



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M Nykiel

**Respondent:** Mona Hotels Ltd

**Heard at:** Birmingham (by CVP)      **On:** 3 September 2021

**Before:** Employment Judge Miller  
Ms L Wilkinson  
Mr P Paw

## **Representation**

**Claimant:** Mr P Smart - lay representative and friend

**Respondent:** No Attendance

# RESERVED JUDGMENT

1. The claimant's claim that she was subject to pregnancy and maternity discrimination under s 18 Equality Act 2010 in respect of the respondent's failure to pay statutory maternity pay is unsuccessful and is dismissed.
2. The tribunal does not have the jurisdiction to decide the claimant's claim that she was not paid statutory maternity pay to which she claims was entitled.

# REASONS

## **Introduction**

1. The claimant was previously employed by the respondent. She brought a number of claims against the respondent and the case number 1301291/2019 which were the subject of a judgement dated 1 October 2020. That judgement upheld claims of unauthorised deductions from wages, failure to pay holiday pay, pregnancy and maternity discrimination under section 18 of the Equality Act 2010 and made a declaration as to

the claimant's normal weekly earnings for the purposes of calculating statutory maternity pay.

2. It is the claimant's case that the respondent failed subsequently to make any payment of statutory maternity pay and following a period of early conciliation from 7 December 2020 to 10 December 2020, the claimant brought a further claim to the employment tribunal of pregnancy and maternity discrimination under section 18 of the Equality Act 2010 and for non-payment of statutory maternity pay.
3. Initially, the claim was brought against a named individual and the claim was served on that individual. Following correspondence and directions from the tribunal the name of the respondent was amended and the claim form was served on the respondent, Mona Hotels Ltd, on 8 June 2021. The respondent was given until 6 July 2021 to present a response and they failed to do so.
4. A judge decided not to issue a judgement under rule 21 of the Employment Tribunal Rules of Procedure 2013 as there are matters relating to jurisdiction and proving the claim to be determined. The case was therefore listed for hearing today before a full panel.

### **Issues**

5. At the start of the claim the issues were clarified with the claimant. The claimant confirmed that the two claims she wished to bring were as follows:
  - a. Pregnancy or maternity discrimination under section 18 Equality Act 2010.
    - i. For the purposes of this claim, the alleged unfavourable treatment is the failure by the respondent to pay the claimant any statutory maternity pay following the declaration of the tribunal on 1 October 2020 that the claimant's wages for the purposes of calculating statutory maternity pay were £240 per week.
    - ii. The other issues for the tribunal to decide in respect of this claim are:
      1. was the unfavourable treatment done or decided on in the protected period; and
      2. if so, was that because of the claimant's pregnancy or because of illness suffered by her as a result of it?
  - b. failure to pay statutory maternity pay.

- i. The primary issue for the tribunal to determine in respect of this claim is whether the tribunal has jurisdiction to determine entitlement to statutory maternity pay.
- ii. Alternatively, has the amount of statutory maternity pay payable been agreed between the respondent and the claimant or determined by an adjudicating authority,
- iii. if so was less than the full amount paid by any occasion; and
- iv. if so by how much was the claimant underpaid?

### **The hearing**

6. The claimant attended and was represented by her friend and lay representative Mr Smart. The claimant had produced a short witness statement and a bundle of documents. The documents were not collated in a bundle but all of the relevant documents and an index have been provided so that the tribunal was able to collate and refer to the documents.
7. Mr Smart apologised for what he describes his failure to provide a bundle of documents which he said was related to his disability. I did not give Mr smart an opportunity to explain further and nor was it necessary to do so. There was no inconvenience to the tribunal in the way that the documents had been provided on this occasion. We are grateful to the helpful and cooperative way in which Mr Smart and the claimant presented the claimant's case to the tribunal.
8. The respondent did not attend and was not represented at the hearing. There was correspondence on the tribunal file to suggest that the respondent's director had moved to Poland and was in the process of dissolving the company and winding up his business. As the respondent had failed to produce a response and it was apparent that they had no intention of attending this hearing, the tribunal decided to go ahead in the respondent's absence in accordance with rule 47 of the Employment Tribunal Rules of Procedure 2013.

