EMPLOYMENT TRIBUNALS

Claimant: Ms M Smietanka

Respondent: Meatailer Limited

Heard at: London Central (remotely by CVP)
On: 24, 25 and 26 November 2021

Before:
Employment Judge Heath
Mr R Baber
Mr M Ferry

Representation
Claimant: Mr L Werenowski (Counsel)
Respondent: Mr S Rahman (Counsel)

RESERVED JUDGMENT

1. The claimant's claims for pregnancy and maternity discrimination under section 18 Equality Act 2021 are not well-founded and are dismissed.

2. The claimant's claims for unauthorised deductions from wages are not well-founded and are dismissed.

REASONS

Introduction

1. By an ET1 presented on 12 March 2020 the claimant claims pregnancy and maternity discrimination and unauthorised deduction from wages against the respondent. She entered into ACAS early conciliation on 4 December 2019 and received her certificate on 4 January 2020.

Issues

2. At the start of the hearing the issues were agreed as follows: -

Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

2.1. Did the respondent treat the claimant unfavourably by doing the following things:

2.1.1. Reducing her hours and consequently her pay;

2.1.2. Demoting her to a less prestigious position;

2.1.3. Requiring her to do more physical work;

2.1.4. Taking on a member of staff to replace her, who took over her duties;

2.1.5. Failing to include her on the New Management Team photograph on social media;

2.1.6. The chef becoming unreasonably demanding;

2.1.7. The chef telling her she was useless;

2.1.8. Treating her in a demeaning way.

2.2. Did the unfavourable treatment take place in a protected period?

2.3. Was the unfavourable treatment because of the pregnancy?

2.4. Was the unfavourable treatment because the claimant was exercising or seeking to exercise the right to ordinary or additional maternity leave?

Time limits

2.5. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 November 2019 may not have been brought in time.

2.6. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.6.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.6.2. If not, was there conduct extending over a period?

2.6.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.6.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.6.4.1. Why were the complaints not made to the Tribunal in time?

2.6.4.2. In any event, is it just and equitable in all the circumstances to extend time?

Unauthorised deductions

2.7. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

Procedure

3. At the start of the hearing Mr Werenowski made an application for a postponement on the claimant's behalf. In brief, he reminded the tribunal that this matter had last been before the tribunal on 29 June 2021 when it had been postponed to today. There had been slippage in case preparations on both parties' sides. The claimant had received two witness statements prior to the 29 June 2021 hearing. There were ongoing problems with the bundle, and the claimant had prepared the bundle despite the direction that the respondent was to prepare it. Mr Werenowski received five additional witness statements from the respondent yesterday. Mr Werenowski had concerns that the tribunal would not be able to deal with 10 witnesses within the time slot, especially as a Polish translator would be needed for the claimant and a couple of the other witnesses.

4. Mr Rahman observed that a number of witnesses were not central and would not take long. The two central witnesses' statements had been served previously. The factual issues were narrow, although he accepted that one witness, Mr Doffman, would be giving evidence which the claimant may need to give instruction on, that this could be done during breaks in the hearing.

5. We did not grant the application for a postponement. The full merits hearing of this matter has been postponed twice before, the last time on the day the hearing was due to take place. Employment Judge Spencer on that occasion observed that further postponements would be unlikely except in exceptional circumstances.

6. While the circumstances of late exchange of witness statements, against a backdrop of slippage in case preparation on both sides, is not ideal, it is not exceptional. The real issue, certainly as regards any prejudice to either party, is how the claimant can prepare to deal with the evidence of Mr Doffman effectively. The claimant would be giving evidence first in this case and Mr Doffman would not be giving evidence until the following day. There would be sufficient time overnight for Mr Werenowski to take instructions and prepare cross examination.

7. On the other hand, if this matter were postponed it would not be relisted before June 2022. This is a case where the claim was presented on 12 March 2020 and concerns a fairly narrow set of events over the course of summer and autumn 2019.

8. It would not be proportionate to postpone the matter, it would cause substantial delay and further expense, and the time available to prepare for Mr Doffman's evidence overnight is sufficient to ensure the parties are on an equal footing as regards late exchange of that evidence.

