EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms A McGinn **v** **Cambridge Dental Hub Limited**

Heard at: Watford via CVP **On**: 21 and 22 June 2021

Before: Employment Judge Andrew Clarke QC
Members: Ms Jacqueline Beard
Mr Michael Kaltz

Appearances
For the Claimant: In person
For the Respondent: Ms Claudia Zakrzeqska, Croner Representative

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing not objected to by the parties. The form of remote hearing was via CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

JUDGMENT

1. All claims against the respondent for unlawful pregnancy and maternity discrimination contrary to s.18 of the Equality Act 2010 are dismissed.

REASONS

1. The claimant began work for the respondent as a dental receptionist on 12 March 2019. She resigned on 22 September 2019. She was pregnant at the time and suffering with severe morning sickness, as she had done since early in her pregnancy.

2. The claimant commenced this claim on 4 December 2019. She alleged unfair dismissal and pregnancy related discrimination. The former claim was not allowed to proceed as she did not have the required two years' qualifying service, nor was her claim of a kind that disapplied the need for qualifying service. The claimant provided some further details of her claim

by email of 24 February 2020 but this neither changed the basis of her claim nor established that her unfair dismissal claim could proceed.

3. At a preliminary hearing on 10 December 2020 the issues in the case were identified as being whether certain kinds of "unreasonable or less favourable" treatment were related to the claimant's pregnancy or something arising from it. The treatment relied upon was said to be:

   3.1 The respondent criticising pregnancy related ill-health absences, and

   3.2 The respondent being "rude and nasty" when the claimant reduced her working hours, a reduction related to her pregnancy.

4. At the start of this hearing, we clarified the issues in the case. The claim is brought under s.18 of the Equality Act 2010 and there is no dispute that the unfavourable treatment relied upon all took place within the protected period. The claimant relies upon the following instances of alleged unfavourable treatment:

   4.1 The giving of warnings to the claimant regarding allegedly unauthorised absences.

   4.2 Deciding to monitor the claimant's performance for four weeks after the giving of a written warning.

   4.3 Informing the claimant that if she took a further day of unauthorised absence in that period she would be dismissed.

   4.4 Regarding the claimant as unreliable after she had cut her hours due to her pregnancy.

   4.5 Requiring the claimant to work 12 hour shifts without adequate breaks when pregnant and experiencing severe morning sickness.

   4.6 Requiring the claimant to act as a dental nurse when she was not employed or trained as such, was pregnant and had not had the vaccinations appropriate to such a role.

   4.7 In mid-July 2019 Dr Gilmartin of the respondent instructing the claimant to pick up cigarette butts outside the practice premises.

5. The claimant alleges that each such act was undertaken because of her pregnancy. It was clear that some claim in time issues might arise as regards certain of these matters depending upon their timing, their inter-relationship and whether they amounted to continuing acts. In the circumstances we decided not to deal with that aspect of the matter further until after the facts had been decided.

6. We heard from the claimant and from five witnesses on behalf of the respondent. Of those five, four were current members of staff (both Dentists

and Nurses) who had been and/or were currently absent on maternity leave. Each spoke about how they had been treated. All described a flexible and caring employer which carried out appropriate risk assessments and made changes to their hours, location and type of work to assist them during their pregnancies. These both pre and post-dated the claimant's pregnancy.

7. The other live witness called by the respondent, Ms Sophie Milburn, was employed as Practice Manager but had left the respondent since the claimant's departure. She spoke about the treatment of the claimant as well as about the respondent's response to pregnancy more generally.

8. Two potential witnesses, one from each side, provided a witness statement but did not attend for cross examination. One was a manager who had had dealings with the claimant. These were documented in contemporaneous correspondence which we found to be of more assistance than her unchallengeable witness evidence. The other was a trainee dental nurse dismissed after about two months, who made allegations of a lack of professionalism and general rudeness on the part of the Gilmartin family who own or control the respondent. The evidence could not be challenged and did not relate directly to the claimant's allegations. We found it of limited assistance.

