

THE EMPLOYMENT TRIBUNALS



BETWEEN

Claimant

Respondent

Miss A Thompson

AND

Really Easy Car Credit Limited

HELD AT: North Shields

ON: 27 & 28 February 2017

EMPLOYMENT JUDGE HUNTER

MEMBERS:

Dr S Kay
Mrs D Winter

Appearances

For the Claimant: Mr R Owen, Gateshead CAB

For the Respondent: Mr C Green legally trained lay representative

REASONS

1 The claims and the issues

1.1 At a preliminary hearing on 5 December 2016 Employment Judge Reed recorded that the causes of action related to the claimant's dismissal on 5 August 2016 and whether she was dismissed unfairly and the subject of discrimination for dismissal by reason of her pregnancy. The issue to be resolved was whether the dismissal was related to the claimant's pregnancy.

2 The Facts

2.1 The respondent sells second hand cars. It is a small family owned business. The shareholders are Mr Tony Mate, his brother Mr Brett Mate, Mr Anthony Crawford who is related by marriage and Mr Steven Douglas. The company started to operate in May 2015. At the time of the claimant's dismissal the company employed Mr Nick Fullerton whose duties included human resources.

2.2 The respondent advertises heavily on-line and attracts customers via its web-site. At the relevant time Brett Mate, Michael Rankin and the claimant were engaged as tele-sales operators. Their duty was to contact those who had registered on line with a view to converting their enquiries into sales.

2.3 The claimant, who had had previous tele sales experience started work on 20 June 2016. The post was subject to the completion of a 3 month probationary period. During that period one week's notice could be given by either party to terminate the contract.

2.4 Mr Douglas had been monitoring the number of the claimant's daily calls and had been dissatisfied with them. He was strongly critical of them. The claimant says that no performance issues were ever brought to her attention. Mr Tony Mate says that she was repeatedly told her performance was poor. The only contemporary reference we have to her performance is an e-mail dated 15 July 2016 from Steve Douglas to the claimant saying:

"Hi Amy Just so you know I have been looking through the system at your work and just thought I would let you know you are doing a great job. Keep it up. Happy with your effort and the progress you are making."

2.5 We find this most bizarre. It is clear that Mr Douglas was not satisfied with the claimant's performance and the claimant herself acknowledged that the number the number of calls she was making was poor, especially when compared with her colleagues. Mr Douglas did not give evidence. Mr Tony Mate explained away the email of 15 July on the basis that it was a carrot designed to improve her performance. This makes no sense. If anything, it was more likely to have had the opposite effect.

2.6 The claimant took cigarette breaks. She was told that they were too frequent. She reduced the number of breaks.

2.7 She took breaks with a mechanic Shane Saunderson. The respondent cited as an example of the claimant's failure to fit in that she had complained to Mr Fullerton that Mr Saunderson had made advances towards her. Mr Fullerton had spoken to Mr Saunderson about this. He denied the behaviour and no further action was taken. Mr Saunderson subsequently avoided contact with the claimant. The claimant said that Mr Fullerton, who did not give evidence, was mistaken and that her complaint had been that someone else in the office had commented that because she and Mr Saunderson were taking breaks together there was something going on between them.

2.8 The respondent's staff wear a uniform with the company name embroidered on shirts and body warmers. At the time the claimant was the only female employee. Mr Tony Mate gave as a further example of the claimant's not fitting in, that she had initially been resistant to wearing a uniform. The claimant says that she did at first ask whether she had to wear a uniform and that when told she had to, she was shown a catalogue, chose a blouse and wore it.

2.9 The claimant told us that she discovered that she was pregnant in the week commencing 25 July 2016. On Saturday 30 July 2016, she began to experience

pains. They continued on Sunday and Monday. (The claimant did not work on Mondays). On Tuesday 2 August at 7:49 she sent a text to Tony Mate as follows:

“Tony, I have had to go RVI. I have had pains since Saturday night. Am here now but am not sure what is going on. Not sure how long I am going to be. Am still in pain. Am not sure I’ll be able to come in today. Can I take it as holiday. If not I gonna just to (sic) have it as sick. Sorry for the short notice.”

The RVI is the Newcastle Royal Victoria Infirmary. Although the respondent was unaware, the claimant had gone to hospital for a scan to find out whether she had miscarried. Happily she had not.

2.10 Tony Mate replied:

“Not a problem. Just get yourself sorted. Don’t worry about work. It will be still there when you are sorted.”

2.11 Mr Crawford was annoyed that the claimant had waited until Tuesday before going into hospital, which was a working day, when the pains had started on Saturday. He said that this was the last straw and that he had wanted to terminate her probationary period there and then. He said the other directors talked him out of it. They decided to give the claimant the benefit of the doubt, from which we assume that the respondent meant that they decided at that stage they would not dismiss her.

