



EMPLOYMENT TRIBUNALS

Claimant: Miss L McLelland

Respondent: CT News Limited

Heard at: Sheffield

On: 03 July 2017

Before: Employment Judge Brain

Members: Mrs K Grace

Mrs N Arshad-Mather

Representation

Claimant: In Person

Respondent: Mr L Hutchings, Solicitor

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

1. (By a majority decision) the respondent became aware on 9 October 2016 that the claimant was pregnant.
2. (Unanimously) the reason for the respondent's dismissal of the claimant did not relate to the fact of pregnancy.
3. Accordingly:-
 - 3.1 The claimant's complaint that she was unfairly dismissed for a reason that related to her pregnancy fails and stands dismissed.
 - 3.2 Her complaint of unfavourable treatment because of pregnancy fails and stands dismissed.

REASONS

1. After hearing evidence and receiving each party's helpful submissions, the Tribunal adjourned to consider its decision. The Tribunal commenced Chambers deliberations at around midday. We did not find this to be an easy case and accordingly at 3:30pm we told the parties that judgment was reserved. We now set out our reasons for the judgment that we reached.

2. The claimant was employed by the respondent between 13 June 2016 and 31 October 2016. She was employed by the respondent as a Sales Operative.
3. The claimant was summarily dismissed by the respondent on 31 October 2016. The respondent's case is that she was dismissed because of continual lateness in attending work and her conduct.
4. The claimant's case is that, while lateness and conduct was given as the purported reason for her dismissal, the real or principal reason was because she had informed the respondent that she was pregnant.
5. The claimant presented her claim form to the Tribunal on 7 March 2017. She complained of unfair dismissal and of unfavourable treatment because of her pregnancy.
6. The claimant is not excluded from her right to complain of unfair dismissal by reason of her length of service. This is because the usual two-year qualifying service period before an employee has the right to complain of unfair dismissal does not apply where the reason or principal reason for dismissal relates to pregnancy. There is, of course, no qualifying period before a complaint of discrimination may be brought under the Equality Act 2010. The proscribed conduct of unfavourable treatment because of pregnancy is made unlawful in the workplace by virtue of the provisions of Part 5 of the 2010 Act. That proscribed conduct extends to discrimination against an employee by an employer by way of dismissing the employee.
7. In circumstances where the employee bringing the complaint lacks the requisite continuity of service to claim ordinary unfair dismissal then he or she will acquire the burden of proving, on the balance of probabilities, that the reason for dismissal was one (such as pregnancy-related dismissal) not requiring two years' continuity of service.
8. Thus, the essential issue to be addressed upon both of the claimant's complaints is the reason why she was dismissed. Was it because, as the respondent says, there was a persistent problem with her conduct and lateness? Or was it because, as the claimant says, she had announced to the respondent that she was pregnant?
9. The Tribunal heard evidence from the claimant. On her behalf, she called evidence from Mohammed Khan who is the claimant's former partner.
10. We heard from the following witnesses on behalf of the respondent:-
 - 10.1 Callum Tinker. Mr Tinker is a Director of the respondent along with his father Paul Tinker. It was Callum Tinker who dismissed the claimant on 31 October 2016.
 - 10.2 Rebecca Brown. She is employed by the respondent as a shop supervisor.
 - 10.3 Marianne Johnson who is an employee of the respondent.
11. The Tribunal was also presented with a signed and dated witness statement from Julie Wright. She is an employee of the respondent. The Tribunal was informed that she was away on holiday and unable to attend today to give live evidence.

