



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101646/2019

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Held in Glasgow on 12, 13 and 16 September 2019

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**Employment Judge L Doherty
Members Ms McAllister
Mr Docherty**

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Miss H McSorley

**Claimant
Represented by:
Mr D Hutcheson**

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Tooltime UK Ltd

**Respondent
Represented by:
Ms N Younger -
Company Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is:

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(1) That time should not be extended under section 123(2) of the Equality Act 2010 to consider the claim of less favourable treatment under the EqA insofar as the claim relates to alleged failure to carry out a risk assessment;

(2) The claim of unfair dismissal does not succeed and is dismissed;

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(3) The claimant's claim of harassment under section 26(2) of the EqA succeeds, and a remedy hearing will now be fixed.

REASONS

1. The claimant presented a claim on 5 February 2019 against the respondents under a number of jurisdictions. The original ET1 identified a claim of unfair dismissal and discrimination on the ground of pregnancy/ maternity, and sex, and a claim of failure to pay notice pay, and arrears of pay. These monetary claims were not insisted upon.
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2. A preliminary hearing (PH) took place on 26 April 2019 further to which the claimant was ordered to confirm if she was proceeding with a claim of disability discrimination; set out the details of the acts which she said amounted to pregnancy discrimination; and the acts of which she said constituted sexual harassment. She was ordered to specify what is said to have happened, who did it, when it happened and whether there were any witnesses.
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3. The claimant provided information in response to this Order on 9 May 2019. Firstly, it was confirmed that a claim of disability discrimination was not to be pursued.
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4. Additional information was provided, to the effect that the claim for pregnancy discrimination was based on the alleged failure to carry out a risk assessment after the claimant advised the respondents that she was pregnant.
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5. Additional information was provided in relation to the sexual harassment claim (the section 26 of the EQA claim). It was said that another employee, (who will be referred to as 'the male employee' in these Reasons), commenced working with the respondents on 19 December 2018 and made comments about the claimant's physical appearance, and had taken a photograph of her and telling her what he had planned to do with the photograph.
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6. The respondents responded to that information on 23 May 2019.
7. Thereafter, the claimant provided further information on 30 August, indicating that the claim was also one of unfair dismissal and pregnancy
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discrimination, citing that it was unlawful to discriminate because of pregnancy, or a pregnancy related illness, and that it was automatically unfair to dismiss the employee who was pregnant and on maternity leave; asked about legal rights at work, for example to be paid minimum wage; or had took action about a health and safety issue.

8. The claimant was represented by Mr Hutchison, a friend, and the respondent were represented by one of their directors, Mrs Younger.

9. At the outset of the hearing the Tribunal took some time to establish the ambit of the claim. It was confirmed that the complaint in relation to an alleged failure to carry out the risk assessment, is a complaint of unfavourable treatment under section 18 (2) of the EqA on the grounds of the claimant's pregnancy.

10. It was also confirmed that there is a time bar point in relation to this claim, which the tribunal will have to determine. Time bar issues were identified in the PH Note which was issued following the PH in April, and that Note explained the tests which the tribunal would have to apply to consider whether time should be extended to consider the claim which is presented out with the three month statutory time limit.

11. It was confirmed that a claim of harassment is brought under section 26 (2) of the EqA, in relation to the alleged actions of the male employee.

12. In relation to the unfair dismissal claim, it was also confirmed that this was presented under section 18 of the Equality Act, the unfavourable treatment being complained of being dismissal, on the grounds of pregnancy related illness. There is also a claim of automatically unfair dismissal on the grounds of pregnancy - section 99 of the Employment Rights Act 1996 (the ERA.) Albeit the respondents had a short notice of the claim of dismissal, Mrs Younger confirmed that she was in a position to deal with it at the hearing.

13. The issues for the tribunal will therefore be as follows:-

14. The first issue for the tribunal will be to consider whether time should be extended under section 123 (1) (b) of the EqA to consider the claim and in the event the tribunal does extend time, it would require to consider whether or not a risk assessment was carried out, and secondly, if it was not carried out, if this amounted to less favourable treatment under section 18 of the EqA.

Section 26 claim

15. The first issue for the tribunal will be to determine as a matter of fact whether the conduct complained of occurred.

16. Thereafter, if the tribunal was satisfied that the conduct complained of did occur, it has to consider whether or not the conduct amounted to unwanted conduct of a sexual nature, and whether it had the proscribed effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Section 18 claim and Section 99 of the ERA claim - dismissal

17. There is no dispute that the claimant was dismissed. The less favourable treatment complained of is the dismissal. The claimant lacks sufficient qualifying service to present a complaint of unfair dismissal under section 94 of the ERA; the issue for the tribunal will be to consider whether in dismissing the claimant, the respondents treated her less favourably because of a reason connected to her pregnancy, or because of her pregnancy or a pregnancy related illness within the proscribed period in terms of section 18 of the EQA.

