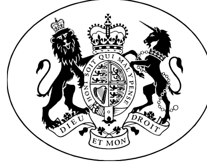
Case Number: 3400414/2017



EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss AP Read	**v**	**(1) Aftala Norfolk Ltd T/A Papa John's Pizza**
		(2) Whitestone Norwich Ltd T/A Papa John's Pizza

Heard at: Norwich **On:** 17, 18 and 19 April 2018

Before: Employment Judge Postle

Members: Mr TM Doyle and Mr R Thompson

Appearances
For the Claimant: Mr Dean, Solicitor.
For the Respondents: Miss Halsall, Advocate.

JUDGMENT

1. The claimant did not have sufficient qualifying service to bring a claim for ordinary unfair dismissal under the Employment Rights Act 1996.

2. The claimant's claim under s.10 (and s.26?) of the Equality Act 2010 that she was discriminated against on the grounds of religion and belief, particularly harassment was not well founded.

3. The claimant was treated unfavourably as a result of her pregnancy under s.18 of the Equality Act 2010.

4. The claimant's claim for unlawful deduction of wages is not well founded.

5. The respondents have conceded holiday was not paid to the claimant.

6. The Tribunal makes a declaration the claimant did not receive the National Minimum Wage for the period September 2016 until he dismissal in January 2017.

7. Any award the Tribunal makes is jointly and severally against the first and second respondents.

REASONS

1. The claimant brings a number of claims to the Tribunal, and these were set out at the case management hearing on 6 July 2017, to summarise there were claims for; ordinary unfair dismissal under the Employment Rights Act 1996; there was a claim under s.10 and s.26 of the Equality Act 2010 religion and belief discrimination particularly harassment; and a claim under s.18 of the Equality Act 2010 for pregnancy discrimination. There are also claims for unlawful deduction of wages, failure to pay the minimum wage, a claim for holiday pay and who is the correct employer.

2. The Tribunal heard evidence in this case from the claimant, from her mother Mrs Sarah Mason and from a former employee, Mr Tim Cleaver all giving their evidence through prepared witness statements. For the respondent we heard evidence from Mr Ricky Shaw the manager,

Mr Zohaib Hassan an employee of the respondents, Miss Rachel Brewster another employee of the respondents, Miss Leanne Warrington another employee of the respondents, Mr Muhammad Usman Naeem the area manager of the respondents, and Mr Syead Anjum a director and shareholder of the respondents all giving their evidence through prepared witness statements. The Tribunal also had the benefit of a bundle of documents consisting of 111 pages.

3. Dealing with the law, firstly s.18 pregnancy and maternity discrimination – this is where a woman complains that a respondent has contravened the Equality Act 2010, in particular it requires that a respondent must not discriminate against an employee, and if she then establishes that they have there is some form of detrimental action relied upon, in this case dismissal. So the law is quite simply this; a respondent discriminates against a women if in the protected period of her pregnancy he treats her unfavourably because of her pregnancy or because of illness suffered by her as a result of it. What the Tribunal are looking at is are there facts from which the Tribunal could decide in the absence of any other explanation that the respondent contravened the provision, the Tribunal will then hold that the discrimination is proved unless a respondent shows in some way that it did not contravene the Act. That is known as the burden of proof under s.136 of the Equality Act 2010.

4. In relation to harassment, a relevant for the s.10 claim, religion and belief, what the Tribunal is looking for is; has there been conduct complained of

unwanted by a claimant, if the answer to that is yes, was the conduct claimed of on the grounds of religion or belief. Has the respondent proved that the conduct was not on that ground, if they have, has the claimant proved facts from which the tribunal could conclude that the conduct had the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. If the answer to that is yes, has the respondent proved that the conduct did not have that purpose having regard to all the circumstances including in particular the claimant's perception should unwanted conduct reasonably be considered has having the affect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for the claimant. In this particular area of the law no comparator is required.

5. In relation to unlawful deduction of wages, s.13 of the Employment Rights Act 1996 states that an employer will not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or the worker has previously signified in writing his agreement or consent to the making of that deduction. In the absence of that the deduction will be unlawful.

6. In relation to claims for ordinary unfair dismissal under the Employment Rights Act 1996, s.108 states that s.94 which deals with unfair dismissal complaints does not apply to the dismissal of an employee unless he or

she has been continuously employed for a period of not less than 2 years ending with the effective date of termination. The facts and conclusions of the Tribunal, the best evidence for the Tribunal would appear to point to the claimant starting her employment with the respondents in or about August 2015. The reason for that is the mother's candid evidence and her diary entry at page 41 and texts of September 2015 to be found at pages 42 and 43 of the bundle, suggesting that the commencement of the claimant's employment with the respondents started around August/September 2015. If one looks at those texts by any objective assessment it seems to be referring to commencement of her employment. The Tribunal in so far as it is relevant do not accept the claimant commenced her employment in May or June 2016 as advanced by the respondents. The claimant was employed as a kitchen assistant. There is no contract of employment and seemingly no contracts of employment are provided to any staff. The company records as far as they exist are frankly unhelpful and some of them are we do not hesitate to suggest are frankly fabricated, which we will deal with later on in this judgment in relation to a pay slip.

7. The hours the claimant worked, appeared to have been anything from 24 hours per week to 9 hours per week. Payslips were not always provided by the respondents, and when they were on the respondents' own admissions they were not always accurately reflecting the amount of hours worked or payments due. Employees appear to have received pay on occasions in envelopes, with hours and their pay written on the outside

of the envelope and undated, and on occasions amounts deducted for food consumed. There may have been other deductions, however the evidence of the manager Mr Shaw was unclear on that point.

8. The claimant received no warnings through her employment, certainly not recorded in any form from the respondents during the course of her employment about her lateness, absenteeism or performance. The claimant received formal conformation from her GP on 21 November 2016 that she was pregnant, and sometime either on that day or shortly afterwards she notified certainly Mr Shaw her manager and other members of staff working with the respondent. It is clear the staff were aware and it is simply inconceivable that Mr Anjum advances an argument that he was not aware of the claimant's pregnancy. In December the claimant was absent on the 2, 5 and 17 December 2016 due to sickness. It is not clear whether the sickness was entirely related to pregnancy, but it is more likely than not the absence was related to sickness due to her pregnancy, and in circumstances where the respondents were aware of the claimant's pregnancy. On 1 January 2017 the claimant was rostered to work, she failed to attend and was dismissed following a discussion between Mr Anjum and Mr Shaw. The letter of dismissal is at page 64 and interestingly enough refers to amongst other things it states:

> "It's nothing to do with you personally or any of your health circumstances."

The Tribunal believe that was a reference to the claimant's pregnancy. The dismissal clearly was related to the claimant's pregnancy and is further enhanced by Mr Anjum's own evidence before this Tribunal as follows:

> "I did not sack her just because she was pregnant."

Furthermore, despite knowing the claimant was pregnant Mr Shaw and Mr Anjum did not arrange a risk assessment following the claimant's pregnancy.

9. During the course of the claimant's employment, she with other members of staff were involved in discussions with Mr Hassan about respective religions and the Koran. Those discussions were heated, the claimant recorded her concerns with Mr Shaw the manager about those discussions, which Mr Shaw accepted in evidence the claimant did raise. However, the Tribunal were not persuaded these were at a level to constitute religious and belief harassment.

10. The evidence before the Tribunal suggests deductions for food were made in breach of s.13 which required the consent before such deductions were made. However, what is not quantifiable and what is not available to this Tribunal is the exact amount of deduction.

11. Looking at payslips, clearly the records suggest that the claimant was paid the minimum wage up to her 18th Birthday, in so far as they are genuine records, however after that, the Tribunal are not convinced she was paid the minimum wage clearly at the preliminary hearing I myself indicated to the parties incorrectly that the minimum wage for the relevant period was £5.55, actually at the time it was £5.30, oddly and surprisingly thereafter the respondents produced payslips for that period showing £5.55 when in fact the rate was £5.30. The Tribunal concludes those payslips or that payslip was clearly fabricated for the purpose of these proceedings. The claimant is therefore entitled to the difference she was paid shown on her payslip for that period of £3.87 and the relevant minimum wage which went from £5.30 to then £5.55 in October.

12. In so far as holiday pay is concerned, this has been conceded by the respondents as not being paid to the claimant, and indeed no doubt there were other employees and we need to assess the amount to be paid.

13. The remedy award in terms of the identity of the claimant's employer is to be a joint and several award, in other words the liability is jointly and severally against both the first and second respondent as it appears at various times the claimant was employed by both.

14. Dealing first with the National Minimum Wage incorrect payment:

<u>28 August to 1 October 2016</u> – 5 weeks

Rate paid £3.87 v rate payable £5.30 = a hourly loss of £1.43.

Average hours per week of 16.5 x hourly loss of £1.43 = a loss per week of £23.60.

Loss per week of £23.60 x 5 weeks =	£118.00

<u>1 October 2016 to 1 January 2017</u> – 13 weeks

Rate paid £3.87 v rate payable £5.55 = a hourly loss of £1.68.

Average hours per week of 16.5 x hourly loss of £1.68 = a loss per week of £27.72.

Loss per week of £27.72 x 13 weeks =	£360.36
Total underpayment on the National Minimum Wage is	**£478.36**

15. In relation to holiday pay:

<u>August 2015 to August 2016</u>

Average 16.5 hours per week x hourly rate of £3.87 = weekly wage of £61.92. (£63.86?)

28 days holiday due

Total payable at a daily rate of £8.82 is	£246.96

<u>August 2016 to January 2017</u>

5 weeks, average 16.5 hours per week x hourly rate of £5.30 = weekly wage of £87.45.

2.7 days holiday due

Total payable at a daily rate of £0.00 is	£33.64

13 weeks, average 16.5 hours per week x hourly rate of £5.55 = weekly wage of £91.58.

? days holiday due

Total payable at a daily rate of £0.00 is	£00.00
Total holiday pay award	**£000.00**

16. Compensatory award:

    16.5 hours per week at an hourly rate of £5.30

    1 January to 14 June – being 6 weeks before the expected date of birth

    At £90.75 per week x 23 weeks = £2,087.25

17. Lower earnings to qualify for SMP at the relevant time was £112.00, therefore the claimant did not qualify. The claimant would have qualified for statutory maternity allowance paid by the UK Government to act at 90% of weekly earnings. It would appear that the claimant could not claim this because she was unable to prove her earnings due to the respondents' failure to provide accurate details to HMRC. Therefore, from the date of birth, 39 weeks at 90% of £90.75 equals £81.63 (£81.68?). The total £3,183.57 (£3,185.52?).

18. Upon that benefit ended and that stayed after the birth of the child, there is no reason in the current employment situation in Norwich the claimant could not have found suitable part time employment.

19. The Tribunal attest the claimant's injury to feelings in regard to the affect of dismissal in the early stage of her pregnancy, and it is quite clear that the difficulty she would have or failure to find alternative employment at that stage, and having seen and heard from the claimant right on the cusp of a lower award or middle award event, and we award £6,600.00.

20. The total award payable by the first and second respondents jointly and severally to the claimant is £12,721.06.

21. Any award for pension does not apply because the claimant was below the age of 22 and that was applicable given the claimant's age.

22. At the conclusion of the remedy hearing, the claimant's solicitor Mr Dean made an application for costs on the grounds that the respondents, particularly Mr Anjum and the fabrication of documents had acted unreasonably. Mr Dean told us that he would be charging his client on a 'no win no fee' basis, a third of the award.

23. For the respondents Miss Halsall said that she was effectively opposing the application without instruction. In terms of the argument that the proceedings have been defended unreasonably, the more multiple heads of claim, some of which the claimant was successful, some of which the respondents were successful. The view is that the respondents have a right to defend and have a reasonable prospect of defending therefore no costs order should be made.

24. The power to award costs arises under rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which states:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success."

25. The Tribunal in effect in considering whether to make a costs order is a two-stage process. Firstly, have any of the factors arisen under 76(1)(a)? If so, should they exercise their discretion to award costs?

26. The Tribunal accepts that in part the claimant was successful and in other parts they were not successful. However, the Tribunal were concerned about the manner in which proceedings had been conducted, particularly with reference to what is clearly a fabricated pay slips produced for the purposes of litigation following the preliminary hearing in July 2017 referred to earlier in this judgment. There was also to frank admission by Mr Anjum at the conclusion of his evidence in response to a question to remember, "I didn't just sack her because she was pregnant". Frankly Mr Anjum, the Tribunal felt, had a passing acquaintance with the truth.

27. The Tribunal is entirely satisfied that the way the pleadings have been conducted have been abused and unreasonable.

28. The Tribunal were unanimously of the view that they should exercise their discretion and award some of the costs equivalent to contingency fee based upon which the claimant's solicitors were and therefore order the respondent to pay a contribution towards the claimant's costs in the sum of £4,250 plus VAT.

____
Employment Judge Postle

Date: 17 / 5 / 2018

Sent to the parties on: ....

....
For the Tribunal Office