Case Number: 1401314/2018

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Ms A Scrivens		**ASRS Preservation Ltd**

Held at Southampton **On 14 and 15 January 2019.**

BEFORE: Employment Judge Siddall, Ms C Date and Mr K Sleeth

Representation

For the Claimant: **Mr Whitehouse, Solicitor**

For the Respondent: **Mr Joshi, Solicitor**

JUDGMENT

The decision of the tribunal is:-

1. The claim for direct sex discrimination is dismissed upon withdrawal.

2. The claim for harassment related to the protected characteristic of pregnancy is dismissed upon withdrawal

3. The claim of indirect sex discrimination is dismissed upon withdrawal

4. The claim for unfair dismissal contrary to section 99 of the Employment Rights Act 1996 is well founded and it succeeds.

5. It is declared that the Respondent unlawfully discriminated against the Claimant because of the protected characteristic of pregnancy or maternity and her claim under section 18 of the Equality Act succeeds.

6. It is declared that the Respondent subjected the Claimant to harassment related to the protected characteristic of sex and her claim under section 26 of the Equality Act succeeds.

7. The claim under section 11 of the Employment Relations Act 1999 does not succeed.

8. The Claimant is awarded a compensatory award for unfair dismissal of £9853.16

9. The Claimant is awarded injury to feelings of £3,500 in relation to her claims under the Equality Act 2010 and interest of £280.

10. The total monetary award is £13,633.16

11. The prescribed element is £9853.16

12. The prescribed period is 9 February 2018 to 15 January 2019 .

13. The amount by which the total monetary award exceeds the prescribed element is £3,780.

REASONS

1. The claims pursued at the tribunal hearing are: a claim for automatically unfair dismissal because of pregnancy; direct discrimination because of pregnancy; and a claim for harassment related to sex.
2. We heard evidence from the Claimant, and from Mr Victor Anderton, the managing director of the Respondent.
3. The facts we have found and the conclusions we have drawn from them are as follows.
4. The Claimant commenced work for the Respondent as a part time secretary/administrator on the 22 May 2017. She worked for twenty hours a week in a job share arrangement with Christine Foster; the Claimant worked from 8am until 12 noon and Ms Foster worked from 12 until 5pm Monday to Friday.
5. We have seen a copy of the Claimant's contract of employment. At page 36 of the bundle we see that the contract included a clause headed 'shortage of work' which allowed the Respondent to place her on short time working or lay her off if there is a 'temporary shortage of work for any reason'.

6. The Respondent runs a building preservation business offering woodworm treatment, dry rot, damp proofing and cavity wall replacement. In addition to the Claimant and Ms Foster, the Respondent employed Mr Anderton and a surveyor called Paul Hume. The Respondent engaged field technicians on an 'as required' basis who were paid a daily rate whenever they worked. Mr Anderton told us that the turnover of the business was between £250,000 and £300,000.

7. The Claimant had unfortunately suffered a miscarriage in July 2017. In November 2017 she texted Mr Anderton to say that she had to undergo an emergency scan for pains and bleeding. It appears that Mr Anderton may have assumed that this was a second miscarriage.

8. On January 4 2018 the Claimant notified Mr Anderton by text that she was pregnant.

9. We have noted a text from Mr Anderton to the Claimant dated Friday 26 January 2018 in which he reports that Ms Foster had not been paid. He advises the Claimant to shop around 'in case I have to fold the company I hope I don't as we have some good jobs coming up'.

10. It was the evidence of Mr Anderton, which we accept, that over the weekend of 27 and 28 January 2018 he decided that he would make both the Claimant and Ms Foster redundant. There is no evidence to suggest that Mr Anderton gave any thought to making the Claimant or Ms Foster redundant prior to being notified of the Claimant's pregnancy.

11. On 29 January 2018 Mr Anderton gave both the Claimant and Ms Foster a letter warning them that they were at risk of redundancy and asking them to attend a meeting on 30 January for a discussion.

12. We find that this meeting was recorded by Christine Foster. We have seen a transcript of that recording and the Respondent does not dispute its accuracy. The Claimant says that she was not aware that Ms Foster was recording the conversation although we find that in view of the fact that the two of them worked closely together and shared information it is more likely than not that she was aware.

