EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107280/2019

Preliminary Hearing Held in Dundee on 9 December 2019

Employment Judge I McFatridge

Mr R McAuley	**Claimant** **In person**
Sandvik Materials Limited t/a Kanthal	**Respondent** **Represented by** **Mr MacKenzie,** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent's application to strike out that part of the claim relating to sex discrimination is refused. The claim of discrimination on grounds of pregnancy and maternity in terms of section 18 of the Equality Act is dismissed.

REASONS

Introduction

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent. He also claimed that he had been unlawfully discriminated against on grounds of pregnancy and

maternity. He narrated a history where he had agreed to do overtime on 9 March 2019 but that on that day he had to attend hospital with his pregnant partner in an emergency as his partner was in pain and feeling light headed. His position was that he had subsequently been subjected to a disciplinary investigation and thereafter required to attend a disciplinary meeting following which he had been dismissed. He indicated that his pregnant partner was dependent on him to support her in the emergency as was his unborn child. He said that he had been willing to attend overtime after attending hospital with his partner. He claimed associative discrimination. The respondent submitted a response in which they denied the claim. It was their position that the claimant had been dismissed for misconduct and in particular that whilst on a final written warning for similar conduct the claimant had failed to follow the correct absence reporting procedure in respect of his absence on 9 March. Their position was that the claimant appeared to be claiming discrimination by association with a pregnant woman and that there was no such right arising out of the Equality Act 2010 or other legislation and that the Tribunal had no jurisdiction to consider the claim. A preliminary hearing was held for case management purposes during which the respondent clarified that their position was that that part of the claim relating to pregnancy/maternity discrimination should be struck out and a preliminary hearing was thereafter fixed in order to deal with this application. At the preliminary hearing I indicated that I would be proceeding on the basis of the claimant's averments as set out in the ET1 taken at their highest. I heard legal submissions from both parties. The respondent's submission proceeded on a written heads of argument and provided an extensive exposition of the relevant case law for which I was extremely grateful. The claimant's representations were necessarily more brief given that the claimant is not legally qualified. Given that the respondent's submissions essentially followed the written heads of argument I shall not seek to repeat them here but shall refer to them where appropriate below.

Discussion

2. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 provides

> "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds ….
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success; …"

3. My understanding was that in this case the respondent wished the Tribunal to strike out that part of the claim relating to discrimination on grounds of pregnancy/maternity on the basis that it had no reasonable prospect of success.

4. I understood that the discrimination claim made by the claimant was what has been termed a claim of associative discrimination. The claimant himself, who is male, cannot be pregnant. His claim is based on the assertion that he is associated with his partner who was pregnant I understood his claim to be that he had been dismissed because of his association with his partner's pregnancy. The respondent's position was set out in their ET3 in paragraph 23 where they state that there is no such right arising out of the Equality Act 2010 or other legislation.

5. Clearly if the respondent is correct in this assertion then this part of the claim has no reasonable prospect of success and should be struck out. I should say that the respondent's legal submissions were based on establishing this general proposition rather than any detailed critique of the claimant's pleadings. Accordingly, I shall first of all address the question of whether or not I agree with the respondent that there is no right not to be discriminated by association with a pregnant woman arising out of the Equality Act 2010 or other legislation.

6. Looking at the Equality Act 2010 I considered that there are two possible sources from which such a right might arise. The first of these which I shall consider is section 18. This provides

> "(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. …."

The legislation goes on to list various other matters which might amount to discrimination but in each case the legislation refers to the claimant being a woman in relation to a pregnancy of hers. Certain clauses refer to the claimant exercising rights to ordinary or additional maternity leave rather than specifically stating that the right arises only in relation to the woman's own pregnancy but given that a woman is only entitled to maternity leave in respect of her own pregnancy the effect is the same.

7. The concept of discrimination by association is described by the European Court in the case of ***Coleman v Attridge Law [2008] ICR 1128***. In this case the European Court interpreted the UK Disability Discrimination Act 1995 in light of the European Directive 2000/78. As is well known the authorities of a member state of the EU are obliged so far as possible to interpret national legislation in light of any EU directives on the subject which are relevant. Where possible, a Court or Tribunal should interpret the national law in a way which is compatible with the terms of the directive. In the ***Coleman*** case the relevant directive was Directive 2000/78 which is the framework directive securing equal treatment in employment and occupation. Paragraph 1 sets out the purpose of the directive as being to lay down a general framework for combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting in to effect in the members' states the principle of equal treatment. Article 2 states

"1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1."

I have set these out at length since the European Court in the ***Coleman*** case held that the Directive as a whole and in particular Articles 1, 2(1)

and 2(a) must be interpreted as meaning that the prohibition of direct discrimination laid down in those provisions is not limited only to people who are themselves disabled but that where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation and it is established that the less favourable treatment of that employee is based on the disability of his child whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2 2(a). I also accepted that as pointed out by the respondent's representative the court in the ***Coleman*** case considered that the discrimination was liable to have a direct effect on the disabled person i.e. the child.

