



EMPLOYMENT TRIBUNALS

Claimant: Ms W Zhang

Respondent: Bathroom Classics Ltd

Heard at: Birmingham Employment Tribunal

On: 15/08/2019-17/08/2019

Before: Employment Judge Butler
Ms S Campbell
Mr K Palmer

Representation

Claimant: Mr Russell (Counsel)

Respondent: Mr Gilbert (Consultant)

JUDGMENT (LIABILITY & REMEDY)

The unanimous judgment of the tribunal is that:

1. Contrary to sections 18(4) and 39 of the Equality Act 2010, the respondent discriminated against the claimant by dismissing her because of her having exercised her right to ordinary or additional maternity leave.
2. The claim for unpaid bonuses formed part of wages pursuant to s.27 of the Employment Rights Act 1996. As wage does not need to be maintained during maternity leave, in line with s.9(2) of the Maternity and Parental Leave regs 1999, failure to provide the claimant with her bonus during maternity leave was therefore not unlawful discrimination pursuant to s.18 of the Equality Act 2010. This part of her claim fails and is dismissed.
3. Pursuant to section 99 of the Employment Rights Act 1996, the claimant's claim for unfair dismissal is well-founded.
4. Liability for underpayment of maternity pay, for failure to pay holiday pay, which had accrued before dismissal, and for 1 months' notice pay, were all conceded by the respondent, and therefore they all succeed.
5. The respondent is ordered to pay the claimant the sum of **£30,195.33**.

6. The claimant's application for costs was unsuccessful.

LIABILITY

These are the written reasons provided at the request of the respondent, following oral reasons having been delivered at the hearing.

1. The case primarily related to claims of automatically unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 ("ERA") and of discrimination on grounds of pregnancy or maternity pursuant to section 18 of the Equality Act 2010 ("EqA"). The EqA claim extended to unfavourable treatment in the form of dismissal and non-payment of a bonus during maternity leave. There were also claims for notice pay and for failure to pay holiday pay.
2. The claimant submitted her claim form on 08/06/2018 pursuing the claims outlined above, with an additional claim of sex discrimination. The claim of sex discrimination was dismissed on withdrawal prior to the hearing. The extent of the claim was confirmed in further and better particulars provided by the claimant, dated 29/01/2019, and can be found at pages 42-46 of the bundle, having been ordered to provide them by Employment Judge Woffenden's Order of 9/01/2019. This Order can be found at pages 34-39 of the bundle.
3. This claim ultimately arose following the claimant's dismissal on 26/03/2018.
4. In terms of the dismissal, the respondent contends that it was on the grounds of the claimant's performance. Whilst the claimant submits that any such reason was not genuine and that the real reason for her dismissal was for reasons connected to her having exercised her right to take maternity leave.
5. The respondent conceded the claims of notice pay and holiday pay. Therefore, nothing more will be said in this judgment in relation to these two claims, save for remedy.
6. The case was initially listed for a mediation preliminary hearing to take place on 02/04/2019. However, this was cancelled on the direction of Employment Judge Dimbylow by letter dated 25/03/2019, following correspondence with the parties.
7. For the claimant, we heard evidence from the claimant herself. There were no further witnesses for the claimant. For the respondent, we heard evidence from Mr Xiao, who is a manager of the respondent, and who was the dismissing officer. Mr Xiao was assisted by an interpreter in this case. There were no other witnesses for the respondent. We were assisted by a bundle of documents, which was 175 pages long.
8. There were no requests for adjustments during the hearing. However, suitable and adequate breaks were provided during the hearing.
9. The first half day of the first day of the hearing was used for reading in time. It was decided at the hearing that the respondent would give evidence first. The respondent's witness gave evidence from 12.30 on day 1 of the hearing. Evidence from the respondent's witness was concluded on day 1.

10. The claimant gave evidence from the beginning of day 2 of the hearing, and her evidence was concluded at 10.50am on day 2. Closing submissions were made before lunch on day 2.
11. The panel used the remainder of day 2 to deliberate and reach a decision. The judgment was handed down orally at the beginning of day 3.
12. Evidence and submissions on remedy were considered on the remainder of the morning on day 3. With remedy judgment handed down orally to the parties before lunch time on day 3.
13. On the conclusion of remedy, the claimant made an application for costs.

Summary of the legal dispute

14. We noted that a key issue for us to address was the reason for the dismissal. The reason had direct relevance for the claimant's unfair dismissal claim in that, in order for us to consider the unfair dismissal claim, we would first have to establish whether the respondent had shown the reason for dismissal and that it was one which fell within the scope of section 98 ERA, the respondent asserting that the reason was for capability reasons justifying the dismissal of the claimant.
15. If we were satisfied that the Respondent had shown that its reason for the dismissal, that being the claimant's performance/capability, we would need to consider the general fairness of the dismissal under section 98(4) ERA in accordance with equity and the substantial merits of the case. Section 98(4) ERA provides that:
 - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason 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.
16. When considering ordinary unfair dismissal claims we remind ourselves that it is not for the tribunal to substitute our view as to whether or not we would have dismissed the claimant for the reason in the same circumstances. In *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 it was held that:

"...in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; ...the function of the [Employment Tribunal] ... is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might

have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

17. This approach applies to dismissals generally.
18. In reflecting on unfair dismissal in the ordinary sense, we also have to consider the procedure adopted in light of s.98(4). Under the case of *Polkey v AE Dayton* [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost her employment.
19. If we were not satisfied that the respondent had discharged its burden in advancing that the reason for dismissal fell within one of the potentially fair reasons, but instead concluded that the reason or principal reason was the fact of the claimant's pregnancy or the fact that she had taken maternity leave, then, pursuant to section 99 ERA, we would have to conclude that the dismissal was automatically unfair.
20. Turning to the discrimination claim, we noted that the claimant was asserting that her dismissal was unfavourable treatment on the grounds of her pregnancy and/or the fact that she had exercised her right to take maternity leave.
21. We noted that the burden of proof in relation to a discrimination claim is set out at section 136 EqA. That required us to consider that, if there were facts from which we could decide, in the absence of any other explanation, that the respondent treated the claimant unfavourably on the grounds of her pregnancy and/or the fact that she had exercised her right to take maternity leave, then we would have to conclude that discrimination occurred unless the Respondent demonstrated that its reason, or at least its principal reason, for the treatment of the claimant and her dismissal was not connected to the fact of her pregnancy and/or maternity leave.

Issues for the tribunal to determine

22. Had the claimant been subjected to unfavourable treatment pursuant to s.18 EqA in that:
 - a. She was dismissed during the protected period
 - b. She was not paid a bonus of £800 per month, which she always received prior to the start of her maternity leave
23. What was the reason for the dismissal?
24. Was the dismissal of the claimant automatically unfair pursuant to s.99 of ERA?
25. If the dismissal was not automatically unfair, was it unfair in the ordinary sense?

The witness evidence

26. We do not consider that either of the witnesses we heard from had any intention to deceive the tribunal. We do not call into question the credibility of either. However, we do make some comment on the reliability of the evidence given by the witnesses.
27. The claimant gave her evidence in a clear, compelling and consistent manner throughout. Her evidence remained consistent with the written contemporaneous documents that we have seen.
28. Mr Xiao for the respondent gave evidence that was not so clear. There were a number of occasions where he gave inconsistent evidence, and even gave conflicting answers when considering the same matter. However, we observed that he was trying his best to answer the questions he was asked.
29. Where there was a discrepancy between the evidence given by the claimant on the one hand, and that given by Mr Xiao on the other, we prefer the evidence given by the claimant and we have made our factual findings accordingly.

Findings of fact

We make the following findings of fact, on the balance of probability based on all the matters we have seen, heard and read. In doing so, we do not repeat all the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

30. The claimant's continuous employment with the respondent started on 02/09/2013.
31. There were no issues concerning the claimant's performance before she started her maternity leave. Mr Xiao, under cross examination, gave unclear evidence on complaints raised against the claimant before maternity leave. This appeared to fluctuate between complaints in 2013, 2015 and 2016. When questioned on these matters he was not able to give specific details. The claimant's position, in contrast, was that there were no performance issues raised with her, and that Mr Xiao in fact wanted to promote her. We preferred the claimant's evidence on this, but also took into account the lack of any supporting documentation in relation to any complaints. We found Mr Xiao's oral evidence to be unreliable in relation to this.
32. The claimant became pregnant around July/August 2016, so this was the beginning of her protected period. She went on maternity leave on 07/04/2017.
33. The respondent employed a temporary replacement, Ray, on a 6-month contract. He received less pay than the claimant, as he was not paid a monthly bonus, which the claimant had been receiving.
34. At some point during the claimant's maternity leave, Ray's contract was extended beyond the expected return date of the claimant, and he was employed for the duration of his contract into the role of Logistic Manager, which was the position that was occupied by the claimant before she started her maternity leave.

35. During the claimant's maternity leave she was never informed of the status of Ray's contract, or that he would be replacing her as logistics manager.
36. There was no decision made to dismiss the claimant at the point of maternity leave starting. There was no dispute between the parties in relation to this. Both parties gave evidence that they expected the claimant to return to work for the respondent once her maternity leave ended.
37. The claimant sought to end her maternity leave early. She did this through a text message on 12 March 2018, with a view to returning to her previous job on 26/03/2018.
38. On the 20/03/2018, the claimant had a telephone conversation with Mr Xiao with a view to returning to work on the 26/03/2018.
39. No action had been taken against or considered being taken against the claimant until she raised prospect of returning. Again, this was not in dispute between the parties.
40. There was no mention of performance matters during this telephone call between the claimant and Mr Xiao. The claimant gave clear evidence on this under cross examination. There was no record to contradict the claimant's version. On balance we accept the claimant's explanation of the content of this phone call.
41. There was no significant change to the claimant's job role whilst she was on maternity leave. Mr Xiao put forward a suggestion that the respondent introduced the use of a new computer system. He further identified that this new computer system would only need 2-3 days training. Ms Zhang's evidence was that she had already used the computer system in question, and that she was able to log on to the system in the morning of 26/03/2018. We accepted the claimant's evidence on this, and considered that Mr Xiao's own evidence suggested that the computer system was not a significant change. On this basis we find there was no significant change in the role of logistics manager.
42. M Xiao told the claimant over the phone on 20/03/2018 that if she came in to work on the 26/03/2018 then he would dismiss her. Not only did we consider both witnesses oral evidence in relation to this matter, but that the claimant's evidence is consistent with what actually happened.
43. The decision to dismiss was crystallised on around 20/03/2018 in the mind of the dismissing officer, Mr Xiao. This decision was implemented through a letter handed to the claimant on 26/03/18.
44. In the meeting on 26/03/2018 we find that there was no discussion or explanation behind the reasons for the dismissal, but that they were simply contained within the dismissal letter itself. In deciding this we take into account the consistency/reliability of the claimant's oral evidence and the consistency that this evidence had with the documents contained at pp109 and 112 of the bundle. There was consistency with the transcript produced at pg112, which Mr Xiao under cross-examination, appeared to verify the accuracy of
45. The claimant returned to the workplace on 26/03/2018

46. The dismissal was executed through the handing over of the dismissal letter, which took place on the morning of 26/03/2018.
47. No dismissal procedure was followed. No warnings of dismissal given before dismissal. No evidence of giving an opportunity to improve. No evidence was presented on any of these matters. The claimant's case in relation to these matters was not challenged.
48. Dismissal was not because of matters relating to the claimant's performance that came to light during maternity leave. There was simply no evidence of this, and Mr Xiao provides no substance or explanation or particularisation of that.
49. It was not disputed that the claimant was paid £800 bonus every month, regardless of performance, although there is some conflicting evidence on the purpose behind this payment. However, Mr Xiao accepted under cross examination that this bonus was about retention. We find this a work-related bonus for the purposes of retaining low paid staff.

Conclusions

50. Looking first at the discrimination case. We had to consider whether there were sufficient primary facts from which a prima facie case could be concluded that the dismissal and the treatment of the claimant could be on the grounds of her having been pregnant or having taken maternity leave. If we found that this was the case, the burden would then have switched to the respondent to demonstrate that the treatment of the claimant and her dismissal were for reasons not connected to her pregnancy and/or maternity leave.
51. We were satisfied that there was a prima facie case of discrimination in these circumstances. Becoming pregnant, taking maternity, and decision to dismiss and being dismissed were relevant factors. However, we were conscious that more was needed for us to reverse the burden. We noted that that the claimant was not kept informed of Ray's change of status during her maternity leave, that Ray would be remaining beyond his initial 6 months contract, and that he was replacing her as Logistics Manager. We further noted that no action was taken against the claimant until after she raised the matter of her return over the telephone with Mr Xiao on the 20/03/2018. And we considered that there was no mention of performance issues with the claimant until she had indicated a desire to return to work during that same phone call. Taking all that into account, we are satisfied, that the claimant has established a prima facie case that her dismissal could have been caused by her pregnancy/maternity leave. The burden of proof thus switched to the respondent. I also just add- that these primary facts, aside from the actual dismissal all took place during the protected period described at s.18(6) EQA, with the dismissal being an implementation of a decision taken in the protected period, as per s.18(5) EQA.
52. The respondent was therefore faced with having to establish that the reason for the dismissal was for another reason. The respondent submitted that the reason behind the claimant's dismissal was for performance related matters. This was their pleaded case. However, for reasons already stated, we were not satisfied that this was the case. We are not satisfied that the respondent has discharged that burden. The respondent provided no evidence that supported that the reason for the dismissal was the claimant's performance.

