EMPLOYMENT TRIBUNALS

Claimant: **Miss E Taylor**

Respondent: **Domino's Pizza West Country Limited**

Heard at: **Plymouth** **On: Monday 14, Tuesday 15 and Wednesday 16 December 2020**

Before: **Employment Judge Matthews**

Members: **Ms R A Clarke & Mr J Howard**

Representation:
Claimant: **Mr K Loomes - Claimant's partner**

Respondent: **Ms S Clarke of Counsel**

Unanimous Reserved Judgment

1. Miss Taylor's claim that she was unfairly dismissed by the Respondent Company because the reason or the principal reason for her dismissal was her pregnancy, by reference to section 99 of the Employment Rights Act 1996, is dismissed.

2. Miss Taylor's claim that she was discriminated against by the Respondent Company because she was dismissed because of a pregnancy of hers, by reference to section 18 of the Equality Act 2010, is dismissed.

3. Miss Taylor was discriminated against by the Respondent Company because it failed to carry out a risk assessment on being notified of a pregnancy of hers, by reference to section 18 of the Equality Act 2010. The Respondent Company is ordered to pay to Miss Taylor £900 as compensation in this respect together with interest on that sum of £100.41.

REASONS

INTRODUCTION

1. Miss Emily Taylor claims that she was unfairly dismissed because the principal reason for her dismissal was a pregnancy of hers by reference to section 99 of the Employment Rights Act 1996 (the "ERA")). Miss Taylor also claims that she was discriminated against because her dismissal was unfavourable treatment because of her pregnancy by reference to section 18 of the Equality Act 2010 (the "EA")). Miss Taylor's third claim is that she was discriminated against because the Respondent Company failed to carry out a risk assessment on learning of her pregnancy, again by reference to section 18 of the EA.

2. Central to Miss Taylor's case is this. Miss Taylor says the Company purported to dismiss her for two reasons. First, re-dating perishable stock (foodstuffs). Second, authorising holiday pay for employees in breach of Company procedures. Miss Taylor says that the re-dating of stock was a common practice known to and/or authorised by those who dismissed her. Further, in context, there was nothing wrong with the way she handled holiday pay. That being the case, the real reason she was dismissed was something else and that "something else" was her pregnancy.

3. The Company defends the unfair dismissal and discrimination claims. In short, the Company says that Miss Taylor's dismissal had nothing to do with her pregnancy and it did carry out any required risk assessment.

4. Miss Taylor gave evidence supported by a written statement. Mr Kyle Loomes (formerly a Store Manager with the Company) and Mr Thomas Bolton (formerly a Driver with the Company) gave evidence in support of Miss Taylor and produced written statements. There was a statement in support of Miss Taylor from Mr Jordan Moss (formerly a Team Member and Shift Manager with the Company). Mr Moss did not appear and we explained to the parties that we would read the statement but give it little evidential weight.

5. Mr Colin Rose (Support Manager), Ms Leah Rose (Area Manager for the Company's 5 stores in Plymouth and Mr Colin Rose's Sister) and Ms Carys Allen (Business Development Manager) gave evidence on behalf of the Company. Each produced a written statement.

6. There was an agreed bundle of documentation. All references in this Judgment to pages are to pages of the bundle unless otherwise

specified. Ms Clarke produced a Case Outline and supporting authorities.

7. The Tribunal reserved judgment to better consider the evidence and its conclusions.

8. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Section 136 of the EA (burden of proof) is applied as necessary.

FACTS

9. The Rose family runs a Domino's Pizza franchise through the Company. The Company has 11 stores. There are 5 in Plymouth, 4 in Torbay and 2 in Taunton. The Company employs some 350 people.

10. Miss Taylor started work with the Company on 18 April 2018 as a Driver. On 4 March 2019 Miss Taylor was promoted to Store Manager of the Company's Exeter Street, Plymouth - City Centre, outlet on a 26 week probationary period (117). Miss Taylor was dismissed with pay in lieu of notice some 5 months later, on 30 July 2019. As a Store Manager in the Plymouth Area, Miss Taylor reported to Ms Rose.

11. Mr Loomes who, we understand, is Miss Taylor's partner, worked for the Company as a Store Manager from 8 August 2018 until 23 July 2019. In mid-September 2018 Mr Loomes took over the Company's Plymouth - Mutley Plain outlet. Mr Loomes also reported to Ms Rose.

