

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104578/17

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Held in Glasgow on 17 November 2017

Employment Judge: Susan Walker

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Mrs O Abayomi

Claimant

**Represented by:
Ms Allen, solicitor**

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Skin Scotland Ltd

First Respondent

No response

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Samina Mohammed

Second Respondent

No response

Rizvan Ali

Third Respondent

No response

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that:-

1. The first respondent made an unauthorised deduction of wages under Section 23 of the Employment Rights Act 1996 and the first respondent is ordered to pay to the claimant £1,350 in this respect.

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2. The first and second respondent discriminated against the claimant in terms of Section 18(2) of the Equality Act 2010 and the first and second

E.T. Z4 (WR)

respondents are ordered to pay to the claimant (on a joint and several basis) the sum of £26,920 by way of compensation.

- 5 3. The first and third respondent victimised the claimant in terms of Section 27 of the Equality Act 2010 and the first and third respondents are ordered to pay to the claimant (on a joint and several basis) the sum of £1,032 by way of compensation.
- 10 4. The first and second respondent harassed the claimant in terms of section 26 of the Equality Act 2010 but no separate award of compensation is made.

REASONS

Introduction

- 15 1. The claimant presented a claim to the Tribunal on 19 September 2017. In accordance with the terms of Rule 16 of the Rules to be found in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the respondents were required to enter a response within twenty eight days of the date on which a copy of the claim was sent but failed
20 to do so.
2. The case had been listed, in accordance with normal procedure, for a case management hearing because the claim included complaints of
25 discrimination. That hearing was listed for 17 November 2017.
3. The case was referred to Employment Judge Doherty to consider issuing a judgment without a hearing under Rule 21. However, she considered she needed to hear evidence from the claimant about the remedy in relation to injury to feelings that was claimed before issuing a judgment. Unfortunately
30 the hearing remained listed as a preliminary hearing and had not been intimated as a final hearing. I considered the appropriate course, in accordance with the overriding objective, was to convert the hearing to a final hearing as permitted by Rule 48. I did not consider that there was material prejudice to the respondents in doing so as no response had been intimated

to the claim and it would have been possible to issue a judgment under Rule 21, at least on liability.

The complaints

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4. The claimant complains that she was discriminated against because of pregnancy and maternity. Ms Allen clarified that this complaint is to proceed, in respect of dismissal, under Section 18(2) of the Equality Act 2010 and not as a complaint of unfair dismissal under section 99 of the Employment Rights Act 1996. The unfavourable treatment relied on is dismissal, a request that the claimant change to part time hours and the insistence that the claimant never call in sick.

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5. The claimant also complains that she was harassed because of her sex .

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6. The claimant further complains that she was victimised in terms of Section 37 of the Equality Act, specifically that the respondent instituted unfounded disciplinary proceedings after her dismissal because she had indicated that she would be bringing a claim of discrimination.

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7. The claimant further complains that she has suffered an unauthorised deduction from wages.

8. At the hearing, the claimant adopted her ET1 as her evidence which is accepted as unchallenged. A schedule of loss was also provided which was also accepted as unchallenged except in respect of the element relating to injury to feelings. The claimant gave evidence in relation to the injury to feelings sustained as a result of the treatment by the respondents. From all of this, I make the following relevant findings in fact:-

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(i) The claimant was employed by the first respondent as a beauty therapist.

(ii) She commenced work on 26 July 2016.

- (iii) Her take home pay was £265 per week.
- 5 (iv) The second respondent (SM) was a director of the respondent and the claimant's manager.
- (v) In March 2017 the claimant discovered she was pregnant and advised SM.
- 10 (vi) SM initially told the claimant there was nothing to worry about and she would be given less strenuous tasks such as reception.
- (vii) The following day SM told the claimant this was not the case and she would be required to carry out her usual duties.
- 15 (viii) The claimant was told by a colleague that SM thought she would have to make the claimant work part-time.
- (ix) This caused the claimant distress as she could not afford to work part-time.
- 20 (x) In May 2017, SM said to the claimant "I hope you know we aren't going to pay you maternity pay. You will get that from the government".
- 25 (xi) On 13 June 2017, the claimant called in sick because of pregnancy related illness. This was the first instance of this. The claimant spoke to Gemma Taylor (GT) who said it would be best if she came in as SM would be angry. The claimant said she would try to do so but realised she was not able to and telephoned back. GT said the claimant would need to contact SM. After unsuccessful attempts to contact SM the
- 30 claimant called GT back who said that SM and the third respondent (ZA) wanted to meet her the following day. This was confirmed by text message from SM. The claimant was anxious about the prospect of

this meeting and this made her feel even more unwell. She was unable to sleep.

