

Neutral Citation Number: [2024] EAT 28

Case No: EA-2022-001099-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 March 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between :

HILTON FOODS SOLUTIONS LTD

- and -

ANDREW WRIGHT

Appellant

Respondent

MARTIN BLOOM (retired solicitor instructed by Hegarty LLP) for the **Appellant**
JACK CASTLE and DANIEL HALLSTRÖM
(on behalf of the Free Representation Unit) for the **Respondent**

Hearing date: 21 February 2024

JUDGMENT

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE

Determining the question of whether an employee has “sought” to take parental leave is a factual determination for appreciation of the Employment Tribunal having considered the relevant evidence.

There is not an absolute requirement that the employee must have given notice to take parental leave pursuant to paragraphs 1(b) and 3 of Schedule 2 to **MPLR**.

HIS HONOUR JUDGE JAMES TAYLER

1. An employee is protected against being dismissed because s/he took parental leave. An employee is also protected if s/he “sought” to take parental leave. Well, at least, in broad terms. The provisions are something of a mosaic. We will need to inspect the mosaic in a little detail to understand the scope of the protection.

2. This appeal raises one point of construction; what is required for an employee to have “sought” to take parental leave? The appellant (who I will refer to as the respondent as it was in the Employment Tribunal) contends that the employee must have complied with certain formal requirements of the **Maternity and Parental Leave etc. Regulations 1999** (“**MPLR**”) that are a prerequisite of exercising the right to take parental leave. The respondent to the appeal, Mr Wright (whom I will refer to as the claimant), contends that whether an employee has sought to take parental leave is a question of fact for the appreciation of the Employment Tribunal having considered all the relevant evidence.

3. The claimant was employed by the respondent as a Logistics/Supply Chain Manager from 4 February 2019 until 13 March 2020 when he was dismissed, purportedly by reason of redundancy. Mr Wright contended that the real reason for his dismissal was that he had sought to take parental leave.

4. The respondent applied to strike out the claim on the basis that it had no reasonable prospect of success because the claimant had not complied with the provisions of the **MPLR** that must be fulfilled to exercise the right to parental leave, and so he could not as a matter of law have sought to take parental leave.

5. The application to strike out the claim was considered at a Preliminary Hearing before Employment Judge Mason on 25 May 2022. For the purpose of the strike out application Employment Judge Mason was required to take the facts asserted by the claimant at their highest. She set out the assumed facts on the basis of which the application to strike out was considered:

27. The Claimant was employed by the Respondent from 4 February 2019 until 13 March 2020; his role was Logistics/Supply Chain Manager and he

reported to Justin Marshall (JM). PH is the Managing Director.

28. The Respondent prepares and supplies meat products for (amongst others) Tesco supermarket. The Claimant confirmed on cross-examination that although the Respondent prepares food for Tesco the name of the Respondent does not appear on the packaging and therefore anyone buying from Tesco would not know where it came from.

29. The Claimant has two children; his son is disabled; the impairment is autism.

30. The Claimant had informal discussions with various personnel at the Respondent (including his Line Manager and HR) regarding unpaid parental leave; these discussions took place in November 2019, late 2019 and early 2020.

31. On 7 February 2020, Ms Pietruszewka (HR) emailed the Claimant (page 43)

“Subject: Unpaid Parental Leave

“Referring to your question regarding Unpaid Parental Leave – if you wish to apply, you need to write a request to your manager, stating the date you would like to start your parental leave. Please be aware you need to allow 21 days’ notice before the start day of your leave. You are entitled to 18 weeks’ leave for each child, however you can take up to 4 weeks per year. Please see GOV website with Unpaid Parental Leave Guidance: <https://www.gov.uk/parental-leave>. Please be aware that if your request is approved you may be asked to take your Unpaid Parental Leave in one week blocks.

If you have any further questions, please do not hesitate to let us know.”

On 10 February 2020, the Claimant responded (page 43):

“Thanks for that. I think the only thing different is with a disabled child you can take leave in days rather than weeks according to the policy”

32. The Claimant met with PH on 14 February 2020. The Claimant says he mentioned to PH that he would be seeking parental leave and that PH’s response was negative and he told the Claimant that he would need to be in the office “Monday to Friday, 8-5pm with no exceptions”. The Claimant says he suggested to PH that he was eligible to take parental leave to which PH replied “so you want to go f*ing legal then”. The Respondent denies this and I have made no findings of fact as to what was said as it is not necessary for the purposes of determining the preliminary issues.

33. On 17 February 2020 the Claimant emailed KP (page 45):

“Do you have 15 mins this week we can sit down and have a quick chat about Parental Leave?” The Claimant then met with KP on 18 February 2020. The Claimant says he explained to KP what

had happened at the meeting with PH; he says Ms. Pope “dismissed the conversation as “Pete just being Pete”.

Again, I have made no findings of fact as to what was said as it is not necessary for the purposes of determining the preliminary issues.

34. The Claimant accepts that he did not at any time make a formal written application for parental leave. He also confirmed on cross-examination that he knew he had to make a formal application in writing. He told me he was in discussions with his ex-wife to work out how it would work.

35. The Respondent had a whistleblowing policy (pages 37-38) which sets out a procedure for raising matters of concern. The Claimant confirmed on cross-examination that he was aware of the policy.

36. The Claimant was dismissed on 13 March 2020 and paid 3 months pay in lieu of his contractual notice. The reason relied on by the Respondent is redundancy.

6. Employment Judge Mason analysed the application to strike out and dismissed it:

46. S99 ERA and Reg 20 MPL Regs: Automatic Unfair dismissal (family reasons/parental leave)

46.1 I do not agree with Mr. Bloom that the Claimant’s failure to exercise his entitlement to parental leave by complying with the provisions of Schedule 2 of the MPL Regs is fatal to the Claimant’s case that he “sought” to take parental leave:

(i) This protection is not analogous to s104 (asserting a statutory right). The wording in s104 is different and requires the employee to show either that he brought proceedings to enforce a relevant statutory right or that he alleged that the employer had infringed a statutory right. The wording in reg 20 on the other hand is wider and requires the employee to show that his dismissal was connected with the fact that he “took or sought to take” parental leave.

(ii) The meaning of “sought to take” was considered in a detriment case, **Tavernor v Associated Co-operative Creameries Ltd** ET case no. 1902341/00. It was held that in order to be able to claim to have suffered a detriment as a result of taking, or seeking to take, unpaid parental leave, the employee must have made it clear that he or she was relying on the right to take unpaid parental leave. In that case, the claimant had not at any time mentioned parental leave and had been unaware of his parental rights; the claimant had not therefore “sought” to take parental leave. In my view it follows, that had the claimant in that case made it clear he was relying on the right to take unpaid parental leave, he would have overcome the hurdle of showing that he “sought” to take parental leave.

The wording in Reg 19 MPL Regs (protection from detriment) is the same as reg 20 MPL (dismissal) i.e. “took or sought to take” and it is therefore reasonable to apply this analysis to Reg 20.

(iii) In this case, it is agreed that the Claimant made informal enquiries about taking parental leave and made it clear on a number of occasions that this was his intention. It is certainly arguable that he thereby “sought” to take parental leave despite the lack of a written application and due notice.

46.2 The Claimant will also of course need to show a causal connection between dismissal and seeking to take parental leave; that connection must be stronger than merely associated with parental leave but less stringent than the “but for” test (*Atkins v Coyle Personnel plc* [2008] IRLR 420). It is for tribunals to determine as matter of fact whether there is a connection between the taking of leave and the dismissal and that must be determined by the Tribunal in the light of all the evidence at a final hearing.

46.3 For these reasons, I am not striking out this claim or making a deposit order as I cannot conclude that there are no prospects of success or little reasonable prospects of success.

7. The appeal is brought on one ground:

The Appellant appeals against paragraph 1 of the Judgment not to strike out the Claimant's Claim of Automatic Unfair Dismissal brought pursuant to the provisions of Section 99 Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave Regulations 1999. The Employment Judge erred in law (paragraphs 45 and 46.1 - 46.3 inclusive of the Judgment refers) in concluding that "sought to take Parental Leave" does not require the Claimant to have submitted a written application to take Parental Leave pursuant to the provisions of paragraph 1 (1) (b) Schedule 2 and Paragraph 3 of Schedule 2 of the Maternity and Parental Leave Regulations 1999 ("the Regulations"). The Regulations are prescriptive and require a formal written application as required by Schedule 2 of the Regulations to be made as a requirement to take Parental Leave. An informal discussion as to the possibility of an employee wishing to take Parental Leave does not amount to "seeking to take" Parental Leave as required by Regulation 20 of the Regulations.

8. The mosaic of relevant provisions are set out in the **MPLR** and the **Employment Rights Act 1996** (“**ERA**”)

9. Regulation 2 **MPLR** defines parental leave:

Interpretation

2.—(1) In these Regulations ...

“parental leave” means leave under regulation 13(1) ...

10. Regulation 13 **MPLR** sets out the entitlement to parental leave:

Entitlement to parental leave

13.—(1) An employee who—

- (a) has been continuously employed for a period of not less than a year ...; and
- (b) has, or expects to have, responsibility for a child,

is entitled, in accordance with these Regulations, to be absent from work on parental leave for the purpose of caring for that child.

11. Regulation 16 **MPLR** applies, as a default, a statutory parental leave scheme where an employee's contract of employment does not provide for parental leave or incorporate provisions for parental leave that are set out in a collective or workforce agreement:

16. The provisions set out in Schedule 2 apply in relation to parental leave in the case of an employee whose contract of employment does not include a provision which—

- (a) confers an entitlement to absence from work for the purpose of caring for a child, and
- (b) incorporates or operates by reference to all or part of a collective agreement or workforce agreement.

12. Regulation 21 **MPLR** allows an employee to take the benefit of the most favourable terms of any contractual entitlement and the statutory scheme:

Contractual rights to maternity or parental leave

21.—(1) This regulation applies where an employee is entitled to—
...(c) parental leave,

(referred to in paragraph (2) as a “statutory right”) and also to a right which corresponds to that right and which arises under the employee's contract of employment or otherwise.

(2) In a case where this regulation applies—

- (a) the employee may not exercise the statutory right and the corresponding right separately but may, in taking the leave for which the two rights provide, take advantage of whichever right is, in any particular respect, the more favourable, and
- (b) the provisions of the 1996 Act and of these Regulations relating to the statutory right apply, subject to any modifications necessary to give effect to any more favourable contractual terms, to the exercise of the composite right described in sub-paragraph (a) as they apply to the exercise of the statutory right.

13. Schedule 2 **MPLR** sets out the default statutory provisions, including those that relate to the

exercise of the right to take parental leave:

DEFAULT PROVISIONS IN RESPECT OF PARENTAL LEAVE

Conditions of entitlement

1. An employee may not exercise any entitlement to parental leave unless—

(a) he has **complied with any request made by his employer to produce for the employer’s inspection evidence of his entitlement**, of the kind described in paragraph 2;

(b) he has **given his employer notice, in accordance with whichever of paragraphs 3 to 5 is applicable**, of the period of leave he proposes to take, and

(c) **in a case where paragraph 6 applies, his employer has not postponed the period of leave** in accordance with that paragraph.

2. The evidence to be produced for the purpose of paragraph 1(a) is such evidence as may reasonably be required of—

(a) the employee’s responsibility or expected responsibility for the child in respect of whom the employee proposes to take parental leave;

(b) the child’s date of birth or, in the case of a child who was placed with the employee for adoption, the date on which the placement began, F1...

Notice to be given to employer

3. Except in a case where paragraph 4 or 5 applies, the notice required for the purpose of paragraph 1(b) is notice which—

(a) **specifies the dates on which the period of leave is to begin and end**, and

(b) **is given to the employer at least 21 days before the date on which that period is to begin.**

4. Where the employee is the father of the child in respect of whom the leave is to be taken, and the period of leave is to begin on the date on which the child is born, the notice required for the purpose of paragraph 1(b) is notice which—

(a) specifies the expected week of childbirth and the duration of the period of leave, and

(b) is given to the employer at least 21 days before the beginning of the expected week of childbirth.

5. Where the child in respect of whom the leave is to be taken is to be placed

with the employee for adoption by him and the leave is to begin on the date of the placement, the notice required for the purpose of paragraph 1(b) is notice which—

- (a) specifies the week in which the placement is expected to occur and the duration of the period of leave, and
- (b) is given to the employer at least 21 days before the beginning of that week, or, if that is not reasonably practicable, as soon as is reasonably practicable.

Postponement of leave

6. **An employer may postpone a period of parental leave where—**

- (a) **neither paragraph 4 nor paragraph 5 applies**, and the employee has accordingly given the employer notice in accordance with paragraph 3;
- (b) **the employer considers that the operation of his business would be unduly disrupted if the employee took leave during the period identified in his notice;**
- (c) **the employer agrees to permit the employee to take a period of leave—**
 - (i) **of the same duration** as the period identified in the employee’s notice,
 - (ii) beginning on a date determined by the employer after consulting the employee, which is no later than six months after the commencement of that period;
 - (iii) ending before the date of the child’s eighteenth birthday.
- (d) **the employer gives the employee notice in writing of the postponement** which—
 - (i) states the reason for it, and
 - (ii) specifies the dates on which the period of leave the employer agrees to permit the employee to take will begin and end, and
- (e) **that notice is given to the employee not more than seven days after the employee’s notice was given to the employer.** [emphasis added]

14. An employee who relies on the statutory scheme, rather than one provided for in a contract of employment, may not “exercise” the entitlement to parental leave unless s/he has given the notice provided by paragraph 1(b) and 3 of Schedule 2 to **MPLR**. These are the provisions relied upon by the respondent. The respondent contends that the notice must have been given before an employee

can be said to have “sought” to take parental leave. However, it is important to note that there are other circumstances in which an employee may not exercise an entitlement to parental leave, such as where an employee has failed to provide evidence supporting the right to take parental leave when requested by the employer and where the employer has exercised the right to postpone parental leave in appropriate circumstances. Thus, there may be circumstances in which an employee has given the relevant notice and has become entitled to exercise an entitlement to parental leave but then loses the entitlement because of a failure to provide information supporting the right on request from the employer, or the parental leave is postponed.

15. The protection from dismissal because an employee has “sought” to take parental leave arises from a combination of Section 99 **Employment Rights Act 1996** (“**ERA**”) and Regulation 20 **MPLR**. Section 99 ERA provides that:

Leave for family reasons.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(c) the **reason or principal reason** for the dismissal is **of a prescribed kind**, or

(b) the **dismissal takes place in prescribed circumstances**.

(2) In this section “prescribed” means prescribed by regulations made by the Secretary of State.

(3) A **reason or set of circumstances prescribed under this section must relate to— ...**

(c) parental leave, ... [emphasis added]

16. Regulation 20 **MPLR** provides:

Unfair dismissal

20.—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the **reason or principal reason** for the dismissal is **of a kind specified in paragraph (3)**, or ...

(3) The kinds of reason referred to in paragraphs (1) and (2) are **reasons**

connected with—

...

(e) **the fact that she took or sought to take— ...**

(ii) **parental leave**, or ... [emphasis added]

17. Standing back and focusing on the overall picture; the claimant contended that he was dismissed for a reason, or principal reason, connected with the fact that he had “sought” to take parental leave. The respondent contends that the claimant cannot as a matter of law have “sought” to take parental leave because he had not complied with the notice requirement in paragraphs 1(b) and 3 of Schedule 2 **MPLR** as result of which he “may not exercise any entitlement to parental leave”.

18. I do not find the respondent’s analysis persuasive. If Parliament’s intention was to limit the protection against dismissal to employees who have given notice so that they are entitle to take parental leave, it could have used the same wording, rather than introducing two concepts: an employee who has sought to take parental leave and an employee able to exercise a right to parental leave because the relevant notice has been given. If the statutory intention was that in order to be protected against dismissal an employee must have given notice to take parental leave by complying with paragraphs 1(b) and 3 of Schedule 2 to **MPLR** the protection against dismissal could have been defined by requiring compliance with those specific provisions.

19. The approach to be adopted to the construction of the **MPLR** was considered in **Atkins v Coyle Personnel PLC** [2008] IRLR 420 in the context of determining what is meant by the words a “reason connected with” in Regulation 20 **MPLR**:

41 We are satisfied that ‘connected with’ in reg. 29 means causally connected with rather than some vaguer, less stringent connection, though in a sense the debate is both sterile and semantic as the task of considering the facts and determining whether the reason or principal reason found is such that it is connected with the fact that the employee took or sought to take paternity leave is a factfinding task which, like any finding on causation or otherwise, has to be performed. **The legislation must, in our view, be given a wide purposive interpretation and the application of the test must, as on any causation issue, be approached in a pragmatic commonsense fashion on the facts of the individual case.**

20. **Atkins** is authority for the unsurprising proposition that a wide and purposive approach should

be adopted to interpretation of the **MPLR**. There are a number of consequences that follow from the respondent's analysis that would be incompatible with a purposive approach to the construction of the **MPLR**.

