



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103696/2022

5

Held in Glasgow on 23 May 2023

Employment Judge S MacLean

10	Miss Malwina Kulak	Claimant Not present and Not represented
15	Art Hot Ltd t/a Artto Hotel (in Creditors' Voluntary Liquidation) c/o Quantuma Advisory Limited	Respondent Not present and Not represented

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claims are dismissed under rule 47 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

25

REASONS

Introduction

30

1. The claimant sent a claim form to the Tribunal office on 2 July 2022. The claimant asserts that she was employed by the respondent as a receptionist from 4 April 2022 until the respondent terminated her employment on 16 May 2022. In mid-May 2022 the claimant was six weeks pregnant. She did not inform anyone of her pregnancy. In the claim form the claimant complains of unfair dismissal, discrimination on the grounds of pregnancy or maternity and payment of a redundancy payment. The claimant seeks compensation and a recommendation.

2. The respondent sent a response on 29 July 2022 resisting the claims. The respondent asserts that the claimant's employment terminated on 22 May 2022 when her notice period ended. The claimant was not available to work during her notice period. The respondent disputed the details of the claimant's wages and provided payslips for the months of 30 April 2022 and 31 May 2022. Also attached to the response were copies of an email exchange between the parties sent on 16 May 2022. The claimant's gross monthly wage was £1,187.50. Her net weekly wage was £1,114.50.
3. The respondent's position was that the claimant's employment was terminated by Fiona Milne, hotel manager, by reason of conduct. The claimant had swapped shifts and left early without management authorisation. She had been spoken to on 17 April 2022 at which it was explained that she was expected to work late shifts and weekends. The claimant indicated that she was unavailable to work a late shift on 17 May 2023 as her mum had a hospital appointment and she would have to take her. The claimant was advised she could not change shifts and she would need to make alternative arrangements. The claimant sent a Whatsapp message to Ms Milne on 15 May 2022 stating that she was unable to come in for her late shift on 16 May 2022. She did not know about the shift on the Tuesday. If shifts could be covered she would return to work on the early shift on 20 May 2022. The claimant said that she had not had a period for two months and that she was bleeding heavily and felt weak and had a fever. The claimant did not provide details.
4. The claimant's employment was terminated on 16 May 2022. The letter of termination stated that during the interview process, the claimant was informed that the work was shift work, working five days out of seven including weekends. It was considered that the claimant was not willing to work shifts that were required to support the business and therefore her employment was being terminated "with immediate effect". The claimant was advised that the money would be paid by bank transfer on the last working day and payslips and P45 would be forwarded. The claimant's final salary included holiday pay.

5. The claimant did not dispute that she did not inform Ms Milne or anyone else at the respondent that she was pregnant before the decision to dismiss was taken and communicated to her.
6. A preliminary hearing for case management took place on 30 August 2022 which the claimant attended. Employment Judge Hendry noted that the statutory basis of the claimant's claim was section 18 of the Equality Act 2010 which provides that a person discriminates against a woman if, in the protected period, in relation to a pregnancy of hers, treats her unfavourably because of the pregnancy or because of an illness suffered by her as a result of it. The Judge issued an order on 12 October 2022 requiring that the claimant within 14 days of the date of the order provide a schedule of loss setting out what remedy she sought and how much was sought in respect of each complaint with a detailed explanation of how each sum was calculated including injury to feelings.
7. On 24 October 2022, Ian Wright, joint liquidator, wrote to the Tribunal advising that he and Scott Milne were appointed joint liquidators of the company on 27 September 2022. Mr Wright further advised that due to lack of funds, the liquidators did not intend to be represented and would not be defending the claim. This was not an admission of liability but reflected the lack of funds available to allow a defence to be provided.
8. On 2 November 2022 the case was listed for a final hearing on 9 January 2023. The claimant failed to comply with the order and a reminder was sent on 1 November 2022. The claimant was asked to reply by 8 November 2022.
9. The Tribunal advised the claimant was advised of the appointment of the joint liquidators but was erroneously informed that the respondent was in compulsory liquidation and a letter of consent was required. In light of this development, an instruction to strike out the claim for a lack of compliance with the order was delayed.
10. The hearing fixed for 9 January 2023 was postponed to allow the claimant to obtain consent.

11. On 10 February 2023, the claimant wrote to the Tribunal saying that her position had not changed. She wanted £1,000 compensation and holiday pay. She advised that she could go to court “at any time and any day”.
12. On 8 March 2023, the claimant was advised that the letters regarding compulsory liquidation were sent in error. An apology was given. The claimant was advised that the respondent is in creditors voluntary liquidation where the procedure is different. The claimant did not need to obtain consent from any other person and the claim could proceed. The claimant was advised that it might be possible to issue a judgment in her favour without a hearing but more information was required. The claimant was therefore asked to set out in writing within 7 days how she calculated the compensation that she was asking the Tribunal to award. She was told that it was simply not enough to give a total figure. She was to show all necessary working.
13. On 8 March 2023, the liquidator wrote to the Tribunal and the claimant advising:
- “The Insolvency Service (Redundancy Payments Office) would have to process any claim for wages, holiday pay, notice pay or redundancy that is awarded.
- If you have to subsequently submit a claim in the liquidation, it is unlikely that there will be any funds available to pay a dividend to creditors.”
14. On 23 March 2023, the claimant was provided with a notice of final hearing to take place remotely by Cloud Video Platform (CVP) on 23 May 2023 at 10am. Three hours were allocated for the hearing. The respondent was advised of the hearing for information only.
15. The notice of hearing also advised that there would be a test arranged prior to the hearing. The notice stated:
- “If you do not join the video hearing on the day, the hearing may go ahead and a decision made in your absence. If you wish to apply for a postponement of the hearing to another date, you must do so in writing and explain why. You must confirm in any application for a postponement that you have copied

the application to the other parties and notified them that any objections must be sent to the Tribunal as soon as possible.”

