



EMPLOYMENT TRIBUNALS

Claimant:
Ms P J Sedze

v

Respondent:
Bulb Interiors Ltd

Heard at: Reading

On: 1 and 2 June 2017

Before: Employment Judge S Jenkins
Members: Mrs A E Brown and Ms H T Edwards

Appearances

For the Claimant: In person

For the Respondent: Mr A Peck (Counsel)

JUDGMENT

1. The Claimant's claim of unfair dismissal fails and is dismissed.
2. The Claimant's claim of discrimination on the ground of her pregnancy or her exercise of her right to take maternity leave fails and is dismissed.

REASONS

Background

1. The case before us related to claims of automatically unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 ("ERA") and of discrimination on grounds of pregnancy or maternity pursuant to section 18 of the Equality Act 2010 ("EqA").
2. We heard evidence from the Claimant on her own behalf and from Mr Derek Jones, the Managing Director of the Respondent, on the Respondent's behalf. We also read four additional written statements from family and friends of the Claimant which related to the impact on her of the issues that arose in relation to the termination of her employment. We explained to the Claimant at the outset of the hearing that the evidence contained in those statements only seemed to have relevance for matters of remedy, in particular the issue of injury to feelings, and therefore would only be relevant if we decided her claims in her favour. We also informed the Claimant that, unless the individuals were present to have their evidence tested by way of cross-examination, there was limited weight we

could give to the evidence provided. Finally, we considered a bundle of documents spanning some 137 pages.

The claims

3. The Claimant submitted a claim form in September 2016 pursuing claims of automatically unfair dismissal, by reference to her having been pregnant or having taken maternity leave; and of discrimination, alleging unfavourable treatment, also on the grounds of her having been pregnant or having exercised her right to take maternity leave.
4. The claims arose following the Claimant's dismissal, at the expiry of her notice period, in August 2016, which the Respondent contended was on the grounds of redundancy or reorganisation, whilst the Claimant asserted that any such reason was not genuine and that the real reason for her dismissal, and consequently what she alleged to have been discriminatory treatment, was the fact that she had been pregnant and exercised her right to take maternity leave in 2015 and 2016.

Issues and Law

5. The issues for us to consider had been identified at a preliminary hearing held on 30 January 2017 before Employment Judge Vowles which recorded as follows:

"Unfair Dismissal – section 98 / section 99 Employment Rights Act 1996

5. *The Claimant does not claim any procedural unfairness but claims that there was not a true redundancy situation. She claims that her dismissal was unfair and that it was related to her pregnancy. She was still on maternity leave and due to return to work on 4 July 2016 when she was told on 23 June 2016 that her employment was at risk because of redundancy.*

Pregnancy/ Maternity Discrimination – section 18 Equality Act 2010

6. *The Claimant claims that the unfavourable treatment was her dismissal and that she was dismissed because of her pregnancy.*

7. *The Respondent failed to keep in touch with her during her maternity leave and less than 2 weeks before she was due to return to work she was put at risk of redundancy and then dismissed.*

Respondent

8. *The Respondent denies any unfairness or pregnancy related dismissal or pregnancy / maternity discrimination.*