12. The Tribunal also received brief statements in the form of emails from Kieran Butler, Rachel Turner-Smith and Gemma Siddons. All three are or were employees of Lindholme Stores Limited. This is a business owned and operated by Mr Tinker and his father. Attached to Gemma Siddons email are P60s for the tax years ended 5 April 2006 and 5 April 2010, both of which make reference to the payment of Statutory Maternity Pay.
13. In addition to the witness evidence, the Tribunal received a bundle of documents. The bundle contained:-
 - 13.1. A form MAT B1. This document was signed by Kay Webster who is the claimant's midwife. It is dated 4 October 2016 and certifies that the date upon which it was expected that the claimant would have her baby was week commencing 18 February 2017.
 - 13.2. An email from Kay Webster to the effect that the claimant feared the loss of her employment due to pregnancy.
 - 13.3. A statement of terms and conditions of employment. This appears to be in a standard form and not specific to the claimant.
 - 13.4. The claimant's wage slips.
 - 13.5. Till log-on times.
14. The till log-on times are at pages 15 to 45 of the bundle. This documentation was advanced by the respondent as corroborative of their contention that the claimant was persistently late for work. The Respondent operated two tills in the store.
15. At the end of the bundle (at pages 46 to 50) we see a letter from the claimant raising a grievance of 'unfavourable dismissal'. Mr Tinker says that he received this letter on 9 December 2016. His father Paul replied on 12 December 2016. It was claimed, in that letter, that the respondent was unaware of the fact of the claimant's pregnancy until receipt of the claimant's letter by the respondent on 9 December.
16. The claimant's evidence was that she worked every Monday, Wednesday, Friday and Saturday and alternate Sundays. She had Tuesdays and Thursdays off. When working Sundays, her hours of work were between 8:00am and 4:00pm. She worked between 10:00am and 5:00pm each Friday. Upon the other days, she worked either an early shift between 5:45am and 12:00 noon or a late shift between 12:00 noon and 5:00pm.
17. Mr Tinker's account was that the claimant worked every day except Saturday. He told the Tribunal that there was a weekly rota. However, the respondent failed to produce this.
18. Upon this issue we prefer the evidence of the claimant. The respondent runs two shops and employs ten people. In addition to that, as we have said, Callum and Paul Tinker run Lindholme Stores Limited. That being the case, it is less likely that Callum Tinker would be able to remember (in the absence of rotas) the claimant's hours than it is for the claimant to have done so.
19. As we have said, Mr Tinker set some store by the till log-on records at pages 15 to 45 of the bundle. His evidence was that he had used a marker pen to show the occasions upon which the claimant was late logging on. He focussed upon the entries at pages 15 to 17 which is a summary of operator

log on times for the tills between 18 September and 31 October 2016. He has marked 11 separate days over that period.

20. Mr Tinker told us that when working the morning shift (except on Sundays), the claimant was expected to turn up for work at 5:45am and get the shop ready to be opened to customers at 6:00am. Therefore, she would have 15 minutes to open the shop, switch off the alarms, bring in the newspapers and do whatever else needed to be done before opening the shop doors to the public at 6:00am. Mr Tinker's expectation, therefore, was that the claimant would activate the tills (using his code rather than her own) no later than 6:00am. Similarly, on Sundays the expectation was that the tills would be activated by 8:00am. (We interpose here to say that although the claimant told us that when working Sundays her hours were between 8:00am and 4:00pm we presume there to have been an expectation that she would turn up for work at 7:45am if she was opening up the shop).
21. The claimant was not given her own log-in code to use when activating the tills. She did this using Mr Tinker's details. It appears from the documentation at pages 15 to 45 that only Mr Tinker's and Mrs Brown's names were recorded as operators upon the system.
22. The Tribunal is not satisfied that the till log-on records are satisfactory evidence of the claimant's lateness. Our principal reasons for the rejection of the respondent's evidence upon this point are that:-
 - 22.1. The records do evidence that the tills were made operational after 6:00am and (on Sundays) 8:00am on occasions. However, that does not show that the claimant was late for work. At worst, it shows that the claimant (or whoever else was operating the tills that day) made the tills operational after 6:00am or 8:00am. The records do not show that the claimant was late getting into work to attend to her other duties.
 - 22.2. In any event there was no way (from the documentation presented to us) that it could be demonstrated that it was the claimant who had made the tills operational after the expected commencement times.
23. The latter point was amply demonstrated by Mr Hutchings' cross-examination of the claimant about entries on 23 and 30 October 2016. Both of these were Sundays. It was put to the claimant by Mr Hutchings that one of other of these days "*must have*" been the claimant given that she worked alternate Sundays. The Tribunal was surprised that the respondent was unable to put to the claimant precisely which Sundays she had worked and had no records of when she worked.
24. As a relatively minor point, Mr Tinker's evidence that 26 September 2016 was an instance of lateness is incorrect in any event. Whoever operated the till that day put each of them on before 6:00am.
25. It follows, therefore in our judgment that the respondent may only rely upon its witness evidence upon the issue of the claimant's lateness. This is because the documentation falls short of showing that which the respondent wishes it to demonstrate. It is to that witness evidence that we shall now turn.

