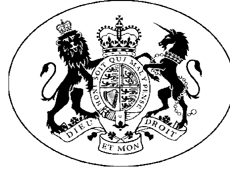

EMPLOYMENT TRIBUNALS

Claimant: Miss S Cowie

Respondent: Legna Restaurant Ltd (1)
Mr A Islam (2)

Heard at: Birmingham **On:** 16, 17, 18 &19 August 2021

Before: Employment Judge Miller
Miss L Clarke
Mr E Stanley

Representation
Claimant: Mr J Heard (counsel)
Respondent: Ms H Platt (counsel)
:

JUDGMENT having been sent to the parties on 19 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, Ms Cowie, was employed by the first respondent as an assistant general manager. Her employment started from 22 October 2018.

2. The claimant's employment was terminated by the first respondent on 30 January 2019. The claimant commenced early conciliation on 1 February 2019 and that finished on 19 February 2019. The claimant submitted her claim on 23 April 2019. In her claim form the claimant brought claims of maternity and pregnancy discrimination, automatically unfair dismissal and a claim for notice pay against the first respondent.

3. The issues were identified at a preliminary hearing before EJ Findlay on 30 August 2019 and they are as follows:

    a. In respect of unfair dismissal: What was the principal reason for the claimant's dismissal and was it connected with the pregnancy of the claimant?

b. In respect of the pregnancy and maternity discrimination: did the respondent treat the claimant unfavourably by dismissing her; if so did that unfavourable treatment take place in the protected period and, if so, was it because of the claimant's pregnancy?

4. The claim for breach of contract was withdrawn by the claimant at this hearing.

5. On 9 January 2020, the claimant made an application to add Mr Islam as a respondent in respect of the claim of discrimination and at a hearing before EJ Meichen on 13 August 2020, Mr Islam was added as a second respondent.

6. Having considered a report of the note of the hearing from Mr Heard, the fact that the hearing was an open hearing and that the factual issues in this case are limited to the claimant's dismissal, we conclude that EJ Meichen determined at that hearing that it was just and equitable to extend time in respect of the discrimination claim against Mr Islam and that the issue is no longer before the tribunal

7. The tribunal was provided with an agreed bundle of documents and further documents were disclosed in the course of the hearing.

8. The claimant and her partner, Mr Ternent, each produced a witness statement and both attended and gave evidence. The Claimant also produced a witness statement from Mr Vanderson which we were asked not to read. Mr Vanderson did not attend and the statement was not referred to. We have not therefore read or considered that statement.

9. The second respondent produced a witness statement and attended and gave evidence. Mr Frost and Mr Brunton also produced witness statements and gave evidence on behalf of the second respondent.

10. The first respondent is in creditors voluntary liquidation and did not attend and was not represented. We decided to proceed in their absence and on the basis that all relevant witnesses were attending on behalf of the second respondent any event.

Facts

11. The first respondent, Legna Restaurant Ltd is a restaurant that is owned and operated by second respondent, Mr Islam. The second respondent also owns and operates a number of other restaurants including Opheem which is described as a "fine dining" restaurant. At the point that the claimant's employment started it was the second respondent's intention to open and operate Legna as another fine dining restaurant.

Recruitment and appointment

12. The claimant was recommended for the role of assistant general manager at Legna by Mr Brunton who is a recruitment consultant who had worked previously with Mr Islam. Mr Brunton also recommended Mr Vanderson for the role of general manager. Mr Islam's evidence was that the cost of recruiting the claimant and Mr Vanderson was £8000.

13. The claimant was also previously known to Mr Islam – her partner, Mr Ternent who is also a chef and at the time restaurant operator, had known Mr Islam for a long time – at least ten years – and they were at that point friends.

14. The claimant did not have previous experience of working in a fine dining restaurant but did have experience of working in a high volume chain restaurant. Mr Islam said, and we accept, that he was prepared to give the claimant an opportunity to show that she could do the job and that he made this decision based on the claimant's assurances. The claimant did not have experience of opening a restaurant but Mr Vanderson did.

15. The claimant was offered the role and was appointed under a contract that was signed by both parties on 6 November 2018.

16. The offer letter included reference to a six month probationary period but the contract ultimately provided for a three month probationary period. There was a dispute as to how that change came about, but nothing turns on it. It is clear that by the time the claimant started work and commenced her employment she had agreed that her employment would be subject to a three month probationary period. The particular term in her contract is:

    "3.1 the first 3 months of your employment will be a probationary period during which your performance and conduct will be monitored and appraised. The probationary period may be extended at the company's discretion by up to 3 months or more and this is without prejudice to the company's right to terminate your employment before or on the expiry of your probationary period if you are found for any reason whatsoever to be incapable of carrying out, or otherwise unsuitable for the job. At the end of your probationary period your employment shall be reviewed within a reasonable time of its expiry and your probationary period will not be deemed to have been completed until the company has carried out its review and formally confirmed the position in writing to you"

17. The contract also include provision about the claimant's hours of work at clause 4 that the hours are between 10 am and midnight Tuesday to Sunday. The claimant was required to work various shifts during this period, not necessarily for the whole of this time.