8. Directive 2000/78 EC does not refer to discrimination on the basis of the protected characteristic of either sex or pregnancy/maternity. Directive 2006/54 EC is the directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It is a re-cast directive and refers back to Council Directive 92/85 EEC, Directive 96/34 EEC. Directive 92/85 EEC is a directive which deals with measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. The directive refers at Article 1 to its purpose being to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Article 2 goes on to define types of discrimination and confirms that direct discrimination is where one person is treated less favourably on grounds of sex than another is, has been, or would be treated in a comparable situation. Article 2 2 then goes on to stated

> "For the purposes of this Directive, discrimination includes:
>
> (a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct
>
> (b) instruction to discriminate against persons on grounds of sex;
>
> (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC."

Again I note that the specific discrimination in relation to pregnancy or maternity leave within the meaning of Directive 92/85/EEC is restricted to less favourable treatment of a woman and does not therefore assist the claimant in this case.

9. The issue of whether the Directive protected employees who were not themselves pregnant, but who alleged they were treated less favourably on the ground of their association with a person who was herself pregnant was examined in the case of ***Kulikaoskas v MacDuff Shellfish [2011] ICR 48***. Here the court was considering section 3A(1) of the Sex Discrimination Act 1975 this provided

> "(1) A person discriminates against a woman if
>
> (a) at a time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably."

10. The EAT considered an extensive list of European Authorities on the matter. It concluded that there was nothing in Article 2 2(c) which required the court to interpret Article 3(a) of the Sex Discrimination Act as applying to pregnancy discrimination by association. In that context it is appropriate to realise that what the EAT was effectively doing was looking at the provisions of the Sex Discrimination Act 1975 which only apply to a woman in respect of her own pregnancy and interpreting this in the light of Article 2 2(a) which again refers to less favourable treatment of a woman related to pregnancy leave within the meaning of the 1992 Directive. Subsequent to the EAT case the Court of Session, on appeal, referred the matter to the European Court of Justice for a preliminary ruling but the case settled before the reference could be decided.

11. The relevant provision is now contained in section 18 of the Equality Act rather than in the Sex Discrimination Act 1975. Although the decision in ***Kulikaoskas*** refers to the earlier legislation I consider that it is also correct in terms of the interaction between the 2006 Directive and the Equality Act. Accordingly, it is my view that the claimant cannot use this provision to make a claim in respect of unfavourable treatment based on the pregnancy of someone he is associated with. He cannot do so since both the domestic and EU legislation limits the protection to a woman.

12. There is however a further route which I am required to consider. Initially the concept of sex discrimination in both EU law and UK domestic law did not make specific reference to unfavourable treatment of a woman relating to pregnancy or maternity. Over the years a line of jurisprudence emerged through the European Court which established that unfavourable treatment of a woman relating to pregnancy or maternity constituted direct discrimination on grounds of sex. The lacunae which led to this jurisprudence was to some extent remedied by the EU Directive 92/85 but, prior to the implementation of this Directive, cases relating to inter alia dismissals for pregnancy related absences were decided on the basis that these were sex discrimination claims reliant on the national law and the Equal Treatment Directive 76/207. One of the last of these cases ***Brown v Rentokil [1998] IRLR 464*** provides a useful overview of the European Court's jurisprudence on the issue. The outcome of that case was quite clearly set out in the penultimate paragraph which states

> *"Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9th February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and the working conditions preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness relating from that pregnancy"* (Brown v Rentokil page 465)."

13. The provision of the Equality Act which relates to direct sex discrimination is section 13. This provides that

> "(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.
>
> …..
>
> (6) If the protected characteristic is sex –
>
> …..
>
> (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth."

14. It therefore appears to me that although I agree with the reasoning in the ***Kulikaoskas*** case, the ***Kulikaoskas*** case can be readily distinguished from the present case. In the present case, I am required to deal with section 13 of the Equality Act 2010 rather than section 3A of the Sex Discrimination Act. It is quite clear that there is nothing in section 13 which precludes discrimination by association. There is no requirement that the protected characteristic requires to be a protected characteristic of the person claiming to have been discriminated against. I am bound by the line of jurisprudence demonstrating that it is part of EU law that unfavourable treatment due to absence caused by pregnancy related illness is direct sex discrimination. My view that this is part of the acquis communautaire and nothing in the subsequent jurisprudence of the European Court or in any subsequent Directive has reversed this.

