EMPLOYMENT TRIBUNALS

Claimant: Miss A Prosser

Respondent: Community Gateway Association Ltd

Heard at: Manchester (remotely, by CVP) **On:** 1 and 2 March 2021
6 April 2021
(in Chambers)

Before: Employment Judge Warren
Mr M C Smith
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Mr R Powell, Counsel

JUDGMENT

The judgment of the Tribunal is that the claims of discrimination because of sex/maternity, and victimisation, are ill-founded and are dismissed.

REASONS

Background

1. By an ET1 presented on 4 September 2020, the claimant alleged that she had been discriminated against by the respondent whilst pregnant and when she entered a grievance, was victimised.

2. The respondent is a company which supports around 6,000 vulnerable tenants in social housing. It has a centrally employed workforce, and a number of members of staff who have signed zero hours contracts. There are two types of work available, one as an adviser (someone who remains in the office and gives telephone advice) and a responder (someone who attends the tenant's home in response to a call for help).

Agreed List of Issues

3. The List of Issues for the Tribunal to determine are as follows:

1. Jurisdiction

1.1 Are any of the claimant's claims under the Equality Act 2010 out of time?

1.2 If so, do the acts amount to a continuous course of conduct extending over a period of time within the meaning of section 123(3)(a) of the Equality Act 2010?

1.3 Further or in the alternative, would it be just and equitable to extend time for submission of the claim under section 123(1)(b) of the Equality Act 2010?

2. Direct Pregnancy/Maternity Discrimination

2.1 Did the respondent treat the claimant unfavourably? The claimant relies on the following acts of unfavourable treatment:

2.1.1 Being sent home on 17 March 2020 due to being classed as vulnerable, and being told not to return for 12 weeks;

2.1.2 Being promised payment for shifts but this payment was not made as promised on 15 May 2020;

2.1.3 Being told as part of the risk assessment on 27 May 2020 that she was only eligible to do one adviser shift in six (i.e. just the morning adviser role); and

2.1.4 Being told on 16 June 2020 that she could not return to work because adequate social distancing measures were not in place.

2.2 If so, was each act of unfavourable treatment because of the claimant's pregnancy?

2.3 If so, did the respondent treat the claimant unfavourably to comply with legislation designed to protect women in relation to pregnancy and maternity and any other circumstances giving rise to risks specifically affecting women?

3. Victimisation

3.1 Was there a protected act? The protected act relied on by the claimant is her grievance submitted on 9 July 2020, and conceded as a protected act by the respondent.

3.2 Did the claimant suffer the following detriments?

3.2.1 That she could not benefit from the respondent's birthday day off/payment scheme in 2020; and

3.2.2 That she was told she was not eligible to receive maternity pay.

3.3 If so, were the detrimental acts as a result of the claimant doing a protected act?

4. Defence

4.1 If the claimant succeeds in any elements of her claim, can the respondent show that it took all reasonable steps to prevent the discrimination from occurring?

The Evidence

4. The claimant gave evidence in her own regard and the respondent called Ms L Mattinson, Ms C Mason, Mr Thomas Jones and Ms F Fisher. The case was decided on the evidential test, the balance of probabilities. The Tribunal was unanimous in its findings. There was an agreed bundle of documents and each witness had made a statement which was taken as read.

5. The claim was heard by CVP, all parties having consented to it. There were some minor issues of disconnection, but we were satisfied that we all heard all of the evidence and submissions.

Findings of Fact

6. On 24 June 2019 the claimant began her engagement with the respondent. She had written terms and conditions which she signed. These described her as subject to zero hours, and a worker. She would be advised of available shifts and choose those she took. She generally worked four shifts a month. The system was that she would be advised of available shifts, morning, afternoon or night shift, and she worked an average of four such shifts a month.

7. On 13 March 2020 the claimant advised Colette Mason that she was pregnant. Colette Mason was the respondent's Independent Living Team Leader and the claimant's line manager.

8. On 16 March 2020 Ms Mason sent the claimant an email with a link to advice on COVID-19 and pregnancy (page 62). The Government issued guidance explaining that it classed certain groups of individuals as clinically vulnerable and others as clinically extremely vulnerable.

9. On 17 March 2020 Ms Mason sent the claimant home as she considered her, a pregnant woman, to be clinically vulnerable. She did not specify exactly how long the claimant would be away from work, but she may have mentioned the word "shielding". If she did, this was an error on her part, but this was the first couple of weeks of COVID-19 in 2020 when all such terms were novel. It is possible that from the word "shielding" the claimant was led to believe that she would be at home for 12 weeks. We do not find that Colette Mason specifically mentioned 12 weeks to the claimant.