5 (xii) The next morning (14 June) she went to work, despite feeling unwell. SM said that she would have to go part-time as she could not keep a "fully pregnant person at work as it is fast paced" She also complained that the claimant was "ill all the time" and "tired". The claimant was upset by this and said that she could not afford to go part-time. SM said that she could stay full time but must promise never to call in sick. 10 The claimant was upset by this and said that she could not promise this.

15 (xiii) ON 16 June, the claimant made £850 of sales. The first sale was a £700 order. SM did not comment on the sale. The second sale was £180. This was a sale to a customer who wanted an appointment that day. It was normal to offer a discount in such circumstances and the claimant quoted the customer £150. When the claimant sought to confirm this with SM, she screamed at the claimant that she should not apply discounts. She said that the £30 would be deducted from her pay. This surprised the claimant who had been encouraged to use 20 discounts to secure sales.

25 (xiv) The next day, GT said that she had been telephoned by SM who was unhappy about what had happened the previous day and that GT was to convey this to the staff. A staff meeting was then held where GT said that SM was unhappy about the situation with the claimant and GT said it might be better if the claimant looked for a new job.

30 (xv) The claimant's husband attended the workplace after the meeting. He asked to speak to SM. He was asked to leave and he said "why are you always stressing my wife? She is always coming home crying. Are you treating her so bad because you don't want to pay maternity pay?"

SM said "yes". SM then approached the claimant and told her to leave. The claimant understood this to be a dismissal.

5 (xvi) The claimant appealed against her dismissal on 19th June saying it was unfair and that she had been discriminated against because she was pregnant. ZA replied on 20 June. He said that the claimant had resigned. He said that as she was now claiming unfair dismissal which he said was contrary to the facts, he was calling her to a disciplinary hearing for gross misconduct with a date of 21 June. The claimant did
10 not attend.

(xvii) The claimant would have taken maternity leave on 2 October 2017 and would have taken 39 weeks leave.

15 (xviii) The claimant did not receive any holidays or holiday pay during her employment.

(xix) The respondent deducted £30 from her final pay.

20 (xx) The claimant was very upset at her treatment. She still gets upset when she thinks about it and has nightmares about it.

Relevant law

25 8. The principal claim is brought under the Equality Act 2010. Section 18 provides that a person (A) discriminates against another (B) if , in the protected period, A treats B unfavourably because of B's pregnancy or because of illness suffered by her as a result of it. The "protected period" begins when the pregnancy begins and ends at the end of her maternity leave
30 or when she returns to work (if earlier).

9. Section 27 of the Equality Act provides for another type of unlawful act of "victimisation" where A subjects B to a detriment because B has done a

protected act, or A believes B has done, or may do, a protected act. A “protected act” includes bringing proceedings under the Equality Act.

5 10. Section 26 of the Equality Act provides for a third type of unlawful act of “harassment”. This is where A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. This section does not cover the protected characteristic of “pregnancy and maternity” but does include the protected
10 characteristic of “sex”. In the case of *Dekker v Stichting 1991 IRLR 27*, the ECJ considered that discrimination on grounds of pregnancy constituted discrimination on grounds of sex as only women could be pregnant. The Equality Act provides that a claim of direct sex discrimination cannot be brought where there is a claim under section 18. It does not specifically
15 preclude a claim under section 26.

