



EMPLOYMENT TRIBUNALS

Claimant: Miss Abigail Baines

Respondent: Reach2 Academy Trust

PRELIMINARY HEARING BY TELEPHONE

Heard at: East London Hearing Centre

On: Monday 21 December 2020

Before: Employment Judge Speker OBE DL

Representation

Claimant: In person

Respondent: Ms Ciara Jenkins (Solicitor)

ORDER

**Made Under Employment Tribunals Rules of Procedure 2013
Rule 29**

1. The complaints under the Equality Act 2010 were presented outside the statutory time limits in Section 123(1)(a) & (b) of the Equality Act. However, I find it just and equitable to extend the time limit and accordingly the claims under the Equality Act 2010 are allowed to proceed and are dealt with under 4 below.
2. The claims under Section 13 of the Employment Rights Act 1996 were presented out of time. It was reasonably practicable to have presented the claims within time and accordingly those claims are dismissed on the basis that the Tribunal has no jurisdiction.
3. The claim of breach of contract is dismissed on the grounds that this was presented outside the statutory time limit and in any event the Tribunal has no jurisdiction bearing in mind that when presented, the Claimant was no longer employed by the Respondent and that claim is dismissed.

4. The claims of discrimination on the grounds of pregnancy or maternity are struck out as having no reasonable prospect of success.

REASONS

TELEPHONE HEARING

This Telephone Preliminary Hearing was arranged in order to consider preliminary issues set out in the notice of 23 September 2020:

Was any complaint presented outside the time limits in Sections 123(1)(a) & (b) of the Equality Act 2010 and if so, should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis or little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was “conduct extending over a period”, whether it would be “just and equitable” for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.

1. The Claimant participated in this hearing and represented herself. The Respondent was represented by Ms Ciara Jenkins, a Solicitor. In advance of the hearing the Respondent had filed detailed submissions running to 11 pages within which reference was made to each of the claims brought by the Claimant and the reasons why the Respondent considered that the claims were out of time and also why it was argued that they should be struck out as having no reasonable prospect of success. The bundle of documents included the Claimant’s contract and two policies dealing with employment rights including rights to maternity leave and maternity pay. I also noted a form which had been signed by the Claimant in which she selected an option as to her right to receive Occupational Maternity Pay being deferred and subject to her returning to work for 13 weeks after her maternity leave and also other email correspondence.

2. The Claimant had also filed late on the night before this hearing her own bundle of documents including minutes of grievance hearings in which she was involved, and which were unsuccessful. The Claimant had appealed against the refusal of her grievance regarding her claim for “contractual” maternity pay but had ultimately informed the Respondent that she would not be proceeding with that appeal because she was issuing an application to the Tribunal.

3. The brief and essential details are as follows:

- (i) The Claimant was employed by the Respondent as a teacher at one of the Trust’s 19 schools;
- (ii) Her employment with the school commenced on 1 January 2018 although she had continuous employment extending back to 2014;

- (iii) The material conditions of employment were governed by the Burgundy Book although the Trust incorporated policies from the local authority in which each school was based in the case of this employment the Waltham Forest Council policy which offered terms which were enhanced and higher than the Burgundy Book, in particular entitling employees on maternity leave to receive 9 weeks of 100% of average earnings;
- (iv) The 2017 policy made clear that employees were entitled to receive Statutory Maternity Pay (SMP) and Occupational Maternity Pay (OMP) and the conditions and details were set out;
- (v) Options were provided for employees, for example to be paid 45% of average pay for 20 weeks or 100% for 9 weeks both amounting to the same total. However, in each case the entitlement to Occupational Maternity Pay was conditional upon the employee returning to work for 13 weeks after maternity leave.
- (vi) On 4 June 2019 the Claimant notified the Respondent of her pregnancy and was sent the policy and payroll form which stressed the requirement to return to work 13 weeks after maternity leave.
- (vii) On 11 July 2019 the Claimant sent in the completed form stating that her baby was due on 4 November 2019 and that her leave would commence on 28 October 2019 and further stating that she wished to have her Occupational Maternity Pay after she returned from maternity leave, the form recommending that option to avoid an employee having to repay Occupational Maternity Pay.
- (viii) On 28 October 2019 the maternity leave commenced, and the Claimant was paid SMP as she had selected.
- (ix) From early in January 2020 the Claimant was querying whether she was entitled to other maternity pay which she described as 'contractual' maternity pay.
- (x) On 27 January 2020 the Claimant resigned from her employment with the Respondent and in her letter expressed her gratitude to the Respondent but stated that she was leaving for personal reasons to be closer to her support. The resignation letter was acknowledged, and it was stated that under the terms of the contract, the Claimant's employment would end on 1 August 2020 and that this was the effective date of termination (EDT). The Claimant did not work her notice as she was on maternity leave and her Statutory Maternity Pay continued.
- (xi) On 6 April 2020 the Claimant lodged a grievance which she asked to be treated informally. When the grievance was not upheld, she asked for it to be treated as formal.