10. The claimant did have pre-booked shifts for the rest of March and April which she was unable to fulfil.

11. At the beginning of April, Sue Milaszewicz (the respondent's independent Living Manager and Colette Mason's line manager) retired. She was responsible for ensuring that the claimant should be paid for the hours that she had worked and the shifts that had been cancelled, as she had been told.

12. The claimant noted on 15 April 2020 that she had not been paid. It is fair to say that the other respondent witnesses were unaware of this lapse until the claimant complained of a lack of pay.

13. On 11 May 2020 the claimant asked Colette Mason if she could come back to work.

14. On 18 and 19 May 2020 the claimant was asking for her P60, requesting payment for the shifts that she had been scheduled for working in April 2020, and expressing her desire to return to work.

15. On 19 May 2020 some IT equipment was moved, which meant that the desks in the office could be socially distanced by up to 1.8 metres. Before then, because of the fixed nature of the computers, it had been impossible to move the desks.

16. On 27 May 2020 the claimant, Mr Jones (the respondent's Health and Safety Manager) and her line manager, Ms Mason, undertook a risk assessment. The claimant was assessed as safe to undertake day shift work as an adviser subject to the fitting of Perspex screens between the desks. With this in mind towards the end of May/early June 2020 the claimant was given potential shifts as an adviser. It was not thought appropriate for her undertake night shifts which involved lone working, or responder roles which could involve potentially both travelling alone to tenants' homes, and/or having to offer physical support.

17. On 20 June 2020 the IT equipment was moved further apart again, so that the desks were over three metres apart. The respondent had had to wait for these equipment moves for the availability of technicians to undertake the work.

18. On 30 June 2020 the claimant raised a grievance, claiming that she had suffered pregnancy discrimination. In particular this related at this stage to her lack of pay and the failure to allow her to return to work.

19. On 8 July Ms Lewin replied to the claimant explaining that the claimant could return to work and it was now time for her to provide details of her availability. The following day the claimant asserted that she wished to pursue a formal grievance. Six days later Ms Lewin emailed the claimant and explained to her that she would not be entitled to maternity pay under the terms of her contract. The claimant had spoken to Colette Mason whom she believed was going to get contractual maternity pay. It is clear from the evidence given by Ms Mason that she did not receive maternity pay under the terms of her contract, and that she did not tell the claimant that she had had it. We do not find the claimant to be disingenuous on this point. We find rather it was an understanding of what Ms Mason had said. As a matter of fact Ms Mason had not received contractual maternity pay, and we find it highly unlikely therefore that she would have told the claimant that she had. There

appeared no motive for her to lie about the issue. Other witnesses, for example Fiona Fisher, were also able to confirm that Colette Mason did not get maternity pay. The claimant however believed that when Ms Lewin emailed her on 15 July to tell her she was not entitled to maternity pay, this notification was because she had lodged a formal grievance.

20. On 27 July 2020 there was a second risk assessment between the claimant, Mr Jones and Ms Lister (Sue Milaszewicz's replacement). The claimant's grievance was not upheld, but the second risk assessment did find that she was able to work during the day as an adviser. The company was still waiting for Perspex screens to be fitted having suffered considerable delays. There was clear email evidence of attempts to get them fitted as quickly as possible.

21. On 7 August 2020 the claimant wrote to Fiona Fisher and asked to appeal her grievance outcome. Three weeks later the claimant submitted a timesheet which included an entry for an eight hour birthday leave.

22. On 1 September 2020 the claimant was advised that she was not entitled to the paid birthday leave. The circumstances of the birthday leave were that this was a perk or a bonus provided to salaried members of staff. It would seem that Sue Milaszewicz had, prior to retiring, been in the habit of offering it to the zero hours contract workers as well. Therefore in August 2019 the claimant had received a day's pay in lieu of a day off. She expected to get this every year. There was no mention of this, or of maternity pay or any other benefit at all in her contract. When Ms Lister realised what had happened, a letter was sent to all zero hours contract workers advising them that although this had been given to them by mistake in 2019, they would not be receiving it again in the future.

