Case Number: 2303160/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH (remote hearing by CVP)**
BEFORE:	**Employment Judge Harrington, Ms R Bailey and Ms P Barratt**
BETWEEN:	
	Ms M Klepacka **Claimant**
	and
	Otium Services and Facilities Limited **Respondent**
ON:	**20 April & 21 April 2021, 6 September 2021 and 22 September 2021 (in chambers)**
APPEARANCES:	
For the Claimant:	**Ms Dabrowska, Legal Consultant**
For the Respondent:	**Ms Y Montaz, Senior Litigation Consultant**

JUDGMENT

The Claimant's claims of automatic unfair dismissal and pregnancy discrimination are not well founded and are dismissed.

REASONS

Background

1 By an ET1 received by the Tribunal on 26 August 2018 the Claimant, Ms Klepacka, brings complaints of automatic unfair dismissal and pregnancy discrimination against her former employer and the Respondent in this matter, Otium Services and Facilities Limited. The Respondent denies the entirety of the claims.

2 At the start of the hearing, it was agreed that the Claimant commenced her employment on 18 December 2017 and that she was informed of her dismissal on 13 April 2018. It was also agreed that the Claimant's claims of automatic unfair dismissal and pregnancy discrimination were brought in time. Accordingly, the issues for the Tribunal were recorded as follows:

Unfair Dismissal –

2.1 When did the Respondent decide to dismiss the Claimant?

2.2 What was the reason or principal reason for dismissal?

2.3 Was the reason or principal reason for dismissal of a prescribed kind, namely related to the Claimant's pregnancy (section 99 of the Employment Rights Act 1996)?

If so, the Claimant will be regarded as unfairly dismissed.

Pregnancy Discrimination –

2.4 Did the Respondent treat the Claimant unfavourably by dismissing her?

2.5 Did the unfavourable treatment take place in a protected period?

2.6 Was the unfavourable treatment because of the pregnancy?

2.7 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

3 It was the Claimant's case that the Respondent knew she was pregnant at the time she was dismissed and that her pregnancy was the reason for her dismissal. It was the Respondent's case that the Claimant was dismissed because of her poor performance.

4 Throughout the hearing, the Claimant was represented by Ms Dabrowska and the Respondent by Ms Montaz. A polish interpreter attended to interpret for the Claimant.

5 At the start of the hearing Ms Dabrowska confirmed that the first time the Claimant told the Respondent she was pregnant was by a text to Matthew Daish ('MD') on 13 April 2018. However on the second day of the hearing, Ms Dabrowska referred to the Claimant being in hospital from 27 March – 6 April 2018 and that, at the meeting on 7 April 2018, the Claimant had provided documents from her hospital stay to Rafal Luczak ('RL'). These documents were the hospital inpatient discharge summary and they referred to the Claimant's early pregnancy. Ms Dabrowska said that the Claimant wished to change her case to contend that, from the information contained within the discharge summary and given to RL at the meeting on 7 April 2018, RL would have realised that the Claimant was pregnant. Accordingly, the Claimant wanted to assert that the Respondent had knowledge of her pregnancy from 7 April 2018 meeting.

6 The Claimant had not included this factual assertion in her ET1 or her witness statement, nor had she provided a copy of the discharge summary in disclosure as part of the relevant documentary evidence in the case. In the circumstances, the Tribunal considered the issue as an application to amend the claims to add a new factual basis to the existing claims.

7 In its consideration of the application, the Tribunal heard submissions from both parties. The Tribunal was particularly mindful of the late stage at which the application to add an entirely new factual allegation was made. It was submitted on the Claimant's behalf that she did not realise the importance of this part of the factual context despite the Claimant's case being focused on the allegation that the Respondent had knowledge of her pregnancy at the time of the decision to dismiss the Claimant. The Tribunal considered the balance of prejudice if the application were refused or allowed. It also took into account the fact that a further day of Tribunal time would be needed to complete the hearing of the Claimant's case, even if the Claimant's application to amend was refused. On balance, the Tribunal concluded that the application to amend should be allowed. The Tribunal's decision on the application, with reasons, was set out to the parties.

8 Following the application to amend being allowed, the Claimant was required to produce the additional medical evidence referred to and to prepare a further witness statement setting out the precise detail of the new factual matter, as it arose in the chronology from 27 March to 7 April 2018. The Tribunal acknowledged that further preparation would be required from the Respondent and that, as indicated by the Respondent, a costs application might be made by the Respondent accordingly.

9 When the hearing reconvened on 6 September 2021, the Respondent's witnesses were recalled to address matters arising from the amendment. Following the completion of the witness evidence, it was agreed by the parties that closing submissions would be provided in writing. Appropriate directions

were made for the parties to receive the written submissions of the other and to raise any further points by way of rebuttal.

10 In its consideration of the claims, the Tribunal was provided with the following materials:

10.1 Tribunal bundle ['TB'] comprising 112 pages;

10.2 Supplemental bundle ['SB'] comprising 14 pages;

10.3 Supplemental pages:

10.3.1 'Translation of screenshot' and page of text messages;

10.3.2 Email from Claimant to HR dated 19 March 2018;

10.3.3 Handwritten note from MD to Claimant dated 24 March 2018;

10.3.4 Schedule of Loss as at 1 March 2019;

10.3.5 Hospital Inpatient Discharge Summary dated 27 March 2018;

10.3.6 Timesheets for the week commencing 8 April and 15 April 2018

10.4 Witness statements from the Claimant (two statements), Ms Slater Smith, Ms Turner, Ms Cantwell, Mr Luczak, Mr Daish and Ms Ruffley;

10.5 Respondent's closing submissions dated 13 September 2021;

10.6 Claimant's closing submissions dated 14 September 2021.

Factual Background

11 The findings of fact are set out below. The standard of proof is on the balance of probabilities, namely what is more likely than not.

12 The Claimant was employed as a cleaner by the Respondent from 18 December 2017. At all relevant times she worked primarily at a health club in Southampton ('the Club'). The Respondent's area manager was Rafal Luczak ('RL') and the Claimant's direct supervisor was Matthew Daish ('MD').

13 Prior to commencing her employment the Claimant had a conversation with RL and she was issued with a new starter form. It is noted that both the Claimant and RL speak polish and their conversations were in that language. The Claimant was required to sign the form but she told RL that she wished to read it through before signing. Whilst the Tribunal heard differing accounts as to precisely what happened at this early stage, and prior to the Claimant commencing her employment, the Tribunal concluded that it was more likely

than not that the new starter form was, in the event, signed by the Claimant's husband. In reaching this conclusion, the Tribunal noted that the parties agreed that it was the Claimant's husband who handed the signed form to RL, that the Claimant said her husband had signed it and that this was consistent with, on the face of it, the appearance of the signature on that form which was different to the Claimant's signature on her statement and other documents shown to the Tribunal.

14 Following the commencement of her employment the Claimant would most typically work afternoon shifts, whilst her daughter attended nursery. She would travel by bus from Southampton city centre to the Club. The Claimant would try to arrive at work at 2.35 pm in order to begin her shift at 3.00 pm.

15 The Claimant's working hours varied. The Tribunal noted that she was paid for 58.5 hours for February 2018, 69.75 hours for March 2018 and for one day in April 2018. Her rate of pay was £7.50 per hour and this rose to £7.83 per hour for the small number of hours she worked in April 2018.

16 It is agreed by the parties that a probation period applied to the Claimant's employment. In her evidence, the Claimant said that she was told by RL on her first day at work that there was a three month probation period. This assertion was contradicted by the Respondent's evidence that a six month probation period applied. Having considered the evidence on this issue, the Tribunal concluded that the Claimant's employment was subject to a six month probationary period. In reaching this conclusion, the Tribunal noted that a six month probation period is set out in the Respondent's manual, which was referenced in the Claimant's Terms and Conditions [TB 28 & 32]. Further, the Tribunal accepted Ms Slater Smith's evidence that the Respondent's policy was to apply a six month probation period and that RL did not have a discretion to depart from this. The application of a six month probationary period is also consistent with the Claimant having a meeting to review this in April 2018, following a start date in December 2017.

17 The Claimant received a letter confirming her employment [TB 72] and subsequent letters from the Respondent dated 19 March and 26 March 2018 [TB 78, 79]. Those letters were produced at the Claimant's request, as she wanted a written record of her employment with the Respondent. The Claimant's correct home address was used and the Claimant safely received those letters.

18 On 9 February 2018 the Claimant sent a text to RL notifying him of her new home address [SB 29].

19 On Monday 26 March 2018 the Claimant began to fell unwell at work. On balance, the Tribunal concluded that the Claimant telephoned RL to report this. The Claimant's evidence on this was consistent with a text message she sent to RL later that evening (see below). The Claimant originally attended

Southampton General A&E before being transferred to the Princess Anne Hospital. At 11.44 pm she sent a text message to RL which read as follows,

'I am going to stay at the hospital. They are running lots of tests. Sorry to text you so late.' [TB 74] [SB 30]

20 The Tribunal heard evidence from the Claimant about various telephone calls that she made from hospital. Her evidence about what happened following her hospital admission was, at times, contradictory and vague – this might well be explained by the fact that she was unwell at this point and receiving medical care. For example, at one point in her evidence she suggested that RL told her she should leave hospital to attend a meeting and then return to hospital. She also said that she had told RL that she suspected she was pregnant and then, in answer to questions from the Employment Judge, stated, '*I didn't tell him I was pregnant in the call on 26 March'*. The Claimant also described a conversation where she explained her various symptoms to RL including that she was *'bleeding from down below'* and that she was at the Princess Anne Hospital. Having carefully considered this evidence the Tribunal concluded that these telephone calls did not take place, as described by the Claimant, for the following reasons:

20.1 As stated the Claimant's evidence was confused on this matter. For example, her case at the outset was that she first told the Respondent that she was pregnant by text on 13 April 2018;

20.2 In her oral evidence to the Tribunal, the Claimant said she told RL she was pregnant on the phone but she later said that she did not tell him she was pregnant;

20.3 A persistent theme in the Claimant's evidence was that for personal reasons she did not want to tell people, even her family, that she was pregnant until she had had the relevant scan. The Tribunal considered that it would be entirely contrary to this approach to enter into a detailed description of her symptoms to RL;

20.4 The Tribunal preferred the Claimant's account, which she confirmed on multiple occasions whilst giving evidence, that she did not tell either RL or MD that she was pregnant at this stage.

21 On 27 March 2018 there was an exchange of texts between RL and the Claimant. RL queried whether the Claimant would be coming to work on that day and, if not, referred to there being a staff meeting on Thursday 29 March 2018. The Claimant confirmed that she would not be working that day, that she would be in hospital for a while and that she would definitely not be attending the staff meeting. RL responded that he would need a doctor's certificate to send to the Respondent's HR department. [SB30]

22 In the event, on 27 March 2018, the Claimant was discharged from the Bramshaw Womens Unit. She was in the early stages of pregnancy and was deemed medically fit for discharge. A doctor's note was produced and signed on that day [TB80]. The note records that the Claimant was not fit for work for seven days because of an *'infection'*. Again, there were differing accounts as to how that note was passed to the Respondent. The Claimant said that she sent a text to RL and MD, with a photograph of the sick note on it, and that her husband also took the note to the Club on 30 March 2018.

23 The text referred to by the Claimant was not seen by the Tribunal. RL also denied having received such a text. The Tribunal did not hear evidence from the Claimant's husband. The Tribunal preferred RL's evidence on this point and concluded that RL did not receive a sick note until the meeting on 7 April 2018 (see further, below).

24 On 29 March 2018 RL sent a text to the Claimant asking if she had been signed off work until 4 April and for the Claimant to let him know when she was next coming into work [SB 31]. The Claimant responded that she would be returning on 6 April, working from 3pm – 11 pm.

25 On 4 April 2018 RL sent a text to the Claimant asking her to come into work on 'Saturday 2pm –10 pm' [SB 31] – the Saturday was 7 April rather than 6 April. Although there was a lack of clear evidence as to what happened after this, the Tribunal concluded that it was likely that there was a telephone call between RL and the Claimant during which the Claimant was told about the meeting on Saturday 7 April and the need to bring in her sick note. This was followed by a further text message on 6 April 2018 in which RL told the Claimant that he would be at the Club the following day to fill in a form about coming back to work *'after being signed off'* [SB 32].

26 At around 2 pm on 7 April 2018 RL and the Claimant met at the Club. The Tribunal was satisfied that RL saw the Claimant's sick note at this stage [TB 80]. The Tribunal concluded that RL did not see the discharge summary. In reaching this conclusion, the Tribunal took account of the following matters:

26.1 That it would be very unusual for an employer to request a copy of a discharge summary; such a document essentially being a personal medical record rather than setting out a medical opinion as to fitness for work.

26.2 RL, as an Area Manager, had asked to see a sick note. There was no documentary evidence to support the contention he had asked to see the discharge summary.

26.3 It was not part of the Claimant's original case that she produced the discharge summary to RL. The Tribunal was of the view that if the

Claimant had provided the summary to RL, it was more likely than not that she would have referenced this in her original claim to the Tribunal.

26.4 If RL had been given the discharge summary at the meeting, it is likely that he would have passed it onto the HR department and it was confirmed by Ms Slater Smith that this document was not within the Respondent's possession.

26.5 If the Claimant had given the discharge summary to RL at the meeting, it is likely that she would have referenced it at her later appeal meeting with Ms Slater Smith.

27 The return to work meeting took place with the Claimant and RL in attendance. Notes were taken of the meeting [TB81-82]. The Claimant signed a Return to Work Interview Form which noted the reason for absence as *'Hospital / Infection'* [TB 81] and a further document was completed, headed *'Probationary Review Meeting'* [TB 82]. The Tribunal heard evidence as to how the completion of this form was undertaken. The Tribunal was satisfied that the Claimant understood the questions that were recorded on the form and that she was asked those questions during the meeting. This is consistent with her evidence that she had some concern about why she was being asked them. For example, under the heading '*Cleaning Standards'*, the Claimant was asked whether she followed the cleaning schedule and why were her cleaning standards so poor. The Claimant queried with RL whether there was a problem with her work, as she wanted to have the opportunity to address this.

28 In her evidence to the Tribunal, the Claimant said that RL told her everything was fine. This is different from RL's account (see paragraph 5 of RL's witness statement) and what is reflected in the notes of the appeal meeting.

29 Following a detailed review of this evidence, the Tribunal concluded that RL approached these meetings with a very light touch. Holding one short meeting to discuss two quite separate matters - namely the Claimant's return to work and a probationary review - likely led to a lack of understanding on the Claimant's part and, in particular, a failure by her to realise that the continuation of her working for the Respondent hung in the balance at the meeting.

30 The Tribunal is satisfied that the Claimant's performance at work was referenced; this was confirmed by the Claimant at the appeal meeting [TB101] and in the Claimant's oral evidence to the Tribunal. For example her evidence to the Tribunal included the following,

'*I said to him if there was a problem, he should come to me as I cared for the job …, I clarified the position with Rafal, what were his expectations, what was I supposed to change ….'.*

However, the purpose of the two parts of the meeting were not fully explained to the Claimant and the discussion about her capability as a cleaner were brief, with no detailed concerns being raised with her. It wasn't made clear to the Claimant that there was an issue as to her performance such that her future employment was to be actively considered following that meeting.

31 After the meeting, RL sent the meeting notes and a copy of the Claimant's sick note to Deborah Gilbert, HR Manager.

32 The Claimant worked on Monday 9 April 2018. On this day there was also some further contact between RL and the HR department. It was agreed by RL that the Claimant should be dismissed and this triggered the sending of a letter to her dated 9 April 2018 [83]. In that letter it stated that the Respondent had '*high hopes and expectations'* that the Claimant would meet the standards required but that this had not proved to be the case. Accordingly, the letter confirmed *'notice of termination of your employment with immediate effect'.* Unfortunately the letter was sent to the Claimant's old address and she therefore didn't receive it.

33 On 11 April 2018 RL emailed the HR department to ask for an update on the Claimant. A response was received later that day confirming that the *'failed probation'* had been authorised and a letter had been sent. There was further email correspondence with RL seeking confirmation as to the Claimant's last day of employment [84-86].

34 In the event, the Claimant had not planned to work on 11 April 2018 but she did attend for work on 13 April 2018. On that day, the Claimant sent a text to MD as follows,

'Hi. I will be late today, because I have a visit with midwife. I am pregnant.' [TB88]

35 The Tribunal is entirely satisfied that this text was received by MD and that this was the first occasion upon which the Claimant informed the Respondent that she was pregnant. This is consistent with the Claimant's evidence that she did not tell anyone at the Respondent before this and the account she gave to Ms Slater Smith during the appeal meeting that the first time she informed the Respondent that she was pregnant was in a text to MD. For the avoidance of doubt, the Tribunal does not accept that the email from MD stating that he first became aware of the pregnancy on 3 May 2018 is accurate [TB93].

36 MD told RL that he had received the text on 13 April 2018 and, as a result, RL met the Claimant when she arrived for work on that day at around 3 p.m. RL informed the Claimant that she had been dismissed for failing her probation and that she should have received a letter informing her that she had been dismissed. RL then telephoned the HR department in order for the Claimant to speak with them about the matter. The Claimant was told about the letter,

which had been sent to her old address, and a copy of the letter was emailed to her at that time.

37 On 18 April 2018 the Claimant sent a letter appealing her dismissal. In that letter the Claimant linked the fact that she was told she was dismissed after she had sent the text to MD telling him she was pregnant. The Claimant referred to not receiving the letter dated 9 April 2018 until it was emailed on 13 April 2018 and that she believed that her pregnancy was the reason for her dismissal. [TB89]

38 By a letter dated 30 April 2018 from Ms Slater-Smith ['SS'], Regional Manager, the Claimant was invited to an appeal meeting on 8 May 2018. Within that letter the Claimant was told that it was important for her to bring any paperwork or other evidence that she wanted to be considered. The Claimant confirmed that she received this letter. In the event, the appeal meeting took place on 10 May 2018. Notes of that meeting are provided within the bundle [TB101-102]. The meeting was attended by the Claimant and SS, with an interpreter joining by telephone for part of the meeting. The Tribunal accepted the evidence from SS that the notes were an accurate record of what was said at the meeting.

39 During the meeting the Claimant said that she believed her probation had ended after three months and that she thought RL was advertising for staff to replace her because she was pregnant.

40 The outcome to the Claimant's appeal was recorded in a letter dated 11 May 2018. The Claimant didn't receive the letter and emailed on 21 May 2018 to ask how long she had to wait for further information [TB103]. SS responded copying the appeal outcome letter to the Claimant by email. SS upheld the decision to dismiss the Claimant on the grounds that the decision was made after the meeting on 7 April 2018, several days before the Respondent knew that the Claimant was pregnant. SS reached the conclusion that the Respondent had not been given any detail about the Claimant's sickness, prior to the decision to dismiss, which suggested that the Claimant was pregnant.

Closing Submissions

41 The Respondent submitted that the Claimant's dismissal had absolutely nothing to do with her pregnancy as RL had no knowledge of the pregnancy prior to the dismissal. Ms Montaz, on behalf of the Respondent, referred to the decision to dismiss being taken on 9 April 2018. With regards to any suggestion that there was an earlier conversation between the Claimant and RL, during which the Claimant described symptoms that could suggest a pregnancy, the Respondent referred to the late disclosure of this alleged conversation, the failure by the Claimant to mention it in her ET1 and during her appeal hearing with SS. It was also submitted that the Claimant never gave the discharge summary to RL.

42 In her written submissions, the Claimant referred to a fair reason for her dismissal being given but that employers see it as too costly and not effective to keep a pregnant employee in a company. Regarding her claim of automatic unfair dismissal, the Claimant submitted that it was essential that the employer knows or 'believes that you're pregnant'. The Claimant referred to the Respondent knowing that she was pregnant from the conversation she had with RL, the hospital discharge summary and the text message sent on 13 April 2018.

43 The Claimant reiterated her argument that she was dismissed because she was pregnant and stated that she had never been told that she was not working properly or that the company received complaints. Referring to the forms completed at the meeting on 7 April 2018, the Claimant stated that it looked like the company were preparing themselves *'for the situation in the event Ms Klepacka could be pregnant in order to dismiss her and avoid cost for the company'*. The Tribunal notes the language used by the Claimant here and in particular the phrase 'could be pregnant'.

Legal Summary

44 Employees who are dismissed for a reason connected with pregnancy are given special protection by the Employment Rights Act 1996. Section 99 provides that an employee will be regarded as unfairly dismissed if the reason or principal reason for the dismissal is of a kind prescribed in regulations or the dismissal takes place in prescribed circumstances. A reason or set of circumstances prescribed under section 99(1) includes pregnancy, childbirth or maternity (section 99(3)(a)). A woman's dismissal is unfair where the principal reason for it is connected with her pregnancy.

45 For a claim of automatically unfair dismissal for a reason connected with pregnancy to succeed, the employer must have known or believed in the existence of the employee's pregnancy (see Del Monte Foods Ltd v Mundon 1980 ICR 694, EAT and Ramdoolar v Bycity Ltd 2005 ICR 368, EAT). The EAT has explained that it was essential to show that the employer knew of the pregnancy when the decision to dismiss is taken. The mere fact that, after deciding to dismiss her, the employer learned of the pregnancy did not make the dismissal automatically unfair. Where an employee lacks the two years' continuous service required to claim unfair dismissal, the employee will bear the burden of proof in showing that the reason for dismissal was a prescribed reason within the meaning of Section 99 and the applicable regulations.

46 Once the reason for dismissal is found to be an inadmissible reason, there is no room for the employer to argue that the dismissal was nonetheless reasonable in all the circumstances and therefore fair.

47 The automatically unfair dismissal provisions relating to pregnancy overlap with the pregnancy and maternity discrimination provisions in the Equality Act 2010.

A dismissal found to be automatically unfair for the inadmissible reason of pregnancy will almost certainly also amount to pregnancy and maternity discrimination. A claim can be brought under both heads.

48 Section 18 of the Equality Act 2010 creates a specific form of direct pregnancy and maternity discrimination. It provides that an employer discriminates against a woman if, in the 'protected period' in relation to a pregnancy of hers, the employer treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it. The 'protected period' in relation to a woman's pregnancy starts when the pregnancy begins. Section 18 does not require that a complainant compare the way she has been treated with the way a comparator has been or would have been treated. It simply requires the complainant to show she has been treated 'unfavourably' with no question of comparison arising. A woman dismissed for a pregnancy-related illness during the protected period will be able to claim that her dismissal is automatically discriminatory under Section 18. Pregnancy discrimination cannot be justified.

Conclusions

49 In reaching our conclusions, the Tribunal took into account the entirety of the witness evidence we heard, the documentary evidence referred to and the submissions made by both parties.

50 Following the findings of fact, the Tribunal was satisfied that the decision to dismiss the Claimant was taken on 9 April 2018.

51 It was the Claimant's case that the reason for her dismissal was her pregnancy. Initially, the Claimant relied upon the text she sent to MD on 13 April 2018 informing him that she was pregnant but, following the amendment to her case, the Claimant contended that the Respondent knew she was pregnant prior to 13 April 2018 from a telephone call with RL during which the Claimant described some symptoms and from the hospital discharge summary, which the Claimant said she provided to RL at the meeting on 7 April 2018.

52 As detailed in the findings of fact, the Tribunal was not satisfied that a telephone conversation happened during which the Claimant described her symptoms to RL. The Tribunal also rejected the contention that RL requested the hospital discharge summary and that it was provided to him at the meeting on 7 April 2018. The Tribunal was satisfied that it was more likely than not that RL was only in receipt of the Claimant's GP fit note which made no mention of a pregnancy. Accordingly, the Tribunal concluded that the Respondent was only aware of the Claimant's pregnancy following receipt of the text message on 13 April 2018.

53 The Respondent did not dismiss the Claimant because of her pregnancy. They did not know that she was pregnant when they took the decision to dismiss her. The principal reason for the Claimant's dismissal was the Respondent's

concerns with her performance and capability in carrying out the job of a cleaner.

54 Accordingly, the Claimant was not automatically unfairly dismissed nor was she treated unfavourably because of her pregnancy. Her claims for automatic unfair dismissal and pregnancy discrimination are not well founded and are dismissed.

Employment Judge Harrington
16 October 2021

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