18. The Hearing

19. The claimant gave evidence on her own behalf. For the respondent's evidence was given by the following:-

- (i) Nicola Younger - Company Director;
- (ii) Scott Butters - Warehouse Operative for the respondents;

- (iii) Fiona Cameron - Warehouse/ Admin Operative;
- (iv) Linda Harvey - Warehouse Operative
- (v) Ross Callaghan - Senior Warehouse Operative/Manager.

20. The respondents lodged a bundle of documents.

- 5 21. At the outset of the hearing, there was no information at all provided in relation to the quantification of the claim, and in these circumstances, a decision was taken to split the hearing into one of merits, and remedy.

Findings in Fact

10 22. The respondents operate an internet retail company, a significant part of which involves the distribution of goods. The respondents are a family run business, the directors of the company being Mr and Mrs Younger. Mrs Younger had a hands on role in the running of the company, and from time to time, works in the warehouse.

15 23. The respondents have around 15 employees, some of whom work in administration, and some of whom work in the warehouse. At the relevant time, four women worked in the warehouse, and seven men.

20 24. The respondents provide their employees with contracts of employment; there is a disciplinary grievance procedure, and a company handbook. The respondents keep employee records, which comprise of names, date of birth, start date and any sickness absence. The respondents do not have any written records of individual risk assessments carried out for members of staff.

25 25. The claimant's date of birth is 6 November 1992. She commenced employment with the respondents working as a warehouse packer on 1 August 2017. Her work broadly comprised of packing, and emptying containers. From time to time the claimant's work required her to lift heavy weights, and to bend down to do so. She worked shifts, from 07.30am until 5pm, Monday to Friday.

26. On 27 June 2018, the claimant advised Mrs Younger that she was pregnant. The claimant did not want all of her work colleagues to know that she was pregnant, as she had not yet told all her family members.
27. Mrs Younger told the claimant that she would have to go on light duties. Mrs Younger was about to go on a three week holiday, and she told the claimant that she would have to inform Ross Callaghan of the claimant's circumstances.
28. Mr Callaghan had been employed by the respondents for almost nine years, and albeit there was no formal line management structure in place, Mr Callaghan was left in charge of running the warehouse side of the business when Mr and Mrs Younger went on holiday.
29. Mrs Younger had a meeting with Ross Callaghan on 27th June and advised him that the claimant was pregnant and that she was to be removed from all heavy lifting aspects of her jobs, and she would only be able to perform light work. Mrs Younger told Mr Callaghan that the claimant she should only work on small parcels and large letters. Mr Callaghan was told to ensure that this information was passed on to others in the warehouse and the claimant was moved on to light duties. Mr Callaghan passed this information on the relevant Warehouse staff, including Mr Butters. From 27th June the claimant carried out light duties.
30. Mrs Younger was on holiday from 20 June, returning on 23 July.
31. On 24 July, the claimant was certified as unfit for work time off work, on account of stress. The claimant provided a doctor's certificate to the respondent, dated 24 July 2018 which indicated that she was unfit for work because of stress. The certificate expired on 6 August 2018. The claimant submitted a further certificate on 3 August 2018 certifying she was unfit for work because of 'stress at home', up to the period of 16 August 2018. A further certificate was submitted up to 29 August 2018, stating the reason for the claimant's not being fit for work was stress at home.
32. Very unfortunately the claimant suffered a miscarriage on 14 August.

- 5 33. A further certificate of fitness for work was submitted by the claimant covering the period from 31 August 2018 for 42 days, which indicated that the claimant's condition was stress at home and miscarriage, but that she may be fit for work fit for work taking account of account of advice, which reduced her hours, and amended her duties.
34. The claimant submitted a further certificate on 28 September again for a period of 42 days, indicating her condition was miscarriage, but indicating that she may be fit for work taking into account amended duties for a further six weeks.
- 10 35. The claimant and Mrs Younger were in text communication in the period from 24 July to 31 August 2019.
- 15 36. The claimant was diagnosed suffering from depression. The claimant texted Mrs Younger on 24 and 25 July 2019 keeping her apprised of things. The claimant went go into the office on 26 July to hand in a doctor's certificate. There was no significant discussion between the claimant and Mrs Younger about the claimant's condition at that stage.
37. The claimant texted Mrs Younger on 14 August to advise that she had discovered on having a scan that her baby had no heartbeat. There followed a series of texts between the claimant and Mrs Younger.
- 20 38. Mrs Younger texted the claimant on 14 August to say that her sick line finished on the Thursday of that week but she still has 15 days holiday to take, and suggested she take a week's holiday to get her head round things and to give Mrs Younger a phone when she felt up to it but that it was 'just a thought'. She texted the claimant again on 16 August asking what was
25 happening with work, and if she was coming back the following day. The claimant texted Mrs Younger on 16 August to advise that she was seeing her doctor and texted again on 20 August to say that she was in hospital for an operation in connection with the baby. On 23 August, Mrs Younger telephoned the claimant asking if she could make it into work on Monday for
30 an update meeting or whatever time suited her best.