23. It is fair to say that the respondent, although late in making payments to the claimant, did pay her for April, May, June and July. The claimant returned to work in August. She was paid the average of her earnings, including time paid for training over that period, for the shifts that she would have been expected to take i.e. four a month, her usual average. The claimant was therefore not left out of pocket. This went beyond her contractual entitlement.

24. The claimant had originally received a draft risk assessment from Ms Mason, and had noted that there was no mention of screens in there. It only dealt with the issue of the distance between the desks, which was resolved in July 2020. However, subsequent to sending the claimant the draft risk assessment Ms Mason undertook further investigation and found that screens would be required until such time as the then IT issue was resolved. The final risk assessment sent to the claimant in this regard mentioned the requirement for screens. The claimant however accepted in evidence that she probably did not read that one. She did not understand therefore why, having said she could return to work, the respondent appeared to be prevaricating. The respondent had decided the claimant should only work day shifts. She would have preferred to work nights, but the respondent considered it unsafe at night as she may have had to go out to a tenant on her own, and in any event would be in the office on her own at the very least. The claimant did not argue that she should be allowed to work as a responder and accepted that the role of adviser i.e. staying in the office and answering telephone enquiries and providing support, was appropriate.

25. The claimant believed that she was only being offered morning shifts. Out of six shifts in the day (three for a responder and three for an adviser), the claimant was therefore only being offered one shift in six. She believed, without any evidential foundation, that she was only being offered the chance to undertake morning shifts as an adviser. She accepted in cross examination that that is not what she was told: it was an assumption which she did not complain about at the time. The reality was that the respondent was happy for her to work morning and afternoon shifts i.e two out of six, where three were agreed to be inappropriate responder shifts.

26. In the meantime the claimant had another job concurrently with somebody else providing personal care to a disabled person. This involved lifting and sleeping over. Whilst she was pregnant she considered this inappropriate and so she resigned. However, by mid May she was again working three days a week in alternative work.

27. In returning to the issue of maternity pay, the claimant agreed that her eventual maternity allowance amounted to the same as statutory maternity pay and she actually suffered no financial loss. The evidence led us to conclude that either the claimant did not understand the difference at the time in the nature of maternity payments or that Ms Mason may simply have used a generic term. The claimant confirmed that she suffered no loss and accepted that she was unaware of anyone actually receiving statutory maternity pay in the respondent organisation.

28. The Law

1. The Equality Act 2010 provides that the relevant time limit for starting Employment Tribunal proceedings runs from “the date of the act to which the complaint relates” (Section 123(1)(a)).

2. The relevant time limit in relation to claims in this case, is three months beginning with the date of the act complained of. This is subject to the provisions of early conciliation.

3. The Tribunal may consider any such complaint which may be out of time providing that it is presented within “such other period as the Employment Tribunal thinks just and equitable”. Section 123(1)(b) Equality Act.

4. Section 123(3) of the Equality Act makes provision for the situation where the act complained of amounts to a continuing act of discrimination in which case Section 123(3)(a) states that conduct extending over a period is to be treated as done at the end of that period.

<u>Direct Pregnancy/Maternity Discrimination</u>

5. Section 13(1) of the Equality Act 2010 provides that “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. Both sex, and pregnancy and maternity are among the protected characteristics listed in Section 4 of the Equality Act 2010.

6. Section 18 of the Equality Act 2010 contains specific provisions for the purpose of the application of part 5 of the Act to the protected characteristic of pregnancy and maternity. Section 18(2):- a person (A) discriminates against a woman if, in the protected period in relation to her pregnancy of hers, A treats her unfavourably – (a) because of the pregnancy, or ….

7. Section 18(7) provides that Section 13 does not apply where Section 18 does.

8. In this case, it is not in dispute that Section 18 does apply to the claimant.

Victimisation

9. Section 27(1) of the Equality Act 2010, a person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act.

10. Section 27(2) each of the following is a protected act:-

(a) Bringing proceedings under this act;
(b) Giving evidence or information in connection with proceedings under this act;
(c) Doing any other thing for the purpose of or in connection with this act;
(d) Making an allegation whether or not express that A or another person has contravened this act.

Findings

Jurisdiction

29. The first alleged discriminatory incident occurred in April 2020 when the claimant says that having been sent home in March from her shifts, the respondent failed to pay her in April 2020 as she expected. That incident was well before three months (plus early conciliation) and on the face of it therefore out of time. However, all of the incidents that followed and which she alleged were discriminatory related either to her pay or the fact that the respondent would not let her return to work. Although different individuals were involved in those decisions as they were taken through different ranks of the respondent organisation, the fact remained that they were consequent generally one or the other. As such, we find that they formed a series of allegations of discrimination in the form of acts amounting to a continuous course of conduct extending over a period of time as set out in section 123(3)(a) of the Equality Act 2010. The last such act occurred on 1 September 2020 when the claimant was advised that she was not entitled to be paid for birthday leave.