9. The tribunal was provided with a 184 page bundle. The claimant, Ms A Majewska and Mr D Zentiek provided witness statements and gave evidence on behalf of the claimant. Ms K Jasinska, Mr K Dworcynski, Ms A Duarte, Mr S Volante, Mr T Doffman, Ms S Taylor and Ms S Moorhouse provided witness statements. Mr K Dworcynski, Mr T Doffman, Ms S Taylor and Ms S Moorhouse gave evidence on behalf of the respondent and the other statements were tendered.

10. Ms Majewska came to give evidence for the claimant at the start of day two of the hearing. More or less immediately it was established that she was currently in Poland. When a witness is not currently in the UK, the party calling the witness should ensure that it was lawful for them to give evidence from the country in which they are based. We gave Mr Werenowski an email address at the Foreign, Commonwealth & Development Office (FCDO) where he could inquire whether it was lawful for evidence to be given from Poland. We agreed to put Ms Majewska's evidence back pending a response.

11. At the start of day 3 of the hearing, Mr Werenowski told us that he had still not heard from the FCDO, but that he had asked his cousin in Poland, who was a lawyer specialising in civil law, if she was aware of any code prohibiting a Polish citizen from giving evidence to a tribunal overseas. Her response was *"I don't think so, some cases when you have to keep professional secrecy, but nothing in the code*". We have no concern whatsoever that Mr Werenowski was not properly putting all relevant matters before us, but we still felt uneasy about proceeding. We noted that Poland was not on the FCDO list of countries who do not have objections to witnesses giving evidence in UK proceedings. We are also aware that until 30 December 2020 the UK was part of a reciprocal consent agreement with every EU member state in relation to the Hague Convention of the Giving of Evidence from Abroad 1970. However, we were unaware what the current position was in respect of Poland after the reciprocal consent agreement ended, and we had not been persuaded that it was lawful for the witness to give evidence from there.

12. Mr Werenowski said that Ms Majewska was coming back to London on 1 December 2021 and would be available to give evidence after that. He described her as an important eyewitness of treatment meted out to the claimant. He asked that the tribunal relist after that date to hear her evidence. The respondent resisted this and submitted that such an approach would be disproportionate given the probative value of her evidence. The respondent's witnesses had given unchallenged evidence that Ms Majewska would have

worked with the claimant for a very short period of time, and he suggested she may have an agenda as she had been dismissed for poor performance. We considered Ms Majewska's witness statement, and the evidence about her employment given by Mr Doffman, which had not been challenged, and in the circumstances, we did not hear from Ms Majewska, and we did not relist to hear her evidence. We indicate that we would be receptive to arguments about what weight to give to her witness statement given that she had attended the tribunal and had been ready and willing to give evidence.

The facts

13. The respondent is a company which operates and manages a chain of restaurants. It operated a restaurant known as MEATliqor in Covent Garden ("the restaurant") where the claimant was employed from 5 May 2018. She was initially employed as a Kitchen Assistant, but in around November/December 2018 she was promoted to the role of Grill Boss, which was also known as Second Chef.

14. Ms Taylor was the General Manager of the restaurant from 10 April 2019. Mr Dworczynski was employed by the respondent from February 2018, and became the Kitchen Manager at the restaurant on 9 October 2018. It was he who promoted the claimant to the role of Grill Boss.

15. The restaurant had 14 tables and was open from around noon to 11.30 pm each week days, and later at weekends. The restaurant was generally not full on week days from Monday to Wednesday, but would be busy for the rest of the week and weekend. It's peak hours were between 12-3pm and 7-10pm. The restaurant employed front of house staff, and back of house staff in the kitchen (descending in order of seniority) a Kitchen Manager, a Grill Boss, two Grill Chefs and two Kitchen Assistants.

16. The claimant was provided with a job description which was a combined Kitchen Manager/Grill Boss job description. The duties consisted of 12 short bullet points, eight of which appeared to be clerical in nature. The first duty, however, was set out in the first bullet point "*Being involved in and overseeing day-to-day food preparation, ensuring that it is done to the recipe provided and always to the highest standard*".

