Appeal No. UKEAT/0527/12/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 25 April 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

PROFESSOR K C MOHANTY JP

MR S YEBOAH

NORTHUMBERLAND COUNTY COUNCIL APPELLANT

MRS A TREBILLCOCK RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS J CALLAN (of Counsel) Instructed by: Northumberland County Council Legal Services County Hall Morpeth Northumberland NE61 2EF
For the Respondent	MR D ROBINSON-YOUNG (of Counsel) Instructed by: Carr & Co 2 Fountain House Newmarket Morpeth Northumberland NE61 1LA

SUMMARY

PRACTICE AND PROCEDURE

Application/claim

Withdrawal

There was an argument before the Employment Tribunal on the question whether any claim under section 18(4) of the **Equality Act 2010** had been withdrawn by the terms of a response put in by the Claimant in answer to an order of the Employment Tribunal. On analysis, two questions had to be considered. (1) Was a claim under section 18(4) ever made? (2) If so, was it withdrawn?

Held: (1) No claim under section 18(4) had been made; and the response which the Respondent said amounted to a withdrawal in effect confirmed this. (2) If a claim had been made the response did not purport to be and would not have amounted to a withdrawal for the purposes of rule 25.

HIS HONOUR JUDGE DAVID RICHARDSON

1. There are two questions in this appeal, the first of which is only emerged with clarity today. The first question is whether Mrs Anna Trebillcock ("the Claimant") has brought a claim under section 18(4) of the **Equality Act 2010**. The second question is whether she has withdrawn it by the terms of a response to an order served in about January 2012.

2. The appeal arises out of a ruling given by the Employment Tribunal sitting in Newcastle at the beginning of the second day of the hearing of the Claimant's claims of unlawful discrimination and constructive dismissal brought against Northumberland County Council ("the Council"). The Tribunal itself raised, for reasons which were entirely understandable given the facts of this case, the relevance of section 18(4). On behalf of the Council it was argued that the claim had been withdrawn. The Tribunal rejected that argument and made it plain that it intended to proceed on the basis that there was a section 18(4) claim. It did not identify precisely where and how that claim was made.

Statutory provisions

3. We think it helpful to have in mind key statutory provisions as we trace what has happened in this case. Under the **Equality Act 2010** pregnancy and maternity are protected characteristics; see section 4. When the Act sets out in chapter 2 what conduct is prohibited pregnancy and maternity are treated in a particular way. Section 18 provides as follows:

> **"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.

(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.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as–

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).”

4. The terms “compulsory maternity leave”, “ordinary maternity leave” and “additional maternity leave” are defined by reference to those concepts in the **Employment Rights Act 1996**: see section 213 of the **Equality Act 2010**.

5. Summarising, it can be seen that section 18 prohibits in the protected period five forms of unfavourable treatment, 1) because of an employee’s pregnancy; 2) because of illness suffered by the employee as a result of her pregnancy; 3) because she is on compulsory maternity leave; 4) because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary maternity leave; 5) because she is exercising or seeking to exercise or has exercised or sought to exercise the right to additional maternity leave.

6. Section 13 (which governs direct sex discrimination) will not apply if the treatment of which complaint is made is for these reasons: section 18(7). Section 19 (which governs indirect discrimination, including indirect sex discrimination) is still potentially applicable: there is no

embargo on a claim of indirect sex discrimination merely because the provision, criterion or practice concerned is related to pregnancy or maternity. But pregnancy and maternity themselves are not protected characteristics under section 19.

