EMPLOYMENT TRIBUNALS

Claimant: Miss J Green

Respondent: Doncaster and Bassetlaw Hospitals NHS Foundation Trust

Heard at: Sheffield **On:** 10 and 11 September 2018

Before: Employment Judge Little
Mr L Priestley
Mr D Fell

REPRESENTATION:

Claimant: In person (accompanied by PSU volunteers)
Respondent: Mr R Dunn of Counsel (instructed by DAC Beechcroft LLP)

JUDGMENT having been sent to the parties on 24 September 2018 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. These reasons are given at the request of the claimant. She made that request in her email of 29 September 2018. The Tribunal wrote to the claimant on 15 October 2018 apologising for the delay in dealing with her email, and explaining that the request had just been forwarded to Employment Judge Little. We should add that the issue date given in the Judgment is shown as 24 August 2018 but obviously that is an error because the case was heard in September, and the Employment Judge signed the Tribunal's Judgment on 17 September 2018. The date of issue should therefore have been recorded as 24 September 2018.

2. **The Complaints**

In this claim Ms Green complains that the respondent made errors in the calculation of her occupational maternity pay. At a preliminary hearing conducted on 27 April 2018 before Employment Judge Rostant it was agreed that in legal terms the complaints before the Tribunal were **an alleged breach of the maternity equality clause deemed by the Equality Act 2010 section 73**, to be included in the terms of the claimant's contract, and a complaint of **unauthorised deduction from wages contrary to the Employment Rights Act 1996 section 13**.

Specifically, the claimant contended that:-

- Initially the respondent failed to include a pay rise which the claimant had been awarded on 1 September 2016 (shortly before the claimant's maternity leave which commenced on 19 December 2016);

- That the respondent also failed to include a national pay increase of 1% from 1 April 2017 (at an abortive hearing before Employment Judge Traylor in July 2018 the claimant had been permitted to add this aspect);

- That there was a failure to recognise that the claimant's return of a car leased under the NHS Car Lease Scheme should, on the claimant's case, have resulted in her pay reverting to its level prior to a salary sacrifice.

Shortly before the preliminary hearing in April 2018 the respondent had made a payment of £1,478.68 to the claimant representing the shortfall by reason of the December 2016 pay rise and also, it said, the subsequent national 1% pay rise. As matters stood on the first day of our hearing, the claimant accepted that belatedly the first pay rise had been reflected accurately in her maternity pay, but she was still uncertain whether the second one had. However, on the second day the claimant conceded that the 1% increase had been included in the calculations of the sum of money which had eventually been paid to her in April 2018.

In any event the claimant sought damages under section 132 of the Equality Act 2010 or payment of compensation under the Employment Rights Act 1996 section 24(2) in each case to compensate her for the financial loss sustained in consequence of the late payment. That amounted to a recovery of interest incurred on her Barclaycard.

3. **Time Issue**

An issue about the time of presentation had been raised by the respondent in its ET3 response. However, at the April 2018 preliminary hearing before Employment Judge Rostant, his provisional view had been that the effect of the Equality Act 2010 section 129 was that the section 73 complaint had been brought in time. Before us Mr Dunn confirmed that the respondent now accepted that both complaints had been presented in time.

4. **Issues**

The major issue before us has been the salary sacrifice and its ramifications.

5. **Evidence**

The claimant has given evidence and we have also read two brief statements, one from Michael Leng, Head Biomedical Scientist, and the other by Sarah Drydale, another colleague of the claimant. Neither of those individuals attended the hearing.

The respondent's evidence has been given by Mr N Newham, Payroll Manager with NHS Shared Business Services Limited, and by Ms Karen Barnard, the respondent's Director of People and Organisational Development.

6. **Documents**

The Tribunal have considered documents within an agreed trial bundle which now runs to 320 pages. A few additional documents had been added by the respondent at the beginning of our hearing, although the claimant confirmed that she had been provided with those additional documents some weeks prior.

7. **The Tribunal's Findings of Fact**

7.1 The claimant is employed by the respondent as a Specialist Biomedical Scientist. That employment commenced on 3 June 2013.

7.2 On 23 July 2014 there was a variation to the claimant's contract of employment. That was in the context of the respondent supplying a car to the claimant under the NHS Car Lease Scheme. The claimant signed an official order form with NHS Fleet Solutions on 23 July 2014 (page 120) and on the same day signed a variation of contract of employment document with the respondent (pages 121-122).

7.3 Clause 6. of the latter document provided as follows:-

> "In the event that you accept the variation in paragraph 3 of this variation of contract (which should clarify that paragraph 3 dealt with a salary sacrifice whereby the claimant's gross salary would be reduced from £16,271 per annum to £12,914.63 per annum) and you have a major lifestyle change in your personal circumstances such that you no longer wish to make use of the lease car, you may invite the employer to enter into negotiations to vary the terms and conditions of your revised contract of employment. This will be solely at the discretion of the employer, who will not normally consider invitations to renegotiate your contract during the life of the lease, but may do so where there is a major lifestyle change event, for example on the birth of a child. The lease period runs from the effective date of variation in paragraph 3."

7.4 On 1 December 2016 the claimant was promoted from Band 5 to Band 6. That increased her salary from £21,909 per annum to £26,302 per annum.

7.5 On 8 December 2106 the claimant completed a pro forma issued by NHS Fleet Solutions. That form had been provided following the claimant's request for early termination of the car lease. There is a copy at page 105A. The form sets out various lifestyle changes, including "employee becoming pregnant". The claimant had ticked that box. She returned the car and paid the early termination fee of £206.66.

7.6 On 19 December 2016 the claimant began her maternity leave.

7.7 From March 2017 onwards the claimant made various enquiries of the respondent as to whether her maternity pay (which was occupational maternity pay) was being calculated and paid correctly. Among other things the claimant believed that the salary sacrifice should no longer apply as she had surrendered the car and accordingly she believed that

her maternity pay should not have been based on the lower sacrificed salary.

7.8 In April 2017 a national 1% pay increase was implemented for NHS staff.

7.9 Being still dissatisfied about her maternity pay, the claimant raised a grievance on 11 November 2017 (page 191) and a further grievance on 30 January 2018 (page 201).

7.10 The claimant returned from maternity leave in January 2018 and her employment continues.

7.11 The claimant's grievance was considered by Ms Barnard but an outcome letter was not issued until 5 January 2018 (see page 294). Prior to issuing that letter Ms Barnard had not conducted a grievance hearing with the claimant.

8. **The Parties' Submissions**

8.1 <u>The Respondent's Submissions</u>

8.1.1 Mr Dunn had prepared a skeleton argument which the Tribunal considered. He also provided us with copies of an EAT decision in the case of **BMC Software Limited v Shaikh UKEAT/0092/16/DM**, and **694 Alabaster v Woolwich PLC [2005] ICR 695**, a decision of the Court of Justice.

8.1.2 In his oral submissions Mr Dunn pointed out that whilst the Employment Rights Act 1996 section 24(2) and the Equality Act 2010 section 132(2) permitted recovery of incidental losses, that did not extend to injury to feelings.

8.1.3 In relation to the salary sacrifice we were referred to the terms of the agreement which the claimant had entered into, and in particular clause 6 of that agreement. The respondent contended that it was entitled to consider the salary sacrifice in the claimant's maternity pay calculation because the full implications of the variation of contract had been explained to the claimant at the time she had entered into the salary sacrifice arrangement.

8.1.4 With regard to the complaint under the Equality Act 2010, the claimant was unable to show that even if she had not gone on maternity leave that her salary would have increased before April 2017 so as to reflect the return of her lease car. Accordingly, she was not able to show that section 74(2)(b) –(that in the relevant period her pay would have increased had she not been on maternity leave) – had been satisfied. That was to be contrasted with the claimant's promotion and resultant higher pay.

8.1.5 In his oral submissions, Mr Dunn queried whether the claimant had sustained a financial loss because although she had been

deprived of part of her maternity pay reflecting the pay rises she had at the same time been in receipt of an overpayment from the respondent in almost the same amount. In any event, the claimant had only provided Barclaycard statements from January 2018 and so it was unknown what the state of the claimant's debt to Barclaycard was prior to that. There was no evidence of any other accounts which the claimant may have maintained. Moreover, the claimant had accepted that her expenditure was likely to have increased because of her new child.

8.1.6 We were reminded that NHS Fleet Solutions was a separate organisation to the respondent. Mr Dunn noted that the claimant had not invited negotiations to take place under clause 6 of the variation of contract. The pro forma (page 105A) which the claimant had sent to NHS Fleet Solutions did not have that effect. On the enquiry of the Employment Judge, Mr Dunn conceded that the claimant's subsequent grievance could be viewed as an invitation to enter into negotiations, but in any event the respondent retained an absolute discretion.

8.1.7 The Employment Judge also asked Mr Dunn to comment on what a layperson would no doubt consider to be an unfair result – that the employee deprives herself of the car (albeit voluntarily) but is then paid maternity pay at a rate which in a sense assumes that she still has the car. Mr Dunn accepted that this would appear unfair but nevertheless the claimant had entered into that contract. There had been no discrimination.

8.2 <u>The Claimant's Submissions</u>

8.2.1 The claimant believed that initially both the respondent and NHS Shared Business Services Limited had been unaware that by law pay increases should have been reflected in maternity pay. The Equality Act 2010 had been breached. The claimant had suffered a lot of stress and she required compensation for that. She had not used her Barclaycard prior to January 2018. It had been illegal for the respondent to make deductions in respect of the car after it had been returned. Clause 3 of the variation did not impose any time limit and the claimant had contacted the respondent. She accepted that she had not in so many words asked the respondent to renegotiate, but there had been the grievance she raised. The net result was that the Trust had benefitted by reducing the claimant's salary. The claimant sought an uplift because she believed that the ACAS Code had been broken with her regard to her grievance, which had taken 7½ months to complete.

8.2.2 The claimant went on to say that she had not wanted it to come to this hearing and at this point appeared to be about to tell the Tribunal about recent ACAS negotiations. She was informed that the Tribunal should not be made aware of such matters.

She had been the victim of three errors by the respondent in terms of calculating her maternity pay. She did not want to be in the same position with her next child. A dark cloud had hung over her during what should have been a happy time. Although the claimant acknowledged that she had been in receipt of an overpayment form the respondent for 12 months, she believed that she was entitled to bring these proceedings to ensure that the respondent followed the correct procedure.

9. **The Tribunal's Conclusions**

9.1 Should the claimant's salary sacrifice have been restored on the return of the car?

9.1.1 This question is relevant to the issue of whether that event, if it had occurred, would have represented a pay increase, in turn resulting in a modification under the Maternity equality clause – and so an alteration to the claimant's benefit in the calculation of her maternity pay.

9.1.2 The respondent says that the claimant did not have a contractual entitlement to restoration of full pay. Although it is not pleaded in their grounds of resistance, the respondent now relies on Equality Act 2010 section 74(2)(b). This is one of the conditions which must be satisfied before a modification can take place. The condition is that in the relevant period (the reference period to the end of the protected period) the woman's pay would have increased if she had not been on maternity leave.

9.1.3 The respondent says that the effect of clause 6 of the variation agreement is that the claimant's pay would not have increased on the return of the car if the claimant had remained in work. That is because, they say, she had no contractual right to the restoration of her pay during the remainder of the notional lease period. The respondent's witness, Mr Newham, when giving evidence to us did not appear to agree with that proposition and instead agreed with the claimant that she would have got the salary back if she had not been on maternity leave. However, with respect, Mr Newham is not legally trained and ultimately it is for this Tribunal to decide what the claimant's contractual entitlement was.

9.1.4 We do not find the brief written evidence of Mr Leng and Ms Drydale particularly helpful. That is because their circumstances differ from those of the claimant. We should add that Ms Barnard's evidence was that she had never encountered a case where the circumstances were the same as the claimant's. Neither Mr Leng nor Ms Drydale have been present to be questioned by respondent's counsel or the Tribunal.

9.1.5 Because it is this Tribunal which is required to construe the contract, even if the same contract had, for the sake of argument, been misapplied in the cases of Mr Leng and Ms Drydale, that would not alter the correct legal analysis.

9.1.6 On the evidence before us it is doubtful whether the claimant ever invited the respondent to enter into negotiations as to the consequences of the returned car. Although we have mused that her grievance might have been such an approach, that still leaves the claimant with the difficulty as to the broad discretion, which clause 6. invests in the respondent. The claimant has not pursued her case on the basis that there has been a capricious exercise of that discretion.

9.1.7 Therefore, whilst it is common ground that the effect of clause 6 could be unfair, that does not alter the fact that it is part of the bargain struck between the parties. Accordingly, we conclude that the result is that one of the essential conditions for the application of the maternity equality clause has not been satisfied. The claimant's pay would not have increased on return of the car if she had not been on maternity leave. Accordingly we find no breach of that maternity equality clause.

9.1.8 Viewed as an unauthorised deduction from wages complaint, the position is the same in that the claimant was not, on our finding, contractually entitled to the monies which she alleges were unlawfully deducted.

9.2 <u>The promotion pay rise and the 1% pay rise</u>

The respondent concedes that it was in breach of the Equality Act section 74, and for that matter that it had made unauthorised deductions from the claimant's wages in respect of these elements of maternity pay. Ultimately, the respondent has rectified this breach by making the payment of £1,478.68 to the claimant, but only in April 2018. In these circumstances we find that the claimant is entitled to a declaration that there had been both a breach of the maternity equality clause and an unauthorised deduction from wages in respect of these two elements, which were not at the time reflected in her maternity pay.

9.3 <u>Is the claimant entitled to compensation for consequential financial loss?</u>

9.3.1 Here the claimant seeks damages of £314.46 in respect of interest incurred on her Barclaycard. We agree with Mr Dunn’s submission that the limited and redacted evidence that the claimant has provided about this – the statements between pages 308-214 – are unsatisfactory. No opening balance is shown nor is there any indication of what purchases or other transactions were done using that card.

9.3.2 However, over and above that, the Tribunal were informed on the first day of the hearing – and given further information on the

second day – that the claimant had in fact received an overpayment from the respondent in December 2016. That was an overpayment in the amount of £1,481.39. We understand that it had arisen because the claimant's pay rise resulting from her promotion had been backdated to an erroneous date. We were referred to the respondent's letter of 10 May 2017 (page 249) which informed the claimant of this overpayment and notified her that the respondent intended to recover that repayment by making monthly deductions from the claimant's pay, but only commencing in January 2018.

9.3.3 The claimant had made no reference to this whatsoever in her evidence, but more surprisingly neither had the respondent until it seeped out on the first day of the hearing during the cross examination of Mr Newham, who is employed not by the respondent but by NHS Shared Business Services Limited.

9.3.4 As the money of the respondent that the claimant had possession of (when she should not have) virtually matched the maternity pay which the respondent had kept her out of, we concluded that the claimant had not suffered a consequential financial loss during the relevant period. Accordingly we were not prepared to make an award of damages.

10. **Final Observations**

Having given reasons for our judgment on the day, we commented to the parties that this had been an unfortunate case as it appeared that if the parties could have held a round table meeting it seemed that the dispute could have been nipped in the bud and resolved at an earlier stage without the need for these proceedings. Although in the circumstances there was no financial award made to the claimant to which an uplift could be applied, we also observed that the respondent had failed to deal with the claimant's grievances in accordance with the ACAS Code. Ms Barnard had failed to hold a meeting with the claimant (which could have resulted in a resolution) and there had been inordinate delay in the grievance outcome being delivered to the claimant. Bearing in mind that the claimant continues to be employed by the respondent, that makes these failings all the more significant.

Employment Judge Little

Dated: 8th November 2018