EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss I Skrzydlo	**v**	**CRC Recruitment Ltd**

Heard at: Cambridge **On:** 20, 21 & 22 November 2017

Before: Employment Judge Ord

Members: Mr T Williams and Ms J Evans

Appearances

For the Claimant: Ms M Wisniewska, Lay Representative.
For the Respondent: Mr Whysall, Solicitor.

Interpreter: Marta Pijewska – Language: Polish.

JUDGMENT having been sent to the parties on 7 December 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant carried out work through the respondent which is an employment agency from 27 May 2015.

2. In January 2016 the claimant told the respondent and the manager at the premises where she was working (operated by Ingram micro) that she was pregnant.

3. The claimant says that she was denied work thereafter because of her pregnancy and/or because of her nationality. The claimant is Polish.

The claims

4. The claimant presented her claim form to the tribunal on 12 July 2016. At a preliminary hearing on 23 September 2016 the claimant's complaints were clarified. The complaints that proceeded to the final hearing were as follows:

    4.1 Not being offered any further work by the respondent after telling the respondent that she was pregnant (unfavourable treatment contrary to s.18 of the Equality Act 2010); and

    4.2 Direct discrimination on the protected characteristic of race (contrary to s.13 and S.39 of the Act). The less favourable treatment relied upon was the respondent not providing the claimant with work after telling the respondent that she was pregnant, whereas a pregnant woman of British origin, Cheryl Dunkley was provided with work.

The Hearing

5. Evidence was heard from the claimant and her former colleagues Agnieszka Fac and Joanna Klonowska. On behalf of the respondent evidence was heard from Mr Paul Harris (director) and Miss Stephanie Theobald (senior consultant). Both sides had the opportunity to make closing submissions and reference was made to a bundle of documents.

The facts

6. Based on the evidence provided to us we have made the following findings of fact.

7. The claimant began work with the respondent shortly after applying for the same in April 2015. At that stage she confirmed that she had one dependent (her two-year-old daughter) and that she wished to begin work as soon as possible, and was looking for a job within school hours (9am to 3pm).

8. Shortly thereafter the respondent contacted the claimant advising a new warehouse was opening in Daventry which would provide opportunities for work but the hours were 8am to 4pm.

9. The claimant was initially unwilling to take up this work because of the hours so she visited the respondent's premises to explain this. On her own evidence, which we have no reason to doubt, she was effectively persuaded by Ms Theobald that the opportunity was a good one and if she could find a childcare solution she should take up the opportunity. The claimant discussed these arrangements with her partner and decided to accept the role.

10. The opportunity was with Ingram micro ("Ingram"). They were opening a new site in Daventry and there was an initial induction in Crick. Following that induction, the claimant was asked if she could work for a period in Crick, which she did until transferring to Daventry at the end of June 2015.

11. The respondent's expectation was that the work would continue for a period of time, certainly up to Christmas, but that thereafter they could not be certain that there would be an ongoing need for agency staff at Ingram. The claimant says that she was not told this but rather was told that there would be opportunities to become a permanent member of staff with Ingram. We do not accept the claimant's evidence in this area, but accept the evidence of the respondent, in particular that of Ms Theobald who explained that the work in question was to a degree seasonal and given that this was work as a warehouse operative the busy time would be in the run-up towards Christmas but thereafter work would "tail off". The respondent would be in no position to judge whether or not Ingram would take on more direct labour in due course.

12. Save for periods of time when she took annual leave the claimant worked every week until January 2016. Hours varied a little from week to week but were usually between 36 and 40 hours.

13. The anticipated reduction in demand immediately before and following the Christmas and New Year period 2015/2016 did materialise. At the beginning of November 2015 the respondent had 131 agency workers working at Ingram. In the week beginning 21 December this was down to 25 and for the week beginning 11 January 2016, the number was 14.

14. On 7 January 2016 Asim Iqbal on behalf of Ingram contacted the respondent to identify the eight named workers which Ingram wanted for the following week. The respondent confirmed that in certain circumstances certain clients identify precisely which workers they wish to have on their premises for a particular week and that usually they will ask for individuals who have worked with them before. At 8.17am that morning Mr Iqbal send the respondent the eight named individuals required for the following week. There was a question about the number of days and the start time for those individuals and Mr Iqbal replied at 11.20am that morning, including an amended list of individuals requested. The claimant had been on the original list but was not on the revised list and Ms Theobald asked why (she had been replaced by Ludmila). The reply was that there was "no specific reason … Other than we had to lose someone" and that "Ludmila is trained on more functions plus she is a [forklift truck] driver which is why she has been added".

15. The following day at 6.53am the claimant sent an email to Ms Theobald advising that she was pregnant, stating that she hoped that was not a problem because you wanted to work as long as possible. She said she would also tell her manager (at Ingram) that day.

16. On the same day Ms Theobald saw the claimant on site and advised her that she was not required to work the following week, reassured her that the news had been given by Ingram the previous day and was not connected to her pregnancy.

17. The respondent was providing workers to both Ingram sites (Crick and Daventry). The total number of individuals placed in those two sites for the week beginning 11 January was 14 and between that date and 26 April the weekly numbers were 14, 35, 18, 20, 17, 17, 19, 27, 10, 18, 23, 14, 9, 9 and 14.

18. Thereafter the claimant did from time to time work at Ingram and the respondent made attempts to find her work there.

19. She worked on 13 January, and on 15 January was identified by the respondent as one of three workers free to work on 16 January and was chosen from that list of three by Ingram.

20. On 18 January Ingram advised that the claimant was not required for the following day.

21. On 19 January the respondent asked if the claimant and four others who had been stood down were required on 20 January.

22. On 25 January the respondent sent Ingram a list of temporary workers who were available. That list included the claimant, indeed her name was at the top of the list of 28 who were available throughout the week.

23. On 1 February 2016 the respondent again sent a list of available workers who Ingram identified there was one of those who had done work the week before and identifying of further smaller group of others who had not worked in the previous week.

24. On 2 February 2016 Ingram asked for two additional workers but emphasised the need for them to have transformation experience.

25. The claimant was not offered the opportunity on 2 February. The respondent did not know that the claimant had transformation experience and indeed on her own evidence any such experience which she did have was limited to the period of “dummy runs” done before the warehouse was fully operational. The respondent was not aware of this.

26. We find as a fact that the respondent genuinely and reasonably believed that the claimant lacked the relevant experience so that she could be offered or considered for the vacancy on 2 February 2016.

27. On 3 February 2016 Ingram identified eight people who they wanted to work for the following week. The claimant was not on that list.

28. The claimant made direct contact with her manager at Ingram by text, and he described the position as “like a lottery” and said that he could not promise the claimant anything as things changed from day to day.

29. The history of the matter corroborates the respondent’s stated position that there would be a substantial downturn in work after the period leading up to Christmas and the New Year.

30. On 4 February the current as well to people to Ingram Creek alongside three other workers (more usually at Crick). The claimant and her colleague were identified as people who had worked at Crick in the past.

31. This was in direct response to a visit by the claimant and Ms Fac on 4 February. The contemporaneous file notes of this conversation, made by Ms Theobald, indicated that both ladies were “desperate for work” ideally at Ingram. Both asked about other contracts, in particular AAH where there was now anticipated increase in activity at that stage. Ms Theobald mentioned a possible contract at Wetherspoon’s with the comment on the claimant’s file that she was “unable to start at 6am”.

32. Subsequently an opportunity arose at Walker’s packaging and Ms Fac was offered and took up that work. The respondent (claimant?), as Ms Fac knew, was looking for two additional people to work there. It required a 6.30am start.

33. In evidence before us the claimant says that she was flexible, and can arranged the childcare from her father who would have travelled from Poland to enable her to work earlier mornings. We find as a fact, however, that this was not stated to the respondent then stage so that they reasonably believed that the claimant was unable to start any time before 7am. We also note that when Ms Fac was aware of this opportunity she did not (or at least neither she nor the claimant has given evidence that she did) contact the claimant and advise her of this work. The evidence from Ms Fac was that Ms Theobald had described the claimant as “not flexible”, but we accept her evidence, but what she in fact said was that the client was not flexible about the start time, which would be consistent with her stated view that the claimant could not work before 7am. Neither Ms Fac nor the claimant contacted Ms Theobald to disabuse her of this error (if it was an error).

34. After 4 February 2016 the claimant made no contact with the respondent at all save through ACAS in March. In March ACAS contacted the respondent as the claimant had been in touch for the purposes of early conciliation saying that she believed she had been discriminated against due to her being pregnant and not being given work.

35. Mr Harris dealt with that call and he said in evidence that his response had been to tell ACAS that the claimant should get in touch with the respondent if she wanted work. We accept that evidence as being consistent with the respondent’s previous efforts to try and find the

claimant work, in particular as a response to contacting them. The claimant's evidence was that she was expecting (indeed had been promised) that Ms Theobald would make special efforts to find her work (by implication ahead of other people on the agency's books). Ms Theobald denied this and we accept her evidence. In any event, we note that the claimant is thereby raising as a complaint, is a failure to give her more favourable, as opposed to unfavourable treatment. In any event we find is a fact that no such offer was made by Ms Theobald.

36. We note that in terms of engagement for agency workers a copy of which was given to the claimant at the time she made the application for work clause 9.5 states "if the agency worker does not report to the employment business to notify his/her availability for work for a period of three weeks, the employment business will forward his/her P45 to his/her last known address".

37. It is agreed that the last time the claimant made any contact with the respondent after 4 February was on 26 April 2016 when the claimant was asking for her P60. The respondent subsequently sent the claimant her P60 and her P45.

38. The claimant also complained that the British pregnant employee (Ms Dunkley) was given work whilst pregnant and the claimant was not.

39. The details of the arrangements involving Ms Dunkley were not made clear to us, but findings of fact that we have set out above illustrate what actions were taken by the respondent to assist the claimant during the relevant period. As we understand it Ms Dunkley was given office work at a location where she was already working during her pregnancy. Other than that, the claimant did not advance informational evidence about that workers position.

40. It is against that factual background that the claimant brings her complaints.

The Law

41. The law under s.4 of the Equality Act 2010 raised is a protected characteristic.

42. Under s.9 race includes nationality.

43. Under s.13 a person discriminates against another if because of a protected characteristic they treat that person less favourably than they treat or would treat others.

44. Under s.18 a person discriminates against a woman if in the protected period in relation to a pregnancy of hers she is treated unfavourably because of the pregnancy.

45. Under s.18(6) the protected period begins when the pregnancy begins and ends either the end of the period of maternity leave to which that person is entitled or, if there is no entitlement to maternity leave, at the end of the period of two weeks beginning with the end of the pregnancy.

46. Under s.55 an employment service provider must not discriminate against a person in the arrangements the service provider makes for selecting persons to whom to provide, or to whom to offer to provide, the service [or] by not offering to provide the service to the person.

47. Under s.136 in proceedings under the Act, if there are facts from which the court could decide in the absence of any other explanation that a person contravened the provision concerned the court must hold the contravention occurred unless the person shows that they did not contravene the provision.

48. In Efobi v Royal Mail Group Ltd EAT/0203/16/DA the employment appeal tribunal confirmed that it is not for the claimant to establish such facts, but it is for the tribunal to hear all of the evidence and determine whether such facts from which they could decide that there has been a contravention of the provision has been established. It has been well known since the case of Madarassy v Nomura International plc [2007] ICR 867 that the possession of a protected characteristic and the presence of unfavourable treatment is not enough to establish such facts, on the facts found there must be some causal link between the characteristic and the treatment.

Conclusions

49. Applying the facts found to the relevant law we have reached the following conclusions.

50. The initial decision that the claimant was to be stood down from work at Ingram was taken by Ingram, and not the respondent. It was taken the day before the claimant told first the respondent, and then Ingram of her pregnancy. It was taken because Ingram wished to have another worker (Ludmila) available because of her wider training and because she was a forklift truck driver. It was taken the day before the claimant announced her pregnancy and therefore could not have been because of that pregnancy, and in any event it was taken by Ingram and not by the respondent.

51. The claimant was thereafter treated in the same way as any other potential worker on the respondent's books was treated in particular in the following ways:-

    51.1 First, she was promoted for work to the respondent's client as being available for work. The claimant worked on 13 January and on 16 January (when she was identified by the respondent as one of the three workers free for that day and was the only individual chosen from that list by Ingram).

51.2 Second, the respondent continued to try to place the claimant, and others, with their client when work was available in particular on 19 and 25 January, and again on 4 February. The respondent had anticipated a downturn in demand from Ingram and the claimant was one of many individuals who has previously worked at Ingram but will do no work was available. We have not had any evidence put before us to suggest that there were significant other opportunities elsewhere.

51.3 During her evidence the claimant suggested that Ms Theobald had effectively promised to prefer the claimant for any opportunities because of her pregnancy and to "look after her" by making sure she had work. Ms Theobald denied making any such statement and we accepted her evidence in that regard, but even if that were the case the claimant's complaint would be of the absence of more favourable treatment rather than the existence of unfavourable treatment.

52. The unchallenged evidence of Mr Harris was that in the early part of the calendar year that and for workers of the type the respondent provides is much lower than it is in the later part of the year.

53. There were two specific opportunities at the clients of the respondent which the claimant says she would have been offered had she not been pregnant. The first of those relates to Wetherspoon's, but in fact that contact did not materialise. The claimant was advised of the possibility of such work on 4 February, but at that stage contract had been secured and according to the evidence which we have received and which we must accept (there being nothing to the contrary) it was not secured.

54. The second opportunity was at Walker's packaging. Ms Fac was placed there and the claimant says she should have also been placed there too.

55. The around the position at Walker packaging relates in substantial part to the starting time for the work. Ms Theobald told Ms Fac about the opportunity and that there were two other vacancies. The claimant was mentioned by Ms Fac bold said that the client was not flexible about starting times. The respondent therefore did not contact the claimant about this opportunity because they genuinely and reasonably believed that the claimant could not start work before 7am due to her childcare responsibilities. It must be assumed, and we have found, that Ms Fac did not tell the claimant about this opportunity because had she done so the claimant would doubtless have contacted the respondent to confirm that she was available before 7am if that was indeed the case. The alternative is that the claimant was told about the opportunity but did not pursue it by contacting the respondent because, notwithstanding her evidence before us, she could not start work before 7am. In any event the reason why the respondent did not contact the claimant was because they genuinely,

honestly and reasonably believed the claimant could not start work before 7am which was a requirement of that placement.

56. After 4 February the claimant made no contact with the respondent and under the respondent's terms any agency worker who does not report to the employment business to notify their availability for work from for a period of three weeks I will be forwarded that the P45 to the last known address. That is a sensible and understandable provision given the transient nature of many of the workers with whom the respondent deals. Accordingly, by 25 February the respondent was entitled to reasonably form the view that the claimant was not actively seeking work with them.

57. When an opportunity arose for individuals with transformation experience within Ingram the respondent did not identify the claimant as being a suitable candidate because she had no recent transformation experience. The claimant's transformation experience was limited to the "dummy runs" which were carried out prior to the warehouse being fully operational. Others had more recent and more significant transformation experience and they were promoted to Ingram by the respondent for that reason. That was not unfavourable treatment towards the claimant, she was being treated in the same way as other without transformation experience.

58. The claimant complains about the fact that the respondent had a vacancy for a receptionist within its own business which was not offered to her. Mr Harris candidly accepted that he had not considered the claimant in that position but this was primarily because the post required a fluent English speaker and the claimant's English was not good enough to be offered that post. That is wholly unrelated to the claimant's pregnancy.

59. Accordingly, in relation to the claimant's complaint that she was the victim of unfavourable treatment because of her pregnancy we have found no facts to support that allegation. The claimant's work at Ingram came to an end because of a downturn in demand and in the period thereafter she was dealt with in a manner consistent with the way others were treated. The respondent had a genuine belief that the claimant could not start work before 7am which limited opportunities for her. Although the claimant says in evidence before us that she would have arranged for her father to come from Poland and stay with her to provide childcare to enable her to begin work earlier this was never suggested to the respondent and the respondent could not be aware of that possibility. The claimant was not considered for the post of receptionist because she did not have sufficient mastery of the English language which has nothing to do with her pregnancy.

60. Turning to the claimant's complaint that she was the victim of race discrimination, this has turned on one single matter, the fact that Ms Dunkley continued in work during her pregnancy in an office based capacity whereas the claimant was not. This however was also the case with one other identified worker, identified as Andrea, who continued to work at another client (NX-Secure) during her pregnancy. The

determining feature in each case was that the individuals concerned were already in place at clients who had a continuing demand for workers including the two individuals. Ingram's did continue to take the claimant, albeit sporadically, after they were aware that she was pregnant and there is no reason to doubt that had the level of demand at Ingram's remained at the same level after the claimant was pregnant been in the later part of 2015 then she would have continued to work there. There has been no evidence put before us to indicate that the situation of Ms Dunkley, when contrasted to that of the claimant, was in any way influenced by the race or nationality of the two individuals or either of them. The fact that Andrea, who we have been told is also Polish, also worked whilst pregnant is further indication that the nationality of the individuals played no part in the question of whether or not they continued to work during the period of their pregnancies.

Summary

61. The respondent did not treat the claimant unfavourably during the period of her pregnancy. The reason why she did not continue to work at Ingram's was because of a downturn in that customer's requirement for agency workers. The decision as to who went to Ingram's on a day-to-day basis was made by Ingram's and not the respondent.

62. There is no evidence that the claimant was the victim of any discrimination on the basis of her nationality. Other pregnant employees who remained at work did not do so on the basis of their nationality. Although the claimant has pointed to one British worker who remained at work the respondent's unchallenged evidence was that others of other nationalities, including one identified Polish worker, also remained at work.

63. Accordingly, the claimant's complaints are not well founded and her claim is dismissed.

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Employment Judge Ord

Date: 03.04.18 ……

Sent to the parties on:

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For the Tribunal Office