EMPLOYMENT TRIBUNALS

Claimant: **Ms J Stolk**

Respondent: **Hunts Food Service Ltd**

Heard at: **Southampton** **On:** **9 and 10 April 2019**

Before: **Employment Judge Hargrove**
Members Mr J Shah
Mr N Knight

Representation
Claimant: **In Person**
Respondent: **Mr M Norris, Finance Director**

JUDGMENT

The unanimous decision of the Employment tribunal is as follows:

1. The claimant's complaints of unfair dismissal contrary to Section 94 of the Employment Rights Act 1996 and of pregnancy and maternity discrimination contrary to Sections 18 and 39 of the Equality Act 2010 are well founded.

2. The claimant is awarded the following sums by way of compensation.

   (1) For unfair dismissal a basic award of two weeks' pay less 20% for contributory fault amounting to £714.46.

   (2) A compensatory award for loss of earnings and for loss of statutory rights less 20% amounting to £3,961.76.

   (3) For discrimination injury to feelings £5,000

   (4) For loss of pay from 25 June – 11 July £728.30 and interest on the first two figures £5,728.30 from 11 July – to date £343.70.

   (5) Total £11,028.22.

REASONS

1. The claimant was employed as the Payroll Manager by the respondent from 1 June 2016 until her resignation with immediate effect on 11 July 2018. She presented a claim to the Employment Tribunal on 24 July 2018 having submitted an EC notification on 23 May and received a certificate of early conciliation on 23 June 2018. The respondent submitted a response denying the claims.

2. The case was the subject of a telephone case management hearing on 6 November 2018 at which the heads of claims were identified as being of unfair dismissal (constructive) contrary to Section 94 of the Employment Rights Act 1996, and discrimination on grounds of pregnancy and childbirth contrary to Section 18 of the Equality Act 2010. It is to be noted that there was no additional claim of automatically unfair dismissal for leave for family reasons contrary to Section 99 of the Employment Rights Act identified as having been made at the case management hearing.

3. At this hearing the Employment Tribunal heard evidence from the claimant and, for the respondent, Richard Hunt, Managing Director, Andrea Baily, Finance Manager and Melvyn Morris, Finance Director and Company Secretary. All relied upon witness statements. There was a bundle of documents of 57 pages to which additions were made.

4. We set out the background facts sufficient to identify the issues of fact and law.

    (1) The claimant commenced employment as the Payroll Manager on 1 June 2016 after three months as an agency worker for the respondent, the previous payroll manager having left giving only one week's notice. A statement of terms and conditions and a job description is at pages 17 – 36. We accept that the claimant's primary duty was to manage the payroll of the 450 staff of the respondent which inter alia ran two cold stores. We find that the payroll duties did not occupy all of her working hours of £37.5 per week and she was expected to help out with payroll related enquiries and also assist with purchase ledger invoicing within the finance/accounts office when time allowed. She was also required to provide reconciliation functions on a monthly basis to the Finance Director. All of these duties were consistent with her role in the business as provided for in paragraph 2 of the statement of terms and conditions and the job description.

    (2) The claimant was pregnant in January 2017 and first notified Mr Norris in March 2017, confidentially because although she was not due her first scan until April, she was having problems with morning sickness. She presented her MAT B1 form dated 26 June shortly after that date. On 3 July she gave notice to start her maternity leave on 16 October

2017, and to return to work on 1 May 2018 after ordinary maternity leave, which is 28 weeks under Regulation 7 of the MPLA Regulations 1999. The return to work date was agreed.

(3) In fact, the claimant went off on holiday for the first two weeks in September and began her maternity leave slightly early on 25 September 2017 after which she received maternity pay.

(4) There had been prior discussions about who was to be the replacement as the Payroll Manager when she was to go off work in advance of her maternity leave. The respondent had recently taken agreed to take over a small family run cold storage business which was in distress. Five employees transferred and at least two of the directors also went to work for the respondent. One of them was the former Finance Director, Marie Cornick. It was arranged that she would take over the claimant's payroll duties during her maternity leave and also manage one of the cold stores. She commenced her employment with the respondent in about June 2017 and there was a period of overlap during which she was trained up on the payroll duties by the claimant.

