



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D. Kozlik

**Respondent:** Athlone House Limited

**Heard at:** Watford (by CVP)      **On:** 8 December 2023

**Before:** Employment Judge McNeill KC

## Appearances

For the Claimant: Ms D. Janusz, Employment Adviser

For the Respondent: Ms K. Sheridan, Counsel

## RESERVED JUDGMENT

1. The Claimant's claims for automatically unfair dismissal, direct sex discrimination contrary to sections 11 and 13 of the Equality Act 2010 (EqA), unfavourable treatment contrary to section 18 of the EqA and breach of contract are struck out.
2. The hearing listed for 8, 9 and 10 May 2024 is vacated.

## REASONS

### Introduction

1. The Claimant, who was employed by the Respondent as a Housekeeping Assistant at Athlone House, Highgate, London, has brought claims against the Respondent for:
  - (i) Automatically unfair dismissal for reasons related to pregnancy/maternity contrary to section 99 of the Employment Rights Act 1996 ("the ERA");
  - (ii) Direct sex discrimination, contrary to sections 11 and 13 of the Equality Act 2010 ("the EqA");
  - (iii) Unfavourable treatment because of pregnancy or maternity contrary to section 18 of the EqA; and
  - (iv) Breach of contract, in particular breach of a verbal agreement that the Respondent would pay the Claimant maternity pay in the sum of £1,500 a month from the start of her maternity leave in November 2021 until November 2022.

2. The Respondent company was owned by Mr Mikhail Fridman until 2 March 2022, when the company was transferred to Mr Fridman's executive assistant, Ms Nigina Zairova. She is now the sole director and shareholder of the Respondent. Mr Fridman and Ms Zairova have respectively since 15 March and 13 April 2022 been "*designated persons*" pursuant to regulations 5 and 6 of the Russia (Sanctions) (EU Exit) Regulations 2019/855 (as amended) ("the Russian Regulations").
3. The Respondent is the managing agent for Athlone House, a private residence of Mr Fridman's and was the employer of the Claimant at all relevant times.
4. The Respondent has applied to strike out the whole (alternatively part) of the Claimant's claim pursuant to rule 37 of the Employment Tribunals Rules of Procedure on grounds that it has no reasonable prospect of success. In the alternative, it asks for a deposit order or orders to be made pursuant to rule 39 of the Rules of Procedure. The Respondent admits that the Claimant was dismissed and that she was only paid maternity pay until February 2022. It contends that the sole reason for the Claimant's dismissal and for the failure to pay maternity pay was that the Respondent was prohibited from making any payments to the Claimant by reason of the application of the Russian Regulations and that the Claimant has no reasonable prospect of establishing that there was any other reason for her treatment.

#### **The provisions and effect of the Russian Regulations**

5. The Russian Regulations and their applicability to the Respondent's liability to make payments to non-security staff, such as the Claimant, employed at Athlone House were recently considered by the High Court in a statutory application brought by Mr Fridman under Part 8 of the Civil Procedure Rules: ***R (Fridman) v HM Treasury*** [2023] EWHC 2657 (Admin) ("**Fridman**"). In that application, Mr Fridman challenged, among other matters, the decision of the Office of Financial Sanctions Implementation (OFSI) to refuse Mr Fridman's application for a licence in respect of payments to the Respondent for payment to staff for household-related services.
6. Under the Russian Regulations, individuals may be "designated" by the Secretary of State and made subject to sanctions, including economic sanctions. The effect of designation under the Russian Regulations is that a person's assets and economic resources are frozen. The use of such assets and economic resources is dependent on a licence or licences being obtained from OFSI. OFSI is the part of Her Majesty's Treasury ("HMT") which is responsible for administering the licensing regime under the Russian Regulations.
7. The relevant provisions of the Russian Regulations were considered by Mr Justice Saini at paragraphs 13-22 of **Fridman**. He referred in particular to regulations 11-15 of the Russian Regulations, which cover the restrictions on dealing with funds and economic resources owned, held or controlled by a designated person. Financial prohibitions apply not only to the designated persons themselves but also to persons owned or controlled directly or indirectly by the designated persons, such as the Respondent in this case.
8. Pursuant to regulation 11:

***“Asset freeze in relation to designated persons***

11 –

- (1) *A person (P) must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources.*
- (2) *Paragraph (1) is subject to Part 7 (Exceptions and licences).*
- (3) *A person who contravenes the prohibition in paragraph (1) commits an offence.*
- (4) *[.....]*
- (5) *For the purposes of paragraph (1) a person “deals with” economic resources if the person –*
  - (a) *exchanges the economic resources for funds, goods or services, or*
  - (b) *uses the economic services in exchange for funds, goods or services (whether by pledging them as security or otherwise).*
- (6) *The reference in paragraph (1) to funds or economic resources that are “owned, held or controlled” by a person includes, in particular, a reference to –*
  - (a) *any funds or economic resources in which the person has any legal or equitable interest, regardless of whether the interest is held jointly with any other person and regardless of whether any other person holds an interest in the funds or economic resources:*
  - (b) *[.....]*
- (7) *For the purposes of paragraph (1) funds or economic resources are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person.*

9. Regulation 7 provides that:

***“Meaning of “owned or controlled directly or indirectly”***

7-

- (1) *A person who is not an individual (“C”) is “owned or controlled directly or indirectly” by another person (“P”) if either of the following two conditions is met (or both are met).*
- (2) *The first condition is that P –*
  - (a) *holds directly or indirectly more than 50% of the shares in C,*
  - (b) *holds directly or indirectly more than 50% of the voting rights in C,...*
- (3) *[.....]*

(4) *The second is that it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that the affairs of C are conducted in accordance with P's wishes.*

10. Regulation 14 refers to making economic resources available directly or indirectly to a designated person, which includes by regulation 14(4) *“a reference to making them available to a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person”*.
11. I was also referred by the Respondent to regulation 15 of the Russian Regulations, although this seemed to me to have less relevance as regulation 15 relates to the designated person obtaining a *“financial benefit”*.
12. Pursuant to regulation 64(1) of the Russian Regulations, the prohibitions in regulations 11-15 do not apply where a licence has been granted by HMT. OFSI has a discretion whether to grant a licence if the licence sought relates to something falling within one of the purposes in the Regulations. One of those purposes is *“basic needs”*. OFSI did not consider that pay for housekeeping services such as those provided by the Claimant or maternity pay should be licensed and the High Court did not consider that decision to be unlawful.
13. In **Fridman**, although the issues under consideration were in the context of a public law challenge, the factual background and the analysis of the legal framework of the Russian Regulations are relevant and material to the issues in the current case. The High Court rejected Mr Fridman's challenge to OFSI's refusal of Mr Fridman's application for a licence in respect of payments to the Respondent for payment to staff for household-related services. The absence of a licence to make such payments provided the factual context in which the Claimant was dismissed and in which her payments in respect of her maternity leave stopped after February 2022.
14. The Claimant accepted that, following the imposition of sanctions on Mr Fridman and Ms Zairova and, in the absence of a licence to pay the Claimant either for her housekeeping services or her agreed maternity pay, the Respondent could not make any payments to her without committing a criminal offence. This was the effect of the Russian Regulations. Her contention was that the Respondent should have challenged the decision of the High Court by way of an appeal.

### **The Tribunal's approach to the application to strike out**

15. The proper approach to considering the strike-out application was not contentious. Striking out a Claimant's claim is a draconian step, which should only be taken in the clearest of cases. Discrimination cases should not be struck out save in the most obvious of cases as they are often fact-sensitive and a proper investigation of the facts is required before conclusions are drawn. The Claimant's case should be taken at its highest, unless contradicted by clear and undisputed evidence that is inconsistent with that case.