26. Mr Tinker's evidence is that the claimant's lateness "*was especially bad when I went on holiday in August 2016 (pages 27 to 31).*" He says that when he got back he administered a verbal warning on 26 August 2016.
27. Mr Tinker did not of course witness the claimant's lateness given that he was on holiday. He was therefore reliant upon Mrs Brown's evidence. In her witness statement Mrs Brown cited specific dates and times between 19 and 26 August upon which she says the claimant was late attending work. She was unable to give any satisfactory account as to how it was that she could be so specific. She said that she had a notebook upon which she wrote down the times at which the claimant attended work. However, that notebook had been lost or destroyed sometime before the preparation of the witness statement with which the Tribunal was presented. Mrs Brown's evidence was therefore unsatisfactory upon the issue of the source of her information.
28. That said, we do accept Mr Tinker's account that he gave the claimant a verbal warning following his return from holiday. That would be a memorable event for him coinciding with his return to work from holiday. That he did it upon the day he returned to work makes credible his account of being able to recall the date upon which the warning was administered.
29. It is surprising that the respondent made no record of the verbal warning. The claimant made a good point when she put it to Mr Tinker that she had not signed any form of acknowledgment of a warning. The respondent may wish to consider its practice in future to avoid this kind of dispute. However, for the reasons given, we accept the respondent's account that the claimant was given a warning on 26 August 2016 about a perceived problem with lateness. We also accept, notwithstanding our reservations, Mrs Brown's account that the claimant was late several times during the course of Mr Tinker's holiday. As Mr Tinker was not there, it is credible that he administered the warning upon the basis of what he was told by Mrs Brown who was acting as supervisor. She therefore observed the claimant's conduct.
30. Mr Tinker's account is that he gave the claimant a second warning on 17 October 2016. The circumstances are described in paragraph 8 of his witness statement. He says that he was picking up Mrs Wright with a view to travelling to the respondent's other shop in Wood Street. The claimant turned up 18 minutes late and gave an explanation that her taxi or bus had not turned up. We observe in passing that upon that day the tills were made operational at 6:03am which is precisely 18 minutes after the claimant was due to commence work. It appears therefore as if Mr Tinker and Mrs Wright did not attend to operating the tills while they were waiting for the claimant. This further reduces the significance which may, in our judgment, be properly attached to the fact that on occasions the tills were switched on late and corroborates our earlier findings upon this issue.
31. The claimant denies being late on 17 October 2016. However, she fairly accepts that she did turn up late on 9 October 2016. She says that her bus had not turned up and she telephoned Mr Tinker to explain the situation. She then hurried on foot to the shop. Her account is that she received a sympathetic reaction from Mr Tinker who told her that if it were to happen

again then she should telephone him and he would try to pick her up. She says that he bought her breakfast in McDonalds. It was upon this occasion she says that she made him aware of the fact of her pregnancy.

32. Mr Khan's evidence was that he would normally take the claimant into work. However, he was unable to do so for a period of around three weeks between the end of September and the middle of October. This was because he was on holiday. The claimant was therefore left to her own devices to get into work.
33. Mr Tinker's account of the events of 17 October 2016 is corroborated by Mrs Wright. The Tribunal has to treat her account with some caution as she was not present before the Tribunal to have her evidence tested in cross-examination. That said, she has signed and dated the statement. It therefore serves as corroboration for Mr Tinker's account of events that day. She says in paragraph 8 of her witness statement that the claimant was 10 minutes late on 17 October 2016. This is confusing evidence given that in paragraphs 2 and 3 of the same statement she refers to the claimant being 18 minutes late. Further, Mr Tinker has not helped himself by also failing to keep a record of the warning administered on 17 October. Notwithstanding the paucity of documentation in the respondent's possession and the inconsistencies in Julie Wright's account as to whether the claimant was 10 or 18 minutes late the Tribunal is persuaded upon the basis of Mr Tinker's and Mrs Wright's accounts that a second warning was administered on 17 October. It is also rendered credible by the fact that the event took place within the timeframe within which Mr Khan was away and not able to take the claimant in to work.
34. After 17 October there was a further incident which took place on 26 October 2016. The respondent's case is that the claimant turned up on time for a shift commencing at 12:00 noon that day in order to relieve Mrs Wright. However, the claimant proceeded to have a cigarette and take a personal telephone call which meant that Mrs Wright was 20 minutes late leaving work. Again, Mr Tinker's account is corroborated by Julie Wright. Upon the basis of that the respondent has corroborative evidence of this incident we accept the respondent's evidence.
35. He then says that "*over the next few days she was late to every shift by at least 10 minutes (28, 29, 30 & 31 October).*" We shall take each of these four days in turn.
36. The Tribunal does not accept that the claimant was late on 28 October 2016. The till log-on record at page 17 shows that the tills were made operational at 5:58am that day. Therefore, if it is the respondent's case that it was the claimant who was responsible for opening the shop that day then she did so properly and arrived on time (or at any rate got the tills working on time). There is no other evidence that she was late that day.
37. We do not accept the respondent's account that the claimant was late on 29 October 2016. None of the respondent's witnesses give any first hand account of the claimant being seen to arrive late that day. Paragraph 7 of Julie Wright's witness statement is poorly worded and we understand her only to be referring to the claimant being allegedly late on 28 October (which she was not) and not 29 October. She refers to specific times in