13. Mr Anderton asked the Claimant what her thoughts were about the proposal to make her redundant. He indicated that there may be a few hours a week

available. He stated that he would want someone to come in between 4-6pm in the afternoon while Mr Hume was in the office. During evidence he said this would not suit the Claimant who worked in the mornings and needed to arrange childcare. We note from the transcript that the Claimant did not raise any childcare issues at the meeting on 30 January.

14. The Claimant indicated that if Mr Anderton paid her notice pay and holiday pay, and if she was permitted to work her normal hours for another five weeks she could 'cut right back for fifteen weeks'. We accept that her concern was to ensure that she qualified for statutory maternity pay.
15. Mr Anderton replied 'but that then doesn't do the company any good at all because I then got to pay you while you are off as well'.
16. The Claimant pointed out that he would be able to recoup the SMP but he replied that he would still have to pay it and that the company had a cashflow problem.
17. Mr Anderton sought to argue that during that exchange he was talking about having to pay the Claimant for a further five weeks, and/or paying holiday pay. We do not accept that and find that Mr Anderton was clearly talking about the obligation to pay statutory maternity pay, even if he could reclaim it from the government at the end of the financial year.
18. There is then an exchange in which the Claimant argues that her rights were protected because she was pregnant, and Mr Anderton states his belief that the Claimant was not protected until she had undergone her twenty-week scan.
19. Towards the end of the meeting, the discussion deteriorated. On page 85 we note that Mr Anderton said to the Claimant 'you have planned it' and 'you've only worked for me for 9 months and you've been pregnant 3 times'. The Claimant queried this and Mr Anderton said 'you've had two miscarriages that I know of'. The Claimant said that she had one. Mr Anderton replies 'at least two, anyway by the by'. The Claimant told him his facts were wrong.
20. There was a second meeting on 31 January at which the Claimant stated that the hours on offer were of no benefit to her and that she could not work fewer hours for the next seven weeks. Ms Foster also indicated that she needed more hours.

21. On 2 February the Respondent wrote to the Claimant giving her notice of the termination of her employment on grounds of redundancy with effect from 9 February 2018. Ms Foster was also made redundant.
22. The Claimant appealed her dismissal by letter dated 8 February 2018. An appeal hearing took place on 16 February 2018 and the Claimant stated that Mr Anderton had made her redundant because she was pregnant. The outcome of the appeal is set out in a letter dated 20 February 2018. Mr Anderton stated that 'the main reason for the redundancy is that there is no money in the company and the cash flow is very stretched..'
23. The Respondent has produced one bank statement covering the period from 23 to 30 January 2018 showing that the company had an overdraft in the region of £10,000. The Claimant stated in evidence that this was always the case, and that documentation she had seen suggested that the company was owed quite a lot of money and had work coming in. In his evidence Mr Anderton said that the company had received £14,000 but was owed £19,000 and he referred to a situation in October 2017 with one of the plasterers that he had employed that had meant that a large bill had not been paid. He said that he had lost a number of contracts as a result.
24. In his witness statement Mr Anderton referred to his wage bill for field technicians (not for the Claimant and Ms Foster) which he said had reduced from £12,640 in November 2017 to £4074 in January 2018 which shows a reduction in the work the field technicians were doing. We note that this figure was increasing from March 2018 onwards.
25. Mr Anderton said that after he made the Claimant and Ms Foster redundant he thought that he could deal with all the office work himself, but this was a 'nightmare'. In March he arranged for a former employee, AP, to work for him unpaid. From 4 April 2018 he employed AP under a zero hours contract. We have seen a schedule of hours worked by AP in April and May 2018 which shows her working an average of sixteen hours per week. We do not have information about the number of hours she is working now. Mr Anderton's evidence was that AP is carrying out an enhanced role in which she manages the banking and is also responsible for sourcing suppliers and other project

management activities. We note that AP tends to start in the morning although there are some afternoon starts.

Decision

Claim for Unfair Dismissal because of Pregnancy

26. Under section 99 of the Employment Rights Act 1996 and regulation 20 of the Maternity and Parental Leave regulations 1999 we must decide whether the reason or principal reason for the dismissal is of a kind specified in regulation 20(3), which can include the pregnancy of the employee and the fact that she was seeking to take maternity leave.
27. We have considered the case of *O'Neill v Governors of St Thomas More Roman Catholic School [1996] IRLR 372* which states that pregnancy need not have been the sole reason but that we must ask if it was the 'effective cause'.
28. We have also considered the EAT decision of *Intelligent Applications Limited v Wilson* EAT 412/92 which is a case where a potential redundancy existed but the dismissal for redundancy had its origins in and was connected with an employee's pregnancy: there was a direct connection between the pregnancy and the dismissal.
29. With this guidance in mind, we have considered the question of Mr Anderton's motivation in deciding to make the Claimant and Ms Foster redundant over the weekend of 27 and 28 January 2018.
30. We accept that over that period Mr Anderton was very concerned about the financial position of his company and the cashflow. He was also concerned about the prospect of the Claimant going on maternity leave and qualifying for maternity pay. That is very clear from the transcript of the meeting on 30 January at pages 81 and 82.
31. At this point Mr Anderton had another option. The contract of employment would have allowed him to put the Claimant and Ms Foster on short time working or even to lay them off. He says that he was not aware of that clause, but we find it very surprising that he did not consider the contract before acting or did not have his attention drawn to it. Instead Mr Anderton proceeded to start a redundancy process with great haste, and ignorance as

to the correct legal position. He had obviously formed a clear view that the Claimant would acquire some form of additional legal protection when she reached the 20th week of her pregnancy. We find that his reasons for acting at such speed were motivated by that belief.

32. We conclude that although Mr Anderton had a desire to cut his staffing costs in light of the poor financial position of the company, his motivation for acting at that time, and with such haste, was directly related to the fact that the Claimant was pregnant and would shortly qualify for statutory maternity pay and leave.

33. Had the Claimant not been pregnant we find that Mr Anderton may not have considered redundancies at that time. He may have looked at short time working, laying them off or negotiating some form of alternative arrangement. It is clear to us that although there may have been a need to cut costs, there was still a need for support in the office. This is demonstrated by the fact that around a month after the two employees were made redundant, the Respondent engaged AP, first on an unpaid basis and then on a zero hours contract from 4 April. Although the arrangement is stated to be 'zero hours' we note from the evidence supplied that AP appears to be regularly working around sixteen hours a week, only a few hours less than the Claimant. There seems to be no reason why the Claimant could not have fulfilled that role. We also note that although when Mr Anderton spoke about offering casual hours he stated that he wanted someone in the afternoon, and believed that the Claimant would not be interested in this, in practice AP is tending to start work in the morning; or at the very least, has a degree of flexibility about when she works.

34. We have also considered the fact that Ms Foster was made redundant as well as the Claimant. Does this affect our conclusion that the redundancies were related to the Claimant's pregnancy? We find that it does not. We fear that in this situation it is more likely than not that Ms Foster suffered collateral damage as a result of the Respondent's decision to implement staff cuts as a result of the Claimant's pregnancy. Given the fact that the Respondent clearly had an ongoing need for office staff, it is possible that in another scenario the Respondent could have initiated a redundancy procedure, carried out a

selection process and decided to keep one member of staff and make the other redundant. The fact that both were made redundant within a matter of days suggests to us rather that the Respondent decided to act with urgency before the Claimant qualified for SMP.

35. We therefore find that the Claimant was unfairly dismissed contrary to section 99 ERA 1996.

Pregnancy Discrimination

36. We have considered whether the Claimant was unfavourably treated because of pregnancy contrary to section 18 of the Equality Act 2010. We find that she was.

37. As stated above we find that the Respondent may not have made both staff redundant at that time if the Claimant had not been pregnant. There were other options that the Respondent could have considered and in any event there was some work available that might have been offered to the Claimant had a fair selection process been carried out. For the same reasons that we find that there was a causal connection between her pregnancy and her dismissal (namely the concern about the pending maternity leave), we find that this amounted to unfavourable treatment.

Harassment related to sex

38. We have considered whether the Respondent engaged in unwanted conduct related to the protected characteristic of sex which had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

39. We have no hesitation in concluding that if an employer engages in an unwanted conversation with an employee about the fact she has had a miscarriage, that is conduct related to her sex.

40. The Claimant relies upon the exchange that she had with Mr Anderton during the meeting on 30 January 2018 which is set out on page 85, the transcript of which we have considered carefully. Mr Joshi concedes that what Mr Anderton said about the Claimant's pregnancy and miscarriage was inappropriate but asks us to consider the context. He suggests that the Claimant was aware that the conversation was being recorded and that she initiated this discussion, and that Mr Anderton was 'ensnared' into making an

inappropriate remark. We accept that by this point the conversation had deteriorated and both sides were becoming frustrated. However we find that even allowing for this Mr Anderton's remarks about a matter that was very distressing to the Claimant were highly inappropriate and had the effect of violating her dignity. We don't accept that the Claimant prompted Mr Anderton or goaded him into making these remarks. It is particularly surprising to us that Mr Anderton decided to take issue with the Claimant about the number of pregnancies she had and criticised her for the fact that, according to his belief, she had worked for him for less than a year but had become pregnant more than once.

41. In all the circumstances we find that this exchange amounts to an incident of harassment related to sex and this claim succeeds.

Failure to permit Claimant to be accompanied

42. We do not find that there was a breach of the Employment Relations Act 1999. The Claimant was advised of her right to bring a member of staff with her. She was not advised of her right to bring a trade union representative but we heard no evidence that she was a member of a union. The Claimant attended the various meetings with Ms Foster.

Remedy

43. In relation to the claim for unfair dismissal, we note that the Claimant claims £500 for loss of statutory rights which was not challenged and we award that amount.

44. The evidence of the Claimant was that she had made efforts to find new work between the date of her dismissal and the 15 April when she would have started maternity leave. She applied for a job with Estee Lauder and was granted an interview but was unsuccessful. She thinks she made 20-25 applications in total but could not find a new job. We accept that she made efforts to mitigate her loss and award her the sum of £1644.78 (based on net earnings of £177 per week).

45. We accept that had the Claimant not been unfairly dismissed on 9 February she would have remained employed until the start of her maternity leave period on 15 April 2018. At that point she would have qualified for SMP and we award the sums lost for the period from 39 weeks, amounting to 6 weeks

at 90% of earnings and 33 weeks at the standard rate, sums of £1045.44 and £4791 respectively totalling £5836.38.

46. We accept the Respondent's submission that had the Claimant not been unfairly dismissed in February, Mr Anderton would have contemplated redundancies during her maternity leave period at some point, due to the financial situation of the business. We note that he has employed AP for around sixteen hours a week at a rate of £160. That is a significant reduction upon the total hours being worked by the Claimant and Ms Foster together, and we accept Mr Anderton's evidence that it has resulted in a necessary cost saving.
47. However, we find that if redundancies had been made during the maternity leave period, the role now carried out by AP would have become available. We accept that it was not suitable alternative employment as AP has a wider range of responsibilities. Nevertheless we find that if the Claimant had expressed interest in the role, there is a strong chance that she would have been offered it and that it is a role that she could have grown into. Ms Foster indicated that she could not accept a reduction in hours as she had bought a new house and was paying the mortgage. Whilst finding that the Claimant would not have priority consideration for the role as it was not an exact match to her current job, that it is a role that she would have been able to carry out. We put the chance of the Claimant commencing AP's role as 90%.
48. We make no award for the period December 2018 to the date of hearing. The Claimant says that she started looking for work in December, but although she downloaded the App for a recruitment agent, she did not apply for any jobs. She has however started to put childcare arrangements in place. We accept that she wants to return to work. We do not agree with Mr Whitehouse submission that it could take her nine months to find a job. The evidence is that the Claimant has an NVQ level 3 in administration. She has experience in office work and there is no suggestion that she was not capable in the way she carried out her job for the Respondent.
49. We award the Claimant future loss of earnings for a period of thirteen weeks. We base our award upon the weekly salary of AP which averages £160. We make a ten percent reduction to reflect the chance that the Claimant's position

would have become redundant and that she would not have been offered or accepted AP's role. The figure comes to £1872.00

50. We turn to injury to feelings. We accept that the Claimant was distressed by her conversation with Mr Anderton and by the redundancy. We note that she went off sick on 31 January. She went to see her doctor who signed her off work, but she says that later that day she felt better and went back to work. In her evidence she did not suggest she had suffered long term effects from what happened and she did not produce any medical evidence. We place injury to feelings in the middle of the lower band and award £3500 plus 8% interest amounting to £280.00.
51. The total award comes to £13,633.16.

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Employment Judge Siddall

Date: 15 January 2019.