2.12 On 3 August 2016 the claimant turned up for work. There was an incident when the claimant spoke to a customer. Mr Fullerton spoke to her over the staff intercom. The claimant became upset over the words Mr Fullerton had used. She admits that she may have misunderstood. She was still in an emotional state following the hospital visit. She went to the rest room. Mr Crawford went to check she was alright. What was said between them is in dispute. The claimant went home at this point.

2.13 The directors had a further meeting about this that afternoon. The respondent says that at this point they decided to dismiss the claimant. They say that this was the breaking point because they were tired of the claimant’s emotional volatility. Her conduct was not good enough and her performance was average at best.

2.14 The respondent says that a letter was written by Mr Fullerton that day and dated 3 August. Mr Mate says that he instructed Mr Fullerton not to post the letter to the claimant. He asked Mr Fullerton to speak to the claimant and ask her when she could come back to work so that a meeting could be arranged when the letter would be handed over. Mr Fullerton did phone the claimant but we do not know what was said.

2.15 The claimant phoned Mr Fullerton on 4 August 2016 to say she would come back on Friday 5th August. It was during this conversation that she told him that she was pregnant. Mr Fullerton reported to Mr Tony Mate who told him to speak to their lawyers.

2.16 On Friday 5th August the claimant returned to work. She was seen by Mr Fullerton who handed her the prepared letter and expressed the reasons for her dismissal. He emphasised it was nothing to do with her pregnancy.

2.17 The dismissal letter says:

“It is vital to the efficient operation of the employer’s business that employees abide by the principles and rules within operation alongside our impenetrable work ethic. As you are within a probation period and have not met the satisfactory level we regret to inform you that the said contract will be cancelled with immediate effect.”

3 The Law

Pregnancy Discrimination

3.1 The following provisions of the Equality Act 2010 are relevant:

39 Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

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.
- (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.

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (6) A reference to the court includes a reference to—
- (a) an employment tribunal;

3.2 If the tribunal concludes that the burden of proof has transferred from the claimant, it is for the respondent to prove, on a balance of probabilities, that the treatment was in no sense whatsoever because of the claimant's pregnancy or an illness suffered by her as a result of it. See *Igen v Wong* [2005] IRLR 258.

Unfair dismissal

3.3 Section 99 ERA provides:

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
- (a) the reason or principal reason for the dismissal is of a prescribed kind, or
 - (b) the dismissal takes place in prescribed circumstances.
- (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

- (a) pregnancy, childbirth or maternity,
- (b) ordinary, compulsory or additional maternity leave,

and it may also relate to redundancy or other factors.

3.4 Regulation 20 of MAPLE provides:

20 Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

- (a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
- (b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—

- (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
- (b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
- (c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

- (a) the pregnancy of the employee;
- (b) the fact that the employee has given birth to a child;
- (d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave [or additional maternity leave];

4 Analysis

4.1 We are satisfied that the respondent took a decision on 3 August 2016 to dismiss the claimant, but did not communicate that to her until 5 August 2016.

4.2 The reason for the dismissal was the claimant's emotional volatility and her failure to fit in with the respondent's work ethic.

4.3 We are satisfied that the events of the 2nd and 3rd August were the final straw. Mr Crawford believed that the claimant ought to have gone to hospital in her own time rather than in the company's time. The final straw for the other directors was the claimant's emotional outburst on 3rd August. Although her performance had been average at the best, the evidence shows that this was not the primary reason for her dismissal.

4.4 On 4th August the claimant told the respondent that she was pregnant. It must have been obvious to the respondent that the claimant's attendance at hospital and her emotional state were pregnancy related. Nonetheless the respondent went ahead with the dismissal.

4.5 We are satisfied that the claimant has in the circumstances of this case proved facts sufficient to reverse the burden of proof.

4.6 The respondent has failed to satisfy us that in no sense whatsoever was the dismissal unrelated to her pregnancy.

4.7 It follows from our analysis that we accept much of what both sides have told us. Had the respondent posted the letter to the claimant on 3 August, we would have found in its favour. But by delaying, the respondent had the opportunity to review its action in the light of the knowledge of the claimant's pregnancy which clearly had a bearing on the behaviour that the respondent considered was the final straw.

JOHN HUNTER EMPLOYMENT JUDGE
REASONS SIGNED BY THE
EMPLOYMENT JUDGE ON
9 March 2017
JUDGMENT SENT TO PARTIES
10 March 2017
G Palmer

FOR TRIBUNAL OFFICE