EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000168/2023 (V)

Held at Aberdeen on 27 July 2023

Employment Judge N M Hosie
Members: S Singh
J Lindsay

Miss L Ralston	**Claimant** **Represented by** **Mr J Quigley - CAB**
Corporate Health International UK Ltd	**Respondent** **Represented by** **Mr J Connor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is dismissed.

E.T. Z4 (WR)

REASONS

Introduction

1. Miss Ralston claimed that she was discriminated against because of her pregnancy/maternity; she also claimed that the respondent had unreasonably refused her request for flexible working. Her claims were denied in their entirety by the respondent.

The evidence

2. The hearing was conducted by video conference using the Cloud Video Platform ("CVP"). The Tribunal heard evidence from Miss Ralston and on behalf of the respondent, from Dr Mary Miller, Nurse Manager and Operations Manager for the UK and the claimant's Line Manager.

3. A Joint Bundle of documentary productions was also submitted ("P").

The facts

4. Having heard the evidence and considered the documentary productions, we were able to make the following findings in fact. We should say that both witnesses gave their evidence in a measured, consistent and convincing manner and presented as credible and reliable.

5. The claimant commenced her employment with the respondent as a Nursing Assistant on 31 May 2021. She remains in the respondent's employment. On 14 July 2022, she went on maternity leave. She planned to return to work after 12 months maternity leave.

"Work e-mails"

6. On or about 24 October 2022, the claimant discovered that she had been removed from access to her "work e-mails". The respondent had e-mailed all employees using their "work e-mail addresses" concerning recovery of a salary over payment. However, the e-mail was not received by the claimant. She discovered this when she raised her concerns about a shortage in her wages with her Line Manager, Mary Miller, by way of mobile text message (P.94). Dr Miller was not made aware of this until February 2023.

"Teams"

7. The claimant raised this issue with Dr Miller by way of e-mail on 14 December 2022 (P.21). It would appear from that e-mail that the claimant had been aware that she only had "restricted access" to Teams since August.

8. The claimant also discovered, on or about 14 December 2022, that she had been denied access by way of "the respondent's 'Teams' messaging App".

9. Dr Miller explained, and we accepted her evidence, that it had only been the respondent's intention to remove the claimant from messages relating to patients, by reason of confidentiality. Her removal from communication using the respondent's e-mail address and Teams was done in error.

10. Dr Miller said that it had not been the respondent's intention to remove the claimant completely from using her work e-mail address and from using Teams and she was surprised that when the claimant discovered this she had not raised any concerns with the respondent's IT Manager.

Office move

11. On 21 February 2023, Dr Miller sent an e-mail to the claimant to advise her that the respondent was "*actively seeking a new office space outwith the city centre*" and that they had been looking at premises in Hamilton (P.27).

12. On 2 March, Dr Miller sent another e-mail to the claimant to advise her that the offices in Hamilton had been secured and that they would be moving in April (P.49).

13. The claimant replied by e-mail on 6 March to complain that she had not been "*kept up-to-date*" with the move. She said this in her e-mail (P.49):-

> "*I would however like an explanation as to why I was not kept up-to-date until the last minute, whilst on maternity leave about this potential move. As we have had numerous phone calls and e-mails regarding my return. For the avoidance of doubt, this lack of information will have serious ramifications for me.*
>
> *Yet again you have made me feel isolated and excluded whilst on maternity leave.*"

Christmas Lunch

14. The claimant discovered from one of her work colleagues that the respondent had arranged a Christmas lunch in Inverness for the Glasgow and Inverness employees with the option of an overnight stay. She was upset at not being advised of this and also because she thought it would have been a good opportunity for her to meet new members of staff. Dr Miller explained that the lunch had been arranged at fairly short notice. An e-mail had been sent out to all members of staff on or about 5 December 2022 using the respondent's e-mail addresses. She was unaware at that time that the claimant did not have access to her "office" e-mail address.

Application for flexible working

Informal request

15. On 23 November 2022, the claimant sent a message to Dr Miller concerning "*potential options in terms of hours and working days*", on her return to work the following July after maternity leave (P.25).

16. Dr Miller asked her about the options she was thinking about and later that day she sent a further message to Dr Miller to ask if she would be able to "*work from home and the office*" (P.26). The claimant had worked exclusively at home and in the office for around six months from the time she advised the respondent of her pregnancy until she went on maternity leave on 14 July 2022.

17. However, Dr Miller advised that that would not be possible as *"clinic cover"* was also required, which she understood to mean that the claimant would require to travel to see patients at hospital clinics (P.26).

18. The claimant then sent the following message to Dr Miller (P.26):-

"*What clinics r on wot days as I'll need to start contacting nursery's etc. for certain days, I take it that I would be just doing the clinics in and around Glasgow? x*"

19. Dr Miller replied as follows:-

"*Unfortunately we now have clinic clinic* (sic) *in Lochgilphead, Borders, Fife, Perth and I can't guarantee you'll just be in Glasgow, that wouldn't be fair on the other girls with children.*"

20. The Lochgilphead clinic was the only additional clinic for which the respondent had become responsible, since the claimant went on maternity leave.

21. The difficulty for the claimant was that if she was required to go to clinics outwith the Glasgow area, she would require to leave home at around 6am for an 8am start and that would pose problems with childcare arrangements.

Formal request

22. On 29 November 2022, the claimant sent an e-mail to Dr Miller in the following terms:-

"*Request for flexi-time working dated 30/11/22*

Following on from the birth of my son, I am keen to explore the option of returning to work, utilising flexi-time working policies that you may have in place.

Consequently, I would be grateful if we could arrange a flexi working pattern for myself (working 3 days a week, part-time working & home working being in and around the Glasgow clinics) commencing in July upon my return from maternity leave. This may impact my new work colleagues having to do the further away clinics, but I feel it could be accommodated for a time period to help me balance my new family life with continuing my professional career.

No previous statutory application has been put forward for flexible working hours."

23. Dr Miller replied on 1 December as follows (P.29):-

"*Glad to hear that you are planning your return. We certainly can accommodate your request to switch from full-time (37.5 hrs) to part-time (22.5 hrs per week).*

Having given your request for working from home and attending only clinics in Glasgow, reasonable consideration, I am afraid, unfortunately this is not something we can accommodate. As we continue to deliver the provision of care, safely and effectively, to the customers and patients we serve throughout the central belt, from the Glasgow office, your position as a Nursing Assistant requires that you function within clinical settings. Therefore, it will be impossible to do this from home. In addition, I am unable to re-organise the work amongst work colleagues to enable you to work only in the Glasgow clinics.

Please let me know if you have any questions."

24. Dr Miller explained that there was one other Nursing Assistant and she also has a young child. She had spoken with the employee concerned to ask if she would be prepared to do all the clinics outwith the Glasgow area but she was not.

25. However, it had been agreed between Dr Miller and the claimant that were she to return to work on a part-time basis she would work on Mondays, Wednesdays and Thursdays.

ACAS

26. On 16 February, Dr Miller received from the claimant, "*an Early Conciliation notification about a potential Employment Tribunal claim*" (P.38/29). The claimant had notified ACAS on 7 February.

27. On the day before, the claimant and Dr Miller had what appeared to be positive e-mail exchanges concerning the claimant's application for flexible working (P.45-43). In any event, agreement was not reached concerning the claimant's application for flexible working; on 14 April 2023 she submitted her claim form; and shortly before she was due to return to work, after maternity leave on 14 July, she was signed off work due to ill-health. That remains the position.

Discussion and Decision

Pregnancy discrimination

Relevant law

28. S.18(2)(a) of the Equality Act 2010, upon which the claimant's representative relied, is in the following terms:-

"***18 Pregnancy and Maternity Discrimination: Work Cases***

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) 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…….."

29. The alleged discrimination was within the "protected period" to which the section applies, namely when she was on maternity leave (s.18(6)).

30. The next issue which we considered was whether the claimant had been treated "unfavourably". While this is not defined in the Act, Employment Tribunals have interpreted it in line with the well-known concept of "detriment" that applies in discrimination cases.

31. We were persuaded that the claimant was treated unfavourably when she was denied the use of her "work" Teams and e-mails and not invited to the Christmas lunch in Inverness. However, we arrived at this view with some hesitation as the claimant did not complain at the time about her lack of access to Teams and e-mails; she was still able to correspond with her Line Manager, Dr Miller, using her personal e-mail and by mobile phone texts and she did so, regularly, and, for the most part, in a convivial manner; she also said in evidence that she only wanted to use Teams in connection with an enquiry about her pay; she had only discovered her lack of access some three

months after she had gone on maternity leave; she accepted that due to patient confidentiality she would only be allowed restricted access to Teams, in any event.

32. However, we were not persuaded that her treatment relating to information about the office move was unfavourable. She had been advised of possible move by Dr Miller on 21 February 2023 (P.27); the move was confirmed by Dr Miller on 2 March 2023 (P.49).

33. Further, although s.18 does not require the claimant to show that she had been unfavourably treated, by reference to the treatment that was afforded to comparators who were not on maternity leave, the EHRC Employment Code suggests that evidence of the treatment that was afforded to others may be useful and in the present case the same e-mail intimation of the office move was made to her colleagues.

"Because of"

34. Further, and in any event, even if the manner of the intimation of the office move was also unfavourable treatment, along with the non-access to "work" Teams and e-mails and the failure to advise the claimant of the Christmas lunch, for a discrimination claim to succeed under s.18 the unfavourable treatment must be "*because of*" the employee's pregnancy or maternity leave. We had no difficulty in deciding, unanimously, that any unfavourable treatment, such as it was, was not *"because of"* the claimant's maternity leave or pregnancy.

35. There were a number of reasons for this. There was nothing to suggest in the evidence or in the documentary productions that such treatment of the claimant had anything to do with the fact she was on maternity leave at the time. Further, Dr Miller denied any such treatment of the claimant had anything to do with the fact that she was on maternity leave at the time. She presented as an entirely credible and reliable witness and we believed her.

She was unaware that the claimant had been denied access to "work" Teams and her e-mails. It had only been her intention to restrict the claimant's access to Teams for matters relating to patient confidentiality. It was perfectly clear that if there was any unfavourable treatment it was due to an administrative error on the respondent's part and was not because of her pregnancy or maternity leave. Miss Ralston said she felt, *"isolated and* ex*cluded",* but that was through no fault of the respondent and as Dr Miller said, *" She was on maternity leave. She didn't want me calling her all the time",* which was understandable.

36. Accordingly, we arrived at the unanimous view, and we are bound to say with little difficulty, that the discrimination claim was not well-founded and should be dismissed.

Flexible Working Application

Relevant Law

37. Part VIIIA of the Employment Rights Act 1996 deals with flexible working. S.80G(1)(a) requires an employer to deal with applications "in a reasonable manner". Further, the employer can only refuse the employee's flexible working request for a valid business reason. There are eight such reasons set out in s.80G(1)(b). These duties are underpinned by the ACAS Code of Practice.

38. Again, we had little difficulty in arriving at the unanimous view that the respondent, and in particular, Dr Miller, had dealt with the claimant's application in a reasonable manner.

39. We accepted the evidence of Dr Miller that she had carefully considered the application. That is abundantly clear not just from her evidence but also from the extensive e-mail correspondence between her and the claimant.

40. We also accepted Dr Miller's evidence that she had spoken to the other Nursing Assistant and asked her if she would be prepared to do all the clinics outwith the Glasgow area, but she was not prepared to do so as she also had a young child. That was why Dr Miller advised the claimant that she had to be, *"fair to everyone*".

41. The reason for the refusal of the claimant's application, primarily because Dr Miller could not accommodate her request that she would only do clinics "*in and around Glasgow*" and could not give a guarantee to that effect, was an "*inability to re-organise work among existing staff*" which is one of the valid business reasons, in terms of s.80G(1)(b).

42. It appeared to us that such a guarantee was a material condition of the claimant's application but it was a condition which the respondent could not reasonably accept.

43. We are bound to say that we were surprised that the claimant notified ACAS of her intention to bring a claim as early as 7 February 2023. That appeared to be somewhat premature as at that time she was still in active discussion with Dr Miller, mainly by e-mail correspondence, about flexible working, and that correspondence appeared to be convivial and positive.

44. Dr Miller had agreed that the claimant could work part time 3 days each week. On 6 February, Dr Miller had provided details of the "current clinics" (P.43) and later the same day the claimant replied by e-mail saying "*Ok that's good. That's predominantly what the clinics mostly look like on the days I was working there prior to leaving…….*" However, as we recorded above, the claimant wanted a "guarantee" that she would not be required to work at clinics that were *"more than an hour away*" (from her home). But, that was not a guarantee Dr Miller was able to give as it would have impacted unfavourably on existing staff.

45. In our unanimous view, it was reasonable for Dr Miller to advise the claimant, in these circumstances, that that was not a guarantee she could give.

46. We arrived at the unanimous view, therefore, that the claimant's contention that there was an unreasonable refusal by the respondent of her application for flexible working was not well-founded. Accordingly, that claim is also dismissed.

Employment Judge: N M Hosie
Date of Judgement: 4 August 2023
Date sent to Parties: 7 August 2023