15. I did consider whether, as suggested by the respondent, section 25 of the Equality Act 2010 had any relevance to this issue. This describes pregnancy and maternity discrimination as being discrimination within section 17 or 18. It goes on to describe sex discrimination as being discrimination within section 13 because of sex. I note that the claimant has ticked the box for pregnancy and maternity discrimination in his ET1 rather than the box for sex discrimination. In my view however section 25 does nothing more than interpret how the particular strands of discrimination are referred to within the Act and related legislation. I do not consider that section 25 means that pregnancy discrimination claims can only ever be brought under section 17 or 18. I do note however that section 18(7) goes on to state

> "(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)."

This means that a woman cannot claim pregnancy/maternity discrimination under section 13 but nothing precludes a man such as the claimant from doing so using the earlier jurisprudence to the effect that such claims can be brought as a claim of sex discrimination.

16. I am fortified in my belief by the Employment Tribunal case of ***Gyenes v Highland Welcome (UK) Limited t/a The Star Hotel [2014] WL10246834***. This is an Employment Tribunal case at first instance to which I was referred to by the respondent's agent. It is not binding on me. In that case the Employment Tribunal in Inverness, extrapolating from the ***Coleman*** decision reached the view that associative sex discrimination claims were possible. I agree with the sentiments expressed by the Judge in that case that in relation to gender there should be an equally robust conception of equality as in relation to disability (paragraph 56). I am also fortified in my view by the remaining case which I was referred to by the respondent namely that of ***EAD Solicitors LLP v Abrams [2016] ICR 380***. This was a claim of age discrimination by association. The circumstances were that a company had been set up by an individual to provide the individual's services to an LLP. They ended the arrangement once the individual attained retirement age. It was noted in that case that it was clear from the use of the term "because of the protected characteristic" in section 13(1) that the protected characteristic did not have to be enjoyed by the person who was the subject of the detrimental treatment and it was entirely possible for the protected characteristic to be that of an individual who was not the claimant. There was nothing in the Equality Act 2010 to indicate a contrary intention and that it would be consistent with EU law if the Tribunal had jurisdiction to consider the claim of associative discrimination by the claimant company.

17. Given that the respondent based their attack on the premise that the Tribunal had no jurisdiction to hear claims of associative discrimination in relation to the pregnancy of the claimant's partner in principle and given that I have come to the contrary view I am not prepared to dismiss the claim and this application is refused. That having been said I have some concerns in this case as to whether the current state of the pleadings allow the claimant to put forward a claim of direct discrimination. The respondent's representative highlighted in his final submissions that there were a number of matters where the Tribunal would require further information. The claimant's claim is one of direct discrimination. The concept of discrimination is usefully described at a philosophical level in paragraph 17-19 of the ***Coleman*** case. In paragraph 17 it states

> "When we say that it is wrong to treat someone less favourably on certain grounds what we mean is that justice requires that we do not rely on these grounds in order negatively to affect that person's position. Put differently, if we rely on those prohibited grounds we have inflicted on the person concerned an injustice."

It states in paragraph 19 that

> "The distinguishing feature of direct discrimination and harassment is that they bear unnecessary relationship to a particular suspect of classification. The discriminator relies on a suspect's classification in order to act in a certain way. The classification are not a mere contingency but serves as an essential premise of his reasoning. An employer's reliance on those suspect grounds is seen by the community legal order as an evil which must be eradicated. Therefore the Directive prohibits the use of those classifications as grounds on which an employer's reasoning may be based."

Paragraph 22 goes on to state that in Mrs Coleman's case the wrong the law was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others. What it does is to remove disability, sexual orientation (and others) completely from the range of grounds an employer may legitimately use to treat some people less well. The Directive does not allow the hostility an employer may have against people falling into the enumerated protected classifications to function as the basis of any kind of less favourable treatment in the context of employment and occupation. Paragraph 22 then goes on to state crucially

> "This hostility may be expressed in an overt manner by targeting individuals who themselves have certain characteristics or in a more subtle and covert manner by targeting those who are associated with the individuals having the characteristic."

It therefore goes on to state:

> "Therefore if someone is the object of discrimination because of any one of the characteristics listed in Article 1 then she can avail herself

with the protection of the Directive even if she does not possess one of them herself."

In the Coleman case there was a clear allegation that the claimant was singled out and targeted because of her disabled son. The discrimination would have an effect on her disabled son. The current pleadings in this case do not specify the effect of the discrimination on the claimant's wife. It is not entirely clear that they address the issue of why the claimant feels he was treated less favourably because the absence was related to pregnancy rather than for any other cause.

18. It follows on from this that the further information which the claimant required to provide is (1) the effect of the respondent's treatment on the person who does have the protected characteristic, and (2) those matters which lead the claimant to consider that the reason for his less favourable treatment was his wife's protected characteristic of pregnancy.

19. The claimant shall provide this additional information within 28 days of the date of promulgation of this Judgment. A preliminary hearing will then be fixed thereafter to discuss further procedure. The date for this will be arranged with the parties.

Employment Judge: **Ian Mcfatridge**
Date of Judgment: **19 December 2019**
Date sent to parties: **19 December 2019**