



EMPLOYMENT TRIBUNALS

Claimant: Miss T Legg

Respondent: Miss H Burrridge (1)
Care Direct (2)

Heard at: In Chambers **On: Tuesday 8 September 2020**

Before: Employment Judge Matthews

Representation:
Claimant: Mr B Humphries (CAB – Tavistock)

Respondent: Mr G Temme (Solicitor) (R1)
Mr A Yendole (Solicitor) (R2)

RESERVED JUDGMENT

1. The Second Respondent (Care Direct) is removed from these proceeding by consent and by reference to rule 34 of the Employment Tribunals Rules of Procedure 2013.
2. Miss Legg's claim that she was unfairly dismissed by Miss Burrridge because the reason or the principal reason for her dismissal was her pregnancy, by reference to section 99 of the Employment Rights Act 1996, is dismissed.
2. Miss Legg's claim that she was discriminated against by Miss Burrridge by being treated unfavourably because of a pregnancy of hers, by reference to section 18 of the Equality Act 2010, is dismissed.
3. Miss Legg's claim of wrongful dismissal (for notice pay) is dismissed on withdrawal of that claim by Miss Legg.

REASONS

INTRODUCTION

1. All parties have given their written consent to these proceedings being heard by an Employment Judge sitting alone by reference to section 4(3)(e) of the Employment Tribunals Act 1996.
2. All parties consented to the removal of the Second Respondent (Care Direct) from these proceedings. Although the Second Respondent had not filed a response in these proceedings, I heard from Mr Yendole by reference to rule 21(3) of the Employment Tribunals Rules of Procedure 2013.
3. Miss Tara-Marie Legg claims that Miss Heather Burridge discriminated against her by dismissing her because Miss Legg was pregnant (section 18 of the Equality Act 2010 (the “EA”)). For the same reason Miss Legg claims she was unfairly dismissed (section 99 of the Employment Rights Act 1996 (the “ERA”)). Miss Legg also made a contractual claim for notice pay but this was withdrawn during the hearing.
4. Miss Burridge defends the discrimination and unfair dismissal claims. In short, Miss Burridge says that she was not Miss Legg’s employer, if she was, she did not dismiss Miss Legg and, if she did, Miss Legg’s pregnancy had nothing to do with any dismissal.
5. Miss Legg and Miss Burridge both gave evidence supported by written statements.
6. There was an agreed bundle of documentation delivered “electronically”. All references to pages are to pages of the bundle unless otherwise specified. The Tribunal also had available a copy of Employment Judge Livesey’s Case Management Orders dated by him on 7 September 2020.
7. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face to face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way. The hearing finished late on day one of three allocated for the purpose. In light of that the Tribunal reserved judgment. The hearing was managed to allow adjustments for Miss Burridge’s care requirements.
8. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal’s findings are on the balance of probability taking account of the evidence as a whole. Section 136 of the EA (burden of proof) is applied as necessary.

FACTS

9. Miss Burridge has severe ME. Miss Burridge uses a powerchair and is housebound. Miss Burridge receives twenty-three hours of care every week (WS3).
10. Miss Legg was employed to provide seventeen and a half hours of the required care. The remainder was provided by another carer. Miss Legg did so from 24 January 2018 until, on Miss Legg's case, 12 March 2019. Miss Burridge does not agree that Miss Legg's employment ended on 12 March 2019, but this difference is not material in the event. There is a payslip for Miss Legg dated 31 March 2019, but it does not specifically refer to the period covered by the hours worked (84). It is agreed that it was Miss Legg's final pay slip.
11. There is an issue about who employed Miss Legg. This issue has a somewhat tortuous history in these proceedings. Miss Legg has never said that her employer was anyone other than Miss Burridge. Miss Burridge, however, says that Care Direct was the employer. Whilst Mr Temme (on behalf of Miss Burridge) consented to the dismissal of Care Direct as the Second Respondent from these proceedings, he did not abandon the point in evidence or argument.
12. Essential evidence touching on this issue was not put before the Tribunal. For example, if Miss Legg had a statement of terms and conditions of employment, it has not been produced to the Tribunal. Mr Temme questioned Miss Legg on the subject of the employment relationship but that threw little light on the matter. Miss Burridge asserts that she was not the employer (WS4-8).
13. All that the Tribunal can say on this particular issue is this. The arrangement seems to have been one common in such circumstances. Miss Burridge had received statutory care and support funding from Devon County Council since around 2014. Miss Burridge was helped with the administration of Miss Legg's pay by an agent of the Council (a charity called Disability Focus). However, whilst Miss Burridge received funding and administrative support from agencies, on the face of it the employment relationship was between Miss Burridge and Miss Legg. Miss Burridge selected Miss Legg from candidates who came forward for the job and appears to have had day to day management control of her. The Tribunal has proceeded on that basis. In doing so the Tribunal notes that, even if the employment relationship was not with Miss Burridge, the discrimination claim would probably lie against her as an agent of the employer under section 110 of the EA.

14. All seems to have gone well for almost the whole of the working relationship between Miss Legg and Miss Burrridge. In her evidence Miss Burrridge described Miss Legg as *“fantastic”* and *“brilliant”*.
15. The period of primary focus in this case is from 17 February 2019 to on or around 31 March 2019. There is a copy of contemporaneous text messages between Miss Legg and Miss Burrridge in the bundle running through until 8 April 2019 (72-83).
16. On Sunday 17 February Miss Legg texted Miss Burrridge to say that she was having problems with childcare and could not come to work (72). For that and a variety of other reasons Miss Legg did not subsequently return to work until Monday 11 March.
17. During that period Miss Burrridge, understandably, had considerable difficulty in filling the gap in care resulting from Miss Legg’s absence. Miss Burrridge says that she was *“struggling and had to contact Devon”* (WS11). This was a reference to contacting the Council to try to make alternative arrangements.
18. As noted, there were a number of reasons for Miss Legg’s absence from work. On Friday 1 March, she became unwell and texted Miss Burrridge to say she would not be able to attend work (75). Miss Burrridge expressed some concern about Miss Legg’s illness and there were several text exchanges on the subject (75-76). There was also a text from Miss Burrridge asking Miss Legg *“It’s not the job is it, you are happy?”* (76). There was no response to that question.
19. Over the 2-5 March there were further text exchanges about how Miss Legg was feeling (76-77). On 5 March Miss Burrridge texted Miss Legg to say that she *“might have to get social involved again maybe an hour or 2 a week”*.
20. On Friday 8 March Miss Legg texted Miss Burrridge to say that she would be back to work on Monday 11 March and had an appointment with the midwife on Wednesday 13 March (78). It is common ground that this was the occasion on which Miss Burrridge found out that Miss Legg was pregnant. In her claim form Miss Legg says this about this text (8):

“On 9 3 2019 I told my employer that I was pregnant. She made it clear to me that day that she would not keep me in her employment because of my pregnancy.”
21. As Miss Legg accepted in questioning, that is not what happened. The date is wrong (the text was on 8 March) and there was no such discussion on that day.

22. On Monday 11 March Miss Legg duly returned to work. Miss Legg says that she found Miss Burridge with a lady from Tavy Care and Miss Burridge's other carer also turned up.

23. Miss Legg reports that (WS5):

"After the lady from Tavy Care left Heather Burridge's property, I assisted her back into bed where she wanted to be. She then said to me in person "I've got 2 new carers starting the following Monday; you're out of a job, I'm sorry." I did not know how to react I just said "ok" and left it at that...."

24. Miss Burridge's account of what happened on that Monday is quite different. Miss Burridge says that she had told Miss Legg that there would be a meeting with Tavy Care to discuss who would do what to ensure Miss Burridge received the care she needed. Miss Burridge says that Miss Legg agreed to attend the meeting. Miss Burridge continues (WS15):

"At the meeting, it was agreed that Tavy Care would take over the personal care and physical side of things. This was so that if the Claimant continued to have health issues, I would at least be guaranteed my nutrition and personal care needs would be met. The Claimant agreed at the meeting to her times (work hours) being divided with Tavy Care. It was agreed that the Claimant would only attend to the M.E. side/duties of my care. The Claimant and I talked about it afterwards and she seemed happy to carry on as my personal assistant."

25. The two accounts are not reconcilable although they contain a degree of commonality. The only third party evidence the Tribunal has about what happened is at page 71 in the bundle. Here there is a note addressed to Miss Burridge from the Tavy Care Lead Supervisor who was also present at the meeting. It includes this:

"We first met on 11th March 2019 at 1045am to discuss setting up a package of care for you. Tara was there and from what I remember was taking over from another lady but I am not aware of what that role was."

26. That note is not of much help, although it does not support Miss Burridge's evidence that Miss Legg was part of any formal meeting. On the balance of probabilities what happened was this. Miss Burridge was concerned by the gap in care she had experienced during Miss Legg's absence and had contacted the agencies to

address it then and for the future. There was a meeting of sorts on Monday 11 March 2019 at which Miss Burrridge's care package was re-distributed. Miss Legg did not demur but wasn't happy because she was losing hours. Miss Burrridge, in terms, apologised for that. Later Miss Legg decided that she was not prepared to continue working for Miss Burrridge on that basis.

27. Miss Legg attended work the next day, Tuesday 12 March. Miss Legg says that Miss Burrridge asked her if she wanted the "tea lady job", a reference to the 9am to 11am job done by Miss Burrridge's second carer. Miss Legg says she didn't say "yes" or "no". What Miss Legg wanted was her seventeen and a half hours a week. Miss Burrridge says that there was no such conversation. The Tribunal does not need to reconcile the difference between them on this.

28. On Wednesday 13 March Miss Legg texted Miss Burrridge that she intended to come to work after her appointment with the midwife (79). It seems this was actually an appointment with the CAB to talk through what had happened on 11 and 12 March. Subsequently, by agreement with Miss Burrridge, Miss Legg did not attend work that day. Miss Legg, who had previously miscarried, was experiencing stomach pains and was naturally worried about them.

29. Thursday 14 March was Miss Legg's day off and Miss Legg did not go to work on Friday 15 March, primarily because of continuing concern over stomach pains. Throughout this period Miss Legg and Miss Burrridge remained in contact by text (79-81).

30. At this point the employment relationship seems to have more or less petered out. Miss Legg says (WS10):

"18/3/2019 I didn't turn up at work due to Heather Burrridge telling me the previous Monday "I've got 2 new carers starting the following Monday, you're out of a job, I'm sorry" and family telling me I didn't need to turn up. I didn't know what to do. Yes I could have texted her but I didn't want to as I didn't know what to say or what she'd reply (down to my anxiety) I didn't have any messages from her asking me if I'm at work on Monday so I just left it."

31. The contemporaneous texts between Miss Legg and Miss Burrridge reflect no more than a few exchanges of a social nature and sorting out pay (81-83).

32. Again, on the balance of probabilities, it seems that Miss Legg was not happy with the outcome of the meeting on 11 March and decided not to return to work. Despite enquiries about how Miss Legg was,

Miss Burrige accepted that Miss Legg was not going to return to work.

33. On 5 April 2019 Tavistock CAB wrote to Miss Burrige on Miss Legg's behalf alleging discriminatory treatment.

APPLICABLE LAW

34. So far as they are applicable sections 4, 18, 39 and 136 of the EA provide as follows:

"4 The protected characteristics

*The following characteristics are protected characteristics-
"....*

"pregnancy and maternity"

"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."....

"(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."

"39 Employees and applicants"....

"(2) An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;"....

“(c) by dismissing B;

“(d) by subjecting B to any other detriment.”

“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.”

35. Section 99 of the ERA, so far as it is applicable, provides as follows:

“ 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,”

36. Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 is the relevant prescribing regulation for the purposes of section 99 of the ERA. A reason connected with pregnancy is prescribed.

CONCLUSIONS

37. **The claim of unfair dismissal by reference to section 99 ERA**

38. **Was Miss Burridge Miss Legg’s employer?**

39. The Tribunal's conclusion, though somewhat unsatisfactory through want of evidence, is that Miss Burridge was Miss Legg's employer. The Tribunal's reasons are in paragraphs 11 to 13 above.
40. Was Miss Legg dismissed by Miss Burridge?
41. The Tribunal's conclusion about what happened is this. Miss Burridge asked Miss Legg to vary her hours of work. Miss Legg either reluctantly agreed or did not demur. Subsequently, Miss Legg thought better of it and simply did not turn up for work, thereby, in effect, resigning. That being the case, there was no dismissal and, therefore, no question of unfair dismissal. If, however, the Tribunal is wrong about that, it would have to go on to examine the matter further.
42. If there was a dismissal, was the principal reason for the dismissal related to the pregnancy?
43. The evidence does not support this. What it shows is that Miss Burridge, concerned to secure her care package, approached the outside agents to make alternative arrangements should Miss Legg's absences continue. At that stage, the absences were not pregnancy related. There is no evidence at all that Miss Burridge had Miss Legg's pregnancy in mind at the time of any dismissal.
44. The claim fails either because there was no dismissal or, if there was, the principal reason for it was not Miss Legg's pregnancy.
45. The claim of discrimination on grounds of pregnancy by reference to section 18 EA
46. At all relevant times Miss Burridge was within the protected period for the purposes of section 18 EA.
47. Did Miss Burridge dismiss Miss Legg because of her pregnancy, offer her less favourable terms of employment because of her pregnancy or subject her to any other detriment because of her pregnancy?
48. What the Tribunal must consider is whether or not there are facts from which it could decide, in the absence of any other explanation, that Miss Legg was discriminated against as set out in paragraph 47 above.
49. Dismissal - On the Tribunal's findings, there was no dismissal. However, if that is wrong, the Tribunal would have to consider whether or not Miss Burridge dismissed Miss Legg because of her pregnancy. Miss Legg has not shown primary facts from which the Tribunal could conclude that any dismissal was because of Miss Legg's pregnancy. The only possible pointer in that direction is that

Miss Legg told Miss BurrIDGE (in terms) that she was pregnant on 8 March 2019 and the employment relationship ended shortly thereafter and certainly before 31 March 2019. All the other evidence points in an entirely different direction. On 5 March Miss BurrIDGE had told Miss Legg that Miss BurrIDGE might have to resort to the agencies to secure her care. At that point in time Miss BurrIDGE did not know Miss Legg was pregnant. Miss BurrIDGE acted as she did to secure her care package and not because Miss Legg was pregnant.

50. Less favourable terms and/or other detriment – Miss Legg’s case has always been put on the basis that she was dismissed because she was pregnant. Although not identified as an issue, the Tribunal’s finding that Miss Legg was asked to cut her hours engages the question of whether or not that amounted to the imposition of less favourable terms or any other detriment because of her pregnancy. The Tribunal deals with this for the sake of completeness. Exactly the same reasoning applies here, as it does to the issue of any dismissal. Any imposition of less favourable terms or other detriment was not because of Miss Legg’s pregnancy. It was because Miss BurrIDGE wanted to secure her care package.

51. It follows that the discrimination claim also fails.

Employment Judge Matthews
Date: 10 September 2020