



EMPLOYMENT TRIBUNALS

Claimant: Mrs N Oliveria

Respondent: 1 Affinity Finance (in administration)
2 Mr Ian Cunningham

Heard at: Cardiff **On:** 28 and 29 November 2022

Before: Employment Judge Ward
Tribunal Member Horne
Tribunal Member Owen

Representation:

Claimant: In person

Respondents: Not in attendance

JUDGMENT

1. The claimant was automatically unfairly dismissed by R1.
2. The claimant was directly discriminated against and harassed on 8 April 2021 by R2.
3. The claimant was subject to pregnancy discrimination by R1 and R2
4. The claimant was not victimised and that part of the claim is dismissed.

REASONS

The issues and applicable law

1. The claimant presented a claim to the Employment Tribunal for race discrimination, pregnancy discrimination and automatic unfair dismissal on the grounds of pregnancy. Early conciliation started on 11 August 2021 and ended on 7 September 2021. The claim form was presented on 8 October 2021.

2. The applicable law is s99 Employment Rights Act 1996 which states that an employee who is dismissed shall be regarded as unfairly dismissed if the reason for dismissal is pregnancy.
3. The Equality Act 2010 states at section 18 that a person discriminates against a woman if in the protected period they treat her less favourably because of pregnancy. Further section 13 states a person is directly discriminated against, where, because of a protected characteristic (in this case race) they are treated less favourably than others. Section 26 states that someone is harassed where a person engages in unwanted conduct relevant to a protected characteristic (in this case race) and that conduct has the purpose or effect of violating a person dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Victimisation under section 27 states a person is victimised if they are subject to a detriment because they do a protected act (in this case making an allegation that someone has contravened the Equality Act 2010). S108 states that post employment discrimination is prohibited where the discrimination arises out of and is closely connected to the employment relationship, where if it occurred during employment it would constitute discrimination.
4. A case management hearing was held on 5 May 2022 identifying the issues which was the basis upon which the Tribunal addressed the claim as set out below.

Unfair dismissal R1 only

1.1 Was the Claimant dismissed?

1.2 Was the reason or principal reason for dismissal that the Claimant was pregnant? The Claimant does not require two years service to bring such a claim. If so, the Claimant will be regarded as unfairly dismissed.

Remedy for unfair dismissal

2.1 Does the Claimant wish to be reinstated to their previous employment?

2.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide: What financial losses has the dismissal caused the Claimant? Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the Claimant be compensated? Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the Claimants compensation be reduced? By how much? Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%? If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the Claimants compensatory award? By what proportion? Does the statutory cap of fifty-two weeks apply? What basic award is payable to the Claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Direct race discrimination (Equality Act 2010 section 13) both Rs

3.1 The Claimant is half Egyptian and half African.

3.2 Did the Respondents do the following things:

On 8 April 2021, the Second Respondent said to the Claimant that she was ³like a talented footballer whose head is not in the game, you don't know what hard work is...African kids know what hard work is.'

3.3 Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who they say was treated better than they were.

3.4 If so, was it because of her race?

3.5 Did the Respondent's treatment amount to a detriment?

Pregnancy and Maternity Discrimination (Equality Act 2010 section 18) both R's (R2 only in respect of his acts)

4.1 Did the Respondents treat the Claimant unfavourably by doing the following things:

4.1.1 On 3 June 2021, the Second Respondent, upon being told that the Claimant was pregnant, asked the Claimant if she had had her probation review?

4.1.2 Members of the senior team only spoke to the Claimant if necessary after she disclosed her pregnancy to the Second Respondent;

4.1.3 On 9 June 2021, the Claimant was told that her probation review meeting would be conducted differently to other employees and her continued employment would be subject to board approval;

4.1.4 On 14 June 2021, the Second Respondent questioned the Claimant's work and work load during a meeting of senior staff;

4.1.5 On 14 June 2021, the Claimant had a positive meeting with Ms Burgess and was given the impression the probation review meeting would be positive;

4.1.6 On 18 June 2021, the Claimant attended the probation review meeting and was told she had failed and was dismissed;

4.1.7 On 18 June 2021, the Claimant's laptop was shut down remotely and she was logged out of the systems/accounts;

4.1.8 On 18 June 2021, the Claimant received her probationary outcome letter without the reviews collated as she asserts was promised in the probation review meeting;

4.1.9 The Claimant's attitude and performance were only called into question once she disclosed her pregnancy;

4.1.10 On 23 July 2021, the First Respondent wrote to the Claimant's solicitor asking inappropriate, insensitive and discriminatory questions. The Claimant in particular complains of the following question "why didn't you announce your pregnancy at the time of your interview or earlier, given that you knew you were pregnant at the time of your employment (you were circa 3 months pregnant during the interview)?";

4.1.11 In a letter dated 16 August 2021, the Claimant was informed that her grievance had not been upheld;

4.1.12 In a letter dated 30 August 2021, the Claimant was informed that the grievance appeal was not upheld without any detail provided as to why not;

4.1.13 The grievance process was slow.

4.2 Did the unfavourable treatment take place in a protected period? As the Claimant was pregnant, this is during the protected period.

4.3 Was the unfavourable treatment because of the pregnancy?

4.4 Was the unfavourable treatment because the Claimant was seeking to exercise, the right to ordinary or additional maternity leave?

Harassment related to race (Equality Act 2010 section 26) both R's

5.1 Did the Respondents do the following things:

On 8 April 2021, the Second Respondent said to the Claimant that she was 'like a talented footballer whose head is not in the game, you don't know what hard work is...African kids know what hard work is.'

5.2 If so, was that unwanted conduct?

5.3 Did it relate to race?

5.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27) R1 only

6.1 Did the Claimant do a protected act as follows:

On 8 April 2021, the Second Respondent said to the Claimant that she was 'like a talented footballer whose head is not in the game, you don't know what hard work is...African kids know what hard work is.' The Claimant raised a concern about this to Ms Burgess on or around 8 April 2021.

6.2 Did the Respondent fail to deal appropriately with the concern raised to Ms Burgess by the Claimant?

6.3 By doing so, did it subject the Claimant to detriment?

6.4 If so, was it because the Claimant did a protected act?

6.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

Remedy for discrimination

7.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the Claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the Respondent or the Claimant unreasonably fail to comply with it by [specify breach]?

7.10 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

The evidence

5. The Tribunal heard evidence from the claimant and her former manager Mr Ellis. A bundle of 218 pages was submitted. There was no evidence from either Respondent, neither whom had submitted a defence. The first respondent (R1) went into administration on 4 November 2021 and the administrator has given consent for the claim to proceed. There has been no

communication from the second respondent (R2) who was served the claim at his business and home address.

The relevant facts

6. The Claimant was employed by R1, a financial company lending money to law firms, as a client relationship manager, from 22 March 2021 to 18 June 2021. R2 is the Chief Executive Officer of R1. The Claimant's employment was subject to a three month probationary period.
7. On 8 April 2021, R2 said to the Claimant that she was "...like a talented footballer whose head is not in the game, you don't know what hard work is...African kids know what hard work is."
8. This evidence was unchallenged by the Respondent's. The Tribunal found the Claimant on giving evidence to be genuine and consistent. The Claimant explained this conversation had arisen due to her not returning calls and emails outside of normal working hours. The Claimant was offended by the comment and raised it with the Director responsible for HR (though this Director later denied this), who reassured her that it would be dealt with. However, on enquiring a month later it was clear that although the Director said it was "dealt with" the instruction was to forget it and move on given "the amount of work that there was to do."
9. On 28 May 2021 the Claimant's former line manager, just before leaving the company, completed mid year reports for all his employees and sent them to his replacement Mr Wright. The report for the Claimant whom he had worked with since she commenced employment recommended continued employment at her probationary review based on her performance to date.
10. On 3 June the Claimant called R2 to inform him she was pregnant. She was able to take a note of the call that was in the bundle at p198. In reply to this information, he made no reference to this significant life event but simply asked about her probationary review and if it has been "done yet". The Claimant advised that it was next week to which he replied "grand, grand." The Claimant was then worried and intimidated by R2 and felt extremely apprehensive about what might happen.
11. What she found was that she was ostracised by senior staff who had previously called and emailed her constantly.
12. She was advised by her new line manager that her probation review had changed and that Board approval would be required. In contrast to Mr Ellis's experience which was he approved probationary reviews after consultation with HR.

13. She was also openly questioned on 14 June 2021 on a teams call in front of colleagues about her poor performance by R2 suggesting that her work was poor.
14. On 18 June 2021 the Claimants probationary review took place and she was dismissed for an unsatisfactory outcome. The letter of dismissal (p184 of the bundle) gives no reason but at the meeting the reasons given were “not being a good fit.” When she asked for evidence, she was told they would be provided but in fact they never materialised. The Claimant was deleted from the IT system that day.
15. The Claimant submitted a grievance on the 18 June 2021 which was not upheld in part or full, with her appeal rejected. During the investigation 21 written questions were sent to her on 23 June, one question asked “...why didn't you announce your pregnancy at the time of your interview or earlier, given that you knew you were pregnant before obtaining employment...you were circa 3 months pregnant during the interview...why did you provide notice to your employer on 3 June which was outside if the statutory notice period when you had known you were pregnant at the start of your employment?”

Conclusions

Automatic unfair dismissal

16. The Tribunal finds that the Claimant was unfairly dismissed on 18 June 2021 because the reason for her dismissal was her pregnancy. The reason for this conclusion are as follows; the probationary review procedure changed to be arguably more difficult, three weeks prior to the decision, her line manager had reviewed her performance and recommended that she passed her probation. There was no evidence given by R1 of what performance was unsatisfactory and the reaction of R2 when advised of the pregnancy which was to immediately check the status of the probationary review.

Direct Race Discrimination

17. The Claimant is mixed race, half Egyptian and half African and had advised the R1 of this. R2 made the statement on 8 April and this was less favourable treatment compared to her hypothetical comparator who is not of mixed race. There was no reason other than the Claimants race for R2 to make this comment To make this statement in the workplace was to the claimants detriment as it was humiliating, shocking and upsetting.

Harrassment

18. For the same reasons we find that the comment also amounted to harassment. It was unwanted conduct which had the effect of creating an intimidating and offensive environment which when reported little was done and the sentiment was to get on with it.

Victimisation

19. The Tribunal did not find that the Claimant was victimised for advising the Director responsible for HR of the 8 April incident. The failure to deal with the complaint may not have been to the claimants satisfaction (as evidenced in her grievance) but if the Director spoke to R2 as the claimant understood, that did not victimise the claimant, the complaint was dealt with informally. What made the situation worse however was the inference from the Director to move on and forget about it, and then deny that the Claimant ever raised the complaint which is what happened in the grievance.

Pregnancy discrimination

20. The finding of facts are that all the incidents set out in the case management hearing happened. The Tribunal found the evidence of the Claimant compelling. As these took place during her pregnancy they occurred during the protected period. The question for the Tribunal was whether the treatment was due to pregnancy and we deal with these each in turn by reference to the claims identified the case management orders in paragraph 4 above;

4.1.1 On 3 June 2021, the Second Respondent, upon being told that the Claimant was pregnant, asked the Claimant if she had had her probation review? This very clearly was asked because the Claimant had just advised that she was pregnant.

4.1.2 Members of the senior team only spoke to the Claimant if necessary after she disclosed her pregnancy to the Second Respondent; This only happened once she had advised of her pregnancy.

4.1.3 On 9 June 2021, the Claimant was told that her probation review meeting would be conducted differently to other employees and her continued employment would be subject to board approval; This was different to other employees and happened only after she informed R2 she was pregnant.

4.1.4 On 14 June 2021, the Second Respondent questioned the Claimant's work and work load during a meeting of senior staff; This was the only occasion this happened, it was after advised she was pregnant and was linked to the ability to not confirm satisfactory completion of the Claimants probation.

4.1.5 On 14 June 2021, the Claimant had a positive meeting with Ms Burgess and was given the impression the probation review meeting would be positive; No evidence was provided on this.

4.1.6 On 18 June 2021, the Claimant attended the probation review meeting and was told she had failed and was dismissed; This was because of her pregnancy, there was no other performance evidence and was contrary to her line managers assessment just three weeks earlier.

4.1.7 On 18 June 2021, the Claimant's laptop was shut down remotely and she was logged out of the systems/accounts; The Tribunal do not find that it occurred because she was pregnant.

4.1.8 On 18 June 2021, the Claimant received her probationary outcome letter without the reviews collated as she asserts was promised in the probation review

meeting; for the reasons given on unfair dismissal the Tribunal finds this was because of pregnancy.

4.1.9 The Claimant's attitude and performance were only called into question once she disclosed her pregnancy; see 4.1.4 above

4.1.10 On 23 July 2021, the First Respondent wrote to the Claimant's solicitor asking inappropriate, insensitive and discriminatory questions. The Claimant in particular complains of the following question "why didn't you announce your pregnancy at the time of your interview or earlier, given that you knew you were pregnant at the time of your employment (you were circa 3 months pregnant during the interview)?" These questions arose and were closely connected to her employment and were only asked because the Claimant was pregnant.

4.1.11 In a letter dated 16 August 2021, the Claimant was informed that her grievance had not been upheld; The grievance outcome arose and was closely connected to her employment and the response given was because she was pregnant.

4.1.12 In a letter dated 30 August 2021, the Claimant was informed that the grievance appeal was not upheld without any detail provided as to why not; The appeal arose and was closely connected to her employment and the response given was because she was pregnant.

4.1.13 The grievance process was slow. The Tribunal do not find that it occurred because she was pregnant.

Compensation

21. It would not be possible to reinstate or re engage the Claimant even if she wished, due to R1 being in administration. There is no basic award due to the Claimants length of service. The compensatory award for automatic unfair dismissal compensates the Claimant from the time of her dismissal until R1 went into administration. This is an unrelated event that occurred which limits the amount recoverable due to the dismissal. The period is 10.2 weeks, no deduction is made for maternity allowance only the one week paid in lieu of notice. This payment is made as a net payment.
22. The actions of both Respondents, directly by R2 where he was the perpetrator and R1 as vicariously liable for the acts of its employees and agents, caused the Claimant distress. She spoke of panic attacks, anxiety and being a shell of herself who is usually resilient and enthusiastic. The incident on 8 April caused her to be so shocked she immediately told her husband and cried. The anxiety caused by her experience on advising of her pregnancy she has had support from a therapist, but the worry stays with her and she experienced the same concerns when her probationary review at her new employment was conducted.
23. The award for injury to feeling has been dealt with separately as there are two causes of action not arising from the same facts.

24. Taking account of the injury suffered by the claimant due to the race discrimination the Tribunal are satisfied that this is a lower Vento band but was aggravated by the complaint being shut down and later denied any awareness of by the Director.
25. The pregnancy discrimination occurred from 3- 18 June though the effects are still present. As the distress relates to a number of complaints it is permissible to take a global approach and award in the middle vento band taking into account the injury suffered. It is not in the Tribunal's jurisdiction to apportion the liability between the respondent's.
26. Interest is awarded on the injury to feelings.

Employment Judge Ward
Dated:29 November 2022

REASONS SENT TO THE PARTIES ON 1 December 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche