EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110323/2021

Held via Cloud Video Platform (CVP) on 21 June, 17 August 2022

Employment Judge J Hendry

Members Z.Van Zwanenberg and R. Henderson

Miss Siobhan Black	**Claimant** **Represented by:** **Mr A Watt - Solicitor**
Ms Evelyn Drain t/a Pat Drain Barbers	**Respondent** **Represented by:** **Mr P Hannon - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claim is well founded and that the respondent shall pay to the claimant the sum of Seven Thousand Five Hundred pounds (£7500) as injury to her feelings.

REASONS

1. The claimant in her ET1 sought a finding that she had been discriminated against on the grounds of her pregnancy in terms of section 18 of the Equality Act 2021. The respondent resisted the claim, arguing that the claimant had been made redundant for business reasons unconnected with the claimant's pregnancy.

2. The issues for the Tribunal to consider were set out by Judge Eccles in her note dated 4 November 2021 as being:

    - Was the claimant dismissed by the respondent because of her pregnancy amounting to discrimination in terms of section 18 of the Equality Act?

- What compensation should be awarded to the claimant including any injury to feelings?

Evidence

3. The Tribunal heard evidence from the claimant on her own behalf. It also heard evidence from the respondent, Ms Evelyn Drain, and from her accountant Mr Peter Deans. The Tribunal had reference to the Joint Index of Documents lodged by parties.

Facts

4. The claimant began work with the respondent's business on 23 October 2019. Her employment ended when she was dismissed on 12 May 2021.

5. Latterly, the claimant had agreed to work 16 hours per week. She was paid £8.91 per hour.

6. The claimant is a qualified hairdresser and barber. She has a number of years' experience. She joined the respondents as a barber.

7. The respondent's business is owned and managed by Ms Drain. Ms Drain is not a barber and does not work in the premises day to day. The business had belonged to her father. Although the business historically was not very profitable, she wanted to continue it in memory of her late father and to keep employment for the employees, one of whom, the manageress Sharell, worked there for many years.

8. In 2020, the claimant became pregnant with her first child. Ms Drain contacted the claimant and at that point tried to terminate her employment. The claimant took advice from her husband about her rights during pregnancy. She reminded Ms Drain about the claimant's employment protections and she dropped the proposal.

9. The claimant left on maternity leave. She had a son on 12 July 2020. She returned in early April 2021.

10. The COVID-19 pandemic adversely impacted on the respondent's business. However, just prior to the pandemic, in about February or March 2020, the business was quiet and becoming unprofitable and Mrs Drain decided to reduce staff hours. An agreed reduction of hours took place in the week leading up to the lockdown on 23 March 2020. The claimant agreed to reduced hours. She did so because she was aware the business was struggling. She was told that all the employees had agreed to be flexible over their hours and reduce them.

11. The claimant was furloughed from 23 March 2020 to 11 July 2020.

12. From 13 July 2020 until 10 April 2021, the claimant was absent from work on maternity leave.

13. The business reopened on 13 July 2020 until a further lockdown on 21 November 2020. It then reopened on 5 April 2021.

14. Ms Drain annually had the accounts of the business prepared. She spoke to her accountant who emphasised the need to cut costs. He suggested she contact ACAS if she were considering redundancies.

15. The claimant met Ms Drain on or about 27 March 2021 to discuss her return from maternity leave. It was agreed that the claimant would return on 12 April 2021 to 16 hours per week. The claimant had indicated she wanted to spend time with her new baby but to continue working. The claimant was at this point claiming Universal Credit and was entitled to work up to 16 hours per week without impacting on the benefit. She was advised that the other staff had agreed to work flexibly depending on the available work in order to safeguard everyone's employment.

16. The claimant discovered that she was pregnant and on 7 April 2021, the claimant advised Ms Drain of this. She told her that she would return as planned on 11 April 2021.

17. Following the latest lockdown, the salon was reasonably busy for the first week but thereafter business was poor. The claimant was asked to work alongside the manager Sharell. Sharell had her own client base and it was

agreed that the claimant would pick up any clients her colleague could not deal with. It was also hoped to introduce the claimant to these clients and develop a relationship with them. The barbershop had two chairs for haircutting and only two staff members worked at any one time. There were four staff members in total.

18. On 11 April the claimant was asked to stay behind that evening and speak to Ms Drain. Ms Drain advised the claimant that she was being paid off. The claimant asked if anyone else was being paid off and she was told no. In the event, no other staff members were paid off or had their hours reduced.

19. The claimant was distressed and upset following the termination of employment. She had separated from her partner and was a single mother. She was anxious as to how she could afford to support her family. She was stressed and she believed that the stress caused her to have an epileptic fit. She contacted her GP who increased her medication. She continues on the increased dose of medication. She took additional medication prior to the hearing because she felt under stress. The claimant has not worked since her redundancy.

Witnesses

20. The claimant gave evidence and in the course of that evidence, it became apparent that she was reading. It transpired that she had prepared an *aide memoire* which the respondent's solicitor had been unaware of. Mr Watt apologised and indicated that he thought he had mentioned this to the Tribunal. There had been a period when the CVP system was not operating properly and the lawyer muted. The Tribunal considered that this might have been when this was aid. In any event the Tribunal did not believe the matter was deliberate.

21. The Tribunal arranged for a copy of the aide memoire to be given to the respondent's solicitor prior to cross examination to allow him to check what it said. No issue appeared to arise from it's use. The Tribunal found the claimant to be generally credible and reliable. Mr Hannon attacked her credibility on a number of grounds for example that she had said she 12 years'

experience before joining the respondent but the real period was less than this. What the claimant had meant by ‘‘experience’’ was not explored at the time but it was clear that she did not have 12 years’ full time experience in hairdressing before she began work with the respondent.

22. We did not regard this submission as assisting the respondent. The claimant appeared to mean general experience in the industry including her time at college when she was doing work experience. We accept that even if she had overestimated the period, it had little or no bearing on the issues we had to address. We did note that at some points, she was slightly reluctant to address Mr Hannon’s questions directly but this did not give us the impression she was deliberately trying to mislead the Tribunal or prevaricating from answering. The claimant appeared to us to be a generally credible and reliable witness.

23. Ms Drain also had a reluctance to address questions put to her by the claimant’s solicitor head on and she was often keen to get her side of events across and often didn’t listen closely to the questions put to her. We found her generally credible and reliable except when it came to some crucial matters, essentially why she decided when she did, to make the claimant redundant and the reason for that redundancy.

24. Mr Dean is an experienced accountant with a long association with the business. His evidence was really concerned with the lack of profitability and his regular exhortations to Ms Drain to cut costs. He would regularly give this advice in the rum up to the end of each financial year when accounts were being prepared in about January. His position was that he believed that there was a genuine redundancy situation. He seems to have been aware that she was considering making a staff member redundant and suggested she contact ACAS for advice. We found the witness generally credible and reliable.

Submissions

25. Mr Watt’s submissions were short. He invited us to find the claimant a credible witness and that the events were persuasive that the claimant had been made

redundant because she had notified the respondent of her pregnancy. He pointed out that there had been no redundancy process as might have been expected and no consultation. The claimant was simply chosen for dismissal. The important circumstance was that this occurred very shortly after she had announced that she was pregnant.

26. Mr Hannon provided the Tribunal with detailed submissions which we found helpful. He took us through the burden of proof in some detail referring to various cases principally the cases of **Madarassy v Nomura** and **Igen v Wong**. His position was that the Tribunal should accept Ms Drain's evidence as Mr Deans was a credible witness. The business was doing badly. It did not pick up after lockdown which coincided with the claimant's return to work. Mr Deans had been speaking to her accountant for many years about cutting costs particularly wage costs. The business was as he described it financially precarious.

27. He submitted that the first question for the Tribunal was whether or not the claimant had met the first part of the test namely whether she had demonstrated facts from which the Tribunal could infer discrimination. The claimant in his submission failed at this hurdle. Although the respondent's actions might be regarded as being unreasonable, there was no taint of sex discrimination. It was put to Mr Hannon by the Tribunal what his position was in relation to the conjunction of events and their possible relevance. He responded that too much should not be read into this. The claimant accepted that Ms Drain was happy for her pregnancy on both occasions. She had accepted that his client had been a good employer and she had enjoyed working there. It was the economic conditions which drove Ms Drain to dismiss.

28. In Mr Hannon's submission, the claimant did not get to the second part of the test. Even if she did, the Tribunal should accept the evidence of Ms Drain and Mr Deans that the termination was in no way tainted by discrimination.

29. He observed that there had been no evidence led in relation to the holiday pay claim nor any submissions addressed towards that and it should therefore

be dismissed. His client's position was any accrued holiday pay had been properly paid.

Discussion and Decision

30. The claimant as a pregnant women at the time of her dismissal had various legal protections. Neither side argued that if the claimant had been dismissed because of her pregnancy that would have been lawful and not amounted to sex discrimination or a breach of the ''MAPLE'' Regulations.

