Appeal No. UKEAT/0602/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 June 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR N SINGH

MISS S M WILSON CBE

MRS B YEKINNI — APPELLANT

LONDON BOROUGH OF HACKNEY & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR D TIYAMIYU (Adviser) Supreme Solicitors 452 Kingsland Road Dalston London E8 4AE
For the Respondents	MISS C MacLAREN (of Counsel) Instructed by: London Borough of Hackney Legal Services First Floor The Annex 2 Hillman Street London E8 1FB

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE – Pregnancy

SEX DISCRIMINATION – Pregnancy and discrimination

Discrimination on the grounds of pregnancy - the Employment Tribunal applied the wrong statutory provision and referred to and apparently applied the wrong comparator. Victimisation - the Employment Tribunal referred to and may have applied the wrong comparator.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mrs Bolanle Yekinni against a judgment of the Employment Tribunal sitting in London dated 6 July 2012. By its Judgment the Employment Tribunal rejected claims of direct sex discrimination on the grounds of pregnancy, constructive unfair dismissal on the grounds of maternity, unlawful deduction from wages contrary to section 13 of the **Employment Rights Act 1996** and victimisation contrary to section 4 of the **Sex Discrimination Act 1975**. She had brought these claims against the London Borough of Hackney and named individuals, Janina Knowles and Manjit Dhillon.

2. We will first set out the background facts and then turn separately to the criticisms which are made of the Tribunal's reasons in respect of each claim.

The background facts

3. Hackney is responsible for running a home care service within its borough. Service provides personal care, support, development and guidance to older people and other client groups within their own homes. In April 2009 Mrs Yekinni applied for a post as home care worker on a part-time basis working 25 hours per week. In her application from she identified Homerton Hospital as her current employer, the application form called for her to provide two referees; one of whom must be her present or most recent employer. She provided the details of two referees, neither of whom came from Homerton Hospital.

4. On 14 May 2009, Mrs Yekinni was interviewed by Ms Knowles and another manager. She was told that the need for home care workers was to cover weekends and evenings. She was told that staff were not allowed to exceed the 48 hour working week. On 4 June 2009 Hackney made Mrs Yekinni a conditional offer of employment subject to the taking up of

references. The recruitment team realised that they did not have a reference from the current employer; they asked Mrs Yekinni to provide one. The reference provided on 5 July 2009 however did not come from her line manager at Homerton Hospital or anyone in authority there.

5. In July 2009 Mrs Yekinni discovered that she was pregnant. There was some delay before her offer of employment was made unconditional but this had nothing to do with pregnancy; Hackney did not know at this time that she was pregnant. In October 2009 she was given an unconditional offer of employment with a start date of 19 October. Written particulars of her employment confirmed that the employment was on a permanent basis, part-time with a normal working week of 25 hours. Sick pay in the first year of service was expressed to be, "One month's full pay and after completing four months service, two months half pay."

6. On 19 October Mrs Yekinni came to work for the first and only time. It was an induction day for herself and more than 15 others. They were told that the requirement was for evening and weekend slots. They were told that employees were not permitted to work more than 48 hours in all and that anyone who had commitments which would take them over that time was to speak personally to the manager who gave the presentation.

7. Shortly after this presentation Mrs Yekinni did say that she worked with Homerton, though evidently she said that she worked as a bank worker with St Leonard's Hospital. She did not inform the manager or anyone else that she was employed as a permanent member of staff working 37.5 per week. She did ask with whom she should discuss her hours of work and medical condition: she was told she should speak to her line manager.

8. That afternoon Mrs Yekinni said that she was pregnant and needed to leave immediately as she was feeling unwell. She asked if she could defer her start or have a reduction in her hours. The manager could not agree anything; he said he would have to speak to Human Resources. Mrs Yekinni went to her doctor. She was signed off with pregnancy related sickness for three weeks from 19 October. She did not at this time give the certificate or a copy to Hackney. On 5 November she received a payslip to the effect that she had been paid £358.32, she rang Hackney and requested a meeting asking for Ms Knowles to be there. Hackney arranged a meeting for 13 November 2009. It was not a formal meeting under any procedure. As it happens that very day Mrs Yekinni received a further £792.45 from Hackney.

