EMPLOYMENT TRIBUNALS

Claimant: Ms Y Takehana

Respondent: Querida Coffee Company Limited

Heard at: London Central (Via Cloud Video Platform) **On:** **27, 28 and 29 April 2021**

Before: Employment Judge Joffe
Ms H Craik
Mr S Godecharle

Appearances
For the claimant: Ms E Lanlehin, counsel
For the respondent: Ms C Ibbotson, counsel

JUDGMENT

1. The respondent failed to pay the claimant for accrued but untaken annual leave under regulation 14 of the Working Time Regulations 1998 in the sum of £465.64 and must pay that sum to the claimant.

2. The respondent failed to provide the claimant with a written statement of employment particulars, as required by section 1 of the Employment Rights Act 1996.

3. It is just and equitable to award the claimant the higher amount of four weeks' pay in respect of the failure to provide employment particulars and the respondent must pay the claimant the sum of £899.28.

4. The claim for wrongful dismissal is not upheld and is dismissed.

5. The claim for detriment pursuant to section 47C of the Employment Rights Act 1996 is not upheld and is dismissed.

6. The claim of direct discrimination under section 18 Equality Act 2010 is not upheld and is dismissed.

RESERVED REASONS

Claims and issues

1. The claims and issues had been largely agreed at a preliminary hearing in front of Employment Judge Isaacson on 14 September 2019. Some of the issues had not been fully defined and were further clarified at the outset of the full merits hearing. The issues as finally agreed are as set out below. The respondent had conceded at an early stage that the claimant was entitled to accrued but untaken holiday pay and the sum calculated by the respondent was agreed by the claim to be correct. There were therefore no more issues in respect of that claim for the Tribunal to determine and we told the parties that judgment would be entered in that amount.

Holiday Pay

(i) The claimant and the respondent agree that the claimant was entitled to be paid for annual leave during her employment with Querida Coffee Company Limited in the sum of £465.64.

Failure to issue a s1 Compliant Statement of Terms to the claimant

(ii) The respondent accepts that it did not provide the claimant with a written statement of employment particulars that was compliant with section 1 of the Employment Rights Act 1996. It did however provide a letter to the claimant confirming her employment.

(iii) What award is the claimant entitled to for the failure? The Tribunal can award either two or four weeks wages.

Wrongful dismissal

(iv) Was the claimant given her correct legal notice period?

(v) The respondent and claimant accepted that the claimant's statutory notice period was one week.

(vi) From the date of her resignation on 26 July 2019, and her last day of employment on 4 September 2019, did the claimant work for at least her statutory notice period?

Claim for detriment under s 47C ERA 1996 / reg 19 Maternity and Parental Leave Regulations 1999

vii) Did the claimant comply with her obligations under Regulation 4 of the Maternity and Parental Leave Regulations 1999 to provide the requisite information to the respondent, in particular:

a. Regulation 4(1a)(ii) to inform the respondent of her expected week of childbirth; and

b. Regulation 4(1)(a)(iii) to inform the respondent of the date when she intended to start Ordinary Maternity Leave?
in order to be eligible for maternity leave?

viii) Did the respondent subject the claimant to a detriment by refusing to permit her to take maternity leave because she was pregnant or sought to take maternity leave?

Direct discrimination under the Equality Act 2010 based on the protected characteristic of pregnancy

ix) Did the respondent dismiss the claimant on the grounds of the protected characteristic of being pregnant?

x) The claimant alleges that she was told by the respondent, after notifying them that she was pregnant, that she would need to resign and then she would be able to claim government benefits. That would be a constructive dismissal. The claimant relied on a hypothetical comparator.

Findings of fact

The hearing

2. For the claimant, we heard from the claimant and her partner, Mr Donald Ndoro. For the respondent, we heard from Ms Lisandro Reginaldo, co-owner and sole director of the respondent and her husband, Mr Benjamin Smith, the other co-owner of the respondent. We had a bundle of some 129 pages.

3. The hearing was a remote hearing via Cloud Video Platform because it was not practicable to hold an in person hearing. The parties did not object to a remote hearing and there were no significant technical issues.

