EMPLOYMENT TRIBUNALS

Claimant: K Voy

Respondent: Salvation Army Trustee Company Limited

Heard by CVP at: Newcastle Upon Tyne On: 11-13 and 25 November 2020

Before: Employment Judge O'Dempsey,
and non-legal members P Kent and S Mee

Representation
Claimant: self
Respondent: Mr Parmar (in house counsel)

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

REASONS

1. We heard evidence from the claimant, VC, CR and CH variously employees or managers at the Respondent at the relevant time.

2. The issues in the case were defined in case management orders given in February 2020 and which were set out at paragraph 4 of the case management summary:

4.1 Was the claimant treated unfavourably by the respondent because of her pregnancy and/or maternity?
4.2 The unfavourable treatment relied upon being:-
4.3 Not being properly considered for the full-time position before applying for it:-
4.3.1 firstly because it was offered to a co-worker called Millie ("MX" below) who turned it down;
4.3.2 secondly because it was promised to a co-worker called Annelise ("AB" below) who was given interview questions in advance of the interview;

4.4 Not being given the same number of hours as she previously worked after approximately the end of September/beginning of October 2019;
4.5 Not being offered the full-time position either because of her pregnancy or because she was about to go on maternity leave.
4.6 The claimant identified the persons who she alleged were responsible for the unfavourable treatment - in the case of paragraph 4.3 – CH and CR; in the case of 4.4 - Mr CH and in the case of paragraph 4.5 -the interview panel and CR.

Disclosure

3. There were case management orders in this case. The parties were ordered to make disclosure of documents and they were told that disclosure was to be done on the basis that they should disclose all documents relevant to the issues which were in their possession custody or control *whether they assist the party who produces them, the other party or appear neutral*. The respondents in particular therefore were under no confusion about what documents should be produced. Centrally relevant documents would have been those relating to the PIE questions in this case. That much ought to have been apparent from the claimant's pleadings in which she said "I was told that [AB] was given a sheet of paper with information about the interview questions on, specifically the PIE one. I have messages from colleagues as evidence of this. [AB] had told two members of staff about getting the sheet to research.". AB, we were told, was currently on maternity leave and we did not hear evidence from her.

4. From February to September 2020 the process of disclosure appears to have been held up by health matters in the respondent's case. We are satisfied (on his volunteering the information) however that Mr Parmar had advised the respondent that relevant documents should be disclosed. It became apparent however that we could not be confident that this had taken place. Two documents were produced which were plainly central to the case: one was an email attaching the interview questions; the other was an induction form relating to AB's time as a volunteer. Yet another document was mentioned but which was not disclosed at any stage relating to a supervision session said to prove that AB's pregnancy was mentioned to CH on 5th October (and thus proving, it was implied, that the respondent knew that AB was pregnant at the time of a risk assessment being carried out).

5. We will come back to the significance of the approach that the respondent adopted to disclosure later in these reasons.

6. We approached each issue in turn.

Relevant law

7. The relevant law is set out in section 18 of the Equality Act 2010. This provides

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.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(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.

8. There was in reality little dispute about how that provision should be interpreted. The claimant also drew our attention to Ayodele v City Sprint and to Forbes at para

76 for the proposition that if pregnancy or maternity leave had a more than minor or insignificant impact on the giving of the unfavourable treatment then that treatment will be because of pregnancy or maternity leave.

Findings of fact

9. In August 2018 the claimant started doing work as the Weekend Concierge at Swan Lodge which is a hostel run by the respondent. She then left that position in March 2019. There was discussion of the claimant staying on as relief staff. In July 2019 the claimant started to get relief work. She claims to have been working 3/4/5 shifts per week. She was covering weekday concierge shifts whilst a colleague (H) was acting up as an Assistant Support Worker before interviews for that role took place. There was a dispute as to whether MX had been offered the role.

10. The claimant complained that from when MX started working for the respondent (23rd September) the shifts allocated to her declined or became non existent. We found that they did not become non-existent. The claimant had certain shifts booked in before MX was taken onto the rota of relief staff, 12th and 13th September, and during October 2019 the claimant worked shifts on 7 and 8 October. The latter were not pre-booked but were instances of the claimant standing in for her partner VC (from whom we also heard evidence).