(5) In February 2018 the claimant contacted Mr Norris to arrange a meeting to discuss her return to work. This was originally to be on 16 February 2018 but was put off following an exchange of emails which are at page 5 of the bundle. In the claimant's opening email, she stated "I am scheduled to return to work at the beginning of May. I was hoping to return to the payroll position but due to the vacancies and maternity leave in accounts I wondered if you had other plans for me". Mr Norris responded saying that he was going to have to postpone the meeting scheduled for the next day as he was struggling to find free time before he went away, and the claimant was due to go to South Africa on holiday in March. At that time the claimant also booked their daughter, born on 1 November 2017, into a child nursery for morning sessions only from 1 May.

(6) The scheduled meeting took place on 16 March. The claimant was expecting a discussion about her return to work and the duties she was to undertake. It is to be noted that under Regulation 18 of the Maternity Regulations of 1999 she had the right to return to work "to the job in which she was employed before her absence, or if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances".

(7) We accept that Mr Norris had some genuine concerns about her performance at work, prior to her pregnancy and his discovery of her pregnancy, about some of which he had raised matters informally with the claimant, including her lateness at work in the mornings. There are a series of fourteen emails dating between 1 June 2016, which was her first day at work as an employee, and the 16 March 2017 (most prior to her pregnancy) indicating that she would be late for work. We accept the claimant's evidence given to the Employment Tribunal that the claimant's longstanding depression and the effects of the medication may have contributed to her lateness but the claimant did not give that

reason to Mr Norris at the time and he was unaware of them. Nonetheless the issue of her lateness was a material issue. Other concerns which genuinely Mr Norris had were as to her performance. In particular her unwillingness to participate in purchase ledger invoicing activities and her failure to perform and notify the other Finance Director on a monthly basis of various matters that needed reconciliation. Also he had a concern about her accessing social media websites during her working hours. Despite these concerns however, we accept that he made a conscious decision not to raise them on a formal basis when he discovered that she was pregnant.

(8) By the time of the meeting on 16 March, we find, Mr Norris had decided to attempt to put off the claimant's return to work as Payroll Manager by starting a section 111A process at the meeting. Section 111A of the Employment Rights Act provides that evidence of pre-termination negotiations is inadmissible in any proceedings in a complaint under Section 111 that is a complaint of unfair dismissal of the kind which the claimant has made in this case. This is however subject to subsections (3) – (5). Subsection (3) provides that the evidence is admissible (or rather is not inadmissible) where, according to the complainant's case, the circumstances are such that a provision, whenever made contained in or made under this or any other Act, requires the complainant to be regarded for the purposes of this part as unfairly dismissed. Subsection (4) provides that in relation to anything said or done which in the tribunal's opinion was improper or was connected with improper behaviour subsection (1) applies only to the extent that the tribunal considers just. There is no such impropriety on the part of the claimant which was concealed in this case. The fact of the matter is however, that we have had to consider the matters which were the subject of the negotiations and also other without prejudice discussions in an attempt to settle this case because in our view they are material to the other claim which the claimant makes of discrimination on grounds of pregnancy and maternity. For that reason the evidence of the pre-termination negations are, we find, admissible and relevant.

(9) We will make further findings in relation to that important meeting on 16 March 2017 in our conclusions but the respondent in the course of the mentioning of the Section 111A process on that day made an offer of £1500 tax free and £250 contribution towards her legal costs, which were likely to be incurred by the necessity for a legal agreement to settle tribunal proceedings.

(10) The only other face to face meeting between the claimant and Mr Norris took place on 20 April. It lasted only ten minutes. by that time Mr Norris had increased his offer to £2,000 plus legal costs. The claimant wanted a further increase. Mr Norris said he would need to speak to Mr Hunt and return to her. Later in April he came back with an increased offer of £4,000.

(11) On 1 May 2018, the respondent sent a draft of the proposed settlement agreement to be referred to the claimant's solicitor. We accept that by that stage the parties had agreed that the maternity leave was to continue beyond 1 May until the completion of the 39 weeks entitlement

in about the third week in June 2017. The claimant was agreeing, subject to the settlement agreement being concluded, that her return to work was to be delayed for that period. There was correspondence about the legal fees and the respondent agreed to increase to £390 plus VAT. The claimant went to solicitors on 14 May and a without prejudice letter was sent by the solicitor on 18 May submitting a much higher counter offer, somewhere in the region of £25,000. The respondent responded by letter of 22 May refusing to increase their £4,000 offer and leaving it for acceptance until 28 May. On 23 May, the claimant made an application for early conciliation to ACAS and an EC certificate was issued to her on 23 June. Also on 23 May, the claimant's solicitor rejected the respondent's offer, made allegations that she had been dismissed, which had not in fact occurred, and asked for "written reasons for dismissal". As we have stated the claimant had not been dismissed as of that date 24 May. The respondent wrote stating that they were intending to liaise directly with the claimant in respect of a return to work.