4. On 28 April 2019 the claimant commenced employment at the respondent's coffee shop 'The Little One Coffee Shop' after asking for a job and doing a trial shift. She had recently come to the UK on a tier 5 young person's visa. She arrived on 8 April 2019. The claimant's first language is Japanese and her English is still not fluent. She had the benefit of a Japanese interpreter, Mr Nakatani, throughout the hearing. The claimant gave her evidence in Japanese and Mr Nakatani translated all of the evidence, questions, submissions and Tribunal remarks for the claimant's benefit. We were immensely grateful for his skilled assistance.

5. The claimant was not provided with a written contract of employment although she was issued with a letter on 17 May 2019 confirming that she was employed by the respondent.

6. The respondent is a company which runs a single small coffee shop; it is owned and operated by the husband and wife team of Mr Smith and Ms Reginaldo.

Ms Reginaldo is the sole director. They have been in business for some ten years. The coffee shop began as a van and now has small premises. The respondent has had over fifty employees in total in that time, but has apparently six or so at any one time. The workers are often young people who do not stay for long periods. Ms Reginaldo is responsible for the staff. Mr Smith deals with stock and supply, maintenance and roasting the coffee. Ms Reginaldo is of Brazilian origin and has been in the UK since 2003.

7. The respondent's payroll is done by a firm of accountants. There is no internal or external HR function. Ms Reginaldo's evidence to us was that she did not know that written contracts were required for employees.

8. In terms of other formalities, the respondent's evidence was that payslips were provided to employees in a basket at the coffee shop, having been received by Mr Smith from the accountant by email. The claimant said she did not receive payslips. We saw payslips for the claimant for June 2019 onwards – we understood that there had been some initial difficulty in relation to the claimant's bank account. We concluded that payslips were provided in the manner described by Mr Smith. It is possible that the claimant did not know or did not understand the system and did not pick hers up.

9. Ms Reginaldo told us that she had never had an employee request maternity leave and she had never taken maternity leave herself.

10. Ms Reginaldo's evidence was that for her first month, the claimant was mainly training. She then worked full time, serving coffee, making crepes and baking muffins which had been prepared by Ms Reginaldo at home.

11. There were occasions when employees' pay was delayed. The respondent told the Tribunal that was due to delays from card payments being received from third party service provider. Some of these occasions occurred before the claimant was employed and some after. The claimant accepted that she had received all of her pay during the time she was employed, but not always at the point when it was due. Although there had been a suggestion that the claimant was treated differently from other employees in this respect, that was not pursued at the hearing. This was, however one of the irregularities about the claimant's employment which caused the claimant's partner, Mr Ndoro, to become concerned.

12. On 14 July 2019, there were WhatsApp messages between the claimant and Ms Reginaldo:

    The claimant said: 'Hi Risa, is it ok for me to change to working 3 days per week.'
    Ms Reginaldo said: 'Hey, Yuki, from when? I just need time to find someone else, have people coming for interviews this week. Also which days would you be able to work?'
    The claimants said: 'I prefer next week cz I have to go to hospital like scheduled. So I can work anyday. Then if I get day off Ill go to hospital. I'm sorry who talking like selfish.'

Ms Reginaldo said: ’So do you want just for next week or permanently thought you wanted to change to part time with us? Sorry’
The claimant said: ’yes I need to part time. I’m sorry.’
The messages we looked at are reproduced with any idiosyncrasies of spelling, punctuation and grammar as they occurred in the original and we have indicated as far as possible where emojis have been used as these convey much about the tone of the messages.

13. The claimant told us that she needed to work part time because of ongoing hospital appointments. Ms Reginaldo’s evidence was that she had some difficulty in finding cover but she wanted to accommodate the claimant and did so.

14. It was suggested to us on behalf of the respondent that the claimant was being dishonest because in a letter sent by her solicitor and then in her witness statement she alleged that the respondent had decided to reduce her hours without discussion with her. This was clearly an incorrect assertion. We considered this matter with some care. Ultimately we were unable to be satisfied on the balance of probabilities that the claimant had been deliberately misleading because she had such limited English and we had significant concerns as to the extent to which she had been able to communicate effectively with her solicitors.