11. Under cross examination the claimant explained that she thought that the respondent was getting ready for her to leave on maternity leave by doing this.

12. The claimant had informed the respondent that she was pregnant in or about 23/24 weeks pregnant at the time MX was appointed. The claimant was a worker on a zero hours contract at this time.

13. The claimant's unchallenged evidence was that she found she would be able to claim Maternity Allowance from week 29 of her pregnancy. In those circumstances she signed up to a Masters Degree in order to better her prospects of finding a job after her leave.

14. We find that MX told the claimant that she had spoken to CH on 8 October and told him that she did not want the job which had been offered to her. This was because she did not want to work full time. We find that MX also indicated that she would be interested in a job share, and in the absence of any other plausible explanation and in the absence of either side calling MX to give evidence, we concluded that this was the most likely explanation for MX proceeding to the job interview.

15. There was then a conversation on the afternoon of 8th October between the claimant and CH, who approached the claimant and said that the respondent had got her application for interview for the post. The claimant then asked to speak to him before she left for the day and did so. She explained that his approach to her, which appeared to be excited about her application was false and did not feel good.

16. When they did speak about this, about half an hour afterwards, the claimant told CH that she knew that the job had been promised already to MX and she said that she did not know if she wanted to be interviewed for a job that she felt did not exist. We accept that she said that she felt humiliated to have him pretending to be excited over the interview. CH agreed that it was false to pretend to be excited.

17. CH did not explain to the claimant that she was not getting shifts because of the balancing exercise he in fact carried out. He was dealing with the fact that the claimant was saying that she felt like a last resort in shift allocation, and he assured her that there was no problem with her work. He explained that she had not done anything wrong, but that he had been thoughtless.

18. The claimant later learned that AB had been given trial shifts.

19. We find that the respondent had told AB that it would be a good idea to reduce her shifts in order to get ready for the post that was coming available.

20. On 8 October 2019, pages 113-4, VC and the claimant had an exchange of messages. In this is recorded that MX had told the respondent that she wanted to remain as a relief worker. We accept that these messages are genuine and record

what the claimant and VC had been told by MX (and that MX had probably told them the truth). It records that MX had stated she was considering asking for a job share but that CH had told her to think about the job offer and get back to him with her decision by the following Thursday.

21. The claimant expressed some anger in these messages. The tribunal accepts that MX had asked the claimant if the claimant would consider a job share with her.

22. The exchange records the conversation we have found did occur. The claimant recorded CH apologising to her and her berating him for having interviewed for a job which was not going to be given (presumably in fair competition).

23. Mr CH did not deal with these conversations at all in his witness statement save to say that much of what the claimant alleged about the recruitment processes, and individuals supposedly being offered jobs or interview questions was completely false, and was not based on facts, but instead on supposed rumours. We found it surprising that his evidence did not attempt to deal with the conversations recorded in the documents which the claimant had sent to the respondent in disclosure and which were obviously relevant. He was cross examined on these conversations, and we accept the facts we have recorded above based on his evidence and that of the claimant concerning these conversations.

24. On 9 October 2019 the message exchanges show that the claimant was wondering whether to go for the interview which was doing to be taking place on Tuesday 15th. The claimant was concerned that if MX decided that she did want the job, but on a part time basis, it would still be worth interviewing for the job.

25. The claimant went on to say that the respondents had needed to talk to another member of staff (Andy) whose partner was in the running for the job because they had promised jobs to AB. She also recorded her feeling that “the worst part was the fake enthusiasm for getting my application, not thinking I already knew she'd spoke to them. I hate people lying to me haha. He took criticism very well yesterday and didn't try to argue with me like they usually do.” This had the ring of an authentic account of an event the claimant felt strongly.

26. So we accept the claimant's evidence under cross examination that she brought up the question of the job being promised to AB with CH during conversations she had with him no 8th and 10th October, and that CH did tell her that he had promised the job first to MX, but then to A.

27. On 19 October (page 120) VC and the claimant messaged each other again. This time VC told the claimant that "apparently they gave AB a paper to study for one of the questions for the interview as well". The claimant asked who had said that, and VC said that the person did not want people to know she had talked about it. VC then continued "apparently she said that Craig asked her to study a question like INC or something one of the tough questions". The claimant deduced from this that it was the PIE question. VC then confirmed that it was the PIE question.

