Appeal No. UKEAT/0090/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 22 November 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

SOUTH WEST YORKSHIRE PARTNERSHIP NHS FOUNDATION TRUST APPELLANT

MR C JACKSON & OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BEN WILLIAMS (of Counsel) Instructed by: Capsticks Solicitors LLP Toronto Square Toronto Street Leeds LS1 2HJ
For the Respondents	No appearance or representation by or on behalf of the Respondent

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE

The Claimant was on maternity leave while a redundancy exercise was being carried out. An important e-mail requiring her to fill in a redeployment document and return it to HR as soon as possible was sent to her work e-mail address which she was not accessing. As a result, she did not get notice of the e-mail or fill in the form for several days. Although this did not cause any substantial harm it caused her legitimate concern and the Employment Appeal Tribunal ("EAT") upheld the Employment Tribunal's ("ET") finding that it amounted to "unfavourable treatment".

The ET also found that the unfavourable treatment was "because" she was exercising her rights to maternity leave and thus amounted to discrimination under section 18(4) **Equality Act 2010**. The appeal in relation to this issue was allowed because the ET did not consider causation properly in the light of the decisions in **Indigo design Build & Management Limited & Anor v Martinez (Sex discrimination: Direct)** [2014] UKEAT/0020/14/0007 and **Onu v Akwiwu and Another** [2014] EWCA Civ 279. Although the unfavourable treatment would not have happened "but for" the fact that the Claimant was on maternity leave, the ET had not considered whether this was the "reason why" she had been treated unfavourably. There was no finding that the fact that she was on maternity leave had operated on the Respondent's mind and there was no sufficient factual basis or analysis to support a finding that the Respondent had applied an inherently discriminatory criterion; in particular, the ET's Judgment was not clear as to why the sender of the e-mail used only her work email address or why the Claimant did not have access to her work emails.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Respondent below, which I shall refer to as the Trust, against one particular decision of the ET sitting in Leeds (Employment Judge Jones and Ms J Lancaster and Mr K Lannaman) in a Judgment sent out by the Tribunal on 12 March 2018. That decision was set out in paragraph 4 of the Judgment and it was to the effect that the eighth Claimant, Mrs Emma Pease, was unfavourably treated because she had exercised her right to take maternity leave. It is right to point out that straight away there were 19 Claimants and that the ET sat for 14 days and produced a unanimous Judgment on all issues, which covered some 39 pages.

2. For readily understandable reasons neither Mrs Pease nor her representative Mr Jackson, who was also a Claimant, are present today. They have put in an answer and a skeleton argument in the form of a letter dated 8 November 2018, which I have read and take account of. The Trust today is ably represented by Mr Ben Williams as below.

3. The background is that Mrs Pease and her fellow Claimants worked in the Trust's Health and Wellbeing Service. They were dismissed for redundancy following the decommissioning of the Service by Wakefield Metropolitan District Council on 16 October 2016, and they claimed unfair dismissal. The Claimant and two others, Miss Adair and Mrs Ross-Briggs, were at the time of the redundancy exercise on maternity leave.

4. Each of those three, in addition to claiming unfair dismissal, alleged discrimination on maternity grounds under section 18(4) of the **Equality Act 2010** ("EqA"), which provides so far as relevant that, "A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right

to ordinary or additional maternity leave." The nature of the relevant claim under section 18 is set out at paragraph 3 of the Reasons themselves; it was said that the treatment in question was "a failure adequately to communicate with them with regard to the redundancy exercise …"

5. Returning to the factual background, there had been a meeting on 26 July 2016 to discuss the forthcoming redundancies, which Mrs Pease, although she was on maternity leave, had attended. The day after that she and her fellow Claimants were put on the At Risk Register. On 28 July 2016, they were sent an email by Mr Daniel Eades of the Trust. I have that email at page 191 in my bundle. It is addressed among others to Mrs Pease and it says this:

> **"Hi**
>
> **Please find attached the redeployment document and the guidance notes that you must complete. I cannot stress enough the importance to complete this document as fully as possible and return to HR as soon as possible. The sooner the document is returned the sooner HR can commence matching.**
>
> **When filling in the form you need to consider all your experience and qualifications, not just the ones you use in your present roles.**
>
> **If anyone needs any support please give myself, Jill or Denise a call …."**

The email was sent to Mrs Pease's work email address. There was no evidence before the Tribunal from Mr Eades to explain why that was so or exactly what the anticipated effect on Mrs Pease would have been. In any event, Mrs Pease did not receive the email because she was not accessing her work emails; there is no finding of the ET as to why she could not access them. In any event, she learnt fairly soon afterwards that she had missed something and she rang in on 4 August 2016. At that stage she was sent a copy of the relevant form. It looks as if it was sent to her home email address. She returned it straight away and it seems that she was not in fact disadvantaged by the short delay.

6. Nevertheless, her claim under section 18 succeeded. The relevant passages in the Judgment are as follows:

> **"133. The delay in contacting Mrs Pease to give her the opportunity to return her preference form was a detriment and unfavourable treatment because it arose as a consequence of her exercising her right to maternity leave. She was anxious that she was not on the at-risk register and therefore contacted her union and the human resources department. She believed there may have been missed opportunities for a period of nine days in considering her for redeployment opportunities. Whilst it is fair of the respondent to point out that Mrs Pease had been on the register from 27 July 2016, unbeknown to her, she was nevertheless at the disadvantage of not having been able to submit her preferences. We are satisfied this would have impacted upon the ability suitably to match her to jobs and this was a detriment.**
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> **134. Moreover, the communication with her work email which she was unable to access left her in ignorance of three job opportunities. It was not suggested by Mrs Pease that these were suitable, but it was a consequence of her being on maternity leave and not having access to that information led to a legitimate concern that she was being kept out of the loop. It might be said that these disadvantages were shared by others who were on sick leave and not maternity leave. They were not disadvantages shared by those who are at work and who had access to their emails. Given that section 18 of the EqA relates to unfavourable treatment and not less favourable treatment, a comparison of this type does not assist the respondent. We are satisfied that the causal connection is established, in that the missed opportunity to furnish her details to the At Risk team and the ignorance of three potential job matches was a direct consequence of Mrs Pease's maternity leave whereby she was out of the workplace.**
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> **135. From 4 August 2016, we are satisfied that this unfavourable treatment ceased. Although the levels of communication were unsatisfactory, including the misinformation as to when her payments were to be received, this was not because the claimant was pregnant or had exercised her right to take maternity leave. The same unsatisfactory communication applied to all, regardless of whether they were on maternity leave."**

In due course she was awarded the sum of £5,000 compensation for her section 18 claim.

7. In the meantime, the Trust appealed on liability. Mr Williams really relies on three points to say that the ET have made an error of law. First, he says that the ET should not have found that there was "unfavourable treatment". Second, he says that the ET have not properly approached the question of causation, so as to justify a finding that the unfavourable treatment was discriminatory. Third, he says that the decision was perverse.

8. The first point (unfavourable treatment) seems to me, with respect, hopeless. Having an important and urgent work message sent to an email address which one cannot access for some reason must, it seems to me, amount to unfavourable treatment one way or another, although it is fair to say that the reasoning in the first sentence of paragraph 133 does not add up, insofar as it suggests that it was unfavourable treatment *because* it arose as a consequence of her exercising her right to maternity leave.

9. The suggestion that the decision is perverse is also, in my view, hopeless. There are some gaps in the ET's findings of fact but the decision in itself cannot, it seems to me, be considered perverse. On a certain view of the facts, if there had been full findings, what happened may have amounted to section 18 discrimination. Mr Williams helpfully took me to the 2011 Code of Practice, which is relevantly at page 2076 in ***Butterworths Employment Law Handbook*** where he showed me paragraph 8.23, which gives as an example of unlawful discrimination in this area a failure to consult a woman on maternity leave about changes to her work or about possible redundancy. That demonstrates that this is the type of action which could amount to maternity leave discrimination.

10. That brings me to the question of causation. I have been referred very helpfully to the decision of HH Judge Richardson in **Indigo design Build & Management Limited & Anor v Martinez (Sex discrimination: Direct)** [2014] UKEAT/0020/14/0007, which directly concerns section 18 of the **EqA**, and in which he considered the question of causation in the context of section 18 at paragraphs 29 to 36. For the reasons he gives, I agree that the ET must ask itself the standard "reason why" question in relation to why the unfavourable treatment took place and that it is not sufficient for the "but for" test to be satisfied for there to be a finding of discrimination under section 18. HH Judge Richardson also at paragraph 34 makes a statement which may be apposite in relation to this case where he says:

> **"34. …. Failure to provide a notification or a risk assessment relating to pregnancy or maternity leave may be, but is not necessarily, "because of" pregnancy or maternity leave. It may, for example, be a simple administrative error. The same process of reasoning is required in such a case as is required in any other discrimination case."**

Mr Williams (and indeed HH Judge Richardson) refer in the context of section 18 to the wider learning in relation to the relevant causation test in discrimination cases and to the case of **Onu v Akwiwu and Another** [2014] EWCA Civ 279, where Underhill J sets out the ways in which the "reason why" test can be satisfied, namely where a rule is applied which is inherently

discriminatory or where the protected characteristic has actually operated on the discriminator's mind.

11. Having regard to that law, I make the following observations. First, in this case, the ET make no finding to the effect that the characteristic of being on maternity leave operated on anyone's mind. Although Mr Eades gave no evidence, it is not possible simply to read into the Judgment some kind of finding that he was motivated by a discriminatory attitude in relation to the Claimant being on maternity leave. Nor, in my view, is there sufficient factual material or analysis by the ET to say that they had decided that an inherently discriminatory rule was applied in this case. Further fact-finding and analysis would be required before that kind of case could be upheld.

12. Second, it looks from the passages I have read from paragraph 133 and 134 as if the ET have simply applied a "but for" test; but for being on maternity leave, Mrs Pease would not have been disadvantaged. That is not sufficient for a finding of discrimination.

13. Third, the indications are, looking at the findings of the ET in para 135 in relation to Ms Pease and those in relation to Mrs Ross-Briggs, that the underlying reason in this case may have been an administrative error. The ET said this in dealing with Mrs Ross-Briggs's claims:

> **"157. Mrs Ross-Briggs has identified a series of miscommunications and errors which had to be corrected and necessitated her having to challenge a series of calculations and assertions. These related to her entitlement to maternity pay, when her maternity leave could commence and whether she had disentitled herself to a redundancy payment for refusing an offer.**
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> **158. Whilst these matters arose against the context of Mrs Ross-Briggs' pregnancy and maternity related issues, the errors and miscommunications, which were unfavourable treatment, were not because of her pregnancy or because Mrs Ross-Briggs was on maternity leave or seeking to exercise her right to such leave. Many of the claimants have identified errors made by the human resources and payroll team. In determining the reason why Mrs Ross-Briggs received such treatment, we are satisfied it was because of maladministration and error and not because the decision makers were in any way influenced by Mrs Ross-Briggs' protected characteristic."**

14. I have therefore reached the view that the finding of discrimination in Mrs Pease's case cannot stand. On the other hand I cannot myself say that it is bound to fail on the material I have and it seems to me that it will have to be remitted. I will hear Mr Williams further if he wishes but it seems to me it would be wrong to send this case off to a new Tribunal and that it should be remitted to the same Tribunal. That Tribunal will have to decide whether it would be appropriate to hear further evidence and/or whether they should or can make further findings of fact and then consider the case directing themselves properly in relation to causation.