



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4112396/2021

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Held by Cloud Video Platform in Glasgow on 14 July 2022

Employment Judge M Kearns

10 **Mrs L Burns**

**Claimant
In Person**

15 **Smokin' Gun Fitness Ltd**

**Respondent
Represented by:
Mr McCormack -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal following the Preliminary Hearing was that the issues of time bar including:

- (i) whether the claimant's complaints amount to 'conduct extending over a period' as defined in section 123(3)(a) Equality Act 2010; and if not,
- (ii) whether it would be just and equitable to extend time;

25 are reserved to be determined at the full hearing.

ORDERS OF THE EMPLOYMENT TRIBUNAL

(1) **Within 28 days from the date this Note is sent out to the parties, the claimant is ordered to provide a written statement to the respondent, copied to the Tribunal as follows:**

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- (i) **The claimant is ordered to specify the legal basis of each of her discrimination claims: In respect of each act of which complaint is made, the claimant is ordered to confirm whether she is claiming pregnancy/ maternity discrimination contrary to section**

18 Equality Act 2010, sex discrimination contrary to section 13 (or 19) of the Act or both in the alternative and the basis for this.

(ii) The claimant is ordered to confirm whether the statement about sex-based pay disparity in her further and better particulars lodged on 8 February 2022 is a background factual averment or a claim for equal pay under section 66 Equality Act 2010; and if the latter, whether she is seeking to amend in those terms and her argument as to why amendment should be permitted.

(2) Within 28 days of their receipt of the claimant's written statement, the respondent is ordered to inform the Tribunal of their position in relation to any application to amend together with any supporting arguments if the application is opposed.

A telephone Preliminary Hearing is provisionally fixed for 10am on Friday 9 September 2022 to discuss case management (time estimate one hour). Parties should attend this with their availability and the availability of any witnesses they intend to call to enable a full hearing to be fixed in December 2022, January or February 2023.

Parties may agree an alternative date for this telephone Preliminary Hearing and this may be requested by application to the Tribunal within 7 days from the date this Note is sent out to parties.

REASONS

1. The claimant was employed by the respondent as a fitness instructor from 1 September 2019 until 25 August 2021, when her resignation took effect. Shortly after the claimant began work with the respondent she realised she was pregnant. She states that she informed Mr McGee, the respondent's director of this in or around October 2019. The expected date of delivery of her baby was 6 June 2020. For the purposes of calculating the protected period under section 18 Equality Act 2010, the claimant indicates that the pregnancy began around mid-September 2019. The claimant began ordinary maternity leave on 25 May 2020. Her baby was born on 16 June 2020. While

still on maternity leave, the claimant was furloughed on 19 November 2020 until 26 April 2021 due to the Coronavirus pandemic. Because of the furlough, it is unclear when the claimant's maternity leave ended and/or when she returned to work after the pregnancy. This may require determination at the full hearing. The claimant understands the date of her return to work from maternity leave as 13 February 2021. However, she did not physically return to the workplace until 26 April 2021.

2. The claimant resigned on 19 August 2021. Her last day of employment was 25 August 2021. She notified ACAS of her present claim on 21 September 2021 as required by the early conciliation provisions. An early conciliation certificate was issued by ACAS on 11 October 2021. The claimant presented an application to the Employment Tribunal on 11 November 2021 in which she indicated at box 8 of her ET1 that she claims both pregnancy or maternity and sex discrimination and the claim has been registered for both. The claimant also claims arrears of pay and automatically unfair dismissal under section 99 Employment Rights Act 1996 ("ERA").

Proceedings to date

3. A Preliminary Hearing was held on 17 January 2022 for the purposes of case management. At that hearing, it was identified by the Employment Judge that any complaint about an act or omission prior to 22 June 2021 would potentially be out of time. The Judge also made an order for the claimant to provide further and better particulars. The claimant lodged further and better particulars on 8 February 2022 (J21 – 4). The respondent responded to these (J25 – 7).
4. In her further and better particulars, the claimant asserted (J22) that the respondent's conduct complained of amounted to unfair treatment "*because I was a new mother and because I am female*". She also complained that she had been paid less than two male colleagues doing the same work because she is female.
5. A further PH took place for case management on 21 February 2022. It was recorded at paragraph 5 of the PH Note that the claims are made under

5 sections 13, 18 and 19 Equality Act 2010 and under sections 13 and 99
Employment Rights Act 1996. The PH Note of 21 February records: "*There
may be an issue as to whether the protected characteristic founded on is only
pregnancy or includes sex in addition*". Mr McCormack submitted today that
it was his understanding that the discrimination claims put forward in the ET1
were solely pregnancy/maternity claims and not sex discrimination claims. He
argued that if the claimant was now saying that some of those claims were
claims of sex discrimination then that would require amendment. The claimant
indicated that it was her intention to prepare an amendment application and
10 that she intended her amendment to cover equal pay. (The time limit for an
equal pay claim is 6 months from the date of termination of employment (with
no discretion to extend time), so the issue to be addressed is whether the
claimant in fact presented an equal pay claim on 8 February 2022 or not.)

15 6. As stated above, the claimant had ticked the boxes for both pregnancy or
maternity and sex discrimination in her original ET1 and it appears to me that
she is entitled to make the claims in the alternative (for example maternity
which failing sex discrimination). Section 18 covers pregnancy and maternity
discrimination and section 13 covers sex discrimination. It would be helpful for
the claimant to set out the legal basis for each claim. The issue may be one
20 of timing as to whether the act complained of was said to have occurred in the
protected period (or in implementation of a decision taken during that period);
or after that period; or because she exercised the right to take maternity leave.
For present purposes, the protected period ended when the claimant returned
to work after the pregnancy (section 18(6)) but that, in itself is complicated by
25 the fact that the claimant was furloughed.

7. The claimant is going to try and get some legal advice on this so that the legal
aspects of her claim can be more clearly specified and the respondent can
understand the nature of the claims it is required to meet and the legal tests
applicable to each.

30 8. At the Preliminary Hearing on 21 February 2022, today's hearing was fixed to
consider "*whether or not each of the claims made are within the jurisdiction of
the Tribunal*". At paragraph 7 of the Note of that PH it states that the PH is to

address: *“issues as to jurisdiction on the ground of time bar for any matter arising or said to have arisen prior to 22 June 2021.”*

9. There are two problems in addressing these issues today. The first is that the nature of the claims requires urgent clarification by way of further particulars and possibly amendment, especially if the claimant is making a claim for equal pay under section 66 Equality Act 2010.
10. The second and more fundamental problem is that the issue of whether there was ‘conduct extending over a period’ is inextricably bound up with the merits of the claim. Whilst it may be possible in some cases to run together acts constituting different types of discrimination (e.g maternity discrimination and sex discrimination) in order to establish conduct extending over a period, provided that as a matter of fact there is a connection between them, a claimant may not run together discriminatory acts with other acts which are not discriminatory. (See South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, EAT). Thus, a judgment must be made on whether any of the acts of discrimination alleged occurred and were discriminatory (and if so which acts and when) before a judgment can be made on whether there was discriminatory conduct extending over a period. In the circumstances I have reserved the time bar issues to be determined at the full hearing.
11. A telephone conference call case management PH is provisionally fixed for Friday 9 September. Parties should attend that call ready to fix the final hearing.

25 Employment Judge: Mary Kearns
Date of Judgment: 29 July 2022
Entered in register: 29 July 2022
and copied to parties