28. The interview was conducted with CH, Fiona Sayer and Ian Armstrong (from whom we did not hear evidence). There was a question in the interview on a Psychologically Informed Environment. We do not accept the claimant's evidence to the effect that this was not a framework used at or mentioned the respondent at this workplace. However we do accept that she had not been trained on it. The respondent's witnesses sought to say that she had been trained on it, and then modified this to an assertion that she had seen the materials from a training course because they had been pinned up on the notice boards at the workplace. We do not accept that the respondent emphasised it as a way of working so as to bring it to the attention of all of those working in that workplace (and in particular the claimant).

29. The marking of the interviews itself was fair, in the sense that scores were allocated in an objective way. The claimant's objection to the process was that AB was given prior knowledge of what would be the most difficult question for interviewees for the job.

30. We accept that towards the end of the interview CH said "I need you to know that this has been a fair process, and it has been". We do not find that this was an odd thing for him to have said because the claimant had challenged CH over offering the job to MX previously.

31. We did not reach a conclusion over whether the claimant would have obtained the job as this was not necessary to any of the matters before us. In particular in the light of what was claimed by way of compensation by the claimant, it was not necessary to reach a conclusion on whether she had suffered the loss of any particular rate of pay from that job. Instead she had claimed the lost shifts she would have had until she went on maternity leave. Had it been necessary to reach a conclusion on that point we would have concluded that she might have obtained the job, but that there was a significant risk, which we place at 50% doing the best we can, that she would not have obtained the post. This is because her scores without the PIE questions would not clearly have resulted in her obtaining the post.

32. We accept that the claimant had been told by colleagues that AB had been given advanced information that PIE was to be a question in the interview and that therefore she should study it. We accept that, as she puts it in her witness statement and under cross examination: the claimant was told that AB had been given some paperwork about PIE either from CH (who we heard from) or from Andy (AB's partner). We accept that it was only those on the interview panel (and we heard from only one) who had the PIE question in advance.

33. It was put by the respondent that perhaps Andy could have assisted AB in her preparation. When the claimant responded that it was unlikely that Andy would have known the question to be asked, the respondent immediately put that Andy had been involved in other interviews. The EJ asked the respondent's representative whether it was being put as a positive case that Andy had been involved in other interviews and hence knew that PIE would be a question. The respondent's representative said that this was not a positive case being put. In Ms R's evidence it emerged that she had only sent the interview questions shortly before the interview, and she said that PIE had never been on previous interview questions. So the suggestion that there was any connection between Andy assisting AB with her interview preparation and knowing about the PIE question from having been on other interviews, appears fanciful.

34. CH was cross examined about his statement in the witness statement (para 18) that he did not know what the questions were going to be until the day of the interview. He was referred to the email sent by Ms R on 13th (p208) and said that he did not open the interview questions until the day of the interview. We considered whether we accepted that assertion. We considered that CH's answer was a careful one, distinguishing between opening the questions and opening the email. It was clear from his evidence that he admitted that he had opened the email. We considered whether it was likely that CH would have seen the statement by Ms R that she had changed the questions and not opened the attachment. We thought it was highly unlikely that a member of an interview panel would not open an email containing the questions and which had the content that Ms R's email had. We found CH's demeanour to be unsatisfactory on this point. His answer to the question as to whether the email would have piqued his curiosity, for example, was that it may have done. We found that an odd answer from someone who was due to sit on an interview panel and who knew that the questions he was being asked to deal with had been changed. We think it more likely that he did open the attachment.

35. We also considered that CH was not truthful in his answer about opening the email or its contents and we had to consider why he was not being truthful on this point. We concluded that the most likely explanation was that he was seeking to explain the fact that he had received the email in enough time for him to have notified AB directly or indirectly of the PIE question being in the questions and that he had knowledge of fact that PIE was on the interview. We considered therefore that it was more likely than not that he had communicated (whether by giving the document or other means does not matter) this fact to AB. It was this, in our view, that the witness statement and his evidence before us was aimed at concealing.

36. We also considered that CH had referred to another document which was not disclosed to the claimant despite being relevant to the question of the respondent's knowledge (and the timing of that knowledge) of AB's pregnancy. This was Andy's supervision document, on which (under cross examination) CH stated he had endorsed the fact of AB being pregnant, and which he asserts had taken place on 5th of the month (i.e. the day before the pregnancy related risk assessment was carried out in relation to AB).