12. The Company used a review system to monitor aspects of performance in its outlets. The system included a periodic (at least once a month) "OER" (Operations Evaluation Report). These seem often to have been conducted by Ms Natalie Ariss (Training and Development Manager). In turn, the internal OERs are backed up by Domino's Head Office random external audits 4 times a year. The ultimate sanction for failure to pass the Head Office audits is the loss of the franchise.

13. On 25 February 2019, before Miss Taylor became the Store Manager, an OER was carried out for the City Centre outlet (237-241). Although it was Miss Taylor's shift and she was the Manager in Charge, Miss Rose was named as the Store Manager. Under the heading "Food Safety", sub-heading "All products within shelf life" the OER records a number of products as being out of date or undated. The "Action Plan" dated 4 March 2019 records this as rectified.

14. After Miss Taylor had become Store Manager, there was a further OER on 18 April 2019. There was an exchange of e-mails on the subject on the same day (123-124). Items of out of date stock had been identified. Ms Rose expressed herself as “Very concerned” with the overall OER score.

15. A further OER was conducted by Mr Connor Matthews (Store Manager - St Budeaux) at the City Centre outlet on 24 April 2019. There is an e-mail exchange about this at 126. Undated, wrongly dated and out of date items of stock had been found.

16. On 8 May 2019 there was another OER at the City Centre outlet. The e-mail exchange is at 127-129. Stock had been found to be undated. Miss Taylor points out that, despite this and the earlier incidences, no formal action was taken against her. Rather, Ms Rose sent Miss Taylor a supportive message, in essence apportioning blame to Mr Ollie Rouch, who had been in charge at the relevant time.

17. At this point we move away from recording the mainstream events to note Mr Loomes’ evidence on the subject of re-dating and, indeed, many other alleged breaches of health and safety standards aimed at the Company. Mr Loomes, both in his statement and his questioning of the Company’s witnesses, made no bones about his assertion that the re-dating of stock was *“common practice within the company”* (WS 5). Generally, Mr Loomes was scathing about the Company’s health and safety standards.

18. Mr Loomes refers us to 8 OERs completed at his Mutley Plain outlet between mid-September 2018 and the beginning of May 2019 (220-227, 229-236, and 242-261) and one on 11 June 2019 (267). These show out of date food, a lack of dating, wrong dating and re-dating. Mr Loomes points to the fact that no disciplinary action was taken against him in respect of these failures.

19. There is no question that the OERs show that the Company’s managers, particularly Mesdames Allen and Rose, knew that these things went on in the Company’s Mutley Plain and City Centre outlets. However, what they do not show is that Miss Taylor and/or Mr Loomes were instructed by their managers to re-date stock. Rather, they show the OERs being used as a tool to correct the failures. The extent to which Ms Rose took the issue of re-dating seriously is questionable (see, for example, Mr Bolton’s Witness Statement - 9-11). There is, however, no compelling evidence to suggest that Ms Allen did not take the matter seriously.

20. Ms Rose was on leave from 14 June 2019 until 2 July 2019.

21. On 17 June 2019 Miss Taylor sent an e-mail to Ms Rose and Mr Colin Rose (134). Miss Taylor explained that she was pregnant and her due date was 30 December 2019. Miss Taylor asked that they let her know when a risk assessment could be pencilled in.

22. Mr Colin Rose replied on 18 June 2019 (135-136). Sending his *"Congrats!"*, Mr Rose asked if Miss Taylor was free that week, so he could pop in and see her. The same day Miss Taylor replied that she was in daytime Wednesday to Saturday. Mr Colin Rose says that he went to the Mutley Plain outlet on Wednesday 19, Monday 24 and Wednesday 26 June 2019 but Miss Taylor was not there. In any event, no meeting took place.