9. *It claims that the reason for the dismissal was redundancy or alternatively some other substantial reason.”*
6. We noted that a key issue for us to address was the reason for dismissal. That had direct relevance for the Claimant’s unfair dismissal claim in that, in order for us to consider the unfair dismissal claim, we would first have to establish whether the Respondent had shown the reason for dismissal and that it was one which fell within the scope of section 98 ERA, the Respondent asserting that the reason was either redundancy (section 98(2)(c)) or some other substantial reason of a kind such as to justify the dismissal of the Claimant (section 98(1)(b)).
 7. If we were satisfied that the Respondent had shown that its reason for the dismissal, or, if more than one, the principal reason for the dismissal, of the Claimant had been on those grounds then we would need to consider the general fairness of the dismissal under section 98(4) ERA in accordance with equity and the substantial merits of the case. In that regard, if the conclusion was that the Respondent had demonstrated that the reason for dismissal was redundancy, we would need to consider the following issues: whether there had been a genuine redundancy situation, whether the Respondent had carried out an appropriate pooling and selection exercise, whether the Respondent had offered any suitable alternative employment that was available, and whether the Respondent had consulted appropriately throughout.
 8. If we were not satisfied that the Respondent had advanced those reasons, or at least one of them, as being the reason or reasons for the dismissal, but instead concluded that the reason or principal reason was the fact of the Claimant’s pregnancy or the fact that she had taken maternity leave, then, pursuant to section 99 ERA, we would have to conclude that the dismissal was automatically unfair.
 9. If we considered either that the dismissal was automatically unfair or had been unfair pursuant to section 98(4), we would then need to consider the issue of remedy. In that regard, we noted that the Respondent was contending that if there had been any deficiencies in the steps that it had taken then, applying the principle set down in the case of Polkey v A E Dayton Services Limited [1988] ICR 142 (that, notwithstanding procedural deficiencies in a dismissal, the fact that, had a fair procedure been followed it could have resulted in a fair dismissal, should be taken into consideration in terms of remedy), it would contend that the underlying decision to dismiss would nevertheless have been fair such that compensation should be extinguished or at least substantially reduced.
 10. Turning to the discrimination claim, we noted that the Claimant was asserting that her dismissal was unfavourable treatment on the grounds of her pregnancy and/or the fact that she had exercised her right to take maternity leave. In essence, her claim was that the Respondent did not want the trouble of having the mother of a new baby in the workplace and therefore took the opportunity to dismiss her.

11. We noted that the burden of proof in relation to the discrimination claim is set out at section 136 EqA. That required us to consider that, if there were facts from which we could decide, in the absence of any other explanation, that the Respondent treated the Claimant unfavourably on the grounds of her pregnancy and/or the fact that she had exercised her right to take maternity leave, then we would have to conclude that discrimination occurred unless the Respondent demonstrated that its reason, or at least its principal reason, for the treatment of the Claimant and her dismissal was not connected to the fact of her pregnancy and/or maternity leave

Findings

12. The Claimant was employed by the Respondent from February 2014 as a Business Development Manager. The Respondent is a contractor specialising in the design and build, and the furnishing and refurbishment, of commercial office and laboratory interiors. It was, and is, a small company employing approximately nine or ten people, including its two directors.
13. The Claimant's role was primarily focused on telesales and the conversion of leads generated by the Respondent's Sales Director who was, at the time of her recruitment, Mr Paul Scott. We were satisfied that the Claimant reported to Mr Scott at the outset of her work for the Respondent, but subsequently reported more to the Respondent's Managing Director, Derek Jones. We were however satisfied that her role primarily remained focused on telesales, although we were conscious that she did take on some other duties, such as office management and occasional visits to clients, which we felt were in line with the duties which someone working in her role within a small employer would undertake.
14. The Respondent was not doing particularly well on the growth front through 2014 and 2015 and, in particular, sales from new leads were not developing. In fact, it subsequently transpired, following some further investigation, that sales from new leads made up a small proportion, approximately 10%, of business that came into the Respondent, with the vast majority of the business being generated from existing customers and connections.
15. There do not appear to have been any issues regarding the Claimant's performance during her time with the Respondent, and there was no suggestion that the lack of sales from new leads was down to any failings on her part.
16. The Claimant became pregnant in the course of 2015 and we heard evidence that she had some difficulties with her pregnancy and that the Respondent had been supportive of her by allowing time off for medical appointments. The Claimant's maternity leave officially started in January 2016 but she took a month or so off on holiday in advance of that and her last day in the office was 4 December 2015. No discussion took place with

her about how her work would be managed during her absence, it seemingly having been tacitly understood that it would be absorbed by a combination of Mr Scott and Mr Jones.

