



EMPLOYMENT TRIBUNALS

Claimant: Mrs Liliana Martins Salvador

Respondent: T & A Textiles & Hosiery Limited

Heard at: Manchester

On: 25 and 26 February 2019
18 March (In chambers)

Before: Employment Judge Hill
Mr Q Colborn
Dr H Vahramian

REPRESENTATION:

Claimant: Miss Jones (Counsel)

Respondent: Mr Hanif (Co Director)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim of Direct Discrimination is well founded and succeeds.
2. The Claimant's claims of Pregnancy/Maternity Discrimination are well founded and succeed.
3. The Claimant's claim for automatically unfair dismissal on the grounds of her pregnancy/childbirth is well founded and succeeds.
4. The Claimant's claims for unlawful deduction of wages are well founded and succeed.
5. The Respondent is order to pay compensation in the sum of £20,407.77.

REASONS

Evidence

1. The Tribunal was provided with a bundle of documents consisting of 483 pages that had been agreed between the parties. The Claimant produced a written witness statement and gave oral evidence. The Respondent produced three witness statements from: Mr Adnan Aslam; Mr Asjed Qayyum and Mr Salim Mirza who all chose not to give oral evidence. The Tribunal spent some time discussing with the Respondent and their representative the implications of their decision. The Tribunal reminded the Respondent that the decision was theirs but by not giving oral evidence the Claimant would be unable to test their evidence through cross examination and that the Tribunal would attach such weight to the statements as it considered appropriate. Mr Aslam was in attendance at the Tribunal hearing but confirmed that he did not intend giving oral evidence but that the Respondent intended relying upon a transcript of a telephone conversation between the parties included in the bundle (pages31-46).

Issues for the Tribunal to determine

The Tribunal discussed the issues to be determined at the outset of the hearing and during submissions. It was agreed between the parties that the Claimant was entitled to payment in respect of annual leave accrued during her maternity leave, payment for attending ante-natal appointments and payment for a shortfall in statutory maternity pay. It was also agreed that treatment complained of occurred during the protected period (see 3. below).

Discrimination

2. Direct Sex Discrimination S13 Equality Act 2010

2.1 Was the Claimant subject to the following treatment?

2.1.1 Did Adnan Aslam ask the Claimant if she “had any plans to get pregnant” during her interview on 27 January 2016?

2.1.2 If the above is not accepted, did Adnan Aslam ask the Claimant whether “she had any plans to get pregnant” on the day she started employment on 1 February 2016?

2.2 Has the Respondent or any of its employees treated the Claimant less favourably than it treated or would have treated a compactor?

2.3 Does the Claimant reply upon an actual or hypothetical comparator?

2.4 Was the Claimant subject to less favourable treatment because of her sex?

3. Pregnancy/Maternity Discrimination S 18 Equality Act 2010

- 3.1 Was the Claimant subject to the following treatment?
 - 3.1.1 When the Claimant told Imran about her pregnancy in August 2016, did Imran remind the Claimant about her response to Adnan Aslam's question at the interview (or her first day if the Tribunal are against the Claimant in respect of 1.1.1 above)?
 - 3.1.2 Did Imran Aslam say that the best thing for the Claimant to do was for her to resign as the business was not doing well and that they were considering terminating her contract?
 - 3.1.3 Did the Claimant decline to leave?
- 3.2 Has the Respondent or any of its employees treated the Claimant less favourably?
- 3.3 Was the unfavourable treatment in the protected period?
- 3.4 Was the unfavourable treatment because of her pregnancy?
- 3.5 Was the Claimant subject to the following treatment?
 - 3.5.1 In October 2017 when the Claimant requested a letter from Asjed Qayyum to confirm her employment, date of return to work and salary in support of her mortgage application, did Asjed Qayyum say that he would give her the letter if she resigned from her post?
- 3.6 Has the Respondent or any of its employees treated the Claimant unfavourably?
- 3.7 Was the unfavourable treatment in the protected period?
- 3.8 Was the unfavourable treatment because of her pregnancy and or as a result of her being on maternity leave?
- 3.9 Was the Claimant subject to the following treatment?
 - 3.9.1 Did Asjed Qayyum send an email to the Claimant containing a notice of termination of resignation to terminate her employment?
 - 3.9.2 Did the Claimant ask Asjed Qayyum to send her such a letter?
- 3.10 Has the Respondent or any of its employees treated the Claimant unfavourably?
- 3.11 Was the unfavourable treatment in the protected period?
- 3.12 Was the unfavourable treatment because of her pregnancy and/or as a result of her being on maternity leave?

- 3.13 Was the Claimant subject to the following treatment?
- 3.13.1 Did the Respondent send the Claimant a letter reducing her hours to 3 hours per day 4 days per week?
- 3.13.2 Did the Respondent properly consult the Claimant on this?
- 3.14 Has the Respondent or any of its employees treated the Claimant unfavourably?
- 3.15 Was the unfavourable treatment in the protected period?
- 3.16 Was the Unfavourable treatment because of her pregnancy and/or as a result of her being on maternity leave?

Unfair Dismissal

4. Has the Claimant been dismissed?
5. Was the dismissal connected to the Claimant's pregnancy/childbirth and thus automatically unfair?
6. Was the dismissal for one of the potentially five fair reasons as per section 98(1) and (2) of the Employment Rights Act 1996?
7. If so, did the Respondent in all the circumstances act reasonably in treated that reason as a sufficient reason for dismissal?

Constructive Unfair Dismissal

8. If the Claimant was not dismissed did she terminate the contract?
9. Was she entitled to do so without notice by reason of the Respondent's conduct?
- 9.1 In particular, was there a repudiatory breach of contract by the Respondent of the express or implied terms of the contract?
- 9.2 Did the Claimant resign in response to that breach?
- 9.3 Did the Claimant delay in resigning?
10. If so, was the constructive dismissal unfair?

Unlawful Deductions – Agreed between the parties

11. Has the Respondent failed to pay the Claimant annual leave whilst pregnant contrary to Regulation 16(1) and Regulation 13 of the Working Time Regulations 1998?
12. Has the Respondent failed to pay the Claimant for her time off to attend ante-natal appointments contrary to section 56(1) of the Employment Rights Act 1996?

13. Has the Respondent failed to pay the Claimant the correct rate of statutory maternity pay prescribed under section 166(1)(b) of the Contributions and Benefits Act 1992?

Relevant Facts

14. The Claimant by way of an ET1 dated 17 May 2018 brought claims of Direct Discrimination on the grounds of sex; Pregnancy and maternity; unfair dismissal/constructive dismissal; automatic unfair dismissal for a reason connected with her pregnancy/childbirth and Unlawful deduction of wages.

15. The Respondent defended the Claimant by way of an ET3 dated 3 August 2018 denying that it discriminated against her on the grounds of her sex/pregnancy/childbirth and that she was not dismissed constructively or otherwise. The Respondent also brought a counterclaim which it withdrew on the grounds that it accepted the Tribunal had no jurisdiction to hear such a claim.

16. In January 2016 the Claimant applied for the position of Office Assistant as advertised via the website Gumtree and was invited to attend an interview at the Respondent's premises on 27 January 2016. The interview was conducted by Mr Asjed Qayyum.

17. During the course of the interview Mr Adnan Aslam and Mr Imran Aslam who are Directors of the Company, came into the interview and asked the Claimant about her personal life including questions regarding the number of children she currently had and whether she had any plans to become pregnant. The Claimant said that she found the questions to be intrusive, personal and unprofessional.

18. The Respondent denies that Mr Adnan Aslam or Mr Imran Aslam came into the interview or that they asked the Claimant about her plans to get pregnant during the interview. During the course of the hearing the Respondent confirmed that the Claimant was asked questions about her personal situation and whether she intended getting pregnant but that it was not during her interview but on her first day at work. The Tribunal preferred the evidence of the Claimant. The Claimant's evidence was consistent and she gave clear oral evidence when cross examined on this point during the course of this hearing.

19. The Claimant started work on 1 February 2016 as an office assistant. Her role involved dealing with customer enquiries; taking orders; booking couriers; chasing deliveries and checking stock. The Claimant was paid £6.70 per hour and was contracted to work 6.5 hours per day over 5 days; a total of 32.5 hours per week.

20. The Claimant stated that she enjoyed her job and had a good working relationship with her colleagues and managers. She was not subjected to any disciplinary issues and had not had any complaints regarding her work from customers, colleagues or managers.

21. In August 2016 while on annual leave the Claimant found out that she was pregnant. Her baby was due in March 2017. Upon her return to work the Claimant informed her manager, Asjed Qayyum, who told her to inform Mr Imran Aslam.

22. The Claimant informed Mr Imran Aslam who told her that the Company had been considering her position within the company and that the business was not doing well. He told her that as a result he was considering terminating her employment and suggested that she should resign. Mr Imran Aslam also reminded the Claimant of their previous conversation regarding her plans in respect of becoming pregnant. The Claimant refused to resign.

23. The Claimant was upset; anxious and stressed as a result of this conversation and considered that she was in a fragile position within the workplace. The Claimant told the Tribunal that as a result she did not sleep well and that it also affected her family life.

24. After taking advice from the CAB, on 22 November 2016 the Claimant notified the Respondent in writing of the fact that she was pregnant; her due date; her holiday entitlement and when she intended starting her maternity leave. The Respondent did not respond to this letter. The Claimant therefore sent a further letter dated 22 December 2016.

25. The Respondent asserted in its ET3 that they implemented the firm's maternity procedures but no evidence was adduced on this point and the Tribunal accepted the Claimant's evidence that the letters were not responded to and that the Respondent failed to carry out a risk assessment.

26. During her pregnancy the Claimant attended regular ante natal appointments. The Claimant was not paid when she took time off to attend the appointments. The Respondent accepted at the hearing that it had kept a record of when the Claimant was absent and that they made deductions from her pay. The Tribunal was provided with a list of dates created by the Respondent at pages 139 and 140 of the bundle.

27. The Claimant had a difficult pregnancy and suffered from swelling in her ankles. Despite her difficulties the Claimant continued working although after informing the Respondent that she was pregnant she had been moved to another office without explanation. The Respondent did not carry out a risk assessment and did not enquire after her health. The Claimant's condition deteriorated at the beginning of February 2017 and she requested a meeting with her managers to discuss starting her maternity leave early due to her health.

28. At this meeting Mr Adnan Aslam asked the Claimant if she intended to return to work after her maternity leave and the Claimant confirmed that she did. The Claimant requested that she start her maternity leave on 13 February 2017. The Respondent requested that she start one week later due to a trade show during that week and the requirement for the Claimant to do the paperwork. The Claimant agreed.

29. The Claimant developed pre-eclampsia and was taken into hospital on 11 February 2017 and her baby was delivered by emergency C section. The Claimant informed the Respondent in writing.

30. During the Claimant's maternity leave the Claimant required confirmation of her employment for a mortgage application she and her husband were making. The

Claimant contacted Asjed Qayyum and requested a letter. Mr Qayyum informed the Claimant that she could have a letter if she resigned. Mr Qayyum drafted an email and told the Claimant that she should print it off and sign and return the resignation letter.

31. The Respondent denied this allegation. The Respondent relied upon a witness statement from Mr Qayyum where he alleged that the Claimant was 'emotionally blackmailing' him to set up a constructive dismissal claim and that the Claimant had offered to give Mr Qayyum a percentage of any damages she recovered. The Respondent stated that it investigated this matter and subsequently disciplined and demoted Mr Qayyum as a result. They did not provide any evidence to support this and although a witness statement from Mr Qayyum submitted, he did not give oral evidence and the Claimant was unable to cross exam on this point. The Claimant gave evidence that this was not the case and provided consistent clear evidence that she had been asked to resign. An email was produced by the Claimant from Mr Qayyum at page 83 of the bundle dated 24 October 2017 setting out a resignation letter to be signed by the Claimant.

32. The Tribunal accepted the Claimant's evidence on this point and finds that the Claimant was asked to resign in return for a letter confirming her employment and salary. In the end the Claimant and her husband were able to secure their mortgage based on her husband's income only.

33. The Claimant was due to return to work on Monday 12 March 2018. She had taken advice from the CAB regarding her return date and had been informed that she should return on 12 February 2018. This was the end of her period of maternity leave. The Claimant contacted the Respondent and was informed via text (page 148 of the bundle) by Mr Qayyum that she should return on 14th because both Mr A Aslam and Mr I Aslam were away on business and that Mr Adnan Aslam would meet with her then.

34. The Claimant was concerned about exceeding her maternity leave and therefore returned to work on 12 February. Upon her arrival at the office she noticed that there was no computer on her desk and that both Adnan and Imran were in the office. The Claimant asked to speak to Mr Adnan Aslam. The Claimant said that she had lost trust in her employers and decided to record the conversation. The Tribunal was provided with a transcript of the conversation set out at pages 32-49 of the Tribunal bundle.

35. There was no dispute between the parties as to the accuracy of the transcript. And indeed the Respondent stated that the reason they would not give oral evidence was because they intended relying upon the contents of the transcript.

36. During this conversation the Respondent made it clear that the Claimant's job was no longer available and said; *"In nine months, we have to put someone else who can takeover, a little this, a little that, you know what I mean, whatever we can adjust. So now I can't go take that stuff away from that guy and tell you that you're now going to do it, you know, where I'm going to put that guy somewhere else?"*

37. The Respondent also questioned the Claimant's reliability and said "*we don't know how positive you're going to be because we need a reliable, to be 100 percent and beyond.*"

38. At this meeting the Claimant was told that there was not a full time position available and that the Respondent could only offer part time hours. The Respondent asked the Claimant to tell him the days that she was free. The Claimant said that she wanted the hours that she had previously had.