9. The meeting on 13 November was the subject of much disputed evidence. We will say something of the Tribunal's findings later. Suffice it to say that at this meeting Hackney learned that Mrs Yekinni was a full-time employee with Homerton. Following the meeting Ms Knowles wrote as follows:

> **"I was concerned to hear to that as at no point had you declared that you are working full-time with another employer, nor had informed them I also advised you that it would be impossible for you to work 37.5 hours with the NHS and 25 hours with Hackney as you are required to work on a flexible rota over 7 days. You also stated that at times you were a bank nurse so would do extra hours if required.**
>
> **You confirmed that you work long hours over 2-3 days per week with the NHS and have not declared to them that you have a job with Hackney. As explained during our conversation as you have not declared that you have an additional job with the NHS nor informed the NHS you have a contract with Hackney this can be construed as fraudulent activity. I stated that you could potentially be in receipt of sick pay for two organisations in addition to maternity pay.**
>
> **I must now advise you that failure to declare this information will instigate a management investigation that could lead to disciplinary action.**
>
> **You have received payments as follows:**
>
> **£358.32 on 29/10/2009**
>
> **£792.35 on 13/11/200**
>
> **I would advise that you do not spend any of this money as you may not be entitled to it. I will be contacting payroll who will contact you separately to discuss the repayment of it.**
>
> **I explained that we were unable to defer your start date and informed you that you could not work for the NHS for 37.5 hours and also with Hackney for 25, this would equate to approximately 62.5 hours per week.**
>
> **You stated that you would resign once you had received the outcome letter."**

10. On 19 November Ms Knowles instructed pay to stop paying Mrs Yekinni's wages, the instruction said:

> **"Bolanle is a new starter, she has been off sick the whole time since her appointment date of 19-10-09. Please suspend her pay immediately until further notice. HR are pursuing recovery of the salary already paid."**

11. It was, as the Tribunal said, technically incorrect to say that Mrs Yekinni had been office sick "the whole time": she had attended the induction on 19 October. At this time moreover, HR were not actually pursuing recovery of the salary already paid.

12. In December 2009 enquiries were made into the matter. Ms Knowles spoke to someone at Homerton. There was an exchange of emails concerning Mrs Yekinni's work there and the circumstances of the reference. By January 2010 Homerton was also making enquiries. Ms Dhillon wrote a letter in answer to the enquiries.

13. In the meantime on 18 December 2009 Mrs Yekinni wrote tendering her resignation. In a separate letter she wrote complaining about her treatment at the meeting on 13 November, saying that she had been the victim of discrimination on the grounds of pregnancy. This letter was a protected act for the purpose of a victimisation claim and she subsequently brought such a claim, relying on the letter which Miss Dhillon wrote in January.

Direct discrimination

14. The Tribunal set out at the beginning of its reasons the issues as regards direct discrimination during the course of employment. They related to the meeting and letter dated 13 November. It was the case for Mrs Yekinni that (1) she was threatened with disciplinary action if she did not resign; (2) she was accused of trying to defraud the London Borough of

Hackney; (3) there was a threat to stop her pay if she did not resign. In effect it was said that she was bullied at the meeting. She relied additionally on failure to provide her with minutes of the meeting and a failure to answer questions in a sex discrimination questionnaire.

