CASE NO: 2603717/2020

EMPLOYMENT TRIBUNALS

Claimant: Joanna Kusmierek
Respondent: Spalding Market Ltd

Record of at Full Hearing heard by CVP at the Employment Tribunal

Heard at: Nottingham On: 21 September 2021 & 1 November 2021

Before: Employment Judge P Britton
Members: Ms F Newstead
Mr M Alibhai
Interpreter: Mrs Monica Savage

Representation
Claimant: In Person, assisted by her husband Mr Leszek Kusmierek
Respondent: Mr Mohammed Kadir, Director of Respondent
assisted by Mr Rabar Ibrahimi, Manager

JUDGMENT

1. The claims for automatic unfair dismissal by reason of pregnancy pursuant to section 99(3) of the Employment Rights Act 1996 and unfavourable treatment by way of discrimination because of pregnancy pursuant to section 18(2) of the Equality Act 2010 succeed.

2. As to the finding of discrimination the Tribunal makes an award for injury to feelings of £10,000 and orders the Respondent to pay the Claimant that sum.

3. It makes no separate award for the automatic unfair dismissal claim for reasons as set out hereinafter.

4. It makes finally an award under section 38 of the Employment Act 2002 in relation to the failure to provide written particulars of employment, of 4 weeks pay in the sum of £525.40 which the Respondent is accordingly also ordered to pay the Claimant.

5. This makes a total award of **£10525.40** payable to the Claimant by the Respondent.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal on 20 October 2020 via the Citizens Advice Agency at Gateshead. Set out was that the Claimant, who is Polish, was employed by the Respondent as a Shop Assistant from 10 May 2019 to 1 June 2020. However, in that respect it is clear from the documentation before us that the effective date of termination (EDT) was 9 June 2020 when the Claimant learnt of her dismissal when she received the P45. Boxes ticked in the ET1 were for unfair dismissal and pregnancy/maternity discrimination. The Claimant of course does not have the required two years of qualifying service to bring an unfair dismissal claim pursuant to s95 of the Employment Rights Act 1996 (the ERA). But as clarified before Employment Judge Hutchinson at the Case Management Hearing on 6 May 2021, it is in fact a claim for automatic unfair dismissal because of being dismissed by reason of pregnancy. Such a claim does not require the two years qualifying service as to which see section 99 of the ERA.

2. The second claim in the circumstances was for discrimination by way of unfavourable treatment because of pregnancy which engages section 18 of the Equality Act 2010 (the EqA). Set out essentially was that she was dismissed while she was absent on sick leave due to the pregnancy having been advised by her GP not to inter alia bend or lift. Thus she was certified as unfit for work from 30 March 2020. She was only aware that she was dismissed when she received the P45 on 9 June 2020.

3. The response (ET3) was received on 10 November 2020. It was again somewhat scant. It was prepared by Mr Ibrahimi. Essentially as per the email that the Tribunal received from the Respondent circa 17 June 2021 it was simply denied that she had been dismissed.

4. As is by now clear there was a Case Management Hearing in this matter before Employment Judge Hutchinson on 6 May 2021. He directed that the main hearing be heard by way of Cloud Video Platform (CVP) over the two days commencing 21 September. He made directions for a bundle which would be prepared via the Respondent and exchange of witness statements by 15 July. He also ordered the Polish interpreter.

5. Stopping there, there has never been a bundle prepared and the documentation that the Tribunal has had in is piecemeal. Essentially it consists of first, 3 pay slips for the period January - March 2020; second, and only sent in on 17 September 2021, payslips purporting to have been issued for the period July 2020 – March 2021; third

the P45 via the Claimant which shows a leaving date of 1 June 2020 but the same having been dated as issued by the Respondent 9 June 2020; finally, a statement from Leszek Kusmierek. There are no other statements. Otherwise, the Tribunal received a schedule of loss. But it cannot apply other than for injury to feelings because the Claimant has not got sufficient qualifying service for a basic award. And as to loss of earnings because of the interface to statutory maternity pay and the back dated payments of the employer for the period that we have now referred to going all the way through to March 2021, there cannot be any loss.

The Issues and first observations

6. Encapsulated the issues in this case as they emerged before us are as follows:

6.1 Was the Claimant dismissed by the Respondent employer? Before us it was confirmed for the Respondent that she was, which explains the P45.

6.2 What was the effective date of termination? A dismissal is not effective until the Claimant knows that she has been dismissed. On the evidence it is now essentially not in dispute that she could not have known this until she received the P45 by e-mail on 9 June 2020. Thus, allowing for the ACAS Early Conciliation period which was between the 2 September and 2 October 2020 the claim is in time. [1]

6.3 What was the reason for the dismissal? In that sense the burden of proof as per the ERA is on the Respondent to show us that it had a reason for the dismissal. This has to be one that it genuinely believed in. But when it comes to a pregnancy related dismissal it really is a situation where once the employee has established that she was dismissed as in this case, then it is whether on the evidence the Respondent proves on a balance of probabilities that no part of the reason to dismiss was a prescribed reason ie the fact that the Claimant was pregnant. The Claimant learnt that she was pregnant circa February 2020 and her baby was born prematurely on 11 September 2020. As to the Respondent knowing that she was pregnant, for reasons we shall come to that issue has resolved itself and particularly via the evidence of not just Mr Kadir otherwise known as “Mo” but also in particular the witness, Karolina Miszara who was called on behalf of the Respondent. That she was made aware via the Claimant that she was pregnant very soon after she found out became absolutely clear on the evidence of Karolina and that she informed the employer i.e. Mo and Mr Ibrahami.

6.4 The core issue then becomes as to did the Respondent know of the reasons why the Claimant went off sick from 30 March and which on the face of it included pregnancy related reasons?. If so, did it unreasonably require that the Claimant return back to work even if it was on light duties when she made plain that she could not. And finally in that context did the Respondent via Mo therefore issue an ultimatum to the Claimant’s husband when he came in with the Claimant’s final sick notes and the Mat B1 form viz pregnancy, that unless

[1] The time limit is three months from the EDT plus in this case the ACAS EC period.

the Claimant returned to work forthwith she would be dismissed?

6.5 Was she then dismissed because she did not turn up for work and was this in turn therefore related to her pregnancy?

Findings of Fact

7. The Tribunal heard sworn evidence in the following order; first from Leszek Kusmierek the Claimant's husband. We have already referred to his written statement. He is also Polish and gave most of his evidence via the interpreter. Then we heard from the Claimant mainly through the interpreter. For the Respondent from Mo followed by Karolina and finally Mr Ibrahimi ("Rabar").

8. The Tribunal finds the following facts and in so doing makes plain that it found the evidence of the Claimant and her husband consistent and compelling. In contrast the Respondent's evidence was on many occasions contradictory save for that of Karolina who corroborated much of what the Claimant was saying. Also during that evidence, she went further when questioned by one of the Tribunal members and said that she had told Mo and Rabar that it was not right to demand that the Claimant return to work whilst she was still covered by the sick notes and because she herself was a mother with three children and thus understood problems during pregnancy. But that there was nothing she could otherwise do about it and because she wasn't the boss.

9. This matters because initially the Respondent via Mo and Rabar appeared to be saying that it had no knowledge of any sick notes or any conversation with the Claimant's husband and when he had visited the premises; and that the Claimant was not told that if she didn't return to work she would be dismissed; or finally that it had dismissed her because of her pregnancy. These matters are crucial. What is of concern is the evidence clearly given by Rabar but also endorsed in his comments to us by Mo, that he and Mo did not believe the Claimant's sick notes and therefore the certification by the Doctor that she was not fit to return to work, and of course because of the pregnancy; instead they believed that: *"using this pregnancy as an excuse to get out of doing her job…. she's lying back taking the money when she should be at work".*

10. Having made those observations we now come to our other findings. The Claimant realised that she was pregnant in February 2020; she was feeling very tired and inter alia her breasts were hurting. She informed Karolina who is also Polish. Karolina in turn told Mo and we also believe Rabar. There was some discussion with the Claimant as to whether she could undertake light duties. She cannot incidentally work on the till because her English is so poor in what is a food related store in Spalding. Most of her work it seems was going up and down the stairs to get stock and dealing with also the stocking "warehouse" in what is not a large store and most of which seems to be upstairs.

