RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss K Londono**

Respondent: **Metrus Limited**

Heard at: **East London Hearing Centre**

On: **12 & 13 July 2018**

Before: **Employment Judge Ferguson**

Members: **Ms J Hartland**
Mrs SA Taylor

Representation

Claimant: Mr J Steel (Legal representative)
Respondent: Mr P Bradley (HR Consultant)

JUDGMENT having been sent to the parties on 19 July 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

INTRODUCTION

1 By an ET1 presented on 15 December 2017 following a period of early conciliation from 11 October to 25 November 2017 the Claimant brought a claim of pregnancy discrimination. The claim was brought both against her employer Contract Cleaning and Maintenance London Limited ("CCM"), and against the Respondent, Metrus Limited, as a "principal" under Section 42 of the Equality Act 2010 ("EqA"). The claim against CCM was withdrawn following a settlement. The Respondent defended the claim.

2 The following facts are not in dispute:

2.1 The Claimant was employed by CCM to work as a cleaner on the Harbour Exchange Square contract.

2.2 The Respondent asked CCM to remove the Claimant from the contract.

2.3 The Claimant became pregnant in or about June 2017.

2.4 The Claimant was removed from the contract on or about 7 July 2017.

3 At the start of the hearing it was agreed that the issues for the Tribunal to determine were:

3.1 Does the Tribunal have jurisdiction to hear the claim? Was it presented in time and if not it is just and equitable to extend the time limit?

3.2 Is the Respondent a principal within the meaning of Section 41 EqA? The Respondent claims that the building owner was the principal and it was simply the owner's agent.

3.3 Was the Claimant's lateness in June 2017 due to morning sickness?

3.4 Did the Respondent request the Claimant's removal from the contract because of an illness suffered by her as a result of pregnancy? The Claimant relies on Section 18(2)(b) EqA only.

3.4.1 Did the Respondent decide to remove the Claimant from the contract because of her lateness and maintain that position up until 7 July 2017?

3.4.2 Did the Respondent know that lateness was related to sickness?

3.4.3 As a matter of law, is knowledge of pregnancy required? If so, at the time of the Claimant's removal from the contract did the Respondent know the Claimant's lateness was due to morning sickness?

4 We heard evidence from the Claimant via a Spanish interpreter and on behalf of the Respondent we heard from from Valerie Wridgway and Richard Goudie.

FACTS

5 At all material times the Claimant was employed by CCM as a cleaner. The Respondent is a property management company. CCM provide cleaning services at Harbour Exchange Square pursuant to a contract entered into in 2012. The contract states that the parties are: (1) CCM and (2) the owner of site "acting by their agent Cushman and Wakefield LP". In the section entitled "obligations of the contractor", the contract states:

"4.2 The contractor shall at all times during the period of this Agreement…

…

4.2.2 obey all lawful and reasonable directions of the Owner and C&W

4.2.3 immediately replace any member of its staff engaged in the provision of the Services should the Owner or C&W so require in its absolute discretion."

6 The Claimant was assigned to clean at Harbour Exchange pursuant to the contract. Initially her duties were to clean the toilets only but later she was also required to clean the communal areas. She was supervised by a manager from CCM.

7 In September 2015 and January 2016 CCM recorded issues with the Claimant's standard of work.

8 On 14 January 2016 Val Wridgway, then facilities manager at Cushman and Wakefield, emailed the Claimant's manager saying,

> "With all the complaints recently on cleaning/toilet hygiene and improvement we need to make could you please sort this issue out with Katharine [that is the Claimant] tomorrow. I actually witnessed the state of this toilet following a 'service' this afternoon. As I have mentioned many times previously, we are not happy with Katharine's performance as janitor at this building. She has been given ample time to improve but clearly does not take a pride in her job."

9 The Respondent took over management of the site from Cushman and Wakefield in March 2017. Ms Wridgway transferred to the Respondent under TUPE.

10 On or around 13 June 2017 the Claimant's manager at CCM, Lori Checherita-Tocila, created a performance report in relation to the Claimant noting that the Claimant had been found in the corridor on her mobile phone. The Claimant was told she was not allowed to use the phone during working hours except in the case of an emergency. The report also states that Lori and the Claimant had numerous face-to-face meetings regarding the Claimant cleaning in toilets. It is said that on many occasions she "missed to clean the mirrors, the hand drier tray and not reporting the faults in the toilets."