17. The evidence of Ms Taylor and Mr Dworczynski was that, essentially, the role was to oversee the kitchen service, and that paperwork occupied no more than 20 minutes to half-an-hour per shift. The respondent's evidence was also that staff were not precious about defined roles and all would "muck in" to ensure service. Ms Taylor told us that even as a General Manager she would often step in to prepare food and wait tables. Much of the work of all kitchen staff involved a significant manual element, be it cooking, food preparation or cleaning. Kitchen staff would habitually clean up after themselves as they went along, but each week a "deep clean" of the kitchen would be carried out with strong chemical cleaning agents.

18. We prefer the respondent's evidence in this regard and find that the claimant's role was primarily to oversee kitchen service. We do not accept

that a role that is sometimes known as Second Chef in a kitchen of a reasonably small to medium-size restaurant would be largely clerical. The overwhelming likelihood is that the bulk of the role was as set out in the first bullet point of the job description, namely overseeing day-to-day food preparation. This was, we find, largely a hands-on rather than clerical role. This is also supported by how the claimant described her role during the pregnancy risk assessment that was to take place (see below).

19. All staff were on zero hours contracts, meaning they were only paid for the hours they worked, and they were not guaranteed work.

20. One of the functions of the Kitchen Manager, assisted by the Grill Boss, was to draw up a rota allocating shifts to members of staff. A sample rota appeared in the bundle. The Kitchen Manager would have to ensure that the kitchen was adequately staffed between 10 AM and 11:30 PM each weekday and later at weekends. A member of staff could be allocated a single shift, which (on weekdays) would generally be from 10 AM to 5 PM or 5 PM to 11 PM, or what is known as either a split shift or a double shift where they would be to cover both early and late shifts with a break in the middle when the restaurant was less busy. An early shift could carry some more heavy lifting duties associated with opening up the kitchen. Someone at Kitchen Manager or Grill Boss level would always be needed to open up the kitchen. The kitchen manager would send out weekly rotas to staff a week in advance.

21. The rota was prepared on a computerised system which is linked in with the respondent's payroll system. At the start of each week the rotas for all staff would be printed up and a hard copy kept in the restaurant. If staff worked hours different to those they had been rostered, a handwritten note would be made on the hardcopy rota and the computerised rota would be amended at the end of the week. Staff were, understandably, very quick to point out if hours they had worked had been mis-recorded and they had been or were likely to be underpaid. The hours worked would then determine staff pay. This system meant an accurate record was kept of the hours worked by staff and what they were paid.

22. Kitchen staff would generally be allocated work five days a week. On two days they would work a double shift and on three days a single shift. There would be some scope for picking up additional hours to cover absences and staff could occasionally be deployed, if they chose, to cover shifts in the respondent's other London restaurants.

23. On 20 May 2019 Mr Dworczynski went on annual leave for around three weeks. Prior to going he prepared rotas to cover the period of his absence. It was part of the Grill Boss's role that they would deputise for the Kitchen Manager in his or her absence, although this was not formally recorded in the job description. When Mr Dworczynski was away, the claimant covered his role. It was not a question, as the claimant asserted, that she effectively had to do two jobs during this period. She acted up into Mr Dworczynski's role and someone stepped in to cover her role.

24. During late spring and early summer Mr Dworczynski had certain concerns with the claimant's performance. They were not major, and he did not feel the need to take them up under a formal process. The respondent's informal method of addressing performance concerns does, however, have a degree of formality about it. On 22 June 2019 Mr Dworczynski called the claimant into a meeting to discuss his concerns. At the end of the meeting he produced an informal letter noting the concerns and outlining the improvements required. We find that this was not an acrimonious meeting, and the claimant countersigned the letter. She also made efforts to address the concerns and thereafter performed her role satisfactorily.

25. On 26 June 2019 the claimant told Mr Dworczynski that she had recently taken a home pregnancy test and found out that she was pregnant. Mr Dworczynski's evidence was that this disclosure took place at the meeting of 22 June 2019. Nothing really turns on this issue, but we find it more likely that a woman would remember the date she learnt she was pregnant for the first time than her manager.

26. Mr Dworczynski was delighted to learn of the claimant's good news. They enjoyed a good working relationship as is evident from the WhatsApp and SMS messages between them that appeared in the bundle. It was put to Mr Dworczynski that he was an ambitious man who viewed the prospect of a pregnancy in his team as "*a drag on the team*". Mr Dworczynski denied this accusation. He readily admitted being ambitious, but took the view that managing a pregnant member of a well-functioning team could only be a good thing for his career aspirations. It is beyond doubt that many businesses, and many individuals within them, view a woman's pregnancy negatively. There was, however, no evidence to support the accusation levelled at Mr Dworczynski, and the text correspondence would rather suggest he was considerate and accommodating during the claimant's pregnancy.

27. Mr Dworczynski discussed with the claimant what adjustments she might like to assist her in her pregnancy. The claimant indicated that she would not want to work double shifts, early mornings or late evenings. The respondent's payroll system shows that in the weeks prior to her disclosure of pregnancy she worked between around 42 hours and 50 hours. In the two weeks following her disclosure he worked 38.3 hours and 36.6 hours.

28. The claimant was on leave for the next three weeks. On the week commencing 29 July 2019 she worked two shifts. On week commencing 5 August 2019 she worked 31 hours with two double shifts.

29. Ms Taylor was also told of the claimant's pregnancy. This was her first experience of managing a pregnant member of staff. She was candid with the tribunal that if it was felt that there was a delay in organising a formal assessment for the claimant, then she accepted any blame, which she attributed to her inexperience.

30. Ms Moorhouse runs a training and consultancy service for the hospitality industry, an industry she herself had worked in for many years. She was invited by the respondent to carry out a pregnancy risk assessment ("PRA") in

respect of the claimant on 6 August 2019. Ideally this should have been carried out sooner, but a combination of the claimant's holiday and Ms Taylor's admitted inexperience meant this was not done. We do not accept that this was part of a deliberate or negligent disregard of the claimant's circumstances.

31. Ms Moorhouse's approach to PRAs is to shape their contents around the needs of the mother-to-be and to seek their input. The claimants PRA was no different.

32. Ms Moorhouse undertook the assessment on 6 August 2019 with the claimant and Ms Taylor present. The claimant was happy and chatty and able to articulate her needs in English. After the meeting, Ms Moorhouse created a table setting out eight different working conditions ("Movement and Posture", "Manual Handling", "Working time" etc), setting out the nature of the risk, what to look out for, and finally action to be taken.

33. The PRA itself has a box for a signature of the pregnant employee which is empty in the case of the claimant's. However, Ms Moorhouse's evidence that the PRA accurately reflected the input from the claimant was not challenged in any of the pleading, witness statements or in cross-examination. We accept that it accurately reflected the ground covered at the assessment on 6 August 2019.

34. The PRA set out the following:-

    34.1. Under **Movement and Posture** one of the things to look out for was "*Does she have to sit for periods of more than 2 – 3 hours?*" The **Action** was "*No, Martyna does small amounts of paperwork*".

    34.2. Under **Manual Handling**, one of the things to look out for was "*Does the job involve rapid repetitive lifting (even of lighter objects)?*" The **Action** was "*When unpacking the delivery, Martyna will ask for help*".

    34.3. Under **Working Time** one of the things to look out for was "*Is that the woman expected to work long hours/overtime?*". The **Action** was "*No, Martyna does 35 hours per week*".

    34.4. Also under **Working Time** one of the things to look out for was "*Does she have some flexibility or choice over her working hours?*" The **Action** was "*Yes, Martyna is in charge of her rota. Martyna will only do single shifts with another kitchen manager with her and a strong team*".

    34.5. Again, under **Working Time** one of the things to look out for was "*Does the work involve very early starts or late finishes*?" The **Action** was "[*Martyna] will finish no later than 11:30 PM – Travel is fine on public transport*".

35. Two months prior to the claimant becoming pregnant the respondent had decided to promote one of its Senior Grill Chefs, Ms Jasinka, to the role of Grill Boss to join the claimant in that role so that there were two Grill Bosses. Ms Taylor gave unchallenged evidence of this. In August 2019 Ms Jasinska was formally promoted to Grill Boss and her training was fast tracked to

ensure she would be ready to carry out the role on her own when the claimant went on maternity leave. The claimant was heavily involved in Ms Jasinska's training, and was in charge of her. As with all other members of kitchen staff apart from the claimant, Ms Jasinska was rostered to work two double shifts per week.

36. From early August onwards the claimant worked between 27.2 hours per week and 30.3 hours per week (apart from one week where she had five days holiday). Ms Jasinska was working between 34.9 hours to 44.5 hours per week.

37. The claimant's oral evidence was that she was "*constantly asking for more hours*" and that she "*asked every single rota to have hours increased*". As set out above, text messages between the claimant and Mr Dworczynski appeared in the bundle. A number of these messages are about the hours and shifts that the claimant was doing. Sometimes Mr Dworczynski would ask the claimant whether she could work a shift; sometimes she accepted sometimes she did not. There is not one single request from the claimant to have her hours increased. Indeed, the picture which emerges from a reading of these messages is of a good working relationship, with Mr Dworczynski fully prepared to accommodate reasonable requests from the claimant (such as attending work late and providing cover when she felt sick). He also showed concern for the claimant, urging her to speak with her doctor before she took a flight when she was pregnant.

38. We find this lack of complaint about hours all the more surprising given that rotas were sent out to staff a week in advance. It would have been clear to the claimant in advance of her working week what hours she was given, and she would have had plenty of opportunity to complain.

39. We find that the contemporaneous documentary (i.e. Whatsapp and SMS messages) does not support the claimant's claim that she was asking for more hours. The explanation that best fits the available facts, and ties in perfectly with the documentary evidence (the PRA and texts), is that the claimant specifically requested not to work double shifts, to work a maximum of 35 hours per week and not to work late. These factors combined to make it inevitable that the claimant worked fewer hours than she had done before she became pregnant.

40. In November, this does change, as we set out below.

41. In terms of the tasks undertaken by the claimant following her disclosure of her pregnancy, she was not required to do any heavy lifting or deep cleaning. The nature of her role meant that she had to clean up after herself as she went along but this did not involve the use of noxious chemicals. At her request, she was not asked to do early starts which might have involved an element of heavy lifting.

42. The claimant's case was that she was effectively demoted to carry out the role of a Kitchen Assistant doing manual labour. Her case was that her management role was passed over to Ms Jasinska. Again, if this was the

case, she mentioned none of this in her text correspondence with Mr Dworczynski. The claimant's case involves an allegation that she had her role removed as an act of discrimination and was given manual labour that potentially was dangerous for her as a pregnant woman. This is a very serious allegation, and we find it implausible that if this were the case that she would not have mentioned it in her texts.

43. The claimant's case is supported by the evidence of Mr Zientek and Ms Majewska.

44. Mr Zientek was the claimant's baby's father and he was formerly a Kitchen Manager in one of the respondent's other London restaurants. He told the tribunal that he and the claimant were no longer together. In his witness statement Mr Zientek said that he "*noted that the claimant's work changed*" in that she worked fewer hours and did "*a lot more of the kitchen assistant work such as cleaning, scrubbing, and moving food in bulk and preparing it*".

45. Mr Doffman gave unchallenged evidence that Mr Zientek was not employed at the restaurant but covered what would amount to around three shifts at the restaurant working alongside the claimant prior to her disclosing her pregnancy. He did not work any shifts alongside her after she disclosed her pregnancy.

46. Mr Zientek's oral evidence was that he often picked up the claimant after work and on around 40 occasions saw her doing manual work such as cleaning the grill. Ms Taylor and Mr Dworczynski were clear i) restaurant staff are trained to observe when people come through the front door and that the rear door is a fire door which could not be opened from the outside ii) that they only saw Mr Zientek at the restaurant a maximum of three times, and iii) the kitchen could not be observed from outside the restaurant, iv) Mr Zientek had his own job at another restaurant and it was unlikely he would attend the restaurant 40 times to pick up the claimant, v) on the few occasions he actually was at the restaurant he may well have seen the claimant clean up after herself, but that this would not have been heavy manual labour.

47. Mr Zientek did not put any of the evidence of how he had observed the claimant in his witness statement, and his oral evidence gives the impression of a late adjustment to counter Mr Doffman's evidence showing the limitations of his perspective.

48. Ms Majewska's witness statement sets out that she knew from when she worked at the restaurant that the claimant carried out a number of administrative tasks. She said "*in July 2019 onwards things changed when the claimant became pregnant. I noted that the claimant's work changed. She worked less hours. She did a lot more of the kitchen assistant work such as cleaning scrubbing and moving food in bulk and preparing it*." This is more or less identical wording to Mr Zientek's witness statement.

49. Mr Doffman gave unchallenged evidence that Ms Majewska worked at the restaurant from November 2018 until 10 July 2019. She worked for around 10 days after the claimant's disclosure of her pregnancy, during which (according to hours recorded on the respondent's payroll system) the claimant's hours

were not significantly reduced from those she had been working previously. He also pointed out that she had been dismissed on 10 July 2019 following multiple performance reviews.

50. As set out above, Ms Majewska was ready and willing to give evidence but we did not permit her to do so. We cannot speculate what additional evidence she may have given or how she may have responded to the inevitable line of cross examination she would have faced suggesting that she was a witness with an axe to grind and a limited perspective. However, the key evidence for us as a tribunal was the fact that the claimant did not complain to Mr Dworczynski about her alleged reduction in role in her texts. We do give some weight to Ms Majewska's witness statement, but we cannot ignore the unchallenged evidence which does undermine it to an extent.

51. In the circumstances, we find that the claimant did not have her role reduced. We find that Ms Jasinska would have been undertaking some of the more managerial aspects of the Grill Boss role, but this was very much under the direction of the claimant herself. Again, if the claimant was concerned about a possible loss of status, a loss of hours or Ms Jasinska benefiting in any way at her own expense this was not made known to Mr Dworczynski.

52. Ms Jasinska provided a witness statement for the respondent. In it she set out that she was both willing to support the respondent but in a difficult position because she knows the claimant's family. She put in a second witness statement during the course of the hearing to counter an allegation made by the claimant under cross examination about Mr Dworczynski allegedly saying to her that if his wife was pregnant he would not want her to work long hours. We can appreciate how such a witness might sense themselves in difficulty. However, we found it very hard to gauge how much weight we should give to the statement of a witness who makes a firm decision not to attend the tribunal. Accordingly, we have attached no weight to her statements. We feel ourselves in a position to resolve the conflicts in this case by reference to the witnesses who gave live evidence to the tribunal.

53. As set out above, the claimant gave oral evidence that Mr Dworczynski said to Ms Jasinska that he would not want his own wife working long hours if she was pregnant. Mr Dworczynski denied this. This is an allegation which emerged for the first time under cross examination. It is an allegation that the individual most deeply implicated in the pregnancy discrimination which the claimant alleges against the respondent had said something that suggested a discriminatory intention. It is surprising, therefore, that this evidence did not emerge sooner. The fact that it did not do so undermines our willingness to accept it. We do not find that Mr Dworczynski did say this.

54. On a date unknown, Ms Taylor had a management meeting with Ms Jasinska and a new Assistant Manager and Supervisor (who were also personal friends of hers). The claimant was not working on this day. After the meeting Ms Taylor took a photograph that she posted on her own personal Instagram account, making a comment about the new management team. The respondent's Instagram account shared the picture.

55. It is entirely understandable that the claimant may have felt (quite literally) "out of the picture", and felt that her status as a manager at the restaurant was undermined. We accept Ms Taylor's evidence that all she was doing was posting a personal picture on her personal social media with no intention of undermining the claimant. She took the view that her own personal social media does not need to be justified to anyone. It was merely a coincidence that the claimant is not in the restaurant when the picture was taken. Ms Taylor was neither asked nor felt the need to take and post another photograph when the claimant subsequently came on shift.

56. On 6 November 2019 the claimant emailed Ms Moorhouse saying that before she was pregnant she worked 50 hours per week, and after that her hours reduced. She said "*I start to feel useless because there was replacement for me and automatically was no longer needed to do my duties just come to work to prep and go home. Holiday rate getting worse and worse every week because of hours and I shouldn't be worried about it now but I'm especially I told [Mr Dworczynski] during a few months that I want more hours which affect on my SMP*".

57. Ms Moorhouse emailed back on 11 November 2019 asking whether the claimant was working the following day. The claimant responded shortly afterwards saying "*I spoke with [Mr Dworczynski] again about my hours and we've sorted a bit more full-time until I start my mat so sound better*".

58. Mr Dworczynski confirms that the claimant approached him to ask him for more hours in November but not before then. Mr Dworczynski arranged for the claimant to do a few more hours, which is reflected on the respondent's system. We find that this was the only time the claimant asked for more hours, and that her request was readily accommodated.

59. The claimant went on maternity leave on 15 December 2019. The claimant resigned from her role on 9 October 2021 following her maternity leave and a subsequent extended absence.

The law

Pregnancy and maternity discrimination

60. Section 18 Equality Act 2010 provides: -

> *(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 the protected period in relation to a pregnancy of hers, A treats her unfavourably—*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it.*
>
> *(3) …*

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

61. The burden of proof provisions (also applicable to harassment and victimisation) are set out in section 136 Equality Act 2010:-

(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.

62. By analogy with the approach adopted in disability discrimination (see *Williams v Trustees of Swansea University Pension & Assurance Scheme* [2019] IRLR 306) 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. In the EAT Langstaff P in Williams had observed *'treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous … Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be*.'

63. When considering direct discrimination, the tribunal must examine the "reason why" the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (*Amnesty International v Ahmed [*2009] IRLR 884). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an "effective cause" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1996] IRLR 372).

64. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council [2006] ICR 1519*). The Supreme Court has observed that provisions "*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*" (*Hewage v Grampion Health Board [2012] UKSC 37*).

Deductions from wages

65. Section 13 of the Employment Rights Act 1996 ("the ERA") provides: -

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

[…]

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

66. Section 23 sets out the right to present a complaint to the tribunal, and provides: -

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

[…]

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made

[…]

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions

[…]

the references in subsection (2) to the deduction […] are to the last deduction […] in the series […].

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

67. In order for the tribunal to have jurisdiction to hear a claim for unlawful deductions the claimant must be for an identifiable sum (*Coors Brewers Ltd v Adcock* [2007] IRLR 440). In Coors Wall LJ observed that Part II ERA "*is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be swift and summary procedure*".

Conclusions

Pregnancy and maternity discrimination

Reducing her hours and consequently her pay

68. The schedule of the claimant's hours produced from computerised payroll records show that the claimants hours did reduce following her disclosure of pregnancy. The reason why she worked fewer hours was because she requested, when she knew she was pregnant, that she did not work double shifts, did not work early or late and that she was on a zero hours contract. This inevitable had an effect on the number of hours she could work. The normal working week would be 3 days of single shifts and 2 of double shifts. Not wanting to work double shifts would take out the equivalent of two shifts a week. The respondent accommodated her requests. The reduction in hours was something which was set out in the PRA which was based on her input. Also, the fact that the claimant did not complain about a reduction of hours in her texts to Mr Dworczynski supports the view that the reduction of hours was not something she viewed negatively, at least until November.

69. The explanation that best fits the facts, is that in late October early November the claimant began to realise that working fewer hours would have a knock-on effect on her statutory maternity pay. It is at this point that she wrote to Ms Moorhouse to raise the issue of hours. Her reply to Ms Moorhouse on 11 November 2019 reveals that within days of this the issue had been resolved to her satisfaction.

70. In the circumstances, a reduction in hours following a request cannot amount to unfavourable treatment. Additionally, the reason for this treatment was not the claimant's pregnancy but her requests. This claim is not upheld.

Demoting her to a less prestigious position; Requiring her to do more physical work; Taking on a member of staff to replace her, who took over her duties

71. These were expressed as three different issues when the tribunal clarified the issues with the parties at the start of the hearing, but are all connected and will be dealt with together.

72. We have found as a fact that Ms Jasinska's promotion to 2nd Grill Boss had been in the pipeline before the claimant disclosed her pregnancy. The claimant's disclosure fast-tracked the promotion as Ms Jasinska needed to be in a position to carry out the role when the claimant went on maternity leave. We do not accept the claimant's evidence that, effectively, Ms Jasinska became her boss. Again, the good working relationship between the claimant and Mr Dworczynski is evident from their text correspondence. Had such a stark demotion, whether formal or *de facto*, taken place the claimant would

surely have mentioned it. It is often the case that power imbalances in an employment relationship, along with other factors, mean that employees understandably feel unable to complain of discrimination or poor treatment. However, there is nothing in the evidence to suggest that this was the case here.