31. Paragraph 9 provides as follows:

Protection from detriment

19.—(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee—

(a) is pregnant;

32. The Tribunal bore in mind the guidance given in the case of **O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School** 1996 IRLR 372 EAT the EAT that, in relation to a complaint of pregnancy discrimination:

"The critical question is whether, on an objective consideration of all the surrounding circumstances, the dismissal or other treatment complained of is on the grounds of pregnancy or on some other ground. This must be determined by an objective test of causal connection. The event or factor alleged to be causative of the matter need not be the only or even the main cause of the result complained of. It is enough if it is an effective cause"

33. Section 136 of the Equality Act 2010 deals with the approach to be adopted by Tribunals in relation to the burden of proof 136 (1) This section applies to any proceedings relating to a contravention of this Act. (2) 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.

34. The approach to be adopted by a Tribunal to the application of the burden of proof is set out in some detail in **Igen v Wong** [2005] IRLR 259 CA:

> *"(1) Pursuant to section 63A of the SDA , it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
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> *(2) If the claimant does not prove such facts he or she will fail. (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*
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> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
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> *(5) It is important to note the word "could" in s. 63A(2) . At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA .

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA . This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the

tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

35. It is not sufficient to establish a primary case for a claimant simply to show less favourable or unfavourable treatment, there must be "something more" enabling a Tribunal to find that the protected characteristic could be the cause of the treatment (**Madarassy v Nomura** [2007] IRLR 246 CA). That element of something more may be found in matters such as the making of discriminatory comments, in a breach of a code of practice, in evasiveness or failure to provide information and so forth.

36. The background to this case is an unfortunate one and the Tribunal has some sympathy with the respondent who has kept the business going through very difficult times. We accepted that she had a good relationship with her staff including the claimant. There was in this no doubt in our minds that there was a difficult financial background and that Mr Deans had over the years annually pointed out to her the slow decline of the business and it's marginal profitability.

37. Although it was argued that Ms Deans was happy at the claimant's first pregnancy it seems that this was the first occasion that she broached the claimant leaving. It appears that the suggestion was dropped when the claimant, after speaking to her husband, reminded Mrs Deans that she had various legal protections as a pregnant employee. Thereafter on a couple of occasions hours were cut by agreement and consultation with all the staff. The claimant was quite willing to cut her hours and agreed to these proposals. The second feature that then stood out was Ms Deans failure to consult staff on the redundancy she sought to make. She did not ask if anyone would accept voluntary redundancy or a further reduction in hours. It seemed strange that she had come to the view that the claimant could assist the busiest hairdresser, the manager with overspill clients and get to know them in case the manager was ill or absent and gave this re-organisation very little time, a matter of weeks, to bear fruit.

38. The final element that the Tribunal considered significant was the timing of the redundancy essentially almost as soon as she had returned back at work after having notified Ms Deans of her new pregnancy. The timing and conjunction of events coupled with the past actions of Ms Deans when the claimant first became pregnant coupled with lack of wider consultation was sufficient in our view to allow us to draw inferences of discrimination.

39. We turned to consider carefully the respondent's position. She could get some support from the evidence of Mr Deans but in essence he had been giving her the same advice, cut costs, for some years. We regret that in relation to the timing and lack of consultation we found Ms Deans to not be a persuasive witness. She was unable to prove to us on the balance of probabilities that the dismissal ''*was in no sense whatsoever on the grounds"* of the claimant's newly announced pregnancy. In these circumstances we find the claim well founded.

40. We were left with the issue of the act of discrimination alone to consider the other claims for unfair dismissal and holiday pay having fallen by the wayside. The claimant had in any event not demonstrated to us that she had tried to mitigate her loss by finding alternative employment. The question was what sum the claimant as entitled to receive for injury to feelings. We had regard to the applicable Presidential Guidance which set the upper lower band at £9100. We accepted that the loss of her job affected her greatly particularly given the fact she had just discovered she was pregnant. She had received no warning that this was to happen and had no time to adjust or think about the situation she faced. She was upset and anxious as to how she could support her children.

41. We accepted that the stress of the situation had an impact on her epilepsy condition leading to an increased dose of medication being prescribed. We noted that the respondent's solicitor has submitted that we should disregard this evidence. It was not objected to at the time and we are at liberty to consider it. We accept that the claimant could have produced some medical evidence as corroboration but the evidence she gave on this matter seemed spontaneous and wholly credible. It would be an unusual allegation to make

unless there was a basis for it. She explained that her condition had been kept under control for some years and that it was the stress surrounding the dismissal and the dismissal itself that triggered a fit.

42. We had regard to the Vento scales which have been uprated throughout the years. We treated this as a one off act of discrimination and that the lower scale was appropriate but that this was a situation where the sum awarded should be in the upper part of that scale. We concluded that £7500 was appropriate.

Employment Judge: James Hendry
Date of Judgment: 31 August 2022
Entered in register: 12 September 2022
and copied to parties