EMPLOYMENT TRIBUNALS

Claimant: **Miss J Dowdell**

Respondent: **Keys Group Limited (1)**
The Leaving Care Company Limited (2)
Crossways Limited (3)

Heard at: **Bristol** **On:** **24 and 25 October 2019**

Before: **Employment Judge O'Rourke**
Mrs Simmonds
Ms Cusack

Representation
Claimant: **Mr Watson-Griffin - friend**
Respondent: **Ms Jennings - Counsel**

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed by the Third Respondent (R3) as a residential support worker and latterly worked as a housing officer, on secondment to the Second Respondent (R2). The First Respondent (R1) is the parent company of the other Respondents, who predominantly provide care services to vulnerable persons. She was employed for approximately eighteen months, until her resignation on 3 September 2018.

2. As a consequence of that dismissal, the Claimant brought claims of maternity discrimination (s.18(4) Equality Act 2010 – 'the Act') and unlawful deductions from wages and arrears of holiday pay.

3. There was no dispute that the claim had been brought out of time and therefore, as a preliminary issue, we considered whether it would either be just and equitable (in respect of the discrimination claim) to extend time, or whether, in respect of the other claims, it was not reasonably practicable to have brought them within time. Without rehearsing our decision here, in full, we concluded that it would be just and equitable to extend time for the discrimination claim, but not in respect of the other claims, which were accordingly struck out.

4. The issues in respect of the discrimination claim are set out in paragraph 20 of the Case Management Order of Employment Judge Rayner, dated 25 July 2019 and are as follows:

    a. Did any Respondent subject the Claimant to the following unfavourable treatment, falling within s.39 of the Act:

        i. She was required to carry out a different job from her previous job, when she returned to work after maternity leave on 8 August 2018.

        ii. On that return, the pattern of work she had agreed with R2, namely Wednesday to Friday, was changed to Monday to Wednesday, to cover the absence of another employee, who was doing her job.

        iii. Following the Claimant attending for Keeping in Touch (KIT) days, in August 2018, she was told she would not be paid accrued holiday pay and wasn't paid such pay for the period 1 April to 8 August 2018.

        iv. She was due to be paid on 31 August 2018, but was not in fact paid until 3 September 2018.

        v. She was not provided a pay slip for August.

        vi. She suffered an unlawful deduction from her wages for August, being paid £184, instead of £384.

    b. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the unfavourable treatment was because the Claimant had taken maternity leave?

The Law

5. We referred ourselves to s.18(4) of the Act.

The Facts

6. We heard evidence from the Claimant and on behalf of the Respondent, from Mr Sean Hamilton, HR operations manager for R1.

Chronology

7. We set out a list of relevant dates and events.

    (1) 3 March 2017 – C's employment commenced with R3.

    (2) 24 April 2017 – the Claimant informs R3 of her pregnancy.

(3) 29 May 2017 – due to a pregnancy-related condition, it was agreed, as a reasonable adjustment between the Claimant and R3 and R2 that she would be seconded to R2, as an office-based worker.

(4) 25 August 2017 – R3 wrote confirming her apparent request that she was to go on a year's maternity leave, from 10 November 2017 and that she could take up to 10 KIT days during that time [61].

(5) 10 November 2017 – the Claimant commences maternity leave.

(6) 1 February 2018 – R1 purchase the previous parent company, Aspirations Bidco Ltd. R2 and R3 were unaffected, at least in respect of the Claimant, her terms and conditions remaining the same [63].

(7) In April 2018, R3 advertised the role of housing administrator [65], also informing the Claimant. The Claimant was not ready to return to work at that point, but in fact the role was not filled.

(8) 5 July 2018 – the Claimant informs R1 (because, as the parent company they had overarching HR responsibilities and R3's office staffing had been subject to redundancies) that in fact she wished to return to work on 10 August 2018 (all dates hereafter 2018) and also complete her KIT days [67]. It is the mutual intention of all parties that she is going to return to the housing administrator role with R3.

(9) 25 July – following some prior correspondence as to the number of days and which days she would work, there is an exchange of emails, in which she proposed either Monday to Wednesday, or Wednesday to Friday [71 and 76].