(12) On 25 May an email was sent by the respondent to the claimant asking her to get in touch with regard to a written to work which was followed up by an email chase up on 1 June. The claimant did not respond to either. The claimant's maternity pay continued until the third week in June, paid at the end of that month.

(13) On 3 July the claimant by her solicitors reduced their offer of settlement from over £25,000 to £12,000 with a reference.

(14) On 11 July Mr Norris wrote rejecting that and referring again to a return to work.

(15) On 12 July the claimant submitted her resignation letter dated 11 July by email which we set out in full.

> "I am writing to inform you that I am resigning from my position as Payroll Manager with immediate effect. Please accept this as my formal letter of resignation. I feel I am left with no choice but to resign in light of my recent experiences regarding a fundamental breach of contract. I feel I have been discriminated against because of my pregnancy and subsequent maternity leave. I feel that Hunts Food Service Ltd has acted in such a matter that has caused me much distress and damage to my reputation. I consider your conduct to be a fundamental breach of contract on your part and I have lost all faith in our working relationship".

(16) We accept that the claimant submitted her grievance letter with the intention of making subsequent applications for re-employment. She obtained a short-term three week contract in August and was offered a permanent job with another employer at a higher rate of pay on 3 October to start on 31 October 2018.

5. The relevant statutory provisions and the tribunal's self directions on the law.

(1) Section 18 of the Equality Act which deals with pregnancy and maternity discrimination materially provides as follows:

> "(1) This Section has effect for the purposes of the application of Part V (work) to the protected characteristic of pregnancy and maternity.
>
> (i) 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 the pregnancy…
>
> (ii) 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.
>
> (iii) For the purposes of (ii) if the treatment of a woman is in implementation of a decision taken in the protected period the treatment is to be regarded as occurring in that period even if the implementation is not until after the end of that period.
>
> (iv) The protected period in relation to a woman's pregnancy begins when the pregnancy begins and ends.
>
> (a) If she has the right to ordinary and additional maternity leave at the end of the additional maternity leave period or, if earlier, when she returns to work after the pregnancy.
>
> (v) Section 13 so far as relating to sex discrimination does not apply to treatment of a woman insofar as it is in the protected period".

It is to be noted that the references is to "unfavourable treatment", not to less favourable treatment, if the claimant is submitted to unfavourable treatment which is related in some way to treatment during the relevant period. There is no requirement for a comparison with a comparator who is not pregnant. Such a claimant will have a claim against the employer because Section 39(2) of the Equality Act provides that an employer must not discriminate against an employee in the way that he affords access to, or not or refuses to afford the employee access to opportunities for promotion, transfer or training, or for receiving any other benefit, facility or service, or by dismissing the employee, or by subjecting the employee to any other detriment. To deny or to delay the right to return to work is a detriment and a disadvantage.

(2) As to the claim for constructive dismissal, Section 39(7) provides that the reference to dismissing the claimant includes a reference to the "termination of the claimant's employment by an act of the employers including giving notice in circumstances such that the claimant is entitled because of the employer's conduct to terminate the employment without notice."

(3) That definition of constructive dismissal is mirrored in Section 95(1)(c) of the Employment Rights Act which contains this definition:
" The employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."
The conduct must amount to a fundamental breach of a term of the contract of employment. In this case the term on which the claimant relies is the implied term of trust and confidence. There is a term implied in all contracts of employment that neither party to the contract will act in such a way, without reasonable and proper cause, such as to destroy or seriously damage the trust and confidence of the employee in the employer or the employer in the employee. If that is proved and the claimant resigns in reliance in part at least upon that breach by the employer, and resigns without affirming the breach; in other words without continuing the contract, then that person is constructively dismissed.

Conclusions

6. The claimant had the unfettered right to return to work to her original job under the terms of her existing contract on 1 May. We have accepted that at the meeting on 16 March, which was scheduled as a meeting to discuss her return to work and nothing else, Mr Norris stated that he did not think it appropriate for her to continue to work at Hunts, citing her performance, her attitude and her demeanour at work. This was the first time that any complaint had been raised against her in a formal setting. It was tantamount to stating to her that she was not to be allowed to return to work. It was also tantamount to saying that they no longer had confidence in her. That was in itself unfavourable treatment and a detriment under Section 18 of the Act entitling her to make a claim at that stage for injury to feelings. However, we reject the claim that this process was entered into by Mr Norris in bad faith from the start and that from the start of her maternity leave there was in place a plan whereby her job was to be replaced permanently by the services of the recently employed Maria Cornick. The respondent must have made some enquiries as to the application of Section 111A, but the process was carried out without thought and in such a way as, we find, to destroy the claimant's trust and confidence in the respondent.

7. That is the next issue or one of the next issues which we have to decide. We find that his remark at the start of the process and the conduct of the meeting as a whole was sufficient to undermine trust and confidence. It clearly related to her pregnancy and absence on maternity leave

8. The next issue we have to decide is whether the claimant resigned in part at least due to that conduct. We decide that clearly she did and she cited it within her resignation letter. Although we do not accept the serious contentions that she is now making against her employer, who otherwise

acted in good faith in the course of this process but failed to comply with the necessary provisions in Section 18 and the Regulations, we accept that she resigned in part because of repudiatory conduct. We then had to decide whether she subsequently affirmed the continuation of the contract. If someone faced with repudiatory conduct by the employer continues to work under the terms of their contract without objection for a considerable period of time there will come a time when effectively the misconduct on the part of the employer has been forgiven.

9. We had to ask whether that had occurred in this particular case. We clearly decide that it had not taken place because the claimant was agreeing to the continuation of the contract only for the purposes of an agreed termination on monetary terms. That possibility came to an end at the end of May 2018. She continued only for a limited period of time during which early conciliation was taking place, ending on 25 June. She was hoping that the matter could be resolved without having to recourse to a tribunal. That is not affirmation of the contract, nor is the receipt of maternity pay which in any event stopped on 25 June, the claimant still having the right to return to work at that stage. She was entitled to ignore the letter inviting her to return for a short period of time during she considered her position. Within that short period of time, within a fortnight or so, she sent in her resignation letter.

10. For these reasons we find that the claimant's claims of discrimination in relation to her right to return to work for maternity leave were breached and the claimant was constructively dismissed both for the purposes of the unfair dismissal claim and for the purposes of the discrimination claim. As to the finding of unfair dismissal, the obligation would fall upon the respondent to prove a reason for dismissal of an admissible kind specified in Section 98 of the Employment Rights Act. It does not put forward any such reason, but has merely denied that it is guilty of repudiatory conduct justifying a dismissal. For that reason, we find the dismissal unfair.

11. We have decided to award compensation for loss of earnings under the Employment Rights Act. Sections 122 and Section 123 deal with the calculation of the basic and compensatory awards.

12. Section 122(2) provides that "where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly". There is a similar but not identical provision in Section 123(6): "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding"

13. . We accept that there was some contributory fault on the claimant's part for the reasons set out in paragraph 4(7) above, but we also recognise that the respondent did not deal with his concerns appropriately and at the appropriate time.

14. We think that it calls for a small reduction in percentage terms in both the basic award and the compensatory award. We fix that reduction as being of 20%. We have calculated the basic award as being two weeks pay at

£446.54 gross per week which amounts to £893.08 reduced by 20% which amounts to £714.46.

15. In respect of the compensatory award, the loss from the date of termination of earnings is to be calculated commencing on the 11 July and ending when the claimant found alternative employment at a higher rate of pay on 31 October. That is sixteen weeks net pay at £364.15 per week making £5,826.40 less £874.20 received in temporary employment in August making a sub heading of £4,952.20. That sum, reduced by 20%, amounts to £3,961.17.

16. There is to be added to that the figure of £350 for loss of statutory rights. As to the compensatory award for injury to feelings, which is to be awarded under Equality Act, we find that in all of the circumstances the appropriate award is within the lower band of Vento as uprated for inflation, a figure of between £1,800 - £8,200. We find the appropriate award to be £5,000. There is to be added to that the figure of two weeks pay from the end of the maternity leave period until 11 July which is not to be reduced for contributory fault, which does not apply to claims for compensation for discrimination. That figure is £728.30.

17. Interest is payable on awards in discrimination cases at the rate of 8% per annum. The interest runs from the date of the discriminatory act, which is taken to be date in July 2018 when the claimant resigned claiming constructive dismissal, up to the date of the award. The interest figure amounts to £343.70.

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Employment Judge Hargrove

Date 24 April 2019.