Case No.
2400177/2017

EMPLOYMENT TRIBUNALS

Claimant: Ms S Derouiche

Respondent: Salam & Co Solicitors Ltd

HELD AT: Manchester **ON:** 20 March 2017

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: In person

Respondent: Mr J Frederick, consultant

JUDGMENT BY CONSENT

The complaint of unlawful deduction of holiday pay is dismissed following withdrawal by the claimant.

CASE MANAGEMENT ORDER

1. The tribunal will determine the complaints and issues set out in the following discussion.
2. The final hearing will take place before an employment judge sitting with lay members on **23, 24 and 25 August 2017**. **Three days** have been allocated to the hearing. The parties must be prepared to deal with all issues relating to liability (whether the claim is well founded or not). If the claim is well-founded, issues relating purely to remedy will be determined at a separate hearing.
3. The timetable for the hearing will be as follows:
   3.1 Day 1 (to 11.30am) – preliminary discussion and tribunal reading time;
   3.2 Day 1 (from 11.30am) to Day 2 (11.00am) – oral evidence of the claimant and her two witnesses;

3.3 Day 2 (11.00am to 1.00pm) – oral evidence of Mr Salam for the respondent;

3.4 Day 2 (2.00pm to 3.00pm) – oral evidence of Ms Jones for the respondent;

3.5 Day 2 (from 3.00pm) – closing submissions

3.6 Day 3 – deliberation and judgment.

4. If at any time a party considers that the timetable or time allocation needs to be varied, that party must immediately apply in writing to the tribunal.

5. No later than 4pm on 3 April 2017, the claimant must deliver her schedule of loss to the respondent. The schedule must indicate what remedy the claimant seeks. If the remedy includes compensation, the schedule must indicate the amount sought and how it has been calculated. If the claimant seeks compensation for loss of earnings, she must set out any earnings from other employment. Any claimed compensation for hurt feelings must be quantified by reference to the cases of *Vento v. Chief Constable of South Yorkshire Police* and *Da'Bell v. NSPCC.*

6. No later than 4pm on 3 April 2017, the respondent must deliver the following information in writing to the tribunal and the claimant:

   6.1 the issues in relation to the complaint that the respondent discriminated against the claimant by failing to carry out a specific risk assessment within the meaning of regulation 16 of the Management of Health and Safety at Work Regulations 1999;

   6.2 whether or not it disputes the claimant's contention that the provisions, criteria or practices (PCPs) set out in the following discussion put women at a particular disadvantage when compared to men and, if so, the respondent's basis for disputing that contention.

7. If, for health reasons, the claimant requires the tribunal to make any adjustments to the ordinary procedure for conducting a final hearing, she must notify the tribunal and the respondent in writing of any such adjustments by 4pm on 24 April 2017.

8. No later than 4pm on 24 April 2017, each party must make a reasonable search for all relevant documents in that party's control and deliver a copy of all such documents to the other party.

9. A document is relevant if it assists a party's case or undermines a party's case.

10. This order does not require disclosure of documents that are relevant purely to remedy.

11. The parties are reminded of their continuing obligation to disclose relevant documents.

12. The respondent must prepare the bundle of documents for use at the final hearing. The bundle must be contained in one or more files that can be opened flat. It must have an index. Pages must be consecutively numbered. They must appear in chronological order unless there is a good reason for them appearing in a different order.

13. No later than 4pm on 8 May 2017, the respondent must send to the claimant a draft index for the bundle to be used at the final hearing. The parties must produce an agreed index no later than 4pm on 22 May 2017. The respondent must then immediately send a copy of the agreed bundle to the claimant.

14. By 4pm on 12 June 2017, the parties must deliver to each other signed witness statements from all the witnesses on whose evidence they rely. The claimant complies with this paragraph in relation to her own evidence by delivering a copy of her own witness statement.

15. This order does **not** require the parties to exchange their witness statements simultaneously. If a party considers that the other party has failed to deliver its witness statements on time, it must deliver its own witness statements to the other party in compliance with the order and immediately inform the tribunal of the other party's non-compliance.

16. Witness statements must be full and complete and must contain all the evidence upon which the party calling the witness relies. The statements must, however, be confined to the evidence that is relevant to the issues to be determined by the tribunal. They must be divided into separate numbered paragraphs. Evidence of communications covered by "without prejudice" privilege must not be included. If a witness statement refers to documents, it must indicate the page of the agreed bundle where each document can be found.

17. If the maker of a witness statement does not attend the hearing to be cross-examined, the tribunal may nevertheless consider the evidence contained in the witness statement, but is likely to give the statement reduced weight.

18. The respondent must ensure that, in addition to the parties' own copies, 4 copies of the bundle and 5 copies of the witness statements are brought to the tribunal no later than 9.15am on the first day of the hearing.

19. **By 4pm on 6 April 2017, the respondent's representatives must inform the claimant and the tribunal in writing:**

    19.1 **whether they also represent Mr Salam personally as well as representing the respondent;**

    19.2 **if so, whether Mr Salam objects to the claim being amended so as to add him as a respondent; and**

    19.3 **if so, his grounds of objection and whether he requires a further preliminary hearing to decide that question.**

DISCUSSION

Complaints and issues

1. By a claim presented on 13 January 2017, the claimant raised the following complaints:

    1.1 automatically unfair constructive dismissal, contrary to sections 94, 95(1)(c) and 99 of the Employment Rights Act 1996 ("ERA") and regulation 20 of the Maternity and Parental Leave etc Regulations 1999;

1.2 a claim for damages for breach of contract (wrongful dismissal)

1.3 direct sex discrimination contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");

1.4 discrimination because of pregnancy and/or maternity, contrary to sections 18 and 39 of EqA;

1.5 indirect sex discrimination contrary to sections 19 and 39 of EqA;

1.6 breach of section 80G of ERA in relation to flexible working; and

1.7 detriment on the ground of having made such a request, contrary to section 47E of ERA.

Unfair constructive dismissal

2. The claimant relies on one term of the contract only, which can conveniently be labelled "the implied term of trust and confidence".

3. The complete list of ways in which trust and confidence is said to have been undermined is recorded under the other headings in this discussion.

4. When asked whether it was her case that there was a "final straw" prompting her resignation, the claimant replied that the final straw was the combination of the alleged remarks on 5 September 2016, the way the respondent dealt with her grievance, and the way she was "messed around" in relation to her sickness absence reporting.

5. The tribunal will have to determine the following issues:

5.1 Did the respondent conduct itself as alleged?

5.2 Was that conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

5.3 Did the respondent have reasonable and proper cause?

5.4 If not, did the claimant resign in response to the breach?

5.5 Did the claimant affirm the contract by remaining in employment? (In order to determine this issue, the tribunal may have to decide whether or not the matters set out above were capable of amounting to a "final straw").

5.6 If the claimant was constructively dismissed, was the sole or principal reason for the fundamental breach of contract related to the fact that the claimant was pregnant or had taken maternity leave?

Wrongful dismissal

6. This complaint hinges on whether the claimant was constructively dismissed (see above).

Pregnancy and maternity discrimination

7. The claimant has set out a list of ways in which she says she was unfavourably treated. These are at paragraphs 37(b)a. to 37(b)h. of her Particulars of Claim. All of them are alleged to have taken place during the protected period, either during her pregnancy or during her maternity leave. The claimant clarified that allegations g. and h. (failure to discuss or offer a training contract) relate to the period before her maternity leave started.

8. By e-mail of 21 March 2017, the day after the preliminary hearing, the claimant also sought to add to the list the e-mail from Mr Salam referred to in paragraph 9 of the Particulars of Claim.

9. To this list, the claimant has added three specific allegations of events ("the post-return events") that took place after she returned to work. These are:

   9.1 (paragraph 32) rejecting the claimant's grievance before inviting the claimant to a meeting;

   9.2 failing to pay the claimant's statutory sick pay; and

   9.3 failing, in the written grievance outcome dated 25 November 2016, to explain why the claimant could not work part-time.

10. Together, these add up to a complete list of the allegations of unfavourable treatment.

11. The tribunal will have to decide:

   11.1 in relation to any occasion prior to 3 September 2016, whether the treatment formed part of an act extending over a period ending on or after 3 September 2016 and, if not, whether it would be just and equitable to extend the time limit;

   11.2 whether the respondent treated the claimant as alleged;

   11.3 if so, whether the reason why the claimant was treated in that was because she was pregnant or was on maternity leave; and

   11.4 in relation to the post-return events, whether they were the implementation of a decision taken whilst the claimant was pregnant or on maternity leave.

12. Further issues may arise in relation to the complaint of discrimination based on alleged failure to carry out a specific risk assessment. Claims such as these are not straightforward. The respondent contends, at present, that the claimant's work was not such as to give rise to a statutory duty to make a specific risk assessment. What is unclear is:

   12.1 whether or not the respondent accepts that the claimant notified it of her pregnancy within the meaning of regulation 18 of the Management etc Regulations;

   12.2 whether or not the respondent contends that it actually did carry out a risk assessment; and

   12.3 whether or not the respondent accepts as a matter of law that a failure to comply with regulation 16 of the Management etc Regulations automatically amounts to unlawful discrimination, or whether it contends that further issues would have to be determined.