11. In any event this was overtaken by the fact that from 30 March 2020 the Claimant stopped working because she was feeling poorly; and the evidence is that there were complications with the pregnancy. We have no evidence to contradict that of her and her husband and also Karoline that she was having to increasingly visit the hospital. Having been issued with the first sick note by the GP on 30 March and which

covered her to 13 April 2020, she brought the same in to the store and gave it to the Respondent on the same day. . She did likewise with the second sick note which covered the period 14 April – 28 April 2020. There is always in this case a promptitude about informing her employer of the extended absence and bringing in those sick notes. On 28 April or thereabouts she brought in with her husband the third sick note which would cover her to 12 May 2020. On or about 12 May 2020 the husband duly brought in the next sick note which would cover to 26 May and with it the Mat B1 form which of course is a notification that the Claimant will be taking her maternity leave in due course and of course will be claiming for maternity pay.

12. This brings us to the clear conflict. Did Mo refuse to take that last fit note and did he call the husband back to the store a few days later and hand back the Mat B1 and give an ultimatum that either the Claimant returned to work forthwith or she would be dismissed. As we know the Claimant was to receive a P45 giving a departure date of 1 June and which she received circa 9 June 2020.

13. At first the evidence of Mo in particular was that she had asked herself for that P45 and this goes back to not wanting to work but instead *"use pregnancy as an excuse…. lying on back and taking the money".*

14. But what undermines the Respondent is the evidence of Karolina whose evidence in that respect obviously didn't come up to proof in terms of what the Respondent might have expected. We also have that Mo changed his evidence in many respects such as at first denying knowledge of the sick notes or having seen the husband come in for the reasons we have gone to. The evidence of Karolina who we have no reason to disbelieve and currently remains in the employment, corroborates that of the Claimant and her husband namely;

1. That she knew of the pregnancy early on.

2. That she informed the employer.

3. That she herself had never heard the Claimant say that she wanted to lie on her back and take the money. S or when it was said: in other words it is distinctly hearsay.

4. That she could remember the Claimant coming in with her sick notes and that Mo at that stage having been told by her of the sick notes had asked that Karolina look after them.

5. That she could recall the husband coming in and with what seemed to be a fit note and a document that Karolina referred to as *"being from the midwife"* i.e. that is sufficient to support that this would have been the Mat B1. The husband went upstairs to talk to Mo, and she doesn't know what they said.

6. That on the instructions of Mo, and because there is otherwise considerable difficulty in communication between Rabar and Mo who are Kurdish but fluent English speaking and on the other hand the Claimant who has very poor English, she therefore conveyed to the Claimant that they wished

her to undertake light duties which would mean that of course they did not accept that she was unfit to return to work per. The discussion which the Claimant had with Karolina was to the effect that she was not feeling well and also on occasions dizzy and therefore she did not wish to return to work and risk for instance falling down the stairs until her Doctor had certified her as fit. Initially Karolina seemed to suggest, which would fit with evidence of Mo and Rabar, that it didn't seem that the reasons given for not being able to work i.e. relating to *"physiological"* and *"breasts worry about a lump"* were pregnancy related, but she conceded to the Tribunal that she could not rule out that they might be and given of course the Claimant was pregnant and had complained about feeling unwell in that respect. We can add that at no stage did the Respondent ever ask of the Claimant a medical report from her Doctor to confirm the reasons for her absence despite the fact that on the evidence of Mo and in particular also that of Rabar that they didn't believe her sick notes and this goes back to the lying on her back/ malingering comments .

7. And she then told us that she in effect knew about the ultimatum because she told us how she had been unhappy that the Respondent was requiring the Claimant to come back to work given that she was pregnant but that there was nothing she could do about it as she is not the boss.

13. Well of course all of that fits with the evidence of the Claimant and her husband. It also undermines large parts of the evidence of Mo and Rabar which has a significant impact upon their credibility. On the other hand, it only enhances the credibility of the Claimant and her husband in terms of the consistency of their evidence.

