EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms D Mushi		Bread and Tea Limited (in voluntary liquidation)

Heard at: London Central **On**: 10 December 2019

Before: Employment Judge Stout

Representations
For the claimant: Mr T Mousis (Claimant's husband)
For the respondent: No appearance or representation

RESERVED JUDGMENT ON LIABILITY AND REMEDY

Under Rule 21 of The Employment Tribunal Rules of Procedure 2013

The judgment of the Tribunal is that:

1. The unfair dismissal claim is not well-founded and is dismissed.

2. The unlawful deductions from wages claim under ss 13 and 23 Employment Rights Act 1996 is well-founded. The Respondent must pay to the Claimant the sum unlawfully deducted for the period 30 November 2018 to 31 May 2019, being £414.13.

3. The Respondent contravened ss 18(2)(a) and 39(2)(c) of the Equality Act 2010 by dismissing her on 15 May 2019. The Respondent must pay to the Claimant a total of £1,568.71, comprising £1,500 injury to feelings plus interest of £68.71.

4. The Respondent failed to provide the Claimant with a statement of particulars of employment as required by ss 1(1) and 4(1) Employment Rights Act 1996 and the awards made in these proceedings are accordingly increased by two weeks' pay pursuant to s 38(3) Employment Act 2002. The Respondent must pay to the Claimant £661.80.

5. The Respondent must pay to the Claimant the sums ordered to be paid by this judgment (a **total of £2,644.64**) **within 14 days** of this judgment being sent to the parties.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Barista from 15 June 2017 to 15 May 2019 when she was dismissed without notice on commencing maternity leave.

2. There was a period of ACAS Early Conciliation between 11 July 2019 and 7 August 2019. By a claim form received by the Tribunal on 7 August 2019 the Claimant claims unfair dismissal, discrimination on grounds of pregnancy/maternity and unlawful deductions from wages.

3. The claim was served on the Respondent on 10 October 2019. No response was received. By letter of 21 November 2019, the Tribunal informed the parties (under Rule 21 of The Employment Tribunal Rules of Procedure 2013 (as amended)) that as the Respondent had failed to file a defence to the claim the Respondent would not be permitted to take part in the proceedings save to the extent permitted by the Tribunal.

4. The matter therefore comes before me, sitting as a judge alone under Rule 21(2), to determine whether judgment should be entered in favour of the Claimant and, if so, what remedy should be awarded.

The Evidence and Hearing

5. Only the Claimant's husband attended the hearing. The Claimant was unable to attend today because, her husband says, she has a two month old baby at home who is not well.

6. The Claimant's husband provided me with some documents, which I read. He also gave me some oral evidence in answer to my questions.

Preliminary issue

7. At the hearing I checked on Companies House and found that the Respondent went into creditors voluntary liquidation on 4 September 2019. A liquidator was appointed on that date: Hayley Maddison, The Old Brewhouse 49-51 Brewhouse Hill, Wheathampstead, St Albans, Hertfordshire, AL4 8AN.

8. The claim in these proceedings was not served on the Respondent until 10 October 2019, which was after the company went into liquidation. At that point, Companies House shows that the company's registered office address was no longer 33 Aldgate High Street, Aldgate, EC3N 1DL (the address given on the claim form and to which the claim was sent by the Tribunal) but the address of the liquidator.

9. In those circumstances, I do not know whether any relevant person has ever seen the claim form or had notice of this hearing (the notice having also been sent to the previous registered office address).

10. I therefore considered, as a preliminary issue, whether I should continue with the hearing in those circumstances.

11. Under Rule 86 a document may be delivered to a party by delivering it to the address given in the claim form. Under Rule 90 a document so delivered is taken to have been received by the addressee on certain dates as set out therein.

12. In these proceedings, the claim was served on the Respondent at the address given in the claim form and so was properly served.

13. There is no provision in Rule 21 which prevents judgment being given under that Rule even where proceedings have not been properly served, although under Rule 21(3) the Respondent is entitled to notice of this hearing. In this case, notice was given by sending it to the address required by Rule 86.

14. In the circumstances, I am satisfied that the Respondent has had such notice of these proceedings and this hearing as is required by the rules. I acknowledge the obvious risk in the circumstances that notice has not actually been received by the Respondent. However, taking a proportionate approach (as required by the over-riding objective in Rule 2), it seems to me that, given the relatively low value of the claim, and the fact that the company is in liquidation so that there is (i) little likelihood of anyone from the Respondent being able to or wishing to give meaningful evidence about it; and (ii) little prospect of the Claimant being successfully able to enforce any judgment in any event, it is appropriate for me to proceed.

15. In the event that the Respondent, when it receives this judgment (which will be sent c/o the liquidator), considers that the interests of justice require it to be reviewed, they may make an application (as may the Claimant) under Rules 70-73 for it to be reconsidered.

The facts

16. The facts that I have found to be material to my conclusions are as follows. All my findings of fact are made on the balance of probabilities.

17. The Respondent runs a chain of bakeries and coffee shops under the trading name Granier Bakery. The Claimant was employed in the business as a Barista from 15 June 2017 to 15 May 2019.

18. The Claimant's husband provided me with documents the Claimant had signed with her employer during her employment. This included two contracts as follows:-

    a. A contract signed by the Claimant and someone for "Grainer Bakery" on 15 June 2017 ("the 2017 Contract"). This stated that her employer was "Bread&Coffee (KINGSTON)" and set the commencement date as 15 June 2017. It provided for an hourly rate of £7.50 per hour;

    b. A second contract signed by the Claimant and someone ("TS") for Grainer Bakery on 22 October 2018 ("the 2018 Contract"). On this the name of the employer was blank and so was the commencement date. The hourly rate of pay was £9.50 per hour. The place of work was also blank, but her husband tells me the new contract was because she was moved to the 33 Aldgate High Street branch.

19. I was provided with the Claimant's payslips for 30 November 2018 (238 hours), 31 December 2018 (188 hours), 31 January 2019 (199 hours), 28 February 2019 (127.5 hrs plus 32 hrs holiday), 31 March 2019 (167.5 hours), 30 April 2019 (147 hours), 31 May 2019 (77.5 hours). Each of those shows the rate of pay as £9.00 per hour. The paying entity is Bread & Tea Limited. The total wages paid to the Claimant for the period 30 November 2018 to 31 May 2019 was £8,988.35 (net). The total hours worked was 1,176.5. The Claimant was paying National Insurance contributions (at 12%). Tax was also deducted. She is recorded as being Tax Code 1185L M1, which indicates that her personal allowance was £11,850.

20. The Claimant's husband told me that the Claimant had queried the rate with her employer during employment. There had been some discussion about being paid in cash, which the Claimant did not accept and the rate was not increased.

21. The Claimant's husband gave evidence about the events leading up to the Claimant's dismissal to supplement the information provided by the Claimant in the claim form. I accept his evidence. He said that the Claimant's due date was 22 September 2019. She informed her manager that she was pregnant at three months (i.e. in March 2019) and told him the due date and asked to be relieved of heavy lifting duties. The Claimant understood that she needed to give notice 28 days before starting on maternity leave. She discussed this with her manager and he said she could start when she liked. On 14 or 15 April 2019 she sent a text message saying that she would like to start maternity leave in 28 days. There was no response. The Claimant stopped work on 15 May 2019. Shortly

afterwards, they received a letter from the Respondent's pension company saying that her work with the company was over as she had 'resigned'. She received no maternity pay from the Respondent.

22. The Claimant's husband explained that the dismissal had been very hurtful. She feels that the Respondent took advantage of her because of poor standard of English. The fact that she got no messages, or post or letter caused her distress at a time when she was pregnant.

23. Since having the baby on 20 September 2019 the Claimant has been receiving £148.68 per week maternity allowance from the government with effect from 7 July 2019.

The law and my conclusions

Unfair dismissal

24. Under s 108(2) of the Employment Rights Act 1996 an employee must have not less than two years continuous employment ending with the effective date of termination in order to bring a claim for unfair dismissal.

25. The Claimant was not employed for two years at the effective date of termination, which I find was 15 May 2019.

26. Accordingly, this claim fails and is dismissed.

Unlawful deduction from wages

The law

27. Sections 13 and 27 of the ERA 1996 provide, so far as relevant, as follows:

> **s.13 Right not to suffer unauthorised deductions**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless-
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction….
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> **s.27 Meaning of 'wages' etc**

> (1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise ...

My conclusions on liability and remedy

28. The Claimant maintains that her employer was Bread & Tea Limited, which is the company named on her payslips. In the absence of any other legal entity identified as the employer in her contracts, I find to be the legal entity employing her.

29. I further find that, pursuant to the 2018 contract, she was entitled to be paid at £9.50 per hour with effect from the 30 November 2018 payroll. She was not, but was underpaid by 50p an hour from that date until the termination of her employment. This was a series of deductions for the purposes of s 23(3)(a) of the Employment Rights Act 1996 ("ERA 1996") so there is no issue as to time limits.

30. For 1,176.5 hours worked the Claimant should have been paid an additional 50p per hour, i.e. a total of £588.25 (gross). Although it is possible that the Claimant will not in this tax year earn more than her personal tax-free allowance, I have assumed that the gross additional pay to which the Claimant is entitled should be subject to 20% deduction for income tax and 12% deduction for national insurance contributions, leaving £414.13.

31. The Claimant's claim for unlawful deductions under s 23 ERA 1996 is therefore well-founded and, pursuant to s 27 ERA 1996, £414.13 is the amount that has been unlawfully deducted from the Claimant's wages between 30 November 2018 and 31 May 2019 and which must now be repaid by the Respondent.

<u>Pregnancy discrimination</u>

The law

32. Under s 39(2)(c) of the Equality Act 2010 (EA 2010) an employer must not discriminate against an employee by dismissing her.

33. Under s 18(2) of the Equality Act 2010 (EA 2010) a person (employer) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, it treats her unfavourably (a) because of the pregnancy or (b) because of illness suffered by her as a result of it.

34. Under s 18(6) of the EA 2010 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 (OML and AML), 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.

35. Pursuant to reg 4 of *The Maternity and Parental Leave etc Regulations 1999* (the 1999 Regulations) an employee is entitled to OML and AML if she has notified her employer in accordance with that regulation. So far as relevant in this case, that regulation (reg 4(1)) requires that the employee must, no later than the end of the fifteenth week before her expected week of childbirth, or if that is not reasonably practicable, as soon as is reasonably practicable, she notifies her employer of:
    i. Her pregnancy;
    ii. The expected week of childbirth (EWC); and
    iii. The date on which she intends her OML period to start.

36. By reg 4(1A) an employee who has notified in accordance with reg 4(1) may vary the date on which OML starts provided that she gives 28 days' notice.

37. By reg 4(2)(b), OML may not commence earlier than the beginning of the eleventh week before the EWC.

38. Pursuant to s 164 of the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) a woman is entitled to statutory maternity pay (SMP) during the OML period if she satisfies various conditions, including that she has been employed for a continuous period of at least 26 weeks ending with the week immediately preceding the 14th week before the EWC.

39. Pursuant to s 166 of the SSCBA 1992 and regs 2 and 6 of the *Statutory Maternity Pay (General) Regulations 1986* (1986 Regulations) an employee entitled to OML is entitled to be paid 90% of her normal weekly earnings (calculated by reference to the period of 8 weeks immediately preceding the 14th week before the EWC). For the remaining 33 weeks, an employee is entitled to pay at that 90% figure or £148.68, whichever is the lower.

40. In a discrimination claim such as this, the Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). Discrimination must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

41. The burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931.

My conclusions on liability and remedy

42. In this case, I find that the Claimant was on 15 May 2019 dismissed by the Respondent during the protected period in relation to her pregnancy. I further find that the Claimant's pregnancy was, at least, a material part of the reason for that dismissal since there is no other explanation for it. In this regard, I accept the evidence from the Claimant and her husband that they understood that the Respondent had agreed to her taking maternity leave (i.e. that they had a contractual agreement to that effect, whatever the Claimant's statutory entitlement).

43. As such, I find that the Respondent unlawfully discriminated against the Claimant contrary to ss 18(2)(a) and 39(2)(c) of the EA 2010 in dismissing her.

44. The Claimant is therefore entitled to a remedy under s 124 of the EA 2010.

45. At the hearing, I was under the misapprehension that the Claimant was entitled to OML and to SMP. However, on further consideration, I find that the Claimant was not so entitled. This is because she commenced her maternity leave on 15 May 2019 which was more than 11 weeks prior to her EWC. She had not therefore given notice as required by reg 4 of the 1999 Regulations. Nor did she have an entitlement to SMP under reg 2 of the 1986 Regulations.

46. As such, she has (as yet) suffered no loss of earnings as a result of her dismissal. Because the Respondent has entered voluntary liquidation, it is unlikely to be a going concern by the time she is ready to return to work and accordingly there is no future loss of earnings either.

47. It is, however, appropriate that the Claimant receive an award for injury to feelings as a result of the Respondent's discrimination. The Presidential Guidance of 25 May 2019 provides an update on *Vento* bands as follows for claims presented on or after 6 April 2019: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

48. In this case I have not heard evidence direct from the Claimant, but I am prepared to accept on the basis of the evidence in her claim form and what I was told by her husband, and as a matter of commonsense, that she suffered injury to feelings on finding that she had been dismissed when she considered she was exercising (as agreed with her employer) her statutory right to maternity leave. The must necessarily be at the lower end of the lower band, however, because I have not heard direct from the Claimant. In my judgment £1,500 is the appropriate injury to feelings award.

49. Under the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, reg 4* (the 1996 Regulations), interest must be awarded on the injury to feelings award from 15 May 2019 (when the act of discrimination occurred) to 10 December 2019 (the date of this award), i.e. 209 days at a daily rate of £1,500 x 8% / 365, at 8%, giving interest of £68.71.

Failure to give statement of employment particulars

The law

50. Under s 38 of the Employment Act 2002 (EA 2002) if, in the case of proceedings to which that section applies (i.e. proceedings listed in Sch 5 to that Act) the Tribunal finds in favour of the employee and when the proceedings commenced the employer was in breach of his duty to the employee under s 1(1) or 4(1) of the ERA 1996, then (pursuant s 38(2)/(3)) the Tribunal must add to any award made (or, if no award has been made, make an award of) two weeks' pay and may add/award four weeks' pay. By s 38(5), the duty under s 38(3) does not apply where there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

51. The amount of a week's pay for these purposes is to be calculated in accordance with ERA 1996, Chapter 2 of Part 14 (i.e. generally, where pay is variable, average weekly earnings over a 12 week period: s 221(3)), and must not exceed the maximum specified in s 227 (currently £525). The calculation is to be done gross of tax: *Secretary of State for Employment v John Woodrow and Sons (Builders) Ltd* [1983] ICR 582.

My conclusions

52. In this case, the Claimant's written contract applicable at the time that her employment ceased did not contain particulars of her employer as required by s 1(3)(a) ERA 1996, nor did it set out the date on which her employment began as required by s 1(3)(b)/(c).

53. As such, the Claimant is entitled to an award of an additional two weeks' pay. I do not consider it appropriate to make a higher award in this case because, while these are important contractual details that are missing, it is apparent that the employer has at least endeavoured to comply with the legislation as regards the provision of a statement of particulars of employment.

54. The Claimant's last four payslips (covering 15 weeks) of her employment total £4,963.50, giving an average weekly wage of £330.90.

55. Two weeks' pay is therefore £661.80.

Overall conclusion

56. For the reasons set out above, I have concluded as follows:

    a. The unfair dismissal claim is not well-founded and is dismissed.

b. The unlawful deductions from wages claim is well-founded. The Respondent must pay to the Claimant the sum unlawfully deducted for the period 30 November 2018 to 31 May 2019, being £414.13.
c. The Respondent contravened ss 18(2)(a) and 39(2)(c) of the EA 2010 by dismissing her on 15 May 2019. The Respondent must pay to the Claimant a total of £1,568.71, comprising £1,500 injury to feelings plus interest of £68.71.
d. The Respondent failed to provide the Claimant with a statement of particulars of employment as required by ss 1(1) and 4(1) ERA 1996 and the awards made in these proceedings are accordingly increased by two weeks' pay. The Respondent must pay to the Claimant £661.80.
e. The Respondent must pay to the Claimant the sums ordered to be paid by this judgment (a total of £2,644.64) within 14 days of this judgment being sent to the parties.

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Employment Judge Stout

Date: 10 Dec 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/12/2019

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FOR THE TRIBUNAL OFFICE