EMPLOYMENT TRIBUNALS

Claimant: Miss E Carvalho

Respondent: Omni Facilities Management Ltd

Heard at: Manchester **On:** 2 and 3 January 2019

Before: Employment Judge Sherratt
Mr R W Harrison
Ms V Worthington

REPRESENTATION:

Claimant: In person
Mr P Ramos (Interpreter)
Respondent: Mr B Frew, Counsel

JUDGMENT having been sent to the parties on 8 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, Miss Carvalho, who is of Portuguese nationality, brings her claims under section 18 of the Equality Act 2010 which deals with pregnancy and maternity discrimination at work. Subsection (1) states:

> "This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity."

2. Subsection (2) states:

> "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 pregnancy or (b) because of illness suffered by her as a result of it."

3. In this case the protected period started towards the end of November 2017 when the claimant discovered she was pregnant. Her period of maternity leave

started on 13 April 2018 and her child was born on 20 June 2018. The claimant is currently on maternity leave and the so the protected period has not yet ended.

4. The claimant worked for the respondent as a Room Attendant in a local hotel where the respondent had the contract to provide Room Attendants.

5. The claimant brought her claim to the Employment Tribunal on 17 May 2018. There was a preliminary hearing on 24 July 2018 at which the Employment Judge listed the issues to be determined at the final hearing based upon the information given by the claimant. They are as follows:

(a) Failing to allocate shifts for the claimant to work between 5 and 20 January 2018;

(b) Failing to pay the contractual minimum hours over a two week period from 5-18 January 2018 (although this sum was later paid following the claimant's grievance);

(c) Failing to allocate sufficient hours of work to the claimant between 20 January and the commencement of her maternity leave. The claimant used to work 30-35 hours a week before her pregnancy and although she would have been happy with around 20 hours she was only allocated 3-5 hours;

(d) Failing to allocate sufficient hours to ensure that the claimant was paid at such a rate as would have entitled her to be paid statutory maternity pay rather than having to claim maternity allowance.

6. At the hearing before the Tribunal we are grateful to Mr Ramos who has faithfully interpreted into and out of the Portuguese language for the benefit of the claimant.

7. We have heard evidence from the claimant. The respondent has called three witnesses; Jelena Stepanova, the Deputy Head Housekeeper; Julie Rogers, Executive Head Housekeeper; and Alaiksei Yahorau, the Area Manager who dealt with the claimant's grievance. We have had a bundle of documents with around 95 pages.

The Facts

8. The claimant's employment with the respondent started on or around 10 September 2015. The relevant paragraph in the contract of employment is the one concerning hours of work. The hours were variable according to a weekly rota but:

> "The company guarantees to provide you with a minimum of four hours' work each week. You may be required to work at weekends, in the evenings, at night and on public holidays as part of your normal working week."

9. The claimant unfortunately had a number of periods of sickness absence and the first one in the bundle goes from 14 June to 1 September 2017. On returning to work the claimant had an interview with Jelena Stepanova and the reason for absence was said to be anaemia. Then the claimant was also away from 1

December to 3 December 2017, and there was another interview with Jelena Stepanova. The reason for this absence was recorded as "being sick". It turns out that the claimant was by this time pregnant.

10. On being informed of the pregnancy Jelena Stepanova looked at the respondent's "New and expectant mothers' package", which includes a risk assessment for expectant mothers. We heard from Jelena Stepanova about the way in which she and Miss Carvalho would discuss matters, using a phone-based internet translation tool, so in this case there is always the potential for there to be miscommunication.

11. Looking at the risk assessment, the claimant has indicated that there were two chemicals that she should not have to use whilst at work: one was called Sanimould and the other R2, the problem with R2 being that it triggered the claimant's asthma. There was a question whether the employee had any concerns about her own pregnancy, and what is written down is "high risk pregnancy due to recent miscarriage and employee age". This is information which we believe could only have come from Miss Carvalho to Jelena Stepanova.

12. The document has a list of actions that need to be taken based on the risk assessment:

(1) to reduce the rooms amount;

(2) that the claimant is forbidden to use Sanimould; and

(3) the claimant cannot use R2 as it triggers asthma.

13. The form is signed and dated on 4 December 2017 by the claimant and Jelena Stepanova.

14. As part of the investigation of the claimant's grievance, Jelena Stepanova was asked for more information about the suggestion to reduce the rooms amount, and according to the recorded answer it says:

> "I asked Elsa if she can still do 15 rooms as she was already about 16 weeks' pregnant and she answered 'no' so I suggested to reduce number of rooms cleaned and she agreed. Since then we started to give 12 rooms and most them stayovers if possible."

We were told that the company allows 28 minutes for each room to be cleaned.

15. From the evidence we are satisfied that Jelena Stepanova believed that she had agreed with the claimant that the amount of rooms she cleaned would reduce to 12. It is also relevant to say that the respondent employed about 30 people at the hotel, and of those 30 approximately 6 were full-time staff and the remainder, some 24, were rostered to meet the demands of the hotel which varied from day to day and week to week according to occupancy levels.

16. The claimant was off sick again from 10 December 2017. There is said to be, but we have not seen it, a fit note up to 4 January 2018.

17. On 5 January 2018 the respondent's remote Payroll Department sent an email to the claimant, noting that she had provided a sick note to 4 January 2018 but they had not received any further sick note: could the claimant tell them what her current situation was, was she still off sick and did she have any new sick notes? The claimant responded in an email at 00:37 on 6 January 2018 (although if set to Portuguese time it might have been an hour earlier in the UK), and in her response she stated:

> "I'm in a better state of health now. I have no sick note to present. I've already spoken to the manager of the hotel about this."

But it is significant that the claimant does not say anything more than this: she does not explain what discussion she had with the manager of the hotel.

18. We accept from the respondent's evidence that the claimant was not able to be rostered until she had confirmed her return date, because to roster someone who was not known to be fit to return could cause further problems for the respondent in servicing the rooms.

19. As to what did happen we have conflicting evidence between the claimant and Julie Rogers.

20. According to the claimant, two days before her return date of Friday 5 January 2018 she called to ask what rota she would be on and she was told, by whoever answered, that she had the following 15 days off. She called her manager to ask why she had so many days off and was told there was not much work and that they would talk on the Tuesday of the following week.

21. On the following Tuesday she saw the manager, Julie Rogers, in her office. Ms Rogers was outraged that Miss Carvalho had been away on the busiest days of the year. She told her there was little demand and did not know when she would return to work, and she would not change the hours of the other colleagues to benefit the claimant. After 15 days off Ms Rogers contacted the claimant but the claimant did not see or talk to Ms Stepanova and was not told 15 days off was for her to rest better.

22. From the respondent's perspective Julie Rogers spoke to the claimant by telephone to discuss allocation of shifts and the claimant agreed she was happy not to be allocated shifts so she could rest at home:

> "Due to her telling us this we didn't allocate any shifts."

23. The manager subsequently called the claimant to say she could resume working in two days, on 19 January 2018. There is a note of a return to work interview on 19 January. According to Julie Rogers, from 5 to 18 January 2018 the hotel occupancy was low.

24. Ms Rogers was asked in the grievance investigation why the claimant was not at work between 5 and 18 January and the reply is, "because it wasn't busy and she was only back from off sick so we offered her to stay home longer and she agreed to that". She thought she may have spoken to the claimant a couple of times during the period of absence to check how she was:

> "The claimant did not bring a sick note, she was staying at home resting, the company was OK about it as she had a high risk pregnancy and they didn't want to bother her."

25. We have two conflicting versions of what happened made more difficult by the different languages spoken by the persons having the discussions.

26. The claimant was not paid her minimum contractual 4 hours pay per week when she was not at work from 5 to 18 January. This was raised in the claimant's grievance. Mr Yahorau found for the claimant on this point and arranged for payment to be made to the claimant on the next payroll date.

27. A review of the claimant's maternity risk assessment was carried out by Ms Stepanova on 25 February 2018. This records changes since the first assessment as that the claimant cannot clean more than 10 rooms and should do no "heavy liftings". According to Ms Stepanova supervisors stripped the beds to assist the claimant with this heavy aspect of the role.

28. In her grievance meeting on 15 March the claimant complained that she was only doing 7 hours a week and that she wanted more.

29. Julie Rogers has provided details of the hours that the claimant worked each week from 19 January to the time of her starting her maternity leave. The maximum was 19.20 and the minimum was 7.0 apart from the final week which was 0.

30. As part of the grievance investigation Mr Yahorau looked at the hours worked by the claimant and from the records he found that the claimant had worked for more than 32 hours in only 6 weeks since January 2017. Excluding sickness absence the claimant had worked an average of 25 hours a week. He found that since the pregnancy was announced on 4 December the claimant had averaged 15 hours a week excluding the period of sickness.

31. We have not been provided with evidence of the claimant's earnings or why she was not eligible to receive Statutory Maternity Pay ("SMP") but according to a letter from the DWP the claimant was entitled to be paid Maternity Allowance, which is usually paid to someone who does not qualify for SMP, at the rate of £145.18 a week from 13 April 2018 to 10 January 2019.

Conclusions

32. From the evidence before us we conclude that Julie Rogers acted in accordance with what she believed she had agreed with the claimant and therefore did not allocate any shifts to the claimant between 5 and 20 January 2018.

33. When the claimant was off work for this period the respondent failed to pay her the four hours per week minimum contractual pay in the appropriate pay period. We accept the company's evidence that this was a mistake, which is confirmed for us by the company putting things right as soon as it was discovered in the grievance that the mistake had been made.

34. The claimant complains that there was a failure to allocate sufficient hours of work to her between 20 January and the commencement of her maternity leave. It

was stated in the List of Issues that the claimant used to work 30-35 hours a week before her pregnancy, and although she would have been happy with around 20 hours she was only allocated 3-5 hours.

35. We accept the evidence of Mr Yahorau that the claimant had worked for an average 25 hours a week from January to December 2017 and that following the pregnancy, and the risk assessments, the average reduced to 15. We do not accept that the claimant used to work an average of 30-35 hours or that she was allocated as few as 3 hours a week from 20 January 2018 until the period of maternity leave started.

36. The final issue was that the claimant was not allocated sufficient hours to ensure that she would be paid SMP rather than having to claim Maternity Allowance.

37. To qualify for SMP there must be average earnings at a particular rate which is currently £116 a week. The claimant would have been eligible for SMP had her average earnings reached the appropriate figure at the time of her claim being made. In the absence of evidence we are unable to make any findings as to why the claimant was not eligible for SMP.

38. The claimant applied for maternity allowance and was awarded it at the sum of £144.18 per week from 13 April 2018 to 10 January 2019 which means that the claimant was paid the equivalent of the full amount of SMP, thus ensuring that she did not lose any of her entitlement.

39. Taking all of these matters into account, we do not find that that the respondent has treated the claimant unfavourably either because of her pregnancy or because of illness suffered as a result of it, so the claims fail.

Employment Judge Sherratt

1 February 2019

REASONS SENT TO THE PARTIES ON

7 February 2019

FOR THE TRIBUNAL OFFICE