18. Mr Frost said that the claimant was responsible for managing the rota, subject to senior management approval, to ensure her shifts were covered but that she could also have sufficient rest – so that if she finished late one evening she would be able to start later the next day.

19. It was also put to the claimant that the restaurant was closed for two hours each day during which period she was not required to be at work, although Mr Islam took issue in evidence with the claimant leaving the premises for lunch or coffee. We find that the restaurant was closed for a period each day during which the claimant was not required to work and that the claimant was responsible, at least initially, for setting her own shifts.

Commencement of employment

20. When the claimant's employment commenced, she was based initially at Opheem as Legna was not yet open. The claimant's evidence was that she was based at Opheem's offices and that she and Mr Vanderson were tasked with ordering supplies, food, drink, glassware, crockery and cutlery as well as recruitment.

21. In respect of the ordering glassware, crockery and cutlery, Mr Islam's evidence was that this was a minimal role. Most of this had been ordered long in advance as it had a long lead in time and that the only things left to decide were oyster serves, glasses from a pre-selected list and coffee cups. The purpose, Mr Islam said, of allowing these choices was so that staff felt involved with the opening. He said that the claimant and Mr Vanderson took too long together to make these decisions and did it together rather than delegating the tasks between themselves.

22. We prefer the evidence of Mr Islam on this point. We accept that he was frustrated that things were not getting done efficiently and he genuinely believed they were taking too long. We think it highly likely that he would have felt under pressure during this period when his restaurant was to open. Mr Islam said that the claimant and Mr Vanderson were spoken to about this and then they did start to split tasks.

23. We did not hear any complaints about the ordering of food, although there was said to be an issue in relation to drink to which we will come.

24. In respect of recruitment, it was the claimant's role, together with Mr Vanderson, to recruit staff to work at Legna. It was part of the recruitment process that potential staff work on trial shifts at Opheem. By 14 November, the clamant had selected 4 potential employees – three of whom were given trial shifts and one who was appointed because she was already known to Mr Islam and one of the Opheem managers, Mr Meunier.

25. Mr Islam's complainant about this process is that the claimant and Mr Vanderson would conduct the recruitment process together, rather than one taking it on while the other got on with other tasks. Mr Islam gave an example of both Mr Vanderson and the claimant together interviewing a runner which he described as a role requiring a low level of expertise. Mr Frost did concede that the claimant and Mr Vanderson split the tasks, but only after being instructed to do so. In her witness statement, the claimant also said that many times she and Mr Vanderson conducted interviews separately if the other was busy.

26. Both Mr Frost and Mr Islam said that the claimant and Mr Vanderson were slow and inefficient in the way the conducted the preparations for the opening of the restaurant.

27. Mr Frost and Mr Islam both gave evidence that they spoke to Mr Vanderson and the claimant about the inefficient way in which they were conducting these aspects of the preparations in the first week of November. The claimant says that she was never spoken to about her performance at this time.

28. We find that the claimant was spoken to about the perceived inefficiency of the way she and Mr Vanderson were undertaking the preparation tasks and that they were told they needed to delegate tasks between themselves. The claimant's evidence was consistent with the respondent's evidence in that she agrees that sometimes she and Mr Vanderson would interview together. The claimant has given little to no evidence in her statement about the pre-opening preparations and we prefer the evidence of Mr Islam.

29. Mr Islam said that he was frustrated that the claimant only attended at most 3 training shifts at Opheem. It was Mr Islam's expectation that the claimant and Mr Vanderson would attend a significant number of shifts to understand how his businesses operated, including the cashing up and till reports at the end of the night. He said that he would expect the claimant to immerse herself in the new business.

30. The claimant's evidence in her witness statement was that Opheem was short staffed and sometimes she had to stay to help out. Mr Islam denied this and said that in fact Opheem was adequately staffed, otherwise he would not have later been able to spare the staff to assist at Legna. In fact, he said, he instructed the claimant and Mr Vanderson to attend the shifts. He said he had a "strong conversation" about it but it was always met with frustration on their part – he said that they felt they knew everything already.

31. We were presented with some screen shots by the claimant in the course of the hearing which showed that she had in fact been in attendance at 9 services at Opheem including relatively late in the evening. Mr Frost was reluctant to accept this and said that the claimant did not stay until the end to see close down which was, he said, an important part of the process. The claimant agreed that she did not always stay until the door was locked, but was there until late into the service. In his witness statement, Mr Frost said that the claimant only attended a handful of services, not 3, and that she missed the point of them, which was to learn the brand that Mr Islam wanted to achieve. The claimant was not getting "stuck in".