23. The Company has a general risk assessment for its outlets (53-73). On page 73 we see this:

> *"pregnant team members"…. "Possible problematic issues concerning various health/safety risks"…."All aforementioned team members to be risk assessed by a competent manager or authorised person if deemed necessary. Remedial actions as a result to be implemented by store manager"*

24. The Company's individual risk assessment form can be seen at 126B.

25. Whilst Ms Rose was away on holiday, Ms Allen had a watching brief over some of Ms Rose's job responsibilities. On 27 June 2019 Ms Allen met Miss Taylor with Ms Molseed (Store Manager - Woolwell outlet, training to be an Area Manager). Ms Allen's note is at 143-144. There was a general review of Miss Taylor's progress as a Store Manager. Miss Allen asked why Miss Taylor was including other staff in the rota when she was doing some day shifts. Miss Taylor explained that this was to help her with lifting as she was pregnant. It seems to have been agreed that Miss Taylor should work *"closes"*. This was a reference to the last shift of the working day, finishing around 0100 the next day. This would mean there would be other staff on hand to help Miss Taylor with lifting. Miss Taylor says she was unhappy about night shifts because she had discovered that pregnant women working night shifts had a greater chance of miscarriage (WS 23). If that was the case, Miss Taylor does not seem to have raised it at the time.

26. On 30 June 2019 Miss Taylor sent an e-mail to the Company's accountants (146-147 - this is a copy forwarded by Ms Natalie Ariss to the accountants on 1 July 2019). The e-mail included a request that 17 employees be paid holiday pay. What had happened was this. In the majority of cases the employees had accrued holiday. If not taken, this lapsed at the end of the Company's holiday year. At least

some of the employees concerned had not requested the holiday, nor had it been authorised. However, to avoid those employees losing holiday pay for the outstanding holiday, Miss Taylor requested holiday pay for days when the employees concerned were not on shift. Ms Ariss had intercepted this request, consulted Ms Rose during Ms Rose's holiday and countermanded it.

27. Miss Taylor says that the practice was widespread (WS 26). Miss Taylor points to evidence in the bundle that this practice was adopted by Mr Loomes (WS 27). Ms Rose's evidence was that Miss Taylor and Mr Loomes were the only people who did this and a stop was put to it once it had been picked up. We are satisfied that the Company did not intentionally authorise the practice and, having found it, stopped it.

28. From 1 July 2019 until her return to work on 17 July 2019, Miss Taylor was on holiday. Mr Loomes was on holiday over the same period.

29. Mr Colin Rose reports that he spoke to Miss Taylor on the telephone on her return from holiday. In essence, Mr Colin Rose asserts that he carried out a telephone risk assessment. Mr Colin Rose says this (WS 14):

> *"I asked Emily, at this stage, if there was anything she thought may cause her additional risk in store from a risk assessment perspective in view of her pregnancy. Emily said no. I then let her know that with pregnancy, potential risks in the workplace may change over time and asked her to let me know if she did identify any potential risks throughout her pregnancy. As there were no additional risks identified (beyond those already identified and managed as part of the general risk assessment), there was no action required."*

30. Miss Taylor does not mention such a conversation in her Witness Statement. However, in the Claim Form, Ms Taylor writes that she did speak to Mr Colin Rose on her return from holiday (17). Miss Taylor reports that Mr Colin Rose said he would visit her to make an assessment, but he never did. On the balance of probability, we find that Mr Colin Rose did not have the conversation he reports. There is no note, Mr Colin Rose's account is surprisingly specific given his lack of recollection of other contemporaneous events and it seems to us that the language set out in the preceding paragraph was likely coached.

31. On 18 July 2019 Ms Ariss carried out an OER on Miss Taylor's outlet (149). 5 items of stock were not dated and 3 were out of date.

32. On 19 July 2019, following the OER the day before, Ms Allen sent an e-mail to Miss Taylor (150). It read:

> *"Hope you are well and had a great holiday. I was looking to get our meeting booked for a review of the store over the last three weeks as planned in our last meet. When would be suitable for you on Tuesday to meet with myself and Leah?"*

33. On 20 July 2019, during a meeting with Ms Rose, Mr Loomes was taken to task for not following procedures in relation to holiday pay (Mr Loomes' WS 20-21). The subject of Miss Taylor doing the same thing came up and Mr Loomes says that Ms Rose smirked and commented *"Emily needs to learn her lesson when* it *comes to following the rules."* If it was made, this remark is equivocal. It could be read as indicating either that Miss Taylor's dismissal was not in Ms Rose's mind at the time or, that it was.

34. On 22 July 2019 Mr Colin Rose and Ms Allen heard a grievance from Mr Louis Sidwell, who had worked at Miss Taylor's outlet but had resigned. Mr Sidwell was accompanied by Mr Bolton. Ms Allen's note is at 152-153. Mr Bolton's evidence is that, during the hearing, Mr Sidwell described the City Centre outlet as a *"shambles"* (WS 14). One of Mr Sidwell's grievances was that he had not been paid holiday pay as a result of Ms Ariss disallowing it (as noted above). Mr Sidwell felt that Miss Taylor had promised him the holiday pay. Another of Mr Sidwell's grievances was that staff were re-dating food all the time, although he would not go into specifics. Mr Bolton then told the meeting that he had re-dated stock (WS 15). Ms Allen said that she would look into it. No doubt these two grievances served to bring the two issues to the forefront of Ms Allen's agenda with Miss Taylor.

35. It seems that Mr Colin Rose and Ms Allen spoke to Mr Bolton after the grievance hearing. Unknown to Mr Colin Rose and Ms Allen, Mr Bolton recorded this. The transcript is at 172-183. During this meeting Mr Bolton was clear that he re-dated food. When asked who had told him to do this, he named Miss Taylor and Mr Moss. Mr Bolton added that Miss Taylor had told him that Ms Rose had told her to re-date. Mr Colin Rose asked Mr Bolton to tip them off if it happened again. When pressed again, Mr Bolton said that he believed Ms Rose had told him to re-date food but he had no evidence of it. Mr Colin Rose, referring to the issue generally, assured Mr Bolton *"we'll come down hard on it"*. Again, no doubt this conversation was further motivation for Ms Allen to raise the issue with Miss Taylor. It also prompted Ms Allen to speak to Ms Rose.

36. Ms Allen mentioned to Ms Rose that Mr Bolton had said that he had been instructed by Ms Rose to re-date stock. This happened before

the meeting we next describe. Ms Rose says that she was shocked by this as she had never done it (WS 26).

37. Following Ms Allen's e-mail of 19 July 2019, Ms Allen and Ms Rose met Miss Taylor on 23 July 2019. Ms Allen's note of the meeting is at 155-156. There is a dispute about aspects of this meeting. From the note it seems that the initial discussion focussed on the performance of Miss Taylor's store. In addition, the holiday pay issue was discussed. The note includes this:

> *"Emily agreed she went against company procedure but did this as she felt bad and guilty against those missing out on their holiday pay. She felt bad in them not getting the remainder of any holiday pay not taken."*

38. There seems to have been a comfort break part way through the meeting. After that the subject turned to out of date food. At least a third of the note of the meeting is concerned with this subject. Reference can be made to that note for its full content. The following extracts give the flavour:

> *"Questioned Emily on what to do with ood food? Throw away*
>
> *Emily explained not always thrown away in her store*
>
> *Told staff to re-date bits like ham/sausages as "technically still in date". Her reasoning as Domino's dating expiry is much earlier than the date on packet"* [This is a reference to the fact that the expiry date Domino's puts on some stock is earlier than the manufacturer's expiry date]
>
> *"Emily's reasoning behind this was that it always been a thing that's been done*
>
> *Emily stated no one ever told her to do it she has just always done it"….*
>
> *"Questioned on her view on re-dating Emily didn't have a view on the re-dating and found the conversation humorous and unimportant."….*
>
> *"Emily was asked on how she trains her staff/new shift managers on dating: she explained if out of date to then re-date or throw away.*
>
> *Emily confirmed she is aware that procedure doesn't condone re-dating and that training has never entailed being instructed to re-date.*

> *Emily suggested the extremeness of re-dating has never been something she has thought about as its something she just does and always has.*
>
> *Emily argued that re-dating is carried out in other stores. This was queried as to what stores and who, Emily refused to share any information or identify any stores or employees."*

39. Miss Taylor's account of this part of the meeting is in her Witness Statement at paragraphs 33 and 34. To the extent that it matters, we take the view that the detailed note is likely to be a more accurate record of what happened.

40. We note that Mr Loomes left his job as Store Manager with the Company on the same day, 23 July 2019. We heard no concrete evidence as to the circumstances, but it seems that there was an acrimonious disagreement between the Company and Mr Loomes about working a Sunday shift. Mr Loomes says that he (WS 23) *"verbally resigned from my position as Store Manager on 23rd July 2019 due to unreasonable demands with regards to my working hours."*

41. It seems that Ms Allen and Ms Rose were very concerned by what had come out at the meeting with Miss Taylor on 23 July 2019 as far as re-dating stock and holiday procedure were concerned. Discussions were held with Mr Colin Rose. The upshot was the letter from Ms Allen to Miss Taylor we see at 158. It should have been dated 29 July 2019 but was erroneously dated 29 August 2019. Miss Taylor was to attend an employment review meeting on 30 July 2019. Miss Taylor was reminded of her right to be accompanied and warned that possible outcomes included dismissal. The subject of the meeting was put thus:

> *"The meeting is to discuss your performance in the role of **Store Manager**. We will be reviewing your progress to date, with particular emphasis on the following details:*
>
> *Allegedly failing to follow food safety procedures (i.e. re-dating food)*
>
> *Allegedly failing to adhere to the company holiday procedures*
>
> *General suitability for the role"*….

> *"I must inform you that possible outcomes of this review meeting include a probationary period, and action plan or the termination of your employment."*

42. There is a transcript of a recording of the subsequent meeting that took place between Miss Taylor (accompanied by Ms Sam Hockaday from Miss Taylor's outlet), Ms Allen and Ms Rose on 30 July 2019 (159-165). The recording was made by Miss Taylor, contrary to her assurance that she would not do so. We have listened to the recording which, as far as is material, reflects the transcript. The Respondent's purpose in asking that the recording be played was to demonstrate that Miss Taylor was light hearted about some of the matters discussed, found them funny and laughed. We do not think it material, but our view is that Miss Taylor was probably displaying nerves, rather than finding things funny.

43. In any event, the transcript is an unarguable record of what took place. It can be referred to for its full content. The following gives the overall picture:

> *"CA In the last chat with myself and Leah you said you'd been doing re-dating in the store and instructing others to do so.*
>
> *ET Yep."….*
>
> *CA Re-dating is always an issue in our business, re-dating isn't accepted, it's a very extreme food safety issue and last time we discussed you didn't seem to understand the severity of that."….*
>
> *"ET Sure, and are either of you aware of re-dating in other stores? Have you ever witnessed it happening in other stores?*
>
> *LR That's nothing to do with your situation."….*
>
> *"CA Obviously you've raised this concern last time, we've said to yourself you can give out the information if you did have any and chose not to. any other issues, we're here to discuss yourself not anyone else.*
>
> *ET Okay, the point that I want to make is the fact that other people have been caught and nothing at all like this has happened. For example there was an OER with Shanda and Sam Hunt that you did there were signs of re-dating on mushrooms and wedges yet it was never brought up to Kyle*

or either of those two girls, it was just left, nothing came of that, yet I've not been caught and…

LR Nothing to do with you."….

"CA So therefore as store manager you are training others in your store to do re-dating as well.

ET Again on that point I have admitted it to Leah before, as has Kyle. We had a conversation in April the one where Leah was accused of saying something about Jordan. We both said to her, I was doing my food order at the time and I was like it's still not telling me to order any wedges because one of the deals had been taken off so then there were no wedges on deals. We both said we've got excess wedges because obviously the system was still telling us to order as many as we were using but we weren't using that many and Leah was like "oh don't tell me that, I can't be aware of that" she never said to us don't do it never once did she tell us not to do it when she's been aware of it.

CA But with that comment did she tell you to do it?

ET No but she didn't tell me not to either, she's aware of it."….

"ET Yeah she should tell us to throw it away and get rid of that or at that point, bring me in for whatever review you want to do. I'm confused as to why it's an issue now and not however many months ago."….

"CA Moving onto the next point in the letter, allegedly failing to adhere to the company holiday procedures,"….

"ET I understand that, but that's not written down anywhere, so I don't see how I can be breaking policy when it's not a policy that is written down, that's just a policy that is convenient now."….

"CA Is there anything else you want to say on that?

ET No, although Leah has done it too but whatever, again we're not here to discuss her so."….

"CA So obviously as a business you understand that we don't accept or condone re-dating and you as a store manager you've failed to comply with basic food safety standards whist also instructing other staff members to do

so. So off the back of todays conversation I've decided it is best we give you your notice with immediate effect. We don't expect you to work this and we will pay this to you in lieu and we will pay you any outstanding holiday pay."

44. Ms Rose's note of the meeting is at 166-167. We do not see that anything arises from this. As would be expected, it is not as full as the transcript but it fairly records the points Miss Taylor had raised in her defence, such as Ms Rose's alleged complicity in re-dating. We see no attempt in this note to avoid the parts of the meeting that the Company might have been expected to find uncomfortable.

45. The dismissal was confirmed in a letter dated 5 August 2019 from Ms Allen to Miss Taylor (170-171). Mr Colin Rose was consulted about the letter. It seems to have been Mr Colin Rose's decision to pay Miss Taylor pay in lieu of notice, rather than dismissing her without notice on the ground of gross misconduct (WS 29). Notwithstanding, we are satisfied that the decision to dismiss had been taken by Ms Allen on her own initiative on 30 July 2019. The letter itself is unexceptional. We note that Ms Allen anticipated that the accusation of re-dating in other stores was to be looked into.

46. Ms Rose tells us that the Company has taken on staff when they were pregnant and has female staff who have returned to work after having children (WS 61 and oral evidence). It appears that none of these staff were Store Managers at the relevant time. Mr Loomes suggests that it would be highly inconvenient for the Company to accommodate a Store Manager who was pregnant or returning to work after maternity leave.

APPLICABLE LAW

47. Section 99 of the ERA, so far as it is applicable, provides as follows:

*"**99 Leave for family reasons***

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

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

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

(a) pregnancy, childbirth or maternity,"

48. Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 is the relevant prescribing regulation for the purposes of section 99 of the ERA. A reason connected with pregnancy is prescribed.

49. So far as they are applicable sections 4, 18, and 136 of the EA provide as follows:

*"**4 The protected characteristics***

The following characteristics are protected characteristics-"….

"pregnancy and maternity;"….

"sex;"

*"**18 Pregnancy and maternity discrimination: work cases***

(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."….

"(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends-

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy."

*"**136 Burden of proof***

(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."

50. Regulations 3, 10, 16 and 18 of the Management of Health and Safety at Work Regulations 1999 (the "H & S Regulations"), so far as they are applicable, provide as follows:

*"**3 Risk assessment***

(1) Every employer shall make a suitable and sufficient assessment of-

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work;"….

"for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions"….

"(6) Where the employer employs five or more employees, he shall record-

(a) the significant findings of the assessment;"

*"**10 Information for employees***

(1) Every employer shall provide his employees with comprehensible and relevant information on-

(a) the risks to their health and safety identified by the assessment;"

*"**16 Risk assessment in respect of new or expectant mothers***

(1) Where-

(a) the persons working in an undertaking include women of child-bearing age; and

(b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes

or working conditions, or physical, biological or chemical agents,"…."the assessment required by regulation 3(1) shall also include an assessment of such risk.

(2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work."

"18 Notification by new or expectant mothers

(1) Nothing in paragraph (2) or (3) of regulation 16 shall require the employer to take any action in relation to an employee until she has notified the employer in writing that she is pregnant"….

51. We were referred to *Maund v Penwith District Council* [1984] IRLR 24, *Madarassy v Nomura International Ltd* [2007] IRLR 246, *Stevenson v Skinner & Co* UKEAT/0584/07/DA, *Kuzel v Roche Products Ltd* [2008] IRLR 530, *O'Neill v Buckinghamshire County Council* [2010] IRLR 348, *Sefton Borough Council v Wainwright* [2015] IRLR 90 and *Efobi v Royal Mail Group Ltd* [2019] IRLR 352.

CONCLUSIONS

52. **The claim of unfair dismissal by reference to section 99 ERA**

53. It is important to have in mind that we are not here considering the fairness or otherwise of an "ordinary" dismissal under section 98 of the ERA. If we were, there would be many potential issues of "fairness". We are not, however, concerned with those. We are concerned solely with whether or not the reason or the principal reason for the dismissal was Miss Taylor's pregnancy. If it was, Miss Taylor wins her case by reference to section 99 ERA. Conversely, if it was not, Miss Taylor loses.