15. Against this background we turn to the first ground of appeal advanced by Mr Tiyamiyu, a legal adviser who appeared for her before the Tribunal and again today. The Tribunal in setting out the applicable law concerning sex discrimination on the grounds of pregnancy stated in the law in the following terms:

> **"Sex Discrimination on grounds of pregnancy**
>
> **83 In respect of the unlawful sex discrimination claim, the Tribunal is concerned with direct sex discrimination, namely less favourable treatment contrary to section 1(2)(a) and section 6(2)(a) of the Sex Discrimination Act 1975 ("the SDA"). A woman who is pregnant or on maternity leave does not have to compare herself to a man who suffers from some condition which is likely to mean that he will need time off work; she merely has to establish less favourable treatment than a male employee would have received in circumstances where the employer knew that she was pregnant and treated her less favourably on that ground, see *Webb v EMO Cargo (UK) Ltd IRLR* [1994] 482 (ECJ), [1995] 645 (HL)."**

16. This statement of the applicable law was incorrect as Mr Tiyamiyu submits and Miss MacLaren largely agrees. The reference to section 1(2)(a) of the 1975 Act appears to derive from an understanding of the law prior to amendments which took place in 2005.

17. The relevant provision was by the time of the events in question section 3A of the **Sex Discrimination Act 1975** which provided as follows:

> **"3A Discrimination on the ground of pregnancy or maternity leave**
>
> **(1) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if -**
>
> **(a) at a time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably…; or**
>
> **(b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably…**
>
> **(3) For the purposes of subsection (1) –**

(a) in relation to a woman, a protected period begins each time she becomes pregnant, and the protected period associated with any particular pregnancy of hers ends in accordance with the following rules –

(i) if she is entitled to ordinary but not additional maternity leave in connection with the pregnancy, the protected period ends at the end of her period of ordinary maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;

(ii) if she is entitled to ordinary and additional maternity leave in connection with the with the pregnancy, the protected period ends at the end of her period of additional maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;

(iii) if she is not entitled to ordinary maternity leave in respect of the pregnancy, the protected period ends at the end of the 2 weeks beginning with the end of the pregnancy;

(b) where a person's treatment of a woman is on grounds of illness suffered by the woman as a consequence of a pregnancy of hers, that treatment is to be taken to be on the ground of her pregnancy;

(c) a 'statutory right to maternity leave' means a right conferred by section 71(1) or 73(1) of the Employment Rights Act 1996 (ordinary and additional maternity leave)."

18. The Tribunal was correct to say that a woman making such a claim does not have to compare herself with a man who "suffers" (as the Tribunal put it) from a supposedly comparable condition. There is no possible comparison. The Tribunal was correct to say that a woman only has to establish less favourable treatment on prohibited grounds. The Tribunal was, however, wrong to say that the treatment in question was to be "less favourable treatment than a male employee would have received". That is to bring the male comparator in by the back door. Less favourable treatment in section 3(A)(1) means adverse treatment or unfavourable treatment of the person concerned. It does not require a comparator at all, still less a male comparator: see **Equal Opportunities Commission v Secretary of State for Trade & Industry** [2007] IRLR 327 at paragraphs 41-47 and 62(ii); a decision which resulted in an amendment to section 3(A)(1) introduced in 2008.

19. Miss MacLaren submitted that it was not necessarily an error of law to make a comparison with a hypothetical comparator for the purpose of determining whether pregnancy or some reason was the ground for the particular treatment of a pregnant female employee: see **Madarassy v Nomura International Plc** [2000] ICR 867 at paragraph 119, a case concerning

the provisions of the **Sex Discrimination Act 1975** prior to the amendments which we mentioned. However, taking paragraphs 83, 87 and 100 together we have no doubt that the Employment Tribunal proceeded on the basis that comparison with a male was an essential part of the task which it had to apply. This to our mind was an error of law.

20. Miss MacLaren then took us to the Tribunal's findings of fact. She submitted that the Tribunal made findings of fact adverse to the Claimant's case which were in themselves unassailable and which conclusively established that the claim of discrimination because of pregnancy was not made out.

21. Where, as here, the Tribunal's statement of law contains an important error we must take great care before we uphold its reasoning on the basis that its judgment must have been correct given its finding of fact. We must, we think, be sure that the error of law has played no part in shaping the findings of fact and that the findings of fact are conclusive if the law is applied correctly. Only in such circumstances can it be said that the result was plainly and unarguably correct - which is the test which the Appeal Tribunal must apply if it is to uphold a judgment based on reasons which are defective in law.

