



EMPLOYMENT TRIBUNALS

Claimant: Ms A Wysocka

Respondent: DWHA Limited

Heard at: London Central

On: 9, 10 October 2018

Before: Employment Judge Davidson
Mr T Robinson
Ms S Boyce

Representation

Claimant: Mr P Ward of Counsel

Respondent: Ms L Millin of Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that the claimant's complaints of unfair dismissal, race discrimination, pregnancy discrimination and harassment fail and are hereby dismissed.

The claimant's claims for a statutory redundancy payment, notice pay and holiday pay succeed.

The respondent is ordered to pay to the claimant:

	£
1. Statutory redundancy payment	3423.00
2. Holiday pay (17.5 days)	1937.98
3. Notice pay (7 weeks)	<u>3004.54</u>
TOTAL	8365.52

Employment Judge

REASONS

Issues

1. The issues before the tribunal were as follows:

- 1.1. Was there a TUPE transfer from Atlantic Media Limited to the Respondent in January 2017? If not, issues 1.3 to 1.6 below do not fall to be considered as the claimant will not have the qualifying two years' service unless she can prove some other transferring over applies.
- 1.2. If there was such a transfer, was the transferor subject to relevant insolvency proceedings or any analogous proceedings which had been instituted with a view to the liquidation of the assets of the transferor and were under the supervision of an insolvency practitioner on that date (Regulation 8(7) TUPE)? If so, issues 1.3 to 1.6 below do not fall to be considered as the claimant will not have the qualifying two years' service unless she can prove some other transferring over applies.
- 1.3. What were the dates of the claimant's employment with the respondent?
- 1.4. Was the reason or principal reason for the claimant's dismissal a potentially fair reason under the Employment Rights Act 1996? The respondent relies on redundancy.
- 1.5. If the reason was redundancy, was the redundancy genuine and did the respondent follow a fair procedure by consulting with the claimant, selecting fairly and offering alternative employment?
- 1.6. Is the claimant owed redundancy pay?
- 1.7. Was the actual reason for the claimant's dismissal (including any selection for her redundancy) connected with pregnancy or maternity?
- 1.8. Did the dismissal amount to less favourable treatment because of race by the respondent? Her comparator for this purpose is Gail Tosh (Thai nationality) or, alternatively, a hypothetical non-Polish employee of the respondent with no material difference to the claimant's characteristics.
- 1.9. Did the dismissal constitute unlawful harassment? Was it unwanted conduct related to race and/or sex which created an intimidating,

hostile, degrading, humiliating or offensive environment for the claimant?

1.10. Is the claimant owed holiday pay?

1.11. Did the respondent fail to provide the claimant with itemised pay statements during 2017?

Evidence

2. The tribunal heard evidence from the claimant (via a Polish interpreter) and from Parry Cockwell (owner and sole director) on behalf of the respondent. In addition, there was an agreed bundle of documents before the tribunal.

Facts

3. The tribunal found the following facts on the balance of probabilities:

3.1. The claimant, who is a Polish national, started working for Atlantic Media Limited (Atlantic) in 2008 as Publishing Assistant and Administrator. Atlantic was wholly owned by Parry Cockwell. At that time, Atlantic's business was primarily distribution of CD-ROMs and DVDs from online orders. The claimant's role involved administering the orders including managing the database.

3.2. The claimant was an excellent worker and, in 2012, was promoted to Associate Publisher. She signed a new contract at this time.

3.3. Due to changes in the video distribution market away from physical DVDs and CD-ROMs, Atlantic experienced financial pressures and was struggling to meet its obligations. During this period, the claimant's role adapted and she was flexible about the tasks she performed. Although her initial duties had been mainly administrative, dealing primarily with the database and day-to-day financial transactions, she was gradually given more responsibility.

3.4. As Atlantic's business was failing, Parry Cockwell decided to run another venture of his, the Destination Weddings and Honeymoons Abroad magazine (DWHA), through Atlantic in the hope that it would turn around Atlantic's fortunes. DWHA magazine is aimed at the wedding industry and the profile of wedding magazine readers is generally one-off purchasers at about the time of planning their wedding. There is no reader loyalty or continuity and the magazine has no subscribers. Each issue follows the same structure although, naturally, the actual content changes from issue to issue. DWHA is different from other wedding magazines in that it focuses on destinations and honeymoons abroad as well as wedding fashion.

- 3.5. The claimant was listed as the Publishing Director in the magazine title page and we find that her duties, in addition to the publishing director duties she carried out, included considerable time dealing with Atlantic's financial situation such as dealing with tax authorities and banks. She also did the invoicing, bookkeeping and management.
- 3.6. In late December 2016/early January 2017, Atlantic was in negotiations with HMRC but Atlantic's proposal to HMRC was rejected and on 12 January 2017 Atlantic ceased trading and an insolvency practitioner was instructed, but not formally appointed until 26 February 2017.
- 3.7. As part of the liquidation process, the claimant was told of her eligibility to claim a statutory redundancy payment from the Redundancy Payments Office as a result of the liquidation of Atlantic. She did not pursue this because she understood that this would affect her ability to claim maternity pay.
- 3.8. On 11 January 2017, Parry Cockwell incorporated a new company (the respondent) as a vehicle to publish the DWHA magazine. This started trading on 16 January 2017. Parry Cockwell offered positions to some of the Atlantic team and a number of them agreed to provide their services to the respondent going forward.
- 3.9. By January 2017, the claimant was 8 months pregnant. Mr Cockwell understood that the claimant would lose her entitlement to maternity pay due to Atlantic's insolvency and he offered to take her on with the respondent so that he could make sure she was paid her maternity pay.
- 3.10. Mr Cockwell was not aware of TUPE and therefore gave no consideration to whether TUPE applied and he simply followed the advice given to him by the liquidators. He gave the claimant a new contract of employment in a similar form to the previous contracts she had been issued with by Atlantic but with the addition of an extra clause 19a "Maternity allowance rights are accepted by Parry Cockwell based on previous employment at Atlantic Media Ltd. Maternity leave starts on 20 January 2017."
- 3.11. The employment with the respondent began on 16 January 2017 and the claimant went on maternity leave on 20 January 2017. During her maternity leave, the claimant attended work for two half days top help out, for which she was paid, albeit some time after the event.
- 3.12. After June 2017, the respondent experienced financial pressures due to a problem with a staff member's illness which meant that one issue could not be published. At around this time, two sales members of staff resigned.
- 3.13. In August 2017, the claimant contacted Parry Cockwell about returning to work. They then spoke on the phone on 16 August 2017. We find

that this was the first time Mr Cockwell had considered the claimant's role going forward. He realised that the business did not need a Publishing Director. Some elements of that role were simply not required and other tasks had been absorbed by others, including Gail Tosh. We find that she was doing some, but by no means all, of the claimant's tasks but she did not hold the position of Publishing Director.

- 3.14. On the telephone call of 16 August, Mr Cockwell told the claimant that the respondent did not have a requirement for a Publishing Director, particularly as finances were difficult. The claimant was disappointed at this news and Mr Cockwell left it that they would discuss further in a few days time.
- 3.15. After the telephone conversation, there were email exchanges between Mr Cockwell and the claimant in which the claimant requested written confirmation of her dismissal (on advice from ACAS). Mr Cockwell denied that she had been dismissed and said that there was work available in Sales. This would have been at a lower base salary but with the opportunity to earn commission would could potentially have resulted in higher earnings than the Publishing Director salary.
- 3.16. The claimant declined the offer of a sales role. Mr Cockwell then gave her the opportunity to put forward alternative thoughts or suggestions, because he was keen to have her skills within the organisation. The claimant did not respond and there was no further contact between the claimant and Mr Cockwell.
- 3.17. At the time of the termination of the claimant's employment, the respondent had one employee (Parry Cockwell) and 7 consultants.

The Law

4. The relevant law is as follows:

TUPE

- 4.1. The Transfer of Undertakings (Protection of Employment) Regulations 2006 apply where there is a transfer of an economic entity which retains its identity. The effect of the regulations is to transfer the employment of employees engaged in the undertaking at the time of the transfer on their existing terms and conditions, including length of service.
- 4.2. Regulation 8(7) of TUPE provides that where the transferor is subject to relevant insolvency proceedings or any analogous proceedings which have been instituted with a view to the liquidation of the assets of the transferor and were under the supervision of an insolvency practitioner, TUPE does not have the effect of transferring the employment of the employees.

- 4.3. In *Secretary of State for Trade and Industry v Slater and others*, the EAT held that an insolvency practitioner must have been appointed as the liquidator in order for Regulation 8(7) to apply, applying section 388 of the Insolvency Act which states that 'a person acts as an insolvency practitioner in relation to a company by acting as its liquidator...'.

Unfair dismissal

- 4.4. An employee must have two years continuous employment in order to bring a claim for ordinary unfair dismissal.
- 4.5. It is for an employer to show what the reason for dismissal is. Redundancy is a potentially fair reason.
- 4.6. If redundancy is the reason for dismissal, the employer must act reasonably by selecting fairly, carrying out a consultation process and offering alternative employment if available. An employee who is fairly dismissed for redundancy is entitled to a statutory redundancy payment if they have more than two years' service.

Discrimination claims

- 4.7. A dismissal on grounds that the employee was pregnant or took maternity leave will be automatically unfair and there is no period of qualifying service required.
- 4.8. An employer directly discriminates against an employee on grounds of race if, because of the employee's race, it treats the employee less favourably than it treated or would treat another employee not of that race.
- 4.9. An employer victimises an employee if it subjects the employee to a detriment because that employee has done a protected act.
- 4.10. An employer racially harasses an employee if it engages in unwanted conduct related to the employee's race which has the purpose or effect of either violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Determination of the Issues

5. The tribunal determines the issues as follows:
- 5.1. We find that there was a transfer of an undertaking, namely the part of Atlantic's business which published DWHA magazine, transferred to the respondent.

- 5.2. Following the authority of *Slater*, we find that Atlantic was not subject to relevant insolvency proceedings at the time of the transfer because it was not, at that time, under the supervision of an insolvency practitioner and Regulation 8(7) does not apply.
- 5.3. We find that the claimant was dismissed on the day she would have returned to work after her maternity leave in September 2017.
- 5.4. We find that the reason for her dismissal was redundancy in that her role of Publishing Director no longer existed. This is a potentially fair reason for dismissal and we go on to consider whether the respondent acted reasonably in treating it as such.
 - 5.4.1. We find that the redundancy was genuine. The role was no longer required and was not being carried out by anyone else. Many of the functions did not need to be done and others were absorbed by a number of other people, including freelancers.
 - 5.4.2. We find that there was consultation, of a kind. Taking into account the size and administrative resources of the respondent's organisation and bearing in mind the purpose of consultation to give the employee some input into the process, we find that Mr Cockwell engaged in an open dialogue with the claimant and that he genuinely wanted to retain her in the business.
 - 5.4.3. We find that selection is not relevant as there was no pool from which to select. The claimant was the only person doing that role. In any event, the only other employee at the relevant time was Mr Cockwell.
 - 5.4.4. We find that Mr Cockwell offered alternative employment and was prepared to listen to any proposal the claimant made regarding alternative employment.
- 5.5. We therefore find that the claimant was dismissed but the dismissal was not unfair. She is therefore entitled to notice pay.
- 5.6. We find that the claimant is entitled to a statutory redundancy payment. It was not clear to the tribunal whether the respondent was advancing an argument that the claimant forfeited any entitlement to statutory redundancy pay by unreasonably refusing an offer of suitable alternative employment. We find that the alternative employment was sufficiently different as not be 'suitable' for these purposes, particularly in light of the lower base salary and therefore the claimant was entitled to refuse it. The claimant is therefore entitled to a statutory redundancy payment.
- 5.7. We find that there was no automatic unfair dismissal on grounds of pregnancy and maternity. The claimant's role had gone as there was

no longer a requirement for a Publishing Director. This would have been the same if she had not been on maternity leave. This claim therefore fails.

5.8. We find that the claimant has adduced no evidence of any race discrimination. She has failed to show primary facts from which a tribunal could infer that discrimination had taken place. This claim therefore fails.

5.9. The claimant has adduced no evidence of harassment on grounds of either sex or race. Her claim therefore fails.

5.10. The respondent conceded that the claimant had not received itemised pay statements but all parties agreed she had received all the pay to which she was entitled. No award is made in relation to this claim.

5.11. The respondent accepts that the claimant is entitled to pay in lieu of accrued and untaken holiday pay. The claimant calculates this to be 17.5 days and this was not challenged by the respondent. We therefore award holiday pay equivalent to 17.5 days.

Remedy

6. We calculate that the claimant is entitled to the following sums:

6.1. Statutory redundancy payment	£3423.00
6.2. Holiday pay (17.5 days)	£1937.98
6.3. Notice pay (7 weeks)	£ <u>3004.54</u>
TOTAL	£8365.52

Employment Judge Davidson

Date 17 October 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 October 2018

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FOR EMPLOYMENT TRIBUNALS