Case No: 3334235/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs H Merszarosova	v	The Cracking Egg Company Limited

Heard at: Norwich **On:** 3, 4, 5 and 6 August 2020

Before: Employment Judge Cassel

Members: Mrs L Daniels and Mr D Snashall

Appearances:
For the Claimant: In person, assisted by her husband Mr R Hegarty.
For the Respondent: Mr T Hussain, Litigation Consultant.

JUDGMENT having been sent to the parties on 7 September 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant submitted a claim form on 18 October 2018 and the response entered by the respondent was submitted in good time.

2. A case management hearing took place on 12 March 2020 in front of Employment Judge Kurrein. He characterised the claims that are being brought in the following way; first there is a claim of maternity sex discrimination by which we understand there is a claim of pregnancy and maternity discrimination contrary to s.17 of the Equality Act 2010. There is a claim of sexual harassment. We do not go into the details of the claim because this was dismissed on withdrawal, a claim of holiday pay which similarly we do not go into any great detail as that was dismissed on withdrawal. There was also a claim characterised as public interest disclosure and consideration was given by Judge Kurrein to the provisions of s.43B and C of the Employment Rights Act 1996. In addition, there was a complaint identified by the Judge as a claim of constructive unfair dismissal based on the detriments alleged by reason of the raising of disclosures said to be in the public interest and automatic unfair dismissal under the provisions of s.103A of the Employment Rights Act 1996.

3. The statutory provisions are clear but in view of the issues that have been raised particularly in relation to discrimination we bring to the parties' attention our requirement to consider, so far as discrimination is concerned the provisions of s.136 of the Equality Act 2010 which are in the following terms, it is called "burden of proof". Under s.136(2) we are told the following:

> "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."

S.136(3) states the following:

> "But subsection (2) does not apply if A shows that A did not contravene the provision."

4. The burden of proof provisions are those which we have to apply in cases of discrimination.

5. The trial took place over 4 days during which time we heard evidence from the claimant, her husband Mr R Hegarty and we had two witness statements provided to us by the claimant, that of Nicola Parrish and that of Miriam Kuzalska. On behalf of the respondent we were provided with two statements each by Ms Catia Leite and Mr Rory Bartlett. By video link we heard evidence from Ms Magdalena Kolakowska who confirmed the truth of the statement that had been provided to us.

6. Having considered all the evidence which was made available to us and to the additional documents which were added to the bundle, we are grateful to both Mr Hussain and the claimant for providing those, we make the following findings of fact on the balance of probabilities which we must apply bearing in mind those documents to which our attention was drawn.

   (1) The claimant was engaged by the respondent as a supervisor to start work on the 23 February 2017 at the respondent's establishment in Letchworth.

   (2) The respondent is a limited company which provides beverages and items of food to the public. It has a number of branches and franchisees. Mr Bartlett, from whom we heard evidence, is Head of Operations and is responsible for 18 branches. He was appointed in June 2018. Ms Catia Leite is a General Manager. She was employed from on or around March 2017.

   (3) The claimant's appointment followed her application in response to an advertisement which was produced to us at page 107 of the bundle which gave a description of general duties and described the post as "full time".

   (4) The claimant was interviewed by a former senior manager from whom we did not hear. The claimant whose first language is not English, she is Slovakian gave brief evidence of the interview. She was told that the respondent was seeking a supervisor and that

there was a rota system. There was no guarantee of hours. Two matters of importance emerged. First, that the claimant's English had been limited but had improved as time went on. Second that she was not issued at that stage with a statement of terms and conditions of employment, a section 1 statement, a requirement under the Employment Rights Act 1996 or a written contract of employment.

(5) She worked exclusively at that time at the Letchworth branch. It was a new outlet and there was an increased level of staff time needed in the initial stages while working systems were established and embedded.

(6) She was one of two supervisors. We were told that "Karen" was the other one.

(7) She informed the store manager Ms Catia Leite verbally about her pregnancy in May 2017 and officially by email on 9 June 2017.

(8) We have been shown a number of work rotas that covers the period of her work until the commencement of her maternity leave on 31 July 2017.

(9) We remind ourselves that there is no need in the circumstances of her claim of unlawful pregnancy and maternity discrimination for there to be a comparator. We have however noted a pattern of work that in general terms applies to those working in the Letchworth branch and we can detect no evidence of unlawful discrimination in the period during which the claimant worked prior to maternity leave. There was a pattern of reducing hours consistent with the evidence given by the respondent that the new store was becoming established. We were told that ancillary tasks of cleaning, cashing up and general systems management took less time as they became more familiar to members of staff.

(10) She commenced maternity leave on 31 July 2017.

(11) On 25 May 2018 she contacted Ms Leite requesting a meeting to discuss her return to work.

