



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107053/2023

5

Held in Glasgow on 16, 17 and 18 April 2024

**Employment Judge L Doherty
Members Dr S Singh and Ms N Elliot**

10 **Ms Aroosa Tabasam**

**Claimant
Represented by:
Mr W McParland -
Solicitor**

15

NAV Forecourts Limited

**First Respondent
Represented by:
Mr R Katz -
Consultant**

20

Vaishali Anand

**Second Respondent
Represented by:
Mr R Katz -
Consultant**

25

Mrs Nasheed Anand

**Third Respondent
Represented by:
Mr R Katz -
Consultant**

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:

1. the claim under Section 18 of the Equality Act 2010 (the EQA) is dismissed;
2. the claim under Section 47 (c) of the EQA is dismissed;
- 35 3. the claim under Section 99 of the Employment Rights Act 1996 (ERA) is dismissed;
4. the claim under Section 11 of the ERA is dismissed;

5. the claim under Regulation 14 of the Working Time Regulations 1998 (the Regulations) succeeds;
6. the claim of wrongful dismissal succeeds;
7. a Remedy Hearing will now be fixed in respect of the successful claims; and
5 a hearing will be fixed to determine the complaint of unauthorised deductions from wages; this will take place at the same time as the Remedy Hearing.

REASONS

1. In a claim presented on the 20 November 2023, the claimant brings the following complaints:
 - 10 (1) pregnancy discrimination under Section 18 of the Equality Act 2010 (the EQA);
 - (2) automatically unfair dismissal under Section 99 of the Employment Rights Act 1996 (the ERA);
 - (3) detriment claims under Section 47(c) of the ERA;
 - 15 (4) wrongful dismissal;
 - (5) failure to pay holiday pay;
 - (6) unlawful deduction from wages; and
 - (7) failure to provide a written statement of terms and conditions.

The Hearing

- 20 2. The claimant was represented by Mr W McParland, solicitor and the respondents by Mr R Katz, consultant.
3. A final hearing took place over 4 of days commencing on 15 April 2024. At the outset of the hearing, it was agreed that Remedy would be split from the Merits. In addition, due to the issues of specification, late notice of documents,
25 and issues of time bar being raised in relation to the unauthorised deduction of wages claim, it was agreed that consideration of that claim in its entirety

would be dealt with separately; this will be dealt with at the same time as Remedy, in the event the claim or any aspect of it succeeds.

4. The claimant gave evidence on her own behalf: her husband Mr Rashad, also gave evidence on her behalf. For the respondents, evidence was given by the first and second respondent (referred to in these reasons as Mrs Anand and Mr Ahmad) and by Ms Rogers, the unit manager.

5. The parties lodged a joint bundle of documents.

The issues

Section 18 - Equality Act claim

6. The issue for the tribunal in connection with the claim under section 18 of the EQA, is whether the claimant was subjected to the unfavourable treatment alleged because of her a proscribed reason relating to her pregnancy. The respondents deny knowledge of the claimant's pregnancy prior to her dismissal.

7. The unfavourable treatment alleged is as follows:

a. That on or around 30 July 2023, the claimant was expected to confront customers who drove off without paying when she was at an increased risk;

b. That WhatsApp exchanges with the respondents on 30 July were aggressive and undermining;

c. The respondents' decision to discipline the claimant;

d. That false allegations were put to the claimant at a disciplinary hearing;

e. That the claimant was taken off the rota from the 30 July and the subsequent failure to reinstate her on the rota;

f. That she was not provided with written reasons for her dismissal;

g. That she was dismissed; and

h. The decision to reject her appeal.

8. The respondents accept that the claimant was disciplined and dismissed. Their position is that this was as a result of performance related reasons. The other alleged treatment is denied.

5 *Section 47 (c) ERA claim*

9. The unfavourable treatment alleged are also pled as detriments under Section 47 (c) of the ERA. The issue is whether the claimant was subjected to the alleged detriment for the proscribed reason related to her pregnancy.

Section 99 ERA Claim

10 10. The issue is whether the reason or principal reason for dismissal was the claimant's pregnancy.

Wrongful dismissal claim

11. The issue is whether the claimant was dismissed in breach of her contract, or whether by her conduct the claimant had repudiated the contract entitling the
15 respondents to summarily dismiss her.

Failure to provide a written statement of particulars of employment

12. The issue is whether this was provided.

Failure to pay holiday pay

13. The issue is whether this was due to be paid but was not paid.

20 **Findings in fact**

14. The first respondent business is engaged in the operation of petrol stations with retail units attached. Mrs Anand is the owner and a director of the first respondent business. She and Mr Ahmad, who is also a director and who is involved in the management of the business, are married.

25 15. The respondent's business is a franchise of Motor Food Group (MFG) and is subject to the rules and regulations imposed by the franchisor. The business

is monitored by the franchisor to ensure compliance with these standards. In the event of noncompliance with certain standards (e.g. failed uniform; failed mystery shopper; cleanliness of the Costa coffee machine; shop tidiness; customer complaints), a fine is levied against the business. Repeated breaches of standards could result in the loss of the franchise. The business is subjected to regular announced and unannounced inspections from the franchisor. The respondents consider it very important to maintain standards that do not result in a breach of the conditions imposed on them by the franchisor, so that they do not lose their franchise. Retaining their franchise is a matter of great importance to them.

16. The respondents have a number of policies in place which are displayed on the wall at the unit. This document includes reference to a uniform policy; a mobile phone policy; and a Veeder Root and Tank Level policy.
17. The Veeder Root policy requires staff to check the fuel tank levels at the start of the shift and to close the tank when the level reaches lower than 100ltrs. An alarm sounds when the tank goes below that which must be reported to management. There is a health a safety risk to the tank going below 1000 litres.
18. The respondents have a 'Challenge 25' policy around the sale of alcohol, which requires staff to ID customers who look less than 25 years old. A failure around this results in a franchisor fine.
19. Staff have to carry out regular 'bunker checks' on outside stock, and to complete what is called a DD book where they record temperature checks.
20. A significant loss to the garage business is what is termed 'drive offs', which occurs when a customer takes petrol but drives off without paying. Staff are given training on preventing drive offs. A drive off prevention guide is displayed on the notice board behind the till of the Unit at Airdrie. Staff have the ability to shut down a petrol pump if they have concerns about a drive off. A protocol is in place for dealing with what look like suspicious circumstances for a drive off, and for circumstances where a customer fills up their tank but cannot pay.

21. During the period of the claimant's employment, there were around 7 drive offs.
22. Staff are given with training on a number of aspects of their work, which is provided on an ongoing basis.
- 5 23. The respondents operate a number of Units including one in Airdrie, where the claimant worked. That Unit had 6 members of staff, working a rota of morning, back and night shifts. The majority of shifts are operated on a single member of staff basis. Deliveries are not made weekly, but take place as required. Deliveries are made on a Saturday morning. When a delivery is due
10 two staff members are in the Unit.
24. The manager of the Airdre unit is Ms Alison Rogers. Communication with staff and between staff is conducted by way of a staff WhatsApp group.
25. The proposed staff rota is sent in advance each month to staff. Staff can agree changes among themselves, or management can implement changes
15 according to the needs of the business. Staff changes should be marked up on the rota. Information from the rota is used as a basis of hours of work for pay calculations. Extra shifts which are not rota'd are recorded on a separate piece of paper.
26. Wages are paid monthly. Wages were at some point paid by bank transfer,
20 but this was changed to cash payment of wages at some point. The respondent's accountant makes up the wage slips based on hours of work of the employee supplied by the respondents. At the Airdre unit, Ms Rodgers puts the wage slips and cash payment into an envelope which is then given to the staff member. The claimant received payment of her wages and wage
25 slips in this way.
27. Staff are issued a generic contract of employment.
28. The claimant came from Pakistan to the UK with her husband, Mr Rashad. Mr Rashad worked for the respondents. He approached Mr Ahmad and asked if he could give the claimant a job. There were no vacancies at that stage, but
30 the claimant came to work on occasions to cover holiday leave. An opening

did arise in August 2022 for one shift per week at the Airdre Unit, which was offered to the claimant. Mr Rasheed requested two shifts a week for the claimant in November 2023 and the claimant's shifts were increased to 2 shifts per week.

5 29. The claimant commenced work on 22 August 2022. She was given a contract of employment on that date by Ms Rogers which she signed, and which Ms Rogers signed. This signed contract was kept on the claimant's personnel file.

30. The contract sets out the claimant entitlement to notice of termination of employment. The claimant was entitled to one weeks' notice.

10 31. In in terms of her contract of employment the claimant is entitled to 28 days annual leave. The holiday year runs from 1 April to 31 March.

15 32. The respondents had issues generally with staff performance. These were dealt with to a considerable degree by WhatsApp messages. From around the time of the claimant's employment to date, the respondents have dismissed three members of staff for performance issues.

20 33. The respondents had issues with the claimant's performance at work. Examples of their concerns included a customer complaint because the claimant could not operate the lottery machine; failing to properly do bunker checks; continued use of personal mobile phone at work, on one occasion, early on in her employment, failing a uniform check and continuing to fail uniform standards; one occasion failing a Challenge 25 test; on one occasion a message was sent to her about failing to clean an oil spill on forecourt ;and on another a message as sent about a customer leaving without paying. Mr Ahmed and Mrs Anand's perception of the claimant was that she would leave tasks for other staff members to cover which were her responsibility. This was a view shared by Ms Rogers, who did not think the claimant was a team player with other staff or was good with customers.

25 34. In February 2023, Mr Ahmad decided to dismiss the claimant. He had allocated another member of staff on shift with the claimant to help her, but his perception was that instead of taking his help, the claimant fought and
30

argued with him. He told the claimant and her husband that the claimant was off the rota. Mr Rashad contracted Mrs Anand the same day and asked for this decision to be reconsidered, further to which Mrs Anand spoke to her husband and it was decided to put the claimant back on the rota. This happened within a matter of hours.

5

35. The claimant discovered she was pregnant in March 2023. Her baby was born on 25 November 2023.

10

36. The claimant attended a dinner at the Mr Ahmad and Mrs Anand's home in early April 2023 which they hosted this for all their staff to celebrate the breaking of the fast at Ramadan.

37. By March 2023 the claimant worked settled shifts on a Saturday and Sunday morning; she also covered some additional shifts on occasion.

15

38. In April 2023 the claimant was scheduled to work the Saturday 8 and Sunday 9 April on morning shifts. Another staff member, Sidra, requested the claimant swap her Saturday morning shift with her to Saturday back shift, which was done.

39. The same shift pattern occurred on Saturday 15 April 2023, with the claimant working back shift and Sidra on the morning shift

20

40. The claimant worked Saturday morning shift on 22 and 29 April 2023. She worked the Sunday morning shifts on 16, 23 and 28 April 2023.

25

41. In May 2023, the claimant worked the Sunday 7 May 2023 morning shift, Tuesday 9 May 2023 on a backshift, Sunday 14 May 2023 and Sunday 29 May 2023 on the morning shift. Her shifts reduced in May because other staff members requested more work. The claimant did not work any Saturday morning shifts in May.

42. On 7 May 2023, the claimant's husband messaged Mr Ahmad asking him to do him a favour and increase the claimant's shifts. Mr Ahmed offered the claimant more shifts, however by some point in May, the claimant was also working elsewhere. On 21 May 2023, the claimant messaged Mr Ahmad to

advise she could not cover a shift offered to her as she could not cover two 8 hour shifts in one day. On 25 May 2023, Mr Ahmad messaged the claimant asking which days she was working in the other shop. The claimant responded "...I will manage there. BP is my first priority." Mr Ahmad went back to the claimant to say there was no need for her to leave that job and just to let him know the days she was available. The claimant responded that she was available 5 days and unavailable Tuesday and Saturday. Mr Ahmad responded giving her 3 shifts on Sunday Morning and Monday and Thursday backshift, avoiding Saturday and Tuesday.

5
10 43. The claimant worked a shift in June when she was told there would be a delivery shift.

15 44. The respondents continued to have performance issues with the claimant. In December 2023, she allowed a Megabus to drive off without paying for approximately £800 worth of fuel. The cost was ultimately recovered by the respondent, but the sale of fuel without collecting payment was regarded by them as a breach of protocol. On 23 June 2023, a message was sent to the claimant asking why her shift was £20 short to which she responded that she had no idea. A message was sent to her on 19 June 2023 about not checking the Veeder Root. A Messages were sent to her querying bunker checks on 20 23 July 2023.

45. On or about 24 July 2023, a WhatsApp message was sent to the claimant with the registration number of a vehicle, advising her that this vehicle had been involved in a number of drive offs and asking her to be alert to it. The message was specifically directed at the claimant.

25 46. On 31 July 2023, on a Sunday morning early shift, the claimant sanctioned fuel to this vehicle which was then driven off without payment.

47. In accordance with the respondent's practice, the CCTV footage of the drive off was sent by the manager to Mr Ahmad The claimant contacted the police. She also sent the CCTV footage.

48. When Mr Ahmad viewed the CCTV, he took the view that there were a number of flags which should have alerted the claimant to the fact that this was a potential drive off, in addition to the warning given to her about the registration number of the vehicle. These were that it looked as if fuel was being taken into the passenger side of the vehicle and filled into containers. WhatsApp messages had been sent alerting staff to customers filling up Jerry cans and telling them they had to take cash up front.
49. Mr Ahmad visited the Unit at around 2pm when the claimant's shift was finished and found it to be in what he considered a very poor state, with issues around cleanliness and display of stock. He took photographs of the unit at that time. He decided to call the claimant to a disciplinary meeting on the 1 August. Mr Ahmad sent the claimant a message which stated '*Your disciplinary meeting is on Tuesday at 11 am*' but nothing more.
50. The claimant responded to this saying: "*you are disappointed due to my work am really sorry for that please give me one chance I will work more carefully and pay full attention and never disappoint you again.*" She asked to be returned to the rota and said she would skip her other job.
51. The meeting took place on 1 August 2023 which the claimant and her husband attended. The meeting lasted around 20 to 25 minutes. The claimant asked if the reason for her dismissal was the drive off and Mr Anand told he it was not just that but other issues with her performance, such as failing to maintain standards of cleanliness, use of her personal mobile phone, and her uniform being incomplete. Mr Ahmed decided he would dismiss the claimant as he considered she had had enough chances, but he said that he would write with the outcome of the meeting. He failed to do so until he received a letter from the claimant dated 14 August 2023.
52. Mr Rashad made a number of unsuccessful attempts to contact Mrs Anand and Mr Ahmad after this meeting.
53. The claimant had her husband then consulted with the Citizens Advice Bureau (CAB). After doing so, the claimant wrote to the respondents on 14 August 2023 complaining about the way in which she was dismissed. The letter was

headed *Formal letter of Complaint*. The claimant advised that she was 22 weeks pregnant and intimated a claim of discrimination under the Equality Act. She also complained of lack of wage slips, breach of contract, and unauthorised deductions from wages.

5 54. After the respondents received this, they sent the claimant a letter of dismissal dated 7 August 2023 and undated letter inviting her to a disciplinary meeting which included reference to performance issues not detailed in the dismissal letter.

10 55. They also sent her a letter dated 15 August 2023 headed outcome of appeal in which the respondents refuted the complaints and advised that they did not know that the claimant was pregnant.

56. The claimant received both of the respondents letters after she had sent her letter dated 14 August.

15 57. The respondents have an employee at another unit who has been pregnant, and had her baby, and who continues to work with them.

58. The respondents have to outlay and reclaim the maternity allowance paid to employees on maternity leave. They recover 3% more of the allowance than is paid by them from the government.

20 59. Prior to the claimant's dismissal, she and her husband had a good relationship with Mrs Anand and Mr Ahmad. Mr Rashad had requested Citizenship sponsorship from Mr Ahmed, however Mr Ahmad had declined to do this because of the difficulty and work involved. Mr Ahmed had on occasion agreed to meet Mr Rashad at his home out with working hours to discuss Mr Rashad's personal business.

25 **Note on Evidence**

Credibility of the witnesses

60. A very good deal in this case turns on credibility and unfortunately, with the exception of Ms Rogers, the Tribunal found all of the witness evidence unsatisfactory to varying degrees.

61. Mr McParland made considerable submission about the credibility and reliability of the respondent's witnesses. He submitted the Tribunal should draw an adverse inference from the fact that the Mr Ahmed and Mrs Anand were in the Tribunal room and heard the claimant and Mr Rashad's evidence, submitting they tailored their evidence thereafter in response to that.
62. This, however, was not the impression which the Tribunal formed. Both Mr Ahmed and Mrs Anand are separately named respondents and are entitled to be in the hearing throughout. While they both referenced what was said in evidence by the claimant on some occasions it was the Tribunal's impression that this was generally done in explanation of the evidence they were giving, rather than with a view to manufacturing a counter set of events.
63. Mr McParland asked the Tribunal to draw an inference adverse to Mr Ahmed and Mrs Anand's credibility from the fact that there was an inconsistency between the terms of the ET3, which stated that the claimant was dismissed, but the respondents regrettably agreed to give her more shifts on 11 March 2023, and their evidence given after having heard the claimant to the effect that she was put back on the rota very shortly after Mr Ahmed took her off it in February 2023. The Tribunal did not however consider that a great deal turned on this. While the claimant did not accept she was dismissed, she accepted she was suspended in February, and there no conflict between any of the witnesses that she was put back on the rota. The Tribunal accepted this was done after Mr Rashed had gone to Mrs Anand. The principal element in this case is pregnancy related discrimination which it not contingent on the claimant's length of service.
64. Mr McParland also sought to cast doubt on the respondent's credibility in that they maintained the position that the claimant was not an employee until the morning of the hearing, when Mr Katz made the concession that she was an employee. The Tribunal did not consider that too much could be taken from this. The respondents are legally represented and the Tribunal is not in a position to draw inferences in circumstances where it cannot know what information has passed between the respondents and their legal representative and what legal advice was given. The same considerations

apply to the respondent's failure to accept there was no dismissal of the claimant in February. Mr Katz argued that there was a dismissal, but his position was it did not interrupt the claimant's continuity of employment. That, it appeared to the Tribunal, was a legal argument which even if successful could not impact on the Tribunal's jurisdiction to consider any of the claims and did not give rise to inferences about credibility.

5
65. The Tribunal found there were two significant matters on which there was a lack of credibility in the evidence of Mr Ahmand and Mrs Anand. The first is the production of the final wage slip and payment of holiday pay, which is dealt with more fully below.

10
66. The second is in relation to the letters which they sent to the claimant calling her to a disciplinary hearing and her dismissal letter. The Tribunal did not conclude that the undated letter inviting the claimant to the disciplinary meeting had been drafted or sent by post between 31 July and 1 August 2023 as claimed. It lacked credibility that this particular letter would have been posted when all other messages were sent electronically. Further, it appeared to the Tribunal too coincidental that this letter and the dismissal letter were received by the claimant after she sent her letter of 14 August 2023. The fact that the Tribunal found this to be the case, and its conclusions about payment of holiday pay, had an adverse impact on its impression of Mr Ahmed and Mrs Anand's credibility.

15
20
67. That however was not determinative of all of the credibility issues which the Tribunal had to determine, in particular the fundamental conflict of whether the claimant had told Mrs Anand that she was pregnant at the dinner in early April which is dealt with in more detail below.

25
30
68. The Tribunal formed the impression that Ms Rodgers was a credible and reliable witness. In forming this view it took into account that she answered question put to her in a straight forward manner. She did not seek to embellish her evidence, for example she readily made the appropriate concession that there were performance issues with staff generally which she messaged them about, and not just the claimant. The fact that she was did so rendered

credibility to her her evidence about her perception of the claimant's performance and her interactions with her.

69. The Tribunal did not find either the claimant or Mr Rashad to be credible and reliable witness on all matters, for reasons which are gone into more fully below.

Performance issues

70. Notwithstanding its conclusions about when the disciplinary invite letter was sent, the Tribunal was satisfied that the respondents had genuinely held performance issues about the claimant.

71. While the Tribunal was not in position to make detailed finding about the claimant's performance on the basis of undated WhatsApp photographs produced by the respondents, some performance issues were not in dispute. They accepted she failed a uniform check, which had occurred early in her employment. Mr McParland made submissions to the effect that an inference adverse to the respondent's credibility should be drawn from the fact that the bundle contained notice of a fine imposed because of another member of staff's uniform failure. However, the Tribunal did not consider that anything turned on the production of that document, which the respondents accepted did not apply to the claimant, and submitted was produced to support the position that a fine was imposed for failing to meet uniform standards, in circumstances where the claimant accepted she had failed a uniform check.

72. The claimant also accepted she had failed a Challenge 25 standard on one occasion early in her employment.

73. Mr Katz took the claimant to WhatsApp dealing with the £20 till shortage; the Veeder Root failure; sand left on the forecourt; letting a customer leave without paying; and queries about bunker checks. Albeit the claimant in cross examination did not accept any fault for any of the issues, it was not in dispute that they had been brought to her attention, which again supported the conclusion that there were genuine performance concerns on the part of the respondents.

74. Further, there was no dispute that drive offs occurred on the claimant's shift in December 2022 when she sanctioned fuel to a Megabus, and on 31 July 2023 in circumstances where she had been specifically alerted to the registration number of the vehicle involved and asked to be vigilant. Mr McParland made much of the fact that there had been 7 drive offs during the period of the claimant's employment, and Mr Ahmad accepted that drive offs were part of the hazards of the business. The Tribunal found it credible however that the difference here as far as Mr Ahmed was concerned was that the claimant had been alerted to the vehicle registration and the fact that he considered there were other flags which should have alerted the claimant to the position.
75. The Tribunal's conclusion as to the respondent's performance concerns is also supported by the fact that the claimant had been removed from the rota by Mr Ahmad because of her performance, albeit for a very short period, in February 2023. While there was an issue as to whether the claimant was dismissed at that point, there was an acceptance by the claimant that she was suspended, which supported the fact that there were performance issues at that time. The Tribunal was satisfied that it was Mrs Anand's intervention that resulted in the claimant being put back on the rota. Her evidence on this was credible and it was plausible that something occurred to reverse the claimant's suspension.
76. In reaching its conclusion, the Tribunal also take into account that to some extent it was accepted by the claimant that there were performance issues in July 2023, although she categorised them as nothing serious. Further, although there was a difference of view as to the seriousness of the performance issues, it was accepted by the claimant and Mr Rashed that aspects of her performance was discussed at the meeting on 1 August 2023. It also seemed to the Tribunal to be apparent from the context of the claimant's text message to Mr Ahmad before the disciplinary hearing that she accepted there were issues with her performance. She apologised for these and asked for another chance, saying she would skip her other job.

77. Mr McParland submitted that there were performance issues with all the staff, and the claimant was no different. The Tribunal was satisfied that there were generally performance issues with the staff, which appeared to be managed to a significant degree by group WhatsApp messages. It was also satisfied however that the claimant's performance gave rise to concerns which went beyond the general level of concerns. Her earlier suspension, the number of matters brought to her attention, her text apologising, and Ms Rogers evidence to the effect that that the claimant was not a team player with other staff, that she had a poor attitude towards customers supported this conclusion.

78. Mr McParland submitted that it was significant Saturday and Sunday mornings are quiet shifts; the claimant would not have been offered Sunday morning, and Monday and Thursday backshift by Mr Ahmed in May 2023, had there been concerns about her performance. However, as discussed more fully below, Mr Ahmed offered these shifts to the claimant after having been asked by Mr Rashad to increase her shifts and being told by the claimant that she was not available to work on a Saturday and therefore the Tribunal did not draw the inference that there were no performance concerns about the claimant from the fact that these shifts were offered to her.

20 **Claimant's pregnancy**

79. Mr Katz took issue with the fact of the claimant's pregnancy. He submitted that the respondents had called upon the claimant to produce evidence of her pregnancy, but none had been produced. The respondents did not know that the claimant was pregnant and there was no documentation to support that she was.

80. While it is correct that the claimant has not produced any documentation to support her pregnancy, and the Tribunal did not find her or Mr Rashad's evidence credible on all matters, the Tribunal considered that it stretched the bounds of plausibility to suggest that claimant had made the whole thing up, and it did not conclude that she had done this.

Knowledge of pregnancy

81. There was a fundamental conflict between the evidence of the claimant and of Mrs Anand as to whether the claimant told Mrs Anand at the dinner which she hosted in her home in early April 2024 that she was pregnant.
82. It was the claimant's evidence that she discovered she was pregnant in March 2023. She said that she wanted to tell her employers, but they were not responding to messages or calls, so she wanted to speak to them face-to-face. She said she had the chance to meet face to face on the occasion of the dinner hosted by Mr Ahmed and Mrs Anand during Ramadan. The claimant said she was clearing the dishes with Mrs Anand and that she went into the kitchen with her, where she told her that she was pregnant. The claimant said that Mrs Anand congratulated her and asked if her husband and was looking after her.
83. The claimant said she also told another member of staff, Madeha, the same evening when she rejected a date which she was offered, saying it was harmful to her because she was pregnant.
84. The claimant said that Mrs Annand then offered to change the claimant's delivery shifts and not offer her any more delivery shifts.
85. The claimant said that Ms Rogers spoke to her at some point between April and May 2023. Ms Rogers said to her that the claimant had told Mrs Anand that she was pregnant and asked why she did not tell her. The claimant said Ms Rogers was happy for her and congratulated her.
86. The claimant also said that Mrs Anand spoke to her while she was working in July and asked her about the baby's gender. The claimant said that she thought it was a boy, but it was not confirmed, and that Mrs Anand was insistent that she should have this confirmed.
87. Mrs Anand denied the alleged conversations having taken place. She did not know the claimant was pregnant. She said that it was a taboo in her culture to ask about the gender of a child and that is something she would never do, and she did not have any of the conversations described by the claimant.

88. Ms Rogers denied the conversation attributed to her by the claimant. Her evidence was that she had no idea that the claimant was pregnant.
89. The Tribunal was therefore faced with a stark conflict in the evidence. In resolving this, the Tribunal considered the evidence which it had about the claimant's shift patterns. This was something the claimant placed very considerable of reliance on in establishing that she informed Mrs Anand that she was pregnant.
90. There was a degree of inconsistency in the claimant's evidence in that in the one hand in evidence in chief she said that she was offered an accommodation of not doing delivery shifts, and in cross examination she said that she *told them* she would not do delivery shifts. This inconsistency was not determinative, but it was an adminicle of evidence which the Tribunal took into account in assessing credibility.
91. In any event, it was the claimant's evidence that after the dinner, her shifts in April were changed. The claimant accepted that her Saturday morning shift on 8 April 2023 was swapped with Sidra to backshift on Sidra's request.
92. She said her Saturday morning that her shift on 15 April 2023 was swapped because she was pregnant. The tribunal was satisfied that claimant did not work on the morning of Saturday 15 April 2023. There was a dispute at to whether the claimant worked on the mornings of Saturday of 22 and 29 April 2023. The claimant was taken to the document produced in the bundle at page 252 in evidence in chief and accepted this was the April rota. This document recorded that the claimant had worked morning shifts on Saturday of 22 and 29 April 2023.
93. The claimant then denied cross examination that she worked these shifts. She said she was swapped these shifts to a back shift. She suggested that her position was supported by her wage slips, but those contains hours worked as opposed to identifying shifts worked and there was no clear explanation or evidence as to how the wage slips supported one position or another. The Tribunal was satisfied, taking onto account the terms of the April rota, that the claimant had worked on Saturday morning shift on 22 and 29 April 2023. The

claimant being allocated and working these shifts is inconsistent with the position that after the dinner in early April that her shifts were changed from a Saturday morning because she had told Mrs Anand she was pregnant in response to which Mrs Anand told the claimant would then no longer have to do delivery shifts.

5

94. The claimant's evidence about shift changes in May lacked credibility as to the reason for change in days. There was a drop off in the shifts which the claimant worked in May. She only worked 6 shifts and she did not work on any Saturday morning shift in May. She said her shifts were changed to Tuesday. She accepted in cross examination that the drop off in shifts was not due to her pregnancy.

10

95. The Tribunal concluded on balance that in May the claimant was working elsewhere on a Saturday. It was the claimant's evidence that she was not working; she had only worked one shift somewhere else and she was looking for work and had an opportunity. That however did not sit the fact that the claimant refused a shift offered to her at some point after 7 May 2023 because she said she could not work two 8 hour shifts in one day. Further, the terms of the claimant's text exchange with Mr Ahmed on 25 May 2023 support the position in that she was working elsewhere as a result of which she was not available on a Saturday. In response to Mr Ahmed asking her what days she was working in the other shop and telling her that she did not need to leave that job but just let him know the days she was available, the claimant stated: "*Tuesday and Saturday, rest of 5 days I'm free.*" This suggested that she was working, and was working on a Saturday and that she wanted to avoid Saturday shifts with the respondents because of her other job. The conclusion that the claimant was working is also supported by the terms of the claimant's text to Mr Ahmed in July 2023, when she said she would '*skip her other job*'.

15

20

25

96. In addition, as well as working delivery shifts in April after the alleged conversation with Mrs Anand took place, the claimant accepted a delivery shift in June, without complaint, which is inconsistent with the position that delivery shifts would not be offered to her, or that she would not accept that.

30

97. Taking these factors into account, on balance the Tribunal did not conclude that that the respondents removed the claimant from Saturday morning delivery shifts because she had told Mrs Anand that she was pregnant. This conclusion undermined to a significant degree the claimant's evidence that she had told Mrs Anand that she was pregnant at the dinner in April.
98. The Tribunal also took into account a number of other matters. The first was its impression of Mrs Anand's denial of any knowledge of pregnancy. Notwithstanding that the Tribunal drew an adverse inference as to Mrs Anand's credibility as a result of the factors discussed above, it formed the impression that she was genuinely hurt at the suggestion that the claimant had told her about her pregnancy and as result of this she was dismissed. She also gave convincing evidence about what she considered was a cultural taboo about asking the baby's gender, which in the Tribunal's view rendered the conversation alleged to have taken place in July on balance unlikely to have occurred.
99. While not determinative of the matter, the fact that the respondents were prepared to offer the claimant extra shifts in May when on the claimant's case, they knew she was pregnant in April, was an adminicle of evidence which pointed against the notion that the respondents knew she was pregnant and decided to dismiss her in July because of this.
100. Both sides made much of the impact of paying the claimant maternity allowance. Mr McParland submitted it represented a cash outlay, which was a burden the respondents sought to avoid by dismissing the claimant. Mr Kartz submitted that the respondents gained 3% of the costs and paying maternity allowance was a financial benefit, not a drain. On balance, the Tribunal considered that these factors pointed to the fact that paying the claimant maternity allowance was a neutral factor for the respondents, and that they were unlikely to gain or lose significantly as a result of having to do so. The tribunal concluded that having to pay the claimant maternity allowance was therefore unlikely to be a driver for dismissing her, had they been aware she was pregnant.

101. The Tribunal also considered the evidence of the claimant and Mr Rashad to the effect that Mr Rashad told Mr Ahmed at the disciplinary meeting that the claimant was pregnant and asked for her to be put back on rota as she was like a younger sister. The Tribunal did not find this convincing. Mr Rashed did not strike the Tribunal as an impressive witness. He was reluctant to accept matters on which on the face of it should have been capable of concession, such as the nature of the relationship he had with Mr Ahmad prior to the claimant's dismissal. His denial that he asked Mr Ahmed to sponsor him and his evidence that an approach had been made to the claimant by Mrs Anand to tell Mr Rashad to contact Mr Ahmed who was offering to sponsor him lacked credibility in light of Mr Ahmed's convincing evidence as to his refusal to act as a sponsor because of the work and difficulty involved. Furthermore, the Tribunal formed the impression that Mr Ahmed's evidence as to his surprise at discovering the claimant was pregnant when he received the letter of 14 August 2023 to be genuine.
102. The last piece of evidence which the Tribunal took into account was the claimant's evidence that Ms Rogers knew she was pregnant and spoke to her about it. Mrs Rogers' denied this and denied any knowledge of the claimant's pregnancy. The Tribunal formed the impression that Ms Rodgers was a credible witness. Ms Rodgers gave a convincing denial of the alleged conversation which the claimant said had taken place with her. The fact that the Tribunal found the claimant's evidence about Ms Roger's approach to her to lack credibility undermined her evidence generally as to whether she informed the respondents about her pregnancy in April .
103. On balance, taking all of these matters into account, the Tribunal was not persuaded that the claimant had told Mrs Anand that she was pregnant, or that the respondents knew she was pregnant until they received her letter of 14 August 2023.

Contract of employment/wage slips/holiday pay

104. There was a factual dispute over whether the claimant had received a contract of employment. Her evidence was that she did not. The respondents said she

did, that all their employees received a generic contract. They produced an unsigned copy of a contract, but after Mr Ahmed said in cross examination that a signed copy was retained in office, a signed copy was produced.

- 5 105. The claimant denied receiving wage slips. The respondent's evidence was that she did and that they were given to her with her wages.
106. Mr McParland also asked the Tribunal to draw an adverse inference from the late production of documents, in particular the contract of employment and pay slips and the failure to produce them in time in response to a tribunal order.
- 10 107. It is far from ideal that these were produced late, however the Tribunal had the clear evidence of Ms Rogers to the effect that she provided the claimant with the contract, and that she and the claimant had signed it, and the Tribunal accepted this.
- 15 108. Ms Rogers also gave credible evidence that she put wage slips into envelopes every month and distributed them to staff, including the claimant. The tribunal found this evidence convincing that was satisfied that the claimant had been given wage slips.
- 20 109. The Tribunal did not reach the same conclusion about the issue of the final wage slip and payment of holiday pay. The respondents produced a wage slip dated 31 August 2023 which indicated that holiday pay of £298.22 was due to the claimant. It was the evidence of Mr Ahmed this was paid and that the claimant came to the garage to collect it.
110. The claimant and Mr Rashad denied having collected this holiday pay.
- 25 111. In considering this conflict, the Tribunal takes into account there was no evidence about how the claimant found out at some point at the end of August that the holiday pay she was due to her was ready for collection at the garage. It lacked plausibility in the Tribunal's view that the claimant would have just tuned up at the garage to collect her holiday pay without any such communication. This was a matter which Ms Rogers was not asked about, unlike the other operational matters to do with the issue of a contract and
- 30

wage slips. On balance, the Tribunal was satisfied that the claimant did not receive this pay slip or payment of this amount of holiday pay.

Submissions

112. Both sides helpfully produced written submissions which they supplemented
5 with oral submissions. In the interest of brevity these are not repeated here but are dealt with where relevant as part of the Tribunal's Note on Evidence, or Consideration.

Consideration

10 ***Discrimination claims***

113. The claimant brings the following statutory claims:

Pregnancy discrimination under section 18 of the EQA

114. Section 18 of the EQA provides:

- 15 (1) *This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
- (2) *A person (A) discriminates against a woman if, in or after 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 in that protected period as a*
20 *result of the pregnancy.*

.....

- (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*
25 *maternity leave or a right to equivalent maternity leave.*

Automatically unfair dismissal under Section 99 of the ERA.

115. Section 99 provides:

(1) *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—*

5 (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.*

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

(a) *pregnancy, childbirth or maternity.*

Detriment claims under Section 47(c) of the ERA

116. Section 47 of the ERA provides:

15 (1) *An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.*

(2) *A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—*

(a) *pregnancy, childbirth or maternity*

20 117. The detriment/unfavourable treatment complained of is outlined under the Issues noted above.

118. Under section 136 of the EQA, the claimant has the initial burden of proof.

25 119. The prerequisite of success for any of the claims advanced by the claimant that is that it is found that the claimant was treated in the manner complained of because of her pregnancy/childbirth/exercising maternity leave/exercising or seeking to exercise the right to paid maternity leave. Knowledge of the

claimant's pregnancy is a fundamental element in establishing that causal link. For the reasons which are dealt with in some detail under the Note on Evidence the Tribunal did not conclude that Mr Ahmed or Mrs Anand were aware that the claimant was pregnant when she was called her to a disciplinary hearing and the decision was taken to dismiss her.

5

120. The consequence of that conclusion is that all of the detriments complained of under Section 18 of the EQA and 47 C of the ERA, with the exception of the rejection of the appeal which was sent on 15 August, after claimant's letter advising the respondents that she was pregnant, pre- date the respondents knowing that the claimant was pregnant.

10

121. The effect of that conclusion is that these claims must fail as the claimant has failed to establish the causal link between the treatment complained of and any of the proscribed pregnancy related reasons.

122. The exception to that is the unfavourable treatment/detriment which is categorised as the decision to reject the appeal. Mr McParland in fact criticised the respondents for treating the claimant's letter of 14 August 2023 as letter of appeal, pointing out that it was a letter of complaint. He put to Mrs Anand that it was not a letter of appeal and she accepted this. The Tribunal agree that the respondents miscategorised this letter in responding to it an appeal. On that basis, there was no unfavourable treatment or detriment as there was no appeal to reject in the first place. Even if the Tribunal is wrong about this, it was satisfied that the reason for the claimant's dismissal was what Mr Ahmed what considered were her performance issues. In light of that conclusion, it was satisfied that the reason the respondents did not overturn the decision to dismiss the claimant after they received her letter of 14 August 2023, was because they had decided to dismiss her because of these performance issues, which was unconnected to any proscribed reason.

15

20

25

123. For these reasons, the claims under section 18 of the EQA and 47C of the ERA are dismissed.

30

124. The claimant's claim of automatically unfair dismissal under section 99 of the ERA also rests on it being established that the respondents had knowledge

of the claimant's pregnancy. In light of the Tribunal's conclusion as to knowledge, this claim also fails.

Claim for failure to provide a written statement of terms and conditions

125. For the reasons which are set out above the Tribunal concluded that the claimant was issued with a statement of terms and conditions, and this claim fails.

Failure to pay holiday pay

126. The Tribunal concluded that the claimant has an entitlement to receive holiday pay in respect of leave which had accrued but not been paid, on the termination of her employment. In reaching this conclusion it takes into account the terms of the claimants contract of employment dealing with holiday leave . It also takes into account the respondents own calculations in the wage slip of 31 August 2023 , which support the conclusion that holiday pay was due to the claimant.

127. For the reasons given above, the tribunal did not conclude that the claimant had received the wage slip of 31 August or payment of any holiday pay.

128. This claim therefore succeeds, however as this is a hearing on the merits only, the remedy aspect of the claim is held over to the remedy hearing. In the event there is no dispute between the parties as to the quantum of this claim, the Tribunal would expect this claim to be paid immediately.

Wrongful dismissal

129. The claimant was summarily dismissed without notice.

130. A claim for wrongful dismissal will succeed, unless the employer can show that summary dismissal was justified because of the employee's repudiatory breach of contract. Such conduct must be serious, amounting to repudiation of the whole contract.

131. The Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an

employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

132. While the Tribunal was satisfied that the respondents had genuine concerns about the claimants performance, it was not in a position to conclude as a matter of fact that the claimant was guilty of repudiatory conduct.
133. The Tribunal was satisfied that the drive off occurred in July 2023, however Mr Ahmed was at pains to say that it was not just the drive off, but performance issues generally in addition to that which caused him to dismiss the claimant. The Tribunal was presented with a series of undated photographs and WhatsApp messages, some of which were directed to the claimant, but other directed to the claimant and other groups of staff, and it was unable to reach specific factual conclusions as to when each instance complained of occurred or what the claimant did or did not do, and when. The respondents would be held to have affirmed any breaches which occurred before February after, on their own case, they dismissed and then re-employed the claimant.
134. The Tribunal therefore did not conclude on balance that the respondents had established that the claimant was guilty of repudiatory conduct, going to the root of the contract which entitled them to dismiss the claimant summarily, and this claim succeeds. The notice period is agreed to be as per the terms of the contract of employment. In the event there is no dispute regarding the level of a week's pay, the Tribunal would expect this claim to be now dealt with by the respondents. In the event there is a dispute over the level of a week's pay, then the remedy for this claim will be dealt with at the remedy hearing.
135. In the event there is a dispute about a week's pay, the claimant should specify how much she calculates a week's pay to be, and why, within **21 days** of the date of this judgment.
136. In the event the respondent do not accept this calculation ,they should also specify what they calculate a week's pay to be and why. They should produce the claimant's time sheets, rotas and other information which was passed to

their pay roll provider, and the claimant's pay slips, for a period of 12 weeks prior to the date of termination. They should confirm the number of hours worked by the claimant in each of those 12 weeks and the rate of pay per hour. All of this information should be provided within **21 days** of the date of
5 recipe of the information from the claimant.

Unlawful deduction of wages

137. This claim has been held over to a separate hearing.

138. If there is an issue as to the amount of a weeks or days' pay, then the information referred to above should be provided by both parties.

10 139. The claimant should identify how much is claimed as unlawful deduction from wages how this is calculated, and when it became due. If there is further information/documentation which she requires from the respondents this should be identified, and a request made for it. This information should be provided by the claimant within **21 days** of the date of this judgment.

15 140. The respondents should respond to this information within **21 days** of receipt, confirming if they accept the sums claimed are due, and if not why not.

141. Unless there is a disputed issue arising from any documentation request, they should provide the documentation requested within **21 days**. If there is a disputed issue, the respondents should identify this.

20 142. If there is an issue of time bar, this should be identified and the reasons why the respondents say the claim is time barred provided.

25 **Employment Judge: L Doherty**
Date of Judgment: 07 May 2024
Entered in register: 07 May 2024
and copied to parties

30