54. The two main points put on Miss Taylor's behalf are these. First, re-dating stock was rife in the Company's outlets and Mesdames Allen and Rose were not only fully aware of this but also instructed those they managed to do it. Second, the holiday procedure, requiring an authorised request for holiday on what would otherwise be a working day, was unclear and not followed by others, in particular Ms Rose. Therefore, these could not have been genuine reasons for the dismissal. There must have been another reason and that was Miss Taylor's pregnancy.

55. These arguments work better in the context of the discrimination claim we will come to below. In the context of the unfair dismissal claim they miss the essential point that, if the reason for the dismissal was the issues of re-dating stock and holiday procedure, whether or not this was rational or fair does not matter. The claim will fail.

56. In our view the evidence points to only one conclusion. That Ms Allen, who took the decision to dismiss, did so because Miss Taylor had freely admitted to re-dating stock and training her staff to do likewise and had not followed Company holiday procedure. We think the holiday procedure might have been a secondary issue, but that is not material.

57. The evidence we have set out above shows that re-dating was a common occurrence. The OER system recognised it as wrong and sought to put it right. Ms Rose may have occasionally sent out mixed messages on the subject but, in the final analysis, re-dating was not acceptable and Ms Allen was not going to put up with it in the form of the open admissions of a Store Manager, Miss Taylor. There was a qualitative difference between Miss Taylor's admitting deliberate re-dating and that evidenced, for example, in the OERs.

58. As we record, the holiday procedure issue might have been secondary. Nonetheless, Miss Taylor admitted that she knew she had gone against procedure. Miss Taylor's justification for her action in this respect seems to have been dictated more by what she thought was right than by the procedure she knew she should operate.

59. The grievance hearing with Mr Sidwell on the 22 July 2019 and the subsequent meeting with Mr Bolton the same day put the issues of re-dating and holiday pay procedure front and centre for Ms Allen. That these were the main topic for the meeting with Miss Taylor the next day, 23 July is unsurprising. That set the course for the employment review meeting ending in Miss Taylor's dismissal on 30 July 2019.

60. There is no evidence that we can see that suggests that the reason or the principal reason for dismissing Miss Taylor was her pregnancy.

61. The claim fails because the reason or the principal reason for the dismissal was not Miss Taylor's pregnancy.

62. **The claim of discrimination on grounds of pregnancy by reference to section 18 EA – the alleged unfavourable treatment being the dismissal**

63. At all relevant times Miss Taylor was within the protected period for the purposes of section 18 EA. The Company takes no point on this.

64. As we have mentioned above, the arguments about whether or not re-dating stock and/or not following holiday procedure could have been genuine reasons for the dismissal have more traction in this context. This is because of the way section 136 EA works.

65. What the Tribunal must consider is whether or not there are facts from which it could decide, in the absence of any other explanation, that Miss Taylor was treated unfavourably in relation to a pregnancy of hers. The unfavourable treatment here is the dismissal. If so, it is for the Company to show that it did not treat Miss Taylor unfavourably in relation to a pregnancy of hers by dismissing her.

66. If the re-dating of stock and/or the holiday procedure issues can be shown to have no substance then an enquiry into the reason why Miss Taylor was dismissed might point towards the reason being her pregnancy.

67. However, for the evidential reasons set out in paragraphs 57-59 above, in our view, Miss Taylor has not shown primary facts from which we could conclude that her dismissal was because of Miss Taylor's pregnancy. The argument, that the re-dating and holiday procedure issues had no substance in context, has some initial attraction. However, once the facts are examined in detail the argument does not stand up.

68. The evidence clearly points to the re-dating and holiday procedure issue being the reason for the unfavourable treatment, the dismissal.

69. If we were to be wrong about that and the burden of proof did shift to the Company to prove that its treatment of Miss Taylor was in no sense whatsoever on the ground of her pregnancy, we would conclude that the Company has done so.

70. **The claim of discrimination on grounds of pregnancy by reference to section 18 EA - the unfavourable treatment being the alleged failure to carry out a risk assessment**

71. There is a line of authority commencing with *Hardman v Mallon t/a Orchard Lodge Nursing Home* [2002] IRLR 516 (cited in *O'Neill* and *Stevenson)* that establishes that failure to carry out a risk assessment for a pregnant employee in accordance with the H & S Regulations can amount to unfavourable treatment and, therefore, discrimination by reference to section 18 EA.

72. Broadly, there are two types of risk assessment in such circumstances. They are a general assessment and a specific assessment. As a matter of record, the Company complied with the overarching requirement in regulations 3(1) and 16(1) of the H & S

Regulations to assess risk generally. In its general risk assessment, the Company referred to *"pregnant team members"* and recognised *"Possible problematic issues concerning various health/safety risks"* concluding *"All aforementioned team members to be risk assessed by a competent manager or authorised person if deemed necessary. Remedial actions as a result to be implemented by store manager"*.

73. Here we are concerned with the requirement to conduct a specific risk assessment.

74. On 17 June 2019 Miss Taylor gave the Company written notice of her pregnancy. This triggered the requirement in the Company's general risk assessment for a specific risk assessment for Miss Taylor *"if deemed necessary"*. Quite how that was to be gauged is unclear. What is clear is that the Company did not consider whether or not it deemed it necessary. Apart from the Company procedure, Miss Taylor's written notice also triggered the requirement for a specific risk assessment. This is implicitly required by regulation 16(2) of the H & S Regulations. The employer is required to consider whether the action it proposes to take under the generic risk assessment will avoid the risk for the individual and, if not, must consider further action.

75. The H & S Regulations do not include a definition of a "risk assessment". However, the authorities establish that "risk" refers to the exposure to some sort of harm or danger and an "assessment" is an evaluation of when that risk might occur and what its consequences might be. Any such assessment need not be in writing.

76. *O'Neill* sets out three preconditions for there to be an obligation to undertake a specific risk assessment. First, the employee must inform her employer in writing that she is pregnant. That is not in issue in this case. Second, the work undertaken by the employee must be such that it gives rise to a risk to her health or that of her baby. Third, the risk must arise from, in this case, working conditions.

77. As far as the second factor is concerned (the work undertaken by Miss Taylor giving rise to a risk to her health or that of her baby) we think we need look no further than Miss Taylor's conversation with Ms Allen on 27 June 2019. Miss Taylor raised the issue of lifting, with which Ms Allen appears to have agreed because she let Miss Taylor rota herself on night shifts so help would be available. In no sense, however, can that conversation be regarded as a *"suitable and sufficient"* risk assessment. If that risk does not suffice, we would point to the Company's own general risk assessment that recognised possible problems.

78. Turning to the third factor, it seems to us self-evident that the risk arose from working conditions.

79. In this instance there is no evidence that there was a *"suitable and sufficient"* specific risk assessment for Miss Taylor, written or unwritten. No written record of the significant findings of any specific risk assessment has been produced. Miss Taylor was not provided with any information on any risks identified by any specific risk assessment. This failure was unfavourable treatment amounting to discrimination.

80. **Remedy**

81. There is no direct loss arising from the act of discrimination. The Tribunal, therefore, confines itself to the question of compensation for injury to feelings.

82. Compensation under this heading is intended to compensate a victim of discrimination for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. The guidance offered by case law is that such awards should be considered in three bands. The bands themselves are the subject of guidance from the Presidents of the Employment Tribunals in England and Wales and Scotland. The top band of £26,300-£44,900 is appropriate in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. The middle band of £8,800-£26,300 is appropriate for serious cases which do not merit an award in the highest band. The lower band of £900-£8,800 is appropriate for less serious cases, such as one-off occurrences.

83. The Tribunal has considered the appropriate award to make in this case carefully. It bears in mind that awards are compensatory and not punitive and its attention must be on the injury to Miss Taylor's feelings. The indicators point to any injury having been slight. Taking all this into account the Tribunal's finding on the appropriate level of award is firmly at the lower end at £900.

84. Interest is payable on this award calculated as follows:

> Days between 24 July 2019 (that being taken as the day of the discriminatory act being one week after Ms Taylor's return from holiday by which date a specific risk assessment could reasonably be expected to have taken place) and 14 December 2020 (the day of calculation): 509
>
> Interest rate: 8%
>
> 509 (days) x 0.08 x 1/365 x £900 = £100.41.

Employment Judge Matthews
Date: 23 December 2020