



MK

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss M Kinastowska

and

Respondent

Agnieszka Kokot Ltd

Held at Cambridge on 18 and 19 July 2019

Representation

Claimant:

Mrs B Pawlik, Lay
Representative

Respondent:

Miss M Wisniewska, HR
Consultant

Members

Mr D Sutton
Mr R Eyre

Employment Judge Kurrein

JUDGMENT

- 1 The Claimant has been discriminated against because of pregnancy by the Respondent and is awarded the following sums:-
 - 1.1 Loss of earnings to hearing £6,113.00
 - 1.2 Future loss of earnings £3,600.00
 - 1.3 Injury to feelings £12,000.00
 - 1.4 Interest on injury to feelings £1,430.79
- 2 The Claimant has been unfairly dismissed because of pregnancy. No separate award is made for that claim.

REASONS

The Claims and Issues

- 1 On 29 April 2018 the Claimant presented a claim alleging:
 - 1.1 automatic unfair dismissal contrary to section 99 Employment Rights Act 1996 and Regulation 20 Maternity and Parental Leave etc Regulations 1999;
 - 1.2 maternity/pregnancy discrimination contrary to section 18 Equality Act 2010; and
 - 1.3 failure to make payment for holiday pay on termination of employment contrary to the Working Time Regulations 1998.
- 2 On the 15th of June 2018 the Respondent presented a response in which it denied those claims and asserted that the Claimant had been dismissed for reasons relating to her conduct.

- 3 A preliminary hearing took place on 29 November 2018 before Employment Judge Ord. At that hearing the Claimant withdrew her claim alleging a failure to make payment of holiday pay because she had since received payment and that claim was dismissed.
- 4 The Case Management Order following that hearing only recorded the claim under S.99, and not that under S.18. In our view that was clearly an error. Unfortunately, we did not notice that error until we read the Respondent's closing submission, because they only dealt with the S.99 claim.
- 5 Having addressed both parties on this issue, and explained that they had the right, in the case of the Respondent, to have time to consider the position and have the Claimant recalled. The only additional question the Respondent had for the Claimant was clarification of the unfavourable treatment. The Claimant accepted that in the circumstances it was appropriate to limit that aspect of her claim to the dismissal. Both parties were then content that the matter should proceed on the basis that the only unfavourable treatment relied on by the Claimant was the dismissal.

The Evidence

- 6 We heard the evidence of the Claimant on her own behalf and the evidence of Miss Agnieszka Kokot on behalf of the Respondent. We read the documents to which we were referred and considered the submissions of parties. We make the following findings of fact.

Finding of Fact

- 7 The Claimant is a Polish national who was born on 14 February 1992. She has had the benefit of an Interpreter throughout this hearing, for whose assistance we are most grateful.
- 8 From 19 December 2016 she worked with a predecessor of the Respondent, known as "Sun Studio", where Miss Kokot was then a hairdresser. The Claimant worked as a Receptionist and Customer Service Assistant, making appointments, entering payments on the computer, caring for clients, and cleaning the equipment and premises as necessary. Her normal working hours were Monday to Friday from 11:00 to 19:00. The Claimant and Miss Kokot had a good relationship during this period. Under this ownership all the staff washed up any crockery etc that they had used themselves.
- 9 Miss Kokot acquired that business by way of the Respondent in late 2017. The provisions of TUPE applied from 1 November 2017 so that the Claimant had continuous service from the start of her employment with Sun Studio.
- 10 The Respondent's evidence on what the terms of the Claimant's employment were was unsatisfactory.
- 10.1 At one point it was stated that the Claimant was engaged by the Respondent's predecessor on the same terms as those set out in a redacted contract dated 6 February 2018 made by the Respondent and obtained from its accountants, who had also been used by the predecessor.
- 10.2 It was later asserted that the predecessors had only met their employees face to face and agreed oral terms.

