



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107283/2020

Held in Edinburgh on the 7th April 2021 and the 10th May 2021

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**Employment Judge Porter
Tribunal Member Mr Currie
Tribunal Member Mr Gray**

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Miss A Stokes

**Claimant
In Person**

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Glenham Property Management Ltd

**Respondent
Represented by
Mr Chisholm,
consultant**

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REASONS

Introduction

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1. The claimant was employed as a property manageress between the 19th August 2019 and the 28th August 2020 when she was dismissed by the respondents. In these proceedings the claimant claims that her dismissal was a discriminatory dismissal on the grounds of the protected characteristics of sex and pregnancy/ maternity. She also claims in respect of the respondents' failure to provide her with a written statement of reasons for her dismissal in terms of s92 and s93 of the Employment Rights Act 1996.

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2. The case is defended and there was a Preliminary Hearing (“PH”) in the case on the 3rd February 2021. The case was thereafter listed for a full Hearing on the Merits on the 7th and 8th April 2021. An Order was made for witness statements to be used at that Hearing.
- 5 3. At the Hearing on the Merits on the 7th April 2021 the claimant represented herself and the respondents were represented by Mr Chisholm, consultant. At the outset of the Hearing the jurisdictions that the claimant relies upon in maintaining her claims of discrimination were identified as s13 and s39 of the Equality Act 2010. To this end, the claimant’s circumstances preclude her
10 relying upon s18 of the Equality Act 2010 as her dismissal did not fall within the “protected period.”
4. The claimant led in evidence. In the course of the claimant’s cross examination there was a sequence of events which resulted in the Hearing being adjourned to 10th May to enable the respondents to seek alternative representation.
- 15 5. In advance of the continued Hearing on the Merits the respondents confirmed that they intended to continue to retain Mr Chisholm as their representative. However, Mr Chisholm did not attend the continued Hearing on the 10th May. There were a number of attempts by the clerk to contact Mr Chisholm. Correspondence by email ensued, in the course of which Mr Chisholm
20 confirmed that (i) he continued to represent the respondents but that (ii) the respondents were content that liability and quantum were determined in their absence. Mr Chisholm made a number of offers to settle the case in the course of his correspondence, all of which were rejected by the claimant.
6. The case continued therefore with the evidence of the claimant alone, which
25 was largely unchallenged in the absence of a representative from the respondents. The claimant referred to her Bundle of Documentation numbered **CE1-CE19**. In reaching their conclusions, the Tribunal also had regard to the respondents’ unnumbered Bundle of Documentation.
7. On the basis of this evidence the Tribunal made the undernoted essential
30 Findings in Fact.

FINDINGS IN FACT

8. The claimant commenced her employment with the respondents on the 19th August 2019. She progressed well within the respondents and on the 10th of February 2020 had an appraisal with the respondents. Following the appraisal Miles Gilham, Managing Director of the respondents, emailed the claimant and stated: *“Apologies for cutting the meeting short...Really well done though in your initial period and looking forward to a successful 2020.”* **(CE4)**
9. In their unnumbered Bundle of Documentation the respondents included a sheet entitled: *“Records of Disciplinary Action”* which purported to show a verbal warning administered to the claimant on the 10th of February 2020 for *“Poor Performance”* and a First Warning on the 18th of September 2020 for *“Breaches in Trust Performance and Behaviour”*. The claimant was adamant that such warnings did not take place. The Tribunal accepted the evidence of the claimant which was emphatically given and noted that there was no contradictor to such evidence. Further and in any event the Tribunal observed that a verbal warning administered on the 10th February 2020 would contradict the email from Miles Gilham to the claimant of that date.
10. Against that background the Tribunal were unanimous in their conclusion that the document entitled *“Records of Disciplinary Action”* was a fabrication on the part of the respondents.
11. The claimant advised the respondents that she was pregnant on the 17th June 2020. On the 4th August 2020 the claimant attended a routine scan at which she was advised that her baby had no heartbeat. The claimant’s mother told the respondents of this.
12. The claimant was absent on annual leave between the 7th and the 13th August 2020. On the 13th August 2020 the claimant was signed off by her GP until the 21st August 2020, the reason being *“Miscarriage”* **(CE13)** The claimant was signed off by her GP again for the period 21-30 August 2020, the reason being *“Miscarriage”* **(CE14)**.
13. On the 26th August 2020 the claimant received a letter of termination of her contract of employment written by Mr Chisholm **(CE15)**. The reasons given for

her dismissal were: *“Poor Performance leading to gross misconduct due to loss of monetary assets due to malpractice in turn breaching diligence”* and *“Not being fit to complete your role within the company as per Employment Act 1996 83.1 amend 2020.”* The letter went on to state: *“Sadly we will not accept another sick line..”*

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14. On the 7th September 2020 the claimant received a second letter terminating her contract of employment, which was again written by Mr Chisholm **(CE16)** That letter contradicted the previous letter of dismissal in that it gave the reasons for her dismissal as the economic climate together with: *“Failure to complete your role due to illness. Resulting in poor performance.”*

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15. The Tribunal observed that both letters of dismissal included reference to the claimant’s fitness for her role in circumstances where she was absent due to the sole reason of having had a miscarriage.

