JJE

EMPLOYMENT TRIBUNALS

Claimant: **Ms Ashmita Thakuri**

Respondent: **Cafe Anglo Limited**

Heard at: **East London Hearing Centre**

On: **15 & 16 March 2018**

Before: **Employment Judge Barrowclough**

Members: **Mr Steve Morphew**
Mr Duncan Ross.

Representation

Claimant: Mr B. Wilson (Husband)
Respondent: Mr Muhammad Yousaf (Director of Respondent Company)

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's complaints of (a) discrimination on grounds of pregnancy, (b) automatically unfair dismissal, and (c) non-payment of wages all fail and are themselves dismissed.

REASONS

1 By her claim, presented to the Tribunal on 19 August 2017, the Claimant Ms Ashmita Thakuri raised three complaints against Café Anglo Limited, her former employers and the Respondent in these proceedings, namely (a) discrimination on grounds of pregnancy, (b) automatically unfair dismissal, and (c) non-payment of wages. The Respondent accepts that it employed the Claimant as a team member, working at its premises known as *'BB's Coffee and Muffins'* (hereafter 'BB's') in 'The Royals' shopping centre in Southend-on-Sea, from 1 February 2017 until her resignation some four and a half months later on 20 June 2017, but disputes that it discriminated against the Claimant as alleged or at all, and that the Claimant has not been paid all the monies to which she is entitled. Employment Judge Gilbert conducted a case management hearing of these proceedings on 21 December 2017, at which she helpfully identified the issues to be determined at the full merits hearing, and went on to give appropriate directions for the preparations for that hearing.

2 We heard the Claimant's case over the course of a two-day hearing on March 15 and 16 2018, when we heard evidence from the Claimant, who was represented by her husband, from Mr Muhammad Yousaf, a director of the Respondent company who also represented it, and finally from Mr Muhammad Kamran Shahid, a supervisor employed by the Respondent at BB's; together with submissions from the parties' representatives. The parties used much of the first day of the hearing in preparing and collating an agreed bundle, which we then read (selectively), together with statements from the Respondent's two witnesses, and the documents at pages 19-22 and 32-37 in the bundle which had been prepared by the Claimant as a statement of her case in the absence of a formal statement from her.

3 As its name implies, BB's is a café or coffee shop, serving tea, coffee and other non-alcoholic beverages, snacks, pastries and light meals. Mr Yousaf told us that the business was started by himself and a co-director in 2012. The café is open from 7 am until 6 pm, Mondays to Saturdays, with last orders being taken at about 5.30pm. The Respondent employs about 10 members of staff in all, most of whom will work on Saturdays, which is their busiest day. Otherwise, there is an informal shift system. Two employees will come in early in the morning, ready to open the café at 7 am, and will stay until about 3 pm. The early shift is the hardest, not least since the pastries will then be made and other food prepared in so far as possible. Two or three additional staff will work at the café between 11am and 3 pm, depending on how busy they are. Finally, up to three staff will work between 3pm and closing time at 6 pm. There is always at least one supervisor on site (sometimes more) – they are Mr Shahid, Mr Navi and a lady called Ayesha. Mr Yousaf does not generally work at BB's, which he visits only occasionally. Sweeping and cleaning the café takes place throughout the day, as well as when it is closing.

4 The Claimant was employed on a zero hours contract, a copy of which is in the bundle, and was paid at the hourly rate of £7.20 for the hours she actually worked, which were agreed in advance with a supervisor. Staff (including the Claimant) are entitled to an unpaid break of 15 to 30 minutes after they have been working for four hours, the length of the break and a free hot drink being at the discretion of the supervisor; after a 6.5 hour shift, staff are entitled to a free meal and hot drink during their 30 minute break. Any break requested by a member of staff who has not completed a four hour shift is at the discretion of the manager.

5 As noted, the Claimant commenced employment as a team member at BB's on 1 February 2017, signing the Respondent's statement of main terms and conditions of employment on the same day. Although she initially undertook two early and up to seven late shifts, the Claimant generally requested and was assigned the middle or midday shift at the café. In March the Claimant requested a week's holiday at short notice because she was getting married, which leave was granted. On 3 May, the Claimant told a supervisor (Mr Shahid) that she was then fifteen weeks pregnant, and would not be able to undertake any late shifts thereafter because of the bending involved: it is clear from the Claimant's time sheets/hourly records that following that, the Claimant only ever undertook the midday shift. The Claimant accepts that, despite repeated requests, she did not in fact provide her employers with either the MATB-1 form, or written evidence confirming her antenatal appointments. On 15 May, the Claimant signed a form confirming that she had read and understood the Respondent's Induction Health and Safety policy. Three days later, on 18 May, the Claimant and Mr Yousaf had a face to face meeting at which they