32. On balance, we find that the claimant did attend more than three training shifts, and that she stayed late into the shifts. There is no mention of this alleged failure in the letter of dismissal or the respondent's response. The tone of the claimant's text messages suggests that she regularly attended shifts at Opheem and there is no reference to any issues in those texts. We think it likely that the evidence of Mr Islam and Mr Frost on this issue is tainted by retrospective justifications and that at the time, although Mr Islam probably did instruct the claimant to attend shifts at Opheem, she did so to his broad satisfaction.

33. In respect of training shifts for staff, the claimant had arranged 3 training shifts by 14 November. The respondent says that they should have been brought in on busy weekends rather than the quieter shifts they were brought in on and Mr Frost and Mr Islam say they raised this with the claimant. The claimant does not address whether this was raised with her in her witness statement, but says that three shifts were arranged.

34. We prefer the evidence of Mr Frost and Mr Islam on this point and find, on the balance of probabilities, that the issue of trial shifts for new staff was

raised by them on or around 14 November 2018. We think it likely that, as Mr Frost and Mr Islam both repeatedly said, they were having daily or almost daily discussions with the claimant and Mr Vanderson about the progress towards the opening of the restaurant around this time.

Meetings in November

35. The next issue in the chronology relates to an alleged conversation or meeting between Mr Islam and Mr Brunton about the claimant's and Mr Vanderson's performance or suitability on or around 27 November 2018. Mr Brunton had originally referred to 27 November in his witness statement but by the time of the tribunal that date had been removed. It appeared he had got that date by looking at the wrong diary. However, Mr Islam's witness statement still contained that date. Mr Brunton confirmed in cross examination that there was only one meeting about this issue with Mr Islam and that was on 13 December (to which I will come). He said, however, that there were telephone calls with Mr Islam about the claimant's performance but not during the training period – only once Legna opened (which must have been after 1 December 2018).

36. Mr Islam was given the opportunity to correct his witness statement having heard Mr Brunton's evidence and was insistent that there had been conversations in the week leading up to the opening with Mr Brunton about the claimant's performance.

37. Mr Brunton was very clear that generally speaking he could remember incidents but not dates. He was clear that he had not discussed the claimant's performance with Mr Islam before Legna opened. Mr Brunton is independent of all parties and we prefer his evidence to that of Mr Islam. We find that there were no conversations about the claimant's performance or suitability for the role to which she had been appointed between Mr Islam and Mr Brunton before Legna opened on 1 December 2018.

38. However, we find that there were some conversations after the opening between Mr Brunton and Mr Islam that which culminated in the meeting on 13 December (to which we will come).

Training event

39. On 28 November there was a training event for new staff in preparation for the opening that Mr Vanderson and the claimant were required to deliver. Mr Frost's evidence was that the claimant and Mr Vanderson were absent for the majority of the training, staff were left to undertake menial tasks and Mr Morgan, the bar manager, was left to improvise some training on the drinks.

40. Mr Frost and Mr Islam say that this was raised with the claimant and Mr Vanderson the next day at which the claimant said, and it was put in cross examination on her behalf, that much of the training was venue specific and there was no venue. The claimant did not address the allegation that she was absent from the training in her witness evidence. We prefer the evidence of Mr Frost and Mr Islam that significant amounts of the training – such as laying cutlery and pouring drinks – were not venue specific and

venues were available to undertake training. We also prefer the evidence of Mr Frost and Mr Islam that the failure by the claimant and Mr Vanderson to properly provide the training was raised with them on 29 November.

Soft opening - 1 December 2020

41. The restaurant opened on 1 December 2018 with what is referred to as a soft launch – the restaurant was not open to the general public but to invited guests.

42. Mr Islam and Mr Frost both say that the opening night did not go well – staff were unprepared and the basics of service and table etiquette were not prepared. They say that over the next two weeks concerns about the standards of service were beginning to show but they are not specific. The claimant seems to agree that there were problems on the first day but puts this down to the menus arriving only two hours before service and the electricity failing.

43. Mr Islam said that the menu had been prepared well in advance. We think it unlikely that the finalised menu would not have been agreed until 2 hours before the start of service - the dishes must have been known or it would not have been possible to train the chefs on them and order food. We think it more likely that the claimant is referring to printed menus. It seems unlikely that this would have caused a significant problem for preparation and further that the details of the menu would or ought to have been addressed at the training a few days before. We accept that the electricity was out of the claimant's control, but we generally prefer the evidence of Mr Islam and Mr Frost that the service was not up to the standard they required.

44. Mr Islam and Mr Frost say that the poor service continued over the next couple of weeks and that they each together and separately raised the claimant's performance with her about this. The claimant says that there were no significant problems, the restaurant did well in December and no issues were raised with her then, or on any other occasions.

45. Particularly, the respondent says that there was an event on 8 December at which particular drinks were not available for a particular customer. The claimant said this was not her responsibility – it was that of the bar manager and Mr Frost and that she handled the issue well. Mr Frost's evidence about this was very confused and confusing and he appeared to accept in cross examination that this was not in fact the claimant's responsibility. We find, on the balance of probabilities, that the claimant was not at fault on this occasion.

46. Mr Frost says that he and Mr Islam were disappointed with the claimant's service and on 9 December communicated that to her. 9 December 2018 was a Sunday and the restaurant did not open on Sundays. Mr Frost said that it was in all likelihood after the service on the Saturday. He said that there were a number of issues and he described the claimant as defensive and hostile. After that meeting, he said, they decided to bring Mr Meunier in to implement appropriate standards.

47. The second relevant issue in this period is that Mr Islam said that when the restaurant did open, they were required to heavily discount the food as compensation for the service.

48. The third relevant issue is that Mr Brunton attended the restaurant on or around 5 December and afterwards sent the claimant a text complementing her on the food and service. The claimant relied on this text as evidence that there were no problems with the service. Mr Brunton agreed that he must have had a good night and was sending a supportive message. Mr Islam and Mr Frost effectively said that he was just being polite as he had expressed to them his concerns about the service.

49. We find, on the balance of probabilities, that Mr Islam and Mr Frost did genuinely have concerns about the claimant's performance at this time and the impact on the restaurant. We prefer Mr Frost's evidence of the meeting of 9 December and find that concerns about the claimant's performance were raised with her. We place little weight on any confusion with the dates after such a long period but accept this evidence that it was likely later after the Saturday shift (being the night of 8th or morning of 9th December). We also do not place a great deal of weight on Mr Brunton's text about service. His own evidence was that he must have enjoyed it, but would not criticise a client in that way in any event. However, we think that his perception of the service was unlikely to be the same as the respondents'.

50. We are persuaded by the need to continue to discount the food in light of the likely costs that this was continuing to incur for Mr Islam and do not think he would have taken this step unless he considered it necessary because of the poor service.

Meeting with Conrad Brunton

51. Mr Islam and Mr Brunton say that they had a meeting on 13 December 2018 to discuss finding replacement staff for the claimant's and Mr Vanderson's posts.

52. There was a degree of inconsistency and confusion in Mr Brunton's evidence about this initially. Firstly, the meeting was said to be on 27 November 2018 but that was corrected in his witness statement before being put in evidence. Then it was said there were two meetings, and finally Mr Brunton said there was only one meeting and this must have been on 13 December 2018 because that is the date recorded in his diary and on a text message. Mr Islam refers to the meeting as being on 12 December but said in cross examination that it was in fact 13th now he had seen the texts.

53. Despite the confusion in the dates, we find that there was a meeting on 13 December 2018 between Mr Brunton and Mr Islam and we further find that it was about Mr Brunton finding replacement staff for Mr Vanderson and the claimant. Mr Brunton was very clear in his evidence that he would not remember the date and would refer to his diary or phone, but gave a clear account of the nature and location of the meeting. As stated before, Mr Brunton has no vested interest in the outcome of the case and recognises that his business as a recruitment agent depends on the good will of both employees and employers.

54. We also note that Mr Vanderson soon after left the respondent's employment and we consider that this supports the contention that the meeting was to discuss Mr Vanderson's employment, It is clear that Mr Islam considered the two roles to be interlinked and we conclude that this meeting was to discuss potential replacements for Mr Vanderson and the claimant.

55. Shortly after this meeting, Mr Islam paid for an advertisement on caterer.com website. There is a copy of the invoice, but it is unclear which of the job adverts, if any, provided in the bundle relate to this invoice. The job advert at page 98 appears, on Mr Islam's own evidence, to relate to the Indeed advert placed on 8 January to which we will come.

56. On balance, however, we find that Mr Islam placed an advert for an assistant general manager on caterer.com on 18 December 2018. Mr Islam's evidence was confused about which advert was which, but he was clear in his oral evidence that he had placed adverts for an assistant general manager on 18 December 2018.

Mr Vanderson's employment ending and meeting with the claimant

57. On 22 December 2018, Mr Vanderson left the employment of the first respondent after a meeting with Mr Islam.

58. There was then a conversation between Mr Frost and the claimant in which Mr Frost informed the claimant of Mr Vanderson's departure.

59. The claimant's evidence is that Mr Vanderson handed in his notice on 20 December and she had a conversation with Mr Islam on or around 21 December about how they would push the restaurant forward without Mr Vanderson and that he disagreed with Mr Vanderson's work ethic and would do things differently. In oral evidence, the claimant said that the conversation was solely about Mr Vanderson's working styles and how things would change in future. The claimant said she agreed to adopt more of Mr Islam's style.