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16. The Tribunal accepted the evidence of the claimant that she was unaware of any other employee of the respondents (who was otherwise performing well) being dismissed due to absence on the grounds of illness for a period of two weeks. In these circumstances the Tribunal concluded that the fact that the claimant was absent due to having had a miscarriage was the reason for her dismissal and observed that a miscarriage is unique to the protected characteristics relied upon by her, namely sex and pregnancy/maternity.

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17. The Tribunal accepted the evidence of the claimant that her dismissal from the respondents has affected her profoundly. Since her dismissal she has been anxious, unable to sleep and has suffered an acute loss of confidence. She gave compelling evidence that, as an already vulnerable person at the time of her dismissal, she still suffers from loss of confidence arising from the actions of the respondents in dismissing her.

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18. As a result of the effects of her dismissal the claimant attended her GP and was prescribed valium.

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19. The claimant obtained alternative employment with a letting agent on the 19th November 2020. She sustained no loss of wages from that date.

THE LAW

20. S13 of the Equality Act 2010 provides:

“13 Direct Discrimination

5 *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*

The Equality Act 2010 contains a definition of protected characteristics at s4 which include “**sex**” and “**pregnancy and maternity**”.

21. S39 of the Equality Act 2010 provides:

10 ***“39 Employees and Applicants***

*An employer (A) must not discriminate against an employee of A’s (B) -
“(c) by dismissing (B).”*

22. S136 of the Equality Act 2010 provides:

15 ***“136 Burden of Proof***

If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”

20 S136 provides, in essence, that where a claimant proves facts from which a tribunal could conclude in the absence of an adequate explanation that the respondents have unlawfully discriminated against the claimant, the Tribunal must uphold the complaint unless the respondents prove that they did not discriminate.

25 In considering the application of s136 the Tribunal had regard, as ever, to the guidance to be found in the well known authorities of **Igen v Wong 2005 ICR 931, CA** and **Ayodele v Citylink Ltd and Another (2018) ICR 748**.

23. S 92 of the Employment Rights Act 1996 provides:

“(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee’s dismissal.”

DISCUSSION AND DECISION

- 5 24. In determining this case, the Tribunal proceeded on the basis that the appropriate comparator for the claimant’s claim under s13 of the Equality Act 2010 is a hypothetical man who was absent for a period of two weeks due to ill health but was otherwise performing well within the respondents. On the facts found by them, and given the fact that the claimant’s miscarriage itself was found to be the reason for her dismissal the Tribunal considered that they were entitled to conclude that such a hypothetical man would not have been dismissed in these circumstances. For this reason alone and given that miscarriage is unique to the protected characteristics of sex and pregnancy/maternity discrimination, the claimant’s claim must succeed.
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- 15 25. Further and in any event, the Tribunal considered carefully the facts before them with regard to the issue of the reversing burden of proof. The Tribunal noted particularly their conclusion that the *“Records of Disciplinary Action”* produced by the respondents were fabricated. The Tribunal also observed their Findings that there were two partially inconsistent letters of termination issued by the respondents’ representative Mr Chisholm to the claimant. The Tribunal also observed that the claimant’s absence from work (which, the Tribunal observed, was due to having had a miscarriage) was a feature in both letters of dismissal.
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- 25 26. After reflecting on these Findings in Fact the Tribunal concluded that this is a case where the reversing burden of proof does apply and that in these circumstances the Tribunal must uphold this complaint unless the respondents prove they did not discriminate. On the facts found by them, and in the absence of any appearance from the respondents on the 10th May, the Tribunal concluded that the respondents have not discharged the burden of proof upon them.
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27. In these circumstances the Tribunal concluded that the respondents have discriminated against the claimant under s13 and s39 of the Equality Act 2010 on the basis of her sex and/or maternity and pregnancy.
28. Against that background the Tribunal proceeded to determine what awards should be made to the claimant.

Pain and Suffering

29. In determining what award was suitable for pain and suffering, the Tribunal was unanimous in its view that this case falls within the lower band of the Guidelines contained within the case of **Vento v Chief Constable of West Yorkshire Police (No 2) 2003 ICR 318, CA** as updated by the Third Addendum to Presidential Guidance dated the 27th March 2020. To this end, the lower band of the **Vento** guidelines is **£900 - £9,000**.

30. The Tribunal considered that, although the dismissal of the claimant falls into the category of a 'one-off' act of discrimination both letters of dismissal of the claimant by the respondents referenced her absence on the grounds of ill health which was for the sole reason of her miscarriage. The Tribunal also considered that her dismissal has had lasting consequences for the claimant who, at the time of the Hearing, was still suffering from a loss of confidence as a result of the respondents' actions. Against that background, the Tribunal determined that the award made by them should be at the upper end of the lower band and awarded the claimant the sum of **£7,000** in respect of pain and suffering. Interest on this sum amounts to the figure of **£186**.

Lost Wages

31. In the absence of a contradictor the sum of **£3,326.66** was accepted by the Tribunal in respect of loss of wages for the period to the 19th November 2020 when the claimant found alternative employment with a letting agent.

Failure to Provide a Statement of Written Reasons For Dismissal

32. In the light of their Findings that the respondents did provide letters containing reasons for dismissal, the Tribunal concluded that this claim must fail and therefore should be dismissed.

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10 Employment Judge: Jane Porter
Date of Judgment: 14 May 2021
Entered in register: 17 June 2021
and copied to parties