relation to 28 and 31 October but not 29 October. As we have already said, we are not satisfied that the documentary evidence at page 17 evidences anything other than that the till was made operational after 6:00am on 29 October. It is not evidence that the claimant was late that day.

38. Mrs Wright makes no reference to 30 October 2016. The claimant said that she did not work that day. It was a Sunday. The claimant was able to say that she did not work that day because it was the day prior to her being dismissed by Mr Tinker. We accept the claimant's account as it is entirely credible that she would remember whether or not she worked the day prior to such a significant event as a dismissal. As we say, the respondent has no satisfactory evidence by way of rotas or the like to show that it was the claimant who was working or due to work on 30 October.
39. The claimant's alleged lateness on 31 October is irrelevant as, according to Mr Tinker, he had decided to dismiss her that day anyway. He says, "*On 31 October at 11:50am I had asked Marianne Johnson to come into work early by 10 minutes so I could end Leanne's employment.*" It is not clear from this whether Mr Tinker asked Marianne Johnson to come in for 11:50am in order that he could dispense with the claimant's services or whether he means that he asked her at 11:50am to come in. Marianne Johnson gives no account of being asked to come in early. On the contrary, she says that she arrived at work as normal (we refer to paragraph 4 of her witness statement). At all events, given Mr Tinker's account it is plain that whatever the claimant did or did not do on 31 October was irrelevant as her fate was already sealed.
40. The question that arises, therefore, (given the unsatisfactory nature of the respondent's evidence about the last four days of the claimant's employment and our finding that she was not late upon any of those days) is what changed if anything after 17 October 2016 to cause the respondent to dismiss the claimant. In our judgment, what precipitated Mr Tinker's decision to dismiss the claimant was the claimant's conduct on 26 October 2016 when she caused a delay in Julie Wright leaving work. (We interpose here to say that Julie Wright appears to have the date incorrect as she refers to 20 October in her witness statement. That cannot be correct as 20 October 2016 was a Thursday and thus a non-working day for the claimant).
41. In support of the respondent's case that there was no awareness of the fact of the claimant's pregnancy until receipt of the letter on 9 December 2016, the respondent advanced the evidence of Marianne Johnson. She says that the claimant had confided in her on 29 October 2016 and told her that she was going to tell Mr Tinker. She says that the claimant never got the opportunity because Mr Tinker then dismissed her for lateness two days later. Following the dismissal meeting Mrs Johnson says the claimant told her that she had been dismissed and that she had not told Mr Tinker of the fact of her pregnancy.
42. The claimant's evidence is that she did tell Mrs Johnson of the fact of her pregnancy. However, her case is that she was not particularly close to her and therefore did not confide in her. The claimant's case is that she simply told Mrs Johnson of the pregnancy.

43. Upon the issue of the respondent's knowledge of the claimant's pregnancy the Tribunal found by a majority that Mr Tinker was aware and had been made aware of it by the claimant on 9 October 2016. The majority (being the Employment Judge and Mrs Arshad-Mather) were persuaded of this by the following:-
- 43.1. The claimant's account of being reliant upon public transport on 9 October 2016 was consistent with Mr Khan's evidence of him being away at that time and not able to give her a lift into work.
 - 43.2. That being the case, it would be a memorable event for the claimant were she to find herself without transport and compelled to quickly walk or jog into work (particularly when pregnant).
 - 43.3. It was not put to the claimant that Mr Tinker did not take her for breakfast when she arrived at work late after a traumatic journey.
 - 43.4. It would be a memorable event for the claimant to be taken for breakfast and that would present a perfect opportunity for her to inform Mr Tinker. The claimant's account is therefore plausible and credible.
 - 43.5. It is very much to the credit of the claimant that she did not seek to portray the occasion of informing Mr Tinker that she was pregnant as having happened towards the end of her employment. The longer the period between the telling on the one hand and the dismissal on the other (with intervening events having occurred) the weaker the claimant's case becomes. Contrariwise, the later the telling the stronger would be her case. That her account is that the telling occurred three weeks prior to dismissal renders her account all the more plausible and credible.
 - 43.6. Informing Mr Tinker on 9 October 2016 is approximate chronologically to the discussion that the claimant had with the midwife on 4 October 2016 about her employment concerns. It is therefore credible that the claimant would inform Mr Tinker at around the time that this issue was on her mind.
44. The minority (Mrs Grace) preferred the respondent's account that it had no knowledge of the claimant's pregnancy until after the claimant had been dismissed by the respondent. Mrs Grace was impressed in particular with the demeanour of Mrs Johnson when she gave evidence and when she faced questioning from the claimant. (The claimant made a good point when it was suggested to Mrs Johnson that she would give an account favourable to the respondent given that she continued to work there. Generally, that is a fair point but it plainly goes too far to say that the evidence of all current employees of any employer that comes before an Employment Tribunal should be disregarded upon that basis).
45. We have made reference to the email statements from three current or former employees of Lindholme Stores Limited. The Tribunal sets little store by the email statements of Kieran Butler and Rachel Turner-Smith, However, we do have a signed statement from Gemma Siddons. More significantly this is accompanied by P60s for the years to which we referred

earlier evidencing the payment to Gemma Siddons of Statutory Maternity Pay by a business owned and operated by Callum and Paul Tinker. This was advanced by the respondent in support of its contention that it has experience of female employees going on maternity leave and having no concerns about making such payments. Mr Hutchings also forcefully made the point that the respondent would be able to recover the vast majority of its outlay upon Statutory Maternity Pay anyway. Aside therefore from administrative issues there was little cost to the respondent of making such payments.

46. The claimant made a very good point when she suggested to Mr Tinker that he had no involvement in the payment of the Statutory Maternity Pay to Gemma Siddons. Mr Tinker is 24 years of age. When Gemma Siddons had her first child Mr Tinker would therefore only be around 13 or 14 years of age. On any view, therefore, the claimant must be right when she suggested that it was not Callum Tinker who was responsible for making Statutory Maternity Payment to Gemma Siddons. That said, the fact remains that Paul Tinker has an involvement both in the respondent and Lindholme Stores Limited.
47. The documentary evidence of a history of making Statutory Maternity Payments to female employees (albeit through a different business) tells against drawing an adverse inference against the respondent that it dismissed the claimant because she told Callum Tinker of her pregnancy on 9 October 2016. Perhaps more importantly we consider that Mr Hutchings made a very telling point when it was suggested that if the claimant were correct to say that she informed the respondent of her pregnancy on 9 October 2016 it is surprising that the respondent did not seize the opportunity of dismissing her for lateness on 17 October were the respondent simply waiting for an opportunity to dismiss her using her conduct as a pretext. That Mr Tinker did not seize upon that opportunity is, in our judgment, highly significant particularly as we found as a fact that Callum Tinker knew she was pregnant from 9 October 2016.
48. Instead, Mr Tinker gave her a second warning on 17 October 2016. It was, therefore, the episode of 26 October 2016 which, in our judgment, sealed the claimant's fate. We find that the reason why the claimant was dismissed was because of her conduct (both in terms of the incidents of lateness which led to the warnings and her performance on 26 October). That was the reason why Mr Tinker dismissed her. We are not satisfied therefore that the claimant has shown on the balance of probability that the reason why he dismissed her was because of her pregnancy. It follows therefore that the unfair dismissal and discrimination complaints fail.
49. As we said at the outset of these reasons, the Tribunal did not find this to be an easy case to decide. We are satisfied that each party was telling us the truth as far as they perceived matters. Much of the respondent's evidence was unsatisfactory (in terms of paucity of documentary evidence about the rotas that were operating at the material time, the till records and the inconsistencies in the witness statements which were littered with errors). The Tribunal found the claimant to be an honest witness. She succeeded upon a major plank of her case (that she had told the respondent of her pregnancy prior to her dismissal).

50. It is unfortunate in those circumstances that the respondent sought to impugn the claimant's honesty by suggesting she was responsible for stock shortages. We refer in particular to paragraph 7 of Rebecca Brown's witness statement and paragraph 18 of the Grounds of Resistance. Mr Hutchings (whether on instructions or otherwise) chose not to pursue the impugning the claimant's honesty before the Tribunal. In our judgment, that was a proper and sensible course. On any view, the claimant's case was an arguable one and was one that caused the Tribunal some anxious deliberation.

Employment Judge Brain

Dated: 8 August 2017