### **Findings of fact**

9. The facts in this case are relatively straightforward.
10. The claimant was employed by the respondent from 21 March 2018. On 22 September 2018 the claimant discovered that she was pregnant. She says that she experienced unfavourable treatment after that.
11. The claimant's employment ended on 28 December 2019 and she brought a claim to the employment tribunal. Although we do not have a copy of the original claim form, we conclude, from the subsequent judgment, that that claim included claims of maternity and pregnancy discrimination under section 18 Equality Act 2010; claims for unauthorised deductions from

wages; and claims that the respondent failed to pay holiday pay outstanding on termination of the claimant's employment.

12. On 1 October 2020, the Employment Tribunal upheld the claimant's claims. The judgment of that tribunal is as follows:

The Judgment of the Tribunal is that:

1. The respondent made unlawful deductions from the claimant's pay in breach of s13 of the Employment Rights Act 1996. The respondent is ordered to pay to the claimant the sum of £744.00 gross.
  2. The respondent failed to pay to the claimant her full entitlement to accrued and untaken holiday for the holiday year 1 March 2019 to 29 December 2019 in breach of Reg 13 of the Working Time Regulations 1998. The respondent is ordered to pay to the claimant the outstanding sum of £527.65 gross.
  3. The respondent during the protected period treated the claimant unfavourably in relation to her pregnancy in breach of s18 of the Equality Act 2010. The respondent is ordered to pay to the claimant compensation in respect of injury to feelings in the sum of £7000.
  4. The claimants 'normal weekly earnings' for the purposes of calculating Statutory Maternity Pay for the purposes of Reg 20(2) of the Statutory Maternity Pay Regulations 1986 is £240.00.
13. It is unclear under what provisions the tribunal made the declaration at paragraph 4 of its decision. However, there has been no challenge to that decision as far as we are aware and it therefore stands as it is.
14. In respect of this claim, the claimant said that one of the allegations was that the respondent had sought to reduce the claimant's working hours to avoid liability for statutory maternity pay and that issues relating to maternity pay were part of the previous claim but were not "touched upon" by Judge Dean.
15. The claimant says that the respondent has failed to pay any statutory maternity pay for her during the period of her employment. The claimant said, and we accept, that she had engaged the services of a bailiff to attempt to recover money owed to her from the respondent. However, the respondent's director had taken steps to strike off the respondent company and had then moved to Poland. The claimant described the respondent as leaving a trail of debts behind him. Mr Smart said that the respondent, or its director, had been before the Employment Tribunal on a number of occasions and does not seem to care about the people to whom he owes money.
16. The reason, in the opinion of the claimant and her representative, that the respondent or its director have not paid and don't pay what they owe is because they do not want to.

17. Having failed to receive any money from the respondent by way of statutory maternity pay, the claimant then commenced early conciliation and submitted her claim as set out above.
18. The claimant also explained that the actions of the respondent, or more specifically its director, had caused her a great deal of financial and emotional difficulties. The claimant said that she gave birth to twins but this would not have entitled her to twice as much SMP. To be deprived of any SMP, she said, was tantamount to stealing from her children. The claimant has been left feeling distrustful of employers and that she believes that respondent's director must not understand the very significant impact his decisions have had on her, or he simply does not care.
19. The respondent's director was not here to deny, explain or defend his actions as outlined by the claimant and, as it is not necessary for our decision to make findings about this, we do not do so. However, we recognise the impact that, at the very least, the claimant's perception of the way she has been treated has clearly had a negative effect on her.

## **Law**

### **Pregnancy and maternity discrimination**

20. In respect of maternity and pregnancy discrimination s 18 Equality Act 2010 says:
  - (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.
- (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
- (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
  - (b) it is for a reason mentioned in subsection (3) or (4).