37. We also noted that the respondent, whilst carrying out a maternity specific risk assessment because of the risk of miscarriage which Ms R said existed in AB's case performed only a generic risk assessment in the case of the claimant. This was despite the fact that the claimant had had a scare over her pregnancy which required her to take time off work and of which she notified the respondent on 1 August 2019. She had also previously had a miscarriage.

38. Ms R said that she was not on shift at that time, but we think that the information on page 188 of the bundle would have been available to her. We do not understand why the claimant's pregnancy was treated differently to that of AB. Ms R did say that she had been aware of the problem and had rung VC. She commented that there should be a comment on the generic risk assessment that was carried out (page 78). However when she went to that bundle page it emerged that it was a risk assessment carried out in January 2019. She therefore said that it could not have been the one in the bundle. She suggested that there was another one which was not in the bundle. It was not clear why this had not been disclosed when the specific risk assessment for AB had been disclosed by the respondent. The claimant put to Ms R that no such generic risk assessment existed and we do not accept that such a document exists or that if it does exist that its contents show any assessment of the claimant's pregnancy risks.

Conclusions

1. **The full time position was offered to MX who turned it down**
2. **The full time position was offered to AB in advance.**

39. In both these cases we find that the respondent treated the claimant unfavourably and that this was related to maternity. Although in the oral reasons we distinguished between pregnancy and maternity leave, for reasons stated above, on reflection we consider this distinction to be one without substance in that the true reason for the treatment in this case was pregnancy/maternity.

3. **AB was given information in advance of the interview (giving her an unfair advantage)**

40. We find that CH did (whether on a piece of paper or indirectly) give AB information in advance of the interview because of the claimant's maternity status/pregnancy. AB had, we find told the respondent that she was pregnant. It was clear that she was at a much earlier stage of her pregnancy or perhaps was not actually pregnant. However at the least she told the respondent that she was. The respondent treated her pregnancy completely differently to the way in which the claimant's was treated (in terms of carrying out a risk assessment). We consider the reason that AB was given the information in advance was that the claimant was known to be starting maternity leave much sooner than AB would have been and this played an operative role in CH's decision to share the information he shared. No other non-discriminatory reason for this conduct has been provided, and we infer from the evidence, as we must, that as the explanation for the treatment we have found could be an unlawful act under the Equality Act 2010, we must find that the respondent did commit such an act. There is no cogent or other explanation offered for the treatment we have found.

4. The claimant was not given the same number of hours as she previously worked.

41. The tribunal concluded that whilst the claimant's hours may have reduced in certain respects CH offered an innocent explanation of this. We accept his evidence that he was seeking to balance the hours (day or night hours) between those in the pool.

42. We do not accept the argument put forward by the claimant that the explanation might be the fact that she was going on maternity leave shortly or that she was pregnant. We simply do not believe that this was a likely explanation for this behaviour on the facts before us. We also did not, in this instance, think it legitimate to draw adverse inferences from any non-disclosure. We found CH's evidence of the explanation to be likely and credible.

5. The claimant was not offered the full time post either because of pregnancy or because she was about to go on maternity leave.

43. We do not think that the explanation for the failure to offer the full time post was because of pregnancy directly. We have found that the claimant was not offered the

post because AB was favoured and we have found that the act of favouring AB by giving her advanced knowledge of what was a new question on the interview was related to pregnancy/maternity in the sense explained. So the respondent's failure to give the claimant the full time post was most likely infected by the previous discrimination; it does not matter whether the claimant actually would have achieved the post in a fair competition. We find that because she was about to go on maternity leave (i.e. pregnancy/maternity) she was not offered the post in the sense that the discrimination was an operative cause of this event.

44. Therefore the claim succeeds on all but one basis.

Remedies

45. When we announced our decision on liability we also dealt with the award of damages for injury to feelings, in the hope that this would encourage the parties to deal with financial compensation without the need for a further hearing. Although, as set out below, this hope was disappointed, we set out our reasoning in disctinct segments.