16. A hyperlink was given for further guidance on postponement.

17. On 22 May 2023, the Tribunal clerk contacted the claimant with a view to carrying out a test and providing a link for the remote hearing. The claimant advised that she would be unable to attend the hearing due to a “last minute trip to Poland for personal reasons.”

18. I received an email from the Tribunal clerk at 4.09pm on 22 May 2023 to advise that neither party had completed a test. The claimant had gone to Poland for personal reasons. The respondent had only been sent the notice of hearing for information. The Tribunal clerk confirmed that the claimant had not sought a postponement nor had she elaborated on the nature of the personal circumstances.

19. On 23 May 2023, at 8.07am, the claimant sent an email to the Tribunal as follows:

“Hi, I have had a conversation over the email with you regarding postponing this or making a decision without me being present. I have informed you of my sudden flight to Poland due to personal issues and never heard back. Unfortunately I won’t be able to attend tomorrow, but I am happy for the trial to continue and inform me of a final decision.

Thank you in advance. Malwina Kulak”

20. There was no appearance by or for the parties at the remote hearing.

Deliberations

21. I considered the case papers and noted that this claim was presented on 2 July 2022. There had been a preliminary hearing for case management to clarify the claims and the first final hearing was fixed for 9 January 2023. As the respondent was in voluntary liquidation, the joint liquidators were not participating in the proceedings as there were no funds to do so. While the claimant had spoken to a Tribunal clerk when contacted by the Tribunal clerk,

the claimant had not complied with the orders issued in October 2022 nor did she provide information when directed to do so in March 2023.

22. The claimant had received the Notice of Hearing which specified what she required to do if she wished to apply for a postponement of a hearing. There was no written application for a postponement nor indeed did I understand the claimant asking for a postponement. To the contrary, she appeared to want the case dealt with in her absence. While I noted that the claimant referred to travelling to Poland for personal reasons, she did not elaborate on this or explain why the Tribunal was not advised of her unavailability until the Tribunal clerk made contact with her on 22 May 2023.
23. In all the circumstances, I decided to consider the information which was available to me.
24. There appeared to be no dispute that the claimant was employed by the respondent from 4 April 2022. The claimant's position was that her employment was terminated on 16 May 2022. This was consistent with the email sent on 16 May 2022 attached to the response in which the claimant's employment was terminated "with immediate effect".
25. I had no information before me as to what notice other than statutory notice the claimant would be entitled. The respondent averred that the last day of service was 22 May 2022 (which included notice) but the claimant was not available for work.
26. Despite being directed to do so the claimant did not produce fit notes. I do not know if she was in receipt of statutory sick pay up to 22 May 2022. I considered that it was likely that the claimant was not given or paid notice. She did not include in her claim form a complaint of non-payment of notice pay.
27. I noted that the final payslip included holiday pay due as at termination. The claimant did not make a claim for holiday pay in her claim form although she did refer to wanting all sums that were due to her.

28. While the effective date of termination was disputed, there was no dispute that the claimant had less than two years' continuous service. The Tribunal therefore had no jurisdiction upon which to consider any claims in respect of unfair dismissal under section 98 of the Employment Rights Act 1996 or any failure to pay a redundancy payment.
29. I then turned to consider the claim of pregnancy dismissal. Section 18 of the EqA provides that a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers (A) treats her unfavourably (a) because of the pregnancy or (b) because of an illness suffered by her as a result of it.
30. The claimant says that she was dismissed during the protected period because of a pregnancy related illness. The respondent accepted that it dismissed the claimant. It was during the protected period.
31. The claimant did not provide fit notes. My understanding is that before the claimant's employment was terminated, the fit notes did not refer to pregnancy or any pregnancy related illness. The claimant had not informed anyone of her pregnancy.
32. Although the claimant had been provided with a copy of the response form, there was no evidence before me to challenge the assertion that prior to her absence on 15 May 2022, she had been previously been spoken to regarding her conduct and attitude towards working late shifts and weekends.
33. From the information before me, there appeared to be issues regarding the claimant's performance and conduct. This had been raised with the claimant. The respondent did not know about the claimant's pregnancy or that the absence was related to a pregnancy illness.
34. It was for the claimant to prove on the balance of probabilities the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed an act of discrimination.
35. In recognition that the respondent did not admit discrimination, I referred to the response and the explanation provided by the respondent in its email

terminating the claimant's employment. Its position was that it was because of the claimant's conduct and her unwillingness to work shifts.

5 36. I was not satisfied that the claimant had proved on the balance of probabilities the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed an act of discrimination. At the time the decision was taken, I considered that the claimant's illness which she did not know to be pregnancy related did not have a significant influence on the claimant and was not the reason for her dismissal.

10 37. Having reached that conclusion, I did not consider that it was necessary to go on to consider the issue of remedy.

38. In all the circumstances, I dismissed the claim.

15

Employment Judge: S Maclean
Date of Judgment: 31 May 2023
Entered in register: 31 May 2023
and copied to parties

20

25