15. After the claimant found she was pregnant in June or July 2019, her partner Mr Ndoro suggested she notify her work HR department about making adjustments to accommodate the claimant’s morning sickness and maternity arrangements. Mr Ndoro did not assist with the drafting of any messages. Mr Ndoro’s own experience when he told his employer about the baby was that he was directed to appropriate policies by HR. Mr Ndoro works as an IT support specialist in a financial services company. He was concerned about the lack of formal processes and advice at the respondent.

16. On 26 July 2019, the claimant sent Ms Reginaldo a WhatsApp message:

‘Hi Lisa
I wanted tell you something happened about me. Actually I’m pregnant bt I don’t want tell anyone cuz everyone has different thinking. So sometimes I’m feeling not good then I need sit down and some rest sorry about that. So I could move like before.
If you possible I wanna continue to this work till top of Sep. Cuz I like that work in place and yours.
Thank you.’

17. Ms Reginaldo replied: ‘Oh congratulations. Your baby will be so cute like you [smiling face emoji with hearts] of course whatever is better for you. We have a talk on Sunday.’

18. The claimant responded: ‘Oh thank you so much [thankful hands emoji]. I’m glad to hear that [blushing face emoji]. Yes we’ll see you then!!’

19. Ms Reginaldo's evidence was that she understood that the claimant was resigning in these messages. She said that it did not occur to her that the claimant was asking about maternity leave.

20. Although we scrutinised that evidence with some care, we ultimately accepted it. The claimant had been with the respondent for a very limited time on a short term visa; Ms Reginaldo had not dealt with maternity leave either personally or for an employee; employees of the coffee shop often stayed for a very short time. We accepted that maternity leave was not in her mind.

21. Ms Reginaldo intended to speak with the claimant the following Sunday but, because her daughter was unwell, she delayed the meeting.

22. The claimant's evidence was that she had a lot of pain due to pregnancy and morning sickness. She said she did not understand what her entitlements were as a pregnant woman in the UK.

23. By 7 August 2019, the claimant and Ms Reginaldo had not yet had their meeting. The claimant sent Ms Reginaldo a WhatsApp: 'yes I was to get Sunday to day off and I also have to stop job in top of next month. That's mean could I work until 5/Sep.'

24. Ms Reginaldo replied 'You can have Sunday off no problem and OK about September day as you already told me. Thank you.'

25. The claimant messaged 'thank you for everything. One day, I want to show you my small baby [smiley face emoji]. Thank you.'

26. Ms Reginaldo then messaged 'Oh I can't wait. [Two heart emojis] I'm thank you for letting us have you even for short time it has been such a pleasure!'

27. Ms Reginaldo's evidence that was that the claimant had been having bad morning sickness and she wanted to accommodate a request for a change of shift.

28. We considered that these messages would have reinforced the impression in Ms Reginaldo's mind that the claimant was resigning, for reasons which may not have been connected with pregnancy at all; in particular the claimant was saying that she had to leave by a particular date. The tone of the claimant's email in response does not suggest she envisaging coming back to work; she was thanking Ms Reginaldo 'for everything' and wants to bring her baby in 'one day'. Ms Reginaldo thanked her for letting them have her 'even for short time'. The Tribunal was not convinced the claimant herself envisaged taking maternity leave at this stage. A reasonable employer would have understood the claimant wished to resign with effect from September 2019 and we accepted that that is what Ms Reginaldo understood.

29. On 14 August 2019, Ms Reginaldo and the claimant met in the coffee shop to discuss the claimant's pregnancy. There is a dispute about what was said. Ms Reginaldo would not usually be in the coffee shop during the school

holidays but would work from home; she went in to see the claimant. Another employee, Nicolae Radcicov, was also in the shop. Mr Smith and their daughter and dog waited outside.

30. Ms Reginaldo's evidence was that the claimant confirmed during their conversation that she wished to leave employment on 5 September 2019. They discussed how the claimant was feeling as she had been experiencing morning sickness. They also discussed the reduction in her working hours. She offered to lend the claimant baby clothes and a pram. She also offered to put the claimant in touch with her accountant to see what financial support might be available to the claimant. She said that the claimant never asked her for the accountant's details. Ms Reginaldo described the discussion as a positive one and said she and the claimant kissed on the cheek and hugged when the conversation ended. Mr Smith told the Tribunal that after the conversation he saw Ms Reginaldo hug and kiss the claimant and Ms Reginaldo subsequently told him he needed to get out their pram and old baby clothes to give to the claimant.

