



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Farrance

Respondent: Nightingale Storage and Removals Ltd

Heard at: Exeter by Video **On:** 30 June 2022

Before: Employment Judge Smail

Representation
Claimant: In Person
Respondent: Mr Mukulu, Counsel

These are the Reasons for the Reconsideration Judgment dated 30 June 2022 which has already been sent to the parties.

REASONS

1. This is a reconsideration of the Judgment dated 12 May 2021 because it was overlooked by the Judge that there was a claim for injury to feelings pursuant to alleged pregnancy and maternity discrimination in the original claim. It was noted there was a shortfall of £396.10 on statutory maternity pay. The correct forum for claiming the shortfall per se is not, surprisingly, the Employment Tribunal but is HMRC; so that dispute was referred to HMRC if the Claimant wanted to pursue it. In the end she has not pursued it, which has been noted.
2. Holiday pay was dealt within the Judgment of 12 May 2021 and there was an order for outstanding holiday pay and a large proportion of that has been paid. I ordered £1,387.77 holiday pay to be paid. I understand three quarters of that has been paid. The balance should be paid pursuant to the order.
3. We have today heard the pregnancy discrimination claim which was ordered to proceed as part of the reconsideration. The Respondent has attended by Counsel today. There was an application for a postponement in the last few days on the basis that Mr Nightingale, the Respondent's director, was not well. I refused that application to postpone because there is a long history of Mr Nightingale not appearing. He did not appear on 12 May 2021 and he did not appear at several case management meetings prior to that, so in the exercise of my discretion, I decided that Mrs Farrance was entitled to have this matter brought to a conclusion once and for all. I have Mr Nightingale's

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witness statement and a witness statement from the Respondent's accountant/bookkeeper detailing the history they give of the matter. Mrs Farrance has been cross-examined by Mr Mukulu today.

4. In fact, the issues that have been canvased before me are very similar to what was set out in the ET1 on the part of the Claimant and on the ET3 on behalf of the Respondent. For four months it is common ground the Respondent was paying statutory maternity pay properly without problem. There is no dispute that the Claimant was in the protected period of pregnancy at all material times and that she was exercising the right to ordinary and additional maternity leave.
5. From the fifth month onwards, there was no payment of statutory maternity pay until one year after the continuation of payments should have taken place. The next payment due was November 2019 with four and a half months of payments left. There was a payment of the majority of the amount owed in November 2020, one year left. There remained the shortfall of £396.10.
6. I have little doubt that it was a distressing inconvenience to the Claimant, to say the least, not to be paid her statutory maternity pay for the four-and-a-half-month period.
7. In the ET3 the explanation for that was twofold from the Respondent. First of all, that before the Claimant went on maternity leave from her position as the manager of a branch of the company, she mishandled a deposit from a tenant. The Respondent also performs estate agency services. It was suggested that contrary to company policy and legislation she passed the deposit on to the landlord without first registering it with the rent protection scheme. This was indeed the subject of correspondence passing between the Respondent and the Claimant and answered by the Claimant at the time. Even if the Respondent's allegation is correct, and I do not find that it was, that is no basis for withholding statutory maternity pay. The Claimant was on maternity leave with a young baby. She needed the money.
8. The second reason put forward by the Respondent was an allegation that the Claimant was working on a cash basis for another company. In the correspondence there was a Linked-In picture and profile from the Claimant showing her to be working for another estate agent, Rigby Linham. I accept from Mrs Farrance that she was recruited by the Respondent from that company which in fact changed its name to Linham when Mr Rigby left the partnership. I have seen a letter, which has been disclosed in the proceedings, showing that Linham made her redundant in December 2016. I conclude that this was not a bona fide point made by My Nightingale. On the contrary, he knew the estate agents concerned. It would have been very easy for him to establish properly whether the Claimant was in fact working for this estate agent. What he decided to do was to recycle her old Linked-In page to fuel a bogus argument that she was still working for them. I reject this position on behalf of the Respondent. That does not generate a good reason to withhold statutory maternity pay.
9. A third reason has been put forward today. There was reference to it in Mr Nightingale's witness statement. There was an assertion that the Claimant

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was being investigated by the DWP in respect of her benefits claim. It is unclear what the DWP might be investigating her for in respect of a statutory maternity pay claim. This has been asserted by the Respondent with absolutely no written corroboration whatsoever, and the Claimant tells me and I accept that she knew nothing about it at all, and if she was being investigated by DWP she would be alerted to that by them.

10. It seems to me, on the balance of probability, that the Respondent has put forward three bogus reasons for withholding statutory maternity pay. The Respondent bullied the Claimant by withholding statutory maternity pay. Its motives are not clear to me. The effect is.
11. In terms of the legislation being paid maternity pay is connected to being on maternity leave and I find on the balance of probability that there is a prima facie case that the Respondent was in breach of Section 18(2) and (4) of the Equality Act 2010.

18 Pregnancy and maternity discrimination: work cases

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

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

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

- (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
- (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

- (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 in 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 in subsection (3) or (4).
12. By subsection (2) a person discriminates against a woman if that person treats her unfavourably because of the pregnancy in the protected period of pregnancy. By subsection (4) a person discriminates against a woman if that person treats her unfavourably because she is exercising the right to ordinary or additional maternity leave. Receiving statutory maternity pay is inextricably connected to pregnancy during the protected period and exercising the right to ordinary or additional maternity leave. Deliberately withholding her statutory maternity pay is unfavourable treatment and it is inextricably linked to the pregnancy in the protected period and the exercise of the right to ordinary or additional maternity leave. It is unfavourable treatment because of pregnancy and because the Claimant was exercising ordinary or additional maternity leave.
13. The way burden of proof works in discrimination cases is defined by Section 136 of the Equality Act 2010. By Section 136 (2) if there are facts from which the court could decide in the absence of any other explanation that a person contravened the provision concerned the court must hold that the contravention occurred. However, by sub section (3), sub section (2) does not apply if the employer shows that the employer did not contravene the provision. There is plainly a prima facie case for the reasons set out above. The burden transfers to the Respondent. They put forward three bogus reasons for withholding the statutory maternity pay. They do not therefore discharge the burden to show that discrimination played no role whatsoever.
14. The Claimant has told me in her admittedly very brief statement for today contained in an email dated 10 June 2022 that she felt bullied by the position of the Respondent in this matter. I understand why she says that.
15. Mr Mukulu's primary case was there was no liability. In the alternative, he submits that the amount for injury to feelings must be the lowest commonly recognised under the Vento guidelines. He submits £500 is the correct figure. The Claimant has not researched how much she should claim. She will leave it to my discretion. I have no doubt that for the period the pay was withheld she suffered distress.
16. Originally the Respondent paid properly and ultimately after a year's delay it paid the bulk of what it owed. That will contain the amount of injury to feelings that the Claimant suffered.
17. The lower bracket of Vento is quite broad. I take into account those two mitigating features but nonetheless accept what the Claimant says about having been bullied. There should be some correspondence between the amount withheld at the time (not the continued shortfall) and injury to feelings; at least that is one way of looking at it. I round that up to a figure of £3,000, which must be paid by the Respondent within fourteen days.

18. In short, the Respondent did discriminate against the Claimant in breach of s.18 of the Equality Act 2010 by withholding her statutory maternity pay for November 2019 to April 2020 until payment in November 2020.
19. The Respondent must pay to the Claimant £3,000 compensation for injury to feelings within 14 days.

Employment Judge Smail
Date: 28 July 2022

REASONS SENT TO THE PARTIES ON
04 August 2022 by Miss J Hopes

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