**Case No: 1305782/2018**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Gita Karavadra**

**Respondent:** **B.J. Cheese Packaging Limited**

**Heard at:** **Birmingham** **On: 28, 29, 30 August 2019**

**Before:** **Employment Judge M.G.Butler**
**Members: Mr D. Johnson and Ms. D. Wood**

**Representation**
Claimant: Mr I. Ahmed, Counsel
Respondent: Mr N. Jhinjer, Director

# JUDGMENT

1. The unanimous Judgment of the Tribunal is that the Claimant was automatically unfairly dismissed by the Respondent by reason of her pregnancy and the dismissal was discriminatory.

2. The Claimant's claims for non-payment of wages and notice pay also succeed but her claim for holiday pay is not well-founded and is dismissed.

3. The total award of compensation ordered to be paid by the Respondent to the Claimant is £21,081.14.

# REASONS

**The Claims**

1. By a claim form submitted on 1 December 2018, the Claimant brought claims of pregnancy/maternity discrimination and unfair dismissal by reason of her pregnancy and subsequently amended her claims to include non-payment of wages, holiday pay and notice pay.

2. The Respondent defended the claims on the grounds that they had no knowledge that the Claimant was pregnant at the time her employment terminated, had not dismissed her by reason of her pregnancy, had paid all accrued holiday pay and wages and, since the Claimant had

failed to turn up for work after her holiday, she was not entitled to notice pay.

## The Issues

3. There was an agreed list of issues which is enclosed in the Hearing Bundle at page 7 and 8.

4. Briefly, these issues are: -
   i. What was the reason for dismissal?
   ii. Was the Respondent aware that the Claimant was pregnant?
   iii. Was reason or principal reason for the Claimant's dismissal of a kind which related to her pregnancy contrary to Section 99 Employment Rights Act 1996 (ERA), Regulation 20 of the Maternity and Parental Leave Regulations and Section 18 Equality Act 2010 (EQA)?
   iv. If so, was the Claimant's dismissal automatically unfair?
   v. In dismissing the Claimant, did the Respondent treat her unfavourably because of her pregnancy, contrary to Section 18 EQA?
   vi. Did the Respondent subject the Claimant to a detriment due to pregnancy?
   vii. Did the Respondent dismiss the Claimant without notice contrary to Section 89 ERA?
   viii. Did the Respondent fail to pay the Claimant accrued holiday pay contrary to the Working Time Regulations 1998?
   ix. What was the effective date of termination of the Claimant's employment?

## The Evidence

5. There was an agreed bundle of documents and references in this Judgment are to page numbers in the bundle.

6. We heard oral evidence from the Claimant and, for the Respondent, from Mr N. Jhinjer, one of the Respondent's Directors. Both witnesses had provided witness statements, gave oral evidence and were cross-examined.

## The Factual Background

7. It is Claimant's case that at the beginning of January 2018, she was interviewed by Mr Jhinjer and his father, Bob Jhinjer, who are the two Directors of the Respondent, for the position of administration assistant working at their premises in Smethwick. She was to undertake a three-week trial which, if satisfactorily completed, would be converted to a permanent role. During the interview, she raised questions about having extended holidays and had in mind she was hoping to start IVF treatment later that year. She was told by the Respondent's Directors that she would be able to take one month's holiday as holiday and/unpaid leave. Her trial period commenced on 8 January 2018.

8. She successfully completed the trial period and was offered permanent employment with effect from 29 January 2018. Her role was to undertake general administrative duties including telephone orders, invoicing, answering the telephone etc… On 5 February 2018, the Claimant had a miscarriage and took a day's unpaid leave on the following day before returning to work on the 7 February 2018 when she told Mr Jhinjer about her miscarriage and that she was hoping to start IVF treatment in the near future.

9. Her IVF treatment subsequently started on 25 May 2018 and, prior to treatment starting, she spoke to Mr Jhinjer to say that she would like to request one month's annual leave at the appropriate time in order that she could rest so as to avoid a further miscarriage. This would take place after egg collection and transfer during her IVF treatment.

10. During the period 25 May 2018 to 26 June 2018, the Claimant attended a number of appointments at the Fertility Clinic for which she took time off without pay. On around 24 June 2018 she booked holiday from 27 June 2018 – 27 July 2018, 27 June being the day for egg collection. She found that she was pregnant on 13 July 2018, but told no one at the time. She had the usual scans during early pregnancy, but on 24 July she texted Mr Jhinjer asking if she could have two more weeks off. He replied "Ok, no problem" (page 40). On 8 August 2018, she messaged Mr Jhinjer to say she would return to work on Monday 13 August 2018 and could start at 12pm after a doctor's appointment. She received no response. Mr Jhinjer telephoned her on 10 August 2018, during which conversation he said her long holiday had resulted in staff shortages which meant he had to cancel his holiday and she told him she was pregnant. He responded that he had never before employed anyone who had been pregnant and did not know how to handle the situation. Mr Jhinjer said that he expected that she would need a lot of time off due to her pregnancy and suggested that she took a further two to three months off. She said she did not wish to take any further time off and she wanted to return to work and he said he would call her back.

11. She did not hear from Mr Jhinjer again despite chasing him by telephone and subsequently, having spoken to another employee of the Respondent, she went into the Respondent's premises on 22 August 2018 to speak to Mr Bob Jhinjer's. He said he was not aware that his son had agreed for her to take such a long holiday because he would not otherwise have approved it. He said he was unaware she had had IVF treatment. Faced with the Claimant asking to be allowed to come back to work, he replied that "they would not allow her to return".

12. The Claimant subsequently received her P45 on 6 September 2018 showing a leaving date of 13 July 2018.

13. In relation to the claims, the Respondent, through Mr Jhinjer, denied ever having a conversation with the Claimant about IVF treatment or her pregnancy. He said they simply did not know she was pregnant at

any time up to the termination of her employment. He denied any conversation with the Claimant about her request for a month off and said, "It was a rule of the Respondent that no one could have more than two weeks off at a time". When the Claimant had texted him asking for a further two weeks off, he had replied "ok, no problem" because he was on holiday, distracted by his children and he had not read the message correctly. He was under the impression that the Claimant had returned to work after her initial two weeks off and was merely requesting a further two weeks after a period back at work.

14. The Respondent claims, therefore, that the Claimant failed to return to work after having a month's holiday, they waited for a month before making any decision and then, not having heard from her, processed her P45 with a leaving date of 13 July 2018 which was the last day of her agreed holiday.

15. We found the Claimant's evidence to be given in a logical, straightforward and concise manner. She did not prevaricate or go off the subject. Her account was substantiated by documents in the bundle. She said she regretted the comments she made about Mr Jhinjer when talking to a colleague and complaining that Mr Jhinjer was not taking her calls. Without any prevarication she acknowledged it was a mistake in saying that she was fed up with him and calling him a liar.

16. Notably, in one very important aspect, the Claimant's account was not challenged. This concerned her meeting with Mr Bob Jhinjer on 22 August 2018 at which he told her she could not return to work. It was a quite remarkable feature of this case that Mr Bob Jhinjer was not in attendance to give evidence. Indeed, the Claimant was not even questioned about this meeting. In these circumstances, we find that the Claimant's account was both genuine and accurate.

17. Unfortunately, the same cannot be said of Mr Jhinjer's evidence. We found him to be evasive under cross-examination. He frequently wondered off point by pursuing tangential examples of how other employees had been treated or had conducted themselves in different circumstances to those of the Claimant. For example, to reinforce his argument that the Claimant had effectively resigned by her conduct in not returning to work after her holiday ended on 13 July 2018, he said, "employees often worked to accrue their holiday pay, booked and took their holidays and simply did not return to work". In the light of the correspondence in the form of text messages between him and the Claimant, it was apparent to the Tribunal that this account had absolutely no relevance at all to the Claimant's circumstances.

18. Mr Jhinjer's response to being told by the Claimant that she was hoping to undergo IVF treatment and, subsequently, that she was pregnant, was dismissed by the words "that conversation did not happen". Of course, what he could not challenge with that response was the Claimant's account of her meeting with Mr Bob Jhinjer.

19. Mr Jhinjer also attempted to brush off his response to the Claimant's request for a further two weeks holiday made on 24 July 2018 by saying he was away on holiday, distracted, was looking after his children and text messages, particularly when received in such circumstances, were not taken seriously. In effect, he said that by replying "ok, no problem" he was merely dismissing the text message from the Claimant as not being particularly important. We found this evidence to be totally unconvincing.

20. Mr Jhinjer also could not remember a specific conversation with the Claimant on 10 August 2018 when, inter alia, she told him she was pregnant. His response to the pregnancy issue was "that the conversation did not take place". He did say he recalls a few short conversations but not a lengthy one with the Claimant. When he was shown the Claimant's telephone with a call history confirming he had telephoned her on 10 August and they had spoken for eleven minutes, and seven seconds, he was faced with having to concede that he had made the call.

21. We further noted the issue with the date the Claimant's P45 was sent to her. The P45 (page 78) is dated 7 August 2018. The postmark on the envelope in which it was sent and the date on the compliments slip enclosed with it is 6 September 2018. Mr Jhinjer's response was to suggest that the Claimant had access to stationery whilst she was working for the Respondent and could have written the date on the compliment slip and kept it as evidence against the Respondent if she had wanted to do so. We found this to be evidence that, in popular terms, could be described as "scraping the evidential barrel".

22. Mr Jhinjer was also challenged on the reasons why he did not return the Claimant's text messages and phone calls during August 2018. His response was "that he did not bother to reply because the Claimant had left their employment".

23. In conclusion, we found the Claimant's evidence to be entirely credible and Mr Jhinjer's evidence to be totally unreliable. Accordingly, where there was a dispute on the evidence, we preferred the evidence of the Claimant.

## The Facts

24. In relation to the issues before us, we find the following facts: -

    i. The Respondent runs a business involved in packing, labelling and distributing cheese products. The Claimant was employed as an administrative assistant from 29 January 2018 until 22 August 2018 when she was dismissed by Mr Bob Jhinjer in a meeting with him.

    ii. From February 2018 onwards, the Respondent was aware that the Claimant was hoping to undergo IVF treatment. Mr Jhinjer, during the early part of May, was told by the Claimant that she was to commence IVF treatment and would require a month off in the near future but on an otherwise unspecified date to receive her treatment. In the run up

to egg collection and transfer, the Claimant was allowed time off, unpaid, to attend appointments at the Fertility Clinic.

25. The Claimant asked for and was given by Mr Jhinjer four weeks holiday in order that she could rest after egg transfer. She subsequently sent a text message to Mr Jhinjer on Tuesday 24 July 2018 asking for a further two weeks off to which he replied "ok, no problem".

26. At the end of the additional two weeks off, on 8 August 2018, the Claimant messaged Mr Jhinjer to say she would like to return to work the following week. He telephoned her on 10 August, during which conversation she told him she was pregnant. He replied that the Respondent had never had any of its employees who were, or became pregnant and told her that her absence from work had resulted in staff shortages which the Respondent was finding difficult to cover. He noted that she might have to have quite a bit of time off due to her pregnancy and suggested that she take a further two or three months off.

27. Following this conversation, the Claimant attempted to speak to Mr Jhinjer who was to think about matters but he ignored her calls and messages. With a feeling of exasperation, the Claimant contacted another employee of the Respondent who suggested she went to the Respondent's premises to speak to Mr Bob Jhinjer. The Claimant attended the premises on 22 August 2018 and during the meeting with Mr Bob Jhinjer, he told her they did not want her to return to work.

28. On 6 September 2018, the Respondent posted the Claimant's P45 to her giving a termination date of 13 July 2018. We find that this date was deliberately wrongly submitted by the Respondent in an attempt to avoid the Claimant serving 26 weeks employment and therefore becoming entitled to certain maternity benefits which Mr Jhinjer wrongly thought meant she could not bring a claim for discrimination on the grounds of pregnancy.

29. At all material times, we find that the Claimant was an employee of the Respondent.

## Submissions

30. For the Respondent, Mr Jhinjer said "an employer could not discriminate against a pregnant employee unless the employer knows she is pregnant". If she did not have 26 weeks service, it was not possible to discriminate against her anyway. The Respondent had treated the Claimant well paying her holiday pay and giving flexible working hours. It was not true that she had been given 30 days' holiday or that she was allowed to take more than 2 weeks at a time. The Claimant had clearly been looking elsewhere for employment, so did not return to work after her holiday and then changed her mind and wanted her job back. She was just looking for an opportunity to get a pay-off from the Respondent. Far too much had been made of his text

message approving an additional 2 weeks holiday and he had explained why it was not in fact an approval.

31. For the Claimant, Mr Ahmed relied on his skeleton argument. We do not deal with this in detail here, but will revert to it in our conclusions. In relation to the evidence, he submitted the Claimant's evidence was clear and concise, the same could not be said of that of Mr Jhinjer. Much of the evidence spoke for itself, particularly in relation to Mr Jhinjer's text message. It was notable that Mr Bob Jhinjer had not attended to give evidence, particularly when it was the Claimant's evidence that he had dismissed her. Accordingly, her evidence had been unchallenged.

32. Mr Ahmed went on to suggest that the 26-week time limit was uppermost in Mr Jhinjer's mind and why he deliberately inserted 13 July 2018 as the Claimant's termination of employment. The Claimant's P45 was only sent on 6 September 2018 after the Claimant's meeting with Mr Bob Jhinjer and not before and then being delayed in the post as Mr Jhinjer suggested.

33. In relation to the burden of proof, it had shifted to the Respondent who had given no adequate explanation for the discrimination that had occurred.

## Conclusions

34. Dealing first with the issue of the status of the Claimant, we have found she was an employee of the Respondent. Mr Ahmed made detailed submissions citing relevant Case Law on the point but Mr Jhinjer accepted that the Claimant was an employee. Of course, in any event, the fact that she was employed under a "casual zero hours contract" has no bearing on the reality of the relationship between her and the Respondent. It was clearly one of employment.

35. We must also address the effective date of termination of the Claimant's employment. This we find was 22 August 2018, which was the date of her meeting with Mr Bob Jhinjer at which we find she was told the Respondent did not want her to return to work. Mr Ahmed cites the Judgment of the Supreme Court in Gisda Cyf -v- Barrett [2010] UKSC41 where the Court held that in a summary dismissal, which the Claimant's dismissal was, the effective date of termination is the date the employee actually learned of the decision to dismiss.

36. Section 99 ERA provides that an employee shall be treated as unfairly dismissed if the reason or the principal reason for the dismissal is, inter alia, pregnancy, childbirth or maternity. This is mirrored by Regulation 20 of the Maternity and Parental Leave Regulations 1999. It is necessary to establish that the employer knew or believed that the employee was pregnant (Ramdoolar -v- Bycity Limited [2005] ICR 368 EAT). We have found in this case that as of 10 August 2018, the Respondent was aware of the Claimants pregnancy. Accordingly, the dismissal of the Claimant, not having been considered by the Respondent up until this time, was the principal reason for the

dismissal which was confirmed by Mr Bob Jhinjer on 22 August 2018. Mr Jhinjer argued that the Claimant's employment was terminated because she simply failed to return to work after her holiday. As already noted by the Tribunal in the factual background, we found this argument to be unconvincing. Insofar as there is a burden on the Respondent to prove this alternative reason for the termination of the Claimant's employment, it has failed to do so. There being no minimum service requirement for pregnancy dismissals, we find it was an automatic unfair dismissal.

37. Section 18 of the EQA provides that an employer discriminates against a woman, if in the protected period in relation to a pregnancy of hers, he treats her unfavourably because of the pregnancy. This applies in the "protected period in relation to a pregnancy" and by virtue of Section 18(6) this begins when the pregnancy begins. It is clear in this case, that the Claimant was firmly within the protected period.

38. The unfavourable treatment in this case we find is the dismissal of the Claimant, together with the non-payment of wages and notice pay.

39. Accordingly, we find that the Claimant is entitled to compensation for unfair dismissal and injury to feelings.

40. We also find that the Claimant was available for work with effect from 13 August 2018 but was unable to return to work due to the failure of Mr Jhinjer to respond to her messages or clarify what her position was. Accordingly, since she was available for work, we find she is entitled to the amount she would have earned during the period 13 August 2018 to 22 August 2018.

41. We also find that she was summarily dismissed by Mr Bob Jhinjer on 22 August 2018. As an employee the Claimant was entitled to one weeks' notice pursuant to Section 86 ERA.

42. In relation to holiday pay, we find the position to be rather confusing. The burden is on the Claimant to establish on the balance of probabilities that she was entitled to further holiday pay. We have two issues with her claim in this regard. Firstly, whilst in the main, she worked relatively regular hours, there was a degree of flexibility afforded to her in order that she could attend relevant appointments in connection with her IVF treatment. We have not been given sufficient records in relation to hertaking this time to be able to formulate any idea as to precisely how much holiday she was entitled to. This is because she was hourly paid and the number of hours worked would have had a bearing on the holiday she accrued. It is not as simple as being able to accrue holiday over a period when regular hours have been worked throughout. Further, the only evidence we had in relation to the holiday she had taken was that of the Respondent and, whist we had reason to question the reliability of the Respondent's evidence throughout, the burden is on the Claimant in relation to holiday pay and she has not met it to our satisfaction.

43. Finally, we refer to the burden of proof in relation to the pregnancy discrimination. We have referred to Section 136(2) of the EQA which provides "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". We bear in mind the Judgment of the Court of Appeal in Efobi -v- Royal Mail [2019] EWCA CIV 18 in relation to the burden of proof. It is abundantly clear to us that facts in this case have been established from which it could, in the absence of any other explanation, be concluded that the Respondent had treated the Claimant unfavourably because of her pregnancy. We have had no hesitation in finding that such facts exist, so the burden of proof has shifted to the Respondent to give an explanation to show that the decision to dismiss the Claimant was not related to her pregnancy. In applying the burden of proof, we have first considered the totality of the evidence. The Tribunal was of the unanimous view that the Respondent's explanation for the Claimant's dismissal was totally inadequate in every respect. It is on this basis we have reached the conclusion that the Claimant was dismissed by the Respondent purely on the basis that she was pregnant.

**Remedy**

44. In relation to future financial losses, the tribunal considered making an award of compensation. At page 83 the Claimant produced her CV and from page 86 onwards details of positions applied for through agencies. The issue we have with these indications of interest in positions is that they are all dated July 2019 which indicates to us that the Claimant made little effort to obtain employment in the weeks and months after her dismissal. She gave evidence that she worked one shift in a call centre but did not return after that shift.

45. She said that she applied for numerous jobs but produced no evidence of this. We are of the view that this all adds up to a Claimant who had little interest in obtaining further employment at the time. Accordingly, we limit her future losses to 6 weeks.

46. In relation to loss of wages when she was available to return to work in August 2018, we award a day's pay less than claimed as she indicated in a text to Mr Jhinjer that she had a doctor's appointment on 13 August and could come into work in the afternoon or the following day (page 40).

46. The Claimant said that she was frustrated and distressed after her dismissal. She became depressed. She produced no medical evidence to support this statement and no corroboration from friends and family as to her state of mind. We also bear in mind the amount of time off from work the Claimant had taken in connection with her IVF treatment with the consent of the Respondent. Her focus, understandably in the light of a previous miscarriage, was on success with the IVF treatment and this led to a comparatively short period of time when she was actually at work. An award for injury to feelings is meant to be compensatory and not a punishment for the Respondent.

We bear in mind that dismissing an employee because she is pregnant should not be treated as having little consequence. But in this case, we are not satisfied the Claimant has established a serious injury to her feelings. Accordingly, bearing in mind the Vento bands, we are of the view this case falls into the lower band and assess compensation at £8,500. To this we add interest and the Simmons v Castle uplift.

47. We have also considered the Respondent's failure to follow any form of procedure in dismissing the Claimant. We take the view that a 10% uplift is reasonable for failure to follow the ACAS Code.

48. The financial awards are as follows:

Basic award: £290.40
Loss of earnings 6 weeks at £265.50 per week: £1,593.00
Entitlement to statutory maternity pay: £6,474.60 (90% of gross pay for 6 weeks = £1,568.16 and then 33 weeks at £148.68 - £4,906.44)
Loss of statutory rights: £500
Loss of wages: £348.47
Notice pay: £265.50
Injury to feelings including interest of £691.18 and Simmons v Castle uplift of £850: £10,041.18
ACAS Uplift £1,916.46
Total award: £21,081.14

Signed by: Employment Judge MG Butler

Signed on: 23 September 2019