EMPLOYMENT TRIBUNALS

Claimant: Miss K Baron

Respondent: Christina Kearney

HELD AT: Manchester **ON:** 8 June 2017

BEFORE: Employment Judge T Ryan
Mr A G Barker
Mrs J C Fletcher

REPRESENTATION:

Claimant: Mr P Pem, Solicitor
Respondent: Mr J Bryan, Counsel

JUDGMENT having been sent to the parties on 15 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 6 April 2017 the claimant brought complaints of unfair dismissal, discrimination and harassment against the respondent. At a preliminary hearing time was extended to enable the claimant to bring forward her claims. The claim of harassment as intimated was withdrawn and was dismissed upon withdrawal. The only claim for the Tribunal to determine was one of direct discrimination in relation to the protected characteristic of pregnancy and maternity. The claim was resisted by the respondent.

2. The decision in this case turned upon the tribunal's resolution of factual disputes. In such circumstances it is convenient to set out the legal framework at this point of the written reasons.

3. By section 4 of the Equality Act 2010, pregnancy and maternity are protected characteristics. By sections 13 and 39, an employer who treats an employee less favourably than a real or hypothetical comparator because of a protected

characteristic commits an act of discrimination. On the issue of comparison section 23 provides to the effect that there must be no material difference between the circumstances of the claimant and the comparator. Section 136 requires the tribunal to decide that a contravention of the Act occurred if there are facts from which it could so decide in the absence of any other explanation. Guidance in respect of the earlier formulations of that section in predecessor legislation was given by the Court of Appeal in the cases of: **Igen Ltd v. Wong** [2005] IRLR 258 and **Madarassy v. Nomura International Plc** [2007] IRLR 246. Under section 83, "employment" (and associated expressions such as employer and employee) means, so far as is material for this case, employment "under a contract of employment, a contract apprenticeship or a contract personally to do work".

4. The claimant gave evidence on her own behalf. The respondent, Ms Kearney, gave evidence and called evidence from her employees, café assistants, Ms Shelly Scott and Ms Ana Babliuc, and from her husband, Mr Paul Early. The Tribunal saw witness statements from all those witnesses and a bundle of documents to which we refer as necessary by page number.

5. The opening note prepared on behalf of the respondent helpfully by Mr Bryan identified the issues that the Tribunal had to decide. In summary, there were three issues:

    5.1. whether the claimant was employed under a contract of employment or a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010;

    5.2. whether on 3 August 2016 the claimant was dismissed; and

    5.3. if the claimant was dismissed, was it because of her pregnancy?

6. The evidence was wide-ranging. The factual position of the claimant in evidence changed in the course of the hearing. The position of the respondent remained fundamentally the same. The mere fact that somebody's position changes in evidence is not fatal to a claim but is relevant in the context of the tribunal's findings of fact and the burden of proof provisions in section 136 of the Equality Act 2010.

Findings of Fact

7. By way of background, Ms Kearney and her husband, Mr Early, had in 2013 bought premises in Liverpool which they converted to a dwelling and a small café which opened seven days a week. It was essentially Ms Kearney's business, although she had help in the business aspects from her husband who was a plumber and builder who had worked all his life in that sector. He supported his wife in the business enterprise that she undertook.

8. In the early days Mr Early and Ms Kearney worked in the business. Then she took on two assistants, Ms Scott and Ms Babliuc. Ms Scott hails from the area. Ms Babliuc is Romanian. The claimant is Polish. The common working language of the café was English. There were some linguistic difficulties and behind those there may lie an explanation for what occurred in this case.

9. The claimant's employment started when she asked for work with Ms Kearney in the early part of 2015. Ms Kearney was well disposed towards her. She described her as a "clean, intelligent, polite girl" and she took her on trial, agreeing a rate of £6.50 an hour.

10. It was agreed that the claimant would do a probationary week. In the course of the next few weeks she clearly did a significant number of hours. That is evidenced by the fact that Mr Early's diary, which is the only written document recording the claimant's wages or payments, shows that in the weeks commencing 21 March to 18 April 2015 the claimant was paid the following sums: £136.50, £169, £117, £117 and £58.50. The respondent, having produced that diary to Mr Pem in the course of the hearing, says that that is the only record of payments made to the claimant.