22. This approach applies to any appeal to the Employment Appeal Tribunal. It applies with no less force to discrimination cases which are by their very nature sensitive and to which the Employment Tribunal must apply the correct test when it draws conclusions - often not straightforward - concerning the mental processes both conscious and unconscious mental processes, of the persons concerned,

23. We have looked carefully at the Tribunal's reasons. We see some force in what Miss MacLaren says, for there are findings concerning the credibility of Mrs Yekinni and the

meeting on 13 November which are favourable to the Respondent. But we are not sure that the Tribunal's error in law has played no part in shaping its findings of fact and conclusions. The error in paragraph 83 of the Tribunal's reasons is reflected in its exposition of the burden of proof: see paragraph 86. It appears again in a paragraph which appears to be central to its conclusions: see paragraph 100. We are simply not satisfied that we can safely say the Employment Tribunal's error of law had no impact on the conclusions it has reached or that we can safely substitute our own judgment.

Constructive dismissal

24. By virtue of section 99 of the **Employment Rights Act 1996** read together with regulation 20 of the **Maternity & Parental Leave Regulations 1999** an employee is entitled to be regarded as unfairly dismissed if the reason or the principal reason for dismissal is connected with her pregnancy. The Tribunal summarised the position sufficiently in paragraph 91 of its reasons although it did not mention regulation 20.

25. The constructive unfair dismissal claim was based on two alleged fundamental breaches of contract: the alleged conduct of the meeting on 13 November 2009 and the alleged failure to pay wages. It was following her discovery that she had not been paid in December that Mrs Yekinni resigned. Her case was that she was entitled to resign; see section 95(1)(c) of the **Employment Rights Act 1996**.

26. The Tribunal dealt with this issue briefly in paragraph 109:

> **"Since there was no sex discrimination, her complaint of constructive unfair dismissal also fails. The Claimant was not dismissed but resigned her employment with the Respondent."**

27. Mr Tiyamiyu submits that this finding is inextricably linked to the finding that there was no sex discrimination. He further submits that the Tribunal has not begun to grapple with the significant part of his case, namely that the withdrawal of Mrs Yekinni's sick pay was on the grounds of her pregnancy related illness. He points to the fact that the meeting on 13 November was called when there were concerns about Mrs Yekinni's inability to work, which was itself caused by pregnancy related illness and that suspension of her pay was said to be on those grounds in the instruction which Ms Knowles gave. He further says that the Tribunal did not deal with an additional ground put forward, namely failure by Hackney to explain its refusal to pay wages. He submits that Mrs Yekinni was entitled to be credited with statutory sick pay, that there should have been a slip or explanation in December and none was forthcoming. He argues that she resigned in consequence of these matters and that the Tribunal made no findings about the reason for her resignation.

28. Miss MacLaren argues that while the actual reasons concerning constructive dismissal are thin the findings are evident elsewhere in the reasons. She submits that it could be seen that there was no claim for constructive dismissal since no wages were actually due in December; that the findings concerning the meeting on 13 November were adverse to Mrs Yekinni; and that suspension of pay was solely because of matters to be investigated concerning Mrs Yekinni's employment by two different entities.

29. Our conclusions on the question of constructive dismissal follow our conclusions on the question of direct discrimination. We accept that they were bound together. If the Tribunal's reasoning on the question of direct discrimination was unsafe as we have found we think that the question of constructive dismissal must inevitably be remitted for consideration as well. It would be wise for the Tribunal, to whom this matter is remitted, to consider specifically each of the grounds of claim and to make findings as to the reason for resignation.

30. We would add that it emerged during the course of this hearing that the Tribunal appears to have misunderstood the provision concerning sick pay. It said in paragraph 107 of its reasons that Mrs Yekinni would have been required to work four months before being entitled one months' full pay as sick pay. This is incorrect; we have set out the sick provision correctly earlier in this Judgment.