Findings of fact

9. We set out our findings of fact in the following paragraphs.

10. In April 2019 the claimant informed Ms Milburn that she was pregnant. She was visibly upset, and Ms Milburn sought to comfort and reassure her. She told her to ask if she needed any assistance or help.

11. On 12 June the claimant texted her manager to say that she would be late. This was at 7.27am. At 8.12 am she sent a further text to say that she would not be coming in at all. According to her contract she should have informed the respondent before 8am and by use of its Rostering App if she was not going to attend. She should also have told both Ms Milburn and the manager she actually informed of her absence. The claimant was informally warned of the need to operate in accordance with the respondent's systems. This was because she had not used the systems as she should have done.

12. On 13 June the claimant asked to change her hours. She did not ask to reduce her total weekly hours (40) but to work shorter shifts, albeit more of them. Although actioning such a request would normally take several weeks, the respondent enquired of the claimant if she had any preference for particular shifts and effected the change within a week. We regard this as demonstrating a caring attitude towards pregnant employees consistent with that described by the respondent's witnesses. We note that the claimant made no reference to the need for more frequent or longer breaks and nor did she suggest in her request that she had previously experienced a lack of appropriate breaks.

13. The claimant was due to go on holiday in June but decided not to go. She asked if she could work instead and the respondent accommodated this request.

14. We consider this to be consistent with the respondent's claim that it sought to help employees where it could and inconsistent with any suggestion that the respondent sought to treat the claimant unfavourably once it was known that she was pregnant.

15. On 27 June when the claimant was rostered to be off work, she informed the respondent that her mother (with whom she was living) had "kicked her out". She said that she was going to the council and would also need to go there the next day as well, when she was rostered to work.

16. On 1 July the claimant sent a message at 10.46am to say that she would not be able to work as she again had to go to the council and anticipated being there all day.

17. As a result of these absences, she was asked to attend a meeting on 2 July to discuss her absence record. She asked to bring her mother as a representative and the respondent agreed, albeit that Ms Milburn was puzzled given that the claimant had said that her mother had kicked her out. The meeting took place and the claimant's attendance record to date was reviewed.

18. The respondent told the claimant that it was concerned about her absence record. A review was undertaken with her of various absences. On hearing her explanation of the absences associated with going to the council the respondent accepted that she had provided an explanation for them and for the absence on 12 June, but noted that the had failed to follow required procedures on that day.

19. The claimant told us that she had not used the required app on that day as it was not working, but we note that this explanation does not appear to have been provided at the time.

20. As a result of the review the claimant was told that her attendance record would be monitored over the next four weeks and that if she acted in breach of contract in that time she would be dismissed. Having read the letter setting out the decision with care, and in the context of the surrounding correspondence, and having heard from Ms Milburn, we are satisfied that the intention was to draw a distinction between absence for a good reason (such as illness) and absence for an unacceptable reason and where the claimant did not inform the respondent by the approved method before 8am on the day of absence. However, we do not consider that the letter made this sufficiently clear. This lack of clarity was not deliberate and was unrelated to the claimant's pregnancy.

21. To threaten dismissal against that background of limited prior failure was undoubtedly harsh but (as the claimant accepted in evidence) that was the respondent's usual mode of behaviour towards its employees in her experience, whether pregnant or not.

22. The claimant continued to experience a difficult pregnancy and she felt sick (and was sick) regularly and at all times of the day. Just before the four-week review period expired the claimant was signed off for two weeks with stress. The respondent responded sympathetically and asked to be told if it could do anything to help. No review meeting took place after the claimant returned to work.

23. Shortly after her return the claimant was again ill. On 7 September she informed the respondent of her being sick all night and her intention to go to the doctor. She was absent sick again the following day.

24. At no time did the respondent suggest that these sickness absences put the claimant's employment at risk. The respondent always expressed sympathy in response to them. The claimant was uncertain at the time whether the sickness was, on these occasions, related to her pregnancy and we had no clear evidence on this. The claimant went to hospital, but it was unclear whether she remained there for any significant period.

25. On 15 September the claimant sent the following email to the respondent:

> "I've been thinking whilst in hospital and how I've been suffering with a lot of stress and anxiety, and how this is affecting my pregnancy. I've come to the decision that I will no longer be returning to work.
>
> I have read my contract and are aware that I'm required to work a 2 week notice period but as I am unfit for work I am unable to work this period.
>
> I apologise for any inconveniences this may cause but I need to put my Health and by baby's health first.
>
> Thank you for your time."

26. We note that the email did not suggest that the stress and anxiety was attributable to the respondent's behaviour and the claimant apologised for not working her notice.

27. Against that background we turn to consider two controversial issues of fact.

28. The first relates to the claimant being required to act as a dental nurse in emergency circumstances. None of the witnesses for the respondent had ever seen the claimant act as a dental nurse, nor had they heard of this. They were clear that it would be wholly inappropriate as she would be untrained and would not have had the appropriate vaccinations.

29. The claimant's evidence was that she was required to do this only in an emergency and only by Dr Gilmartin and that she had to hold the suction

device and generally help out, but without wearing scrubs. She told us that other receptionists who were similarly untrained and unprotected were required by him to do this from time to time.

30. On balance we accept the claimant's evidence to this extent. Occasionally, when no trained nurse (or nurse in training) was available and to deal with an emergency, Dr Gilmartin did require a receptionist to act as a dental nurse. This happened in the case off the claimant and she had seen others in a similar position being so required and/or had been told of this happening. The limited evidence before us is such that we can make no more specific or detailed findings as to frequency. We suspect that this conduct is both unprofessional and reprehensible, but without knowing exactly what happened on each occasion we cannot comment further. Dr Gilmartin did not ask the claimant to do this because she was pregnant and having regard to the finding we make below, we have doubts that he knew this to be the case at the material times.

31. Finally, we turn to the allegation that on one Friday when no managers were present, Dr Gilmartin instructed the claimant to collect some cigarette butts that he had seen outside the door to the practice. When she refused, he threatened to dismiss her but relented when a colleague told him that the claimant was pregnant. She accepted at the time and in her evidence that his reaction was such that he did not know of her pregnancy until that moment.

The law

32. At the start of the hearing in the context of clarifying the issues in the case, the Employment Judge summarised the law relating to discrimination under s.18 of the 2010 Act. In particular, so far as this case is concerned, the need to establish unfavourable treatment and that such treatment was "because of the pregnancy". There is no need to identify a comparator in such a case. Rather, the question is whether the treatment relied upon was unfavourable (as distinct from being favourable or neutral so far as the claimant was concerned) which can be paraphrased as treatment which is detrimental to the claimant or which puts her at a disadvantage. It covers situations where a claimant is treated badly or poorly or is rendered worse off by the treatment in question.

33. As regards the causative link required, the treatment must be because of the pregnancy. However, it does not need to be the sole or even the predominant reason for the treatment and it does not help a respondent that the respondent did not mean so to discriminate.

34. The parties did not disagree with the above summary. At the conclusion of the case when making their final submissions, neither made submissions of law, rather the concentrated upon disputes of fact.

The law applied to the facts

35. We shall now consider each of the alleged instances of unfavourable treatment identified in this case as set out at the start of these reasons.

36. Firstly, the giving of warnings. The giving of warnings amounts to unfavourable treatment. In neither case, however, was the warning given because of the claimant's pregnancy. The warnings were both given because the respondent was concerned that the claimant was not following its absence procedures and, hence, appeared to be taking unauthorised absences. On investigation only one of her absences was found to fit into the category of "unauthorised". Giving her the second warning despite accepting her explanation for other absences was also unrelated to her pregnancy: She would have been treated the same whether pregnant or not.

