the dismissal or a significant influence on the dismissal. The cause of the dismissal was the claimant's refusal to return to work on her old shift pattern. This would have led to dismissal whether or not she had taken or tried to take parental leave beforehand. To the extent that s136 Equality Act is relevant we find that the respondent has discharged the burden of showing that its actions were 'in no sense whatsoever' on the protected ground

53. In any event, we harbour some doubts that the claimant's case, as argued, is properly caught by section 18 Equality Act 2010. Section 18(2) refers to the treatment being because of pregnancy or pregnancy related illness. However, the unfavourable treatment must take place during the protected period. The dismissal in this case was not said to be because of pregnancy/pregnancy related illness (but because of parental leave) and did not take place during the protected period. Nor is there any evidence that it was the implementation of a decision taken during the protected period (s18(5)). Section 18(4) concerns unfavourable treatment because of ordinary or additional maternity leave. That too is not applicable here because the issue (on the claimant's case) was the parental leave not the right to ordinary or additional maternity leave. The right to unpaid parental leave is not covered by s18 EA 2010.

54. Given the timing of the dismissal and the alleged reason for it, it is likely that it could properly be considered as a section 13 direct discrimination claim. Section 13 is not disapplied by section 18(7) on the facts of this case. However, even if the Tribunal asked itself whether the claimant was treated less favourably than a comparator because of her sex, pregnancy or maternity the claim would have to fail. Gender was not the issue. An employee of either sex would have been dismissed if they had refused to come back to work on their previous contractually agreed hours and shift patterns. There would be no less favourable treatment of the claimant because of the protected characteristic. If the Tribunal widened the scope to include considerations of pregnancy and maternity leave then the claim would still fail. A comparator employee would also have been dismissed for failing to return to their normal hours after a period of leave even if that was not maternity leave or parental leave.

55. The last extant claim is that for unpaid holiday pay on termination of employment. During the course of the hearing, it became apparent that the respondent had erroneously told the claimant and her colleagues that she was only entitled to two weeks paid annual leave per year rather than the statutory minimum set out in regulations 13 and 13A of the Working Time Regulations 1998. The respondent conceded that the claimant had not been given her full statutory entitlement and would therefore be entitled to payment for accrued but untaken annual leave on termination. However,

the parties did not present a record of the annual leave actually taken by the claimant and did not agree how many days leave had been accrued but not paid for. As a result, the Tribunal has given judgment in the claimant's favour in principle in relation to her entitlement to payment for outstanding accrued annual leave. However, the Tribunal is not in a position to quantify the award without further evidence and submissions. The parties will need to provide such evidence and calculations to each other. They should hopefully be able to agree what sums remain outstanding. However, if they are unable to do so they will need to present the evidence to the Tribunal and make submissions at a remedy hearing.

Next Steps

56. The claimant is entitled to payment in respect of notice pay and accrued untaken annual leave. The parties need to disclose the relevant documentation in relation to these claims and provide any relevant witness evidence to each other. They will be given a short period to see if they can agree what sums are payable. If they are unable to agree they must notify the Tribunal that a remedy hearing is required and provide details of unavailability for listing purposes.

Case management order

57. The Tribunal makes the following case management order:
    1. By no later than 17th September 2021 the claimant shall send to the respondent:
        (a) A written document setting out what sums she says she is entitled to in relation to notice pay and annual leave. She should show the basis for her calculation.
        (b) Any evidence in support of her claim (such as records of holidays taken and paid).
        (c) Any witness evidence she relies upon to show the sums owed in relation to notice pay and holiday pay.

    2. In the event that the respondent does not agree the sums claimed by the claimant it shall send to the claimant, by 1st October 2021:
        (a) A written document setting out what sums the respondent says she is entitled to in relation to notice pay and annual leave. The respondent should show the basis for its calculation.
        (b) Any evidence in support of its calculations (such as records of holidays taken and paid).
        (c) Any witness evidence the respondent relies upon to show the sums owed in relation to notice pay and holiday pay.

3. If the parties are unable to reach agreement on the remaining issues of remedy they must write to the Tribunal by no later than 15th October 2021 asking the Tribunal to list a remedy hearing and providing their dates to avoid during the period 1st November 2021 to 1st May 2022. The Tribunal will then proceed to list the remedy hearing at the earliest opportunity.

Employment Judge Eeley

Date: 30th August 2021