30. In the circumstances we find the entire claim to be in time and also confirm that we have jurisdiction to hear it.

Direct pregnancy/maternity discrimination

31. We look now at each of the alleged acts of unfavourable treatment:

2.1.1 Being sent home on 17 March 2020 due to being classed as vulnerable, and being told not to return for 12 weeks.

32. We have found as a matter of fact that the claimant was not told that she would be away from work for 12 weeks on 17 March 2020. We do find that she was sent home due to being classed as vulnerable. We do not find that to be unfavourable treatment: it was treatment which was appropriately informed through the requirements placed upon the respondent as a result of the Government's public health advice and regulations leading from the onset of the first COVID-19 lockdown.

33. The respondent always indicated that it would pay her for the average of the shifts she had worked leading up to her being sent home. They went further than that, including training days for which she had been paid as well.

2.1.2 Being promised payment for shifts but this payment was not made as promised on 15 May 2020.

34. The respondent was quite clear that it had made a mistake and not paid the claimant for the shifts that she expected to be paid for. However, they did pay when it was realised that this mistake had been made, and they paid generously beyond the requirements of her zero hours contract. On the face of it the late payment was unfavourable treatment, but we do not find as a matter of fact that this was because of the claimant's pregnancy. We find that it was because of a mistake made by the respondent which was subsequently generously dealt with by them.

2.1.3 Being told as part of the risk assessment on 27 May 2020 that she was only eligible to do one adviser shift in six (i.e. just the morning adviser role).

35. We have found as a matter of fact that the claimant was told that she was eligible for the day shifts, and these were morning or afternoon. She was advised that she could only do the adviser role and not the responder role for perfectly legitimate reasons – to protect her and her baby, and that night shifts were not made available to her for the same reason. She agreed this was in order, in her evidence This was following from a formal risk assessment carried out by a qualified risk assessor. The respondent's motive was to protect the claimant and her unborn baby, not to discriminate against her, and they did not.

2.1.4 Being told on 16 June 2020 that she could not return to work because adequate social distancing measures were not in place.

36. This was merely a matter of fact. It was only in mid July that adequate social distancing measures were put in place. Before that it was not safe for her to return to work, although attempts were being made to obtain Perspex screens which the company found difficult to source and even more difficult to achieve a delivery. We do not find that this was an act of unfavourable treatment because of the claimant's pregnancy but a positive step being taken to protected her in complying with legislation designed to provide her with protection.

Victimisation

37. The respondent conceded that there was a protected act when the claimant submitted her grievance on 9 July 2020. She alleged that she suffered detriments that she could not benefit from the respondent's birthday day off, and that she was told that she was not eligible to receive maternity pay. She believed both of these were as a result of these committing the protected act.

38. On the evidence we heard we have found as a matter of fact that a mistake had been made over the payment of the birthday day off to zero hours workers and they were not entitled to that under the terms of their contract. The respondent simply clarified it to the claimant and then to all other zero hours workers that this had been a mistake and they had benefitted from it the year before. It was not part of the terms of her contract that she should be given this. The claimant was also told that she was not eligible to receive maternity pay, which was accurate. She had relied on something she had been told by Colette Mason, and we believe that she has misunderstood what was said. We were satisfied as a matter of fact that neither Colette Mason nor any other zero hours contract worker had been given maternity pay. All that the respondent was doing therefore was advising the claimant of her rights. These were not detrimental acts which resulted from the claimant doing a protected act.

39. The one thing the Tribunal would say is that the respondent appeared to do all it could to keep her and her baby safe through the COVID-19 outbreak and paid her generously beyond the terms of her contract.

40. At the very end of the claimant's submissions she suggested that she may not be a worker but an employee. We therefore confirm that having considered the terms of her contract, the way that she worked (being offered shifts but not having to accept them), and only working an average of four shifts a month up to the COVID-19 outbreak, we are satisfied that the claimant was working to the terms of her zero hours worker's contract, and that she was therefore a worker and not an employee.

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Employment Judge Warren

Date: 13 May 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
14 May 2021

FOR THE TRIBUNAL OFFICE