



# EMPLOYMENT TRIBUNALS

**Claimant:** Denisa Silvana Bordas  
**Respondent:** Gant UK Ltd  
**Heard at:** Croydon  
**On:** 5-9 August 2024  
**Before:** Employment Judge Liz Ord  
Tribunal Member Jane Forecast  
Tribunal Member Michael Cann

**Representation:**

Claimant: In person  
Respondent: Lee Newell (Employment Relations Consultant)

**JUDGMENT** having been given orally on 9 August 2024 and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

## REASONS

### The Complaints and Issues

1. The claimant's complaint is of maternity discrimination (section 18 Equality Act 2010).
2. The issues for the Tribunal were determined at a Case Management Hearing on 21 May 2024:
  - 2.1. Did the respondent treat the claimant unfavourably by doing the following things?
    - 1.1.1. On 14 September 2022, Michalina Kaliszewska asking the Claimant to provide a medical proof of miscarriage?

- 1.1.2. On 11 September 2022 and or 14 September 2022 deciding to terminate the Claimant's employment?
- 1.2. If so, did the unfavourable treatment take place within the protected period?
- 1.3. If not, did it implement a decision taken in the protected period?
- 1.4. Was any unfavourable treatment because of her pregnancy?
- 1.5. Was any unfavourable treatment because of illness suffered as a result of her pregnancy?

## **Evidence**

3. The tribunal had before it the following documentary evidence:
  - a main documents bundle of 252 pages, the Claimant's bundle of 360 pages, investigation meeting notes of 16.12.2022, a document entitled "Extracted Comments with Relevant Laws", amended statement of claim, amended response, chronology, psychiatrist's email;
  - witness statements on behalf of the Respondent from Morad Khatiblou (Store Manager at O2 Store), Michalina Kaliszewska (Assistant Manager at O2 Store), and Timothy Bird (Assistant Manager at O2 Store);
  - from the Claimant, a response to witness statements.
4. The Tribunal heard the following oral evidence:
  - on behalf of the Claimant, evidence on oath from Denisa Bordas;
  - on behalf of the respondent, evidence by affirmation from Michalina Kaliszewska, Timothy Bird and Morad Khatiblou.
5. Page reference numbers in these reasons are to the main bundle, unless preceded by "C" which indicates reference to the Claimant's bundle.

## **The Law**

### **Pregnancy and Maternity Discrimination**

6. Section 18 Equality Act 2010:
  - (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristics 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) ...

- (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
- (6) The protected period, in relation to 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.
- (7) ...

### **Findings of Fact**

7. The respondent is an international brand with a relatively small presence in the UK of about 25 stores.
8. In July 2022, the Claimant applied to the Respondent for an Assistant Manager's role at its Icon O2 store within the O2 complex in Greenwich. She attended three interviews, the first with Tim Bird (Assistant Store Manager), the second with Morad Khatiblou (Store Manager), and the third with Paul Cook (Head of Retail for the Southern region).
9. The Claimant was asked at interview about other commitments and she indicated that she was undertaking post-graduate studies and that she had other employment within the O2 complex, which took very little of her time (about 1 day per month).
10. Whilst the Claimant was unsuccessful in obtaining the role, Morad identified that she had energy and potential and wanted to offer her a Sales Associate position with a view to developing her for any future Assistant Manager role. She was offered the Sales Associate role on probation for 6 months with more hours than usual (32 hours/week as opposed to the usual 8 hours/week) with the expectation of future advancement.
11. The Claimant accepted the Sales Associate role and commenced employment with the Respondent on 19 August 2022. She was, however, only employed for a short time, about 7 weeks. On 7 October she was dismissed in writing (dismissal letter 162).
12. The Respondent says the reason for the dismissal was her absence, attitude and performance. The Claimant says it was because of her pregnancy.

### **Pregnancy – knowledge**

13. The Claimant became pregnant sometime in June 2022. She did not tell anybody in the Respondent's management about this until sometime later. On 14 September she rang the store and spoke to Michalina Kaliszewska (Assistant Manager at the time), and told her she had had a miscarriage. The Respondent's case is that this was the first time they knew about the pregnancy.

14. In her pleadings and closing, the Claimant said she told management about the pregnancy “around” 10 September 2022. She did not say who in management, or how this information was conveyed. However, in cross examination she accepted that she had not told anyone in authority about the pregnancy prior to 14 September. We therefore, find that the Claimant did not tell management about the pregnancy around 10 September 2022.
15. The Claimant’s case is that she told colleagues on the shop floor about the pregnancy some time before this. She said in cross examination that shop floor colleagues talk and she inferred that management would have become aware of it. The Claimant was vague about the details and did not provide any information about how, when and where this might have happened or who might have had the conversations.
16. All three management witnesses (Morad, Michalina & Tim) all gave evidence that they did not know about her pregnancy prior to 14 September. There is no evidence that management got to know about the Claimant’s pregnancy prior to 14 September. In cross examination the Claimant accepted that the first time she told any member of management was in her conversation with Michalina.
17. Therefore, we find that the Claimant did not inform the Respondent of her pregnancy before 14 September, and the Respondent was not aware of it from shop floor colleagues prior to this date. 14 September 2022 was the date of the Respondent’s knowledge.
18. Morad was not at work on 14 and 15 September. He was told about the Claimant’s miscarriage on his next day of work, which was 16 September.

#### **Conversation 14 September 2022 with Michalina**

19. The Claimant phoned the store on 14 September and spoke with Michalina. She told Michalina that she had suffered a miscarriage and was off sick.
20. There is then a conflict of evidence. The Claimant says that during the call, Michalina asked her for proof of the miscarriage. She says Michalina told her to “take as much time as needed and make sure you prove it via a doctor’s note” (199 para 4.3 F&Bs).
21. Michalina’s evidence is that she did not expect the Claimant to be in work for at least a few days. Therefore, she said to the Claimant that she should “provide a doctor’s note”. Michalina said she had in mind that this was to support a claim for Statutory Sick Pay.
22. In Michalina’s interview with Paul Cook on 13 December 2022 (p182) she referred to the Claimant saying she had had a miscarriage, and said the Claimant asked if she needed to prove it. Michalina’s response was – take care of yourself first and foremost – it would be useful to have a doctor’s note. The next day the Claimant sent across a self certification.
23. We prefer Michalina’s evidence and find that in response to a question from the Claimant about proof, Michalina replied that it would be useful to have a doctor’s note. We found Michalina to be a credible witness and we accept

that this was said in the context of the Claimant taking any further time off work.

**Meeting 11 September 2022**

24. There was an informal meeting with the Claimant and Morad on 11 September. Tim Bird was present to take notes (those notes are no longer available). The reason for the meeting was that Morad, having taken feedback from his two Assistant Managers (Michalina and Tim), and from his own observations, had issues with the Claimant on several counts.
25. First there was the issue of attendance. The Claimant had only just started work with the Respondent, yet on the five days from 20 – 25 August, she was late for work and did not call in to warn of her lateness. She also had an early finish on 20 August without authorisation (Michalina's e-mail to Holly Gaches 20.9.22 at 140).
26. The Claimant's defence was that the lateness was only by a few minutes and was largely due to train strikes. She also said other employees were late and, on one occasion, she could not get through security on time to enter the building. However, in Morad's mind she was still late for work early in her probation period and he doubted the reasons she gave for the lateness.
27. From 26 August to 4 September the Claimant was off sick. Her claim for Statutory Sick Pay, sent in to work on 15 September 2022, shows that she self certified her absence as being due to tonsillitis (see SSP Claim at 124-126).
28. The Claimant's seven day sickness self certification expired on 2 September and Morad expected her in work on 3 September. There was no FIT note at that stage to cover her absence post 2 September. Morad called the Claimant on 3 September. There was no response. He followed this up with a text message (127) asking the Claimant to call him as he needed to have an update from her and to discuss her absenteeism. Whilst she texted back to say she had called the store (127) she did not return Morad's call.
29. On 5 September, the Claimant returned to work, although she had an early finish, which is recorded on her roster (128).
30. By the time of the meeting on 11 September, the Claimant had been employed by the Respondent for just over three weeks. In that time she had been late five times, had finished early twice, and had been absent through sickness on all her rostered working days from 26 August to 4 September. Morad had other concerns.
31. First, the Claimant was not following procedure with respect to absence notification. The Respondent's absence policy under "Reporting Your Absence" (109) required employees, who were unable to come to work, to contact their Manager/Duty Manager personally by telephone (not text message) to inform them of the reason for their absence, as early as possible, but no later than 1 hour before the usual start time on the first day of absence. After that the employee was required to keep the Manager regularly informed about how they were getting on and the likely date of return.

32. The Claimant did not follow this procedure. She told work colleagues about her absences and sent text messages to management after her shift had already started (126). She said in evidence that this was because Tim had told her it was acceptable just to call the store. Nonetheless, it added to Morad's concerns.
33. Secondly, Morad sensed a lack of commitment from the Claimant in the way she conducted herself within the store. For example, he believed that the Claimant had been talking/texting other staff on the shop floor about non-work matters instead of engaging with customers and attending to work duties.
34. He questioned whether the Claimant was engaging with the "Customer Experience Expectations" (CEEs), which were competencies she had been asked to learn. At the meeting she was asked how she rated herself against knowledge of the CEEs. She responded that she believed she scored 8 out of 10. Morad explored that by asking her questions about the CEEs and, having done so, his assessment was a score of 2 out of 10. He concluded from this that she was not engaging with the competency framework.
35. Morad asked the Claimant whether she thought she was a good fit for the Respondent, as he was not seeing the commitment he expected from her. He also explored whether the 32 hour contract was right for her, given her other commitments.
36. Morad decided that day (11 September) to terminate the Claimant's contract as soon as possible. The Claimant overheard Morad telling Tim that he intended to dismiss her. She confirmed that in oral evidence.
37. However, according to the Respondent's policy, before making a final decision on dismissal, a formal Probation Review Meeting needed to take place to provide the Claimant with a formal opportunity to respond to concerns raised.
38. The following morning, 12 September, Morad emailed HR colleagues requesting that a Probation Review Meeting be held (129). The reason he gave was: lateness, leaving work early to fix a phone without management approval, lack of focus/application/constantly tired, balancing other job and uni etc.
39. On 13 September HR sent a formal invitation by email to the Claimant to attend a formal Probation Review Meeting on 16 September to be chaired by Morad (132). It said: "During the meeting your behaviour and performance in the following areas will be discussed:
  - Lateness on more than one occasion;
  - Lack of focus and application."
40. The meeting never took place because the Claimant was off sick from 14 September and did not return. However, it was rescheduled for 7 October, the day after her sick note expired.

### **Other matters between 12 September and 7 October**

#### **Attendance**

41. On 12 September the Claimant went off sick and did not return to work. Her roster for the week 12-18 September (129) records that she got Statutory Sick Pay for the days she was rostered to work.
42. The Claimant sent in a FIT note on 22 September covering the period 12.9.22 to 6.10.22 and recorded the reason as "Mental Health"(139A). She obtained a further FIT note on 5 October covering the period 5.10.22 to 26.10.22, which recorded "Depression and Anxiety".
43. For the period the Claimant was employed by the Respondent (about seven weeks) she was in work on only nine days (20-25 Aug; plus 5.9, 8.9, 9.9 & 11.9).

### **Other work**

44. The Respondent has a policy entitled "Taking Other Work whilst Absent from the Company"(109). It says that an employee may not conduct any form of business, whether paid or unpaid, whilst absent from work.
45. Under another policy entitled "Malingering or Moonlighting" (110) it repeats the requirement not to work elsewhere during absence, and states that failure to adhere to the rule will be regarded as an act of Gross Misconduct and may result in summary dismissal.
46. The Respondent was told on 5 October by another employee (Anirudh) (146) that he had seen the Claimant on the train going to the O2 centre on 22 September and it looked like she was wearing a work uniform from another business. Both Anirudh and the Claimant got off the train at North Greenwich.
47. On 7 October, Morad expected the Claimant to return to work as her FIT note had expired on 6 October. When she did not show, he tried to phone her but she did not respond. He followed up with a text message to her at 11.22 that day (144) asking her to call him back before 2.00pm.
48. After sending this text and not receiving a reply, Morad went to the AEG reception in the O2 complex and made enquiries about the Claimant working elsewhere in the complex. AEG staff informed him they were limited in what they could say, but she had been seen within the last few days and she was fine.
49. At 12.50 the Claimant texted saying: "Hi Michalina, my doctor had extended my sick leave after being diagnosed with depression." At 13.01 Morad texted the Claimant saying she needed to follow procedure and call him either on the mobile or at the store by 2.00pm. At 13.04 the Claimant sent in a FIT note (145 & 26C) covering the period from 5 October to 26 October recording "Depression and Anxiety" as the reason for sickness (147).
50. HR, by this time, had sent the dismissal letter to the Claimant by email at 12.45 on 7 October (160). The Claimant's time of receipt is shown as 1.45pm (one hour later) (12C), which suggests her device was on a different time zone. Nothing turns on this.

51. The letter (162) gave the reasons for dismissal as conduct and her levels of absence during probation, and cited instances up to and including 4 September. It made no reference to absences after that date.

### **Discussion and Conclusions**

52. We have considered the evidence so far as it relates to the specific issues in the case, which make up the complaint of maternity discrimination. Much of what was put to us in oral evidence is of little or no relevance to the issues and has not been addressed.

53. With respect to the conversation with Michalina on 14 September 2022, Michalina suggested to the Claimant that she might want to provide a doctor's note in support of her claim for Statutory Sick Pay. She was not asked to provide proof of miscarriage. Consequently, there was no unfavourable treatment in this regard.

54. Morad decided on 11 September 2022 to terminate the Claimant's employment for conduct and attendance reasons. It had nothing to do with the Claimant's pregnancy or illness suffered as a result of pregnancy. At that stage, Morad was unaware of the Claimant's pregnancy.

55. Therefore, the Claimant was not subjected to unfavourable treatment because of pregnancy or illness suffered as a result of pregnancy. Consequently, her complaint is not well-founded and is dismissed.

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Employment Judge Liz Ord

Date **11 September 2024**

### Notes

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