Case No: 2602776/19

EMPLOYMENT TRIBUNALS

Between:

Mrs L Purvey	**and**	Ashfield Healthcare Ltd
Claimant		**Respondent**

At an Open Attended Preliminary Hearing

Held at: Leicester

On: 17 March 2020

Before: Employment Judge Ahmed (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr G Anderson of Counsel

JUDGMENT

1. The Claimant is ordered to pay a deposit of £1,000.00 as the Tribunal considers that the complaint of pregnancy and maternity discrimination has little reasonable prospect of success.

2. The complaint of unfair dismissal is *not* struck out and no order for deposit is made in respect of that complaint.

3. Case management orders in relation to the hearing of the case are set out separately.

REASONS

1. This was a preliminary hearing to determine whether the tribunal should strike out the Claimant's complaints of pregnancy and maternity discrimination and/or unfair dismissal. Alternatively to determine whether a deposit order should be made in respect of those complaints.

2. At an earlier preliminary hearing case management orders were made which included an order that there should be mutual exchange of witness statements, (limited to matters to be considered at this preliminary hearing only) by no later than 3 March 2020.

3. The Claimant produced two "statements" from those other than herself (who were not called to give evidence) but did not produce a statement of her own. Given that her ET1 is in very brief terms, the Claimant's allegations as to pregnancy and maternity discrimination and unfair dismissal are therefore in the briefest of terms. As it was the factual basis for this hearing was determined on oral evidence given by the Claimant and in particular questions asked of her in cross-examination.

4. Included in the Claimant's two witness statements from the Claimant was a statement from Mr Donal Burke, then Group Head of Procurement and Estates. The Respondent gave evidence from two witnesses at this hearing; Mrs Ailsha Newman, HR Director and Ms Leah Payne, Senior HR Adviser, whose statements had been prepared and served earlier.

5. The facts of the matter for the purposes of today's hearing are relatively straightforward. I do not identify material dispute of fact only an interpretation as to some of the documentation in the bundle and in particular the interpretation of an email from Mr Burke to Ms Newman of 30 May 2018. This email only came to the Claimant's knowledge following a Subject Access Request post her dismissal.

6. The Respondent is part of a Group of companies based both here and in the USA with the parent company being UDG Healthcare plc. It provides contracts sales outsourcing to the Healthcare and Pharmaceutical industries. The Claimant was initially employed as a Purchase Ledger Assistant on a fixed term contract. She moved into a permanent role with the Respondent as a Finance Support Assistant in 2009.

7. During her employment the Claimant had three periods of maternity leave: the first from May 2013 to November 2013 (returning to a role of Divisional Estates Manager) the second from July 2016 to 14 June 2017 and the third from 12 March 2018. Upon her return from the second period of leave the Claimant submitted a flexible working request and in line with her request her role was effectively made part-time, working 31.5 hours per week. It is the events of the third period of maternity leave which is the subject of these proceedings though the second is

relevant insofar as it resulted in her working part-time on a job share in the Procurement Team with Miss Emma Loader, Group Procurement Executive.

8. In 2018, the Respondent undertook a general review of the business as a result of which there was a re-structure. So far as the Procurement team was concerned 4 employees were placed at risk. There were internal emails in connection with the process. In what the Claimant regards as a crucial email from Mr Burke to Ms Newman of 30 May a list of employees who could be at risk were identified and discussed. Under the heading entitled *"in scope and possible date subject to cons, process etc"* there are a list of names which are those who were identified as being at risk. They include the Claimant. Next to her name, and what is agreed to have been written by Mr Burke, there are the following: *"need advice, currently on maternity leave".* There is then another heading entitled "*out of scope".* There are two names set out therein. One of them is that of Mr Cy Talbot.

9. In October 2018, the Claimant made a second flexible working application, which was accepted, reducing her working days from 4 days to 4 days per week. This was granted on condition that the Claimant undertook a job share with Ms Loader. Ms Loader would work on Tuesdays, Wednesdays and Thursdays and the Claimant would work on Thursdays and Fridays. There would be a handover of any matters between the two on Thursdays. I am satisfied that at that time Ms Loader was undertaking predominantly procurement work whilst the Claimant was undertaking Estates work but both supporting each other if necessary.

10. The Claimant's maternity leave was due to come to an end on 11 March 2019. She then however began a period of shared parental leave followed by annual leave. She was expected to return to work on 2 September 2019.