21. The periods of ordinary and additional maternity leave are provided for in regulation 7 of the Maternity and parental Leave Regulations 1999. The latest date on which a period of maternity leave starts is the date of birth of the relevant child and the period of maternity leave ends after 26 weeks (ordinary maternity leave), 52 weeks (additional and ordinary maternity leave) or at the end of the employee's employment.

22. These provisions means that a claim for maternity or pregnancy discrimination must relate to unfavourable acts said to be done between the start of the employee's pregnancy and the end of the relevant maternity leave period (the protected period). This includes acts done after the end of the maternity leave period but that were decided to be done by the employer during the protected period.

### **Issue estoppel and the rule in *Henderson v Henderson***

23. Issue estoppel is a legal principle that if an issue between two parties to litigation has been decided in legal proceedings between those parties, the same issue cannot be used to bring a claim in new proceedings between the same two parties.

24. The "rule in *Henderson v Henderson*" is similar. That is a legal rule that says a party may not rely on matters that could and should have been raised in earlier legal proceedings but were not unless new relevant evidence has come to light that could not by reasonable diligence have been discovered before the previous proceedings.

25. These principles are explained in the Supreme Court case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (formerly known as Contour Aerospace Ltd) [2013] UKSC 46.

### Statutory maternity pay

26. The obligation for an employer to pay statutory maternity pay (SMP) comes from s 164 Social Security Contributions and Benefits Act 1992. That provides conditions that must be satisfied by a woman to be entitled to be paid SMP by her employer. It is not necessary to set those out here.

27. Further provisions about the administration of SMP are set out in the Statutory Maternity Pay (General) Regulations 1986. Relevantly, regulation 7 of those regulations says:

(1) Where—

(a) an adjudicating authority has determined that an employer is liable to make payments of statutory maternity pay to a woman, and

(b) the time for appealing against that determination has expired, and

(c) no appeal against the determination has been lodged or leave to appeal against the determination is required and has been refused,

then for any week in respect of which the employer was liable to make payments of statutory maternity pay but did not do so, and for any subsequent weeks in the maternity pay period the liability to make those payments shall, notwithstanding section 46(3) of the 1986 Act, be that of the [Commissioners of Inland Revenue] and not the employer.

(2) In paragraph (1) adjudicating authority means, as the case may be, the Chief or any other adjudication officer, [the First-tier Tribunal or the Upper Tribunal].

28. There are yet further regulations dealing with the administration of SMP, namely the Statutory Sick Pay and Statutory Maternity Pay (Decisions) Regulations 1999. Regulation 2 of those regulations says:

(1) An application for the determination of any issue arising as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay may be submitted to an officer of the Board by—

(a) the Secretary of State; or

(b) the employee concerned.

(2) Such an issue shall be decided by an officer of the Board only on the basis of such an application or on his own initiative.

29. Regulation 3 provides:

(1) An application for the determination of any issue referred to in regulation 2 above shall be made only in writing, in a form approved for

the purpose by the Board, or in such other manner, being in writing, as an officer of the Board may accept as sufficient in the circumstances.

- (2) Where such an application is made by an employee, it shall—
  - (a) be delivered or sent to an office of the Board within 6 months of the earliest day in respect of which entitlement to statutory sick pay or statutory maternity pay is in issue;
  - (b) state the period in respect of which entitlement to statutory sick pay or statutory maternity pay is in issue; and
  - (c) state the grounds (if any) on which the applicant's employer has denied liability for statutory sick pay or statutory maternity pay in respect of the period specified in the application.

30. We also refer to sections 13, 23 and 27 of the Employment Rights Act 1996 in relation to unauthorised deductions from wages.

