



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss R Smith

**Respondents:** 1. Quality Service Recruitment Ltd  
2. MyPSU Ltd (In liquidation)

**Heard at:** Lincoln

**On:** Wednesday 6 December 2017

**Before:** Employment Judge Hutchinson

**Members:** Mr R Jones  
Ms H Andrews

## Representation

**Claimant:** In person  
**First Respondent:** Mr K Gray  
**Second Respondent:** No appearance

## REASONS

**JUDGMENT** having been sent to the parties on 16 January 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

### **Background and Issues**

1. The Claimant presented her claim to the Tribunal on 4 April 2017. In the claim form she said that she had been employed as a Senior Night Support Worker from 15 November 2015 until she was dismissed on 20 January 2017. Her claims were of:-

- Unfair dismissal
- Pregnancy discrimination
- Notice pay
- Holiday pay

2. The second Respondent did not enter a response. At the case management preliminary hearing conducted by my colleague Employment Judge Heap on 22 September 2017 it was clarified that the Claimant accepted that she was not an employee of the first Respondent. That she was an agency worker. She does not therefore make claims of unfair dismissal and breach of contract against the first Respondent.

3. She does not complain about the termination of her relationship with the first Respondent. She complains of two issues with regard to the treatment by the first Respondent. Both of these stem from a reference that the first Respondent gave to Dimensions, a prospective employer of the Claimant.

4. She contended that the reference was inaccurate as it gave a termination date of December 2016 which was not true. At that time she was taking time off to have a baby and was on maternity leave. She says that the first Respondent deliberately gave a misleading reference, either because she had become pregnant whilst engaged by them or otherwise as a consequence of her having taken maternity leave.

5. The first Respondent's say that they gave an end date of December 2016 because that was the last date that the Claimant was recorded as doing any work for the Respondent. Under the terms of her employment the Claimant was not obliged to accept any work nor was the first Respondent obliged to offer any and the assumption had been made that if she wanted any further work when she was ready to return to the agency then she would contact them accordingly. The Respondent said they heard nothing further from her until the reference request was made. The last date that the Claimant worked was put on the reference on the assumption that she had left work, given that she was looking for another job.

6. The Claimant also complained that the first respondent upon giving the reference on 20 January 2017 had terminated her assignment with them. She said that this also amounted to discrimination. The first Respondents said that there had not been any termination in the relationship in December 2016. The reference did not indicate that they were terminating the relationship. The end date on the reference was merely recording the last date she had undertaken work for them.

7. Employment Judge Heap, at the preliminary hearing, explained to the Claimant that the claim in respect of a reference could not be made under Section 18 of the Equality Act 2010. The claim under that section can only be made during the "protected period". It was identified that the Claimant was not an employee for the requisite period to qualify for maternity leave and therefore the protected period ended 2 weeks after the birth of her baby. Her baby was born on 24 April 2016 and therefore the reference given in July 2017 was outside the protected period.

8. Employment Judge Heap said the claim therefore had to proceed as a claim of direct sex discrimination under Section 13 of the Equality Act 2010. At no stage had the Claimant withdrawn her pregnancy/ maternity discrimination claims so they still had to be dealt with by us.

9. We were able to establish at the commencement of the proceedings that the only claims that the Claimant wished to proceed with were her two claims of discrimination. She had been paid her holiday pay and had withdrawn that claim.

10. The second Respondents are in Creditors Voluntary Liquidation. The Claimant's case was that she was an employee of that company. It is not said against them that they had anything to do with the contentious reference and the Claimant had been paid her holiday pay in full. On the face of it the Claimant could have brought claims of unfair dismissal and breach of contract. However the Claimant had been unable to specify when she said that she had been dismissed by the second Respondent or in what circumstances. Without a

termination of the employment relationship there could be no claim for unfair dismissal or for notice pay.

11. At the commencement of the hearing today the Claimant confirmed that she withdrew all her claims other than the claims of discrimination against the first Respondent. We had to decide whether the provision of that reference and the termination of her assignment amounted to an act of discrimination. The Claimant still contended that the treatment was on the ground of pregnancy/maternity leave. We would have to determine if it was committed during a “protected period”. If not, we would have to determine whether it amounted to unfavourable treatment and was it on the grounds of the protected characteristic of the Claimant’s sex? The onus of proof is on the Claimant to establish prima facie facts that could lead us to the view that discrimination had taken place. If the Claimant establishes those facts then the burden of proof will transfer to the Respondents to establish that the behaviour was not discriminatory.

### **The Evidence**

12. The Tribunal heard evidence from:-

- The Claimant
- Mr Gray, the payroll and accounts manager of the first Respondent

13. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

14. QS Recruitment is a recruitment agency who provides workers to their clients. The second Respondent, MyPSU Limited, is a company that operates the first Respondents payroll and employed the Claimant.

15. The Claimant was assigned to work at a care home called St Claire’s Nursing Home. She was a Senior Night Support Worker. Subsequently she went to work at another nursing home called The Laurels.

16. At the time of commencement of her employment she was pregnant but did not inform the first Respondents about this.

17. On 2 December 2015 she performed her last shift for the second Respondents. Thereafter she was off sick with pregnancy related sickness. She was paid sick pay by MyPSU until she commenced maternity leave. She was not entitled to Statutory Maternity Pay and therefore received Maternity Allowance.