11. The claimant's position was that she just wanted work. The respondent maintained that the claimant wanted to be working as self-employed, and on the basis of that Mr Early was advised by his accountants to get the claimant to invoice the respondent and he chased her for invoices over the months that followed, but not on very many occasions.

12. Ultimately in this case it does not matter whether the claimant was invoicing for the work because it is the definition of an employee in the Equality Act 2010 may be wide enough to cover a person who might be described as self-employed. We return to that issue below.

13. The claimant worked significantly more hours in those early weeks for no apparent reason that we could discern, such as people being away on holiday or ill, than Ms Kearney was prepared to accept that she worked. It is likely that Mr Early is correct that in the initial period those sums reflected the hours that the claimant did. He said that the claimant, after that period, worked regularly earning between £100 and £110 a week. That is what he reported to his accountant for the purpose of the preparation of his wife's profit and loss account. In the early days of the business, like many, the respondent's accounts showed losses, and so the precise figures that the claimant was paid in cash maybe were thought to be of less significance. There is no doubt that the claimant was paid in cash, she accepts that she was, as indeed were Ms Scott and Ms Babliuc.

14. In relation to Ms Scott and Ms Babliuc in about May 2016 the respondent produced contracts of employment and payslips and they were put in evidence. Latterly, another person had also been employed and their invoices had been included in the bundle. Again, that is merely the background to the case.

15. In about May 2016 the claimant was probably at about the two months stage of her pregnancy. She told the "girls" with whom she worked that she was expecting a baby. Ms Kearney's evidence was that the girls were excited about that, and that may be significant in the overall context of the factual picture. It was through them that Ms Kearney learned of the pregnancy, and it is common ground between the claimant and Ms Kearney that Ms Kearney said that "they would look after her".

16. Thus it was that the day before the claimant was due to go on holiday the claimant went to the café on the morning of 3 August 2016.

17. It is likely that she went shortly before 11.00am that morning. The reason we think that she went then is because Ms Kearney's evidence was that there was to be a party that day at about 12 noon. Some people from the local walk-in centre were going to attend a party in the café and she, Ms Kearney, went out to the supermarket/wholesalers to buy supplies for the party. In consequence of that, Ms Scott and Ms Babliuc and the claimant were all going to attend to help staff the party. Whether the claimant was in fact due to work that particular day ultimately in our judgment does not matter.

18. It was agreed that at a point in time that morning the respondent was not present but the claimant and the two assistants were.

19. The claimant's case, as set out in her witness statement, is that she was informed that she was going to be dismissed by the two assistants who had been told this, she says in her witness statement, by Ms Kearney.

20. In evidence the claimant's account changed. The claimant said she was told by the assistants that Ms Kearney had asked them whether they had got a leaving gift for her because she was not going to be returning to work. When she heard this it was the first intimation she said she had of no longer working there. She became very upset and eventually went through to the garden where on the claimant's evidence she stayed for an hour sobbing and shaking until Ms Kearney arrived. We think it was probably not as long as that.

21. We should say that Ms Scott's evidence was that she knew that the claimant was upset and there had been a conversation between the claimant and Ana Babliuc on that final day, but she herself was dealing with customers and did not hear that conversation.

22. The evidence of the claimant was that when Ms Kearney came through she asked her what was the matter, and according to the claimant she said, "Why have you made this decision?" and Ms Kearney said, "What do you expect?" According to her witness statement Ms Kearney said, "What do you expect? You're pregnant?" Ms Kearney denied saying anything of the sort.

23. The subject of the leaving gift was not discussed between them.

24. Ms Kearney's evidence about the gift was that some time before she had heard the girls talking about a gift for the claimant to be given as part, perhaps, of a baby shower. She saw a pair of bootees that had been bought from Poundland for £1.

25. The evidence of Ms Babliuc and Ms Scott was that they had discussed the question of a baby shower. The claimant said she was going to hold one after the holiday which was to be a two or three week holiday in August, and they had talked about joining forces to buy a gift. At one point apparently some gifts were bought, although they were never eventually given to the claimant because she left. They were bought with money put together by the two of them, about £15 each: a blanket, a baby-grow and some dummies. This

appears to be in addition to the bootees that Ms Kearney may have seen. Although it was argued for the claimant that there was an inconsistency between the two witnesses - one said they were going to buy gifts and the other said that they had bought gifts - there is not necessarily any inconsistency in that we simply do not know the dates on which these things are said to have occurred.