(12) A meeting took place on 31 May 2018 when the claimant, Ms Leite and Mr Bartlett were present.

(13) A note of the meeting was taken by Mr Bartlett and produced at pages 81 and 82.

(14) Mr Bartlett gave evidence that at the meeting which took place in Stevenage, the claimant had first stated that she was looking to return to work 3 days per week at first with a view to taking on more time in the future.

(15) Prior to the meeting Mr Bartlett discovered that a section 1 statement of terms and conditions had not been issued to her and arrangements were subsequently made for that to be rectified by sending her a written contract.

(16) During the meeting of 31 May and following there was discussion as to the taking of holiday, notice to be provided as to the taking of holiday and entitlement to pay. We understand it became more of an issue following the claimant's return to work and that the dispute in part was responsible for the deterioration in the relationship between the claimant and Ms Leite. Mr Bartlett told us that it was a matter of regret that mistakenly a member of administration had wrongly issued a form P45 claiming to terminate the claimant's employment and that contributed to the misunderstandings as to the entitlement to paid holiday and paid in lieu.

(17) On 4 June Mr Bartlett phoned the claimant. A note of the phone call was made by Mr Bartlett and produced at page 82. He proposed that the claimant return to work 20-22 hours per week as a team member for 3 days over 2 shops. The claimant made it clear that she did not want to reduce her hourly pay or her role. On 4 June 2018 the claimant sent two emails. The first was at 10:56am giving formal notice of her wish to return on 30 July stating that:

> "I would be happy to come back earlier if possible. Obviously I would like to come back on same position as before as supervisor with hourly rate of £8.20 per hour."

(18) The second email which in our view is an important one was sent at 12:58 in terms:

> "I have looked into how many hours per week average I was working before my pregnancy was an issue that i got less hours.
>
> So my average weekly hours were 39 hours per week. So this is what I would be looking to come back to."

(19) The response from Mr Bartlett was at page 50 and after the usual introductions recorded that:

> "I simply looked at the total hours that you had worked up to starting your maternity.
>
> It totals 374 hours over a 4 month period, which average out at 23 hours per week."

(20) There was a dispute as to hours, but the issue was laid to rest effectively shortly thereafter. Any confusion was addressed in the email from the claimant of 5 June at 22:41:

> "As per the suggestion from you that I said I wanted to work 20 hours per week. You must have misunderstood what I meant here.

> I was suggesting that if I came back sooner than the 8 weeks notice than maybe it would be good for me to start on 3 days a week and build up to the hours I was doing before."

(21) At page 46 of the bundle, there was an email from Mr Bartlett sent on 19 June at 8:57 in the following terms:

> "I investigated the working hours and this is reflected in your contract - we will look to provide around 35 hours per week, subject to the requirements of the business as normal."

The contract of employment was sent with that email and there was a request for the contract to be printed out, signed and returned.

(22) Ms Leite gave evidence that she was responsible for drawing up the work rotas for Letchworth and Stevenage which was a new branch. She gave evidence that July and August was a staff holiday period and in her words they "struggled for cover". The general process was to provide work rotas to staff one week in advance.

(23) Of particular significance was Ms Leite's oral evidence that she had a conversation with Mr Bartlett on or around late June 2018, in any event several weeks before the claimant returned to work that the claimant was looking for more hours and wanted to come back full time.

(24) In evidence, Mr Bartlett told us the following:

> "I did explain to Catia (Ms Leite) to ensure that the claimant's return was everything she wanted."

He added:

> "I did express the need to ensure that the claimant had similar hours to those prior to maternity taking into account trading and the number 35 was used."

He confirmed the approximate date of the conversation with Ms Leite.

(25) As part of the return to work process the claimant and Mr Bartlett agreed that whenever possible the claimant would be given two weeks advance notice of the rota.

(26) On 27 July there was an email which was produced to us at page 201 in which the claimant requested her rota for the week commencing 30 July 2018 from Ms Leite which was sent to her by return email.

(27) The rota was produced at page 202 which showed 19 hours for the 30 July up to the 4 and 5 August. The timesheet at page 53 showed that in fact the claimant worked 19.5 hours.

(28) When asked why no work had been allocated or made available to the claimant for the 31 July and the 1, 2 & 3 August, Ms Leite accepted that on her return on 31 July the claimant had requested more hours. Moreover, at paragraph 34 of her first witness statement Ms Leite stated:

> "On the day the claimant started working I had a meeting with her. The claimant asked for full hours. This was never an issue as long as the claimant herself would have not asked for something different before."

(29) In confused evidence Ms Leite continued to refer to the return to work meeting in May rather than the instructions from her manager and the wishes of the claimant.