31. As far as is relevant, section 13 provides:

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
  - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
  - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—
  - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
  - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

32. Section 23 provides, again as far as is relevant:



- (1) A worker may present a complaint to an [employment tribunal]—
  - (a) that his employer has made a deduction from his wages in contravention of section 13

33. And s 27 says (again, as far as is relevant):

- (1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—
  - (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
  - (b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,
  - (c) statutory maternity pay under Part XII of that Act,

34. These provisions were considered in *Hair Division Ltd v MacMillan* UKEATS/0033/12/BI. In that case, Lady Smith said at paragraphs 35 – 37

*“[35] We turn to the matter of SMP. Since April 2005, overall responsibility for the administration of SMP has been with Her Majesty’s Revenue and Customs (“HMRC”). The responsibilities passed to HMRC included those formerly conferred on the Board of the Inland Revenue under the Statutory Sick Pay and Statutory Maternity Pay (Decisions) Regulations 1999 (“the 1999 Regulations”) the provisions of which include:*

*“2 (1) An application for the determination of any issue arising as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay may be submitted to an officer of the Board by –*

*. . .*

*(b) the employee concerned.*

*(2) Such an issue shall be decided by an officer of the Board only on the basis of such an application or on his own initiative.*

*3 (1) An application for the determination of any issue referred to in regulation 2 above shall be made only in writing, in a form approved for the purpose by the Board, or in such other manner, being in writing, as an officer of the Board may accept as sufficient in the circumstances.*

*(2) Where such an application is made by an employee, it shall –*

*(a) be delivered or sent to an office of the Board within six months of the earliest day in respect of which entitlement to statutory sick pay or statutory maternity pay is in issue;*

*(b) state the period in respect of which the entitlement to statutory sick pay or statutory maternity pay is in issue; and*

*(c) state the grounds ( if any) on which the Applicant's employer has denied liability for statutory sick pay or statutory maternity pay in respect of the period specified in the application.”*

*[36] The 1999 Regulations were considered by this tribunal in the case of Taylor Gordon & Co Ltd v Timmons UKEAT/0159/03/RN where a tribunal had decided that there had been an unlawful deduction from wages because, in their assessment, the employee had been entitled to statutory sick pay which he had not received. Mr Recorder Luba QC concluded that the tribunal had had no jurisdiction to do so:*

*“43 I am quite satisfied that the submissions made by Mr Brennan for the Appellant Company are correct. An analysis of the statutes and regulations relating to SSP shows that the appropriate authorities for the determination of disputes as to entitlement are the statutory authorities, ie the officers of the Board of the Inland Revenue (and on appeal the Commissioners). The jurisdiction they have is, in my view, an exclusive or exhaustive jurisdiction. I accept the submission that the inference to be drawn from the words of section 8(1) of the 1999 Act is that that Act prescribes a complete code for the determination of such disputes. I further accept the submission that it would lead to potential inconsistency and otherwise unsatisfactory consequences if first instance decisions on entitlement to SSP were to be made by Employment tribunals rather than by the single statutory authority, the Board of the Inland Revenue. The possibility for inconsistency in decision-making is obvious and it is highly unlikely that the legislature envisaged that there would be two parallel schemes under which disputes as to entitlement to Statutory Sick Pay might be resolved.*

*44 Accordingly, I find that the tribunal Chairman erred. He had no jurisdiction to entertain this employee's complaint that he was not being paid his Statutory Sick Pay.”*

*[37] We note that the Respondents sought a review of the tribunal's decision and one of the grounds on which they did so was that the tribunal had erred in determining the Claimant's entitlement to SMP as they had no jurisdiction to do so. The tribunal did not accept those submissions. One of the reasons they gave was that the 1999 Regulations “. . . did not enable an appointed officer of the Board to make an award against the particular employer in the way in which a tribunal can issue an enforceable award.” (See: Review judgment and reasons dated 2 May 2012, para 26.) However, a compulsitor does exist. Under and in terms of s 113A(6) of Social Security Administration Act 1992, an employer who refuses to pay SSP or SMP after the appointed officer has made a decision, is liable to suffer a penalty up to a current maximum of £3,000. On the issue of jurisdiction, we agree with Recorder Luba QC For the reasons he gives, it seems plain that Parliament cannot have intended that HMRC's*