39. The Claimant was also criticised for coming into work on 12th instead of 14th. Mr Adnan Aslam in respect of her coming in on 12th "*now you are here because you need to work everything by the law*".

40. The Claimant responded to this by asking whether they could "*settle a deal*" because she did not "*want to be in one place that I'm not welcome*". Mr Adnan Aslam said that as she was doing things by the law then he had to be consistent in what he did. He also referred to the fact that she had been asked whether she was going to this (get pregnant) when she started.

41. During this conversation Mr A Aslam told the Claimant that the business was very quiet it would be better for the Claimant to find another job. The Claimant is very clear in this conversation that she needed the hours that she previously had because she could afford to pay for childcare on part time hours. The Claimant stated that she could not just leave because she would not be able to claim state benefits if she just left but that she did not want to leave and wanted her hours back.

42. The discussion concludes with the Claimant stating that she needed "at least the same hours, fixed hours" and Mr Aslam saying that he will contact her on Friday to see what they could offer her.

43. The Respondent did not contact the Claimant. The Claimant chased the respondent requesting confirmation by 23 February 2018 and that if she did not hear she would assume that the company no longer needed her.

44. The Respondent wrote to the Claimant on 20 February 2018 informing her that work was available working Monday to Thursdays from 11.00 am to 2.00 pm. This was unacceptable to the Claimant.

The Law

Direct Discrimination

Section 13 Equality Act 2010

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The Equality Act 2010 Code of Practice Employment, Statutory Code of Practice

Pregnancy/Maternity Discrimination

Section 18 Equality Act 2010

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

(2) 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, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) 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.

(5) For the purposes of subsection (2), 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).

(6) 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;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

Right to return after additional maternity leave or parental leave

Section 18 Maternity and Parental Leave Regulations 1999

(2) An employee who takes additional maternity leave, or parental leave for a period of more than four weeks, is entitled to return from leave 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.

(5) An employee's right to return under paragraph (1), (2) or (3) is to return—

(a) on terms and conditions as to remuneration not less favourable than those which would have been applicable to her had she not been absent from work at any time since—

(i) in the case of an employee returning from additional maternity leave (or parental leave taken immediately after additional maternity leave), the commencement of the ordinary maternity leave period which preceded her additional maternity leave period, or

(ii) in the case of an employee returning from parental leave (other than parental leave taken immediately after additional maternity leave), the commencement of the period of parental leave;

(b) with her seniority, pension rights and similar rights as they would have been if the period or periods of her employment prior to her additional maternity leave period, or (as the case may be) her period of parental leave, were continuous with her employment following her return to work (but subject, in the case of an employee returning from additional maternity leave, to the requirements of paragraph 5 of Schedule 5 to the Social Security Act 1989 (1) (equal treatment under pension schemes: maternity)), and

(c) otherwise on terms and conditions not less favourable than those which would have been applicable to her had she not been absent from work after the end of her ordinary maternity leave period or (as the case may be) during her period of parental leave.

Dismissal

Unfair Dismissal

The burden of proof rests with the Respondent to show the reason for the dismissal. S.98 (2) of the Employment Rights Act 1996 (ERA) sets out potentially fair reasons for dismissal.

The Respondent is required to show that the substantial reason for the dismissal was a potentially fair one and it is then for the Tribunal to decide whether they acted reasonably under S.98(4) of the ERA.

Section 98 of the Employment Rights Act 1996,

- (a) did the respondent have a potentially fair reason to dismiss?
- (b) did the employer act reasonably or unreasonably in dismissing the claimant for the reason given?

Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

Constructive Dismissal

Section 95 (1)(c) of the Employment Rights Act provides:

Circumstances in which an employee is dismissed.

- (1) For the purposes of this Part an employee is dismissed by his employer if.....
 - (c) 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 leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] QB 761**. The Tribunal should ask itself the following questions (agreed between the parties)

- a. Did the Claimants resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?
- b. If so, what was the repudiatory breach that entitled the Claimants to resign?
- c. Was there a series of breaches which entitled the Claimants to resign and, if so, what was the last straw in such a series?
- d. Did the Claimant's resign in response to this breach?
- e. Did the Claimants delay in resigning and reaffirm the contract?

Automatic Unfair Dismissal

Section 99 ERA provides that a dismissal is automatically unfair if the reason or the principal reason for the dismissal is of a kind prescribed in regulations, or the dismissal takes place in prescribed circumstances.

S99(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

- (a) pregnancy, childbirth or maternity,
- (b) ordinary, compulsory or additional maternity leave,

The Claimant is not required to prove her case but is required to produce evidence that enables the Tribunal to create a presumption in law that the dismissal was for an inadmissible reason under S99.

Issues to be Determined

Direct Sex Discrimination

45. The Tribunal finds that the Claimant was asked about her plans to become pregnant. The Tribunal accepts the Claimant's evidence that the question was asked at her interview.

46. The Tribunal noted that the Respondent did not dispute that this question was asked but it argued that it was asked on her first day. The Tribunal finds that to a large extent it is irrelevant whether the question was asked at interview or on her first day; the question was still asked.

47. The Respondent's defence was that it had had a number of applications from men and produced copies of those applications in the bundle. It was submitted that if they were discriminating against women then they would have employed a man. The Respondent appears to have missed the point entirely. The Claimant's case was that a man would not have been asked about whether he intended getting pregnant or whether he intended having children. That she was only asked the question because she was a female. The Respondent by asking this question was treating the Claimant less favourably than a man.

48. The Respondent did not argue that it would have asked a man the same questions and as stated above focused on the fact that it had applications from men and therefore because they interviewed her they could not have discriminated against her.

49. The Tribunal is assisted by the Equality Act 2010 Code of Practice – Employment Statutory Code of Practice and in deciding whether an employer has treated an employee less favourably a comparison must be made with how the employer would have treated a man in similar circumstances. In this case the Tribunal has found that the Respondent would not have asked a man the same question.

50. The Respondent suggested that the Claimant had not suffered any disadvantage because she was employed. Again the Code assists the Tribunal in that "*The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.*" (Para 3.5 of the Code)

51. The Tribunal finds that the Claimant did suffer a disadvantage and was treated unfavourably and the Claimant described how she found the questions to be intrusive and personal.

52. The Tribunal finds that the Claimant was subjected to direct discrimination on the grounds of her sex.

Pregnancy and Maternity Discrimination

53. The Tribunal finds that the Claimant was reminded about her response to the question on whether she intended getting pregnant by Mr Imran Aslam in August

2016 when she informed the Respondent that she was pregnant and that Mr Imran Aslam suggested that the Claimant resign.

54. Whilst the Respondent cross examined the Claimant at length around this point the claimant was not asked specifically about the allegation but rather errors in the ETI. The Claimant accepted that there was an error in the ET1. The Claimant had stated in her ET1 that 'Imram reminded the Claimant how at her interview in January 2016 he had asked her if she had plans to become pregnant. The he should have read Adman. The Claimant stated that this was an error by her solicitor in typing the ET1 and that she had always alleged that it was Adman who had asked her the questions. However, this does not detract from the substance of the allegation. Mr Imran Aslam did not provide a witness statement or give oral evidence. The Respondent never suggested that the comments were not said and indeed accepted during submissions that it was said. There was no evidence whatsoever to rebut the allegations.

55. The Respondent's own evidence was that it was Adman who said it and it was not entirely clear what argument the Respondent was putting forward on this point other than the Claimant's credibility on this point. However, the Claimant gave cogent evidence that it was a genuine mistake. The Tribunal accepted that evidence.

56. The Tribunal finds that the Claimant was treated less favourably by being subjected to questions around her pregnancy and it being suggested that she should resign.

57. The Tribunal finds that the Claimant was treated less favourably when she asked for a letter to support her mortgage application and she was told that she could only have it if she resigned?

58. It was agreed between the parties that the Claimant had asked for a letter in support of her application. The Respondent argued that she was seeking false figures but this was never put to her in cross examination. Further Mr Qayyum did not attend to give oral evidence. The Claimant's evidence was that this was not the case and in any event in the end she obtained a mortgage on her husband's income alone. The Tribunal finds that the likelihood of her asking for inflated figures was remote in view of the fact that her husband's income was clearly sufficient for the purposes of obtaining the mortgage.

59. The Tribunal had the benefit of a recorded telephone conversation between Mr Qayyum and the Claimant regarding this issue and the Claimant says several times that she cannot resign and if they (the Respondent) do not want her then they should sack her. This transcript was disclosed to the Respondent prior to the hearing and its contents were not queried until this hearing. There was no evidence in this telephone conversation of the Claimant blackmailing Mr Qayyum and indeed Mr Qayyum refers to this conversation in his witness statement. The Respondent chose not to give oral evidence on this point and the Tribunal accepts the Claimant's version of events.

60. The Tribunal finds that the Respondent did send the Claimant an email setting out her resignation and that that the Claimant did not ask for it to be sent. It is clear

from the evidence that the reason the Respondent suggested that she resign was because it did not want her to return from maternity leave. The Respondent treated her less favourably because of her pregnancy and or because she was on maternity leave.