discussed the fact of her pregnancy and its impact on her working pattern and capabilities, and related issues, and at which Mr Shahid was present. The Claimant continued working on the midday shift (although not on Saturdays) until 2 June. On Monday 5 June the Claimant went to see her GP, and was signed off work until 18 June because of stress. A copy of the relevant fit note was sent to the Respondent. Mr Shahid accepts that he contacted the Claimant by text on both 16 and 17 June enquiring about her availability for work on 18 June, when her fit note expired. Mr Shahid could not now be sure but believes that he had asked her to undertake the late shift on that day, due to staff shortages. In any event, the Claimant did not respond or come to work on June 18, and did not reply to Mr Shahid's subsequent text on June 20. Instead, the Claimant submitted a letter of resignation on June 21, a copy of which is at pages 39-41 in the bundle. In that letter, the Claimant raises a number of complaints about her alleged treatment by her colleagues whilst at work at BB's during May and early June 2017, which are substantially repeated in her ET1 claim form. The Claimant accepted in evidence that she had not raised any of those complaints with Mr Yousaf before June 21 in any form, and also that that was the first time that she put into writing any concerns she had about her working conditions or her treatment at work.

6 The way the Claimant puts her unpaid wages complaint is that, over the course of her employment lasting four months or so, 30 minutes were deducted from her daily hours total in respect of all the breaks which she had taken (and which she agrees were unpaid), whereas in fact when the Claimant did take breaks, they would only be for 15 minutes. The Claimant has not particularised the number of days and breaks involved in this series of allegedly unlawful deductions, and cannot say how much she is owed as a result; but that is the basis of her claim. We reject that complaint, primarily because we are satisfied and it was not disputed that the Claimant did in fact receive monthly payslips, in one format or another, which specified the hours that she had worked and for which she had been paid, and from which it would have possible for her to work out without any great difficulty any unfair or excessive deductions or underpayments in her monthly salary. Yet the Claimant accepts that at no stage prior to her resignation in June 2017 did she put forward any allegation of any underpayment to the Respondent. Had any such excessive deductions in fact occurred, then we are satisfied the Claimant would indeed have raised them at the time. She did not. Accordingly, we find that she has not proved that any such unlawful deductions were in fact made. The complaint of non-payment of wages due to the Claimant is dismissed.

7 The automatically unfair dismissal complaint stands or falls with the Claimant's pregnancy discrimination complaint. If the discrimination complaint succeeds, so must the unfair dismissal claim; conversely, if it fails, so must the dismissal allegation. Accordingly, it is sensible to consider the discrimination complaint first.

8 As was helpfully made clear in the list of issues, it is for the Claimant to establish facts from which the Tribunal could conclude that the treatment complained of was because of her pregnancy; and if so, to ask whether the Respondent can provide and prove on a balance of probabilities a non-discriminatory reason for that treatment. We therefore consider the specific allegations which were identified and relied upon by the Claimant, and which are set out in the Order arising from the hearing on 21 December 2017.

9 In the first place, we do not accept that the Respondent ignored the Claimant's request for early morning or midday, rather than late, shifts, because of her difficulties with mopping and sweeping due to her pregnancy. The evidence is that the Claimant was, as requested, assigned to and did undertake two early morning shifts on successive days; but that she failed to attend a similar shift on the third day. Thereafter, as seems eminently reasonable to us, the Claimant was continuously allocated on the midday or middle shift until her last day at work, which was 2 June 2017, without complaint. In any event, and as the unchallenged evidence made plain, mopping cleaning and sweeping the premises are regularly undertaken during all three shifts.

10 Secondly, and in relation to the issue raised by the Claimant of a risk assessment being undertaken because of her pregnancy, we accept that Mr Yousaf researched the position, informed the Claimant that no formal assessment by the Respondent was in fact required by law, and told her that she could work shorter than normal shifts if she wished. In any event and as the unchallenged summary of the Claimant's hours proves, the Claimant did indeed take 30 minute breaks when undertaking shifts of less than 4 hours as and when she wished, which would not normally have been permitted for other staff.

11 There is no evidence to suggest that the Claimant was ever refused time off work to attend ante-natal appointments; and the evidence we heard in fact indicated that the Claimant's working hours were rostered around and accommodated all such appointments, for which the Claimant was (understandably) not paid, since they did not occur during her working hours. Moving on, we find the Claimant's working hours were not reduced in May 2017 as she asserts, either dramatically or otherwise. On the Claimant's own evidence, she worked a total of 65 hours in February, 62 hours in March, 74 hours in April, and just under 60 hours in May, rather than the 57.36 figure that she originally put forward. That does not in our judgment amount to a reduction of any significance or substance, and we accept the Respondent's evidence that demand (and therefore working hours) were subject to seasonal and other variations, for example during school and bank holidays.

12 The allegation at paragraph 4.1.4 of the CMH summary, that the Claimant was told that she would not be paid for ante-natal appointments, is not proven and did not arise since, as already noted, all such appointments took place outside her rostered working hours.

13 Mr Yousaf agrees that he did indeed compare the Claimant's pregnancy with that of his wife and indeed other employees of his business, but only in so far as to stress that it was the Claimant's choice when she wished to commence her maternity leave; and that some people, including his wife and some of the Respondent's other female employees, wanted to keep working for as long as possible before their babies were born, in order to have as much time as possible with their children before returning to work. We can see nothing objectionable in that remark, which simply reflects ordinary everyday experience.

14 There was no evidence before the Tribunal to support the Claimant's allegation that the possibility of going to Court was ever mentioned by anyone in relation to her pregnancy and working conditions; and we accept the evidence of Messrs. Yousaf and Shahid that the Claimant was clearly informed that the 90 day probationary period (as specified in her terms and conditions of employment) was not being extended in her case – once again, there is no evidence to the contrary.

15 It was clear from Mr Yousaf's own candid account that on one of his visits to BB's during May 2017 he did in fact privately tell the Claimant that he thought she was behaving like a queen. We accept that he did so because it seemed to him from his periodic visits to the café at that time, when the Claimant was present and working, that she appeared to be *'calling the shots'*, in the sense of frequently telling her managers and her colleagues what she was and what she wasn't prepared to do at work; and that Mr Yousaf tried to encourage the Claimant to instead liaise closely with her supervisors about her capabilities, thereby avoiding disruptive incidents at the café during working hours. We see nothing inappropriate or objectionable in that approach. In any event, we do not accept that Mr Yousaf's remark to the Claimant was made because of her pregnancy, rather than because of her perceived potentially disruptive behaviour whilst at work when customers were present and requiring service.

16 There is nothing in the Claimant's suggestion that the Respondent was intentionally reducing her working hours because of her pregnancy, and that she was available to undertake longer shifts so long as she had a break. As already noted, the reduction in her hours in May was very modest and, as we have found, simply due to demand. We accept Mr Shahid's evidence that the business had one quiet week in May, which seems to us perfectly possible, and that that was the cause of the slightly reduced hours, as was explained to the Claimant. Secondly, the Claimant's working hours were agreed in advance with a supervisor, like other team members. Thirdly, the Claimant was already being allowed discretionary breaks in her four hour shifts, which were not available to her non-pregnant colleagues: if anything, it would have been objectionable had the Respondent demanded that the Claimant start working longer shifts than she had previously undertaken.

17 The Claimant next alleges that she was consistently treated unfairly or in a hostile or aggressive manner by her colleagues, and in particular by her supervisors, Mr Navi, Ayesha, and Mr Shahid, as well as by Mr Shahid's wife who also works at the café, during the period after she informed the Respondent of the fact that she was pregnant on 3 May. We don't accept that allegation for perhaps the most obvious reason: that, as the Claimant herself accepts, she never raised this alleged course of treatment with Mr Yousaf, who she certainly saw on a number of occasions before her sickness absence, or at any stage thereafter during her two week sickness absence, or until it formed part of her resignation letter, whether by way of grievance or otherwise. We are satisfied that, had the Claimant been treated unfairly or in an offensive or prejudicial manner as she alleges, then she would certainly have complained at the time to Mr Yousaf. Whilst Mr Shahid probably did roster the Claimant to work one or perhaps two late shifts on her anticipated return from her sickness absence in June, we accept his explanation of his reasons for so doing – the unavailability of other staff to cover those shifts, and that there was no intention to prejudice or discriminate against the Claimant. We are inclined to accept Mr Shahid's evidence overall, not least because he was noticeably fair towards the Claimant in the course of his evidence, describing her as a generally good employee during her time with the Respondent, when it would have been very easy for him to have sought to discredit her with impunity. In any event, it was open to the Claimant to refuse the suggested shifts if she felt unable to undertake them: and she neither responded to Mr Shahid's text messages nor worked those shifts.

18 Finally, we simply don't accept that the Claimant has shown that the Respondent's behaviour towards her after she informed them of her pregnancy was in any way

unreasonable, or that it in any way threatened or undermined the relationship of trust and confidence which should exist between employer and employee, or that there was any incident or conduct by the Respondent or its staff which left the Claimant with no option but to resign.

19 It therefore follows that in our unanimous judgment the Claimant has not established any facts from which we could conclude that her alleged treatment by them was because of her pregnancy; or, in the very limited cases where she has (e.g. Mr Yousaf's comparison of the Claimant's pregnancy with that of his wife and other employees), the Respondent has, we accept, provided a non-discriminatory explanation for that treatment.

20 For these reasons, the Claimant's complaints of pregnancy discrimination and automatically unfair dismissal must fail and, like her arrears of pay complaint, be dismissed.

Employment Judge R Barrowclough

9 April 2018