39. The claimant returned to work on 27 August. Mrs Younger arranged for the claimant carry out light duties. The claimant's requirements to attend medical appointments were accommodated.
40. The claimant subsequently took up part-time work at a public house, and Mrs Younger took the view that there was no longer any point in insisting that the claimant only did light duties.
41. In or around the beginning of November a new member of staff, (the male employee) commenced working with the respondents on a temporary basis to assist with the pre-Christmas orders. His wife was already employed by the respondents.
42. There was a degree of sexual banter in the warehouse, which from time to time the claimant engaged in. On a number of occasions discussions of this nature would be instigated by another female member of staff, and the claimant would join in.
43. There was speculation among the staff as to the male employee's age, and shortly after he started work, the claimant asked him what age he was when he lost his virginity.
44. At one point, the claimant took a photograph of the male employee in the Warehouse, drinking from her coffee mug.
45. The male employee made comments about the claimant's physical appearance and on occasion did this in front of other members of staff. The male employee asked the claimant to cheat with him on her boyfriend. The claimant told him that as she had a boyfriend, and she did not wish to go out with him. The claimant walked away from this conversation, and the male employee took photographs of her, as she walked away.
46. The following day the male employee told the claimant that he had taken pictures of her, and he had been looking at them at 5am that morning. She asked to see the pictures, and he showed them to her. The claimant was annoyed at this and felt uncomfortable. Again, she told him that she had a boyfriend, and did not want to become involved with him. The male

employee said words to the effect that she didn't need to just be with her boyfriend and compared that to eating the same meal every night. Again, the claimant told her that she did not want to see him. She was uncomfortable at what had taken place, and about the fact that she considered that other workers in the warehouse were aware of it. It was her perception that the warehouse staff were talking about what had happened, and she felt uncomfortable and as though she was 'lying' to the male employee's wife.

47. Another member of staff, Ms Cameron overheard a conversation between the claimant and another employee, Katie about what had happened. On 19th November Ms Cameron alerted Mrs Younger to the fact that this had occurred on the Mrs Younger wanted to speak to the claimant, and she approached the claimant about this. The claimant told her that she did not want to do anything about it.
48. The claimant texted Mrs Younger on 21 November (R38) stating: *"OK so (male employee) just showed me a picture he has off me and said he was looking at it at 5 am this morning still don't say anything am pretty sure a set him straight a told him there no chance I love my bf and he should respect his wife xx"*
49. Mrs Younger responded: *"That is absolutely bang out of order and now classed as harassment!!! He will be getting spoken to tomorrow about this!!!!!! I will not have him speak to you about this and am sorry x"*
50. The claimant responded at 3.44pm (Mrs Younger's text at 3:36pm): *"No really I don't want any grief caused a can handle myself a have made it clear where I stand so if he says anything else then yeah let's do something about it but for now a made my feelings for Gary clear and the lack of feeling towards him clear xx"*
51. Mrs Younger responded: *"You shouldn't bloody have toll! That is bang out of order. One more word from him and I want to know about it then x"*

52. The claimant then responded: **Yeah I promise anything else you will be first to know I have to keep it to ourselves for the time being as the way Gary went about it what he said yesterday was bad enough if he finds out about this he will come to work and end up fighting with him I want an easy life less drama**"
53. Mrs Younger texted the claimant on 22 November 2018: asking how the male employee was and referring to him as 'creepy'.
54. There was then a text exchange between the claimant and Mrs Younger as to whether the claimant should tell the male employee's wife. On 22 November, Mrs Younger indicated that she felt sorry for the male employee's wife and that she wasn't sure that telling her was the right thing to do and the whole thing was a mess. The claimant responded the same day, indicating her agreement to that.
55. Mrs Younger responded saying that the male employee was only at the factory for a few more weeks so she would rather not tell his wife in case things *"kicked off"*. The claimant again confirmed her agreement with this in her text of the same date (pages 58 to 60 of the bundle). Mrs Younger also texted the claimant's partner on the 24th of November advising that she had told the claimant that if the male employee says one more thing to her he will be disciplined and asked to leave.
56. The male employee left the respondent's employment on 27 November 2018.
57. On 14 December 2018, the claimant had an argument in the warehouse with Mr Younger, and she left work. She then submitted a sickness certificate to which cited her condition as *depressive disorder* for the period 14 December 2018 for the period of 21 days to 3 January.
58. The respondents wrote to the claimant on 18 December asking her to attend what they termed a *meeting of concern*. Under the heading *Sickness absence levels* it was noted that the claimant had been absent for a total of 15 weeks to include the current medical certificate which she had submitted.

