



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Holloway
Respondent: The Durdans Stables Ltd

Before: EMPLOYMENT JUDGE CORRIGAN
Ms J Forecast
Mr S Goodden

Representation

Claimant: In person
Respondent: Mr S Cooper, Managing Director

HEARING BY video **On: 22-25 November 2022**

REASONS

For the judgment dated 25 November 2022

Provided at both parties' request

1. The claimant brought claims of unfair dismissal (including automatic unfair dismissal for exercising her right to additional maternity leave) and maternity discrimination.
2. The issues were set out in brief in the Case Management Order sent to the parties on 15 August 2022.
3. In discussion with the parties this was expanded upon and the tribunal drew up a working list of issues, agreed by the parties, as follows:
4. **Unfair dismissal**

- 4.1 Was the claimant dismissed?
- 4.2 Did the respondent fail to allow the claimant to return to the job she was employed to do before her maternity leave (with similar rights as they would have been if she had not been absent and terms and conditions no less favourable than if she had not absent)?
- 4.3 Has the respondent shown that it was not reasonably practicable for the claimant to return to the job she was employed in before her absence?
- 4.4 Did the respondent offer the claimant a job which was suitable and appropriate for her to do in the circumstances?

Alternatively

- 4.5 Did the respondent do the following things:
 - 4.5.1 Delay paying the claimant's wages in June 2020;
 - 4.5.2 Pay wages for June 2020 in two instalments;
 - 4.5.3 Change the pay date from 28th of the month to the 1st of the month without notice;
 - 4.5.4 Record the claimant as a leaver with NOW pensions with the consequence that deductions were made late and employee deductions not made at all;
 - 4.5.5 Say that it was the claimant that had opted out of the pension when that was not correct;
 - 4.5.6 Delay resolving the pension matter until December 2020 or later;
 - 4.5.7 Not allowing the claimant to return from maternity leave on the same days and hours at late notice meaning the claimant had already put childcare in place for her original days;
 - 4.5.8 Refusal to reconsider the days offered when the claimant explained she could not do them.
- 4.6 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
 - 4.6.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 4.6.2 whether it had reasonable and proper cause for doing.
- 4.7 Did that breach the claimant's contractual terms in respect of pay and pay date; pension contributions and/or working days?
- 4.8 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

- 4.9 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 4.10 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 4.11 If the claimant was dismissed, what was the reason or principal reason for dismissal ? Was it because the claimant exercised her right to additional maternity leave?
- 4.12 Was it a potentially fair reason? The respondent relies on some other substantial reason namely reorganisation of the business in order to cover weekends.
- 4.13 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

5. Remedy for unfair dismissal

5.1 The claimant confirmed she did not wish to be re-employed.

5.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

- 5.2.1 What financial losses has the dismissal caused the claimant?
- 5.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 5.2.3 If not, for what period of loss should the claimant be compensated?
- 5.2.4 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?
- 5.2.5 If so, should the claimant's compensation be reduced? By how much?
- 5.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 5.2.7 Did the respondent or the claimant unreasonably fail to comply with it?
- 5.2.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 5.2.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
- 5.2.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 5.2.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

5.3 What basic award is payable to the claimant, if any?

5.4 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?

6 Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

- 6.1 Did the respondent treat the claimant unfavourably by doing the following things:
- 6.1.2 Delay paying the claimant's wages in June 2020;
 - 6.1.3 Pay wages for June 2020 in two instalments;
 - 6.1.4 Change the pay date from 28th of the month to the 1st of the month without notice;
 - 6.1.5 Record the claimant as a leaver with NOW pensions with the consequence that deductions were made late and employee deductions not made at all;
 - 6.1.6 Say that it was the claimant that had opted out of the pension when that was not correct;
 - 6.1.7 Delay resolving the pension matter until December 2020 or later;
 - 6.1.8 Not allowing the claimant to return from maternity leave on the same days and hours at late notice meaning the claimant had already put childcare in place for her original days;
 - 6.1.9 Refusal to reconsider the days offered when the claimant explained she could not do them.

6.2 Did the unfavourable treatment take place in a protected period?

6.3 If not did it implement a decision taken in the protected period?

6.4 Was the unfavourable treatment because of the pregnancy?

6.5 Was the unfavourable treatment because the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to additional maternity leave]?

7 Remedy for discrimination or victimisation

- 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?
- 7.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
 - 7.10.1 By what proportion, up to 25%?
 - 7.10.2 Should interest be awarded? How much?

8 Unlawful deduction of wages/breach of contract

- 8.1 Did the respondent fail to make pension contributions? How much and when?

Hearing

- 9 We heard evidence from the claimant on her own behalf and also from her husband, Mr Ian Holloway and her father, Mr Brian Douglass. We heard evidence from Mr S Cooper, Managing Director, on behalf of the respondent. Where other people who have not given evidence are referred to below they are referred to by job title/role or similar description as the reasons will be published online and available to the public.
- 10 There was a bundle of 97 pages. The respondent also provided further documentation at the Tribunal's request relating to the days staff worked and start/leave dates. The parties also provided further information prior to the remedy state of proceedings.
- 11 The parties made oral submissions.
- 12 Based on the evidence heard and the documents before us we found the following facts.

Facts

- 13 The claimant began her employment in October 2018 as a groom. She worked 21 hours and her days are recorded in the contract as Tuesdays, Thursdays and Saturday mornings. This was in the context the then owner had contacted her

about the fact she was seeking part time work and she took the role because the hours were part time and fitted in perfectly with her family and childcare needs.

- 14 The contract also states that the normal hours of work, currently 21 hours per week (which shall be flexible at the discretion of the Employer) are as required for the proper and efficient performance of the job. The Employer may require overtime to be worked, and it may be requested on demand.
- 15 We find that it was a contractual term that the claimant work on Tuesdays, Thursdays and Saturday mornings and there was no right reserved to the employer to change these unilaterally, albeit that there was flexibility in respect of hours and in particular additional overtime which were covered by a separate clause.
- 16 The contract provides that payment of wages was monthly in arrears, though the normal pay day was 28th of each month. As a consequence and in reliance on this the claimant had financial commitments due on or just after 28th of each month.
- 17 The claimant became pregnant with her second child and this led to her being furloughed at the start of lockdown in March 2020 about three months before her baby was due. She did not return before her maternity leave commenced on 14 June 2020. Just before the maternity leave commenced the respondent was bought from the previous owner by Mr Cooper and other shareholders. The identity of the respondent itself did not change and it was not, as the claimant believed, a TUPE transfer.
- 18 The purchase took place on the 10 June and the claimant received two days' notice of this from the previous owner.
- 19 The first issue that arose was that the claimant and her colleagues were not paid as normal on 28th June. The claimant contacted Mr Cooper the new Managing Director the next day to enquire what would happen given her financial commitments being due. Mr Cooper had been intending to pay staff as normal but then as the sale went through part way through the month there were negotiations with the previous seller about apportioning the salaries of that month and how the payment should be made. We accept that Mr Cooper was anxious they were paid but also felt the matter was not entirely in his hands. In the end he did ensure payment was made, by paying his part by 30 June and the remainder by 5 July which was reclaimed from the seller.
- 20 All employees were affected by this situation but as the claimant was on maternity leave the communication with the claimant was by SMS at her instigation and after the failure to pay on the normal date. She was not warned in advance of a problem. This was particularly distressing for her as her baby was overdue and she was very close to giving birth.
- 21 We accept as she does that the payment difficulties were temporary due to the issues with the sale but the impact on her of the lack of communication about it in advance was significant and her husband became involved. They had the impression that they had to chase her previous employer themselves for the pay for the first part of the month though that had not been Mr Cooper's intention when he explained the issue about the apportionment. During the communication Mr Cooper made reference to the contract saying payment was end of the month.

- 22 The wages were paid at the end of the month again in July. Again the claimant was not informed (apart from the reference to the end of the month referred to above) until she chased the matter at which point she was told the pay date had changed to the end of the month. This was not strictly correct as the business reverted to paying on the 28th once matters settled down.
- 23 These issues prompted the claimant to ask to meet with Mr Cooper. She attended on 6 August 2020 and there was a meeting with Mr Cooper, Mr Cooper's Partner (who was assisting in the running of the Stables) and the Yard Manager (who had been appointed whilst the claimant was on furlough prior to her maternity leave). The claimant was meeting all three of them for the first time and we accept she found the meeting overly formal with the three of them on the opposite side of a table and not friendly. However Mr Cooper did agree to keep her informed and there was a discussion about when she was likely to return and what her days of work had been. The claimant refers to this in her email dated 6 May 2021 and this was not contradicted at the time of that email. In any event Mr Cooper agrees he was aware of what the contract said about the days worked. The claimant said she was likely to take her full entitlement to maternity leave.
- 24 On 20 August 2020 the claimant received a letter from her pension. She no longer has a copy but we infer from the circumstances that this was confirmation of her having been recorded a leaver, as unbeknownst to either the claimant or Mr Cooper she had been processed as a leaver in June 2020. This prompted a message from her to the respondent seeking confirmation that her pension had carried over or whether "something else is happening". She did not explain what the letter said. Mr Cooper replied confirming the pension had carried on as that was his understanding and at that time he had no records or access to the pension data due to administrative issues.
- 25 It was not until November 2020 that the claimant realised from her payslips that deductions for her pension had not been made. The respondent looked into this and the claimant was then informed that she was recorded as a leaver as of 10 June 2020. It is not clear why this had happened or who was responsible. The claimant confirmed she had not requested this and asked that all contributions, both employer and employee, were paid. There was some back and forth but the employer's contributions were brought up to date by February 2021 and eventually the claimant was given the relevant calculation to explain what had been paid. Mr Cooper was informed by his bookkeeper that the claimant was able to make up her own contributions and these were not backdated by the employer. The claimant in her statement said she had no idea how to deal with this and felt that she was considered a nuisance. In oral evidence she said she was not told to do this.
- 26 She says that during the to and fro about her pension she was copied into an email that said "sorry Charlotte is asking questions again" which made her feel a nuisance.
- 27 We find that the respondent did seek to deal with the pension as matters were raised with them and the claimant could have rectified her own contributions herself.
- 28 The claimant was not invited to a Christmas event but we accept the respondent did not hold one as the pandemic restrictions were ongoing. She also said she

was removed from the stable's social media page. We were not shown evidence of this and the respondent says this did not occur. There is insufficient information about this for us to make a finding that it happened (we have not seen a screen shot for example) and there is no evidence that there was a deliberate removal of the claimant from any social media page. There is also no evidence she raised it with the respondent at the time.

- 29 The claimant then arranged a meeting with Mr Cooper to discuss her return which took place on 22 February 2021. Again Mr Cooper, his partner and the yard manager sat across from her in the tea room. She was kept waiting without explanation. We accept that this was because a horse had become loose, which she agrees would be a reasonable explanation, but we accept this was not communicated to her at the time. The claimant said she wanted to return at the beginning of May but Mr Cooper's initial reaction was that this was not possible. The claimant was told that this was because they had employed a temporary staff member to cover her role until June. Mr Cooper says, and we accept, this was not in fact the case, but we accept that it was what the claimant was told as it is consistent with the follow up messages between the claimant and respondent, recorded below. The claimant was very upset by this. We accept that she mentioned her days of work at this meeting for the same reason as recorded above in respect of the previous meeting (she said so in the later message of 6 May 2021 which went uncontradicted). Mr Cooper said the claimant was asked if she had childcare issues and she confirmed her parents would be doing the childcare, which was correct with respect to her original hours.
- 30 The claimant then emailed Mr Cooper saying she had to give 8 weeks notice of her return and that she would like to return in May, with her first day being Tuesday 4th May. The reason the claimant gave a Tuesday for her return was that she had in mind her previous working days.
- 31 On 25 February 2021 the respondent replied and confirmed they were happy to welcome her back on 4 May 2021. They asked "with regards to covid and childcare, could you let us know what days and hours you wish to return". This shows the respondent was aware the claimant had potential restrictions with respect to childcare. The respondent did not at this point state any preference for different days.
- 32 The claimant replied on 26 February 2021 and said she wanted her days and hours to remain as they had been before her maternity leave. She confirmed this was full days on Tuesdays and Thursdays and Saturday mornings, as before. We find it likely this was the first time this was expressly stated, albeit Mr Cooper was aware that these were her contracted days from the contract and their previous meetings and there had been no reason given to think she wanted to do any other pattern.
- 33 The claimant's childcare fit around these days as her parents were her main childcare and they worked Mondays and Fridays. The claimant then organised preschool for her older child on Thursdays.
- 34 It is not until the 17 March 2021 that the respondent replied and raised an issue with the days for the first time in a much more formal tone. We infer from the wording that advice had been taken at this stage (expressly referred to on 29 March 2021). The letter referred to there having been a number of changes with

the change in ownership. In reality the changes made were minor. The only changes we were told about during the hearing were that there were more liveries and more weekend work.

- 35 The email said her position was still available on the same terms and again repeated that a temporary replacement had been secured and their employment would be ended to accommodate her return.
- 36 Despite saying her terms would remain the same the email went on to say that the hours would be needed on different days, Thursday mornings, full days Fridays and Sundays. They also required the claimant to use up her accrued leave before returning. The claimant did not object to that.
- 37 These hours did not work for the claimant as she had arranged the childcare as above. Even if she was able to change the preschool day she could not afford to pay for childcare for the baby on a day her parents were not available (Friday). She also did not want to work a whole day at a weekend with a young family, and Sundays has always been difficult for her because her husband has sporting commitments. The claimant contacted the respondent to explain she now had childcare in place for her original days.
- 38 The response is at page 90. They said "it is not reasonably practicable for us to allow you to return into the same position and on the same specific hours/days as before. In accordance with the advice we have received we may give you another suitable and appropriate job on terms and conditions that are not less favourable on the basis that you have had more than 4 weeks of additional maternity leave over the initial period of ordinary maternity leave." They said they were able to offer the same role for the same pay for the same number of hours but on "slightly varied" days.
- 39 The claimant responded by asking for another meeting which took place in April 2021. The claimant's father went with her. Again they were kept waiting. Mr Cooper and his partner attended with his partner remaining sitting on a horse without dismounting. As a result everyone else had to stand during the meeting.
- 40 This meeting was the claimant's attempt to see if there was any room for movement on the days so that she had more than ½ day of her original days. The childcare issue was explained. The answer was no. We accept that the claimant then said that she felt like if she had never had a baby she would still be working there with no problems and Mr Cooper agreed. The claimant's father supports the claimant's evidence on this point and we accept it.
- 41 The claimant was not able to work around the days offered.
- 42 On 4 May the respondent emailed the claimant to ask for confirmation that she would be coming back on 10 June.
- 43 On 6 May the claimant emailed expressing her difficulty getting adequate childcare for the days offered and her disappointment that this issue had arisen and requesting the respondent review the decision. The respondent replied referring again to changes they had made, though the only specific detail was that the existing staff had had to change their day off to increase cover at the weekends. There was no specific information about why the claimant could not do her previous days.

- 44 The claimant then replied on 10 May 2021 saying she was forced to resign. There was no reply from the respondent, save a P45.
- 45 The claimant said that some time later she bumped into the freelance colleague who said to her that Mr Cooper had said he did not want the claimant back as he would have had to ask her to leave. We haven't heard from the person in question and we find that we cannot rely on it as evidence as anything other than what Mr Cooper admits which is this is the person he would have asked to leave if the claimant returned. She was not a temporary cover but had been a freelance member of staff doing different days to the claimant since before the claimant's maternity leave.
- 46 All Mr Cooper said in his statement about the reason the claimant could not return on her contracted days was that it was "the result of a review and re-organisation of the livery business particularly with regard to other staff members". In fact there has not been a "review and re-organisation". There have been some staff departures and some new employees with greater emphasis on full time work and weekend cover. We had to question at some length to try to establish what the issues with the staff were. We also requested information about rotas and starters and leavers because of the lack of information provided on this point which is the crux of the respondent's defence.
- 47 Some staff are university students, some of whom left at the start of the academic year, as happened in both 2020 and 2021. There were new grooms who then started in November 2020 and December 2020. There's no evidence of any other staff leaving apart from the claimant until October. A groom was employed from 1 February 2021. New staff were all permanent. There was no temporary replacement as the claimant had been told. Another started on 25 March 2021 but only to cover as needed. Despite not being recorded as a leaver she no longer works for the respondent. Noone else was recruited to cover the claimant.
- 48 We were told that in March 2021 there were 4 full time grooms, 2 part time and the freelance person doing 3-4 days, as she had since before the claimant's maternity leave. The freelance person had other work at other yards. There was no change to her days as a result of the maternity leave.
- 49 There was no suggestion that at any time the claimant's needs/contractual terms were a consideration in respect of the recruitment. The recruitment was based on what the stable needed at the time and the person was able to do. There was no suggestion to them that they may be required to change their hours when the claimant returned. There was a concern to be fair to them in considering the claimant's return but no corresponding concern in respect of the claimant and her return from maternity leave when they were recruited.
- 50 There are no notes but Mr Cooper said he spoke to two staff members (having initially said three) about whether they could switch days to accommodate the claimant. This was not all of the relevant staff. It was difficult to establish exactly what he asked each person but it did appear from what he offered them that he could potentially have offered the claimant a full day on Thursday and Saturday mornings, a fact which he did not contradict. He was asked why he had not at least gone back to the claimant with this offer, and he said he was looking at all or nothing. He also did not offer the claimant a contract like that offered to the groom who covered ad hoc/ or explore a compromise such as a return on

Thursdays/Saturdays and using the annual leave on Tuesdays for a period such as until the start of the university term when the students would leave. We find there were other potential solutions which were not explored.

- 51 He did say they would have had to accommodate her if she returned after 6 months and gave no adequate explanation as to how that was no longer possible a few months later.
- 52 He said he had changed staff days and that other staff would have left if he changed days again but we do not have evidence of this. He did not involve or consult the claimant in the changes he had made if he made them. He said he did not ask some of the staff to switch for the claimant as he felt that was unfair. He did say that they had weaker days that they needed cover for which was why the offer of ½ day Thursday, Friday and Sunday was made.

Relevant law

Right to return after maternity leave

- 53 Regulation 18 (2) of the Maternity and Parental Leave Regulations 1999 states:
“An employee who returns to work after ...a period of additional maternity leave is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.”
- 54 Regulation 18A states that the right is to return with the seniority, pension rights and similar rights she would have had if she had not been absent, and on terms and conditions not less favourable than those which would have applied if she had not been absent.

Constructive dismissal

71. Section 95 of the Employment Rights Act 1996 states:
- (1) For the purposes of this Part an employee is dismissed by his employer if . . . _**
. . .
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.
72. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:
- 72.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows

that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);

- 72.2 the breach caused the resignation; and
- 72.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.
73. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
74. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160_00_3009).
75. A series of actions culminating in a "last straw" can cumulatively amount to a breach of the implied trust and confidence, but the "last straw" must contribute something to the breach, it cannot be entirely innocuous (*Omilaju v Waltham Forest LBC* 2005 ICR 35).

Automatic Unfair dismissal

- 55 An employee is automatically unfairly dismissed if the principal reason for the dismissal is that they took ordinary or additional maternity leave (s99 Employment Rights Act 1996 and regulation 20 Maternity and Parental Leave regulations).

Maternity discrimination

- 56 Section 18 Equality Act 2010 states that a person discriminates against a woman if he/she treats her unfavourably because she has exercised the right to ordinary or additional maternity leave.

Conclusions

Was the claimant dismissed?

Did the respondent fail to allow the claimant to return to the job she was employed to do before her maternity leave (with similar rights as they would have been if she had not been absent and terms and conditions no less favourable than if she had not absent)?

57 We find the answer to this is yes. The respondent completely changed the days on offer from the claimant's contracted days bar one half day on a Thursday. That is a significant change for a part time worker with childcare needs. Her contracted days had originally been agreed to suit her childcare and the new days on offer were unworkable for her. The terms on offer were therefore less favourable.

Has the respondent shown that it was not reasonably practicable for the claimant to return to the job she was employed in before her absence?

58 We are not satisfied that the respondent has shown that it was not reasonably practicable for the claimant to return on her contracted days (Tuesdays, Thursdays and ½ day Saturday). The respondent has not shown why the respondent could not have kept the claimant's contracted days in mind and/or consulted her when recruiting and appointing the new staff during her maternity leave. It is apparent they did not keep her and her contracted days in mind. There was a new person recruited as recently as February 2021 and also another in March 2021 on a flexible basis. The respondent also did not consult with all staff at the time of the claimant's return or consider offering the claimant those of her contracted days that could have been accommodated (Thursdays and ½ day Saturday).

Did the respondent offer the claimant a job which was suitable and appropriate for her to do in the circumstances?

59 The respondent did not offer the claimant a job that was suitable or appropriate. It was clearly unsuitable as it was on days that it was clear she did not have childcare and could not do. The respondent's defence was that it was for the claimant to put forward an alternative but it is for the respondent to offer the suitable alternative. The claimant did try to discuss the situation and was shut down.

60 In the above circumstances we find the respondent dismissed the claimant by failing to allow her return to the job she was employed to do and/or failing to offer a suitable and appropriate alternative.

61 Nevertheless we have gone on to consider the alternative of constructive unfair dismissal.

Did the respondent do the following things:

Delay paying the claimant's wages in June 2020;

Pay wages for June 2020 in two instalments;

Change the pay date from 28th of the month to the 1st of the month without notice;

Record the claimant as a leaver with NOW pensions with the consequence that deductions were made late and employee deductions not made at all;

Say that it was the claimant that had opted out of the pension when that was not correct;

Delay resolving the pension matter until December 2020 or later;

Not allowing the claimant to return from maternity leave on the same days and hours at late notice meaning the claimant had already put childcare in place for her original days;

Refusal to reconsider the days offered when the claimant explained she could not do them.

- 62 There was a short delay paying wages in June 2020 as a result of issues around the sale of the business. The business should still have paid on time and then sorted it out but the wages were paid in full by early July. With respect to the July pay it was paid by the end of the month as per the contract, albeit 2 days later than the normal pay date. It was not an ongoing change but only in respect of July. The respondent had referred to the end of the month in the text message in June. The claimant was not informed in advance on either occasion.
- 63 Someone in the business or representing the business incorrectly recorded the claimant as a leaver with respect to her pension. It is not possible to ascertain who and we accept it was an administrative error. It did lead to contributions not being made for a period. The claimant did not initially explain the problem following receipt of the pensions letter. but once the claimant informed the respondent that contributions were not being made in November and the error was then uncovered the employer contributions were made. The employee contributions were not made and were left for the claimant to rectify.
- 64 Once the respondent looked into the issue they informed the claimant of what they had found out in respect of her being a leaver and what their bookkeeper told them which is that it is only an employee who can opt out. This was eventually corrected. Once the claimant raised the issue in November investigation was required to ascertain what had happened and then the contributions were rectified in February. We accept that it is harder to deal with this kind of issue from maternity leave.
- 65 There was a failure to allow the claimant to return to her contracted days and the issue was raised with the claimant for the first time at a late stage. She had already arranged childcare based on her contracted days. The claimant had not been communicated with or considered as staff changes were made during her maternity leave.
- 66 The respondent did not enter discussions about the claimant's return and days of work in a spirit of compromise. There was no proper discussion or explanation at the meeting in April 2021– when Mr Cooper's partner did not even dismount from her horse and everyone was left standing. As a result possible solutions in respect of the claimant's working days were not explored. The respondent did

not even respond to the resignation letter. The respondent did not reconsider the days they were prepared to offer even though they could at minimum have offered all day Thursdays and ½ day Saturdays as set out above.

Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

whether it had reasonable and proper cause for doing so

67 The respondent did behave in a way that was likely to seriously damage the relationship in the way the maternity leave return was handled. This included the meeting with Mr Cooper's partner sitting on the horse with everyone else left standing; the over formal correspondence; the unwillingness to explore, discuss or properly inform the claimant about working hours but instead insisting on days she could not do. The respondent has not satisfied us that there was reasonable and proper cause for this behaviour.

68 Whilst communication about the wages and pension could have been better these issues were not likely to destroy or seriously damage the relationship. It would have been better if the late pay and pension issues had been avoided and there had been better communication but both sides are expected to take such less serious matters "on the chin".

Did that breach the claimant's contractual terms in respect of pay and pay date; pension contributions and/or working days? Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

69 The respondent did breach the contracted agreement in respect of working days and in these circumstances (where the days that were offered instead could not be done by the claimant) this was a fundamental.

70 Although pay issues are often considered fundamental we do not consider these pay/pension issues sufficiently serious to be fundamental. They were short term issues at the time of a business sale.

Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

71 The claimant did not resign in response to the wages/pension issues. Her reason for resigning was the issue in respect of her working days on her return from maternity leave. She therefore did resign in response to the breach.

Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

72 The claimant did affirm the contract after the wages/pension issues. She remained in employment and sought to return after her maternity leave. She did not affirm the contract following the offer of alternative days that she could not do but expressly resigned because of it.

If the claimant was dismissed, what was the reason or principal reason for dismissal? Was it because the claimant exercised her right to additional maternity leave?

73 Yes. The respondent said that if the claimant had not been on maternity leave she would have continued working. He also acknowledged that had she returned at the end of the ordinary maternity leave he would have had to give her the days she was contracted to do. He relied on the fact the claimant took additional maternity leave and his understanding of that to mean he did not have to offer her the same terms on her return.

74 We agree with the claimant that the respondent had not given any consideration to her return whilst she was on maternity leave and we find it likely the respondent did not want her to return and infer that this was because of her maternity leave. This is based on the following.

75 Recruitment decisions were made prior to and during the additional maternity leave, along with changes to existing staff days, that made it harder for the claimant to return on her contractual days. There is no evidence to suggest that the respondent made any arrangements during the maternity leave to ensure the respondent could accommodate the claimant's return or that there was consultation with her as these staff changes were made during her maternity leave. This was because she was on maternity leave.

76 The respondent told the claimant information that was false in respect of the temporary replacement. No issue was raised about working days until the claimant had confirmed she wanted the same days as she was contracted to do before the commencement of her maternity leave. Then despite more of those days being available only ½ day was offered along with days that were unworkable. There was then a refusal to move from that position.

77 Mr Cooper's partner did not even have the courtesy to get off her horse when meeting with the claimant to discuss the situation.

78 It is not true that staff were properly consulted about changing days to facilitate the claimant's return. Mr Cooper kept referring to staff in plural during the hearing, suggesting all of them had been consulted but then when questioned the number consulted reduced to 3 and then 2. We conclude that the respondent

did not try to change the available days to accommodate the claimant and her contracted days.

- 79 Those of the contracted days that the respondent said were available were not offered as part of a negotiation or exploration. No compromise was explored and we find potential compromises were available at the point of the claimant's return.
- 80 The timing and nature of the advice sought by the respondent suggests the respondent was seeking to avoid its responsibilities to the claimant rather than working with the claimant, as does the prompting of the claimant to confirm if she was coming back a month before and the absence of any communication with the claimant after her resignation.
- 81 The respondent exaggerated the "reorganisation".
- 82 On balance we find the respondent made it difficult for the claimant to return to work and this was because she took additional maternity leave. The relationship had not started well because of the hiccups in pay and pension whilst the claimant was on maternity leave. The respondent made a clear distinction between what he believed he had to do in respect of a return from ordinary maternity leave and additional maternity leave. When the claimant said that she felt like if she had never had a baby she would still be working there with no problems Mr Cooper agreed.
- 83 We have also considered the issues in respect of an ordinary unfair dismissal in the alternative.

What was the reason for the dismissal? Was it a potentially fair reason?

- 84 The respondent relies on some other substantial reason namely reorganisation of the business in order to ensure staffing levels to cover weekend working.
- 85 This was not a substantial reason sufficient to justify dismissing the claimant. We are not satisfied that the respondent could not have reasonably accommodated the claimant's contracted working days on her return if she and her contracted days had been in their mind as they considered their staffing needs over the period of the maternity leave and had they had planned around her return, or had they explored her return and the days she needed with her with an open mind.

Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

- 86 No the respondent did not act reasonably. There was no consultation with the Claimant about the staffing changes throughout. There was no willingness to offer those of her contracted days that were available at the point of her return

and seek a solution. The respondent did not even respond to the Claimant's unhappiness with the days they offered.

- 87 The respondent did not follow any process. All meetings were at the Claimant's request and the meeting which led to the Claimant's dismissal Mr Cooper's partner did not even get down off her horse.

Remedy for unfair dismissal

Does the claimant wish to be reinstated to their previous employment? Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

- 88 The claimant confirmed she did not wish to be re-employed and claims compensation only.
- 89 We have only addressed those remedy issues below that were relevant in this case.

If there is a compensatory award, how much should it be?

What financial losses has the dismissal caused the claimant?

- 90 The claimant's loss of earnings were £3,663.45.

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?

- 91 The claimant stated that since leaving the respondent over 75 weeks she earned £12,142.80 net whereas had she stayed she would have earned £15,806.25. The difference is £3,663.45.
- 92 We accept on Mr Cooper's evidence that there is work available in the field. The claimant did not look widely for alternative work. However she did almost immediately take the first job she did find, while continuing looking for more suitable work. That was a flexible zero hours contract at a lesser hourly rate. Then when a position with work on Tuesdays and Thursdays came available she took that. We accept she has some constraints on when she is available due to childcare which may well affect her job seeking and what she has done is reasonable. We thought about whether it would have been reasonable to expect her to also get work at a different stable at weekends to cover the work she lost on a Saturday ie combine two jobs as we have heard others do. However the problem was likely to be that she would have been looking for just 1/2 day and

we have no evidence before us as to whether that is possible. The respondent has not provided evidence of the actual work that was available and whether such a position would be possible.

- 93 Overall we find it reasonable mitigation to have taken the path the claimant did, with the constraints she has, and therefore to minimise her losses over 70 plus weeks to £3663.45 approx.
- 94 We limited pension loss to 3% of the loss of earnings (£109.90) on the basis the new employers should have been paying pension contributions on wages above the minimum. The claimant can make her own employee contributions.
- 95 We also awarded £400 loss of statutory rights.
- 96 Issues with holiday entitlement in her new employment are the responsibility of those employers.

What basic award is payable to the claimant, if any?

- 97 The claimant was entitled to a basic award of £666.

Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

Did the respondent treat the claimant unfavourably by doing the following things? Was the unfavourable treatment because the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to additional maternity leave?

Delay paying the claimant's wages in June 2020; Pay wages for June 2020 in two instalments; Change the pay date from 28th of the month to the 1st of the month without notice;

- 97 There were issues with the wages that applied to all staff due to the issues that arose around the sale of the business and though avoidable these were rectified fairly promptly. There could have been better communication. We consider the impact of these on someone on maternity leave is greater as they are outside of the business and do not have the day to day knowledge of what is going on and the issues are harder to resolve by an employee who is not present day to day (the particular impact on the claimant is at paragraph 20 above). However there is no evidence these issues were done because of the maternity leave.

Record the claimant as a leaver with NOW pensions with the consequence that deductions were made late and employee deductions not made at all; Say that it was the claimant that had opted out of the pension when that was not correct; Delay resolving the pension matter until December 2020 or later;

- 98 The issue with the pension was an administrative error. It took some time for the respondent to get an understanding of the issue but it was rectified. There is not enough evidence to understand who made the error and why. There is not enough evidence to conclude this was done because the claimant was on maternity leave, albeit we acknowledge again the greater impact for an employee on maternity leave.

Not allowing the claimant to return from maternity leave on the same days and hours at late notice meaning the claimant had already put childcare in place for her original days; Refusal to reconsider the days offered when the claimant explained she could not do them.

- 99 We do find there was a failure to allow the claimant to return on her contractual days, the failure to consult with her about any staffing changes and their impact on working days, failure to properly discuss options around her return with her, including the nature of the meeting with Mr Cooper's partner failing to dismount the horse. For the reasons as set out above at paragraphs 73-83 this was unfavourable treatment because she sought to exercise the right to additional maternity leave.

Remedy for discrimination

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

- 100 The claimant did not seek a recommendation but compensation only.
- 101 Loss of earnings were covered in the unfair dismissal award. The compensation for the discrimination was limited to injury to feelings.

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

- 102 The claimant requested £11,544 equating to a year of salary. We considered that the appropriate injury to feelings band is the Vento middle band (£9,100 - £27,400) because the unfavourable treatment involved a dismissal which is not considered a one off act. Moreover the parties started talking about the return and issue in respect of working days in March and the respondent repeated their position a number of times through to May 2021. The unfavourable treatment included being closed minded about the dispute about working days and not engaging to find a solution to the issue. We accept this was stressful and upsetting for the claimant. Maternity leave is protected leave and to lose employment/income at the end of it is an aggravating factor. We accept this is very distressing for a new parent. Other aggravating factors include not properly explaining the issue with the days, and failing to reply or negotiate with the claimant. We also take account of the indignity of how the claimant was treated at the meeting with her father. We've never come across anything like the situation where Mr Cooper's partner held the meeting on the horse forcing everyone to stand. The claimant was also told untruths by the respondent so

they were not being open and transparent in dealing with the claimant and her return to work. Evidently the treatment is still upsetting her despite finding new employment and the passage of time.

103 We decided to award £12,000.

104 We noted that part of the Claimant's distress was about other issues such as her father's health and note that the injury to feelings award should not be about the other distressing things going on at the time.

Unlawful deduction of wages/breach of contract

Did the respondent fail to make pension contributions? How much and when?

105 We find that the respondent did not make the employer pension contributions for a period as the claimant had been incorrectly marked as a leaver. However when this was brought to the respondent's attention this was rectified. The claimant's contributions were not deducted from her salary but she could have rectified her own contributions herself.

Employment Judge Corrigan

4 May 2023

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