11 Around this time the Claimant started to experience the symptoms of morning sickness. We accept that by mid June 2017 she had been late to work on more than one occasion because of morning sickness.

12 On 16 June 2017, during a "contract review meeting", Ms Wridgway raised concern about the Claimant's performance with Diana Cano of CCM. Ms Cano had only recently started working for CCM and Ms Wridgway asked her to review the Claimant's file. Lori, the Claimant's manager, raised a number of matters relating to the Claimant's performance. This included her lateness, use of mobile phone, poor standard of cleaning and not reporting faults, as well as her attitude when challenged about these matters.

13 By 18 June 2017 the Claimant suspected that she might be pregnant and took a home pregnancy test, which was positive. On 19 June the Claimant was late for work. She told Lori in a text message that she had been vomiting all night and was still feeling

unwell at 9.00am.

14 Also on 19 June the Respondent was hearing presentations from cleaning companies, including CCM, as part of a retendering process for the cleaning contract. The evidence of Ms Wridgway and Mr Goudie, associate surveyor for the Respondent, was that the presentations prompted them to have a discussion about CCM's performance generally and that included discussion of the Claimant. Mr Goudie decided that the Claimant should be removed from site. We accept that evidence. It was suggested by the Claimant that the trigger for performance issues being raised in June was her lateness caused by morning sickness. Apart from the chronology, there is no evidence to support that. On the contrary, the meeting on 13 June made no mention of the Claimant's time keeping. We accept that the Respondent had had long-standing concerns about the Claimant's performance and that these were revived in June 2017 as a result of the Respondent reviewing the contract more generally.

15 On 19 June 2017 Ms Wridgway emailed Ms Cano to ask if anyone had spoken to the Claimant following their meeting on 16 June. Ms Cano then had a meeting with the Claimant on or around 21 June. The following day, Ms Cano emailed Ms Wridgway saying that she had spoken to the Claimant and explained to her that they were going to carry out a full review of her work and the outcome could be removing her from the site. Ms Wridgway replied, reminding Ms Cano that she also needed to take account of past issues.

16 On or around 29 June the Claimant informed Ms Cano by telephone that she was pregnant. Ms Cano requested medical evidence. The Claimant attended hospital on 3 July and obtained proof of the pregnancy. She handed this to Lori the following day, 4 July. Also on 4 July, at 10.13am, Ms Wridgway emailed Ms Cano as follows:

> *"Diana,*
>
> *Due to the ongoing issues with Katherine and her past history of her cleaning not being to the standard required Metrus would now like her removed from site and replaced with a cleaner working to the standards required. The management team had given her every opportunity to improve over the years but she continues to revert back to working within her own standards and having to be constantly monitored which is unacceptable."*

17 Ms Wridgway's evidence is that at this point she did not know either that the Claimant was pregnant or that she had been suffering from sickness. The Claimant did not dispute that Ms Wridgway did not know of the pregnancy at this point but Mr Steele argued in submissions that we should infer that she knew that the Claimant's lateness was due to sickness because Lori knew about it and they work in close proximity and spoke daily. It was not directly put to Ms Wridgway in cross-examination that she knew of the sickness but in any case we consider Ms Wridgway to be a credible and straightforward witness and we do not consider there is any basis to doubt her evidence that she knew nothing of the Claimant's sickness until these proceedings. Lateness had been mentioned in the meeting on 16 June but we accept that no one had said anything to her about the reason for the lateness. Further, lateness was not mentioned in her email of 4 July and we therefore accept that it was not a significant factor in the decision to request the Claimant's removal from site.

18 Later on 4 July, at 2.27pm, Ms Cano emailed Ms Wridgway as follows:

> *"Hi Val,*
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> *I confirmed last Friday I sent an investigation meeting letter for Katherine, before Lori had the time of giving her, Katherine comeback to us letting us know she is pregnant, we have already requested her doctors confirmation, I will let you know as soon as we have organise your requirements."*

The following day, 5 July, Ms Wridgway sent a further email to Ms Cano as follows:

> *"Diana,*
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> *Re my email could you please update me on the situation with Katharine being removed from site as she is not carrying out the cleaning to the required standard. She came in late today and is having to be constantly monitored by Lori. This has been going on over years now and we expect CCM to manage this to ensure we have a strong cleaning team in place."*

19 The Claimant had been late that morning and had sent a text message to Lori saying (in Spanish), *"good morning I'm going to be a little bit late had to go home because I started having nausea but I'll be there by 9.00"* Ms Wridgway said in evidence that although she had been told the Claimant was late for work on that day, again no one had said anything to her about the reasons for the lateness. For the reasons already given, we accept that.

20 On Friday 7 July Ms Cano telephoned the Claimant and told her that the Respondent had requested her removal from site and that she should not come to work on Monday. The Claimant says Ms Cano did not give her reasons for the request.

21 On 12 July 2017 Ms Cano wrote to the Claimant confirming that she had been suspended on full pay following a request from the client that she be removed from site. The letter states:

> *"I am trying to clarify the reasons for this and attempting to see if there is any way that the client will reconsider their decision."*

The Claimant was invited to a meeting on 14 July.

22 There is no evidence of any further communication between CCM and the Respondent about the Claimant after 5 July.

23 The Claimant sought the assistance of her union in challenging the decision to remove her from site. Her union representative corresponded with CCM and the Respondent on her behalf and dealt with the early conciliation proceedings and lodging the ET1 claim form. The Claimant's evidence was that her union representative did not tell her about Employment Tribunal time limits. Especially given the language barrier we accept that the Claimant was not aware of Tribunal time limits and left matters in the

hands of her union representative.

THE LAW

24 The Claimant's complaint of pregnancy discrimination was brought under sections 18 and 41 EqA, which provide, so far as relevant:

> 41 Contract workers
>
> (1) A principal must not discriminate against a contract worker—
>
> (a) as to the terms on which the principal allows the worker to do the work;
>
> (b) by not allowing the worker to do, or to continue to do, the work;
>
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
>
> (d) by subjecting the worker to any other detriment.
>
> …
>
> (5) A "principal" is a person who makes work available for an individual who is—
>
> (a) employed by another person, and
>
> (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
>
> …

25 Section 18 EqA provides:

> 18. Pregnancy and maternity discrimination: work cases
>
> (1) …
>
> (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.

26 By section 136(2) EqA, it is provided that:

> (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.

27 Applying section 136(2) EqA the Tribunal must be satisfied that facts have been established from which it could, absent any other explanation, conclude that the Respondent had treated the Claimant unfavourably because of her pregnancy or pregnancy-related illness and, if so satisfied, it must then consider the Respondent's explanation and determine whether that had met the burden of demonstrating that the decision in issue was in no way related to the Claimant's pregnancy or pregnancy related-illness.

28 As to the requirement of knowledge under section 18 it is clear from at least two Employment Appeal Tribunal judgments, Del Monte Foods v Mundon [1980] ICR 694 and Really Easy Car Credit v Thompson UKEAT/0197/17/DA that for the purposes of section 18(2)(a) at least, a claimant must establish that the respondent knew of the pregnancy at the time of the alleged discriminatory act.

29 Pursuant to s.123(1)(a) EqA the Tribunal only has jurisdiction to consider a complaint presented within three months of the date of the alleged discriminatory act unless it considers it just and equitable to extend the time limit. The relevant date for the purposes of section 123(1)(a) EqA is the date of the act complained of, not the date of knowledge, although knowledge may be relevant to the question of whether it is just and equitable to extend the time limit.

30 The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the Claimant to show that it is just and equitable to extend the time limit. The time limit is automatically extended by the early conciliation process, but the effect of those provisions is that the Claimant must at least contact ACAS within the ordinary three months time limit in order to benefit from an extension.

CONCLUSIONS

Jurisdiction

31 The Claimant argues that her position was still unclear as at 12 July 2017 when she received a letter from Ms Cano, so time did not start to run until then or later and therefore the deadline for contacting ACAS was 11 October or later and the claim was in time. We do not accept that. The alleged discriminatory act is the Respondent's decision to request the Claimant's removal from site. As the decision took place on 19 June, communicated to CCM on 4 July. Even if time starts to run from 5 July when Ms Wridgway sent a further email, the claim is still out of time.

32 We do consider, however, that it is just and equitable to extend the time limit in this case. The Claimant was only one week late in contacting ACAS and she was acting through her union representative at the time. He had not informed her of the time limit and we have found that she did not know about them. Further, the Respondent has not

argued that the delay has caused it any prejudice. Indeed it did not raise any issue about jurisdiction until the matter was raised by the Tribunal at the start of the hearing. It has been able to defend the proceedings.

Section 41 EqA

33 The Respondent argues that it is not a principal within the meaning of section 41. We are satisfied that the Respondent is "a person who makes work available" for the Claimant. Although the contract states that the Respondent (or rather, its predecessor) is acting as the owner's agent, it is the management company and is solely responsible for overseeing the cleaning contract. We note that both the owner and the Respondent have the right to require the replacement of any member of staff and supplied under the contract. It must follow that the Respondent makes work available to that staff.

34 It is not in dispute that the Claimant is employed by another person. The much more difficult question is whether the Claimant is supplied by her employer "in furtherance to the contract to which [the Respondent] is a party." Formally speaking the Respondent is not a party to the 2012 contract, even assuming it has stepped into the shoes of Cushman and Wakefield. We consider that section 41(5) should probably be construed as to include a company in the Respondent's position. Although it is acting as agent of the owner, in reality it is the party responsible for the contract and has authority to make all decisions under the contract. Parliament must have intended for a relationship between such a company and contract workers supplied under the contract to be covered by the Equality Act. However, we make no final decision on this issue because it is unnecessary in light of our conclusions below.

Section 18(2)(b)

35 We note that the Claimant pursues her claim under Section 18(2)(b) only. We have accepted that she was late for work on a number of occasions in June 2017 because of morning sickness.

36 On the issue of knowledge Mr Steel submitted that section 18(2)(b) differs from 18(2)(a). His primary submission was that the Respondent need only have knowledge of the effects of the illness (here, the lateness) and need not know of either the illness itself or of the pregnancy. In the alternative he argued that knowledge only of the illness is required but not the fact that it is pregnancy-related.

37 On the facts of this case the second argument does not arise. We have found that the Respondent was never aware of the illness.

38 We reject the first argument. It would wholly illogical if knowledge of pregnancy were required for 18(2)(a) but no knowledge of any kind were required for 18(2)(b). The Respondent will always have knowledge of the effect because that it what gives rise to the alleged discriminatory act. A Respondent cannot be said to have acted unlawfully if it takes action in response to something it has no way of knowing is caused by a pregnancy-related illness. Our interpretation of section 18(2)(b), consistent with the case law on 18(2)(a), is that the Respondent must know of the pregnancy-related illness and the fact that it is pregnancy-related in order for a Claimant to succeed in establishing

discrimination. At the very least, knowledge of the illness is required.

39 On that basis, the Claimant's claim cannot succeed. At no stage did the Respondent know that the Claimant was suffering from sickness, let alone that that was the reason for her lateness. There are therefore no facts from which we could conclude that the Respondent's decision was because of the Claimant's morning sickness. Even if we were to treat the burden as shifted to the Respondent we accept that its decision was in no way related to the Claimant's pregnancy or morning sickness.

40 Mr Steel suggested that once the Respondent was informed of the pregnancy on 4 July it had a duty to revisit the decision and that by then it must have realised that the performance issues were pregnancy-related. Indeed Ms Wridgway accepted in cross-examination that the pregnancy might have provided an explanation for some of the performance issues. However, we do not accept that there was any such duty and we note that a similar argument was rejected in Really Easy Car Credit. Further, the case has never been put on the basis that the performance issues more generally were pregnancy-related. Ms Wridgway did mention lateness in her email of 5 July, but we do not consider that that meant it was a significant reason for the decision to request the Claimant's removal from the contract. The decision had been made earlier on 19 June, based on the Claimant's poor performance generally, and communicated clearly to CCM on 4 July. Ms Wridgway's email of 5 July simply reiterated the request and had nothing to do with the Claimant's pregnancy or the morning sickness of which she was unaware.

Employment Judge Ferguson

8 August 2018