The claimant was advised that it was accepted that she had been off for genuine reasons, but there must come a time when the company has no alternative but to say 'enough is enough', and release the claimant from her position in the company.

5 59. It was stated the purpose of the meeting was to advise the claimant of this, and hopefully and to prevent such a situation arising. The claimant was advised that it was essential that she attend work on a regular basis to avoid being dismissed from the company.

10 60. The claimant attended the meeting on the 18th of December; it was also attended by Mrs Younger, and an HR representative.

61. Mr Hutchison wrote to the respondents on the claimant's behalf after the meeting making a number of points and stating the claimant was fit for her employment.

15 62. Mrs Younger responded to Mr Hutchison's letter on 14 January advising that they were continuing to monitor her attendance.

63. The claimant submitted a further fitness certificate from 4 January to 17 January 2019, which stated her condition was depression and that she was unfit to work. The claimant submitted a further certificate covering the period from 17th January to 28 January 2019, which stated her condition was *'symptoms of depression'* and she was not fit to attend work.

20 64. On 22 January 2019, Mr and Mrs Younger took the decision to dismiss the claimant because of her unacceptable level of absenteeism, and it seemed to them that there was no indication of when the claimant could return to work. The claimant had less than two years less qualifying service and the respondents did not invite her to a disciplinary hearing. Mrs Younger confirmed the decision to the claimant in a letter of 22 January (page 34). She advised the claimant that she had a right of appeal to Mr Younger.

25 65. The respondents took the decision to dismiss a male employee less, who similarly had less than two years qualifying service, and had a high level of absence, at the same time as they took the decision to dismiss the claimant.

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They decided to dismiss these employees because as they did not consider the business could cope with employees who were off on long term sick .

- 5 66. The claimant was aware of the existence of employment tribunals, and of the right to bring a complaint to them in connection with actions of her employer. She did not take any steps to obtain advice as to her position or make any enquiry about the possibility of complaining about what the claimant considered to be a lack of a risk assessment until this complaint to the employment tribunal was presented.

Note on Evidence

- 10 67. A number of the material points in this case were not disputed, but there were some conflicts in evidence which the tribunal had to resolve.

The claimant

- 15 68. The Tribunal found the claimant's evidence in some, but not all, matters credible and reliable. In making this observation, the Tribunal did not conclude that the claimant set out to deliberately mislead. The Tribunal was persuaded that were there was a relevant conflict between the claimant's evidence and that of other witnesses, whom the tribunal preferred, this was accounted for by the claimant's perception of matters and interpretation of events being different to that of other witnesses whose evidence the tribunal preferred.
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- 25 69. The Tribunal heard from Mrs Younger, Mr Butters, Ms Cameron, Ms Harvey, and Ross Callaghan and did not form the impression that any of these witnesses sought to mislead, and to the extent that there was any difference in evidence, the Tribunal again was satisfied this was accounted for by virtue of the witnesses' having a different perception of effectively the same events.

70. The Tribunal also notes that it had only made findings in relation to the disputes in evidence which were relevant to the issues which it has to consider.

71. The Tribunal was satisfied that the claimant was placed on light duties after she told Mrs Younger, she was pregnant on the 27th of June. The claimant appeared to suggest that she was not, but the fact that she was was confirmed by Mrs Younger and Mr Callaghan. It was also confirmed by Mr Butters, who explained that he had been told by Mr Callaghan to implement light duties for the claimant. All of this was persuasive evidence, and the Tribunal concluded that Mrs Younger had given direction that the claimant would be placed on light duties and that this had been done.
72. One of the conflicts the Tribunal had to resolve, was the degree which there was sexual banter in the respondent's premises. Broadly it was the evidence of Mrs Younger, Mrs Harvey, Mr Callaghan and to a degree Ms Cameron, that this took place. It was Ms Cameron and Mr Callaghan's evidence that it was the claimant and another younger female member of staff who were often the instigators of this type of conversation. Mr Butters did not consider that there was sexual banter, however he did give evidence to the effect that the claimant had asked the male employee when he had lost his virginity.
73. The claimant denied having asked this question of the male employee, but on balance the tribunal was satisfied that she had done so. In reaching this conclusion, it takes into account in particular the evidence of Mr Butters. The Tribunal formed the impression that Mr Butters was a credible and reliable witness. It formed the impression that he was genuinely fond of the claimant, and accepted, as he said, that he found it difficult to give evidence in this case. Mr Butters said that this comment had been made, and the Tribunal was prepared to accept this evidence on this.
74. The Tribunal also accepted the evidence of Ms Hardy, to the effect that the claimant had taken a photograph of the male employee drinking from the claimant's coffee mug (the claimant denied taking any photographs of the male employee). Ms Hardy struck the tribunal as an entirely impartial witness, and it was persuaded that her evidence on this point should be accepted.

75. On balance the Tribunal was satisfied that there was a degree of sexual banter in the warehouse, and that and that the claimant took part in this.
76. The Tribunal found the claimant's evidence as to the conversations which she had with the male employee during which on two occasion when he told her that he wanted to go out with her, and took photographs of her, all as recorded in the Findings in Fact to be credible and reliable. In reaching this conclusion, it takes into account that there was effectively no dispute about the fact that a photograph had been taken; indeed, this was confirmed by Mr Cameron and by Mrs Younger. The text messages, which are set out in the Findings in Fact, support the conclusion that the incident of which the claimant now complains had occurred, and the Tribunal accepted her evidence on this point.
77. The claimant gave evidence in cross examination to the effect that she had been asked to go to a warehouse alone with the male employee and she felt very afraid. This allegation did not form part of her claim and was not made until cross examination. There was no explanation as to why that was the case, and there was no support from any of the other witnesses for this having occurred. Given the unexplained lateness of what appeared to be a serious allegation, and the fact that it was unsupported by any other evidence, the Tribunal was not persuaded that this had occurred.

Submissions

Claimant's submissions

78. Mr Hutcheson for the claimant submitted that the respondents did not follow any procedure due to the fact that the claimant had been employed for less than two years and they did not hold a final meeting with the claimant because of how they considered the claimant conducted herself in the meeting of 18 December.
79. When Mrs Younger was asked about the company disciplinary policy, she could not adequately explain it. Furthermore, the person who took the

decision to dismiss was Mrs Younger and her husband. The right of appeal was to Mr Younger, and this was unfair.

80. In relation to sexual harassment, Mr Hutchison referred to the fact that in questioning the claimant, Mrs Younger put it to her that it was "just a picture".
5 That showed that to Mrs Younger it did not seem to be a big deal. Mr Hutchison submitted that Mrs Younger was well aware that there was chat of a sexual nature on the warehouse, but she was not concerned about this as long as the work was being done. No action was ever taken to prevent such discussion. At no point was there a separation of the claimant and the
10 male employee on the warehouse floor. Mr Hutchison submitted that at no point did the claimant say she did not want an investigation carried out into the male employee's behaviour.

81. Mr Hutchison submitted that in relation to the claimant's pregnancy, no risk assessment was carried out. There were no safety procedures and there
15 were no RAMS, no staff had signed a risk assessment. No training was put in place for new staff. Mr Hutchison submitted that it seemed to be the respondent's position that anything goes as long as the work was being done.

82. Mr Hutchison submitted that the tribunal should consider the claim in relation
20 to failure to carry out a risk assessment on the basis that it is linked to the other complaints.

Respondent's submissions

83. Mrs Younger submitted that the respondents are a small business, owned
25 by herself and her husband. They had a good relationship with staff, many of whom are employed for 10-14 years. There was no formal management structure however the most experienced member of staff was responsible for the warehouse when Mr and Mrs Younger were not there. That arrangement worked well for the respondents.

84. In relation to a risk assessment, Mrs Younger's position was that a risk assessment was carried out and that appropriate changes were made. She had no reason to believe that these changes had not been fully implemented. The claimant had never come to see Mrs Younger with any concerns about the work she was being asked to do either before or after her miscarriage. The claimant came back early from work as she wanted to be back at work.

85. In relation to the sexual harassment claim, Mrs Younger submitted that she had done something about it as soon as she was made aware of the situation. She referred to her texts to the claimant indicating that it was 'out of order'. She submitted that the claimant told her she didn't want anything further done. Mrs Younger submitted she told the claimant that if anything else happened then the offender would be dismissed. She did not hear anything further about it from the claimant, and the other employee then left in a short space of time.

86. In relation to the unfair dismissal claim, Mrs Younger submitted that the claimant and another employee (who was a man) who had less than two years' service were dismissed because of absences. The respondent did not invoke their full disciplinary procedure because the claimant did not have two years' qualifying service.

87. Mrs Younger submitted that the claim in relation to failure to carry out a risk assessment was time barred and should not be allowed.

Consideration

Failure to carry out risk assessment

88. The first claim which the Tribunal considered was the complaint that the respondents had failed to carry out a risk assessment: The tribunal understood this to be a claim of unfavourable treatment under section 18 of the EqA. Section 18 (1) provides:

(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

89. (b) because of illness suffered by her as a result of it."

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90. Section 18.6 provides;

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends -

10 (a) if she has a right to ordinary and additional maternity leave, the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does have that right, at the end of the period of two weeks beginning with the end of the pregnancy.

15 (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 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 at subsection (3) or (4).

91. Section 123 of the Equality Act 2010 provides;

20 (1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of -

(a) the period of three months starting with the date of the act to which the complaint relates, or

25 (b) such other period as the employment tribunal thinks just and equitable

....

(3) For the purposes of this section -

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

5 (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-*

fa) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

10 92. There is an issue of time bar in connection with the Tribunal's jurisdiction to consider the claim in respect of failure to carry out a risk assessment.