60. Mr Islam said that in that meeting the claimant blamed Mr Vanderson for all the previous performance issues. He reiterated in his witness statement that he had continually raised issues with the claimant's performance throughout December and that in this meeting he told the claimant that she would continue in her role until the end of the probation period at which point her contract would be reviewed. Other experienced managers were being brought in for the opening in January and she should take the opportunity to learn from them. He said he had already concluded that the claimant was not fit for the role but hoped that she might be able to change his mind about that over the next month or so.

61. In oral evidence, Mr Islam said that he told the claimant it just wasn't working and she, effectively, pleaded for her job. He said that he had decided to allow her to complete her probation as January is a difficult time to get a job.

62. The date of this meeting was not agreed, but it is clear that it was after the claimant's last shift before Christmas and after Mr Vanderson left, so around 22 – 23 December.

63. On balance, we prefer the evidence of Mr Islam. Although there was confusion over dates, we found Mr Islam's account to be broadly consistent throughout from the dismissal letter, the ET3 , his witness statement and his oral evidence, even accepting the confusion over dates.

64. We find, on the balance of probabilities, that by 23 December 2018, Mr Islam had decided that the claimant was not the right fit for his business and he wanted to replace her. However, he was still willing to allow her a further opportunity at that point to prove she was up to the role.

January 2019

65. The restaurant reopened on 4 January 2019. Francesca Malaband had been promoted as an additional assistant general manager and Mr Frost was appointed as the acting general manager. Mr Meunier was also assisting. Mr Frost said that he had regular daily conversations with the claimant from this point and the claimant was well aware that her job was under threat. The claimant denied this – she said there were regular meetings about service but nothing was raised that stuck in her memory.

66. We prefer the evidence of Mr Frost and find that he was having regular conversations with the claimant about her performance and she would have been aware that her job was under threat.

67. On 8 January 2019, further recruitment adverts were placed by the respondent on Indeed.com. We find that these adverts were for an assistant general manager at Legna, not Opheem. We prefer the evidence of Mr Islam and Mr Frost and note the coincidence of the reference numbers in the invoice and the advert.

68. This advert was brought to the claimant's attention by a friend and on 9 January she approached Mr Frost about it. The claimant says that Mr Frost reassured her that the advert was not her job but related to a position at Opheem. Mr Frost says that the claimant in fact asked his if her job was in jeopardy and he made it abundantly clear that it was.

69. We prefer the evidence of Mr Frost of this conversation. It is clear that the job advert was for a job at Legna. We therefore think it more likely that Mr Frost would confirm that it was the claimant's job than say that it was for a job at Opheem. It was put on behalf of the claimant that if it was for a job at Legna, it was for a further AGM in addition to the claimant, but we do not accept this. There is no evidence from either side to support this suggestion. We therefore find that by 9 January 2019 at the very latest, the claimant was aware that her job was at risk because of the respondent's view of her abilities.

70. We do note that at this time Ms Malaband was occupying the role of additional Assistant General Manager. Mr Islam's evidence was that this was a temporary, trial promotion and we accept his account.

71. The respondent's evidence is that there was then a meeting on 15 January between Mr Islam, Mr Frost and Mr Meunier at which the decision was finally taken to dismiss the claimant. The claimant says that if this meeting did happen, it happened after she informed the respondent that she was pregnant.

72. Mr Frost said that they had regular meetings at the beginning of the week and this was the occasion, either the Monday or the Tuesday but 15 January 2019, when they decided that the claimant's performance was not going to improve and she would be dismissed.

73. In common with most of the key events in this case, there is no contemporaneous written record. We acknowledge Mr Heard's submissions that this makes it unlikely that such a key decision was taken with no record, but we find, on the balance of probabilities, that this was in fact because the respondents are poor at documenting and record keeping in respect of employment matters.

74. We also recognise that there was a delay between making this decision and communicating it to the claimant that is hard to understand. The respondent's explanation is that it was because they had already decided to let the claimant work out her probationary period. We refer to Mr Islam's text about Mr Vanderson to Mr Brunton. In that text he stated that he had agreed to let Mr Vanderson work out the month for financial reasons. This is consistent with a decision to let the claimant work out her probationary period.

75. We also acknowledge the personal relationship between Mr Islam and Mr Ternent. Surprising and poor practice as it may be, we find on the balance of probabilities that the decision to dismiss the claimant was made on 15 January 2019.

76. We find, also, that that decision was made by Mr Islam – although it was made in consultation we think it likely that as the owner Mr Islam would have had final say.

77. On 18 January 2019, the claimant discovered that she was 5 or 6 weeks pregnant and on 23 January 2019, the claimant told Mr Islam of that fact. Mr Islam congratulated the claimant on her pregnancy and the claimant said that he told her she would have to carry on her role but that he would support her if she needed to make any changes to her job.

78. On 26 January, the claimant sent Mr Islam a short letter confirming that she was pregnant. It was put to the claimant that it was unusual to inform an employer so quickly after finding out that she was pregnant and that, to the claimant's knowledge, it was a low risk pregnancy. The claimant said that the first trimester is also risky and that she would have to walk up and down to the cellar, carry furniture and spend long hours on her feet. She agreed, however, that she did not in this conversation ask for any changes to her role. The claimant also said that she understood it to be the employer's responsibility to undertake a risk assessment, although we did not hear that she requested one.

79. We find, on the balance of probabilities, that when the claimant found out that she was pregnant, she was aware that her job was in jeopardy for the reasons already explained. We agree that it is unusual for a person to disclose their pregnancy so soon, but not unheard of. However, the very formal letter from the claimant at page 106 is out of keeping with all the other communications in this case. We consider that the claimant wrote this letter, in this way, to ensure that there was a clear record of her notifying Mr Islam that she was pregnant.

80. On 25 January 2019 the claimant says that her shift pattern changed. In the ET3 response and Mr Islam's statement, the respondents say that the claimant was in charge of her own shift pattern and that changes were not imposed. In oral evidence, Mr Frost says that he put the rota together for more structure to ensure that people who worked late had a late start to ensure that there was adequate rest time between shifts.

81. There is a text message from the claimant to her partner on 25 January referencing the changing shifts which refers to the change to 10 – 10 or 12 – finish. The claimant starts by saying "I tell my employer I'm pregnant and my hours get increased".

82. We prefer the oral evidence of Mr Frost, that he did draft a new rota but that the purpose of it was to ensure that there was cover at the restaurant at appropriate times and to ensure that people who worked late didn't get an early start. We do not consider that that was connected with the claimant's pregnancy.

Dismissal

83. On 30 January 2019, the claimant was asked to attend a meeting that same day with Mr Frost, and Mr Meunier. The claimant said that she did not know what the meeting was about – she thought it was going to be related to the upcoming busy period around valentine's day. We have not seen or heard any suggestion that the claimant was given a formal invitation to the meeting, informed what it was to be about or notified that she could be accompanied by a colleague or representative. The purpose of the meeting was to dismiss the claimant.

84. Clearly, this was a wholly unacceptable way for the respondent to go about arranging this meeting. Although Mr Islam and Mr Frost said the claimant was aware that her probation was coming to an end after three months, that is very far from giving someone notice of the meeting and warning them what might happen so that they can prepare themselves.

85. The claimant says that at that meeting she was told that she had no drive and no fire and was not moving the business forward. She said that Mr Meunier said nothing had changed since Michael Vanderson had left.

86. The claimant said that she referred to the businesses emails and social media accounts being linked to her phone which she accessed out of hours and she worked long hours in her own time. She says that Mr Frost said she was not a bad manager but just not the right fit for Mr Islam and that unless he saw her working 80 hours a week, that was not good enough.

They asked the claimant if she could work until Saturday but she, unsurprisingly, said that she was not comfortable doing that and left, saying that she would not be returning.

87. Mr Frost says that he and Mr Meunier told the claimant that they did not believe she was an appropriate manager, and could not see examples of the qualities asked of her in previous meetings. He agrees that he said that they needed an assistant manager with drive who would push the business. Mr Frost said that he told the claimant it wasn't about running around at a million miles an hour, but about being efficient and getting the job done.

88. Mr Frost said that they offered the claimant other potential roles in the company. In cross examination, the claimant denied that she was offered any alternative roles at that meeting.

89. We prefer the evidence of Mr Frost about this meeting. We have found that the respondent was generally unhappy with the claimant's performance and had brought in new managers to oversee the restaurant as well as advertising for the claimant's replacement. Mr Islam said, and Mr Ternent agreed, that he had a long standing personal relationship with the claimant through Mr Ternent and we find that Mr Islam was prepared to offer the claimant different roles in the company to assist the claimant. This is confirmed by the text sent by the claimant to Mr Islam later that day. Mr Islam refers to the possibility of a job in accounts and the claimant says "I wasn't made aware that other roles were an option other than dropping down to FOH team member or working the odd shift for extra hours if I needed to".

90. In our view, this is evidence that alternative roles were discussed at the meeting with Mr Frost and Mr Meunier.

91. The reference to the accounts job arises from a conversation the claimant said she had had with the accounts manager on 29 January who was leaving the business at some point. The claimant said that the conversation arose in the context of her pregnancy, and how her AGM role might be difficult later in her pregnancy.

92. We draw support for our conclusions that the claimant was aware of the respondent's dissatisfaction with her performance in the AGM role from this conversation. Were the claimant confident in her abilities and committed to the role, it seems very unlikely that she would be considering other roles within the respondent. We think it more likely that she was aware of the respondent's unhappiness with her performance and this led her to considering other roles.

93. We refer again to the text communication between Mr Islam and the claimant on 30 January.

94. Mr Islam was not in attendance at the claimant's dismissal and he did not see the claimant before she left. He therefore sent the claimant a text which said:

"Hi Sara, have you left? Really wanted to talk about options for the future in our group. I hope you understand that it's nothing personal. As we're a start

up we need someone to drive the business and we just don't feel it's your management style. Leena mentioned you would be potentially interested in an accounts role"

95. The claimant's reply, in full was:

    "Hi Aktar, sorry for leaving in a flurry I'm very emotional today as it is without seeing that coming. I would like to come and talk to you over the next couple of days however I wasn't made that other roles were an option other than dropping down to FOH team member or working the odd shift for extra hours if I needed to. Before we meet could you email me a copy of the reasons for dismissal that Andy and Pierre covered and an accurate copy of the conversation they had with me".

96. In our view, the claimant's shock could equally have arisen from the lack of warning of the notice as from not realising her performance was in question and we think that that is the more likely explanation.

97. It was put that the ball was left in Mr Islam's court in terms of next steps for alternative roles. We do not necessarily agree. The claimant is clear that she wants a copy of the reasons for her dismissal before meeting to discuss alternatives and they were sent to her the next day. It would have been reasonable for either party to contact the other in those circumstances after the reasons were sent. Instead, the claimant contacted ACAS the following day and no further progress appears to have been considered by either party in respect of reemploying the claimant.

98. The claimant is not to be criticised for quickly starting tribunal proceedings, but equally the respondent is not to be criticised for concluding that the claimant was not, dependent on the content of the early conciliation, about which we rightly heard nothing, to be criticised for not the pursuing the re-employment of the claimant.

99. The following day, 31 January, Mr Frost sent the claimant a dismissal letter with reasons for her dismissal. He said that this letter was originally drafted after the meeting on 15 January – either on 20 or 27 January.

100. The reasons set out in that letter are as follows:

    - That the claimant was not pro-active and driven enough.
    - That on occasion the claimant had been seen sitting at the bar area until midday often eating breakfast
    - That the claimant had been seen using her mobile phone by customers
    - That earlier problems had been accounted to Mr Vanderson but that things had not improved since he had left and that the claimant had not improved. Effectively she was not pushing or driving the business forward.

101. In respect of the specific allegations about using her phone and eating breakfast, the claimant did not deny that these things happened, but she said that she was using her phone to access business social media and

email accounts and this was not during service. The claimant also said that she was not eating during service.

102. Mr Frost said that the claimant ought not to be eating while working unless on a break in any event, and there was no need for the claimant to access emails and social media on her phone in the bar area as there was a designated computer for this at the front desk where the phone was also situated. He said the business did not have heavy email and social media traffic in any event.

103. There was also evidence, not referred to in this letter, that the claimant had been spoken to about her dress style – Mr Frost said that the claimant was too casual – she needed to wear more formal business attire, and the claimant had been seen by guests smoking on the fire escape. The claimant disputed that she had been seen by guests.

104. Overall, we prefer the evidence of the respondent. It is clear, in our view, that the respondent did not consider that the claimant was doing the job in the way they required and we have found that this was communicated to her.

105. We do not think that the respondent has necessarily acted well or reasonably in the way they assessed the claimant's performance and their record keeping is wholly inadequate. It is, as this case shows, important to document important meetings and follow up important conversations in writing so that both parties understand what has been said.

106. Despite Mr Islam's assertion that he was a good clear communicator, it is apparent in our view that there has been a degree of miscommunication in this case. We refer, for example, to the final meeting at which Mr Frost says he said the claimant was not required to run around at a million miles an hour, and the claimant says he said that Mr Islam needed to see the claimant running around working 80 hours a week. It is easy to see how miscommunication arises.

107. Despite this, however, we find that the respondent was genuinely (whether reasonably or not) dissatisfied with the claimant's performance and approach from early on in her employment and communicated that dissatisfaction to her on a number of occasions. The claimant was aware, by 9 January 2019 at the very latest, and probably since December 2018, that she was likely to lose her job at the end of her probation period. The respondent genuinely believed that the claimant's performance had not improved to their satisfaction by 15 January 2019 and that is when they decided that she would be dismissed. We also find that the reason Mr Islam decided to dismiss the claimant was because he was not satisfied that she was performing the role in the way he wished and that this was unconnected with her pregnancy. The decision had been taken before he knew the claimant was pregnant.

108. There was a gap between this decision and the communication of it which is unusual. However, given the respondent's chaotic approach to HR matters, we accept their evidence that this was because they intended to have the

probation meeting then anyway and the claimant had in any event been informed she could stay until the end of her probation period.