53. Although we accept £800 per month was not paid during maternity leave- and it is clear that this would satisfy reversed burden, and the respondent does not challenge this- s. 9 Maternity and Parental Leave Regulations 1999 effectively suspends terms and conditions that form part of remuneration. Remuneration includes wages and salary, which is defined at s.27 ERA so as to include such bonuses. This claim therefore must fail as a matter of law.
54. Mr Gilbert did make submissions in closing to the extent that one of reasons behind the claimant's dismissal was to keep costs down, and Mr Xiao did give some evidence on this. However, this was not the pleaded case of the respondent, and even if it was, it lacked sufficient evidence to convince the tribunal that this was the reason or principle reason behind the dismissal.
55. I just want to explain very briefly what our alternative position would have been, just for the avoidance of any doubt in this case. Had we been convinced by the respondent that this was for reasons unconnected to maternity leave, and dismissal was for reasons relating to performance, which we were not, we would have found this to be an unfair dismissal pursuant to s.98 of the ERA. The employer dismissed the claimant in circumstances where there was no warning, or opportunity to improve. This would not, in our opinion have fallen within the band of reasonable responses test. Further, there was a clear failure in procedure. The decision was made, and there was a period after that before the act of dismissal took place. Yet no process was implemented before making the decision, or before that act. There was no right of appeal. We would have found this to have been both substantively unfair and procedurally unfair in these circumstances. I am not going into any more detail than that, but thought it prudent to explain, albeit briefly, our alternative position.

REMEDY

56. The respondent is ordered to pay the claimant the sum of **£13,277.13** for unfair dismissal made up of the following:
- (i) The agreed gross sum of **£1,991.24** for the basic award
 - (ii) The net sum of **£11,285.89** for the compensatory award, which is calculated as follows:
 - a. 4 months to find new, comparable employment (using the agreed normal weekly pay of £497.81): £8,628.71
 - b. Loss of statutory rights: £400
 - c. Uplift of 25% for failure to follow ACAS code: £2,257.18
57. Having heard submissions from both parties, the respondent is ordered to pay damages of **£11,000** for injury to feelings. This is made up of:
- (i) The sum of £8,800 for injury to feelings
 - (ii) Uplift of 25% for failure to follow ACAS code: £2,200
58. The respondent is ordered to pay for wrongful dismissal/failure to provide one month's notice, the sum of **£2,696.65**. This is made up of:

- (i) The agreed net sum of £2,157.18
- (ii) Uplift of 25% for failure to follow ACAS code: £539.47

59. The respondent is ordered to pay the gross sum of **£1,107.63** for accrued holiday pay. This is made up of:

- (i) The agreed gross sum of £886.10.
- (ii) Uplift of 25% for failure to follow ACAS code: £221.53

60. The respondent is ordered to pay the claimant the net sum of **£2114.10** for failure to pay the owed maternity pay. This is made up of:

- (i) The agreed net sum of £1,691.28.
- (ii) Uplift of 25% for failure to follow ACAS code: £422.82

61. For avoidance of doubt, the respondent is ordered to pay the claimant the total sum of **£30,195.33**. (Do note that the figures in paragraphs 4-8 are rounded up to the nearest pence, and if totaled equal £30,195.51. The total figure stated in this paragraph, that which the respondent is ordered to pay, is the accurate figure without rounding up.)

62. The respondent is ordered to pay the claimant the sum of **£30,195.33** within 14 days of this judgment being handed down to the parties.

63. An application for costs by the claimant was not well founded and refused.

64. The Employment Protection (Recoupment of Jobseeker’s Allowance and Income Support) Regulations 1996 (“the Recoupment Regulations”) do not apply in this case.

Employment Judge **Butler**

Date 25/10/2019

JUDGMENT SENT TO THE PARTIES ON

.....30/10/2019.....

.....
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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