93. The Tribunal firstly considered Mr Hutchison's submission to the effect that what was complained of was conduct extending over a period (section 123 (3)(a) of the EqA) which is to be treated as done at the end of that period.
 15 The Tribunal considered the three complaints before the tribunal. That is a complaint about a failure to conduct a risk assessment, a harassment claim, and a complaint of the dismissal on the grounds of pregnancy or maternity. The Tribunal asked itself whether these were distinct and unconnected acts, from which time would run from the date of each act specified, or whether
 20 the matters complained of were part of an ongoing state of affairs or ongoing act.

94. For the reasons are set out below, the claimant's complaint of dismissal does not succeed and therefore the question for the Tribunal is whether the failure to carry out a risk assessment, and harassment claim, were part of an
 25 -----ongoing state of affairs or, are two unconnected acts? -----

95. Given the different nature of these complaints and taking into account the fact that the claim of harassment is about the individual conduct of the male employee (albeit the respondents are vicariously liable for his actions), the Tribunal did not conclude that the two were linked.

96. The Tribunal then considered the date from which time should run for the purposes of the claim, which is about an omission or failure to act, in that it is said that the respondent's failed to carry out a risk assessment.
97. The Tribunal was satisfied that as a matter of fact, Mrs Younger had a discussion with the claimant and Mr Callaghan, after which the claimant was put on light duties on 27 June 2018. The Tribunal was satisfied it was therefore reasonable to conclude that any failure in connection with the risk assessment process was decided upon on that date.
98. The Tribunal was therefore satisfied that 27 June was therefore the date from which time should run for the purposes of 123(3)(b) of the EqA. The date of receipt by ACAS of the ET notification was 24 January 2019, and the ACAS certificate was issued on 5 February 2019, which was also the date of presentation of the ET1.
99. In the absence of any extension which might have been affected by the early conciliation process, the claim should have been presented by 26 September 2018, which is well before the date of the presentation of the ACAS certificate. The claim is therefore over 5 months out of time, and the Tribunal considered whether time should be extended under section 123 (1)(b) of the EqA on the grounds of justice and equity .
100. The Tribunal borne in mind that the burden rests with the claimant to establish that time should be extended. In considering whether to exercise its discretion to extend time, the Tribunal considered the prejudice which each party would suffer as a result of the claim being allowed or not allowed, having regard to all the circumstances of the case, and in particular, the length of the delay, the reason for it, the extent to which the cogency of evidence was likely be affected by the delay, and the promptness with which the claimant acted once they knew the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once she knew the possibility of taking action.
101. The delay here is in the region of five months, and therefore it is not inconsiderable. The Tribunal took into account that the claimant was absent

from work for a period from 24th July until the end of August. The Tribunal accepted that the claimant's illness would have impacted upon her, however she returned to work at the end of August and remained in employment until 14 December. There was no medical evidence before the Tribunal to support the conclusion that she was prevented from lodging a claim during this period because of ill health. There was no evidence to support the conclusion the claimant had taken any steps to seek advice or indeed take any action at all until after her dismissal, when the claim was lodged. The claimant was aware of the facts she was complaining about, in that she was complaining about events which took place at the end of June 2018. The Tribunal has heard evidence about what took place, and albeit recollections had faded commensurate with the passage of time, there was no significant impact on the cogency of the evidence on account of the delay. However, any prejudice suffered by the claimant is mitigated in that she continues to be able to pursue her other claims against the respondent. Taking into the length of the delay and the unexplained nature of it, and the fact that the claimant took no steps to pursue the claim, albeit she was aware of the matters which she considered gave rise to her complaint, until after her employment had come to an end rendering the claim five months out of time, and balancing that against the other factors present in this case, and the Tribunal was not persuaded that it was just and equitable to extend time to consider this claim under section 123 (1)(b) of the EqA, and therefore it has is no jurisdiction to consider that this claim.

Section 26 - Harassment Claim

This claim is presented under section 26 of the EqA which provides:

"26

(1)-----A person-(A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

- (i) *violating B's dignity, or*
- (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(2) *A also harasses B if—*

- 5 (a) *A engages in unwanted conduct of a sexual nature, and*
- (b) *the conduct has the purpose or effect referred to in subsection (1)(b).*

....

10 (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-*

- fa) the perception of B;*
- (b) the other circumstances of the case;*
- (c) whether it is reasonable for the conduct to have that effect. ”*

15 102. There is no issue of time bar in this case, nor is there any issue that the respondents are responsible for the actions of the alleged harasser. In terms of section 109 (1) of the EqA, anything done by a person (A), during the course of his employment must be treated as being done by the employer.