26. What is clear is that the claimant ran out of the café as a result of the conversation with Ms Kearney that day and would not and did not come back.

27. The next day she went to the Citizens Advice Bureau, went on a holiday and when she came back she wrote a letter to Ms Kearney asserting she had been dismissed. Ms Kearney did not respond.

28. In our judgment the claimant had come to the conclusion that there was to be some intention on the part of the respondent that she should no longer work in the business on her return from holiday.

29. It is correct that Ms Babliuc said she had discussed with the claimant before the claimant became upset how she would not be able to lift pans of water when her pregnancy advanced and the claimant said that she was told she would be too big to move around the café.

30. The respondent accepted she had not had a conversation about risk or risk assessment with the claimant. She had seen her once picking up the heavy sandwich board that advertised the bill of fare outside the café and had told her not to do that again. Ms Kearney had not previously run a business, she had not previously employed people and was not aware of the obligations for risk assessments in respect of pregnant employees.

31. What had happened was, according to Ms Kearney, that she had had a conversation with Ms Babliuc - saying how the claimant would not be able to lift pans of boiling water because it would not be safe. She thought that Ms Babliuc had taken it upon herself to communicate that to the claimant. In our judgment that is likely to be right.

32. In our judgment what happened was that the claimant has misunderstood what was being said. She read into the words of Ms Babliuc, the reference perhaps to a gift and perhaps to not being able to lift pans of water and matters of that sort, and reached a conclusion about an outcome that had not been communicated. Nor, on the evidence do we accept that it was the respondent's intention that the outcome was for the claimant to finish working at that time or for that reason.

33. We do not accept, on the balance of probabilities, that the claimant's primary case that Ms Kearney instructed Ms Babliuc or Ms Scott to have a conversation telling the claimant that her employment was to be terminated ever took place. There was no such instruction in our judgment. It was wholly inconsistent with the background facts. Why would, we ask rhetorically, Ms Kearney suddenly decide to take an adverse view of the claimant's pregnancy when she had not been anything other than supportive of her prior to that point? It does not make

sense. For the avoidance of doubt we state also we do not accept that Ms Babliuc or Ms Scott told the claimant that her employment was being ought to be terminated.

34. Mr Prem made much in submissions of paragraph 11 of the claimant's witness statement which she re-affirmed in re-examination, but in our judgment that is not direct evidence by the claimant of what occurred but evidence, as she said to us in re-examination, of what she believed had been said. It was to do with informing customers and staff that the claimant would no longer work there. The claimant did not purport to have heard the respondent say that directly, and we do not find that she did.

35. The other issue that we have to determine is the claimant's employment status. We have indicated the basis on which she was employed or engaged. It seems common ground that she was to make her own accounting for any necessary tax and national insurance. Her earnings were at a level to take her over the tax threshold.

36. There was evidence as well by the respondent that the claimant wanted to have her hours to suit some personal training business she was running. The claimant's evidence was she was not undertaking a personal training business but that she had in May started a course at weekends to undertake personal training.

37. We make it clear that if we had found that the conversations that the claimant describes in evidence had occurred we would also have found that the burden of proof had passed to the respondent. Mr Bryan, without formally conceding it, did not seek to say that the words taken together that the claimant attributed to Ms Kearney and Ms Babliuc would not amount to words of dismissal. Had the burden of proof passed then the claimant would have established her case.

38. Accordingly, in those circumstances the claimant would have succeeded. We find, notwithstanding Mr Bryan’s ambitious submission, that this was an assignment by assignment case. The claimant was clearly engaged by the employer under a contract to do work personally. She fell within the extended definition of an employee contained in the Act.

39. However the claimant has not in our judgment on the balance of probabilities established the fact that words of dismissal or intimations of dismissal in any terms were given to her. We conclude that she misunderstood the position. She was not dismissed, and in those circumstances the claim must fail.

Employment Judge Tom Ryan

Dated: 25 August 2017

REASONS SENT TO THE PARTIES ON
31 August 2017

FOR THE TRIBUNAL OFFICE