- 11 We concluded that the latter was the more likely basis on which the Claimant was initially employed and that those terms were carried over by TUPE.
- 12 The Respondent sub-let a small area of the premises to the Claimant for her to set up a nail bar business for £130.00 per month. The Claimant worked there on Mondays to Fridays from 18:00 and at weekends.
- 13 In early December 2017 there was a minor dispute between Miss Kokot and the Claimant, when the former asked the latter to decorate the Christmas tree. The Claimant was reluctant and initially refused to do so, but shortly afterwards complied with the request.
- 14 There was some vague evidence that on another occasion the Claimant was asked to hide something under a desk, and stated that there was not enough room, but neither witness had a clear recollection of what took place.
- 15 We accept that Miss Kokot spoke to the Claimant about these issues, but not in the formal sense of a 1 to 1 meeting at which an oral warning was allegedly given as Miss Kokot alleges.
- 16 The Claimant learned of her pregnancy on 11 December 2017. She informed Miss Kokot of this the next day, and that she had an ante-natal appointment with a midwife for ½ day on 22 December 2017. The Claimant had already booked a period starting with 23 December as holiday, when she intended to visit Poland, and it appears that she was persuaded to agree to take this ½ day as holiday as well.
- 17 On the morning of 15 December 2017, the Claimant texted Miss Kokot,
“Would you have anyone who will cover for me from 14-15? I can’t swallow and feel terrible ... I had a nose bleed Now I will come but I don’t know if I can make until 19 ...”
- And received a reply,
“We’ll talk when you are at work ... I have no one”
- 18 We accepted the Claimant’s evidence that when she attended for work that day it was plain to her that Miss Kokot was unhappy that the Claimant was unwell and made remarks to the effect that she would have to speak to her accountant, who she relied on for employment advice, because the Claimant was unwell so early in her pregnancy.
- 19 The Claimant in fact worked until 19:00 that day. By then Miss Kokot had left for the day and the Claimant decided not to empty the waste bins because she still did not feel well. She also left a couple of plates and glasses unwashed in the sink. The Claimant decided to come in early the next day, a Saturday, to empty the bins and do a friend’s nails.
- 20 When the Claimant arrived the next morning she was confronted by Miss Kokot, who alleged that the Claimant was deliberately wronging her by failing to empty the bins or wash up. The Claimant explained that she had left early because she was not feeling well, and understood that all staff did their own washing up. Nonetheless she emptied the bins and did the washing up. She felt humiliated.
- 21 On the morning of 18 December 2017, a Monday and Miss Kokot’s usual day off, the Claimant was at work when a regular client of Miss Kokot’s came in and asked the

Claimant if she would do her nails. We accepted that this was contrary to the arrangement the Claimant had, to only do nails after 18:00, but we also accepted her evidence that the salon was quiet at the time and she thought it was in the interest of the business to assist the client.

- 22 Miss Kokot happened to come into the salon while the Claimant was doing the client's nails and later criticised her for what she had done. Although Miss Kokot has alleged this occurred on other unidentified occasions there was no evidence before us of this.
- 23 On 19 December 2017 the Claimant saw her midwife for the first time. When she came to work she thought Miss Kokot was "clearly unhappy" about her having time off for such visits.
- 24 The Claimant had a further appointment with the midwife on 22 December 2017. There was an exchange of texts that afternoon.

Miss Kokot

"I'm leaving (now) so I won't be in when you are in. Please leave the confirmation of your today's visit at reception. Merry Xmas and safe journey."

Claimant

"Hey! I'll leave it but it's just a piece of paper signed by a nurse"

Miss Kokot

"You should have a red or green pregnancy book where all the visits are there"

Claimant

"This book is only for me and doctor. Confirmation I will get after first [ultrasound] I can give you tel no of nurse I saw"

- 25 The Claimant left a compliment slip signed by the nurse confirming this appointment, and that with her GP, on the reception desk. In the hearing it was suggested that the Claimant's failure to disclose this book to Miss Kokot was a breach of a reasonable management instruction.
- 26 Miss Kokot accepted in cross examination that she suspected the Claimant did not have appointments relating to her pregnancy that day, and might be shopping for Christmas prior to starting her holiday the next day.
- 27 Some insight into Miss Kokot's attitude to the Claimant's pregnancy may also be gleaned from paragraph 25 of her statement.
- "My understanding is these antenatal appointments were booked in December and time chosen for these was the Claimant's working time. She did not ask my permission to attend those appointments, she was not concerned about business needs. December is extremely busy period in our saloon (*sic*)"
- 28 The Claimant was then on holiday until her return to work on 28 December 2017, when Miss Kokot invited her to have a chat. The Claimant was told that Miss Kokot only wanted

the Claimant to work at her nail bar business. The Claimant expressed surprise and said she needed the other work and income, at least until her maternity leave started. Miss Kokot then told the Claimant that she had no choice but to give her notice.

- 29 The Claimant sought to remonstrate with Miss Kokot, and asked for written notice and reasons. She was told orally that Miss Kokot was not happy with her as a worker. The Claimant was later given a letter, drafted by Miss Kokot's accountant, in the following terms,

“ Termination of Employment

Your probation period with us at Agnieza Kokot Limited is due to end on 31/01/2018.

I confirm that I have decided not to continue your employment beyond your probationary period. As a result your employment will end on 31/01/2018.

We wish you well in your future endeavours.”

- 30 On receipt of this letter the Claimant complained that as a pregnant woman she could not be dismissed, and was not on probation as she had continuity of employment. Miss Kokot replied that up to three months pregnancy she had the right to dismiss at any time.
- 31 The Claimant was later told, while still employed, that Miss Kokot was telling clients that the Claimant didn't do her work and was “getting money for nothing.” The Claimant complained about this because she thought it was bullying. Miss Kokot responded to say it was true, and that the Claimant had also been too sensitive about heavy lifting.
- 32 The Claimant told us that thereafter the atmosphere in the salon was very bad. She thought the heating was turned down or off, and her breaks, when she was eating, were often interrupted by her being required to carry out a task. The Respondent had included some 40 pages of timesheets in the bundles to demonstrate that the salon was sometimes quiet, so it was easy to take a break. She sought to pursue that line in cross-examination, apparently being unaware of a worker's right to uninterrupted rest breaks.
- 33 The Claimant's replacement was interviewed and appointed by Miss Kokot before the Claimant's employment ended and she was trained by the Claimant.
- 34 Following the termination of her employment the Claimant has continued her nail bar business, working at her client's homes, and advertising on social media. She has disclosed her tax returns for 2017/18 and 2018/19. Her gross profit was £1,257.00.

Submissions

- 35 We read and heard the submission of the parties. It is neither necessary nor proportionate to set them out here.

The Law

- 36 We are primarily concerned with the following statutory provisions:-

Section 18 Equality Act 2010

Section 136 Equality Act 2010

Sections 99 and 108 Employment Rights Act 1996

Regulation 20 Maternity and Parental Leave etc Regulations 1999

37 We were referred to and/or considered the following authorities:-

Madarassy v Nomura International Plc. [2007] IRLR 246

Nagarajan v London Regional Transport [2000] 1 AC 501

O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372

Further Findings and Conclusions

38 We deal with each of the Claimant's claims in turn. Our principal findings of fact are set out above, and we do not repeat them unless absolutely necessary.

Pregnancy Discrimination

39 This is governed by S.18 Equality Act 2010:-

18 Pregnancy and maternity discrimination: work cases

(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.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as–

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

40 The unfavourable treatment the Claimant relies on is her dismissal. There can be no dispute that it took place in the protected period.

41 The burden of proof in such cases is governed by S.136 Equality Act 2010:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

42 The onus is therefore on the Claimant to establish on the balance of probabilities evidence from which we could conclude, absent an explanation from the Respondent, that the unfavourable treatment complained of could have been because of her pregnancy.

43 In that context we remind ourselves that pregnancy does not have to be the only or principal reason for the treatment: it is sufficient if it was the effective cause: *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1996] IRLR 372.

44 *Nagarajan v London Regional Transport* [2000] 1 AC 501 is authority for the proposition that the alleged discriminator does not have to have the protected characteristic consciously in mind when deciding on the act that is complained of.

45 We have concluded that the Claimant has satisfied that test. In particular, the following events suggest to us that the reason for the treatment could have been the Claimant's pregnancy:-

45.1 The fact that the relationship between the Claimant and Miss Kokot only deteriorated, and then quite suddenly, after Miss Kokot had knowledge of the pregnancy. While we accept that this was also in relatively close proximity to when Miss Kokot became the Claimant's manager we thought it notable that no events concerning the Claimant's conduct were complained of prior to early December, over a month after that transition, despite Miss Kokot's expressed view that prior to her takeover all the staff did as little as possible.

45.2 Miss Kokot's attitude to the Claimant's pregnancy, as illustrated by:-

45.2.1 Miss Kokot's reaction to the Claimant being sick on 15 December 2017, when no cover was available, when she immediately proposed speaking to her accountant, on whom she relied for employment law advice, because of her concerns that the Claimant was ill so early in her pregnancy.

45.2.2 Her wish that the Claimant take the time for her antenatal appointment on 22 December as holiday.

45.2.3 Her suspicions regarding the Claimant's antenatal appointment on 22 December 2017.

45.2.4 The tone and content of paragraph 25 of her statement, also reflected in the Respondent's skeleton argument.

45.3 Her failure to provide contemporaneous reasons for the dismissal.

- 45.4 Her statement that she was entitled to dismiss during the first three months of pregnancy.
- 45.5 The very minor nature of the Claimant's conduct Miss Kokot now gives as her reason for the dismissal.
- 46 In the above circumstances the onus has shifted to the Respondent to establish on the balance of probabilities that the dismissal of the Claimant involved no discrimination at all.
- 47 The reason advanced by the Respondent relies on the alleged conduct of the Claimant, as found by us above and in our principal findings of fact.
- 48 We accept that the Claimant did not have sufficient service to claim ordinary unfair dismissal and that some employers are cavalier as to the process they follow when dismissing employees in that position. This case, however, is not simply concerned with process, although there was effectively none.
- 49 We were unanimous in finding that the reasons advanced by the Respondent for this dismissal were hollow. The events complained of had occurred, although not necessarily as the Respondent alleged, but were wholly incidental to the relationship between the Claimant and Miss Kokot. They were of a very minor nature indeed. They were the sort of events that might occur on occasion in any employment relationship without having any adverse effect on it. Miss Kokot took so little notice of them at the time that she made no note or record of any kind concerning any of them.
- 50 The last event, and one of little note in our view, was the Claimant's decision to assist a regular client of the Salon by doing their nails during normal working hours on a Monday. We did not accept that Miss Kokot was as angered by this as she claims. We also took the view that if this was only one of many such instances some credible evidence would have been adduced of that.
- 51 We were unanimous in concluding that none of the events that the Respondent relied on as conduct entitling her to dismiss the Claimant for a lawful reason were in the forefront of her mind at the time. They have been detailed after the event by a minute examination of everything that occurred in the course of the relationship and put forward to try and conceal the true reason for the dismissal.
- 52 We were further concerned that some of the events relied on directly related to the time off taken by the Claimant to attend antenatal appointments, on 19 and 22 December 2017, both of which took place after that event.
- 53 In light of all our above findings we are unanimous in finding that the Respondent has failed to discharge the burden on it of proving on the balance of probabilities that the dismissal of the Claimant was not discriminatory.
- 54 We therefore make a declaration that the Claimant was dismissed because of her pregnancy.

Unfair, Pregnancy, Dismissal

- 55 This is governed by S.99 Employment Rights Act 1996:-

99 Leave for family reasons

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
 - (a) the reason or principal reason for the dismissal is of a prescribed kind, or
 - (b) the dismissal takes place in prescribed circumstances.
- (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,

56 S.108 of that Act provides

108 Qualifying period of employment

- (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination.
- (2) ...
- (3) Subsection (1) does not apply if—
 - (a) ...
 - (aa) ...
 - (b) subsection (1) of section 99 (read with any regulations made under that section) applies,

57 Thus the Claimant has the right to make this claim even though she does not have two years continuous employment.

58 However, that also has the consequence that the onus lies on the Claimant, not the Respondent, to establish what the reason for the dismissal was.

59 In considering this issue we have had regard to all our above findings.

60 We are unanimous in concluding that the Claimant has established on the balance of probabilities that the reason, or principal reason, for her dismissal was that she was pregnant, and make a declaration to that effect.

Remedy

61 The Claimant presented a schedule of loss which was updated for this hearing. Apart from a suggestion that the Claimant had earned more than she had declared, unsupported by any evidence, that Schedule was not challenged.

62 We therefore accepted the following:-

62.1	Loss of income from 31/1/18 to 27/7/18 (start of MAT)	£7,200
62.2	Loss of income for 6 weeks MAT	£750
62.3	Total	£7950
62.4	Less	
62.4.1	Maternity Allowance	£580
62.4.2	Earnings	£1257
62.5	<u>Net loss to hearing</u>	<u>£6113</u>

63 The Schedule of Loss did not deal with future loss, and we noted that the Claimant had been unable to work since late June 2019 due to an accident that requires her to use a

wheelchair. That will be the case for the next three months, so we have limited her future loss to the date of the accident on the basis that she is likely to be able to fully mitigate her loss when she recovers.

- 64 We therefore award the Claimant the sum of £3,600 for three months future loss.
- 65 We have gone on to consider a *Vento* award, and had regard to the Presidential Guidance. This was a single event, but of great seriousness. The Claimant was dismissed at a most vulnerable time in her life. It was clear that she was at a loss at the time and underwent counselling to assist her. She burst into tears immediately she was asked what effect the dismissal had on her, over 18 months after the event.
- 66 We were unanimous in deciding that the injury to feelings suffered by the Claimant should entitle her to an award squarely in the middle of the middle band, and make an award of £12,000.
- 67 Interest is currently awarded at a rate of 8%pa. From 31 January 2018 to today there are 534 days. Daily interest is at the rate of £2.63. We therefore award £1,430.79 by way of interest.
- 68 We make no separate award in respect of the unfair dismissal claim.

Employment Judge Kurrein

19 July 2019

Sent to the parties and
entered in the Register on : :

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For the Tribunal