31. Ms Reginaldo said there was no discussion of maternity leave and no discussion about when the claimant's baby was due. Ms Reginaldo's evidence was that she would not ask anyone a question about a baby's due date unless the person volunteered information; the claimant was a private person, who had already asked that the information about her pregnancy be kept private. The claimant did not give a date when she wanted to start maternity leave. She denied that she said she had received lots of money from the government when her daughter was born.

32. In her written evidence, the claimant said:
Lisa came to the coffee shop and I mentioned to her about my pregnancy. This conversation was not an official meeting however we had the talk in the main shop area while another colleague was present at the time. Lisa told me that in the UK I am supposed to resign from my position at work and then the government would give me a lot of money to cover the maternity leave.

Lisa told me that this is how they do things in the UK and this is what she did when she took maternity leave from work when she had her daughter. Right away I contacted my partner and tried to tell him this, however, he directly told me to tell them this isn't right and not the correct procedure for maternity and for not having a contract of employment.

33. The claimant's oral evidence was that she was asking for early maternity leave during this meeting. She did not know her entitlements in UK but was aware that maternity leave exists in Japan. She said that she told Ms Reginaldo her baby as due at the end of February. She said that Ms Reginaldo told her the accountant would be in touch with her and she trusted Ms Reginaldo. She waited for a call from the accountant.

34. Mr Radcicov's evidence in his statement was that the claimant told him she was resigning; he could not remember when. He was in the coffee shop and

heard Lisa talking to the claimant about lending her a pram. He was working and not listening to the conversation properly.

35. Other evidence we considered relevant was the fact that Ms Reginaldo's child is adopted and she had not taken any leave at the time, although she had received some money at the time of the adoption; she said in oral evidence that this was from the adoption agency and was to make some purchases such as a pram.

36. We also took into account the act that the tone of the messages passing between the claimant and Ms Reginaldo suggested that they had an extremely warm and friendly relationship.

37. After the meeting, the claimant had a text message exchange with Mr Ndoro as follows:
Claimant: 'My boss came to shop then I asked them. They said I can tell government about work. This place is legal and if I apply about pregnant to government they'll give me a lot of money when I quick [should be 'quit'] job.'
Mr Ndoro: 'No they won't'
Claimant: 'No they will'
Mr Ndoro: 'They won't'
Claimant: 'My boss she's from Brazil'
Mr Ndoro: 'And you are from Japan on a Tier 5 visa. You do not have access to public funds. Your boss should know this'.
Claimant: 'Then she has a daughter'
Mr Ndoro: 'But I guess when she started she never saw you visa so she has no idea. If she employed you correctly she would know this. Clearly she doesn't. UK residents and people with an indefinite leave to remain visa are entitled to British public funds.'
Claimant: 'I think they mean maternity leave.'
Mr Ndoro: 'There isn't such a thing in the UK. Your boss has no idea what she is talking about. If your boss can help you to apply for that please apply for the government money and when you have done it please show me I would be interested to see that.'

38. We noted that Mr Ndoro's understanding of the claimant's potential entitlements was not correct and may well have caused her confusion. Mr Ndoro was certainly seeking to tell the claimant that there was something problematic about the situation with her employer. His evidence to the Tribunal was that the claimant was confused and he was confused as to what was happening. He said that he expected the respondent to provide the claimant with the same kind of information he had received from his own employer about paternity leave.

39. We heard oral evidence from the claimant about why she did not go back and speak to Ms Reginaldo about the issue, either to dispute what Ms Reginaldo had said or to ask for more detail about how to get the money for the government:

- She said that she was waiting for a communication from the accountant and trusted Lisa because she was her boss;

- After Mr Ndoro told her Ms Reginaldo was incorrect and she sought legal advice, her explanation was still that she trusted Lisa and was waiting to hear from the accountant.

40. Mr Ndoro said that he understood the claimant was leaving and waiting to hear from the accountant. He assumed it would operate like his company. He said that he did not look at government / HMRC websites about maternity entitlements, although in his statement he referred to information about maternity being readily available on these websites.

41. The respondent's case was that the claimant either misunderstood what was said at the meeting or was being misleading. We had to consider carefully what we believed the effect of the language barrier was; we also took into consideration the fact that memory is often misleading and that people may genuinely believe they said what they wished they had said or feel they should have said.