61. The Tribunal finds that the Respondent sent the Claimant a letter reducing her hours to 3 hours per day 4 days per week and that this was as a result of the Claimant attempting to return to work after maternity leave. The Tribunal finds that this amounted to unfavourable treatment.

62. The Tribunal finds that the Respondent did not enter into any meaningful consultation with the Claimant about reducing her hours. The Respondent argues that the business was quiet but the evidence before the Tribunal was that the Claimant's role had been given to someone else and was continuing. Indeed the Respondent referred to this during the meeting between the Claimant and Mr Adnam Aslam which shows that the person (a man) was employed to do her role and they did not want to dismiss him.

63. The Respondent also suggested during cross examination of the Claimant and in its submissions that there was some element of poor performance. The Tribunal finds that this was not the case and that there was no evidence whatsoever to support this allegation.

Unfair Dismissal/Constructive Dismissal/Automatically Unfair Dismissal

64. The Tribunal finds that the Respondent had given the Claimant's job to someone else while she was on maternity leave. Whilst it is quite normal for an employer to appoint maternity cover, the Respondent failed to allow the Claimant to either return to her previous position or offer her an equivalent role.

65. The Respondent argued that the meeting on 12th was a consultation meeting to vary the Claimant's contract and that the Claimant agreed to that variation. The Tribunal finds that this was not the case and that this contention was not supported by the evidence. It is clear that the Claimant did not want to change her hours; she had informed the Respondent a number of times during the meeting that she wanted the same hours.

66. The Claimant was entitled to return to her old job on the same terms and conditions or if that role was genuinely not available to return to an alternative role on similar terms and conditions. This did not happen. The exact role offered to the Claimant was not made clear to her and the terms and conditions were markedly different to those she had enjoyed prior to going onto maternity leave.

67. The Respondents letter dated 20 February is a final unilateral determination. There was no element of consultation within the letter and it ended with 'this is the best I can offer at the moment'. The Tribunal finds that the Claimant did not resign but letter amounted to a notice of termination.

68. The Tribunal was helpfully referred to the Employment Appeal Tribunal Judgment, **S A Hogg v Dover College EAT/88/88**. The question for this Tribunal to consider is whether the particular contract under which the employee was employed

by the employer at the relevant time was terminated by the employer. The Tribunal finds that it was. The Claimant's role had been given to someone else and the Claimant was offered an alternative role on reduced hours. This was a fundamental change to the contract entitling the Claimant to consider that she had been dismissed. The Respondent had without agreement imposed new terms and conditions upon the Claimant and we find that this was a breach of contract so that no further performance of the contract could be tendered.

69. As in Hogg, if we are wrong on this point we consider that the actions of the Respondent amounted to a repudiatory breach of contract entitling the claimant to resign and claim constructive dismissal. The Respondent conceded that her role had been given to someone else who they wanted to keep on and the letter dated 20 February unilaterally fundamentally amended the terms of the contract of employment. We have found that the reason for the change to her terms and conditions was because of her pregnancy and or maternity leave.

70. As the Tribunal finds that the reason for the dismissal was connected to the Claimant's pregnancy/childbirth and therefore the dismissal was automatically unfair.

Unlawful Deduction of Wages

71. It was agreed between the parties that the Respondent failed to pay the Claimant annual leave contrary to Regulation 16(1) and Regulation 13 of the Working time regulations.

72. It was agreed between the parties that the Respondent failed to pay the Claimant for hr time off to attend ante-natal appointments contrary to Section 56(1) of the Employment Rights Act 1996.

73. It was agreed between the parties that the Claimant was not paid her correct SMP payments.

Conclusions

74. We have found that the Claimant was discriminated against because of her sex and because of her pregnancy/maternity leave. We have also found that the claimant was automatically unfairly dismissed. The Respondent had from the commencement of her employment demonstrated that it did not want to employ a woman who was going to get pregnant and take maternity leave. The evidence clearly supported the Claimant's version of events.

75. The Respondent spent a considerable amount of time in cross examination and during submissions suggesting that the meeting on 12 February was a grievance meeting and that the Claimant had not raised certain points during that meeting and in particular had not referred specifically to paragraph 3 of her ET1. There was no evidence that the claimant had raised a formal grievance or that the meeting on 12 February was a grievance meeting. The claimant had returned to work and asked to speak to her employer about her concerns. She had been asked to resign during her maternity leave; she had not had any responses to her letters; she had been told to come to work 2 days after the end of her maternity leave; she had returned to work and found her computer gone and considered that the

Respondent did not want her to return to work. It was quite reasonable for her to want to discuss those issues with her employer. There was no agenda, it was not a formal meeting.

76. This appeared to us to be nothing more than an 'off the cuff' meeting and the Claimant would not have prepared an itemised list of things to discuss. The Claimant's main concern was to return to work on the same terms and conditions including the same hours as before. She did not want to resign. She made that clear in the meeting and told the Respondent that if they did not want her to return then they should dismiss her.

77. The Respondent sought to suggest that the Claimant was in some way trying to fraudulently obtain welfare benefits. The Tribunal finds that there is no evidence to support this. The Claimant quite rightly and sensibly informed the Respondent that if her role was no longer available then she did not want to resign because she would then not be entitled to Job Seekers Allowance. The Tribunal finds that these remarks were made in response to the Respondent's actions and quite reasonable for a person to be concerned about their financial stability particularly with a young child to look after.

78. The Claimant gave evidence that she had been happy in her job and had got on well with her colleagues. The Respondent sought to use that against her and suggested that as she was happy and the tone of the conversation/s were friendly that she was agreeable to their proposals. The Respondent wanted the Tribunal to listen to the tape recordings to prove this point. This matter had not been raised prior to the hearing. The Respondent had not provided equipment to enable the tape to be listen to. In any event the contents of the transcripts were not in dispute and the Claimant had not made any allegations about the tone of the conversations. The Respondent does not dispute what was said and it appeared to this Tribunal that it was irrelevant whether the statements made by either party were said in a nice manner or not. The fact that the conversation may have been friendly does not mean that the Respondent's words and actions did not amount to discriminatory behaviour.

79. The Tribunal considers that the Respondent had a complete disregard for the employment relationship. The Claimant was not provided with a contract of employment; no risk assessment was carried out; they did not respond to reasonable requests from the Claimant and did not implement any maternity procedures. The Respondent admitted during the course of the hearing that they had kept a record of her maternity related absences so that they could deduct those hours from her wages. The Respondent agreed that the Claimant had been asked about her pregnancy plans and that it has been suggested she resign.

80. Further the Respondent took the decision not to give oral evidence at the hearing despite being warned that by not doing so the Tribunal could only attached such weight to those statements as appropriate. The Respondent was very clear that they wanted instead to rely upon the conversation between the Claimant and Mr Aslam on 12 February. The Tribunal read the transcript very carefully and concluded that the Claimant's case was supported fully by the contents of the transcript.

81. The Respondent chose not to challenge much of the evidence put forward by the Claimant and rather chose to pick up on perceived errors in the ET1 or tone of conversations.

Remedy

82. The respondent is ordered to pay the claimant compensation for automatic unfair dismissal; direct sex discrimination; Pregnancy/Maternity Discrimination; unlawful deduction of wages and failure to provide a statement of main terms and conditions in the sum of £20,407.77 calculated as follows:

Basic Award

2 weeks x £243.75		£487.50
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Compensatory Award

Loss of earnings to 7 April 2018 (8 weeks)	£1,950.00	
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Uplift ACAS 25%	£487.50	
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Total		<u>£2,437.50</u>
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Loss of statutory rights		<u>£300.00</u>
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Unlawful Deduction of Wages

Annual Leave	£1,365.00	
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Ante natal pay	£190.70	
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Unpaid SMP	£515.19	
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		<u>£2,070.89</u>
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Injury to Feelings

Middle band Vento	£12,000.00	
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Aggravated element	£1,000.00	
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Interest at 8% for 399 days	£1,136.88	
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Total injury to feelings		<u>£14,136.88</u>
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Failure to Provide a Statement of main terms and conditions

4 weeks' pay £975.00

Total award **£20,407.77**

83. The Claimant gave evidence that she is now self-employed. She told the Tribunal that she was a co-director with her husband running a parcel delivery business. The Claimant commenced this employment 7 April 2018 and that her net income was £200 per week.

84. The Claimant provided invoices for work carried out by the business covering the period 14 April 2018 to 26 May 2018 and for 4 August 2018 and 1 September 2018 to 22 September 2018. The Claimant did not produce any other evidence of income/expenditure during that time.

85. These invoices were for services provided by both herself and her husband and averaged around £1500 until August/September where they dropped to around £200-£500.

86. Under cross examination the Claimant explained that the business paid for car/van loans; repairs to vehicles, insurance and that she and her husband drew down £200 each per week.

87. She explained that her husband had had an injury that meant he was unable to work which is why there was a reduction in income. The Claimant said that she had not made any claims for benefits.

88. The Claimant was unable to provide evidence on how she has supported herself during this period and had not produce copies of all invoices or evidence of her drawings. The Claimant was asked whether she had received a Dividend and was unable to answer this question. The Tribunal finds that the Claimant's schedule of loss stated that she had received income of £200 per week since 7 April 2018 but that she has not been able to demonstrate the income she has received since 7 April 2018. The Claimant was legally represented and was aware that she was required to provide proof of earnings from her new employment.

89. The Tribunal has therefore awarded loss of earnings for the period 13 February 2018 to 7 April 2018. However because of the lack of up to date evidence of the Claimant's income and the fact that during cross examination the Claimant was unable to explain her income during the months that she and her husband were not working, the Tribunal was unable to speculate on what her losses were and finds that her losses ceased on 7 April 2018 and makes no award for loss of earnings beyond that date.

90. The parties agreed that the claimant was entitled to £190.70 for failure to pay her for time off to attend ante natal appointments.

91. The parties agreed that the claimant was entitled to £515.19 for unpaid Statutory Maternity Pay. The Respondent believed that this was due to a software error.

92. The Parties agreed that the Claimant was entitled to unpaid annual leave of £1365. This being calculated at 28 days (5.6 weeks) x £7.50 the NMW in force at the time = £1365.00.

93. An Employment Tribunal when making an award of compensation for unfair dismissal has the power to increase compensation by up to 25% if it finds that there has been a failure to comply with the requirements of any relevant ACAS Code of Practice on the part of the employer. It may also decrease compensation by the same percentage amount if it finds an unreasonable failure to comply with a relevant Code by an employee. The power is set out under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

94. The Tribunal has therefore increased compensation by 25% because it considered that the Respondent completely failed to follow the ACAS Code of Practice and has made an award of £487.50.

95. When considering compensation in respect of discrimination the Tribunal is assisted by the Presidential Guidance in relation to injury to feelings and psychiatric injury. In ***Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA Civ 1871***, the Court of Appeal identified three “bands” of potential awards for discrimination claims:

- a. £500 - £5,000 - The lower band applies to “less serious cases, such as where the act of discrimination is an isolated or one off occurrence”.
- b. £5,000 - £15,000 - The middle band “should be used for serious cases, which do not merit an award in the highest band”.
- c. £15,000 - £25,000 - The top band is appropriate for “the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment...”.

The court also went on to determine that it would only be in “*the most exceptional cases*” that an award would exceed this top band.

90. The “bands” have been updated by ***Da’Bell v NSPCC 92009) EKEAT/0227/09 IRLR 19*** and taking account of ***Simons v Castle and De Souza v Vinci Construction (UK) Ltd***, are currently set at: lower band, £800 to £8,400; middle band £8,400 to £25,200 and upper band £25,200 to £42,00. These bands apply to cases presented after 11 September 2017.

91. Claims presented before 11 September 2017 may be adjusted by an Employment Tribunal where there is cogent evidence of the rate of change in the value of money: ***AA Solicitors Ltd v Majid 92016) UKEAT 0217/15***. The Presidential Guidance sets out a formula for calculating awards presented before 11 September 2017.

92. We consider in this case that an appropriate award falls within the middle band of Vento. The respondent from the outset of the Claimant's employment treated the claimant less favourably by asking her questions about her intention to become pregnant and the unfavourable treatment continued throughout her employment culminating in her being automatically dismissed.

93. We consider this to be a serious case that continued over a sustained period and we accept the evidence of the Claimant of how it impacted on her and her family life. The Claimant told us that she felt stressed and anxious throughout her employment and that this became worse as her pregnancy continued and that she was constantly frightened that she would lose her job.

93. The claimant also claims aggravated damages. Aggravated damages may be awarded where the respondent has behaved in a high-handed, malicious, insulting or oppressive manner. In this case the Respondent stated that the Claimant had been blackmailing an employee in order to commit mortgage fraud and in order to contrive a constructive dismissal claim. This was not true and the Respondent provided no evidence of this allegation.

94. The Respondent also told the Claimant that she had to resign her position in order to obtain a letter confirming her salary. This was a deliberate attempt to hold the Claimant to ransom in order to get her to resign.

95. The Tribunal considers that this amounts to high-handed and malice behaviour and makes a total award of £13,000 incorporating injury to feelings in the amount of £12,000 and aggravated damages of £1,000.

Employment Judge Hill

Date: 20 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 May 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410812/2018**

Name of case: **Mrs LM Salvador** v **T&A Textiles & Hosiery Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **21 May 2019**

"the calculation day" is: **22 May 2019**

"the stipulated rate of interest" is: **8%**

Mr S Harlow
For the Employment Tribunal Office