14. It follows that we find as a matter of fact on the evidence that the Claimant established that there was a prima facie case that the reason for her dismissal was pregnancy and that the Respondent has failed to rebut that inference by demonstrating to us on its evidence that no part of the reason for the Claimant's dismissal was related to her pregnancy.

15. Turn it around another way and we are persuaded by the evidence of the husband in particular that he was told that if the Claimant did not return to work forthwith then she would be dismissed. And she couldn't return to work because she was not feeling well enough and throughout she was covered by sick notes to that effect from her GP.. There was then the dismissal. And it makes no sense for the Respondent via Mo and Rabar to contend that this was because the Claimant had not kept in touch, because as the evidence unfolded in effect the Respondent accepted and i.e. via the evidence of Karolina and also Mo changing from no contact to he might have seen the husband but could not recall, that it follows that the dismissal was because of the Claimant's pregnancy. Turn it around another way if she is certified by her Doctor as unfit for work and which is inter alia because of her pregnancy and complications, and the employer chooses to not believe those medical reports and insists that she return to work and when she doesn't dismisses her, it cannot but be for reason related to her pregnancy.

16. As to any evidence that might support the Respondent that the Claimant was a malingerer and exploiting then for the purposes of her pregnancy and maternity

leave in due course, three factors then also come into play.

1. Mo said that he had had other pregnancy related employees who he has treated completely properly in relation to their pregnancy. He produced no documentary evidence whatsoever to that effect. Reference was made to Angelika, but she was employed after the Claimant had been dismissed. In that respect we note the belated pay slips curiously purporting to pay the Claimant statutory maternity pay from July 2020 onward which were only produced by the Respondent very shortly indeed before this Hearing. We now know that the Claimant was paid maternity pay by the Respondent of over £4000 at the end of March 2021 which is of course well after the claim had been presented to the Tribunal. So, in that sense it doesn't assist the Respondent at all. It begs the question why pay her if it in fact had dismissed her. It maybe that it was doing this in order to enhance its position in the case before the Tribunal.

2. It was alleged by the Respondent that she was seeking other work and might even had got it during the period when she was off sick. No evidence has been produced to support that contention; and the evidence of the Claimant was she had looked for other work the year before because there was elements of working at the Respondent she felt uncomfortable with i.e. she says there was a drinking of alcohol etc going on upstairs where she had to work. But she was unsuccessful and soldiered on in the job of course one reason being that she knew Karolina who was a long standing friend of her husband; the Claimant had only recently come to the UK; and of course she had the comfort of working with somebody who was known to her and spoke Polish.

3. To turn it around another way, , the Respondent has produced no evidence that stacks up that the Claimant was seeking jobs in this period and in that sense to justify its assertion that she was taking sick leave on a false premise.

Conclusion

17. Thus looked at in the round the Claimant's case is made out. The Tribunal unhesitatingly concludes that this was not just an automatic unfair dismissal viz the ERA because the primary reason for it was the pregnancy, but was also pregnancy discrimination viz the EqA in that she was therefore unfavourable treated because of the protected characteristic of pregnancy , thus entitling consideration of an award for injury to feelings.

18. That is important because in terms of the ERA claim there is no loss.

The Furlough Issue: and observation

19. We heard during the case from the Respondent that once it became clear that the Claimant was unfit by reason of the sick notes that it decided to place her on furlough leave to assist her. The Claimant when giving her evidence to us was totally

unaware of what Furlough even meant. She had realised that her pay was lower, but she thought that was sick pay.

20. The Respondent may also have paid others for furlough during this period despite the fact that it was a food shop and therefore exempt from lockdown.

21. And the point being that the Furlough Regulations did not permit of avoiding the consequences of somebody being off sick and thus entitlement to sick pay whether it be statutory or contractual, because the payment of Furlough was intended to avoid the need to dismiss employees in businesses otherwise shutdown.

22. It follows that the Tribunal is extremely concerned that the Respondent has on its own evidence prima facie improperly exploited the Furlough Regulations. The members, in particular, wish this to be recorded.

Remedy

23. The Tribunal now has to assess the amount of compensation. This engages two elements the first is an award for injury to feelings. Essentially what the Tribunal has to do, and in terms of accessing the Claimant and the evidence that she has given and of course taking into account her answers to questions from inter alia the Respondent, is to assess the extent to which the treatment of her caused her to suffer such as distress, humiliation, and anxiety. We do not have in this case any medical evidence from the Claimant such as by way of a Doctor's report as to any aggravation so to speak in her own health; and she has had every opportunity to do that should she have wished to. So, we go on the evidence and our observations of her. We also have to assess whether we should award her any loss of earnings and because part of the judicial exercise is to place her in the position in which she would have been but for the act of discrimination.

24. Taking those matters in turn the evidence that we have is that the Claimant was already by the time that she was dismissed suffering complications from her pregnancy. The question then becomes was there any aggravation of her condition consequent upon the dismissal. What we do know is that she was taken aback by being dismissed; that it had the impact upon her of increasing her anxiety in relation to the forthcoming pregnancy; and that she of course also lost the comfort in knowing that she had a job to come back to at the end of her maternity leave. This is doubly so as the hours were always flexible. And the Claimant has on occasion been distressed before us. We have no reason to believe that she isn't genuine in that respect.

25. What we have concluded is that this matter therefore falls at the bottom of the middle band of **Vento**[2] as updated by the latest Presidential Guidance. Therefore the Tribunal has determined the appropriate award for injury to feelings should be **£10,000**. It has a discretion to award interest as to which see section 139 of the Equality Act 2010 and the interface to the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 as amended with the coming into force of the

[2] Vento v Chief Constable of West Yorkshire Police (No.2) (2003) IRLR 102 CA.

Equality Act 2010. But under regulation (2). If awarded interest accrues at 8% per annum from the date of the discrimination which of course is the date of dismissal. But our assessment of the award at £10,000 reflects the totality of what we consider fairly reflects the appropriate compensation. For that reason we will not additionally award interest.

Loss of Earnings

26. On the evidence the Claimant would not have returned to this job before the end of one year from the birth of her baby. That takes us to circa September 2021. She has of course received belatedly her entitlement to maternity pay from the Respondent and thus there is no loss of earnings for that period.. And as to the period thereafter the Tribunal is not persuaded There is abundant work including for part timers in the food industry in and around Spalding. Her lack of English is not a barrier as there is still a significant Polish contingent in the area work force. It follows that the Tribunal is not going to make an award for loss of earnings.

Failure to provide Written Particulars of the Employment

28. Section 38 of the Employment Act 2002 is engaged. The Tribunal is obliged to consider whether to make an additional award if a claim based upon the Employment Rights Act 1996 has succeeded and the employer was in breach of the requirement to provide written particulars of the employment. As to the unfair dismissal claim under s99(3) has succeeded, thus it is engaged.

29. Section 1 of the ERA provides that an employee must be provided by the employer with written particulars of the employment as set out in the section not later than two months from the beginning of the employment[3].

30. Not in dispute is that the Claimant never received such written particulars.

31. As to why this did not happen, from the evidence for the Respondent put simply employment procedures were non-existent. Indeed, on the evidence it still, as an example, is not providing written particulars of employment. But the Respondent has some ten employees and has been in business for some time. Furthermore, its Director, Mo, is an experienced businessman. And he uses, for example, the services of a payroll company. Thus, he could have used it or some other allied service to provide such as written particulars. It follows that we are of the view that this was a significant failing in not providing the Claimant with the written particulars of employment as required. Therefore the Tribunal has decided that it is just and equitable in all the circumstances to make the maximum award of four weeks pay as per section 38. From the payslip that we have been provided with the monthly pay was £525.40 for the last full month worked which equates to £131.35 per week. Thus the award is 4 x £131.35 = **£525.40**.

[3] This was subsequently amended in that where employment starts from 1 April 2020 the requirement is that the particulars be given immediately . In this case the employment started before tht date.

Employment Judge P Britton

Date: 23 November 2021

JUDGMENT SENT TO THE PARTIES ON

26 November 2021

.....

.....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.