Victimisation

31. The case for Mrs Yekinni was that (1) there was a protected act in December and; (2) the act of victimisation was the sending of a letter on 21 January 2010 by Miss Dhillon to Homerton promoting, as it was said, the instigation of disciplinary action against her and failing to inform Homerton that she had resigned; see paragraphs 3.10 to 3.11 of the reasons.

32. The Tribunal summarised the provisions of section 4 of the **Sex Discrimination Act** sufficiently in paragraph 89 of its reasons. However, the following two paragraphs appear in its conclusions on the question of victimisation:

> **"113 She did not provide the information to the Respondent "on the grounds of" the Claimant's status as a woman who was pregnancy or was off work with pregnancy-related sickness.**
>
> **114 The complaint of victimisation on the grounds that the Claimant is a pregnant woman and a woman with pregnancy-related illness fails and is hereby dismissed."**

33. These two paragraphs are, as Mr Tiyamiyu submits, in error. They apply tests appropriate to a claim for direct discrimination rather than tests appropriate to victimisation. Miss MacLaren accepts that these paragraphs are unfortunate but she admits that anterior findings show that the claim was not made out. Again there is some force in what Miss MacLaren submits. The true question for the Tribunal was whether by reason of the protected act Hackney treated Mrs Yekinni less favourably than it would have treated other persons. The

question becomes whether Hackney would have divulged details of employment to another entity if it was concerned with a person who had not made a protected act.

34. The Tribunal did reach conclusions on this in paragraph 112 but without any expressed reference to the correct comparator. While the Tribunal has come close to asking and answering the correct question we simply are not confident that it has performed its task properly having regard to paragraphs 113 and 114 which follow.

Sex Discrimination Act questionnaire

35. It was further submitted on behalf of Mrs Yekinni by Mr Tiyamiyu that the Tribunal did not approach the question of drawing inferences properly in accordance with section 74(2) of the **Sex Discrimination Act 1975**. Section 74(2)(b) provides:

> **"(b) If it appears to the court or Tribunal that the Respondent deliberately and without reasonable excuse omitted to reply within the period applicable under section 2(a) or that his reply is evasive or equivocal, the court or Tribunal may draw any inference from that fact that it considers it just and equitable to draw including an inference that he committed an unlawful act."**

36. The Tribunal did not make clear findings as to the extent of any omission and as to whether the omission was deliberate and without reasonable excuse. It did not make any findings as to whether the reply was evasive or equivocal, it did, however, consider the matter and declined to draw inferences.

37. This is not a separate of head of claim: rather it is an issue which will in any event have to be reconsidered by the Employment Tribunal on remission. We think that a Tribunal is wise when faced with an allegation that a sex discrimination questionnaire has not been provided in accordance with the relevant legislation to set out clearly its findings on the tests which the legislation sets out. Whether, however, in the end it draws an adverse inference is an entirely

different matter. It is worth repeating what Underhill J said in **Deer v Walford & University of Oxford** UKEAT/0283/10:

> **"We wish to add that we detected in the Appellant's case on this aspect a mechanistic approach to the drawing of inferences of a kind which has been deprecated on several occasions at this Tribunal see for example *Da Silva v NATFHE* [2008] IRLR 412 at para 38. There are no special rules of law about what inferences should be drawn from unsatisfactory answers to the statutory questionnaire. The process involved in deciding what, if any, inference should be drawn in the case of an evasive or equivocal answer is no different in principal from that to be applied in any other case where an inference of discriminatory behaviour is sought to drawn. The question is always whether in the circumstances of the particular case the act or omission in question tends to show that the Respondent acted in the way complained, typically that he acted with a discriminatory motivation."**

Conclusions

38. It follows from what we have said that this matter will be remitted in its entirety to be reconsidered by a freshly constituted Tribunal. We make it clear that the Tribunal should hear evidence for itself and make its own findings of fact starting from scratch. We have made reference to some findings of the Tribunal in the course of this judgment so as to explain the background to the case: but the matter is remitted for an entirely fresh hearing.