*jurisdiction be other than an exclusive one. Further, we cannot see that any distinction fall to be drawn between SSP and SMP. The code for determination of disputes must apply as much to SMP as it does to SSP and it is one which excludes the jurisdiction of the Employment Tribunal. We would add that the fact that, for the purposes of considering whether or not there has been an unlawful deduction from wages the term “wages” is defined by the 1996 Act as including SMP does not show that jurisdiction exists. It means that an issue as to whether or not an employee did in fact receive SMP from her employer can be decided by an Employment Tribunal. It does not, however, mean that the separate issue of whether or not, under the relevant social security legislation, a woman was in fact entitled to SMP in the first place, can be decided in that forum.”*

35. This all means that where an amount of SMP has not been agreed between the parties or determined by HMRC or on appeal from a decision of HMRC, the Employment Tribunal has no jurisdiction to consider a claim that an employer has wholly failed to pay SMP or has refused to pay the correct amount, or any, SMP.

## **Conclusions**

### **Maternity and Pregnancy discrimination**

36. The last date on which the claimant’s maternity leave could have ended, and hence the end of the protected period, was 28 December 2019. The claimant’s case is that the respondent failed to pay SMP after the declaration as to the claimant’s weekly pay in the Employment Tribunal judgment of 1 October 2020. This was outside the protected period.
37. Further, the decision cannot have been made by the respondent not to pay in response to that judgment during the protected period as the judgment was handed down outside the protected period. For these reasons, any unfavourable treatment in relation to the non-payment of SMP did not happen during the protected period and the claimant’s claim of maternity and pregnancy discrimination must fail.
38. Alternatively, if the decision not to pay the claimant maternity pay did arise during the protected period, in our judgment and having heard the claimant’s clear and open explanation of the previous proceedings, that matter was raised as part of the previous proceedings. The claimant said that her initial complaint was that the respondent tried to change her hours to avoid paying SMP. The issue of entitlement to SMP was in the forefront of the claimant’s mind when she brought the previous proceedings. The respondent was found to have discriminated against the claimant because of her pregnancy and maternity. We therefore conclude that the issue relating to the non-payment of SMP as unfavourable treatment under s 18 Equality Act 2010 was adjudicated on in the earlier proceedings.

39. Additionally, if it was not raised by the claimant at that point, which seems unlikely given what the claimant said, it ought reasonably to have been raised.
40. For these reasons this tribunal is estopped from determining whether the claimant was subject to discrimination on the grounds of pregnancy and maternity by any failure by the respondent to pay her SMP *during* the protected period and the claimant's claim must also fail on this basis.

**Statutory Maternity pay**

41. As is likely to be clear from our explanation of the law as set out above, the tribunal does not have the jurisdiction to determine whether the claimant is, or was, entitled to any SMP from the respondent. It has not been agreed between the parties what SMP the claimant is entitled to and, as far as we are aware, there has been no adjudication by HMRC as to the claimant's entitlement to SMP.
42. For these reasons the claim for SMP before this Employment Tribunal must fail. However, the Employment Tribunal has not made any decisions about the claimant's entitlement to SMP and there is no basis for concluding from this judgment that any principles of estoppel apply in respect of the claimant's entitlement to SMP.
43. The members of the tribunal note the time limits for bringing a claim to HMRC for SMP and that it runs from the date that payment of SMP was first in issue. We were impressed by the claimant's open and honest approach to these proceedings and have sympathy with the predicament in which she says she finds herself. We can, however, say nothing more than that and what happens next in respect of the claimant's claim for SMP is a matter for the claimant and the relevant adjudicating authorities.

Employment Judge **Miller**

7 September 2021