73. On the question of physical work, one line pursued by the claimant appeared to be that most of the items in her job description were clerical in nature and that after she became pregnant most of her work was of a physical nature. It was put to the respondent's witnesses that the claimant reverted to doing the work of a Kitchen Assistant. Our findings of fact do not support this. The vast majority of claimant's role was set out in the first bullet point of her job description, and the clerical aspects occupied, at most, half-an-hour per shift. We have also found that there was an element of blurring of roles in a busy kitchen which even led to the most senior manager at times "mucking in" to prepare food and wait tables. We have no doubt that there would have been a degree of "mucking in" done by the claimant, but that she was not required to do heavy tasks or anything inappropriate. We also do not conclude that there was a pattern of taking away managerial work and substituting it with menial work. Some more clerical/managerial tasks were undertaken by Ms Jasinska during her training, but the claimant in fact oversaw this.

74. The claimant's case is expressly that her change in duties was inappropriate for a pregnant woman. In her witness statement she says that because of the physical work "*I became worried for the welfare of my unborn baby"* and *"I feared I would harm my baby because I was being given physical work*". It is entirely understandable that a pregnant woman should be concerned for her unborn child. But these are very serious allegations, and once again it is all the more surprising that no contemporaneous complaint appears to have been made. There is nothing about the respondent requiring her to do more physical work or changing her duties in any way in her text correspondence with Mr Dworczynski.

75. As we have set out in our findings of fact, we consider that the claimant's witnesses' evidence cannot be considered to provide any significant support to her claims.

76. In respect of these issues, we conclude that the claimant was not treated unfavourably. The reason why the claimant did the tasks she did were because either they were part of her role or that she was involved in the training up of a colleague whose promotion decision had predated her pregnancy. We do not uphold this part of the claim.

Failing to include her on the New Management Team photograph on social media

77. We have accepted Ms Taylor's explanation of how and why the photograph was posted on the respondent's Instagram account. Ms Taylor had simply taken a photograph of managers who were in the office at one particular time (when the claimant was not there) and posted it on her personal Instagram account. This had been shared by the respondent's account. Whilst this could

amount to unfavourable treatment, we conclude that the reason why the respondent posted this photograph had nothing to do with the fact that the claimant was pregnant or that she would at some stage be exercising the right to maternity leave. We do not uphold this part of the claim.

The chef becoming unreasonably demanding

78. This allegation in the claimant's ET1 was not expanded on by the claimant in evidence or explored in cross examination. The tribunal is uncertain exactly what is meant, but has not found any instances of Mr Dworczynski being unreasonably demanding. The reasonably extensive text correspondence is actually more suggestive of a considerate and accommodating manager. We have found no evidence of unfavourable treatment or that any demands made by Mr Dworczynski in any way related to the fact that the claimant was pregnant or would be seeking to exercise the right to maternity leave. We do not uphold this aspect of the claim.

The chef telling her she was useless; Treating her in a demeaning way

79. These two issues are related and will be considered together. Again, these were raised in the claimant's ET1 but not expanded on in evidence or explored in cross examination. What we do see in the claimant's email to Ms Moorhouse on 6 November 2019 is the claimant saying "*I start feel useless because there was a replacement for me and automatically was not needed to do my duties*". But there is no evidence that Mr Dworczynski told her she was useless. Once again, these allegation run entirely counter to the tenor of the text correspondence between him and the claimant. The Tribunal concludes there was no unfavourable treatment because of pregnancy or maternity. These parts of the claim are not upheld.

Unauthorised deductions from wages

80. The claimant clarified in cross examination that her case was that she should have been given more hours, and that this was an act of pregnancy discrimination. Mr Werenowki made no references to this aspect of the claim in his closing submissions.

81. As set out in the section on the law claims under Part II ERA must relate to ascertainable sums where the employer has paid the employee less than what was properly payable on a particular occasion or occasions. A deduction from wages claim cannot be brought by a zero hours worker who claims that he or she should have been given more hours. Had we found for the claimant in respect of pregnancy discrimination in relation to alleged loss of hours we could have compensated her. However, we do not uphold her unauthorised deduction from wages claim.

Employment Judge **Heath**

10 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 10/12/2021.

FOR EMPLOYMENT TRIBUNALS