42. We were not satisfied that the claimant referred to maternity leave although she may by the time of the hearing have believed she had. We took into account the fact that the assertion that she mentioned maternity leave was not mentioned in her pleadings or in the statement which was before the Tribunal. Her text to Mr Ndoro: 'I think they mean maternity leave' would make no sense and we considered would have been mentioned earlier in the text chain if the claimant was relating what Ms Reginaldo had actually said in response to an enquiry about taking early maternity leave.

43. We did not find that Ms Reginaldo said that the claimant would have to resign to get money from the government but we accepted that is what the claimant understood. It would make no sense for Ms Reginaldo to tell the claimant to quit her job when she had, reasonably, understood that the claimant had already given notice that she was leaving. We think the language barrier probably played a part. If, for example, Ms Reginaldo had expressed herself in this way: 'if you [meaning any person] quit your job you may be entitled to payments from the government', this could easily have been misconstrued by the claimant.

44. We accepted Ms Reginaldo's account that she offered to put the claimant in touch with her accountant with the expectation that the claimant would ask for contact details if she decided to go down that route. We accepted that the claimant thought that meant the accountant would get in touch with her.

45. We accepted that, for the reasons she gave, Ms Reginaldo did not probe about the claimant's due date. If the claimant volunteered any information on this subject, Ms Reginaldo did not retain it, as evidenced by the text messages referred to at paragraph 53 below.

46. We found Ms Reginaldo did not say she had taken maternity leave with her daughter. It would not have been a true statement because her daughter was adopted. There may have been some discussion about the fact she received some monies which was misinterpreted by the claimant and became confused

in the claimant's memory with discussions she subsequently had about the meeting with Mr Ndoro and her solicitors.

47. On 30 August 2019, the claimant sent Ms Reginaldo a WhatsApp message saying: 'Buy the way could I get your email address to send you information.' Ms Reginaldo replied with an address and the claimant responded 'Hi Risa, this is for something confidential, would this still be the appropriate email to send personal information.'

48. Ms Reginaldo said: 'No problem you email it.'

49. On 31 August 2019, she messaged further to apologise to the claimant for forgetting to wish her a happy birthday. She said 'Wishing you all the best in this world, always here whenever you might need a job when you come back from maternity or just come for a coffee. Whatever! Hope you are feeling well let me know when you are in the area as I have something for you. We all miss you'. The claimant sent a message in reply thanking Ms Reginaldo and including a heart emoji.

50. The claimant's evidence was that she asked for the email address to raise the issue of maternity leave via email. However she says she was confused by the message Ms Reginaldo sent her on 31 August and therefore did not send an email but took legal advice instead. The Tribunal found it difficult to understand why the claimant never raised the issue of maternity leave clearly with Ms Reginaldo. Her explanations were variously that she trusted Ms Reginaldo, that she was waiting for the accountant to call and then that she sought legal advice.

51. The claimant certainly sought legal advice at around this time although it was not clear exactly when.

52. Ms Reginaldo's evidence was that when she used the word maternity, she may have been confused with the Portuguese word for the state of having a new baby. She was not intending to refer to maternity leave. She and her husband valued the claimant as a good worker and would like to have had her back.

53. 2 September 2019 is the date on a letter from the claimant's solicitors which was not sent that day. It stated:

We have been instructed by Miss Y Takehana who was employed by your company on 28th April 2019 as a worker within the coffee shop.
Ms Takehana informs us that she was employed by your company to work between the hours of 7 am to 17:30 pm, 5 days a week form 28th April 2019, and these hours were reduced on 07th August 2019 for reasons she is not aware of, and no prior discussion were held with her as to the reasons why her hours of work were reduced.
Our client also informs us that she has now been placed on indefinite maternity leave by your company without being given reasons for your action.

The letter then asked that a copy of the claimant's employment contract be provided within fourteen days.

54. The claimant's final day of employment was 4 September 2019. This arose out of a series of WhatsApp messages:
Claimant: 'I feeling still bad only morning and sometimes throw up and to tired. So I want the last day. Bt I miss you guys [crying face emoji]'
Ms Reginaldo:' Such a shame. But like I said we here if you need us. Just confirming so the 4th will be your last official day nor the 6th as you originally requested cos I need to tell my accountant so you can have your P45? [sad face emoji]'
Claimant:' yes sure!! Thank you so much [crying face emoji]'
…
Claimant: 'Hi! I finished work, I'm gonna leave there!! So anyway thank you for everything [smiling face emoji]'

55. Ms Reginaldo told the Tribunal that on the morning of 4 September 2019, Mr Smith drove her to the coffee shop especially to say goodbye to the claimant. They hugged the claimant and wished her all the best. The claimant said she would come into the coffee shop with her partner once she had had the baby. Ms Regnaldo told the claimant that she would miss her.

56. After they got home, theyreceived the claimant's solicitor's letter. Mr Smith telephoned the solicitor to try to understand what it was all about. He was told to answer the letter. Ms Smith replied to the letter saying that the claimant had asked to have her hours reduced.

57. There was some further correspondence between Mr Smith and the solicitor. There was no request to reinstate the claimant's employment and the claim form was presented on 12 December 2019.

58. On 28 December 2019, there were text messages between Ms Reginaldo and Mr Smith about who might know when the claimant's baby was due.

59. So far as the discussions and correspondence between 4 September 2019 and the commencement of proceedings were concerned, there was much that was confusing to us. It was not ultimately necessary for us to make findings about this period in order to determine the issues in the claims.

60. What we can say about this period is that if the claimant had been able to clearly communicate with her solicitors and if what she wanted to communicate was that she wanted to remain in the respondent's employment and ultimately take maternity leave, it would have been sensible for there to have been a dialogue with the respondent to that effect before the claimant stopped work or soon after. We did not have sufficient evidence to form a view on the reason why no such dialogue was instigated.

61. We understood that the claimant's baby was born in late February 2020.

Law

Pregnancy discrimination

62. Under s 18 Equality Act 2010, an employer discriminates against a worker if during the protected period in relation to a pregnancy of the worker's, it treats her unfavourably because of her pregnancy, a pregnancy related illness, because she is on compulsory maternity leave or because of the exercise of the right to maternity leave. The protected period begins when the pregnancy begins, and ends, if the employee 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; if she does not have that right it ends at the end of the period of two weeks beginning with the end of the pregnancy.

63. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause' O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

64. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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."

65. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be

drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

66. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

67. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

68. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

69. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

70. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT. If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place, it must apply the shifting burden of proof: Country Style Foods Ltd v Bouzir 2011 EWCA Civ 1519, CA. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator

should be considered. These might be explanations arising from the tribunal's own findings: Chief Constable of Kent Constabulary v Bowler EAT 0214/16.

71. The shifting burden of proof does not apply to underlying facts as opposed to the element of discrimination.

Failure to provide employment particulars

72. Section 38 of the Employment Act 2002 provides that an employment tribunal must award compensation to an employee where a claim under any of the tribunal jurisdictions listed in Schedule 5 has succeeded, and the employer was in breach of its duty to provide full and accurate written particulars under section1 of the Employment Rights Act 1996.

73. The list of jurisdictions set out in Schedule 5 includes claims under the Working Time Regulations and for unauthorised deductions from wages.

74. The Tribunal must award the minimum amount of two weeks' pay and may award the higher amount of four weeks' pay, I f we consider it just and equitable to do so in all the circumstances. There is no appellate guidance on how we are to exercise our discretion.

Maternity detriment

75. To qualify for statutory maternity leave, an employee must notify her employer no later than the end of the 15th week before the expected week of childbirth (or if that is not reasonably practicable, as soon as is reasonably practicable) of the following:
    - her pregnancy;
    - her expected week of childbirth;
    - the date on which she intends her ordinary maternity leave to start. That date cannot be earlier than the beginning of the 11th week before the expected week of childbirth: regulation 4 Maternity and Parental Leave etc Regulations1999.

76. An employee has a right not to be subjected to a detriment by any act or deliberate failure to act of her employer because she is pregnant or has taken, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave: section 47C Employment Rights Act 1996 and regulation 19(2) Maternity and Parental Leave etc Regulations 1999.

Submissions

77. We received written and oral submissions from both parties and gave these careful consideration but refer to them only insofar as may be necessary to

explain our conclusions. Ms Lanlehin made submissions which seemed to raise issues which went beyond the agreed list of issues, but when the Tribunal questioned her about those submissions, she indicated that she was not seeking to go beyond the agreed issues.

Conclusions

Holiday Pay

78. We find for the claimant in the agreed amount of £465.64.

Failure to issue a s1 Compliant Statement of Terms to the claimant

79. The respondent accepted that it did not provide the claimant with a written statement of employment particulars that was compliant with section 1 of the Employment Rights Act 1996. It did however provide a letter to the claimant confirming her employment.

80. The respondent initially conceded that the claimant was entitled to a payment under ERA 2002, s 38 because she had succeeded in relation to her holiday pay claim. In submissions, Ms Ibbotson then said that our jurisdiction was not engaged because the claimant had withdrawn her claim. This was a misunderstanding of what had occurred. We checked at the outset of the hearing with Ms Lanlehin whether there was an issue about the calculation of the holiday pay. Ms Lahnlehin said there was no issue. We then indicated that we would make an award in that amount. There was no withdrawal of the claim.

81. We had to consider whether it was just and equitable to make the higher award of four weeks' wages. We bore in mind the following factors which weighed against making such an award: the respondent is a very small family-run business and does not have significant resources. It has a lot of casual staff who often do not stay for long periods. We were told the respondent has now addressed the issues with staff contracts.

82. On the other hand, the respondent has been in business for a significant period and Mr Smith and Ms Reginaldo have failed to find out basic information about employment rights. There was a total failure to provide employment particulars. That is not a victimless omission because employees who do not have proper particulars are hampered in understanding and asserting their employment rights. In this case the claimant received no accrued holiday pay and had to commence proceedings. We found overall that the balance fell in favour of making the higher award.

83. We considered a schedule of sums paid to the claimant over a twelve week period and calculated that a week's pay for the claimant was £224.82. The parties agreed that figure. The award under this head is £899.28.

Wrongful dismissal

84. The claimant was entitled to one week's notice.

85. The claimant gave notice that she was resigning on a particular date by 7 August 2019 at the latest. This was more than one week's notice and she then worked the period of notice she had given, less a day, at her own request. There was no breach of contract by the respondent in relation to notice.

Claim for detriment under s 47C ERA 1996 / reg 19 Maternity and Parental Leave Regulations 1999

Issue: Did the claimant comply with her obligations under Regulation 4 of the Maternity and Parental Leave Regulations to provide the requisite information to the Respondent, in particular:

a. Regulation 4(1a)(ii) to inform the respondent of her expected week of childbirth; and

b. Regulation 4(1)(a)(iii) to inform the respondent of the date when she intended to start Ordinary Maternity Leave in order to be eligible for maternity leave?

86. Although the parties asked us to consider this issue, it was arguably not necessary for us to do so.

87. On our findings the claimant had not provided either of these pieces of information to the respondent, prior to leaving her employment with the respondent. At the time she left her employment she was more than eleven weeks away from her expected week of childbirth and would not have been entitled to commence maternity leave.

Issue: Did the respondent subject the claimant to a detriment by refusing to permit her to take maternity leave because she was pregnant or sought to take maternity leave?

88. On our findings of fact, the claimant did not ask to take maternity leave or notify the respondent that she was going to take maternity leave and there was no refusal by the respondent.

89. Had either Ms Reginaldo or the claimant been better informed, it is possible that a conversation about the possibility of maternity leave would have taken place, but that was not the issue we had to decide.

Direct discrimination under the Equality Act 2010 based on the protected characteristic of pregnancy

Issue: Did the respondent dismiss the claimant on the grounds of the protected characteristic of being pregnant?

90. The claimant alleges that she was told by the respondent, after notifying them that she was pregnant, that she would need to resign and then she would be able to claim government benefits. This was said to be a constructive dismissal.

91. We found as a fact that this did not occur and that the respondent did not dismiss the claimant so the claim fails on that basis. Ms Reginaldo reasonably understood the claimant was resigning and there was no dismissal. The claim of direct pregnancy discrimination is therefore not upheld.

Employment Judge Joffe
London Central Region
16/05/21

Sent to the parties on:
17/05/21.

For the Tribunals Office