Case Number 1301514/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss A Parsons		**Oswestry Equestrian Centre Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Telford **ON** 10 & 11 January 2018

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Miss S Fritz
Mr MW Pitt

Representation
For the Claimant: **Mr G Edwards (Solicitor)**
For Respondent: **Mr R Sculpak (Consultant)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claimant was wrongfully dismissed in breach of contract.
2 Pursuant to Section 99 of the Employment Rights Act 1996, the claimant's claim for unfair dismissal is well-founded.
3 Contrary to Sections 18(2)(a) & 39 of the Equality Act 2010, the respondent discriminated against the claimant because of her pregnancy.

REASONS

1 The claimant in this case is Miss Alice Parsons, born on 5 June 1994 (23yrs), who was employed by the respondent, Oswestry Equestrian Centre Limited, from February 2016 until 10 February 2017 when she was dismissed. According to the claimant, the reason for dismissal given at the time was redundancy. The claimant was not given any notice of dismissal; nor did she receive any payment in lieu thereof.

2 By a claim form presented to the tribunal on 13 June 2017, the claimant maintains that the true reason for her dismissal was her recently announced pregnancy. Accordingly, she brings claims for wrongful dismissal (unpaid notice); unfair dismissal because of her pregnancy (Section 99 of the Employment Rights Act 1996 (ERA)); and unlawful discrimination on the grounds of her pregnancy (Section 18 of the Equality At 2010 (EqA)).

3 In its initial response to the claim, the respondent stated that the claimant had not been dismissed but had chosen to resign voluntarily as she no longer wished to work for the respondent's in view of her pregnancy. The response presented at trial was rather different: that in fact the claimant had neither been dismissed nor had she resigned; but, that her employment was continuing; it was simply the case that she had not made herself available for work since February 2017. It was expressly not the respondent's case that the claimant was redundant.

4 It is significant to note that the claimant did not have sufficient length of service with the respondent to be entitled to bring a claim for unfair dismissal applying the ordinary principles of Section 98 ERA.

5 The central question for determination by the tribunal is whether the claimant was dismissed: if the tribunal finds that she was, then, absent any finding of gross misconduct against her (none is alleged), she was clearly entitled to be given notice of dismissal and her wrongful dismissal claim would accordingly succeed. If the tribunal finds that the reason for any dismissal was the fact of the claimant's pregnancy then she will be automatically unfairly dismissed and she will have suffered unfavourable treatment contrary to Section 18 EqA.

6 Even if the claimant was not dismissed, there may nevertheless be a claim for unfavourable treatment contrary to Section 18 EqA if work, otherwise available, has been withheld from her because of her pregnancy.

The Evidence

7 The claimant gave evidence on her own account: she did not call any witnesses. For the respondent, there were two witnesses: the joint Owners/Directors of the company - Mrs Maria Carmen Marco Castillo; and her husband Mr Richard Connell.

8 In addition, the tribunal was provided with an agreed trial bundle running to 130 pages: we have considered the documents from within the bundle to which we were referred by the parties during the hearing.

9 The claimant's evidence was clear; compelling; and consistent: we have no hesitation in accepting the truth of what she told us.

10 The respondent's evidence was quite the opposite: in the response to the claim the respondent's case was that the claimant had resigned her employment rather than having been dismissed; but Mrs Castillo gave evidence to the effect that the claimant's employment had not been terminated either by dismissal or

resignation; and that indeed her employment was continuing. Mr Connell said the same: but it transpired that the witness statement from Mr Connell which had been served on the claimant differed in content from that provided to the tribunal. In the earlier version, signed and dated by Mr Connell on 29 October 2017, he stated that in a conversation with the claimant in February 2017 she had told him that she wished to cease working for the respondent straightaway; however, in the later version, signed and dated by Mr Connell on 12 December 2017, he stated that she had simply told him that she couldn't work during the week commencing 13 February 2017 - but that her employment had continued thereafter. Neither Mr Connell nor Mrs Castillo could explain the discrepancy between the response form and their evidence other than on the basis that Mr Connell had received only a limited education.

11 There was a further discrepancy in their evidence: whilst insisting that the claimant's employment had never been terminated and that she remained employed by them, they had taken no steps whatsoever, consistent with their duties as employers, to conduct a risk assessment for a pregnant employee; or to make any enquiries as to their liability for maternity pay. In our judgment Mrs Castillo and Mr Connell well knew that the claimant was not an employee after 10 February 2017.

12 Where there was a discrepancy between the evidence given by the claimant on the one hand; and that given by Mrs Castillo and Mr Connell on the other; we prefer the evidence given by the claimant and we have made our factual findings accordingly.

The Facts

13 The claimant commenced work for the respondent in February 2016 although it was not until 29 September 2016 that a contract of employment was issued to her. The contract states that her employment commenced on 29 September 2016, but it was not in dispute at the hearing that she had been working for the respondent since February. The claimant had no set hours of work but she regularly worked around 16 hours per week.

14 The system in the respondent's yard was basically that the staff manage themselves: the days members of staff worked was organised between themselves provided that the required level of cover was always provided. There was a minimum of four stable-hands namely the claimant; Sara; Ellie; and Charlotte: they worked out their own rota between themselves and often changed duties at short notice for each other's convenience. At the end of each week, staff completed a timesheet for the hours worked; and they were paid accordingly.

15 The respondent has suggested that the claimant's unreliability was the cause of some discord between her and her co-workers who were often needed to change shifts when it was inconvenient for them to do so. The claimant does not accept this: and the respondent's allegations are not supported by any documentary evidence; indeed, text messages passing between the claimant and Mrs Castillo suggest the opposite. In any event, there is no suggestion from the respondent that the claimant was ever disciplined, still less that she was dismissed, because her reliability.

16 In January 2017, the claimant discovered that she was pregnant: on Friday 27 January 2017, during her shift, the claimant informed Mr Connell of this fact; she told him that she was expecting to give birth in mid-September and wished to continue working for as long as she safely could. Two weeks later, on Friday 10 February 2017, Mr Connell spoke to the claimant and told her that she would not be required going forward as he no longer had sufficient hours for her. Mr Connell told the claimant she did not need to work after that date; we find that the claimant was dismissed.

17 One of the claimant's colleagues, Ellie Hughes, had been away from the workplace for some time because of an outbreak of strangles on the yard where she lived - it was unsafe for her to work in another yard until cleared to do so by the vet. Ellie return to work shortly after the claimant's dismissal.

18 Both Mr Connell and Mrs Castillo confirmed in evidence that there was no question of there being insufficient hours available for the claimant; they were short-staffed and needed her; and they welcomed Ellie's return as well.

19 One of the curiosities in the case is that the claimant did in fact work at the respondent's yard on Friday 17 February 2017; and, at one stage, she agreed with her colleague Charlotte that she would work on Tuesday 21 February 2017 but she did not do so. The respondent points to the claimant having worked on 17 February 2017 and made her commitment for 21 February 2017 as evidence that she could not have been dismissed on 10 February 2017. On close analysis however, it is clear to us that when the claimant worked on the 17 February 2017 she was doing so as a favour to Charlotte; she did not expect to be paid; and she was not in fact paid. By 21 February 2017, she had realised that to continue working even on a voluntary basis would not be the right thing to do having been dismissed.

20 In our judgement, it is significant that Mr Connell confirmed that he knew the claimant had worked on 17 February 2017: he agreed that she had not been paid; he claimed that this was because she had failed to submit a timesheet; but could not explain why as a responsible employer he had not pursued this to ensure that she was properly paid for work done. This was not consistent with a belief that the claimant was still employed.

The Law

21 **The Equality Act 2010 (EqA)**

Section 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

(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;

22 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 99: Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave.

23 **Maternity and Parental Leave Etc Regulations 1999 (MAPLE)**

Regulation 20: Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3),

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

24 **Decided Cases**

R (on the application of E) -v- Governing Body of JFS **[2009] UKSC 15 (SC)**

The "but for" test should not be used to determine whether discrimination has been proved, unless the factual criteria applied by the respondent are inherently discriminatory.

Interserve Limited -v- Tuleikyte **[2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the "reasons why" approach; it is not a "criterion" test.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Shamoon -v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Amnesty International -v- Ahmed **[2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Fecitt -v- NHS Manchester **[2012] IRLR 64 (CA)**

If detriment is identified the burden of proof is on the respondent to prove on the balance of probabilities that the detriment complained of did not arise because of the protected characteristic of maternity leave.

Discussion & Conlusions

25 As we have already indicated, we have no hesitation in concluding that the claimant was dismissed by Mr Connell on 10 February 2017. The respondents have advanced before us no potentially fair (or any) reason for such dismissal: their case was firstly that the claimant had resigned; and latterly, that her employment was continuing.

26 Bearing in mind the sequence of events as we have found them to be, it is clear that the reason for the dismissal was because of the claimant's pregnancy:

Mr Connell foresaw that the claimant would be a less useful; and a potential liability to the respondent because she was pregnant.

27 This being the case we find that the claimant was automatically unfairly dismissed pursuant to Section 99 ERA; and that she was unfavourably treated because of her pregnancy contrary to Section 18 EqA.

28 The claimant was dismissed without notice when clearly she was entitled to a period of notice: accordingly, she was wrongfully dismissed and is entitled to damages for breach of contract.

REMEDY

30 The remedy to which the claimant is entitled will be determined by the tribunal at a Remedy Hearing on a date to be fixed and notified to the parties. The following Case Management Orders apply to that hearing.

CASE MANAGEMENT ORDERS

31 By 4pm on 18 April 2018 the parties shall lodge with the tribunal details of availability for the parties and relevant witnesses for a Remedy Hearing to be listed in Telford between 1 June 2018 and 30 September 2018.

32 By 4pm on 18 April 2018, the claimant shall serve on the respondent an updated schedule of loss. If the claimant seeks compensation for injury to feelings the schedule shall quantify the compensation by reference to the band of awards in ***Vento –v- West Yorkshire Police*** **[2003] IRLR 102 (CA):** See also ***Da'Bell –v- NSPCC*** **[2010] IRLR 19 (EAT)**; ***Cadogan Hotel Partners Limited -v- Ozog*** **UKEAT/0001/14**; ***Simmons v Castle*** **[2012] EWCA Civ [2013] 1 WLR 1239**; ***De Souza -v- Vinci Contruction (UK) Limited*** [**2017] EWCA Civ 879** and the **Presidential Guidance** issued on **5 September 2017**.

33 By 4pm on 16 May 2018, the respondent shall serve a counter schedule on the claimant setting out with reasons those items on the schedule of loss which can be agreed and those which cannot.

Employment Judge Gaskell
19 March 2018