



EMPLOYMENT TRIBUNALS

Between:

Claimant: Mrs E T Ellis

Respondent: Agata Gize

Heard at London South Employment Tribunal on 18 April 2018 and in chambers on 24 May 2018

Before Employment Judge Baron

Lay Members: Mrs C Wickersham & Mr P Mills

Representation:

Claimant: Shane Crawford - Counsel

Respondent: Nicholas Cross – Lay representative

JUDGMENT

It is the judgment of the Tribunal as follows:

- 1 The Tribunal **declares** that the Claimant was discriminated against by the Respondent because of her pregnancy contrary to sections 18 and 39 of the Equality Act 2010;
- 2 The Tribunal **orders** the Respondent to pay compensation to the Claimant in the sum of £10,711.88 together with interest thereon in the sum of £114.36, such sums to be paid within 28 days after the date upon which this judgment is sent to the parties.

REASONS

- 1 The hearing of this matter took place on 18 April 2018 at which judgment was given in favour of the Claimant on the merits of her claims for the reasons stated at the time. At the conclusion of the hearing a request was made for written reasons for our judgment. The question of remedies for the Claimant was reserved and further information was sought from the Respondent. I apologise to the parties for the significant delay in providing this document which has been caused by the current substantial shortage of judicial resources.

- 2 The Claimant presented a claim form ET1 to the Tribunal on 1 September 2017. She stated that she had been employed as a Nanny by the Respondent from 1 March 2017 until 2 July 2017. She made claims that she was unfairly dismissed, and under the Equality Act 2010 based on the protected characteristic of pregnancy or maternity.
- 3 We heard evidence from the parties and we also heard from Christine Gear, a neighbour of the Respondent. We were also provided with an extensive bundle of over 400 pages. The vast majority of the bundle consisted of WhatsApp messages between the parties. They are voluminous. For example, the first page itself contains 32 messages being conversations from 24 to 31 December 2016. Most of the 'entries' are of one line only. The other pages are generally similar from a quick look at them. Fortunately we were not required to read the whole of the story as evidenced by those messages. We have only taken into evidence those documents in the bundle or WhatsApp messages to which we were referred.
- 4 We find the material facts to be as set out below. It is not necessary or appropriate to record all the evidence nor to resolve every matter where there is a disagreement.
- 5 The Respondent gave birth to a daughter in February 2015. In this document I refer to her as 'B'. The Claimant and the Respondent met in July 2016 when the Claimant was working at a nursery in Epsom. The Claimant looked after B at the nursery. In November 2016 the Claimant became unwell and had to cease working at the nursery. The Claimant and the Respondent met by coincidence on 19 December 2016, and there was a brief discussion about B being removed from the nursery and the Claimant working for the Respondent as a nanny.
- 6 The parties met at the Respondent's house on 6 January 2017 for a discussion. Present also was B's father, to whom I will refer as 'D'. It was agreed that the Claimant would work as B's nanny, and so she applied to be Ofsted registered. It was agreed that the Claimant would work for 25 hours a week from 1 March 2017 with a probationary period of three months to the end of May 2017. The probationary period was then extended to four months and her hours were increased. The Claimant was properly provided with a revised statement of terms of employment. The increase of hours was to suit the Respondent's changed work commitments from 22 May 2017.
- 7 The reason for the extension of the probationary period was that the Respondent had concerns about the involvement by the Claimant of her husband in B's activities. The point was made very clearly in the revised statement of terms.
- 8 We were referred to various incidents which then occurred. There was what we consider to be a minor issue concerning the possibility of B having marked the Respondent's sofa with felt tips on 19 June 2017. It was not mentioned in the Respondent's witness statement as one of the incidents to which she referred as being 'serious'. The matter also seems

to have been resolved quickly by WhatsApp messages during the evening of 19 June.

- 9 The first incident raised by the Respondent occurred on 28 June 2017. Ms Gear told the Respondent that on the previous day she had seen the Claimant walking with B on a narrow pavement on a busy road without B being on reins or the Claimant holding her hand. The Respondent was not at the time concerned about the matter as she did not mention it to the Claimant until the final sentence of a WhatsApp message sent on 2 July 2017 which is reproduced below. The Respondent then referred in her witness statement to matters on 29 and 30 June 2017 but they were not discussed in any detail during this hearing and we discount them as not being significant.
- 10 On 1 and 2 July there were extensive exchanges of messages. The Respondent and D were not living together and there were proceedings current in the Family Court. Relationships between the two of them were clearly not entirely comfortable, but the Respondent consulted D concerning R. On 1 July the Respondent sent various messages to D. They start at 9.38 pm with some expression of concerns. They are as follows:

I am not completely happy with Emily. This is due to a few reasons, always mess at home and being not flexible. On the other hand she is good with [B] and I can see the difference. On Wednesday Christine mentioned Emily let walk the walk outside at home and behind Emily. It is not a busy road but that should not happen? Also she lost 20 pounds on Friday and damaged the sofa and kitchen utensils. The answer is the same I am sorry I did not know how that happened. But really that is crap answer. Where she was? I am being though [tough] on her but this is my child. [B] could start the nursery in the school from next September. Just to check what is around sent a few emails to the nurseries if they have spaces and to arrange the visit. Can you think please and can we talk tomorrow?

- 11 We were shown the emails to nurseries to which the Respondent referred. There are two emails both sent on the evening of 1 July asking if there were any places for B. One refers to a start date of August and the other to a start date of September. There are some other documents which appear to be screen prints referring to babysitters or childminders from 'August/September'.

- 12 The Respondent then sent the following message to both the Claimant and D on 1 July:

[The Claimant's] probation is coming to the end. I will have a chat with her next week about what's next / [B's] progress / activities etc. If you feel there is anything you feel should be mention or discussed please talk with [the Claimant] on Friday when picking up [B].

- 13 It is necessary to set out in detail the messages between the Claimant and the Respondent as the evidence upon which we base our conclusions.¹ The messages in italics are from the Respondent to the Claimant, and those underlined are the replies. We are not setting out the times of each message, but record that the message to D set out above was sent after the final message below of 1 July. There was a perfectly normal and

¹ A few messages have been omitted as not being relevant and we have elided some messages together.

friendly exchange of messages during the evening of 30 June. For these purposes the relevant messages start with a message from the Claimant at 7.32 pm in which she refers to her probationary period being up the following day, and asks for a chat during the following week to which the Respondent replied that a 'chat next week will be good'. There were then some exchanges about dates of holidays which the Claimant had taken and which she proposed to take in July and September. The Respondent simply said that she wished to keep a record of everything and to update NannyPaye, which we understand is a software package. The title is self-explanatory. There was then a break until the messaging resumed during the evening of 1 July.

1 July 2017

Hi Ebi.² Can we please be a bit more careful with home things.³

Oh I am so sorry I do not know how that happened

Emily just checking with holidays next week its 13 days of holidays you had so far including bank holiday. Is this correct?

4 bank holidays 4 days next week plus the ones you choose in May

ok cool. Thank you it makes 13 so far.

Okay

2 July 2017

Emily I will say this nicely but I am very concerned about your lack of care and lack of attention. stained sofa, melted utensils and lost money. That's lack of care and careless and your answer is I do not know how that happened. I am concerned you do not pay attention so please avoid cooking I will make sure [B]'s food is ready. Please use Raines when out with [B] at all the time. Thank you.

I am sorry you feel like this I do try to do everything to the best of my ability. B's welfare is my priority. We can discuss any concerns you have when we have our chat about probation.

OK should we talk on Tuesday after work?

or tomorrow after work

Tomorrow is fine

Just to let you know before our meeting tomorrow I am pregnant we are not telling everyone until the 12 weeks scan so please keep this to yourself I felt you should know so we can discuss this also in our meeting. I wanted to bring this up as I now have appointments from mid July with the midwife etc and was planning to take [B] with me rather than asking for paid time off and to arrange cover for me during these times so this will be easier for you.

Emily I will seek legal advice tomorrow and we would have a meeting and the week. I am happy you are pregnant. Can I ask you how far pregnant you are.

6 weeks

so technically you pregnant without passing your probation yes?

² That was a name used for the Claimant.

³ An image of a fish slice with a damaged handle was then sent

Yes but it doesn't matter if I'm pregnant whilst being on probation I just have to be working for you a certain amount of time which I have been

[The Claimant then sends a link to a website of 'workingfamilies.org.uk' relating to rights when pregnant and on probation.]

Yes you employed for 4 weeks full-time. Please provide mat b form from the doctor.

I am not gonna comment on that. Let us seek legal advice but I am afraid I will do what a good for my child. Thanks.

Once I have the mat b1 form I will give it to you

thank you

and if you need any special arrangements your pregnancy let me know. Once again please be careful when with [B]. I prefer if you stay in with her so you don't feel tired.

and I will be moving out with the in September to Crystal Palace but as per contract it is ok as the radius of 10 miles so you should be ok⁴

Ok see you in the morning

Exciting times ahead!

We had planned to meet Claire and Peter tomorrow afternoon for a play and playgroup do you still want this to go ahead or shall I cancel so I can give them some notice

Yes please cancel I don't want you to be tired and not paying attention. You need to look after yourself. Tomorrow we need to make a plan how this is gonna work. It is a bit of a shock. The most important you need to rest and look after yourself. I have checked and unfortunately you won't qualify for maternity pay as you don't work for 26 weeks for us but I am to assist with time off for the appointments etc.

Just checked with solicitor but you have worked here and we will support you in your pregnancy start date was 1st March so that is not 26 weeks. But you can claim benefits.

If you check on.gov.uk and use their calculator for maternity leave I had to start work you by 20th of May to qualify for maternity pay, as it is 26 weeks on the 15th week before baby is due

no you start on 1 March as per contract and that doesn't make 26 weeks so I will not be paying you SMP you have to be with the company 26 weeks! You cannot just start work and get pregnant. That is the law

I have to be working for you for 26 weeks on 15 weeks before my baby is due not working for you 26 weeks before I fall pregnant

yes you are six weeks pregnant. You are entitled to nothing financially from me.

Here is the link to the calculator baby is due on 23rd of February if you want to use it to work out whether I am entitled to it or not

[There was then a website link supplied]

Emily I have been pregnant I have checked with the lawyer. You can claim maternity pay from the government as you do not qualify with me as you are not employed long enough.

See you tomorrow.

But I have though I had to start work with you before 20 May to qualify

and can you please arrange a babysitter for oreo. That is not included in your maternity rights. Thanks

⁴ The reference to a radius of 10 miles is to a flexibility clause in the contract of employment.

no you dont

I am sad how you handle this all. I am talking with the lawyer I and I will do what is good for me and my child.

No problem regarding oreo, I do not understand why you are being like this regarding maternity pay I am only telling you what the law is regarding it

well you have worked here and from September in Crystal Palace. I will follow the law with regards to pregnancy. Let me know the dates of your app. so I can take the day off. Also you have Wednesday so please arrange the appointment in the time off when possible.

I will bring the letters tomorrow

thanks

14 The following was then sent by the Respondent at 7.12 pm on 2 July

Dear Ms Ellis

I am writing to inform you that your probation notice has not been extended and I am therefore required to terminate your contract with immediate effect. I understand you are pregnant but the safety of my child is more important to me.

Your original probation period of 3 months was extended to 4 months due to my concerns about your work and practice as we previously discussed. You were encouraging [B] to call your husband on his mobile and on a few occasions you said to her [B] "say you love Simon" – who is your husband and stranger to my child. I have asked you not do this as I found this very creepy and asked you to stop doing this.

Your probation period ended on 1st July, Saturday and we were due to have a chat this week.

On Wednesday 28th June I was informed by my neighbour, Christine from flat 6, that [B] was walking without reins on the pavement next to the street, walking behind you as you were pushing the pram. I was meaning to address this issue during our probation discussion. This is so unsafe and I cannot believe the lack of care and common sense.

It has also been brought to my attention you have been raising your voice and yelling at [B] and the neighbours heard her crying last week a lot which is unusual. I do understand she may cry due to tiredness but this was going on for an hour or so.

On Friday evening whilst cleaning the dishes I realised the plastic fish slice was badly damaged – in fact I noticed that the handle had part-melted. When I asked you about this you said you do not know how it happened. I am surprised that you did not smell that something was burning? You can just imagine how this could have ended . . . with fire! You didn't even offer to compensate for the damages but most importantly you have endangered the life of my child in hazardous situation.

On previous occasions I have noticed my sofa has become damaged with pens which was badly stained. It happened when [B] was in your care so I can only conclude that you don't pay close enough attention at these times. Again you said, you don't know how that happened.

On Friday after transferring a small sum of money (£20) to your account I asked you to withdraw this from the cash machine to save me time whilst you were out, but you said that you somehow have lost the money. Again you don't know how that happened. I asked you to pay this back and you did.

Previously [B] lost her shoes in your care, you have broken plates and you have showed general lack of respect to my property. The dining room table is stained with paint as you cannot be bothered to put a mat on the table whilst covering. Your attitude is very disrespectful. Also slightly concerned when you said you forgot to put your shoes on when going out and my child has to remind you.

I have asked you to work additional 1 hour a week for 4 weeks. Total of 4 hours as I have to attend the court. This is stated in your contract in paragraph 5.1 and you have refused to do it. I have had to make alternative arrangements even though it should be possible to do as per your contract.

I have never asked you to clean, it is however in your contract. You never bothered to clean after [B]'s toys and on daily basis I had to do this when you finish your work. I don't expect you to clean my windows or bathroom but general tidiness is appreciated. It appears to me that you treat your place of work without any respect – this is [B]'s (and my) home.

You are very well aware that your probation won't be extended and on Sunday morning you have informed me about your pregnancy. It is a dirty trick you played!

I am afraid that I have to look after the safety and well-being of my child and these are the grounds of your dismissal. I am scared of my child's life and my home.

You have been employed from 1st of March and your annual holiday entitlement is 28 days a year so you have taken 9 days so far and that means you are not entitled to any further payments.

I would also appreciate if you could replace damaged utensils from Joseph and Joseph. With regards to my sofa it is not replaceable as the company stopped trading and I am unable to replace the sofa. Plates, mugs, dining table and shoes and other things you damaged and mistreated it's countless.

Due to your unprofessional and careless attitude I am being forced to take a time off work and losing money and I am seeking a legal advice on this matter.

- 15 And so the relationship ended before there was any meeting to discuss the Claimant's probation, and the ground was laid for these proceedings. The Claimant appealed against the dismissal on 6 July 2017 saying that there had been pregnancy and maternity discrimination. The Respondent replied on 8 July 2017 saying that the decision to terminate the employment had been made before she had been told of the Claimant's pregnancy.
- 16 The claims being made in these proceedings are under two different heads of jurisdiction. Under section 99 of the Employment Rights Act 1996 and regulations made pursuant to that provision, it is automatically unfair to dismiss an employee where the reason, or principal reason is that the employee was pregnant. It is not necessary for the employee to have been employed for the normal qualifying period of two years. The burden is on the employee to show that her pregnancy was the reason, or principal reason, for the dismissal.
- 17 By reason of section 18 and 39 of the Equality Act 2010 it is unlawful discrimination to treat a woman unfavourably, which includes dismissal, because of her pregnancy. The burden of proof is subtly different in that the claimant has to prove facts from which the Tribunal could reasonably conclude that her pregnancy was the reason for the dismissal. If the claimant proves such facts, then it is the responsibility of the employer to show on a balance of probabilities that the pregnancy was to no extent the reason for the dismissal.
- 18 We will consider this matter under the 2010 Act. Our unequivocal conclusion is that there is adequate evidence to enable us reasonably to infer that the Claimant's pregnancy was the cause of the Respondent's decision to dismiss her. The issue at this stage is not whether we would

eventually find as a fact that the Claimant's pregnancy was the actual reason for the dismissal, but whether we could reasonably come to that conclusion.

- 19 We accept that the Respondent had articulated various concerns about the Claimant to D on the evening of 1 July and that she had started making enquiries about childcare arrangements or nursery vacancies from August or September. There was however no suggestion made by the Claimant of the possibility of the employment of the Claimant being terminated suddenly on the basis of a failure to pass the probationary period. Further, the evidence as to the extent to which the Respondent had raised any of the concerns with the Claimant was very limited. The Claimant was asked to 'be a bit more careful with home things' in relation to the fish slice, and was asked to use reins when taking B out. We conclude that the Respondent was seeking to put into the letter of dismissal every matter which she could raise against the Claimant. However, obviously something happened to cause the Respondent to decide to terminate the Claimant's employment on 2 July 2017, and it is reasonable to conclude that that was the Claimant's pregnancy. In coming to that conclusion we have also taken into account the positive comments made by the Respondent in relation to the Claimant's pregnancy.
- 20 It therefore becomes the responsibility of the Respondent to show that the pregnancy was not to any extent the cause of the Claimant's dismissal on 2 July 2017. In our judgement she has not discharged that burden. The Respondent has not shown what it was, other than news of the Claimant's pregnancy, which caused her to dismiss the Claimant on the day when she was dismissed.
- 21 We therefore find that the Claimant was unlawfully discriminated against because of her pregnancy. We also find that she was unfairly dismissed, but that does not add anything of materiality.
- 22 We now turn to the question of remedies for the Claimant. As mentioned this issue was reserved at the hearing and further information was provided on behalf of the Respondent at our request.
- 23 We address the issues of injury to feelings and other financial compensation in turn. The first matter is injury to feelings. There is no one figure which is the correct award to make in any particular case of discrimination or victimisation. We have had regard to the guidance in *Vento* and the amounts recommended as at 1 September 2017, but noting that those amounts were increased in respect of cases presented on or after 11 September 2017. We have also noted the effect of the general 10% *Simmons v Castle* uplift. Mr Cross for the Respondent submitted that this case fell within the lower *Vento* band as being a single incident. My notes do not record Mr Crawford as having referred to any particular band, but that he submitted that certain conduct of the Respondent after the dismissal should be reflected in the award. We have not recorded that conduct as we do not consider it to be material. Mr Crawford referred to the evidence of the Claimant in paragraph 22 of her witness statement as to the stress caused to her.

- 24 Our conclusion is that the appropriate award to the Claimant in these circumstances is £8,000 on the basis that the top end of the lower band was to increase from 11 September 2017. We accept that this was a one-off incident, but it was a serious one and did cause the Claimant considerable upset.
- 25 We find that the Claimant is also entitled to compensation in respect of loss of earnings. We have to assess as best we can what would have happened if the Claimant had not been dismissed. What did occur was that B was placed in a nursery from 7 July 2017 onwards during term times. We find that the services of the Claimant would not have been required by the Respondent after the beginning of the autumn term 2017. We therefore award the Claimant compensation for the period from 2 July to 3 September 2017. That is a period of nine weeks. The Claimant's gross pay was £321 per week, and we make an award using that figure as the starting point. On the basis of the information before us it appears that the Claimant would not have been liable for income tax during the year 2017/18. National Insurance Contributions are calculated on a weekly basis and we think that £19.68 would have been deducted each week, making a net weekly pay of £301.32. The total compensation in respect of loss of earnings is therefore £2,711.88.
- 26 Interest is payable upon both elements of compensation in accordance with the Employment Tribunals (Interest of Awards in Discriminations Cases) Regulations 1996 and the current rate of 8%.

**Employment Judge Baron
Dated 26 October 2018**