20 103. The Tribunal understands that this claim is presented under section 26 (2). The conduct complained of is that the male employee asked the claimant to go out with him on two occasions, despite the fact the claimant had told her that she did not wish to go out with him and that she had a boyfriend; that he took a photograph of her and told her that he was looking at this at 5am + and made a comment to the effect that she would '*not eat the same meal every night*'.

25 104. The Tribunal firstly considered whether this conduct was of a sexual nature and was unwanted.

105. Given the content of what was complained of, the Tribunal had no difficulty concluding that this the conduct was of a sexual nature.
106. The Tribunal was also satisfied that the conduct was unwanted. Unwanted means essentially the same as unwelcome or uninvited by the employee.
5 The Tribunal accepted the claimant's evidence that the conduct she complained of was uninvited and unwanted by her. The Tribunal was supported in this conclusion from the text exchange between the claimant and Mrs Younger which made clear that the claimant did not want to go out with the male employee.
- 10 107. In reaching its conclusion, the Tribunal also took into account that there was sexual banter in the warehouse, and the claimant took part in this, she had on an earlier occasion asked the male employee a very direct personal question of a sexual nature. However even if an employee participates in banter at first, that does not mean that subsequent banter cannot cross the
15 line and become unwanted, and the tribunal was satisfied given the nature of the conduct complained of, (which included asking the claimant out, and the repetition of that request after the claimant had refused) demonstrated that the conduct complained of was unwanted.
108. Having reached that conclusion, the Tribunal then went on to consider
20 whether the conduct had the proscribed purpose or effect in terms of section 26 of the EqA.
109. The Tribunal could reach no conclusion as to the purpose of the conduct, as there was no evidence to support a conclusion in relation to this, but it did consider the effect of the conduct.
- 25 110. In deciding whether the conduct has the proscribed effect, the Tribunal applied_the_tests setout in Section 26 (4) of the EqA . It took into account firstly, the claimant's perception; secondly the circumstances of the case; and thirdly whether it was reasonable for the conduct to have that effect.
111. The tests which the Tribunal has to apply have both subjective and objective
30 elements to it. The subjective element requires the Tribunal to look at the

effect of the conduct of the alleged harasser on the claimant. The objective part requires the Tribunal to consider whether it was reasonable for the claimant to claim that the conduct had that effect. The Tribunal also takes into account the overall circumstances of the case.

5 112. Those included that that the conduct complained of took place over a relatively short period of time, and that the claimant had herself engaged in sexual banter with the male employee, that she had taken a photograph of the male employee (albeit there was nothing to suggest that there was any sexual element to this), and that when the incident about the male employee
10 taking photographs of her and asking her out was brought to her employer's attention, the claimant did not wish to pursue the matter.

113. Notwithstanding these elements, the Tribunal was satisfied that subjectively the claimant considered that the male employee's conduct did have the proscribed effect. In reaching this conclusion, the Tribunal took into account
15 that the male employee made advances towards the claimant, which she rebuffed, and notwithstanding that rejection he continued to make advances towards the claimant despite the fact she had made clear that she had a boyfriend and did not want to go out with him.

114. The Tribunal was satisfied that this conduct, alongside the male employee's
20 having taken a taking a photograph of her, telling her that he was looking at it at 5am in the morning, and the language which the he used to suggest that she should go out with him as well as her boyfriend, (that you would not eat the same meal every night) was offensive to the claimant and created a humiliating environment. The Tribunal also concluded that the fact that it
25 was the claimant's perception that everyone in the Warehouse was talking about what had taken place, added to her sense of humiliation.

115. The Tribunal was mindful that not every assertion by a claimant that conduct violated her dignity is necessarily to be taken at face value. The Tribunal however was not persuaded in light of the personal nature of the conduct
30 complained of, that the fact that there was a degree of sexual banter in the warehouse which the claimant had engaged in with the male employee, was

capable of demonstrating that the claimant's assertion that she felt that offended and humiliated should be rejected.

5 116. Nor did the Tribunal conclude that fact that the claimant did not pursue matters via her employer lead to the conclusion that the claimant did not consider the male employee's conduct created a humiliating environment.

io 117. From the text exchange between the claimant and Mrs Younger, it appeared that the claimant was concerned about the effect which the disclosure of what had happened would have on the male employee's wife, and the effect it would have on her boyfriend. While the claimant's concerns therefore on the face of it were about the reactions or impact of the male employee's behaviour on third parties, the Tribunal did not conclude that the claimant was unaffected by them. Rather, the Tribunal formed the view that the claimant's concern about how the disclosure of what had taken place would impact on the male employee's wife, and on her own partner, was a
15 symptom of the fact that she felt herself in a humiliating environment.

118. The objective element of the test in section 26 is primarily intended to exclude liability where a claimant is hypersensitive and unreasonably takes offence. Applying an objective test to the conduct complained of, the Tribunal was not persuaded that it was unreasonable for the claimant to feel
20 as she did about the male employee's conduct.

119. The Tribunal was satisfied that the male employee's conduct in making advances towards the claimant, and continuing to make advances towards her after she had rebuffed him; saying that you don't eat the same meal every night; and taking a photograph of her, which he then told her that he
25 was looking at and thinking about at 5am in the morning, amounted to unwanted conduct of a sexual nature, which had the proscribed effect under section 26 (1)(b) of the Equality Act, and Therefore The complaint of harassment succeeds.

120. The merits of remedy have been split in this case, and therefore a separate
30 hearing will be fixed to consider the issue of remedy, for one day, and directions will be issued separately in relation to that hearing.

Unfair dismissal claim

121. It was not until shortly before the hearing took place that it became clear that the claimant wished to pursue a claim of unfair dismissal, however at the commencement of the hearing Mrs Younger confirmed that she was in a position to deal with the claim.

122. The Tribunal understood the claim to be brought under section 18 of the Eq A as a claim of unfavourable treatment, and a claim of automatically unfair dismissal under section 99 of the Employment Rights Act 1996 (ERA).

123. Section 18 of the Eq A is set out above.

124. Section 99 of the ERA provides:

“(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section 'prescribed' means prescribed by the regulations made by the Secretary of State

(3) A reason or set of circumstances prescribed under this section must relate to

(a) pregnancy, childbirth or maternity

....

125. There is considerable overlap between the claim under these sections however the claimant considered both and firstly addressed the claim under section 18 of the EqA.

126. The claimant very sadly suffered a miscarriage, returning to work at the end of August. She was dismissed on 22 January 2019 at which point she had

been absent from 14 December 2018, and was certified as unfit on account of depression, or symptoms of depression.

5 127. Section 18(6) (a) and (b) define the *'protected period'*. It begins when the pregnancy begins and ends at the end of additional maternity leave. If the claimant, as in this case, does not have the right to maternity leave, then it ends at the end of two weeks beginning with the end of the pregnancy (section 18 (6) (b)) The claimant was not dismissed during the protected period, and therefore for a claim to succeed, the claimant would need to establish that she was treated less favourably than a comparable male employee.

10 128. The Tribunal accepted the evidence of Mrs Younger to the effect that the respondents dismissed the claimant and another male employee at the same time, because of lengthy periods of absence, both employees, having less than two years qualifying service. The Tribunal was satisfied that the reason the claimant was dismissed in this case was because of her periods of absence, and the fact that she was unable to return to work or confirm when she would return to work in January 2019. It was also satisfied that a male employee with the same absence would also have been dismissed, and indeed a male employee who was off sick and had a poor absence record was dismissed.

15 129. The Tribunal then considered whether there was unfair dismissal under section 99 of the ERA. The claimant does not have qualifying service to present the claim of unfair dismissal under section 98(4) of the ERA and therefore it is for the claimant to establish the reason for dismissal.

20 130. The Tribunal considered whether it had been established that dismissal was because of pregnancy, childbirth or maternity in terms of section 99 (3)(a) of the ERA. The Tribunal was satisfied that the **claimant was** dismissed because of her lengthy absence .which included periods in July and August, and thereafter in December and January, and the fact that she could not indicate a return to work date, against the background of her having less than two years' service with the respondents.

25
30

131. The claimant was certified to be unfit for work on account of stress on 24 July, and 3 and 16 August in terms of her fit notes. The claimant suffered a miscarriage on 14 August, however she returned to work shortly thereafter. The claimant's certificates of fitness dated 31 August and 29
5 September 2018 indicated that she may be fit to work with amended duties, and the claimant returned to work at the end of August 2018. From the information available to the respondents, the claimant was off as a result of a pregnancy related condition for a period of around 2 weeks. No action was taken against the claimant on account of her absence at that time. The
10 claimant began a period absence commencing on 14th December and by 22 January the respondents considered there was no indication of when she would return to work. It was then that the respondents took the decision to dismiss the claimant. There was no suggestion that the claimant was suffering from a pregnancy related illness at that point; her fit notes indicated
15 that the reason she was not fit for work was depression or a depressive disorder.

132. The Tribunal concluded that the respondents were not prepared to tolerate lengthy periods of absence in employees of less than two years' service. That indeed was the effect of Mrs Younger's evidence, that the business
20 could 'not cope' with it. The fact that the respondents dismissed the claimant and another male employee (both with less than 2 years qualifying service) at the same time because of long term absence supports that conclusion. It also supports the conclusion that the overall length of the claimant's absence, and the fact that there was no indication of when she could return
25 to work in January, was the principle reason why the respondents took the decision to dismiss the claimant.

133. The effect of this conclusion is the claim of unfair dismissal does not succeed.

134. The case will now be listed for a one day hearing to consider remedy in connection with the complaint of harassment.

5

Employment Judge: L Doherty
Date of Judgment: 07 October 2019
Entered in register: 08 October 2019
10 **and copied to parties**