### **The Facts**

16. The primary facts in this case were largely undisputed. Where there is no admission of a fact by the Respondent or a fact is not plainly evidenced by uncontentious documentation, I have assumed that fact to be as set out in the Claimant's Particulars of Claim.
17. The Claimant was employed by the Respondent as a Housekeeping Assistant at Athlone House, a family residence of Mr Mikhail Fridman in Highgate, London. Her employment commenced on 16 March 2021, although she had worked for Mr Fridman as an agency worker since 2015. For the purposes of this application, I treated her employment as terminating on 10 March 2023, which was the date which she relied on as her effective date of termination.
18. In November 2021, the Claimant started a period of maternity leave. She intended to return to work after 12 months. Because of her length of service, she had no entitlement to statutory maternity pay but, in the light of the period for which she had worked for the family, the Respondent agreed to pay her maternity pay of £1,500 net of tax a month. This was a discretionary payment in the sense that the Respondent had no obligation to pay the Claimant maternity pay under her contract of employment. The agreement was made orally and is evidenced in an email from the Respondent to Ms Zairova dated 27 October 2021. There is a dispute between the parties as to whether the Respondent agreed to pay the Claimant maternity pay for 12 months or 8 months. For the purposes of this application, I assume it was for 12 months.
19. The Claimant's contract of employment made no provision for any contractual maternity pay. There was reference at paragraph 18 of the contract to statutory maternity leave for which the Claimant might be (but in the event was not because of her short service) eligible. By paragraph 9 of the contract, the Respondent could "*in its absolute discretion*" pay a bonus to the Claimant but that would be "*purely discretionary*" and would not be part of her contractual remuneration. There was an "*Entire agreement*" clause at paragraph 22 and at paragraph 23 a clause stating: "*no variation....of this agreement shall be effective unless it is in writing and signed by the parties*".
20. Sanctions were imposed on Mr Fridman (15 March 2022) and Ms Zairova (13 April 2022) following the Russian invasion of Ukraine. Until sanctions were imposed on Mr Fridman, the Claimant was paid her agreed maternity pay. When sanctions were imposed on Mr Fridman, the Respondent's bank account at Barclays was blocked.
21. On 2 April 2022, the Claimant contacted her manager, Mr Kuskys, enquiring as to why she had not received her maternity pay and payslips. He explained that salaries in March would be late. The business was subject to sanctions and was awaiting a licence to be able to continue providing services. The Claimant was told that, in the worst case, staff would receive two salaries at the end of April 2022.
22. On 30 April 2022, the Claimant met with the Respondent. She confirmed that she wanted to return to work in November 2022. The Respondent informed her that it could not pay her maternity pay because of restrictions and sanctions. Mr Kuskys continued to assure her that the business was waiting for a licence and asked the Claimant to be patient.

23. On 14 June 2022, OFSI issued a licence which permitted a monthly basic needs allowance to Mr Fridman and his dependants. The licence applied to both the Respondent and Mr Fridman. It did not permit ongoing payments to non-security employees of the Respondent, including housekeeping assistants.
24. Also in June 2022, the Claimant contacted HMRC in relation to her maternity pay and was told that it appeared that her employment had ended on 1 March 2022.
25. On 22 June 2022, the Claimant raised with the Respondent that HMRC had told her that the Respondent had terminated her employment on 1 March 2022. This was against her will and while she was on maternity leave. She complained about the consequences of this including the non-payment of notice and holiday pay and leaving her without the possibility of claiming maternity benefits.
26. In an email of 23 June 2022, the Respondent stated that the Claimant's employment had not been terminated. It was explained to the Claimant again that the Respondent was affected by the sanctions and that a licence was being sought. The Respondent stated: "*after the licence is granted, all the money and employment tax contributions owed to you will be settled*". The Claimant was told that she had a right to terminate her employment if she wished but that payments and tax contributions could only be settled after a licence was granted.
27. The Claimant responded that she had not been paid for some months. She raised concerns about a tax refund and asked for proof of the application for a licence. She provided a copy of her HMRC personal tax account showing that the Respondent had said that her employment ended on 1 March 2022.
28. By a solicitors' letter dated 27 June 2022, the Respondent confirmed that it had not terminated the Claimant's employment and was seeking to rectify matters with HMRC. In the letter, the impact of the financial sanctions was explained to the Claimant. The Respondent sent her details of her pay and tax position.
29. On 24 August 2022, Mr Fridman applied to amend the Licence. The solicitors acting for Mr Fridman brought it to OFSI's attention that the Respondent was responsible, among other matters, for two employees who were currently on maternity leave. One of these employees was the Claimant.
30. On 6 October 2022, the Claimant raised the question of the licence again. She asked if there was a job for her. She said that she was planning to come back after her period of maternity leave but did not know what the situation was. She explained her difficult financial situation. The Respondent referred her to its lawyers and suggested that she apply for Universal Credit.
31. On 22 December 2022, OFSI refused Mr Fridman's application for a licence in respect of ongoing payments to the Respondent for payment to staff for household-related services. All non-licensed staff, other than the Claimant, were accordingly made redundant in February 2023. The Claimant was not sent any notice of redundancy.
32. The Respondent was permitted to pay for service arrears up to and including the point of refusal of the requested licence (22 December 2022), as well as any NICs, redundancy payments and pension contributions. No other payments,