(30) Subsequent rotas also showed limited working days and lower hours than average prior to maternity leave.

(31) On 12 August the claimant attended her place of work as required by the rota. We were told that unsuccessful attempts had been made to contact her to cancel that attendance although phone logs indicated otherwise. She was entitled to her pay for that day.

(32) We were shown evidence of complaints from members of the public and staff concerning the claimant's behaviour at work. Pausing there, it is not part of our role in these proceedings to determine whether those complaints are well founded. We make the comment because the claimant firmly disputes their authenticity, but on this we make no finding of fact.

(33) Although it is difficult to give dates to all the complaints, the earliest appears to be dated 14 August.

(34) On the preceding day, 13 August 2018 the claimant wrote to Mr Bartlett with a list of grievances.

(35) On 31 August a meeting took place between the claimant and Mr Bartlett. He dealt with the grievances which decisions he confirmed in an email sent on 5 September 2018 and produced at pages 76 and 77. Practical solutions were proposed for some of the issues raised and some were dismissed.

(36) On her account the claimant raised two further issues, one in relation to alleged practices of altering best before dates and another allegation relating to the use of fly spray around food preparation areas and tables.

(37) Mr Bartlett said that those issues were not raised until a further meeting on 14 September 2018 when he was shown images on the claimant's phone. That meeting was an investigation meeting in the complaints of the claimant's behaviour.

(38) We remind ourselves of the test of s.43B and C of the Employment Rights Act 1996 and find that the disclosure information made by

the claimant is protected as provided for under the provisions, they are qualifying disclosures bearing in mind that the premises in question provide refreshment to the general public.

(39) We find that these complaints were investigated by Mr Bartlett who told us that he could find no evidence to support the complaints and rejected them on 20 September.

(40) The same day he wrote to the claimant inviting her to a disciplinary meeting to take place on 2 October at Costa Coffee in Letchworth. The premises are those of a competitor.

(41) On receiving that email the claimant resigned on 25 September. She wrote an email at page 28 complaining of bad treatment and discrimination giving one weeks' notice.

(42) The notice of termination of employment was accepted the following day by Mr Bartlett although he gave the claimant the opportunity of withdrawing her notice. We find that the contract of employment ended on 2 October 2018 by reason of the claimant's resignation.

Conclusions

7. We follow the order of the case management reasons produced to us at page 27.

Maternity and pregnancy discrimination

8. As noted in the findings above in relation to matters prior to her maternity leave, we can find no facts which require an explanation by the respondent as required by s.136.

9. All the evidence of fact in our view points to an even-handed treatment to members of staff at Letchworth and to the reduction in the need for the additional hours following the opening of the store.

10. However, this was not the conclusion we reached as to the treatment on her return.

11. Ms Leite was her manager. She knew full well of the requirements of the claimant's return. She had an instruction from her manager with which she failed to comply. There is clear evidence in the apportionment of working hours that led to less favourable treatment of the claimant.

12. We remind ourselves of s.136 and look to the respondent for an explanation. The only explanation proffered by Ms Leite was that she relied on the comments allegedly made in the May meeting by the claimant. Any subsequent discussions or instructions were apparently ignored or overlooked.

13. The conclusion we reach is that this decision making effectively to refuse to provide more working time to the claimant was tainted by unlawful discrimination and the claim succeeds to this extent.

14. We have already noted that the claims of sexual harassment and holiday pay have been withdrawn and understand that the issue in relation to holiday pay was settled prior to the hearing taking place.

15. As far as the public interest disclosure issues are concerned, we have noted the dates of the complaints from staff and members of the public as they have been presented to us. They start as we noted in our findings of fact on the 14 August 2018. On the claimant's account she disclosed the information on 31 August. Mr Bartlett gave a later date. We do not have to decide this as on any view, either the claimant's account or Mr Bartlett's account – the complaints post-dated the complaints or at least some of them. We can find no causal link whatsoever between those complaints and the treatment given to the claimant.

16. Case management orders numbered 8.2, 8.3 and 8.4 which related to requiring her to attend meetings when she was signed off with anxiety, holding meetings in public places and inviting her to a disciplinary meeting in which she might be summarily dismissed were all linked to concerns described above that pre-dated the disclosure of information. In our judgment these were actions or proposed actions inextricably linked to workplace concerns and events, and we could find no causal linkage with the disclosures.

17. Finally, there was no breach of the implied term of trust and confidence as pleaded by the claimant, clarified at the case management hearing. In our judgment she was not automatically unfairly dismissed. She resigned from her employment but not in relation or response to the public interest disclosure breaches as alleged and clarified subsequently.

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Employment Judge Cassel

Date: 8 December 2020

Judgment sent to the parties on
15 December 2020
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For the Tribunal office