EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102573/2019

Held in Aberdeen on 14 and 15 August 2019

Employment Judge J Hendry
Tribunal Member K Pirie
Tribunal Member D Massie

Mrs S Putra	**Claimant** **Represented by** **Ms V Mockus – Friend** **Mr O Eglitas - Interpreter**
De-Luxe Office Cleaners	**Respondent** **Represented by** **Mr P Maratos – Consultant** **Instructed by** **Mr G Stables - Partner**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed from her employment by the respondents with effect from the 9 October 2018.
2. The claim for payment in lieu of notice succeeds.
3. The claim for holiday pay succeeds covering the period 28 September 2018 to 9 October 2018.

4. The claim that the respondents breached Section 18 of the Equality Act does not succeed and is dismissed.

REASONS

1. The claimant in her ET1 sought various findings principally that she had been unfairly dismissed by the respondent business. The respondent's position was that the claimant had not been dismissed but had resigned voluntarily. They also opposed the other claims being made.

2. The claimant had, at the time of the lodging of the ET1, been represented by a firm of Solicitors, Balfour Manson. The day before the hearing the claimant was told by them they would not be representing her at the hearing. At the outset the claimant's representative, a friend, Ms Mockus, sought a postponement.

3. We proceeded to discuss the reasons for the adjournment. Ms Mockus confirmed that she was familiar with the papers and the claimant's position. When discussing this further it became clear that she wanted time to produce a copy of the claimant's 'MAT B' form which the claimant had given to the respondents (this fact itself was not disputed) and also to obtain a medical report on the effect that the dismissal had on the claimant. The postponement was opposed. The respondent's representative pointed out that the postponement was being sought at the last minute and the respondents had gone to considerable time and expense to have their witnesses available for the hearing and it would not, in their view, be in accordance with the overriding objective to adjourn.

4. The Tribunal retired briefly to consider the matter carefully. It was sympathetic to the position that the claimant was in and the last minute withdrawal of her solicitors. The Tribunal concluded that the MAT B form was not critical for the proper understanding of the issues as far as the Tribunal could determine. The medical report might be appropriate for a Remedy

hearing but was not necessary when considering the issue of liability. Whilst we appreciated that the claimant was being represented by a friend the issues that the Tribunal had to determine were relatively narrow as they were based on a couple of disputed conversations. In the circumstances the Tribunal declined to grant the postponement and the case proceeded although it was agreed that the hearing would only deal with liability and not remedy.

Issues

5. The first issue for the Tribunal to determine is whether or not the claimant had resigned or been dismissed and if the latter then what was the effective date of dismissal. The Tribunal if it found that the claimant had been dismissed would have to consider if the claimant had been fairly or unfairly dismissed. The Tribunal also had to consider whether the claimant was entitled to notice pay, holiday pay or whether she had suffered unfavourable treatment amounting to maternity discrimination in terms of section 18 of the Equality Act 2010 and whether the respondents had failed to follow the ACAS Code of Practice in relation to dismissal leading to a requirement to consider an uplift.

Evidence

6. The Tribunal had the assistance of witness statements prepared by the respondents in relation to their witnesses. It also considered the Joint Bundle of Productions lodged by parties – (JB1 – 17).

7. The following witnesses gave evidence for the respondent firm:-

- Lisa Grams
- Isla McCann
- Patricia Stables
- Ewa Wardzinska

The claimant gave evidence on her own behalf.

Findings in Fact

8. The claimant is a Latvian National. She speaks little English. She has difficulty in writing and understanding English. She required the assistance of an Interpreter during the hearing.

9. The respondents have their place of business at 2 Raeburn Place, Rosemount, Aberdeen. They provide cleaning services in and around the Aberdeen area. They have approximately 35 staff. The majority of staff are women.

10. The claimant started work as a cleaner from 7 May 2013 with the respondent business at the Mercedes Benz garage in Aberdeen at which the respondents had a contract to provide cleaning services.

11. In or around May 2018 the claimant became aware that she might be pregnant. She visited her G.P. on 17 May and he confirmed her pregnancy. The claimant then advised the respondents that she was pregnant.

12. By this point in time the claimant had already had two other children who were now 12 and 6 years old. She had gone through the maternity leave process in the UK in relation to her younger child and was aware of the process namely that she would leave on maternity leave and have the right to intimate that she was returning before the end of that leave.

13. Shortly after visiting her doctor the claimant obtained a MAT B form from him which she took to the respondents. It was to allow her to claim Maternity Pay.

14. The claimant had told her Superviser Ms McCann that she was having twins and her leaving date would be sometime in September. Ms McCann passed this information to Ms Lisa Grams who dealt with such matters. Ms McCann only had rudimentary conversation with the claimant at work and would ask a colleague who spoke Latvian to translate for her when she needed to explain matters to her. She did not have the benefit of such a colleague when speaking to the claimant.

15. On the 17 September Ms McCann contacted the claimant by telephone to find out her exact leaving date and the claimant told her that she would be leaving on the 28 September. She did not discuss the claimant's return nor did the claimant raise it during the call. The claimant asked about her entitlement to Maternity Pay.

16. The respondents lost their contract with Mercedes Benz in May and the claimant indicated that she did not want to transfer to the new contractor. The respondents transferred her to Belmar Engineering to work there.

17. In the past Ms Grams had experienced difficulties conversing with the claimant because of the language barrier and had usually asked a colleague who spoke Latvian to translate for her. Ms Grams assumed that the claimant was leaving permanently as there was no mention of maternity leave by her or of returning. The claimant was not asked if she would be returning.

18. The respondents entered the claimant's details into their Sage Payroll system and noted that the claimant's average earnings were not high enough to entitle her to Maternity Pay. They therefore provided the claimant with an SMP1 form which she took, along with the MAT B, to the Job Centre. The claimant later had twins by elected caesarean section on the 12 December 2018.

19. The respondent's Superviser Mrs Patricia Stables saw the claimant at Belmar Engineering on the 28 September. On the 28 September 2018 the claimant returned her security pass. She did not have keys to the premises.

20. The respondents believed that the claimant was not returning to work. They made this assumption because the claimant had not mentioned returning to work and in addition it was known that she was expecting twins. The respondents processed her P45 and posted it to her on or about 2 October 2018. The claimant received the form a couple of days later.

21. The claimant was surprised to receive a P45 form. She noted that the respondents were treating her as having left work on 28 September 2018. She could not understand why the form said her employment had ended. A

couple of days later she asked a friend who had a better command of English to telephone the respondents which she did. The call was put through to Ms Grams who dealt with payroll matters. The claimant witnessed the call. The claimant's friend asked why the claimant had received a P45 and why was she dismissed. Lisa Grams told the claimant that she had not been dismissed and that she was leaving the company, was not coming back and had returned her security pass. She explained that they had received no confirmation of a return to work date from her nor had she expressed any intention to return to work. Ms Grams said that the termination had been recorded and put through the computer and could not be undone. She added that the claimant's position at Belmar had been replaced.

22. The claimant was unhappy at the situation that had developed. She decided to take legal advice. She contacted the Citizens Advice Bureau in Aberdeen. She met an Adviser there and took advice. Following this she wrote a letter dated 9 October 2018 to the respondents. The letter stated:- "*please let me know, why I Sigita Putra was dismissed from her work – position cleaner on 28 September 2018 - can you answer me writing and send a letter to home address …….*"

23. The respondents received the letter. They responded by letter dated 10 October (JB 51).

> ''**RE: Explanation of dismissal accusation**
> Dear Sigita
> *Further to your letter of 09 October 2018.*
> *You were not dismissed from your part-time cleaning position.*
> *You were told by your supervisor Mrs Isla McCann that you will be leaving on Friday 28 September 2018.*
> *Over a month ago we advised all relevant paperwork SMP1 form) stating your average earnings were too low to receive SMP from Deluxe Office Cleaners.*

As you have given us more than one month's notice you are more than welcome to re-apply for a position within our company when you are ready,
I hope this resolves any misunderstandings you may have."

24. The claimant did not believe that she had to reapply for her post. She once more approached the Citizens Advice for advice. She wrote again on 22 October in the following terms (JB 52):-

"*Thank you for your letter of 10/10/2018.*
Please note I did not resign from the company.
I assume therefore that my position is being kept open during my maternity leave.
Please also note that I am due 5 days' holiday pay."

25. The respondents did not respond to the letter. The claimant asked the Citizens Advice Bureau to write to her employers which they did on 6 November 2018 (JB 53).

"We write to you in reference to the above-named client, a mandate authorising this contact is enclosed.
We are writing to try and clear up a potential misunderstanding involving our client Mrs Putra maintains that she did not resign her job with you when she told her supervisor Mrs McCann that she would be leaving on 28 September. Her intended meaning was that she would be starting maternity leave on that date, but she expects to return to work when her 26 weeks maternity leave were up. She knew she is owed holiday pay; she says she would be taking the holiday after the 26 weeks.
We hope this makes clear that Mrs Putra was hoping to return to her job working with you."

26. The respondents replied by letter of 14 November (JB 55):-

> "*Sigita told her supervisor she was leaving on Friday 28 September 2018 so we proceeded to issue her with a P45 from that date.*
> *Received a letter of 09 October 2018 (enclosed).*
> *She has been paid during this year for 22 days' holiday entitlement (enclosed sheet). It would have been for 28 days if she had worked until 31 December 2018 but she left before the end of her holiday year so that is the result of the 22 days' holiday pay.*
> *Our intended meaning of leaving should have been obvious in receipt of a P45 which she took some time to respond by that time all paperwork and computer records had been finalised.*
> *I hope this clarified this matter."*

27. The claimant instructed, solicitors, Balfour Manson. They wrote to the respondents on 13 December 2018 (JB 56/57) seeking compensation for loss of the claimant's employment, pregnancy discrimination and loss of annual leave that she would have accrued during maternity leave, pension payments which she would have accrued during her maternity leave and one week's holiday pay.

28. The letter also alleged that the respondents did not pay the minimum wage. This was incorrect. The respondents have always paid staff including the claimant the minimum wage or above.

29. The respondents wrote to the solicitors on 21 December (JB p58/59) denying that they had dismissed the claimant and reiterating that the claimant had told Ms McCann that she would be leaving in September 2018. They wrote:

> *"On returning to work on Monday 13 August 2018 from a two week holiday Sigita told Isla that she would be leaving on Friday 28 September 2018.*
> *……..*
> *Previously we had correspondence with Aberdeen Citizens Advice Bureau to clear up the misunderstanding involving your client. Mrs Grams contacted the Aberdeen Citizens Advice Bureau on Monday 17 December 2018 to enquire why no explanation had been received from*

our letter of 14 November 2018. Aberdeen Citizens Advice Bureau advised Mrs Grams that they had contacted Sigita on 21 November 2018 and that the case was closed due to no response to their correspondence".

Witnesses

30. We formed the view that the witnesses were honest witnesses who tried their best to assist the Tribunal but at times possibly due to the passage of time and the misunderstanding that had arisen in September 2018 that recollections were not completely clear or accurate. In addition, it was apparent that the claimant's command of English was poor and the employers communications with her posed some considerable difficulty.

31. Mrs McCann also gave evidence that the claimant told her that she was leaving. She was at pains to say that the claimant did not mention returning. Ms Stables stated in her evidence that she had spoken to the claimant on the day she had left. We suspect that her recollection is in error. The claimant vehemently denied any contact with her on that date. Ms Stables in her own evidence indicated that she did not converse with the claimant at work because of the language barrier but spoke to her in a mixture of common words, phrases and gestures. We had no doubt that the respondent's staff genuinely believed that the claimant was not returning after the birth of her child but that this was not what the claimant had said or wished to convey.

32. The Tribunal had some difficulty with the evidence of Ms Wardzinska. She was Polish and spoke very little English. Unfortunately, the tribunal had not been advised of this and no interpreter was available. Her evidence was simply that she did not recall receiving any keys or a pass from the claimant and accordingly her evidence was of little assistance to the tribunal.

33. Ms Grams came across as an honest witness but we regret to say that she fell into the error of making assumptions about the claimant's intentions rather than assessing that the claimant's intentions regarding returning to work, were fully clarified and her understanding was correct.

34. The claimant appeared to us, despite the difficulties occasioned by giving evidence through an interpreter, to be a consistent credible and reliable witness. Much play was made of the inconsistencies between the claimant's original ET1 and the better and further particulars which were produced. We do not know how this occurred but it appears to have been an error. It may have been caused or contributed to by language difficulties but it is clear that the claimant's solicitors did not correctly capture the claimant's position in the ET1 when they stated that she returned briefly to work after 28 September and was told that she was dismissed. We have also no doubt that they did later set out the claimant's position correctly, which was reflected in her evidence, in the further and better particulars that they lodged (JB 18).

Submissions

35. Mr Maratos kindly agreed to give his submissions first. He drew the Tribunal's attention to the details of the evidence. He believed that the claimant's pleadings were inconsistent and that this should impact on her credibility. The respondents had, in his view, sufficient evidence to conclude that the claimant had in fact resigned. She perhaps had a change of heart and realised that her resignation might have implications for her rights to benefits.

36. The respondents he continued had heard from a number of sources that the claimant did not intend returning to work and were entitled to act in accordance with their understanding. There was no unfair dismissal. It was noted that the claimant did not respond to the issue of the P45 for some time and did not take the opportunity to speak to the respondents with whom she said she got on well about the situation that had arisen. The claimant was not entitled to the holiday pay which was being sought.

37. In response Ms Mockus summarised the claimant's position. She had not resigned. She would have been "mad to resign". The respondents adopted no proper process to dismiss her. The Tribunal should have regard to the Employment Rights Act 1996 and to the Equality Act. The respondents had been provided with a MAT B form and it was therefore clear that the claimant was undertaking the usual maternity process, which she knew, whereby she

would leave on maternity leave and this would be her leaving date. She would have the right to return in terms of the law. The P45 was sent out two or three days after the claimant had left work. She was upset at receiving the P45 and took advice but the matter still was not resolved. She had given clear evidence that the position set out by her solicitors in paragraph 9 in the ET1 was incorrect and she could not explain why. She had never said she had returned to her workplace after leaving.

Discussion and Decision

38. The applicable law can be summarised briefly with reference to the statutory provisions.

> ***95 Circumstances in which an employee is dismissed.***
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—*
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> ***97 Effective date of termination.***
> *(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—*
> *(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,*
> *(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect,*
>
> ***98 General.***
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

39. An employment contract is brought to an end by notice being given by one party to the other. We have no doubt that the claimant gave the respondents her 'leaving day' but this must be seen in context. The claimant had already submitted to the respondents a MAT B form and was familiar with the process involved in taking maternity leave. She was aware that she had to give a leaving date to her employers and indeed that is what she did. Ms Mockus made two pertinent points. The first was that the handing over of the MAT B form showed an intention to proceed to take maternity leave as she had in the past. The second point was that there was absolutely no advantage to the claimant telling her employers she was not returning to work as she had some months to decide whether she was going to return to work and in the interim accrue rights to holiday pay.

40. It seems to the Tribunal that there were a number of assumptions made about the claimant's intentions. One of these was that as she was having twins she would not want to return to work as it would be in some way too onerous to do so. Another as that the claimant had not talked about returning to work. There was no legal obligation on her to do so but what struck the Tribunal is that no steps were taken to check that the respondent's understanding was

correct by speaking, or even writing, to the claimant. If they had spoken to her with the assistance of a Latvian speaker, and we understand that the employers were in the habit of doing this when having to explain things to her where her understanding was important. Why the respondents did not check their understanding of the situation puzzled the Tribunal. It was also possible for the respondents to have recognised the misunderstanding that had clearly arisen long before proceedings were raised. The claimant had a friend telephone the respondents and was effectively told that she was too late as her dismissal had been processed. Interestingly the same reason was given by the respondents in their letter dated 14 November (JB p55) stating that by the time the claimant responded to the P54 '*all paperwork and computer records had been finalised'.*

41. The respondents also had opportunities to resolve matters when they received the first letter from the claimant and certainly by the second and subsequent letter from the CAB. It was surprising that they did not do so.

42. We had no difficulty in unanimously coming to the view that the respondents dismissed the claimant. We did not hear any submissions about the effective date of termination. Although the P45 gave the 28 September as the last day of work it is not as such a termination. It certainly caused the claimant consternation and prompted the telephone call to the office on the 9 October during which it was confirmed that the respondents were treating the claimant as having been dismissed. In our view, this was the day on which the claimant was formally told that she had been dismissed and the effective date of termination. It makes little practical difference in this case but we have reflected this in our Judgment.

43. We then turned to consider whether the dismissal was fair. This, as an alternative, was not argued by Mr Maratos and we can fully understand why. The employer advanced none of the reasons for dismissal which might make a dismissal fair. The claimant was well regarded as a good worker. There was no consultation or discussion about the matter and the respondent's position was that if the claimant had wanted to depart on maternity leave and then to

return in due course they would have respected her maternity rights and her right to return.

44. We then turned to consider the claim under section 18 of the Equality Act 2010.

> ***18 Pregnancy and maternity discrimination: work cases***
> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
> *(a) because of the pregnancy, or*
> *(b) because of illness suffered by her as a result of it.*
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
> *(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*

45. The Tribunal spent some time considering the facts that had emerged from the hearing. We heard evidence that over 80% of the respondent's staff are women and that pregnancy absence is something that is common in the business, accepted as such and professionally dealt with by the respondents who had, over the years, welcomed back many staff who had left on maternity leave. There was a suggestion that because of the economic climate in Aberdeen the respondents were happy to allow the claimant to leave permanently and to thus reduce their workforce by one. We accepted the evidence of Mrs Grams that this was not the case. We formed the view that the circumstances of the claimant's dismissal and the excuses that it was too late in some way to reinstate her as her termination had been 'processed' were reprehensible but not tainted by discrimination. In essence the claimant's dismissal arose because of an initial misunderstanding and the stubbornness of the respondents to recognise it as such.

46. The claimant should have been given notice and her claim for notice also succeeds.

47. We accepted that the claimant had been paid her holiday pay to the 28 September and a small holiday entitlement will have accrued to the 9 October thereafter the claimant's loss of accruing holidays will be reflected in any compensatory award.

48. Finally for completeness we see no basis for a so called ACAS uplift sought in the Schedule of Loss as the failure to follow such recommended procedures is only applicable in cases of misconduct or redundancy dismissals.

Employment Judge: **James Hendry**
Date of Judgment: **10 September 2019**
Date sent to parties: **11 September 2019**