Direct sex discrimination

13. If the claimant's claim of pregnancy and maternity discrimination is unsuccessful in relation to the post-return events, she argues, in the alternative, that they amounted to direct sex discrimination.

14. The issues for determination are:

   14.1 whether the respondent treated the claimant as alleged; and

14.2 if so, whether the reason why the claimant was treated in that way was because she had been pregnant or had given birth to a child (being reasons that can only apply to a woman).

Indirect sex discrimination

15. This complaint is based on the claimant's request, made during her maternity leave, to work part-time. She relies on two PCPs:

15.1 PCP1 – a requirement that all paralegals must work full-time; and

15.2 alternatively, PCP2 – a requirement that paralegals could not work part-time on a permanent basis.

16. PCP1 is disputed by the respondent, who argues that it facilitated temporary part-time working by granting annual leave. The respondent accepts PCP2.

17. The tribunal will have to decide:

17.1 Whether PCP1 existed.

17.2 In the case of both PCP1 and PCP2, whether it put women at a particular disadvantage when compared to men. The respondent's case on this point was unclear and the respondent has been ordered to clarify it.

17.3 Whether the claimant was put at that disadvantage. In the case of PCP2, the respondent's case is that the claimant only ever asked for a temporary arrangement.

17.4 Whether PCP1 and/or PCP2 were means of achieving the aims of meeting demand, organising work amongst staff and ensuring adequate service to clients.

17.5 If so, whether PCP1 and/or PCP2 were proportionate to those aims.

Section 80G ERA

18. It is admitted that the claimant made a request for flexible working, but the respondent appears to contend that it was not a request for a *permanent* change. The first question, therefore is whether section 80G applied to the request at all.

19. If it did, the tribunal must decide:

19.1 Whether the tribunal dealt with the request in an unreasonable manner in the following respects:

19.1.1 failing to ensure adequate privacy during the 5 September 2016 meeting;

19.1.2 the remarks allegedly made at the 5 September 2016 meeting;

19.1.3 failing to inform the claimant of the outcome without having to be prompted; and

19.1.4 failing to inform the claimant of the reason for refusing her request (whether a statutory reason section 80G(1)(b) or any other reason); and

19.2 Whether the tribunal rejected the application for a reason other than that listed in section 80G(1)(b).

Detriment on the ground of making a flexible working application

20. The tribunal will have to determine, as above, whether the claimant made a statutory request. If the claimant overcomes that hurdle, the issues will be:

    20.1 Did the respondent subject the claimant to a detriment by the following acts:

        20.1.1 the comments made at the 5 September 2016 meeting; and

        20.1.2 the tone of e-mails sent to the claimant on 11 and 12 October 2016?

    20.2 If so, was that act done on the ground that the claimant had made a statutory request?

Hearing

21. The parties consented to the hearing dates, time allocation and timetable. They agreed to a split hearing on the basis that, if the claimant is successful, she will seek compensation for injury to her mental health.

Documents

22. The respondent helpfully volunteered to prepare the bundle, which is not expected to exceed 100 pages.

Witnesses

23. The claimant will give oral evidence on her own behalf. In addition she is likely to call one witness, Ms Assma Ghidhoui to give evidence about the 5 September 2016 meeting. There is a third witness, Mr Mohammed, whom both parties wish to call and from whom both parties intend to take a witness statement. In reality, because the claimant's witnesses will give evidence first, it is likely that the claimant will call him.

24. The respondent will call Mr Salam and Ms Jones.

Case management orders

25. All case management orders were made by consent, with the following exceptions:

    25.1 The respondent objected to paragraph 10. Mr Frederick wanted pure remedy documents to be disclosed. It seemed disproportionate to me to make such an order at this stage. The parties had agreed that the hearing would determine liability only. Some documents, such as medical records, may be onerous to provide. If the respondent believes that a remedy document is also relevant to liability, it can explain to the claimant the basis for its belief and seek disclosure in the normal way.

    25.2 Paragraph 19 was made on the tribunal's own initiative without consulting the parties, as a response to the claimant's e-mail of 21 March 2017.

Employment Judge Horne

23 March 2017

SENT TO THE PARTIES ON

27 March 2017

FOR THE TRIBUNAL OFFICE