including ongoing payments, were authorised. The maternity pay agreed with the Claimant was not authorised. Following the decision in December 2022, the Licence was issued in March 2023. The decision by OFSI in relation to service arrears was described in **Fridman** as involving an acceptance that some staff *“may have incurred economic loss as a result of providing their services to [Mr Fridman] after his...designation”* and a recognition that those staff *“may be paid for the services already incurred”*.

33. The Claimant next contacted the Respondent, via its lawyers, on 4 March 2023, requesting an update on the licence application and her maternity pay. On 5 March 2023 the Respondent told the Claimant that a licence to process some payments had been received and that once the Respondent had received funds from the client some payment should be made. On 6 March 2023, the Claimant was told that she would be sent her P60 and P45. These were sent to the Claimant on 17 March 2023. The P45 showed the Claimant’s final day of employment by the Respondent as 31 October 2022.
34. On 10 March 2023 at 13:06, the Respondent received a request for an employment reference on behalf of estate agents in connection with a property that the Claimant wished to rent. The Respondent asked the Claimant for clarification and the Claimant explained that she was trying to move house. The Respondent stated that the Claimant’s maternity leave had ended in November 2022 and that, as she had not returned to work, she had been *“suspended”*. The Claimant responded that she had tried to return to work but had been told that it was impossible *“because of the situation”*. She said that she had asked many times about returning to work and that the last time was on 6 October 2022. The Respondent said that it would keep her informed but nobody contacted her. The Respondent replied that it was under the impression that the Claimant did not wish to resume her employment as she never returned to work. She was told that this was why she had not been sent a notice of redundancy. The letter concluded: *“in any event this does not change that we would not be able to continue employing you and so far only have authorisation to pay SMP due to you up to November 2022”*.<sup>1</sup>
35. In further correspondence that day, the Respondent explained to the Claimant that *“a licence to continue employing [the Claimant] alongside a number of others was refused”* and it had therefore had to *“suspend most of the staff”* for whom it had not received a licence.<sup>2</sup> The Respondent said that Mr Fridman intended to challenge the decision in relation to the licence but that the decision was out of the Respondent’s control.
36. The Claimant was paid her holiday pay and pension contributions for her maternity pay period, which were payments licensed by OFSI.
37. At paragraphs 21 and 22 of her Particulars of Claim, the Claimant refers to some staff, including housekeepers, returning to work for the Respondent or being recruited in early 2023. The Respondent disputes that it has hired any other employees into roles which are not permitted by the terms of the Licence.

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<sup>1</sup> This latter contention was in error. The Claimant was not entitled to statutory maternity pay and there was no authorisation for the payment of maternity pay had been given.

<sup>2</sup> In fact staff were made redundant and were not “suspended”.

## Analysis and conclusions

38. I first considered the unfair dismissal and direct discrimination claims and whether the Claimant had any reasonable prospect of establishing the necessary causation to succeed in those claims. If there were no reasonable prospects of establishing the necessary causation, the claims should be struck out as they were bound to fail.
39. In order to establish her claim for unfair dismissal, the Claimant would need to show that the reason or principal reason for her dismissal was a reason relating to her pregnancy or maternity.
40. In relation to her direct discrimination and unfavourable treatment claims, the Claimant would need to show that the reason why she was dismissed and was not paid maternity pay after February 2022 was one or more of the protected characteristics she relies on. The protected characteristic need not be the sole reason for the unfavourable or less favourable treatment, but one or more of those protected characteristics must have significantly influenced the Respondent's decisions to dismiss her and not to pay the agreed maternity pay.
41. The Respondent submitted that this was a case where the undisputed documentary evidence could not support the Claimant's case, even taking her case at its highest. It was absolutely clear that the reason why the Claimant's employment was terminated, and her maternity payments stopped, was the impact of the imposition of sanctions under the Russian Regulations and not any of the protected characteristics she relied on.
42. The Claimant submitted that she had every intention of returning to work at the end of her maternity leave period and tried to return to work. The Respondent did not keep her updated on her employment position and she only found out that her employment was terminated between 5 and 10 March 2023. She considered that there was discrimination because she was blamed for not returning to work. The Respondent was obliged to pay her the discretionary maternity pay as it had been agreed and the Respondent clearly considered itself bound by the obligation to pay as it paid from November 2021 to February 2022. The Claimant did not apply for any statutory maternity allowance (she accepted she was not entitled to statutory maternity pay) because she relied on the fact that the Respondent would pay. She accepted that the Respondent could not make any payments to her without committing a criminal offence but considered that the Respondent ought to have appealed the High Court's decision in **Fridman**. The Claimant was a "*victim of processes*".
43. The Claimant's representative did not, in her submissions, refer to the allegation in the Claimant's particulars of her claim that others had been re-employed or engaged in similar positions to the Claimant before or at around the time of her dismissal, but I took into account in arriving at my conclusions that this was alleged in the Claimant's particulars.
44. The Claimant is indeed the victim of processes that are out of her control. The question I must consider, however, in accordance with rule 37 of the Employment Tribunals Rules of Procedure, is whether her unfair dismissal and discrimination claims have any reasonable prospect of success. Although the



Claimant's absence on maternity leave provided the factual context in which she was dismissed and her maternity pay was stopped, the undisputed documentary evidence demonstrates that the clear and sole reason for her treatment was that the Respondent could no longer pay her because of the impact of the imposition of sanctions under the Russian Regulations. This is evidenced by the contemporaneous correspondence and supported by the matters set out and the findings in **Fridman**, as well as by the Claimant's own acceptance that the Respondent could not make payments to her without committing a criminal offence.

45. Before reaching a final conclusion on whether the Claimant's claims for unfair dismissal and direct discrimination could be said to have no reasonable prospect of success, I considered whether the Claimant's allegation about others being re-employed or engaged in similar positions to the Claimant before or at around the time of her dismissal might give rise to any reasonable arguments that the Claimant's dismissal involved unlawful discrimination. Given the lack of any detail given in relation to this allegation, the lack of dispute between the parties about the impact of the sanctions, the fact that the Claimant did not refer to this matter in submissions and the manner in which Mr Fridman pursued his application for a licence to make payments for non-security staff such as the Claimant (and to pay maternity pay), I did not attribute any substance to this allegation or consider it to be reasonably arguable.
46. For all these reasons, taking the Claimant's case at its highest, I concluded that the Claimant has no reasonable prospect of showing that the reason why she was dismissed and not paid continuing maternity pay was significantly influenced by her sex, pregnancy or maternity.
47. In relation to the claim for breach of contract for unpaid maternity pay, the Respondent's contention in its written submissions that the breach of contract claim was out of time, was not pursued in oral closing submissions in the light of the time limit provisions in Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
48. In its written submissions, the Respondent submitted that the maternity pay was discretionary and relied on the Entire Agreement and Variation clauses in the contract. It developed this argument in oral submissions, submitting that there could not have been any breach of contract as there was no contractual liability to pay maternity pay. It further submitted in oral submissions that even if it was reasonably arguable that the Respondent had a contractual liability to pay maternity pay to the Claimant, once the making of such a payment became a criminal offence, which was the consequence of the sanctions, there could be no continuing liability to pay.
49. As stated above, the Claimant accepted that it would have been a criminal offence for the Respondent to pay her agreed maternity pay following the imposition of sanctions. Although she contended that there was a contractual liability to pay her (and I accepted her contention for the purpose of this application), the sole basis on which she contended that she should have been paid following the imposition of sanctions was contingent upon a successful appeal being brought against the decision of the High Court in **Fridman**. I must,

however, apply the law as it currently stands and not on the basis of a hypothetical appeal that may or may not succeed.

50. Here too, taking the Claimant's claim at its highest, I concluded that the Claimant's claim has no reasonable prospect of success. There is no reasonable prospect that the Employment Tribunal would find that the Respondent was liable to continue making a payment to the Claimant when the making of that payment would have constituted a criminal offence.
51. For all these reasons, all the Claimant's claims are struck out and the hearing listed for 8, 9 and 10 May 2024 is vacated.

Employment Judge McNeill KC

20 December 2023

Sent to the parties on:  
19 January 2024

For the Tribunal Office: