Case Number: 3400199/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms A Swierczynska	**v**	**1. Kaprys Polish Delicatessen ltd** **2. Piotr Pietruch** **3. Kamil Myszak**

Heard at: Bury St Edmunds **On**: 22/23 January 2018

Before: Employment Judge Cassel

MEMBERS: Mr D Hart
Mrs L Feavearyear

Appearances

For the Claimant: Ms A Polec
For the Respondent: 1) Mr Rodi Hatami 2) and 3) In person.

RESERVED JUDGMENT

1. The claim for unlawful pregnancy discrimination under section 18 of the Equality Act succeeds against the first respondent.

2. The claim for notice pay against the first respondent succeeds.

3. The claim under the Transfer of Undertakings (Protection of Employment) Regulations is dismissed as are the claims against the second and third respondent.

4. We make a basic award for unfair dismissal of £372 and compensatory award of £4032.50 which makes a total of £4404.50 payable by the first respondent.

5. We make an award for unlawful discrimination of £14,000 for injury to feelings plus interest of £1215 making a total of £15,215 payable by the first respondent.

6. No separate award for 2) above.

REASONS

1. In her claim to the Employment Tribunal the claimant Ms A Swierczynska complains of unfair dismissal, unlawful sex discrimination on the grounds of pregnancy or maternity, unpaid notice and arrears of pay. The first respondent denied all the complaints.

2. There was a preliminary hearing on 31 July 2017 and a further preliminary hearing on 1 November 2017. The claims were set down for trial for two days 21 and 22 January 2018. The second and third respondents were joined in these proceedings.

3. On 1 November 2017 Employment Judge Ord found that the claimant had been unfairly dismissed and identified the claimant's remaining claims as follows:-

    3.1 That she was dismissed because she was pregnant.

    3.2 That she was not paid notice pay.

    3.3 There was no information or consultation regarding the transfer of an undertaking.

4. The first claim relates to a breach of section 18 of the Equality Act 2010. The second claim to the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 and the third claim to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

5. The claimant attended and was represented by Ms Polec and was assisted by Ms Otty who interpreted the evidence from English to Polish and vice versa to assist the claimant. The first respondent was represented by Mr R Hatami, director, and the second and third respondents represented themselves.

Evidence

6. We had presented to us a bundle of documents comprising 77 pages and

    6.1 the response form of the second respondent;
    6.2 the response form of the third respondent;
    6.3 a written statement of Jolanta Milczame;
    6.4 Statement of Adrian Brozka.

7. The following gave evidence:

    7.1 The claimant;

7.2 Mr Rodi Hatami, Director of the first respondent;
7.3 Piotr Pietruch, second respondent;
7.4 Kamil Myszak, third respondent;
7.5 Adrian Brozka.

Findings of Fact

8. The tribunal makes the following findings of fact based on the balance of probabilities and having considered those documents to which our attention was drawn.

8.1 The claimant was employed as a shop assistant from 5 November 2014.

8.2 The first respondent is a company, the principal business of which is owning and running a delicatessen in Stevenage.

8.3 The two former Directors, the second and third respondents had business experience, but ran into financial difficulties running the first respondent.

8.4 Accounts were produced which showed a significant trading loss of approximately £22,500 in the year ending August 2016.

8.5 We accept that the second and third respondent made efforts to sell the business and "For Sale" signs were displayed within the shop which led to enquiries being raised, or so we understand it.

8.6 Mr Hatami visited the shop on one occasion, on a date uncertain, and decided to buy it.

8.7 A share transfer took place on 12 December 2016 and a record from Companies House was produced at page 74, which showed that there was a change of Directors effective from 12 December and Mr Hatami was the sole Director of the first respondent from that date. There was no relevant transfer for the purposes of TUPE.

8.8 The two previous Directors, the second and third respondent, decided to dismiss the four employees who were engaged in the shop by way of redundancy. No procedure was followed.

8.9 The claimant was one of three to whom an email was sent which was dated 14 December 2016. It was the intention of the second and third respondents to dismiss the three employees, but the email was not clearly worded and quite ambiguous.

8.10 A letter was prepared and exhibited at page 66 making it clear that their contracts of employment were being terminated. That letter was dated 12.12.16.

8.11 We accept that the claimant did not receive that letter until sometime later after 21 December 2016.

8.12 None of the three who received notification appeared to take it seriously. The claimant who did not receive it, along with the other three attended their work place and carried on as if nothing had changed following the share sale on 12 December.

8.13 The claimant worked according to her rota, which she had received on 2 December 2016.

8.14 In any event the claimant made enquiries and understood that she should carry on working.

8.15 She was at work on 19 December as were Adrian Brozka and Natalia Kosarczuk and Jolanta Milczame. We did not hear evidence from Natalia Kosarczuk who has, so we were told, left the country, but we did hear from Adrian Brozka who overheard a telephone conversation.

8.16 Adrian Brozka told us that the call was from someone called "George" who was the co-owner and was received by Natalia Kosarczuk. No one else involved in these proceedings including the new owner has ever heard of "George" and we accept Adrian Brozka's evidence in so far as a call was received.

8.17 As a result of the call and on this both Adrian Brozka and the claimant are agreed, Natalia Kosarczuk told the claimant that she had been dismissed.

8.18 The claimant took her personal belongings and left the shop.

8.19 She wrote a letter of appeal dated 20 December 2016 addressed to Mr Hatami and the two previous Directors appealing against what she described as "the verbal and incomplete notification of her termination." There was no response to the appeal save that the second respondent told her "not to bother the new owner".

8.20 At the previous hearing, there was a finding of unfair dismissal and we find that the date of termination of the contract of employment was 19 December 2016.

8.21 As far as the reason for dismissal is concerned we find the following:

8.21.1 On 23 November 2016, the claimant sent to the company an email informing the company that she was pregnant. The second and third respondent accept that they received that email. No risk assessment was carried out following the notification of the claimant's pregnancy by the

second or third respondent, or any other person on behalf of the first respondent.

8.21.2 The second and third respondents intended to dismiss all the employees irrespective of protected status or otherwise. In evidence the second respondent stated the details of the employees were provided to Mr Hatami and we accept that evidence and that included the notification of pregnancy.

8.21.3 Mr Hatami on the purchase of the shareholding knew that there were four employees. He told us that three of them had presented themselves to him. He was vaguely curious as to who the fourth person was, but does not appear to have made any further enquires that would have established that the fourth person was the claimant.

8.21.4 Mr Hatami was an unreliable witness. On one occasion, he suggested that his Solicitors had submitted the response form in which dismissal was admitted without his authority. He described the claimant as a customer, but denied that she had ever worked for him. Adrian Brozka who was called by the respondents confirmed that the claimant was at work on 19 December. In her written statement Jolanta Milczame also stated that. On that day, Mr Hatami thought he was at work, but was in and out of the shop, but was clear that the claimant was not at work that day nor in fact ever worked for the first respondent.

8.21.5 If the two former Directors are right, which we find was the case, and employee information was relayed to Mr Hatami, he would have known that she was pregnant. In any event by December the claimant described herself as heavily pregnant and her pregnancy was obvious.

8.21.6 Much of Mr Hatami's evidence we find difficult to accept. It is inconceivable that having been on notice that there were four employees, he did not make enquiries as to the identity of the fourth. It is equally inconceivable that he had not noticed the claimant working in his shop describing her as a customer.

8.21.7 We find that the two previous Directors, the second and third respondents had relayed the information regarding the claimant's pregnancy to Mr Hatami who was in possession of that knowledge at the time he dismissed her.

9. **Submissions**

At the end of the evidence we heard submissions from and on behalf of the three respondents and from the claimant's representative. We were reminded of the salient disputes of fact and the positions adopted by the various parties. Our attention was not brought to any case law and I announced that we reserved our decision with reasons which I now give and on which we are unanimous.

10. **Relevant Law.**

Section 18 of the Equality Act 2010

"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)"

Section 136 Burden of proof regulations

"136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Special Educational Needs Tribunal for Wales;

(f) an Additional Support Needs Tribunal for Scotland."

Conclusions

11. The claimant was clear in her evidence that she had notified the company of her pregnancy and we accept her evidence. The second and third respondents accept that they had received that notification. We find that the second and third respondents relayed that information to the purchaser of the first respondent, Mr Hatami. We have already commented that we have found him to be an unreliable witness and do not believe him in his account of the relationship that the claimant had with the business. To describe her as merely a "customer" in circumstances when he knew that there were four employees working in the shop, in the circumstances that have been described is nonsensical.

12. We had some difficulty with the evidence of Adrian Brozka. We did not believe him when he claimed that the telephone call was from "George." It is likely that "George" is a fiction for reasons which are not apparent and it is not for us to speculate as to the reasons why this character was invented. However, we do find that a phone call was received in the circumstances he has described as a result of which the claimant was dismissed. A finding of unfair dismissal was made at the earlier hearing and one of the matters we had to consider is the reasoning behind the dismissal.

13. We reminded ourselves of the provisions of section 136 of the Equality Act 2010. There are facts from which we could decide in the absence of any other explanation that the first respondent contravened the provision contained in section 39(2)(c) in dismissing the claimant. No explanation or indeed acceptance of the fact of dismissal was made. We find that at the time the decision was taken to dismiss the claimant Mr Hatami knew that she was pregnant. We find that at the time he made his decision to dismiss her, for that is what he did, the decision was tainted with unlawful sex discrimination.

Basic Award for Unfair Dismissal

14. The claimant had been employed for two years. Her gross pay was £186 per week, the award we make bearing in mind her age at dismissal, is £372.

Compensatory award for Unfair Dismissal

15. For loss of statutory industrial rights we award £250. Loss of earnings from 19 December to mid-April when the claimant would have started her maternity leave, 16 weeks at £186 which amounts to £2976 plus the loss for statutory industrial rights amounts to a grand total of £3,226.

16. Uplift for failing to follow ACAS procedure; 25% of the sum awarded, £806.50 making a total of £4032.50.

17. We understand from the claimant that she has returned to Poland where she has been for some time. In these circumstances the recoupment provisions do not apply. On the available information, we are unable to consider making any further compensatory award.

Compensation for Unlawful Discrimination

18. We received a schedule of loss and an injury to feelings statement produced at page 77 of the claimant's bundle and we heard further evidence from the claimant as to the impact on her physical and mental health of the decision to dismiss her. On any view, it had a significant impact on her and the claimant gave further details of the tremendous amount of stress and depression which she described in her statement. We assess the injury to her feelings as being in the middle of the mid Vento Band which we assess at £14,000.

19. We also award interest of £1215 on the injury to feelings compensation.

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Employment Judge Cassel

Date: ……21 February 2018……..

Sent to the parties on: .....

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For the Tribunal Office