(10) 27 July – Mr Owen, on behalf of R1/R2, writes to agree Wednesday to Friday [75] and that she would return to the housing role.

(11) 30 July – Mr Owen sends her a job description [78 to 80]. That draft states that she would be managing an apprentice and describes the role as 'housing officer'. A subsequent re-draft deleted that management responsibility [113].

(12) 6 August – the office manager for R1 sends the Claimant an amended offer of employment letter [83-85], in summary confirming the days of work and job title.

(13) 8 to 10 and 15 and 16 August – Claimant completes six KIT days.

(14) 10 August – on one of those KIT days, the Claimant discusses her return with a manager of the Respondents (there is a dispute as to which one), the handwritten note of which [60] refers to her return to work for Wednesdays to Fridays and there is discussion as to her leave entitlement.

(15) 17 August – there is an exchange of emails, in which a new rate of pay (£9.61 per hour) is stated [93]. However, clearly, the Claimant had enquired also as to payment of 'sleep-ins', as part of the holiday entitlement she had accrued during her maternity leave. When working for R3, she had been paid £52 per shift, when required to 'sleep in' at a client's house. That pay arrangement was continued while she was on secondment with R2, so as not to disadvantage her pay-wise. However, in the email, the HR representative from R1, stated '*I have looked into previous contract documents and cannot find any wording that suggests you are entitled to x number of 'sleeps' per month/week and nothing to say that you will receive sleep-in pay, if you are on leave. So, no sleep-in pay will be applicable'.*

(16) 21 August – the Claimant brings a grievance [92].

(17) 31 August (a Friday) – the Claimant is not paid for her KIT days. She complains by email that day of the non-payment and also that she has been told that she cannot do the remaining KIT days due to her grievance [108].

(18) 3 September (Monday) – the Claimant is informed by email, at 09.45 that she will be paid that day and the writer apologises for the failure to do so on Friday, blaming the fact that the Claimant was still on R3's payroll.

(19) 3 September – by email of 13:16, the Claimant resigns, alleging fundamental breach of contract and maternity discrimination [110]. She was nonetheless willing to proceed with the grievance hearing, arranged for 6 September, which took place on that date [minutes 117-119]. An outcome letter, rejecting the grievance was sent on 21 September [127]. The Claimant did not appeal.

<u>Alleged Acts of Unfavourable Treatment</u>

8. That the Claimant was required to carry out a different job from her 'previous job', on return from maternity leave: the Respondents state that her 'previous job' was her full-time role as a residential support worker, with R3, which she agreed remained open to her and to which she could return, if she wished. However, she did not wish to do so, preferring the seconded housing officer role, with R2. For the first time, in the Claimant's closing submissions, it was clarified for us that in fact the 'previous job' she was referring to was that seconded role, which had been full-time. Even assuming that we now accept that that it is the correct interpretation of this treatment, we do not consider it unfavourable, for the following reasons:

(1) Her contractual entitlement was to return to her support worker role with R3 and she had no such entitlement to any role with R2.

(2) The fact that R2 was willing to offer her a role, nonetheless, on their terms, cannot therefore be unfavourable treatment. They identified that role, while she was on maternity leave and offered it to her and despite her being unable to return at that point, the role was effectively kept open for her. R2 agreed to her proposal to work part-time.

(3) The Claimant asserted that she had agreed with Mr Owen that while she would return, initially, for three days a week, she would, after three months, work full-time. Mr Owen said in an email of 23 July [69], referring to part-time work, that '*we can then look at increase if all goes well?'* The clear implication of that phrase, for us, is that he was reserving his position as to the Claimant eventually working full-time and that is why the contract expressly offered only part-time employment. We think it highly significant that at no point in this extensive correspondence did the Claimant assert that the arrangement for eventual full-time employment had actually been agreed.

9. The next alleged act of unfavourable treatment was that the Claimant was instructed to work Mondays to Wednesdays, as opposed to what had previously been agreed with Mr Owen, on 27 July, of Wednesday to Fridays. There is no corroborative evidence of this request and nor is it mentioned in the grievance. However, in any event, in her email of 25 July [74], she had offered to work either pattern and at no point withdrew that offer. It appears to us that her subsequent complaint on this issue related to that change being allegedly required to cover the absence of an admin apprentice, who had been carrying out some of the housing officer duties while the Claimant was on maternity leave. This issue seemed to us to be potentially one of status for the Claimant. She seemed to think that she was effectively being offered a job share with the apprentice, on equal terms, with the Claimant no longer supervising her. Mr Hamilton, in his evidence, was clear that this was not the case. The apprentice, he said, was '*recruited purely to fulfil business needs during the time Jessica was on Maternity Leave. This role was substantially different to Jessica's*. It was, he said in cross-examination, '*not the same job as the Claimant. It would have been to do admin functions and basic HR functions, such as filing.'* It appears to us, overall that the Claimant somewhat 'jumped the gun' on this matter. The acid test for her would have been to return to work and see if her fears were realised. In the absence of her doing so, there is no evidence that they were anything more than just that, fears. We cannot therefore see that the alleged decision to change her days constitutes unfavourable treatment.

10. The next alleged act of unfavourable treatment was a failure to pay her holiday pay, for the second period of her maternity leave. Her evidence on this point was contradictory. She initially said that in fact the failure was to include, in the calculation, payment for sleep-in shifts, but then, under questioning, said that in fact that it was the total holiday pay. The evidence, however, indicates that R1 accepted the Claimant's 'normal' holiday entitlement, which they said she could take at any time in that holiday year, but as per their email of 17 August [93], they were not willing to pay the sleep-in supplement, as they did not agree that she was entitled to it while on leave. There was no contractual evidence that such an entitlement existed. In fact, R1 did not actually pay the Claimant her 'normal' accrued in lieu holiday entitlement, until August of this year. However, while that may constitute unfavourable treatment, the burden of proof is on the Claimant to satisfy us that that failure was because she had taken maternity leave. There is simply no evidence that that was the case. If the Claimant had left under different

circumstances, not following maternity leave and had not been paid her accrued holiday pay, the obvious explanation would be administrative error. We think it significant that the Claimant, as any such leaver would have done, did not pursue this failure through normal administrative channels, instead only raising it in her claim five months later.

11. Next, the Claimant complained of late payment of her August pay, by three days. It is blatantly obvious to us that this was simply yet another administrative error on R1's part. The explanations offered as to her having been on unpaid maternity leave for nine months, during which the parent company changed identity and that she was moving from R3's employment to R2's and therefore her pay arrangements did not transfer smoothly, are entirely plausible. The emails from R1 explain this, offer apologies and rectify the error in short order and therefore cannot be construed, in any way, as unfavourable treatment.

12. Next, the failure to provide a payslip for August – we view this complaint as trivial in the extreme. The Claimant was given a perfectly reasonable explanation for the failure and it was rectified by inclusion in her September payslip. Her refusal to accept this explanation indicates to us her overly-legalistic approach to this dispute, rather than any real attempt on her part to resolve it, as also indicated in her multiple responses to attempts at resolution by the Respondents in the grievance hearing, namely '*I have made my feelings clear'* [118].

13. Finally, it was agreed that there had been a failure to pay her the full amount of £384 for August, she instead being paid £249. When she disputed this, R1 admitted to yet another error on their part and rectified the shortfall in her September pay. While this is, at least theoretically, unfavourable treatment, there is vanishingly little evidence that it was in any way related to her having taken maternity leave, but instead was due, we find, to the previously mentioned administrative errors referred to.

14. As an addendum, while not pleaded in her claim, Mr Watson-Griffin submitted, in closing that the Respondents' decision not to let the Claimant complete her KIT days was also unfavourable treatment, because she had taken maternity leave. R1's explanation for this decision [129] was that they awaited '*clarity as to which role you intended to pursue, i.e. the previous role as residential support worker at Crossways, or the new role, of housing officer in Leaving Care'.* This is, we find, a perfectly rational and sensible decision, in the circumstances and clearly unrelated to the fact that she had taken maternity leave.

Conclusion

15. For these reasons, therefore, we find that the Claimant has not made out her claim of maternity discrimination which accordingly fails and is dismissed.

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Employment Judge O'Rourke

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Date 26 November 2019