Appeal No. UKEAT/0162/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 December 2017

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MRS K HOLLINGHURST — APPELLANT

JAMES HALL & CO LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHAN ROBERTS (of Counsel) Instructed by: Morecrofts LLP Cotton Exchange Old Hall Street Liverpool L3 9LQ
For the Respondent	DR EDWARD MORGAN (of Counsel) Instructed by: Brabners Chaffe Street LLP Horton House Exchange Flags Liverpool L2 3YL

SUMMARY

SEX DISCRIMINATION - Burden of proof

SEX DISCRIMINATION - Pregnancy and discrimination

An Employment Tribunal did not err in applying the provisions of section 48(2) **Employment Rights Act 1996** or of section 136 **Equality Act 2010** concerning the shifting burden of proof. Despite a lack of clarity in the wording used in their Reasons, an analysis of the Judgment taken as a whole demonstrated that the Employment Tribunal had had proper regard to the provisions.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the Full Hearing of an appeal against the Decision of the Employment Tribunal ("ET") sitting at Manchester (Employment Judge Slater sitting with lay members), with Reasons sent to the parties on 21 December 2016. In this Judgment I shall refer to the parties as they were below.

2. I have been greatly assisted by thorough skeleton arguments prepared by Mr Nathan Roberts of counsel for the Claimant, who did not appear below, and Dr Edward Morgan of counsel for the Respondent, who did. Each has augmented their skeleton with focussed submissions this morning, for which I express my gratitude. If I do not engage with all of the arguments or cases cited in this Judgment, it is not because I have not considered them.

3. The Claimant had worked for the Respondent since 2003. By 2013, shortly before she went on maternity leave, she was working from 8.00am to 1.00pm on Wednesdays and 8.30am to 3.00pm on Thursdays and Fridays. She was due to return from maternity leave in May 2015 but it was agreed that she could take annual leave at the end of her maternity leave, with a return date of 27 May 2015. Whilst on maternity leave, she had applied for a further reduction in her hours, effective upon her return, but this was refused. After returning to work, the Claimant worked for just three days before going on sick leave.

4. Over that three day period, events happened which gave rise to her bringing a claim in the ET alleging disability discrimination, indirect sex discrimination, unfavourable treatment because of pregnancy under section 18 of the **Equality Act 2010** ("EqA"), and detriment

A contrary to section 47 of the **Employment Rights Act 1996** ("ERA"). All her claims were dismissed.

B 5. This appeal is concerned with one of the events which happened on 27 May 2015 which are alleged to have constituted unlawful pregnancy discrimination under section 20 of the **EqA** and/or an unlawful detriment under section 47C of the **ERA**.

C 6. The relevant paragraphs of the Reasons are set out at paragraphs 22, 23, 106 and 107:

> **"22. The claimant duly returned to work on 27 May. Soon after arriving, she had a return to work meeting with Mr Huartson relating to the period of sickness absence which had preceded her maternity leave. It is common ground that, during this meeting, Mr Huartson told her that she had the worst sickness record that he had seen. It is also agreed that the claimant told him that he could not take account of pregnancy related absence. There is a dispute as to what Mr Huartson replied. Mr Huartson says that he told the claimant he had not taken into account pregnancy related absence and that he referred to disciplinary letters which related to absences which were not pregnancy related. The claimant says that Mr Huartson commented that he was not bothered as to the reasons because he was "super strict" on sickness absences and that he would not put up with it. The claimant says Mr Huartson said that she should take his comments as a serious warning. Mr Huartson says that he told the claimant that he would be monitoring her absence in accordance with the company's policy. The claimant has not satisfied us, on a balance of probabilities, that Mr Huartson told her that he did not care about the reason for her absence and that he took into account pregnancy related absence when making his comments. The claimant's attendance record, leaving aside pregnancy related absences, was not such that it was not credible that Mr Huartson could regard this as very poor. We find that Mr Huartson did not give the claimant a verbal warning, as in a formal warning under the company disciplinary policy. However, Mr Huartson was warning the claimant that he would be looking very closely at her attendance.**
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> **23. During the investigation of the claimant's grievance, Karen Marsden initially agreed that the claimant had told her that Mr Huartson had given her a verbal warning. She then went on to clarify that she did not understand that this was a formal disciplinary warning and she said she was not sure whether the actual words that the claimant used were "verbal warning". Based on this, we find it to be possible that Mr Huartson may have used the word "warning". Alternatively, the claimant may have understood that she was being given a warning, without Mr Huartson using the word, and relayed to Ms Marsden that she had been given a verbal warning. If Mr Huartson did use the word "warning", we find that he used he word in a non disciplinary procedure sense. It was not clear to us, from the claimant's evidence, that the claimant thought she had been given a disciplinary warning. When asked whether she understood it to be a disciplinary warning she said, "I didn't really think about it. He was giving me a verbal warning". When asked about the importance of this, the claimant said she did not really understand. From her evidence, it does not appear that the claimant was clear what constituted a verbal warning in the sense of a warning with disciplinary consequences.**
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> …
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> **106. In relation to the section 47C Employment Rights Act claim, the next issue is whether, if so, this was because the claimant was pregnant, had given birth or taken statutory maternity leave. The issue for the section 18 Equality Act 2010 claim is whether, by the treatment, the respondent treated the claimant unfavourably because of her pregnancy or maternity leave.**
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> **107. In relation to the allegation that the claimant was given a verbal warning on 27 May 2015, we have found that there was no disciplinary verbal warning. However, the claimant was "warned" about her future attendance being subject to scrutiny in a more colloquial sense.**

> **We conclude that such a "warning" was not to the claimant's detriment. Mr Huartson was giving the claimant guidance. The claimant was not put at a disadvantage and, therefore, subjected to a detriment by such a "warning". Indeed, it may have been to her advantage to be aware of the approach Mr Huartson would take in the future. There was no suggestion that Mr Huartson's approach to the claimant in the future would be any different to any other employees. Mr Huartson had a reputation for strictly adhering to company procedures, which would include matters relating to absence. The claimant has not satisfied us that the way that Mr Huartson dealt with this matter on 27 May was related to pregnancy or taking statutory maternity leave. This complaint is not well-founded."**

7. The appeal is brought on three grounds, each of which was permitted to proceed to a Full Hearing by Her Honour Judge Eady QC, following a hearing under Rule 3(10) under the **EAT Rules**. The grounds are as follows:

1. Failure to consider and/or to apply the law regarding the burden of proof under section 48(2) **ERA 1996**.
2. Failure to consider and/or to apply the law regarding the burden of proof under section 136 **EqA 2010**.
3. Failure to consider and/or to apply the law in relation to determining whether treatment constitutes a detriment.

8. Ground 1 engages section 48(2) of the **ERA**. The ET correctly directed itself as to the effect of that in the context of section 47C of the same Act at paragraph 87 of the Reasons:

> **"87. Section 47C of the Employment Rights 1996 Act [sic], read with the Maternity and Parental Leave etc Regulations 1999 provide, amongst other things, that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a reason that the employee is pregnant, had given birth or had taken statutory maternity leave. The burden of proof is on the employer to show the ground on which any act, or deliberate failure to act, is done: section 48(2) 1996 Act."**

9. Ground 2 engages section 136 of the **EqA**. This was not set out by the ET, but provides as far as follows as relevant:

> **"(1) This section applies to any proceedings relating to any contravention of this Act.**
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> **(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.**
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> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

10. Ground 3 is concerned with the analysis of what constitutes a detriment. In his helpful skeleton argument, Mr Roberts formulated the test, following **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337 HL, in this way: whether "*the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold*". So there is, first, the need to identify the subjective view of the Claimant and then to look at whether that view is reasonable; an objective test. Mr Roberts also took me to the annex of **Igen Ltd v Wong** [2005] ICR 931 CA, at page 956, which sets out broadly guidance given in an earlier case, **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] ICR 1205.

11. In refusing leave at the Rule 3(7) phase, His Honour Judge Clark commented briefly that, based on the ET's factual findings, the conclusions reached in paragraph 107 were permissible. He said that as the Claimant had not been given a formal warning, rather guidance, she had suffered no disparate detriment and thus the allegation failed on causation rather than the burden of proof.

12. Although allowing the matter to come to a Full Hearing, HHJ Eady commented that, on one view, the ET made a permissible finding in fact that what concerned Mr Huartson on 27 May 2015 was unrelated to the Claimant's pregnancy or maternity leave. However, she went on to say that the way in which the ET expressed its findings gave rise to a reasonably arguable question: whether it misapplied the burden of proof.

13. I approach the matter afresh and without being bound either way by the views of those other Judges.

14. The issue arises from the curious and unhelpful formulation to be found in several paragraphs of the Judgment, namely "*The claimant has failed to satisfy us on the balance of probabilities that …*" in the context of a set of claims where, as set out above, specific provisions which shift the burden of proof are potentially engaged. This form of words appears in paragraph 22 and paragraph 107 (see above), but also paragraphs 26 and 38 and possibly elsewhere.

15. Turning to the grounds compendiously, and having regard to the statutory provisions set out above, I examined the evidence in the Decision. At paragraph 22 the ET refers to the evidential dispute as to what Mr Huartson replied when (as is accepted) the Claimant told him that he could not take into account pregnancy related absence. It does not, in its Reasons, resolve that dispute. However, the findings in the last three sentences of paragraph 22 are a permissible rejection of the Claimant's case of a link between the conversation and pregnancy related absence. The third sentence from the end of that paragraph is confusing, containing, as it does, a double negative. However, it is accepted before me that it is a finding that Mr Huartson could validly have viewed the sickness absence as poor, leaving aside the pregnancy absence.

16. At paragraph 23 it is noted that it was not clear as to whether the Claimant thought that she had been given a disciplinary warning and when asked she replied that she "*didn't really think about it*".

17. Dr Morgan puts stress on the sentence "*The claimant has not satisfied us, on a balance of probabilities, that Mr Huartson told her that he did not care about the reason for her absence and that he took into account pregnancy related absence when making his comments*".

A He says that this is a finding applying the correct standard of proof as to the first stage. He also takes issue with Mr Roberts' contention that the finding at paragraph 107 that "*The claimant has not satisfied us that the way that Mr Huartson dealt with this matter on 27 May was related to pregnancy or taking statutory maternity leave*" was a finding of *why* what was said was said, rather he says it was a finding as to *whether* something was said.

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C 18. The relevant complaint in the ET1, with which the Tribunal was concerned, was that the Claimant was subjected to a detriment by "*Being criticised for her absences and being given a warning … when such absences arose from pregnancy related illness*" (paragraph 17(b)(ii) of the Particulars of Claim attached to the ET1, see the bundle page 50).

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19. There has to be a link, in my judgment, between the criticism that the Claimant says she faced (and it is an undisputed finding that Mr Huartson told her that she had the worst sickness record that he had seen) and those absences arising from pregnancy related sickness which preceded her maternity leave.

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F 20. It may well be that, as a matter of good industrial relations, it was insensitive of Mr Huartson to have raised something of this nature, which was obviously critical of the Claimant, at a return to work interview on her first day back, but that does not of itself engage the provisions which are in play.

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21. Dr Morgan urges me to look at the Judgment in the round, noting that this was a series of complaints by the Claimant against Mr Huartson, whose evidence as to all of the events of 27 May and thereafter (including but not limited to those the subject of this appeal) was preferred to that of the Claimant throughout the Judgment.

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22. In the circumstances, it does seem to me that read fairly in the round, and not treating the Judgment as an examination paper, the ET was indeed holding that there was no "treatment" in the sense that the Claimant had not satisfied it on the balance of probabilities that the exchange took the form that she had alleged. She was not, in short, being criticised for absences which arose for pregnancy related reasons.

23. The burden of proof, as set out by the ET at paragraph 87 of its Reasons (see above), is on the employer to show the ground on which an act is done. If, as here, the act complained of is not established there is nothing for the employer to show. On the findings of fact there was no "warning" properly so-called, merely guidance, and there was no finding that even this limited guidance was limited to pregnancy related illness. I therefore agree with Judge Clark's analysis on this point and reject the ground of appeal.

24. The second ground fails for the same reason. In the absence of a finding that there were facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened a relevant provision, the need for an explanation fell away.

25. Following a brief change in the orthodoxy, arising from a decision of this Tribunal earlier this year, the conventional approach has very recently been reinstated by Lord Justice Singh in **Ayodele v Citylink Ltd & Anor** [2017] EWCA Civ 1913 when he said at paragraph 93:

> **"93. … The language of section 136 makes it clear that, if the inference of discrimination *could* be drawn at the first stage of the enquiry, then it *must* be drawn by the court or tribunal. The consequence will be that the claim will necessarily succeed unless the respondent discharges the burden of proof, which Mr Dennis accepts does lie on it at the second stage. I can see no reason in fairness why a respondent should have to discharge that burden of proof unless and until the claimant has shown that there is a *prima facie* case of discrimination which needs to be answered. It seems to me that there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a *prima facie* case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."**

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26. Ground 3 would fall to be considered only where there was the potential for a detriment to have been suffered. As the Claimant cannot, on the ET's findings, have suffered the treatment which had been alleged, the question as to whether it was objectively reasonable for her to regard it as a detriment did not arise.

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27. I therefore dismiss this appeal.

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