109. Finally, we make some brief observations about the various witnesses credibility in response to parties' submissions. We do not place a great deal of weight on discrepancies in dates. As previously observed, the first and second respondents' HR processes and record keeping are somewhat chaotic. A great deal of time has passed and memories fade. We were more persuaded by the recollection of events or conversations. Where there was any documentary evidence we tend to prefer that for well-established reasons.

110. In respect of the timing of the claimant's notification of her pregnancy and the manner of it, we cannot positively conclude that this was a cynical creation of evidence on which the claimant could base a claim, perceiving that her employment was at risk. It could equally have been in response to her perception of the change in shifts and an attempt to ensure that her health and safety was protected going forward. However, the timing of that disclosure and the sparsity of the claimant's evidence has impacted on the weight we have given the claimant's evidence compared to that of the respondents' witnesses.

Law

Unfair dismissal

111. The claimant claims that she was automatically unfairly dismissed under s 99 Employment Rights Act 1996. This provides that an employee shall be unfairly dismissed if the reason or principle reason is of a prescribed kind or the dismissal takes place in prescribed circumstances relating, as far as is relevant, to pregnancy, childbirth or maternity.

112. The prescribed reasons and circumstances are set out in regulation 20 of the Maternity and Parental Leave Regulations 1999 which says, again as far as is relevant:

(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),

113. Paragraph 3 provides

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

(a) the pregnancy of the employee;

114. As the claimant does not have two years' service, the burden is on her to prove that the reason for the dismissal was connected with her pregnancy. The reasons of the employer are a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

Abernethy v Mott Hay and Anderson [1974] ICR 323, [1974] IRLR 21. There is no need for those beliefs to be reasonably held, they just have to be genuinely held by the employer and constitute the reason for the dismissal.

Pregnancy and maternity discrimination

115. Section 18 Equality act 2010 provides as far as is relevant:

    (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

    (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.

116. It is not disputed that the claimant was dismissed during the protected period.

117. Section 136 Equality Act says:

    (1) This section applies 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 contravention occurred.

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

118. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

119. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her race.

120. In *Madarassy v Nomura International* [2007] IRLR 246, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, <u>without more,</u> sufficient material from which a tribunal "could conclude" that,

on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

121. This means that there must be something more than just unfavourable treatment and a difference in status to shift the burden to the respondent to show the reason for the unfavourable treatment.

Conclusions

Unfair dismissal.

122. This claim is brought against the first respondent only, as the claimant's former employer.

123. We have found that the true reason for the claimant's dismissal was because of the respondent's dissatisfaction with the claimant's performance. That dissatisfaction arose early on in the claimant's employment and the claimant was made aware of it. This is not a case of ordinary unfair dismissal under s 98 Employment Rights Act 1996. The respondent is not required to act fairly or reasonably. If this were a standard unfair dismissal case, there are many ways in which the first respondent would be found wanting – the claimant was not given adequate warning of the dismissal meeting, the decision was made without the claimant having an opportunity to comment on the proposed dismissal before the decision was made and there was no capability process at all. However, that is not the test in this case. The only question for us is whether the reason for the claimant's dismissal was for a reason connected with her pregnancy. We have found that it was not – it was related solely to her performance, or more precisely the respondent's perception of her performance – and for that reason the claimant's claim for unfair dismissal under s 99 of the Employment Rights Act 1996 must fail.

Pregnancy and maternity discrimination.

124. This claim is brought against both respondents.

125. We do not understand that it is disputed that dismissal is unfavourable treatment but, in any event, we have no hesitation in stating that it is. It was also not disputed that this occurred in the protected period. The only question for us to answer is whether the reason for the claimant's dismissal was because of her pregnancy or not.

126. We have considered whether the claimant has proved facts from which we could conclude in the absence of any other explanation that she was dismissed because of her pregnancy. We have considered specifically the proximity between the claimant telling Mr Islam on 23 January 2019 that she was pregnant and her dismissal on 30 January 2019 and whether that is enough of itself for us to infer that the reason for the dismissal was the claimant's pregnancy.

127. In the absence of any other evidence, we think that it would be. However, we have to take into account all the evidence before us including when the decision to dismiss was made and we have found that the decision was made before the claimant told Mr Islam that she was pregnant. On that

basis, we cannot infer that in the absence of another reason the decision to dismiss the claimant was because of her pregnancy.

128. In any event, however, we have found that the actual reason for the dismissal was, as set out above, Mr Islam's dissatisfaction with the claimant in her role. It was Mr Islam's ultimate decision to dismiss the claimant, but he did so for reasons unconnected with her pregnancy.

129. For these reasons the claimant's claim for pregnancy and maternity discrimination is unsuccessful.

Employment Judge Miller

30 September 2021