37. Telling the claimant that she would be dismissed if she had a further unauthorised absence in the next four weeks and monitoring her performance for those four weeks were both closely related to the giving of the second warning. Both the threat of dismissal and the imposition of a four-week monitoring period amount to unfavourable treatment. Again, neither was because of the claimant's pregnancy. We have considered whether the threat and the monitoring being a response to a single established instance of unauthorised absence suggests that she was so treated because she was pregnant. We do not consider this to be so. The claimant accepted that this kind of response (which we would characterise as an extreme reaction to the claimant's behaviour) was what she would expect from the respondent. We believe that she would have been treated in this way regardless of her pregnancy.

38. Next, the claimant relies upon the respondent regarding her as unreliable after she cut her hours. Although the claimant's complaint was based upon a cut in hours, we note that her hours were not in fact cut. She asked to reduce the length of her shifts while working more shifts to achieve the same number of hours of work. This was willingly and swiftly accommodated. The respondent did not regard her as unreliable consequent upon this change to her working schedule. Hence, no unfavourable treatment is made out.

39. The claimant also relies upon the respondent requiring her to work 12 hour shifts without adequate breaks when pregnant and experiencing severe morning sickness. The claimant did continue to work 12 hour shifts after she told the respondent she was pregnant. However, as soon as she asked to change her shift length (and pattern) this was quickly accommodated. As we have made clear in our findings of fact, the respondent on several occasions asked the claimant if there was anything it could do to help her, and she got help when she asked for it. We do not consider that the unfavourable treatment relied upon has been established.

40. Even if it could be said that in failing to change her shifts once they knew that she was pregnant, the respondent was treating her unfavourably, that treatment was not because of her pregnancy. Her shift length and pattern remained the same before and after her pregnancy was announced because she did not ask to change it and it did change when she did make such a request.

41. We have made no findings as to the adequacy of the breaks that the claimant was given within shifts. This was touched upon in the ET1 as further particularised. However, it was not dealt with the in the evidence before us and it did not feature in the brief list of issues produced after the preliminary hearing. Indeed, it was not relied upon as a separate instance of unfavourable treatment when we formulated the list of issues at the start of this hearing. It was then linked (as it had been previously) to the requirement to work 12-hour shifts. We note that the claimant made no mention of breaks in her email asking to change her shift pattern. In those circumstances, it is not an issue before us and even if it was, we have no evidence upon which we could find that there was unfavourable treatment in this regard.

42. We now turn to the requirement that the claimant act as a dental nurse. We have found that the claimant and other receptionists who, like her, were not trained nurses or nurses in training were indeed required to act as dental nurses. To ask a receptionist to act as a dental nurse when she has had no training and lacks appropriate equipment and vaccinations is plainly unfavourable treatment. However, the claimant was not required to do this because she was pregnant, but because she was there and there was no one else who was trained who was available. We are satisfied that the claimant and others were required occasionally to do this, and that the claimant was not chosen because she was pregnant. Whether such conduct might amount to a civil or criminal wrong under (for example) appropriate Health and Safety legislation, is not a matter for us. We note that we did not hear from Dr Gilmartin, despite the fact that this allegation was dealt with in the claimant's witness statement.

43. Finally, we turn to the allegation that Dr Gilmartin instructed the claimant to pick up cigarette butts outside the practice. He certainly did so and only rescinded this instruction when he found that the claimant was pregnant. This instruction amounted to unfavourable treatment, but the claimant was not so instructed because she was pregnant. As we have noted, Dr Gilmartin only discovered that she was pregnant when she refused to follow the instruction. That he did not know before is accepted and in any event, seemed to us to follow form his rescinding the instruction as soon as he found this out.

Conclusion

44. In all of the circumstances while we have sympathy for the claimant as regards aspects of her treatment (as will be clear from comments made

above) each aspect of her claim under s.18 of the Equality Act 2010 has failed and her claim must be and is, dismissed.

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Employment Judge Andrew Clarke QC

Date: 21/7/2021

Sent to the parties on: .....

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For the Tribunal Office