- (xii) On 12 June 2020, she was notified of the outcome namely that her grievance was not upheld and that she was only entitled to SMP and OMP but that the OMP was subject to her returning to work which she had not done and therefore she was not entitled to receive it. The Claimant was also advised that Occupational Maternity Pay and Contractual Maternity Pay were one and the same thing. The Claimant then asked if she could be reinstated so that she could qualify for her OMP but was told that her vacancy had been filled, there were no vacancies and that because of the Respondent's financial position resulting from she could not be reinstated. The Claimant proceeded with her formal grievance and there was a meeting on 8 July 2020, but her grievance was not upheld. She was told that she had the right to appeal and she lodged an appeal on 20 July but later indicated she would not pursue this and would be taking a claim to the Employment Tribunal.
- (xiii) The Claimant made reference during the grievance process to the fact that she had received legal advice and it was noted that she was supported by her Trade Union during the grievance process.

4. As the EDT was on 30 April 2020 and the claimant's claims were presented to the Tribunal on 27 August 2020, all of the claims apart from that relating to the refusal to reinstate her were out of time. However, insofar as I am able to do so, with regard to the discrimination claim I find that it is just and equitable to extend time in order to validate the discrimination claims so that they are treated as not being out of time and therefore I do not dismiss the claims for want of jurisdiction. However, with regard to the claim of unauthorised deduction from pay and the other claims under the Employment Rights Act, I find that they are out of time and applying the relevant statutory test, it was certainly reasonably practicable for them to have been presented in time. Therefore, those claims must be dismissed. Where I have extended time for discrimination claims on the basis that is just and equitable to do so, I have taken into account that the Claimant, despite advice she received, was not made aware of the statutory time limits and was totally ignorant of these and these matters arose at a time when she was stressed due to her pregnancy and her maternity leave. That is the basis for extending time. The test of reasonable practicability under the Employment Rights Act is stricter.

5. With regard to the Respondent's application to strike out the claims on the basis that they have no reasonable prospect of success, I have considered the position in relation to this having regard to the submissions made on behalf of the Respondent and by the Claimant herself. Rule 37(1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 states as follows:

At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds - (a) that it is scandalous or vexatious or has no reasonable prospect of success.

The application in this case is made on the basis that the claim has no reasonable prospects of success. I take into account the case of *Mechkarov v Citibank NA 2016 ICR 121* and accept that it should only be in exceptional cases that a

discrimination claim should be struck out and only where it is a clear case for doing so.

6. In the present case, it is clear that the Claimant bases her claim on an interpretation of the documents which I do not find to be reasonable or justifiable. It rests upon the fact that the word 'contractual' is used in some places in the documentation as well as the more frequently used term "Occupational Maternity Pay". On any coherent interpretation of the documentation, it is clear that those terms are interchangeable and mean one and the same thing. Contrary to the view held by the Claimant, there is nothing to suggest that she, as a Claimant going on maternity leave, would be entitled to some separate category of pay named "Contractual Maternity Pay". What she was entitled to under her contract was Occupational Maternity Pay. She did not receive this because in the event she did not return for the required 13 weeks following her maternity leave.

7. I enquired whether the claimant had any evidence to show that any other person within the employment of the Trust or otherwise had received this separate category of 'contractual' maternity pay in addition to Occupational Maternity Pay and she said that she had not made any enquiries about this but certainly she could not produce any evidence that it had occurred. The fact that she maintained that the documentation and policies were contradictory and unclear or that they had not been properly explained to her did not mean that there was any arguable case which a Tribunal could find established on her behalf.

8. I find that there is no reasonable prospect of any Tribunal finding that the Claimant's claims of discrimination based upon her claim of maternity pay could be upheld. There is no cogent evidence to establish that there is any right for her to receive anything other than the Occupational Maternity Pay. The fact that she did not receive it was because she took the decision to resign and not return to work for 13 weeks after her maternity leave. The fact that the Claimant then applied to be reinstated after having resigned and that the Respondent did not reinstate her is also a claim for which I find no valid support and no reasonable prospects of success. It was stated throughout by the Respondent that the Claimant's position had already been filled which was not unusual and that there were no other vacancies and that Covid had placed financial pressure on the Respondent's business. I find that there is no prospect of the Claimant succeeding with this claim.

9. On the above grounds, I therefore strike out all of the Claimant's claims on the basis that there is no reasonable prospect of success and I do so taking fully into account the overriding objective set out in r2 of Schedule 1 to the 2013 Rules.

Employment Judge Speker OBE DL
Date: 7 January 2021