Case Number: 2207651/2017

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mrs C Geldart		**The Commissioner of the City of London Police**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 8-10 October 2018**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mrs M B Pilfold**
Mr J Carroll

On hearing Mr D Leach, counsel, on behalf of the Claimant and Ms L Chudleigh, counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Claimant's complaint of direct sex discrimination in respect of the non-payment or partial payment of London Allowance during her absence from duty on maternity leave is well-founded.
(2) All other claims are dismissed.
(3) Compensation for injury to feelings in respect of the discrimination referred to in (1) above is awarded in the sum of £4,000.
(4) All other points of remedy (including the calculation of interest on the award under (3) above) are adjourned to a remedies hearing at 10.00 a.m. on 3 December 2018, with three hours allocated.

REASONS

Introduction

1 The Claimant, a serving police constable, joined the City of London Police in 2015, having prior to that been a member of the Essex police force since 2006. In 2016 she became pregnant and a period of maternity leave followed, between 18 December 2016 and 3 October 2017. Thereafter she took annual leave, returning to her duties on 9 January 2018.

2 Having been a police officer for more than 63 weeks by the 11th week before the expected week of confinement, the Claimant qualifiedunder her terms of service for Occupational Maternity Pay ('OMP') in addition to Statutory Maternity Pay ('SMP'). She elected to spread the final five weeks of OMP over a 10-week period. As a result, she was entitled during her period of maternity leave to 13 weeks at full pay (which included SMP), 10 weeks at half pay and 16 further weeks of SMP. Thereafter, her maternity leave (but not, of course, the subsequent annual leave) was unpaid.

3 The Claimant's basic pay was, and is, supplemented by London Weighting ('LW') and a 'London Allowance' ('LA'). LW, which has formed part of London police officers' pay since 1949, is designed to compensate for the higher cost of living in London relative to other parts of the United Kingdom. Part-time officers receive a *pro rata* proportion. LW is pensionable and the rate increases in line with basic pay.

4 LA was introduced following a recommendation in 1978 by the Committee of Enquiry on the Police chaired by Lord Edmund-Davies. Its stated purpose was to tackle problems of recruitment of police officers in London. The standard rate of LA, to which the Claimant is entitled, is £4,338 per annum. Again, part-time officers receive a *pro rata* share. LA is not pensionable and the rate has not increased since 2000.

5 During her maternity leave, the Claimant's LW and LA were reduced by 50% when she moved to half pay and to nil when her right to OMP came to an end.

6 By her claim form presented on 9 November 2017 the Claimant brought complaints of discrimination on the ground of pregnancy and/or maternity, alternatively direct sex discrimination, based on the reduction and non-payment of LA.[1] All claims were resisted.

7 The Claimant subsequently withdrew the pregnancy/maternity claim and made an application to add a fresh claim for indirect discrimination. That application was granted, subject to the Respondent's right to argue that the claim so added was out of time and accordingly outside the Tribunal's jurisdiction.

8 The withdrawal of the pregnancy/maternity claim was predicated on the fact that the statutory protection extended (in the case of a police officer) only to the first two weeks of leave, during which the Claimant suffered no loss.

9 The matter came before us on 8 October this year with three days allocated. The Claimant was represented by Mr Douglas Leach and the Respondent by Ms Louise Chudleigh, both counsel.

10 We heard evidence from the Claimant and the Respondent's witness, Ms Kelly Harris. In addition, we read documents to which we were referred in the agreed bundle and a further bundle containing certain government documents,

[1] In addition to these claims under the Equality Act 2010, ss18 and 13 respectively, there was a pleaded claim under the Maternity & Parental Leave Regulations 1999, but it did not add anything of substance to the dispute and did not feature in the argument before us.

authorities and other legal materials. In the interests of saving the parties costs and inconvenience, we reserved judgment on day two. Our private deliberations were completed on day three.

The Legal Framework

11 Police officers are office-holders, not employees, but by virtue of the Equality Act 2010, s42 they are deemed to be employees for the purposes of the Act. Since employment status for the purposes of the Act depends on the existence of a contract (ss83(2)(a) and 212(1)), a police officer must be deemed to work pursuant to a contract. The 'contractual' terms of police officers are to be found in the Police Regulations 2003 ('the Regulations') and Home Office determinations ('the determinations'). All of this is common ground.

12 The Regulations are divided into 12 substantive Parts and four Schedules. Part 4, entitled 'Pay', includes reg 24, which (*inter alia*) grants a general power to the Home Secretary to determine pay of police officers (reg 24(1)). By reg 29, also in Part 4, a corresponding power is given to determine maternity pay.

13 Part 6 of the Regulations is entitled 'Allowances and Expenses'. By reg 34 within that Part, the Home Secretary has power to determine the entitlement of police officers to allowances (reg 34(1)). Reg 36 in the same Part states:

> **If a member of the police force who is regularly in receipt of an allowance to meet an expense which ceases during his or her absence from duty is placed upon the sick list or is on maternity leave, the allowance shall be payable during his or her absence from duty up to a period of a month, but thereafter, during the remainder is or her absence from duty, payment may be suspended at the discretion of the chief officer.**

14 Determinations under reg 24 are set out in Annex F to the Regulations. It deals with the basic pay of the various ranks and sundry other matters. Part 10 of the Annex is entitled 'London Weighting' and stipulates (para (1)) that the annual pay of members of the City of London and Metropolitan forces shall be increased by a specified amount. The rate of LW was set at £1,827 with effect from 1 July 2002 and now stands at £2,373.

15 Annex L contains the determination under reg 29. We have summarised its effect in our introduction above. Apart from the dispute about LA the parties agree that the Claimant was paid during her maternity leave in accordance with her 'contractual' entitlements.

16 Determinations under Part 6 are contained in Annex U to the Regulations, which details terms of entitlement to 13 categories of allowance or other payment. Para (3) is directed to LA. Sub-para (a) states:

> **A member of the City of London or metropolitan police force shall be paid a London allowance at a rate determined by the Commissioner of the relevant force with regard to location and retention needs, following consultation … and not exceeding the maximum rates …**

17 Chapter 2 of the Equality Act 2010 lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the circumstances include the claimant's and comparator's abilities.

18 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

Guided by the judgment of Underhill LJ in *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

19 It is trite law that discrimination based on pregnancy or maternity is inherently sex discrimination (see *Webb-v-EMO Air Cargo (UK) Ltd* [1994] IRLR 482 ECJ and the long line of authority which followed it). In *Fletcher-v-Blackpool Fylde & Wyre Hospitals NHS Trust* [2005] IRLR 689 EAT it was held that a complaint of sex discrimination by a pregnant woman cannot be defended on the ground that all employees are treated in the same way. Treating pregnant women or women on maternity leave during the 'protected period' in the same way as other employees, in circumstances in which they are disadvantaged because of their pregnancy or maternity, is applying the same treatment to different situations and is therefore discrimination.

20 We have already mentioned that the Claimant initially brought a complaint of pregnancy/maternity discrimination under the 2010 Act, s18. It is not necessary to set out the provision invoked (subsection (2)), but we should recite this subsection:

> **(7) Section 13, as relating sex discrimination, does not apply to treatment of a woman in so far as –**
>
> **(a) it is in the protected period in relation to her … , or**
> **(b) [not applicable]**

The effect of s18(7) is that, in circumstances where (as here) a s18 claim cannot be made there is no obstacle to a claim being pursued under s13, based on the protected characteristic of sex or, for that matter, pregnancy and maternity.[2]

[2] The list of protected characteristics in s2 includes pregnancy and maternity.

Issues and Analysis

(1) Were the reductions of LA in conformity with the Claimant's 'contract'?

21 The first question breaks down into two sub-issues: (a) Was the Respondent right to treat LA as 'pay' for the purposes of the Regulations? (b) If not, was the Respondent entitled in his discretion to reduce and then cease payments of LA under reg 36?

22 Starting with sub-issue (a), the Tribunal was somewhat distracted by the debate about the concept of 'pay'. The parties agree that LA is 'pay' for the purposes of EU law and the 2010 Act. This is in keeping with the wide interpretation of the concept of pay under the jurisprudence of the CJEU and its predecessors (see *eg Hlozek-v-Roche Austria Gesellschaft mbH* [2005] CMLR 28). But it does not seem to us to help with the problem in hand. This is not a claim for 'pay'. It is a complaint that non-payment of LA was an act of unlawful discrimination. To address that claim we must ask whether the Claimant has any ground for being aggrieved about reductions in LA. If not, she has suffered no detriment and the claim fails there. If so, we must go on to consider whether the treatment complained of was materially influenced by her sex. The meaning attached to 'pay' under EU jurisprudence or under the 2010 Act could not assist us in that task.

23 In our view the submissions on behalf of the Claimant on sub-issue (a) are clearly right. The structure of the Regulations speaks for itself: if the aim had been for LA to form part of 'pay', rather than stand as a separate allowance, there would have been no difficulty in arranging the legislation accordingly. LA and LW are located in different Parts because they are designed to fulfil different functions, a point consistently made in official reports on police pay to which we were referred. The distinct character of the two payments is also illustrated by the fact that LW is pensionable and subject to regular increases but LA has neither of these characteristics.

24 As to sub-issue (b) Ms Chudleigh argued that the 'expense which [ceased]' during the Claimant's absence on maternity leave was the expense of working in London. For two reasons, we are quite unable to accept that submission. In the first place, LA is not designed to meet an expense, but to tackle recruitment problems. Secondly, the expense of working in London, principally, no doubt, the high cost of housing in or within commuting distance of the capital, did not 'cease' when the Claimant went on maternity leave. The aim of reg 36 is plain: to permit the chief officer to protect the public purse by ending payments of allowances designed to cover expenditure in circumstances where, owing to absence on sick or maternity leave, it is no longer being incurred.

(2) If there was a 'breach of contract', can the Claimant base a direct sex discrimination claim on it?

25 In her skeleton argument and in parts of her oral submissions, Ms Chudleigh advanced the argument that the Tribunal had no jurisdiction to entertain the direct discrimination claim and that the only claim open to the Claimant was one brought

under the equal pay provisions of the 2010 Act, but by the end of her address to us she had accepted that, if there was a 'contractual' entitlement to LA, the claim under s39 could be maintained. We are in no doubt that her concession was correct. Manifestly, it was no part of the Claimant's case to complain of less favourable treatment than that applied to any man. On the contrary, she did not challenge the Respondent's contention that a male officer on long-term sick leave would have been denied LA as she was. There is nothing in the provisions demarcating the provinces of discrimination and equal pay (see in particular the 2010 Act, ss70 and 71 and sch 9, para 17) which excludes this discrimination claim. Since, as we have found, the Claimant succeeds on the 'contractual' entitlement issue, we see no need to delve deeper here.

(3) If the answer to (2) is yes, is a comparator required?

26 Ms Chudleigh submitted very simply that where, as here, no s18 claim is made, the standard comparison set up by s13 applies. The 2010 Act acknowledges no exception to s23(1). We unhesitatingly reject that submission. To state the obvious, the *Webb* principle applied before the 2010 Act and the logic of Ms Chudleigh's argument, that the 2010 Act abolished it save where the claim falls under s18, is, to our minds, clearly untenable. A Parliamentary intention to *diminish* protection of women against pregnancy and maternity discrimination is nowhere signalled in the Act, which was designed largely to consolidate and simplify the anti-discrimination code which had built up over more than three decades. The consolidation involved adopting principles derived from domestic and Community jurisprudence, such as the *Webb* line of authority. No comparator is required.

(4) If the answer to (3) is no, was the treatment complained of 'because of' sex?

27 Here again, the case is, we think, clear. It is common ground that the Claimant was treated as she was because she was on maternity leave. Following *Webb* and *Fletcher* it is inescapable that the treatment was 'because of' sex. Ms Chudleigh did not contend that, if she lost on issue (3), the Respondent had any answer to the direct discrimination claim.

(5) Is the direct discrimination claim out of time?

28 A time defence is pleaded but rightly, Ms Chudleigh did not pursue it before us, at least in relation to direct discrimination. The Claimant suffered reductions and then non-payment of LA until 3 October 2017. Her last payslip showing a relevant non-payment was dated 17 October 2017. The claim form was presented on 9 November, following a period of conciliation. Plainly, the complaint was about 'conduct extending over a period' (see the 2010 Act, s123(3)(a)) and accordingly time ran from, at the earliest, 3 October 2017. The claim is in time.

(6) If the Claimant succeeds on issues (1)-(5), what award should be made for injury to feelings?

29 We accept that the Claimant experienced a degree of irritation and frustration in pressing unsuccessfully for payment of the LA. Those sentiments

were, we accept, exacerbated by the fact that the Respondent initially indicated that payment would be made and then (no doubt on advice) recanted. But we also consider that her references to stress and anxiety and the complaint that the money dispute overshadowed the happy arrival of the family's first child overstate the case. In addition, we bear in mind that an appreciable part of her irritation and frustration was over her unfounded complaint to do with LW. Weighing the matter up, we consider that compensation for injury to feelings belongs in the bottom half of the bottom *Vento* band and that the justice of the case is met by an award of £4,000.

30 All other points fall away.

Outcome

31 For the reasons stated, we agree with Mr Leach that this is, in the end, a straightforward case. The complaint of direct discrimination succeeds and we make an award for injury to feelings of £4,000. The other claims are dismissed. All outstanding remedies issues, including interest on the injury to feelings award, should be readily agreed between the parties. Failing that, the Tribunal will convene on 3 December to determine all remaining matters.

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EMPLOYMENT JUDGE SNELSON
6 November 2018

Judgment entered in the Register and copies sent to the parties on 6 November 2018
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