7. Withdrawal of a claim is governed by rule 25 of the **Employment Tribunal Rules of Procedure 2004**.

> **"25 Right to withdraw proceedings**
>
> **(1) A claimant may withdraw all or part of his claim at any time – this may be done either orally at a hearing or in writing in accordance with paragraph (2).**
>
> **(2) To withdraw a claim or part of one in writing the claimant must inform the Employment Tribunal Office of the claim or the parts of it which are to be withdrawn. Where there is more than one respondent the notification must specify against which respondents the claim is being withdrawn.**
>
> **(3) The Secretary shall inform all other parties of the withdrawal. Withdrawal takes effect on the date on which the Employment Tribunal Office (in the case of written notification) or the tribunal (in the case of oral notification) receives notice of it and where the whole claim is withdrawn subject to paragraph (4), proceedings are brought to an end against the relevant respondent on that date. Withdrawal does not affect proceedings as to costs, preparation time or wasted costs.**
>
> **(4) Where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed. Such an application must be made by the respondent in writing to the Employment Tribunal Office within 28 days of the notice of the withdrawal being sent to the respondent. If the respondent's application is granted and the proceedings are dismissed, the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action (unless the decision to dismiss is successfully reviewed or appealed).**
>
> **(5) The time limit in paragraph (4) may be extended by an Employment Judge if he considers it just and equitable to do so."**

The Claimant's case

8. The Claimant was employed by the Council as an Early Years Inclusion Consultant with effect from 3 September 2007. On 23 September 2010 she wrote to confirm her intention to commence maternity leave on 17 November 2010; she began her leave on that date. Her child was born on 28 November 2010. On 8 September 2011 she gave written notice to the Council terminating her employment forthwith.

9. In the same month she brought a claim to the Employment Tribunal alleging unfair constructive dismissal and unlawful discrimination. Her claim form ticks the claims for unfair dismissal, including constructive dismissal, and sex discrimination. Her grounds of complaint say that on 21 December 2010 she was informed that two of the four posts in her department were to be made redundant; she was advised to apply for her post. She was not in good health and did not feel able or fit enough to engage in a competitive interview process. The illness was connected to her pregnancy and maternity. Unlike the other three candidates for the post she was unable to engage in the process fully. She was evaluated by a desktop study which gave her a low mark.

10. Paragraph 9 of the grounds of complaint then reads:

> **"Pregnancy and maternity is a protected characteristic under Equality Act section 18(2). The claimant believes that she was indirectly discriminated against by the selection process which was a provision, criteria or practice (PCP) employed by the Respondent which because of her pregnancy and maternity she was unable to fully engage in; section 19 Equality Act and therefore amounted to unfavourable treatment. The PCP was applied to all applicants however it put the Claimant at a particular disadvantage in comparison with anyone not showing the characteristics, it also put women at a particular disadvantage when compared to men."**

11. The reference in this paragraph to section 18(2) is, as we have seen, to a provision concerned with direct discrimination because of pregnancy or illness suffered as a result of pregnancy. The balance of the paragraph claims indirect discrimination under section 19. Later in paragraph 12 of the grounds of complaint it is said that the Council "had treated her unfavourably because of her protected characteristics" This is said to be part of the reason for her resignation which undergirds her constructive dismissal claim.

12. Pausing at this stage, it is possible to discern within the grounds of complaint two kind of alleged conducted prohibited by the 2010 Act, 1) a clearly pleaded claim for indirect sex discrimination and; 2) a claim of unfavourable treatment because of pregnancy or illness related

to pregnancy. The claim form nowhere alleges with any specificity that the Claimant was treated unfavourably for exercising the right to any form of maternity leave.

13. We note in passing that the period of ordinary maternity leave would have ended on 16 May and the desktop study was undertaken just before this time when, one might suppose, the Council would have known that she was intending to exercise a right to additional maternity leave.

14. On 21 November a Case Management Discussion took place. There was an order for the Claimant to provide further information. Two requests for further information were:

> **"(b) In what respect the Claimant contends that the Respondent failed to comply with regulation 10 of the Maternity and Parental Leave Regulations 1999.**
>
> **(c) The unfavourable treatment to which the Claimant contends because she exercised or sought to exercise the right to additional maternity leave."**

The inclusion of request (c) indicates that the Employment Judge at the very least was alive to the potential issue of unfavourable treatment related to the exercise of additional maternity leave.

15. In answer to question (b) the response filed for the Claimant was, "The Claimant does not bring a claim under Regulation 10 of the Maternity and Parental Leave Regulations 1999."

16. In answer to question (c) the response simply said, "As for (b)". Taking the response and answer together the natural reading of them is that no claim is brought on the basis that the Claimant has suffered unfavourable treatment because she exercised or sought to exercise the right to additional maternity leave.

17. The final document produced by the Claimant to which we should refer is entitled, "Claimant's Amended Grounds of Complaint"; it was served with the response. It says that it should be read "together with and in addition to the Claimant's original ground of complaint" it refers to "direct discrimination because of her pregnancy and maternity" but relies on provisions within section 13.

Has a claim under section 18(4) been made?

18. This is the logical first question to consider. If no claim under section 18(4) has been made there can be no question of a withdrawal under rule 25.

19. There are many cases - **Chapman v Simon** [1994] IRLR 124 is the best known - which establish that the Employment Tribunal is only empowered to adjudicate upon claims which have been properly made and placed before it. In our judgment no claim under section 18(4) had been articulated on the Claimant's behalf. The claim was put as a claim of indirect discrimination or as a claim under section 18(2). There are faint signs in the amended grounds (for which permission does not seem to have been given) that the claim is also brought under section 13. It may be that a claim should have been put under section 18(4) but it was not.

20. If we had any doubt about the matter, which we do not, the answer to question (c) puts it beyond doubt, certainly so far as additional maternity leave is concerned: there never was any intention to bring a claim, nor was there a claim.

21. The highest Ms Callan in her submissions on behalf of the Council could put it was that there were references in the grounds of complaint which might presage such a claim but she accepts that they are not in any way plain references to section 18(4). In our judgment the true position, for better or worse, is that section 18(4) was not to the forefront of the minds of the

Claimant's representatives either before after the request which was answered so briefly. We understand why the Tribunal thought a claim under section 18(4) ought to be made but it would require an amendment to do so. It follows that the Employment Tribunal should not have proceeded on the basis that a claim under section 18(4) was before it.

Has any such claim been withdrawn?

22. The second question which we identified at the start of this judgment does not in view of our answer to the first strictly arise. We will deal with it briefly.

23. On behalf of the Council Ms Callan submits that the Claimant has withdrawn any claim under section 18(4) by virtue of the answer "as for (b)" in the response to which we have referred. Her argument runs as follows: the request which the Claimant was required to answer was specifically directed to section 18(4); the answer must mean that no claim under section 18(4) is being made; this amount to withdrawing the claim; sending the response to the Tribunal complied with rule 25(2). Accordingly that part of the claim has been withdrawn. Even if the withdrawal was a mistake it takes effect automatically.

24. Mr Robinson-Young accepts that the request was specifically directed at section 18(4) at least insofar as it concerns additional maternity leave. He accepts that the answer means that no claim under section 18(4) in that respect was being made. He submits that there is a distinction between saying that no claim is being made in a particular respect and withdrawing such a claim. He submits also that rule 25(2) envisages a clear and explicit withdrawal. He relies on **Segor v Goodrich Actuation Systems Ltd** UKEAT/0145/11/DM where Langstaff P said that any withdrawal to be accepted must be "clear, unequivocal and unambiguous" (paragraph 11).

25. In our judgment rule 25(2) had no application to the Claimant's response which at the most said that a claim under section 18(4) was not being put forward. Rule 25(2) is intended to apply to clear, unequivocal and unambiguous withdrawals of claims which have been made to the Tribunal. The response does not fall within this category. It was not a mistaken withdrawal of the claim: it did not purport to withdraw the claim at all. In our judgment the Employment Tribunal was correct on this issue.

Remission

26. The appeal will be allowed to the extent that we will declare that there was no claim under section 18(4) before the Tribunal. In other respects it will be dismissed.

27. This of course leaves the Claimant free to make an application for permission to amend if so advised. Any application will, of course, fall to be dealt with by the Employment Tribunal not by the Employment Appeal Tribunal and it will be determined in accordance with the **Selkent** principles. We make it clear that we express no view upon any such application.

28. The question arises whether the matter should be remitted to the same to a freshly constituted Tribunal. Both counsel before us are agreed that it is better to send it to a freshly constituted Tribunal. We agree. We make it plain that the reasons for this are practical reasons. It is now a year since the case was last before the Tribunal. Very little evidence was actually heard before the issue arose to which we have referred. Having made its ruling on that issue the Tribunal then adjourned the matter. It is in these circumstances much better to start afresh.

29. If there is any intention on the part of the Claimant to apply to add a section 18(4) claim this should be done in the near future. Subject to discussions with counsel we think it might very well be sensible for there to be a case management discussion at that point.