46. The claimant's evidence on her injury to feelings, which was contained in her witness statement was not challenged in cross examination. We find that she did have a significant injury to her feelings, and on that basis we considered the correct award to be £10,000. The reason for that relates to what the claimant says in paragraph 20-21 of her witness statement. We noted the medical history there, and we noted the post natal depression she mentions. Those are matters for which the respondent is not responsible. We would have needed medical evidence to demonstrate that therwe as a causal connection either in terms, simply, of causing the depression altogether or in terms of any exacerbation of any pre-existing condition.

47. We also noted what the claimant said about spending the last period of her pregnancy stressed and anxious about finances, and how she could go back to work, and we noted that she was not challenged on her evidence to the effect that those feelings did not stop once her child was born. So for those reasons we

consider that this is a more serious case than one which would merit an award as low as that for which the respondent argued, around £5000.

48. For reasons of time, and not being able to take submissions on the issues surrounding financial loss, we adjourned the hearing. At the resumed hearing it emerged that there was a dispute between the parties over financial loss and the claimant was claiming her preparation time.

49. We decided that the student loan should not be deducted from the losses claimed. Our reasons were as follows.

50. The parties had agreed by the start of the hearing that the proper basis for calculating loss of earnings in this case was on the basis of a 35 hour week worked by the claimant; this was to be awarded for a period of 6 weeks. This yielded a figure of £1806. The student loan which the claimant had taken out amounted to £1598.98. Mr Parmar argued it should be deducted because it was essentially money that came to the claimant and which mitigated her loss.

51. We rejected that argument on the basis that the loan was more like a job which the claimant already had, prior to the relevant acts of discrimination. Whilst we do not accept that there was any evidence that the claimant had a conversation with CH in which the taking of the Masters was discussed and in which he said that it could be done whilst the claimant carried on working, we do not think that is necessary to the conclusion we have reached. On the evidence it was perfectly obvious that the claimant was in a position to carry on working and to do the Masters for the relevant period of time. We would not deduct earnings from a job which the claimant had prior to the act of discrimination and we take the view that we should not make that deduction in respect of the load, the conditions for which were already fulfilled before the relevant discrimination. So we reject the respondent's argument on this point.

52. The parties were asked to draw up the interest calculations on the basis of the resultant figure for the loss of £1806, and also the separate interest calculation on injury to feelings of £10,000.

53. When these calculations were done the awards were as follows:

Injury to feelings:

(a) in respect of compensation for injury to feelings: £10,000.00
(b) in respect of interest on compensation for injury to feelings from 8 October 2019 to 13 November 2020 (being the date of oral judgement in this respect), £876.65

In respect of financial loss

(a) in respect of pecuniary loss: £1806.00

(b) in respect of interest on pecuniary loss £79.96

Preparation time application

54. We considered the claimant's application for preparation time and we dismissed that application, as it is not appropriate to make such an order in this case. We considered the tribunal rules relating to costs and preparation time orders under rule 76. We had no hesitation in rejecting the application in so far as it related to missing deadlines and the suggestion that this aspect of the respondent's conduct was unreasonable conduct of the proceedings.

55. We understand why the claimant felt strongly about these failures, but they do not come anywhere near to crossing the threshold of unreasonable conduct of proceedings.

56. Turning to the other argument the claimant presented, the claimant argued that the non-disclosure of the email (p208) and two other documents, constituted unreasonable conduct of the proceedings. We do not make a conclusion that there was deliberate suppression of the documents by the respondents as a whole. We do not think that this is a likely outcome. However that is not the only test we need to apply. We do conclude that it was unreasonable conduct of the proceedings. At the least insufficient attention was given by some of the non-lawyers to the disclosure operation.

57. Although the non-disclosure caused some disruption to the proceedings, we concluded that this was not a major suppression of documentation. It did not add significantly or at all to the necessary length of the proceedings.

58. We accept Mr Parmar's argument that the matters of credibility to which we have referred would have been assessed on the oral evidence. We consider that it is more likely than not that the failure to disclose resulted from a failure of communication somewhere within the management of the respondents. So as a matter of discretion it is inappropriate for the respondents to have to pay the claimant's preparation time costs.

59. Although the application for preparation time fails, we add that there were very few of the items for which the claimant's claim for preparation time was made which we would have awarded. There were, for example, claims made for matters which could not be considered conduct of the proceedings or rightly termed preparation time under the rules.

Authorised by Employment Judge O'Dempsey

Date 4 January 2021