11. During the Claimant's absence on maternity leave, Mr Cy Talbot was appointed Divisional Head of Procurement. His appointment followed a competitive assessment process. The other three candidates were all those identified as being at risk. After they failed in their application for Divisional Head of Procurement, they were all made redundant.

12. Whilst the Claimant was on maternity leave the Respondent identified that the Estates work had reduced significantly. Shortly after his appointment as Divisional Head of Procurement, Mr Talbot decided to leave the business. It was then decided that Ms Emma Loader would undertake the work previously done by Mr Talbot. Ms Loader agreed to work full-time in order to do so. It is agreed that the Claimant was not informed of these changes whilst she was on maternity leave for which the Respondent apologised. The Claimant's allegation of pregnancy and maternity discrimination is that she never had the chance to apply for the job which was offered to Mr Talbot because she was on maternity leave and was never informed of its existence. The Respondent says this was nothing to do with her maternity leave but only those who were at risk could apply and were informed. The Claimant was not at risk. The reason why the Claimant was not considered or informed of the vacancy was therefore, they say, because of not being eligible. It is the Claimant's contention

that Mr Burke's email shows the Claimant was in the at risk category because her name was in the same list as others who were identified as being "in scope". It is the Respondent's case that the Claimant was never placed at risk because she was on maternity leave

13. In the absence of a witness statement from the Claimant I have considered the allegations as set out in the ET1. These are themselves fairly brief but I take the final four paragraphs of the ET1 to set out the position. They are, to summarise, as follows:

13.1 That the Claimant's role was not redundant as the work had not diminished. This is an allegation of both unfair dismissal and maternity and pregnancy discrimination.

13.2 That the Claimant's working days/hours were allocated to another employee. This is also alleged to be a complaint of both maternity and pregnancy discrimination and unfair dismissal. In my view this can only be a complaint of unfair dismissal as it falls outside the protected period.

13.3 That the Claimant was not kept informed of structural and role changes during her maternity leave and was not considered for the new role in the structure which may have avoided redundancy. The role in question is the Divisional Head of Procurement, which was awarded to Mr Talbot. This complaint is of maternity and pregnancy discrimination only.

13.4 That the Respondent failed to conduct a meaningful or clear consultation process on redundancy with conflicting and confusing information being provided. The decision to dismissal was also pre-determined. This relates to the complaint of unfair dismissal only.

THE LAW

14. Section 18 of the Equality Act 2010, so far as is material, states:

> (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.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
>
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

15. Rule 37 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The 2013 Rules") states:

> "(1) 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;

16. Rule 39(1) of the 2013 Rules deals with deposit orders and states:

> "Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

17. I have been referred to the following authorities in closing submissions by Mr Anderson of Counsel on behalf of the Respondent:

Anyanwu v Southbank Students Union [2001] ICR 391
Ezsias v North Glamorgan NHS Trust [2007] ICR 1126
Ahir v British Airways plc [2017] EWCA Civ 1392

Pregnancy and maternity discrimination

18. I am conscious of the case law (in particular **Anyanwu** and **Ezsias)** both of which make it clear that great care needs to be exercised in striking out discrimination claims and should not be done except in the clearest of cases. Where a case is fact-sensitive, the appropriate course is to have those issues determined dealt with at a full hearing rather than at a preliminary hearing such as this.

19. On the other hand there is the following passage from **Ahir** where the Court of Appeal said:

> "… Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involved a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided

> they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. …"

20. The complaint of maternity and pregnancy discrimination is realistically limited to one issue – whether the Claimant could and should have been given the opportunity to apply for the Divisional Head of Procurement role. The rest are in reality issues relating to unfair dismissal. It is common ground that the Claimant was not informed of the vacancy and therefore not able to apply. The reason was that she was not eligible. The Respondent had a policy of only considering internal candidates who were at risk. Since the Claimant was not deemed to be at risk in relation to the 2018 restructure, she was not informed of the vacancy. The determination of this issue therefore depends on whether the Claimant was "at risk". I do not consider that this is a fact-sensitive issue which requires determination only after a full hearing

21. I am satisfied that the Claimant was not at risk for the following reasons:

21.1 The email from Mr Burke has been misunderstood by the Claimant. Mr Burke makes it clear that so far as the Claimant is concerned, he requires further advice as the Claimant was then on maternity leave rather than considering her within the possible 'pool'. That advice was provided to him by Ms Newman on 27 July 2018 as is clear from an email of that date. The advice was that the Claimant should be excluded from the process.