21. On the respondent's analysis even if an employee has unambiguously informed his or her employer of a decision to take parental leave and, for example, asked how to do so, and is dismissed to prevent the exercise of that right, the protection would not apply, because the employee would not have made the formal application. I fail to see how, applying the normal English meaning, an employee in such circumstances has not "sought" to take parental leave.

22. The respondent's analysis does not deal with the fact that an employee may have "sought" to take parental leave that is conferred by a contract of employment or by a collective or workforce agreement that is incorporated into or referred to in a contract of employment. In such cases it cannot be a prerequisite of having "sought" to take parental leave that the employee has given notice under paragraphs 1(b) and 3 of Schedule 2 **MPLR**, because the provisions do not apply unless the default statutory scheme is relied upon. The term "sought" should not have a different meaning depending on whether the default statutory or contractual provisions apply.

23. The respondent's analysis does not take account of the fact that a person may have complied with paragraphs 1(b) and 3 of Schedule 2 of **MPLR** but then lose the right to take parental leave because of a failure to provide information establishing the right to take parental leave requested by the employer.

24. It would also be surprising were the protection to apply to an employee who has complied with the formalities of paragraphs 1(b) and 3 of Schedule 2 **MPLR** but made it clear to the employer that s/he does not really intend to take parental leave. While such circumstances are highly unlikely to arise in practice, it is hard to see how such an employee could sensibly be said to have "sought" to take parental leave.

25. The respondent relies on **Qua v John Ford Morrison** [2003] I.C.R. 482, a case that concerned whether an employee had taken dependants' leave. The case was not about whether the employee had

sought to take leave, although the analysis does include such situations, albeit on an *obiter* basis: Mrs Recorder Cox, as she then was, said:

25. A tribunal asked to determine this issue should ask itself the following questions: (1) did the employee take time off, or seek to take time off, work during her working hours? If so, on how many occasions and when? (2) If so, on each of those occasions did the employee (a) as soon as reasonably practicable inform her employer of the reason for her absence; and (b) inform him how long she expected to be absent; (c) if not, were the circumstances such that she could not inform him of the reason until after she had returned to work? If on the facts the tribunal finds that the employee had not complied with the requirements of section 57A(2), then the right to take time off work under subsection (1) does not apply. The absences would be unauthorised and the dismissal would not be automatically unfair. Ordinary unfair dismissal might arise for consideration, however, if the employee has the requisite length of service. (3) If the employee had complied with these requirements then the following questions arise: (a) did she take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of subsection (1)? (b) If so, was the amount of time off taken, or sought to be taken, reasonable in the circumstances? (4) If the employee satisfied questions (3)(a) and (b), was the reason, or principal reason, for the employee's dismissal that she had taken or sought to take that time off work? If the tribunal answers that final question in the affirmative, then the employee is entitled to a finding of automatic unfair dismissal.

26. I do not consider that the analysis works well when considering whether a person has “sought” to take leave, which was not the situation being considered in the case. The first question includes asking if the employee sought to take time off, which presumably can be answered yes, but then the rest of the questions appear to be focused on a situation in which a person has taken the time off rather than only having sought to do so. I am not persuaded to change my analysis because of the *obiter* comments in **Qua**.

27. I have concluded that on a straightforward reading of the **MPLR** there is not an absolute requirement that an employee must have given notice to take parental leave under the terms of paragraphs 1(b) and 3 of Schedule 2 **MPLR** in order for the employee to have “sought” to take parental leave. The word “sought” is an ordinary English word that the Employment Tribunal is best placed to interpret on a proper consideration of all of the relevant facts to determine whether a stage has been reached at which it can be said the employee has sought to take parental leave, applying a

purposive approach to interpretation of the regulations. While giving notice to take parental leave under the terms of paragraphs 1(b) and 3 of Schedule 2 to **MPLR** will, save in exceptional circumstances, demonstrate that an employee has “sought” to take parental leave, it is not the only way that the fact that the employee has sought to take parental leave can be evidenced.

28. The claimant sought to rely on the underlying EU provisions. Although I consider my analysis is consistent with the EU provisions, I do not consider it is necessary to rely on the EU provisions to construe the **MPLR**.

29. The appeal is dismissed.