20 11. There is also a claim of unauthorised deduction from wages. Such a claim is brought under 23 of the Employment Rights Act 1996. It is unlawful to make deductions from wages unless the right to make the deduction is authorised by a statutory provision or a relevant provision in the employee’s contract of employment or is otherwise agreed to in writing. In relation to holiday pay, compensation for any accrued but untaken leave under the Working Time Regulations 1998 should be paid to an employee at the end of his/her
25 employment. Failure to pay this is an unauthorised deduction from wages under the Employment Rights Act 1996.

Decision

30 12. I am satisfied from the findings above that the claimant was treated unfavourably because of pregnancy and because she had taken pregnancy related absence in terms of section 18 of the Equality Act. The unfavourable treatment included the suggestion that the claimant would need to go part-time because she was pregnant, the insistence that she promise not to call in

sick if she was to continue full time, the incident about the discount , the deduction from wages and the dismissal itself.

5 13. It is possible that it could be argued that the treatment leading up to the dismissal would also constitute harassment under section 26 as unwanted treatment related to sex (based on *Dekker*). I have not heard argument about this and in the absence of any defence I will find that there was unlawful harassment. However, there will be no additional compensation as this conduct is included in the unfavourable treatment for which compensation is
10 being awarded under section 18,

14. I am satisfied that the instigation of the disciplinary proceedings was less favourable treatment because the claimant had done a protected act, specifically, when she said in her appeal that she had been discriminated
15 against because of her pregnancy.

15. I am satisfied that there was unauthorized deduction from wages in respect of the £30 and the failure to pay accrued holiday pay.

20 **Joint and several liability**

16. Ms Allen wished all the awards to be made on a joint and several basis. This is of course only available where the complaints are made under the Equality Act 2010. This was the context in which Ms Allen confirmed that the claim in
25 respect of dismissal was made under the Equality Act only. Clearly the award for unauthorised deductions of wages could only be made against the employer, the first respondent.

17. An employer is liable for the actions of its employees or agents under Section
30 109 of the Equality Act 2010. Anything done by an agent for a principal or an employee for an employer must be treated as also done by the employer. Employees or agents may also be held personally liable for contraventions of the Equality Act under Section 110.

18. Having set out all the facts above, it seems to me that there is no averment of involvement of ZA in the incidents up to and including the dismissal. Equally there is no averment of involvement of SM in the final act of victimisation where ZA appears to be acting in some sort of agency basis for the first respondent. Therefore I will make the awards on a joint and several basis for the first and second respondent for the discrimination and the first and third respondent for the victimisation.

Remedy

19. I accept the claimant's assessment in the schedule of loss of where the injury to feelings awards should be placed in accordance with the *Vento* bands (see Presidential Guidance on this issue that can be found at <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vento-bands-presidential-guidance-20170905.pdf>)

20. I accept that the claimant will take 39 weeks maternity leave and then she will take a further 26 weeks to find employment, again on the basis of the unchallenged evidence.

21. I therefore order that the following sums be paid to the claimant:-

In respect of discrimination under Section 18(2) of the Equality Act:*

Loss of earnings (as per schedule of loss) **£12,245**

Interest on loss of earnings

Calculated from midpoint from date of dismissal to date of judgement (30 August 2017) being 10.5 weeks at 8% p.a

£12,245 x 8% x 10.5/52 **£198**

Injury to feelings for dismissal **£10,000**

Interest on injury to feelings

Calculated from date of dismissal (17 June 2017) to date of judgment

21 weeks at 8%

£10000 x 8% x 21/52 £323

5 Injury to feelings for pre-dismissal treatment £4,000

Interest on injury to feelings

Calculated from mid-May 2017 to date of judgment

10 25 weeks at 8%

£4,000 x 8% x 25/52 £154

Total award for discrimination £26,920

15 **In respect of the claim of victimisation (section 27 Equality Act)**

Injury to feelings £1,000

Interest on injury to feelings

20 Calculated from 20 June to date of judgment

21 weeks at 8%

£1000 x 8% x 21/52 £32

Total award for victimisation £1,032

25 **In respect of the claim for unauthorised deduction from wages**

£1319.70 + 230 £1,350

30 Employment Judge: Susan Walker
Date of Judgment: 20 November 2017
Entered in register: 24 November 2017
and copied to parties