17. Just prior to that, the Respondent had been looking at expanding its work in the laboratory side of its business and had sought to recruit someone with a scientific specialism. There was evidence in the bundle of liaison with a scientific recruitment agency in October 2015 regarding the recruitment of someone with a particular scientific focus. That led to the recruitment of Mrs Manisha Kulkarni who commenced her role on 7 December 2016, which was in fact the Monday after the Claimant's last day at work with the Respondent on 4 December.
18. Although Mrs Kulkarni also had the title of Business Development Manager, we were satisfied that her role was very different to that of the Claimant. She had a scientific Doctorate as well as qualifications in marketing, and had worked in scientific industries for long periods. We were also satisfied that the terms of her engagement, having a higher salary than the Claimant and potentially being in receipt of bonuses for the writing of specialist articles, indicated that her role was substantially different to that of the Claimant. That was also supported by the fact that Mrs Kulkarni spent a significant proportion of her time out of the office, whether at conferences or visiting clients, the evidence indicating that she was in the office for approximately two days each week, whereas the Claimant's own evidence was that she only spent approximately ten days out of the office during the whole of her employment with the Respondent.
19. Prior to going off on maternity leave, the Claimant raised the issue of keep in touch ("KIT") days with the Respondent. We saw evidence of correspondence between the Claimant and Mr Jones which discussed that issue, in which it was confirmed by Mr Jones as being something that the Respondent did not see was necessary, although he noted in the communication sent to the Claimant at the time that that was not a blanket refusal; it was an indication that the Respondent did not see that KIT days would be required but that if the Claimant felt that there would be some benefit to be gained by a KIT day or days, then that would be looked into.
20. The Respondent's concern over the lack of growth from sales was something that was raised with the Sales Director, Paul Scott, in January 2016, when concerns over his performance were put to him. That ultimately led to his departure from the Respondent by resignation in April 2016. The Respondent did not inform the Claimant of that at the time.
21. At about the same time as the concern over sales was being raised with Mr Scott, in January 2016, Mr Jones and his fellow director commenced a course, known as a Business Growth Programme, with Cranfield University, which they followed through to April 2016. This appeared to confirm the concern that they had had, that the Respondent's focus on telesales was not working, and that there needed to be a change of direction, with the focus being put on the generation of work from existing

contacts and the expansion of work from the laboratory side of the business, which had been commenced with the recruitment of Mrs Kulkarni in the previous December.

22. The Claimant notified the Respondent of her wish to return from maternity leave by email of 4 May 2016 indicating her wish to return on 4 July 2016. The Respondent did not immediately respond to that, but ultimately notified the Claimant in June 2016 that she needed to come in for a meeting on 23 June 2016. At that meeting, which was an informal one, the Respondent informed the Claimant that, following Mr Scott's departure, it had decided that it was not going to be pursuing telesales and therefore that her role was at risk of redundancy.
23. A formal meeting to consult upon that potential redundancy took place on 5 July, advance notice of which had been provided to the Claimant in writing, and following which the Claimant was notified that her job was at risk, and that, in the absence of any alternative, she would face redundancy. A potential, or perhaps more accurately, a putative, alternative was discussed with the Claimant during these meetings, that alternative being a role of document controller. We were satisfied from the evidence of Mr Jones that this was not actually a substantive role or a pre-existing role and, in fact, the Respondent did not previously have, and have not subsequently had, a document controller. However, we were satisfied that this was an attempt by the Respondent to seek to pursue every possible avenue to maintain the Claimant in employment. In the event, discussions did not go anywhere with regard to that particular role but we would not criticise either party for that.
24. The Claimant's redundancy was formally confirmed at a meeting on 12 July 2016. She was issued with notice of termination at this point which was served on garden leave for the following month and she was then paid in respect of her redundancy entitlement.
25. The Claimant was given a right to appeal against her dismissal, which she exercised, and that appeal was considered by an external HR consultant, Ms Sarah King. Within her email confirming her appeal, the Claimant, for the first time, raised concerns that she felt that the reason for her dismissal had been that she had been pregnant and had taken maternity leave.
26. The appeal was considered by Ms King at a hearing on 26 July 2016, and was rejected, with the confirmation letter being sent to the Claimant on 28 July. We noted in passing in relation to the appeal hearing that the notes of it confirmed that the Claimant herself had indicated that she had been told by Mr Scott with regard to Mrs Kulkarni that he did not fully understand what she was doing but that he had confirmed that she was not fulfilling the Claimant's role. The notes of the appeal meeting also confirmed that Kirsty Brookfield, the Respondent's Office Manager, who was present as the companion of the Claimant, noted that Mrs Kulkarni did not spend time on the phones but handled social media for the business, attended client meetings, and attended networking events. These observations had

relevance for our conclusions due to the fact that the primary focus of the Claimant's case was that Mrs Kulkarni had been brought in to replace her, or at least that she should have been pooled with her by way of selection

27. The only subsequent fact we needed to record was that the Respondent recruited a further employee in January 2017, a Pre-Contract Manager, who only, in fact, stayed with the Respondent for some two months before leaving due to his own ill health. We were satisfied that that was not a role which would have been suitable for the Claimant. We noted that there had been no other recruitment by the Respondent in the period of close to a year since the Claimant had been made redundant, and that its headcount, including the two directors, remained at nine, which was the number of employees that it had following the redundancy of the Claimant in 2016.

Conclusions

28. Looking first at the discrimination claim, we noted that our approach, as identified in the issues outlined above, was to consider whether there were sufficient primary facts from which a prima facie case could be concluded that the dismissal and the treatment of the Claimant could be on the grounds of her having been pregnant or having taken maternity leave. If we found that that was the case, the burden would then have switched to the Respondent to demonstrate that it had a reason for the treatment of the Claimant and her dismissal which was not connected to the fact of her pregnancy and/or maternity leave.
29. We were satisfied, although we would have to say only just satisfied, that there was such a prima facie case in this instance. We felt that the simple fact of someone becoming pregnant and taking maternity leave was a relevant factor with regard to that, but we were conscious that we needed to look for something more.
30. In that regard, we noted that the Claimant had not been informed about what was going to be happening with regard to her work while she was away on maternity leave. She had also not been informed about the nature of Mrs Kulkarni's recruitment, although she was herself aware that she was to join, as we have noted, pretty much contemporaneously with her last day in the office in December 2015. Also, following Mr Scott's departure in April, no information was provided to the Claimant about that change, and no action was taken with regard to the Claimant until after she herself had raised the prospect of her return. Taking all that into account, we were satisfied although, as we have said, only just satisfied, that that established a prima facie case which switched the burden of proof to the Respondent.
31. However, having looked at that, we were satisfied that the Respondent had discharged that burden. We noted, with regard to the redundancy of the Claimant, the backdrop of the lack of sales growth and the small proportion of sales gained from the generation of new leads and we accepted the reasonableness of the Respondent's change of focus from

trying to obtain business via telesales to the generation of work from existing clients and the expansion of work on the laboratory side.

32. We were satisfied that that was a process, which was accelerated by the fact of Mr Scott's departure in April, but which would have happened in any event at some point in time, and we therefore concluded that the redundancy situation was a genuine one.
33. We were also satisfied that the actions taken by the Respondent with regard to selection were reasonable and fair. The Respondent in this case had proceeded on the basis that the Claimant was in a pool of her own, concluding that it was not appropriate to pool her alongside Mrs Kulkarni even though they had the same job title. As we have noted in our findings, we were satisfied that the job being done by Mrs Kulkarni was very different from that being undertaken by the Claimant and therefore that it was not appropriate to pool them together. We were also satisfied, from the Claimant's own evidence to us, that there was no-one else within the Respondent's organisation with whom she was capable of being compared.
34. Finally, we were satisfied that the Respondent had undertaken an appropriate consultation process with the Claimant, with both an informal and formal meeting and subsequently an appeal having taken place, and had explored the issue of alternative employment.
35. We considered that all these factors demonstrated that the treatment of the Claimant, in the form of her dismissal by reason of redundancy, was not connected to her having been pregnant or having taken maternity leave. Overall therefore we were satisfied that there had been no unfavourable treatment of the Claimant on the grounds of her pregnancy and/or maternity leave.
36. Moving then to the unfair dismissal claim, our conclusions in relation to the discrimination claim could largely be adopted in relation to this claim. We were satisfied that the reason for the dismissal of the Claimant was redundancy and that there was no question of the dismissal having been automatically unfair on the basis that the reason was her pregnancy or maternity leave.
37. Having been satisfied that the reason was redundancy, we were then satisfied, for the reasons we have identified above in relation to the genuineness of the redundancy, the appropriateness of the pooling, and the consultation process that was undertaken, that the dismissal for that reason was fair in all the circumstances.
38. Ultimately, we therefore concluded that both the Claimant's claims failed and should be dismissed.

Employment Judge S Jenkins

Date: 21 June 2017.....

Judgment and Reasons

Sent to the parties on:01/07/17.....

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For the Tribunal Office