



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs O Swieca

v

Unique Employment Services Ltd

Heard at: Watford

On: 3 April 2018

Before: Employment Judge Alliot

Appearances

For the Claimant: Mr P Swieca (the claimant's husband)

For the Respondent: Mr N Carr (solicitor)

JUDGMENT

1. The judgment of the tribunal is that the claim is dismissed.
2. The claimant's application for an adjournment in order to make an application to amend the claim is refused.

REASONS

1. By a claim form presented on 29 October 2017, the claimant made a claim for Statutory Maternity Pay. In a response dated 22 November 2017, the respondent disputed the claimant's entitlement to statutory maternity pay.
2. On 3 November 2017, notice of a preliminary hearing case management was sent to the parties. The hearing was scheduled for Tuesday 3 April 2018 at 2.00pm.
3. On 27 January 2018, notice of extension of hearing was sent to the parties indicating that the hearing had now been allocated three hours to hear the evidence and decide the claim. Various directions were given concerning disclosure, agreed bundle and witness statements. The time of the hearing was changed to 10.00 am.
4. The claimant and her husband were not in attendance at 10.00 am today. They were contacted and were still under the impression that the hearing

was scheduled for 2.00 pm. The start of this hearing was delayed in order to allow them to attend.

5. The claimant has indicated that she did not receive that notice of extension of hearing. From the file that I have it would appear that copies were sent by email to the claimant's husband's email address on 12 February 2018. He has indicated that he did not receive those documents.
6. I have been provided today with a bundle of documents. One of these is headed Particulars of Claim at page 22 of the bundle. This had not previously been served on the Employment Tribunal, but had been sent to the respondent on 12 February 2018. Within that document reference is made by the claimant to the preliminary hearing notice scheduling the preliminary hearing for 3 April 2018 at 2.00pm in Watford. In the circumstances, I am prepared to accept that the notice of this hearing being a full merits hearing was not received by the claimant.
7. The claim as currently constituted is a claim for entitlement to Statutory Maternity Pay. Although jurisdiction is not challenged in the respondent's response form, in an email dated 15 March 2018, Mr Carr, on behalf of the respondent, did challenge the jurisdiction of the Employment Tribunal to determine eligibility for Statutory Maternity Pay. In an email dated 15 March 2018, the claimant asserts that her claim was extended by submitting further particulars of claim along with remedies sought by the claimant. This is a reference to the Particulars of Claim document in the bundle. The matter was considered and Employment Judge Manley directed as follows:

“The case remains listed on 3 April 2018, any preliminary matters of jurisdiction or applications to amend can be made at the outset. If necessary and proportionate the Judge may decide to postpone the final hearing depending on the outcome of the preliminary matters. If time permits, the Judge may decide it is proportionate to determine all matters.”

8. As far as jurisdiction is concerned the relevant facts are as follows:-
 - 8.1 The claimant applied to HMRC for a determination that she was entitled to Statutory Maternity Pay. In the bundle I have a letter from HMRC dated 14 December 2017, which states “as you appear to have met all the qualifying conditions, your employer is liable to pay the SMP due.”
 - 8.2 The respondent invited HMRC to reconsider the preliminary decision and I have been shown today a letter dated 27 February 2018 which states:-

“It is therefore my decision that Mrs Swieca is not entitled to SMP and you are correct not to pay.”
 - 8.3 The claimant has indicated to me today that that decision is currently on appeal and has yet to be determined.

9. I have been provided with the case of Hair Division Ltd v Mrs Lisa MacMillan appeal no. UKEATS/0033/12/BI.

10. In that judgment, the Honourable Lady Smith determined at paragraph 37:-

“The code for determination of disputes must apply as much to SMP as it does to SSP and it is one which excludes the jurisdiction of the Employment Tribunal.”

I am bound by that authority and consequently I have determined that the claim as currently made is doomed to failure as the Employment Tribunal does not have jurisdiction to determine eligibility for Statutory Maternity Pay.

11. During the course of this hearing, the claimant made an application to adjourn the hearing in order to allow the claimant to formulate and make an application to amend her claim form and apply for an extension of time.

12. Any application to adjourn a hearing is a matter of discretion for myself taking into account all the circumstances of the case. I have taken into account the fact that the claimant appeared today seemingly unaware that it was a full merits hearing and expecting a preliminary hearing to include an application to amend the claimant’s claim. In preparation for that the claimant has submitted an agenda for case management that was received by the Employment Tribunal on 29 March 2018. This sets out the complaints that are brought as follows:-

“No provision of employment particulars
Unlawful non-payment of SMP
Unlawful non-payment of antenatal care
Unlawful non-payment of wages and annual leave
Sex discrimination
Unfair dismissal”(told to me today to be on the basis of pregnancy related)

13. To an extent those claims may be echoed in the Particulars of Claim document contained in the bundle. The Particulars of Claim document was never sent to the Employment Tribunal and is not on file, although, as I have said, it was sent to the respondents on 12 February 2018. The claim for Statutory Maternity Pay is in the sum of £6,364.86. The schedule of loss attached to the claimant’s agenda for the preliminary hearing claims a total of £169,100. The proposed amendments are significant in substance and value.

14. Thus it is that at this hearing listed for a full merits hearing, there is not a properly particularised draft amended claim before me.

15. The decision I must make is whether I should grant the application to adjourn this hearing to allow the claimant to draft an amended claim, make an application to amend accompanied no doubt with reasons why time should be extended, which in turn would necessitate the respondent putting in an amended response. A further preliminary hearing would then need to be listed to determine issues relating to extension of time, prospects of success and possibly a Deposit Order. The alternative is not to grant the

adjournment and allow the claimant to take such action as she sees fit to issue a fresh claim to deal with the claims she now wishes to make. I make clear that the claims that the claimant now wishes to make are not contained within the current claim and so an issue of res judicata would not arise.

16. Although I am not deciding on the application to amend, I take note of the relevant factors that would come into play when determining whether or not such an amendment should be allowed. Those factors are required in order to exercise my discretion taking into account the balance of hardship and injustice. The nature of the amendment is relevant and it has been said that the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. In this case the nature and extent of the likely amendments are very significant. The applicability of the time limits has to be taken into account and clearly, on any of the application to amend, the claims are well out of time. Lastly the timing and manner of the application are to be taken into account. In actual fact the application is being made at the full merits hearing, but I do take into account the fact that the claimant was not aware that this was a full merits hearing.
17. Nevertheless, even if this was a preliminary hearing, it would have been open to the Employment Judge to dismiss the claim as the Employment Tribunal lacks jurisdiction as it is currently constituted.
18. One factor I do take into account is that if I were to adjourn these proceedings and put in place directions for draft amendments and responses, this would entail the respondent in further time and expense in relation to these proceedings.
19. Taking into account the overriding objective and proportionality, I have decided that it would not be in the interest of justice to adjourn this hearing to allow the claimant to seek permission to amend her claim. In my judgment, this claim should be dismissed and if the claimant wishes to bring a further claim in relation to the very substantial new matters, then she will have to issue a new claim, deal with any time issues and that will be dealt with in due course.

Employment Judge Alliott

Date: 25 / 4 / 2018

Sent to the parties on:

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For the Tribunal Office