EMPLOYMENT TRIBUNALS

Claimant: Ms D Lima Morocho

Respondent: Ballymore Asset Management Limited

Heard at: **London South Employment Tribunal** **On:** **17 June 2022**

Before: **Employment Judge Ferguson**

Representation
Claimant: In person
Respondent: Mr T Fuller (Legal Executive)

JUDGMENT having been sent to the parties on ***21/6/22*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

BACKGROUND

1. By a claim form presented on 21 July 2021, following a period of early conciliation from 23 April 2021 to 2 June 2021 the Claimant brought complaints of pregnancy and sex discrimination. This Preliminary Hearing was listed to determine:

   1.1. Whether the Tribunal has jurisdiction to hear the claim or any part of it in view of the applicable time limits;

   1.2. Whether the claim or any part of it should be struck out on the grounds that it has no reasonable prospect of success;

   1.3. Whether the claimant should be required to pay a deposit as a condition of being allowed to pursue any allegation in the claim.

2. The Claimant has now clarified the claim as follows.

2.1. The Claimant commenced employment with the respondent on 12 January 2019. She was employed as a housekeeper at a property called Embassy Gardens in Nine Elms, London. During the Covid-19 pandemic from March 2020 the claimant says it was very difficult for her to attend work because she had a child who was 6 years old at the time and she needed to be at home to look after him. She was furloughed until the end of May 2020. Then when she was required to return to work in or around June 2020 she says the respondent did not make any allowances for her childcare responsibilities and she had to take annual leave in order to look after her son. She was also off sick at various times during 2020.

2.2. The respondent commenced disciplinary proceedings against the claimant in December 2020 for carrying out other work while off sick and working for a resident of Embassy Gardens without the respondent's consent. A disciplinary hearing was scheduled on 2 January 2021. This was rescheduled a number of times and was eventually due to take place on 20 January 2021. The claimant did not attend and the meeting took place in her absence.

2.3. At 5.38pm on 20 January the claimant emailed the respondent to say she had been in hospital all day due to "pains in the belly and a lot of bleeding and pain in the body". On 25 January 2021 the claimant emailed again asking for the meeting to be rescheduled for 27 January. On 26 January the respondent sent the claimant by email a letter informing her that the outcome of the disciplinary hearing was summary dismissal. All of the disciplinary allegations were found to be substantiated. The claimant says that on receipt of this email she experienced further pain and attended the hospital again, on 26 January 2021. On this occasion she found out that she was pregnant and it was suspected to be an ectopic pregnancy.

2.4. On 27 January 2021 the claimant emailed the respondent to appeal the decision to dismiss. She informed the respondent that she was pregnant and attached medical evidence. An appeal hearing took place on 15 February 2021. One of the grounds of appeal was that the disciplinary hearing took place in the claimant's absence and the respondent did not consider the valid reasons the claimant had for not attending the meetings. The appeal outcome was sent on 12 March 2021. All grounds of appeal, including about the disciplinary hearing taking place in the claimant's absence, were rejected.

2.5. The claimant alleges indirect sex discrimination in relation to the lack of any support for those with childcare responsibilities during the lockdowns. She also complains of pregnancy discrimination in relation to the disciplinary hearing proceeding in her absence.

3. The indirect sex discrimination complaint is made on the basis that the Respondent had the following PCP: "The Respondent had no (or no adequate) policy and/or rules regarding support with childcare during the pandemic and/or long-term events outside the employees' control". The Claimant says that this put women at a particular disadvantage because they were more likely to have childcare responsibilities and it was difficult for those with young children to attend work during the lockdowns. The Claimant says she was put at that disadvantage and had to use up her annual leave because she was unable to

attend work. It also put her (and was more likely to put women in general) at a particular disadvantage when the Respondent commenced disciplinary proceedings against her in December 2020 because she was unable to attend disciplinary meetings partly for childcare reasons.

4. As regards the pregnancy discrimination complaint under s.18 of the Equality Act 2020 the Claimant complains of the following:

   4.1. The disciplinary hearing being held in her absence;

   4.2. The decision to dismiss the Claimant without her attending a disciplinary hearing;

   4.3. The Respondent's failure or refusal to reschedule the disciplinary hearing when informed of her hospital attendance that day;

   4.4. The Respondent's decision to reject her appeal despite being informed that the reason she was unable to attend the disciplinary hearing on 20 January was due to pregnancy-related illness.

5. The Claimant says that the first three of those were unfavourable treatment because of pregnancy-related illness. She says that (d) was unfavourable treatment because of pregnancy or pregnancy-related illness.

6. The Claimant says she knew nothing of the time limits for bringing a claim in the Tribunal. She was a member of the union and she relied entirely on them. They submitted the claim form on her behalf. The Cleaners and Allied Independent Workers Union ("CAIWU") are named as the Claimant's representatives on the claim form and were on the record as her representatives until shortly before this Preliminary Hearing.

THE LAW

7. Section 123 of the Equality Act 2010 provides, so far as relevant:

> **123 Time limits**
>
> (1) Subject to sections 140A and section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (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;
>
> …

8. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123 (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

9. The Tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Incorrect advice or an error by an advisor may lead a Tribunal to conclude that it is just and equitable to extend the time limit (see e.g. Hawkins v Ball and anor 1996 IRLR 258, EAT).