21.2 Following the above Mr Burke telephoned the Claimant to explain she was not at risk and confirmed this in an email to Ms Newman of 9 August in which he wrote:

> "All OK with Lydia [the Claimant] now"

21.3 Mr Burke's own witness statement, which the Claimant has obtained (Mr Burke having now left the Respondent) states:

> "In June 2018, as part of a departmental restructure two executives and a procurement manager role was put at risk, all three roles were later made redundant. As a result of this restructure a new role was created, divisional head of procurement. After interviews were held with both Aileen Wilkins and Cy Talbot, the role was awarded to Cy Talbot. The role of head of divisional estates manager, held by Lydia Purvey was reviewed as part of the department restructure however as Lydia was on maternity leave, *it was decided that it was not an appropriate time to put the position at risk*." (emphasis added)

22. The Claimant's own 'evidence' is therefore unhelpful to her cause as Mr Burke makes it clear that the Claimant was not at risk at the time of the 2018 restructure.

23. I am satisfied that the Claimant was not put at risk because this was likely to be detrimental to her as she was on maternity leave and Mr Burke therefore sought

advice as to what he should do. Having obtained advice he decided that the Claimant should not be put at risk.

24. I am also satisfied that in these circumstances the Claimant was not treated unfavourably. The Claimant's complaints of pregnancy and maternity discrimination must by definition be limited to the non-appointment of the role because the Claimant's protected period ended in March 2019 and any issue in relation to dismissal must be outside that period.

25. Insofar as it is suggested that the Respondent delayed making the Claimant redundant until after her protected period had ended, there is no evidence in support of this. It is unlikely that the Respondent would have delayed redundancy by several months at a time when they were looking to cut costs.

26. I am therefore satisfied that the complaint of maternity and pregnancy discrimination is unlikely to succeed. The next question is whether it has *no* reasonable prospect or *little* reasonable prospect of success. I am satisfied that in this case a deposit order is more appropriate rather than striking out. It may be that the Claimant upon advice or in framing the case differently is able to bring a valid complaint (though she would need leave to amend) and I would not wish to deprive her the opportunity of arguing an alternative case upon advice. However, I am satisfied that the threshold as to a deposit order at least is met and that it is in the interests of justice to make a deposit order

27. In relation to the amount of the deposit, I explained to the Claimant that if she did not have the means to pay the maximum sum of £1000 a means enquiry would have to take place. After the lunch adjournment when the issue fell to be considered the Claimant confirmed that she was able to pay a deposit of £1,000 and a means enquiry was therefore not undertaken.

28. I am satisfied that there is only one allegation or argument of pregnancy and maternity discrimination and therefore only one order is appropriate. I am also satisfied that the maximum sum of £1,000 is appropriate.

<u>Unfair dismissal</u>

29. The Claimant argues that the decision to make her redundant was a sham in the sense that there was no genuine redundancy situation because the financial position of the company did not warrant it. She has put forward no evidence in support of this contention.

30. Whilst on the face of it the unfair dismissal claim appears weak, I do have some concern as to the consultation process. For example, in the ET3 it is suggested that there were two consultation meetings, on 17 June and 28 June 2019. It is however, clear from the documentation that the consultation process appears to have begun on 17 June but there was no actual consultation on that date, only that the Claimant was shown a slideshow. Showing a slideshow as to what the new structure might be

cannot of itself amount to consultation. It is merely delivering the message of a new structure. The letter sent to the Claimant after the slideshow suggests that the consultation process has not yet started but is about to. There is therefore on the face of it only one consultation meeting on 28 June 2019 and the question of whether there was meaningful consultation will be a matter for evidence.

31. Furthermore, the case of *Williams v Compair Maxam Ltd* [1982] ICR 83 makes it clear that the employer should seek to give as much warning of impending redundancies as possible so that the employee can take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary find alternative employment in the undertaking or elsewhere. The Tribunal will need to consider whether the guidance in *Compair Maxam* and any other procedural steps was followed. That cannot be determined today. The Tribunal hearing the merits of the case may also need to consider the allegations set out at paragraph 13.1 above.

32. For the reasons given, the complaint of unfair dismissal shall not be struck out or be the subject of a deposit order.

33. Case management orders as to the final hearing are given separately.

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Employment Judge Ahmed

Date: 7 May 2020

JUDGMENT SENT TO THE PARTIES ON

Date 18th May 2020

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