18. Her baby was born on 24 April 2016. The “protected period” therefore expired on 8 May 2016. In September 2016 the Claimant sent an e-mail about keeping in touch (KIT) days but received no reply and did not follow this up.

19. At no stage did the Claimant contact either of the Respondents about a return to work for them. Indeed the Claimant described to us that she was looking for alternative work because her baby was 9 months old and a zero hours contract did not provide her with sufficient job security.

20. Shortly before Christmas 2016 she applied for and was offered an interview at Dimensions. She was successful at the interview and was provisionally offered the post provided her references were satisfactory. The reference request is at page 11 and was sent to QS Recruitment. The information provided by the first Respondents indicated that she had been

employed as a care assistant between 15 October 2015 and 2 December 2015. They said that the reason for leaving was “new role” and that they would re-employ the Claimant.

21. There were a number of elements in this reference that were not correct which were:-

21.1 They did not employ the Claimant.

21.2 That she was employed after 2 December 2015.

21.3 They did not know her reason for leaving.

22. This incorrect information caused the Claimant some difficulties. In particular she was not able to start her job immediately and it caused her a degree of anxiety.

23. When the Claimant raised these matters with the Respondents she says they were unhelpful and the e-mail chain between the Claimant and the first and second Respondents is at pages 49-65. She first wrote to Mr Gray. The Claimant pointed out that she had thought she was still employed by the first Respondent. She had not resigned. She had only been aware of the termination of her employment when she had asked for a reference.

24. Mr Gray had responded. He explained that it was standard practice to issue a P45 after four weeks without work. In this case it took considerably longer to do so. This was the responsibility of the second Respondent. He could not explain why this happened and referred her to the second Respondent.

25. Jenna McDonnell of MyPSU then wrote to Ms Smith. She said they had no record of receiving any SMP 1 form and knew nothing about her taking maternity leave. They had not processed her P45 until they received the request from the first Respondents after her reference request was received by them. As her last pay period was April they had used this as the termination date on the P45. She apologised for any inconvenience. It is clear that there was a breakdown in communication between the two companies.

## **The Law**

26. The discrimination complaints are made under the Equality Act 2010 (EA). Section 13 EA provides:-

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 18 of the EA provides:-

“(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.

(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.”

27. The burden of proof is dealt with by Section 136 of the EA which provides:-

“(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.”

28. It is well established law that the initial burden is on the Claimant to establish prima facie facts that an act of discrimination has taken place. If she does then the burden transfers to the Respondent to show that the treatment that was alleged was not discriminatory (**Igen v Wong** [2005] ICR 931).

29. In any claim of direct discrimination there are 3 questions for the Tribunal which are:-

29.1 Has the Respondent subjected the Claimant to unfavourable treatment? In this case the unfavourable treatment is the provision of the reference and the termination of the assignment.

29.2 If so, was that treatment “less favourable treatment” i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The Claimant has not relied on a named comparator but relies on a hypothetical comparator of someone in the same circumstances as herself but not pregnant.

29.3 If so, was any unfavourable treatment because of the pregnancy or because the Claimant was on maternity leave or had been on maternity leave or related in any way to her sex?

## **Our Conclusions**

30. As we have described above the reference was carelessly drawn up and contains a number of matters that were not correct. In particular:-

30.1 They did not employ the Claimant.

30.2 They said she was only employed until 2 December 2015.

30.3 They did not know why the Claimant was leaving.

31. We were also satisfied that the above mentioned mistakes caused the Claimant some difficulties namely:-

31.1 She was not able to start her job immediately.

31.2 It caused her a degree of anxiety.

32. We are satisfied that when she raised the issue afterwards the Respondents were not able to resolve matters to her satisfaction which lead to this claim being made. We are satisfied that at the time the first Respondents prepared the reference they did not know about her pregnancy or that she had been on maternity leave. It could not therefore be the motivation for the incorrect information provided. The e-mail chain at pages 49-65 of the documents shows that.

33. We are satisfied that the first Respondents had not deliberately provided a misleading reference. There was a breakdown in communication between the first and second Respondents. It was borne out of having one company who was responsible for engaging and controlling the assignments and a second company who dealt with the payroll and employed the Claimant.

34. We are satisfied that whilst the errors in the provision of the reference could amount to unfavourable treatment we are not satisfied that it amounted to less favourable treatment. We are satisfied that the Respondent would treat the Claimant in the same way if she was not pregnant, had not taken maternity leave or if she was not a woman.

35. We are satisfied that the first Respondent did not terminate her assignment at any stage. The information provided in the reference did not amount to a termination. It provided details of when her last assignment had been completed. So far as the claim of pregnancy or maternity discrimination is concerned we are satisfied that the behaviour complained of did not occur during the protected period. The claim in respect of that fails.

36. We are satisfied that the claim of sex discrimination also fails. She was not treated in the way she was because she was a woman. We are satisfied that the motivation for the Respondent's conduct was not the Claimant's pregnancy or her being on maternity leave or anything to do with her sex. The claims are therefore dismissed.

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Employment Judge Hutchinson

Date: 10/04/18

JUDGMENT SENT TO THE PARTIES ON  
16/04/18

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FOR THE TRIBUNAL OFFICE