10. Rule 37 of the Employment Tribunals Rules of Procedure states:

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> > (a) That it is scandalous or vexatious or has no reasonable prospect of success;
> > …

11. In Mechkarov v Citibank NA [2016] ICR 1121, the Employment Appeal Tribunal confirmed the approach to be taken in respect of striking out discrimination complaints was: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the C's case must ordinarily be taken at its highest; (4) if the C's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) an ET should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

12. Rule 39 provides:

> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

CONCLUSIONS

13. The complaint of indirect discrimination is on its face out of time. The PCP can only have been applied to the Claimant while she was employed. Her employment ended on 26 January 2021 so the ordinary time limit expired on 25 April 2021. Early conciliation commenced on 23 April 2021 and ended on 2 June 2021 so the extended time limit was 2 July 2021. The claim form was not presented until 21 July 2021, 19 days out of time.

14. The length of the delay, while not insignificant, is not of the order that it is likely to cause an employer real difficulties in responding to or defending a claim of this kind.

15. The reason for the delay is not fully known because the Claimant is no longer represented by the CAIWU and they have not provided an explanation for the late presentation of the claim. I accept, however, that whatever the reason for the delay it was not the Claimant's fault. She had no knowledge of the time limits and English is not her first language. She relied entirely on the union, who held themselves out as knowledgeable about employment law. I accept her evidence that there was no discussion of the time limits; she simply relied on the union.

16. In my view it cannot be said that the Claimant's reliance on the union was unreasonable. In those circumstances it would not be fair to visit their error on her (see by analogy Benjamin-Cole v Great Ormond Street Hospital for Sick Children NHS Trust EAT 0356/09).

17. Weighing up the relative prejudice to the parties I consider the prejudice to the Claimant in dismissing the claim on the basis it is out of time would be far greater than the prejudice to the Respondent in extending the time limit. The Respondent defends the claim and will have an opportunity to do so at a final hearing. There is no suggestion that the delay of 19 days has caused it any difficulty.

18. I therefore consider it just and equitable to extend the time limit so that the Tribunal has jurisdiction to consider the indirect discrimination complaint.

19. The Respondent did not contend that the indirect discrimination complaint should be struck out on the basis that it has no reasonable prospect of success or that a deposit order should be made in respect of it.

20. As for the pregnancy discrimination claim, there is no dispute that the last act complained of, the rejection of the appeal, is in time, but the Respondent argues that it has no, or alternatively little, reasonable prospect of success because the Claimant only contacted the Respondent about her hospital attendance after the hearing had concluded in the Claimant's absence and even the Claimant did not know she was pregnant until after she had been dismissed. In those circumstances none of the acts of alleged unfavourable treatment could have been because of the Claimant's pregnancy or pregnancy-related illness.

21. I accept that the Claimant may have a difficult task in proving that the reason for the treatment complained of was the pregnancy or the pregnancy-related illness. The focus of the Tribunal will be on the mental processes of the dismissing officer, any other staff involved in the decision whether to reschedule the hearing, and the appeal officer. The Claimant will need to show that a significant reason for their decision or decisions was the fact that she was pregnant or the fact that she had a pregnancy-related illness. The fact that her attendance at hospital for a pregnancy-related illness was the background to her non-attendance at the disciplinary hearing will not be sufficient. In proving what was in the mind of those people, the Claimant will need to prove that they at least knew of the illness she now says was pregnancy-related.

22. Given that the Claimant did not inform the Respondent of her hospital attendance until her email of 5.38pm on 20 January 2021, anything that

happened before then cannot have constituted discrimination under s.18. As for the period between that email and the Claimant informing the Respondent of her pregnancy on 27 January 2021, there may be a legal issue at the final hearing as to whether knowledge of the pregnancy itself, or that the illness was pregnancy-related, is required for a claim under s.18(2)(b). I do not consider it necessary or appropriate to determine that legal issue at this Preliminary Hearing, in view of my decision on the other aspects of the claim. For the period after 27 January 2021, there is no dispute that the Respondent knew of the pregnancy, so it will be a matter for evidence whether the pregnancy itself or the Claimant's attendance at hospital on 20 January 2021 due to pregnancy-related illness were reasons for the Respondent rejecting the appeal. The Respondent's case is that neither had any influence on the decision because the appeal officer was simply reviewing the decision to dismiss. Mr Fuller accepted, however, that the appeal officer would have had the power to reinstate the Claimant in order to enable her to attend a rescheduled disciplinary hearing. At this stage I have to take the Claimant's case at its highest and she claims that the rejection of her appeal was because of her pregnancy or pregnancy-related illness. While there would appear to be evidential challenges, this is a matter for the Tribunal to decide at the final hearing after hearing the evidence, including from the appeal officer. I cannot say that the Tribunal would be bound to accept the Respondent's case that so that the claim has little or no reasonable prospect of success.

23. I therefore refuse the application to strike out the complaint or for a deposit order to be made in respect of it.

Employment Judge Ferguson

Date: 24 June 2022