EMPLOYMENT TRIBUNALS

Claimant: Miss K Thomas

Respondent: Maximus UK Services Ltd

On: 3, 4 and 5 January 2024

Before: Employment Judge Ahmed (sitting alone)

At: Leicester

Representation
Claimant: In person
Respondent: Mr Nick Singer of counsel

JUDGMENT

The decision of the Tribunal is that:

1. The Claimant's complaint of an unlawful deduction of wages is well-founded and succeeds. The Respondent has made an unlawful deduction of wages in respect of maternity pay.

2. The issue of remedy is adjourned to Thursday 28 March 2024 at 10.00am.

3. Case management orders in respect of the remedy hearing are given separately.

REASONS

1. In these proceedings the Claimant brings a claim of unlawful deduction of wages. A complaint of pregnancy and maternity discrimination was dismissed upon withdrawal earlier.

2. The broad issue in the case is this: was the Claimant entitled to 'enhanced' maternity pay when she was promoted and signed a new contract of employment with different terms and conditions, in particular on terms which was less favourable as to maternity pay in circumstances where this disadvantage was not known or drawn to her attention?

3. There is no material dispute on the facts. At this hearing I took evidence from the Claimant who did not call any other witness. From the Respondent I heard two witnesses, Ms Fiore who was Head of Operations from 14 October 2020 to 28 April

2023. Ms Fiore decided a grievance brought by the Claimant and Mr Peter Craig, Regional Contracts Director who dealt with the grievance appeal. There is nothing specific that arises from the grievance itself but the evidence of Ms Fiore and Mr Craig has been helpful in understanding the context of the dispute.

4. The Claimant was employed by the Respondent from 18 March 2019 as an Operations Manager. At the time she presented this claim to the Tribunal (on 18 November 2022) she was still employed by the Respondent. The Claim is ACAS early-conciliation compliant. There is no issue as to time limits.

5. The Respondent delivers a range of programmes and services providing employment and skills support for disabled people including those with long-term health conditions. It is the predecessor of the Government-owned Remploy Employment Services.

6. In July 2014 the Department of Work and Pensions announced that it was looking for Remploy Employment Services to leave government control by way of a joint venture between a private company and employees of Remploy Employment Services. In March 2015 it was confirmed that Remploy Employment Services would be 70% owned by the Respondent and 30% by an Employee Trust. The existing employees transferred to a new limited company, Remploy Limited ('Remploy'), which had been incorporated in February 2015 to facilitate the change in ownership out of government control by way of a TUPE transfer and retained their original Remploy Employment Services Terms and Conditions. Any new employees joining Remploy following that date were also issued with terms and conditions based on the legacy Remploy Employment Services' terms which were generally more beneficial on working hours than the Respondent's equivalent hours.

7. The Respondent confirmed details of the changes in a letter which was issued to all employees and in particular to the Claimant on 29 January 2020. The letter attached a FAQ section. This contained, amongst other matters, the following information:

> **What will the impact be on me?**
>
> The impact on colleagues moving to the new entity will be minimal and largely administrative. No action is required by you.
>
> **What will happen to my T&C if I change roles in the future?**
>
> If you apply for another role within the Company the T&C's on offer for this role will be me (sic) made known to you as part of the application process. In some circumstances (such as sideways moves) this might mean no significant changes but in other circumstances (such as promotions) it might mean more fundamental changes to T&C's. By making it clear as part of the recruitment and selections process the individual can decide if the move is the right one for them.

8. The letter of 29 January 2020 also contains the following extract:

> "Further to recent communications you will be aware that we have formed a new legal entity, MAXIMUS UK Services Ltd and that we propose to transfer all existing colleagues who work for Remploy and MAXIMUS People Services into this new entity on 1 April 2020.
>
> **What does it mean for me?**
>
> This change will be covered by the transfer of undertakings (protection of employment) regulations 2006 commonly called TUPE.
>
> Under the Regulations, your employment will continue on the same terms except that you will be employed by MAXIMUS UK Services Ltd. You will retain your current salary, benefits and continue

to give employment, employee number, employment and log on details. MAXIMUS UK Services Ltd will be treated as if it has always been your employer and you will not need to sign a new contract of employment."

9. After a period of consultation with the relevant trade unions it was confirmed that with effect from 1 September 2019 any new employee joining Remploy would be issued with Maximus UK Services Ltd ('Maximus') terms and conditions. Ongoing consultations resulted in further changes being made to the ways of working to existing Remploy employees which included changing the date on which they were paid, amending the annual leave year and harmonising pay bands bringing legacy Remploy employees further into line with the Respondent's terms.

10. The Claimant originally began working for Remploy on 18 March 2019 and was issued with a Remploy contract. That included a term that she was entitled to contractual maternity pay payable for 26 weeks at 90% of her contractual pay.

11. However, in relation to the same benefit the Maximus Terms and Conditions clause 9.1 states:

"You may be entitled to family friendly provisions (maternity/adoption pay, paternity pay, shared parental pay) details of which including eligibility criteria are set out within the relevant family friendly policies."

12. One then has to go to clause 10.7 of the Pregnancy and Maternity Policy which is not attached to the contract of employment and is an entirely separate document. Relevantly this states:

"Statutory maternity pay (SMP) is payable for up to 39 weeks….

SMP is calculated as follows:

First 6 weeks : SMP is paid at the earnings related rate of 90% of your average weekly earnings calculated over the relevant period

Remaining 33 weeks: SMP is paid at the prescribed rate which is set by the government for the relevant tax year, or at 90% of your average weekly earnings, if this is lower than the Government's set weekly rate.

13. The net result is a significantly reduced amount for maternity pay on the Maximus terms than it would be on Remploy terms. An employee staying put on Remploy terms is significantly better off if they go on maternity leave than if they transfer to Maximus terms, for example by a promotion.

14. In May 2021 the Claimant applied for and was successful in securing a promotion as an Operations Manager. This was a new role for the Claimant with a significant pay increase from £30,000 to £44,000 per annum.

15. The Claimant was issued with a Maximus contract which she signed on 11 June 2021. She began her new role on 21 June 2021.

16. In December 2021 the Claimant informed the Respondent she was pregnant.

17. In May 2022 the Claimant requested a breakdown of her anticipated pay during maternity leave. That was when the Claimant first discovered that she would only be entitled to the less favourable maternity terms.

18. The Claimant presented a grievance. A grievance hearing was conducted by Ms Fiore on 22 July 2022. The grievance was not upheld. Ms Fiore's reasoning is fairly brief:

> "I believe that KT applied for and accepted a Maximus vacancy, she was sent a new contract/statement of particulars and that the Company Pregnancy and Maternity Policy in section 10.2 outlines what the company standard entitlement is.
>
> I believe it is clear that the Company Pregnancy and Maternity Policy shows in sections 10.2 what the standard Maximus entitlement is and that when moving to a Maximus role and signing the Maximus Statement of Particulars KT was no longer entitled to the Remploy employees maternity package."

19. The Claimant's appeal against the grievance decision was rejected by Mr Craig. It is unnecessary to set out his reasons. The Claimant was paid her maternity pay on Maximus terms and has therefore been paid less than if she had been on Remploy terms.

THE LAW

20. Section 13 of the Employment Rights Act 1996 ("ERA 1996") states: -

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

21. Section 27 ERA 1996, so far as is relevant, states:

"(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…"

22. There is no dispute that enhanced maternity pay is capable of being defined as 'wages' under ERA 1996.

23. However in order for the Claimant to succeed there needs to be a contractual or other legal right for the amount to be defined as wages – see **New Century Cleaning Co v Church [2000] IRLR 27.**

24. The Respondent's position is that there is no legal right to the enhanced maternity pay as it is not contractual but rather wholly discretionary. It also disputes there was a deduction on the facts. The Respondent argues that all sums that were properly payable have been paid. It does not seek to rely on any deduction being authorised by any relevant provision of the worker's contract.

CONCLUSIONS

Does the Claimant have a legal right to bring a claim?

25. Since the enhanced maternity pay is not a payment under the contract – and it is agreed that the payment was non-contractual - the question is whether it comes under the definition of 'or otherwise' for the purposes of section 27(1)(a) ERA 1996.

26. Mr Singer for the Respondent accepts that this is a case which involved the exercise of discretion by the Respondent although it has to be said that was not Mrs Fiora's understanding of the position. In my view Mr Singer is correct that there was indeed an exercise of discretion which arises from the word 'may' in the Claimant's contract.

27. I am satisfied that a legal right arises in relation to the exercise of a discretion by the Respondent under the contract as per clause 9.1 which states that you "may" be entitled to family friendly provisions (maternity pay etc).

28. Although there appears to be no direct authority on the point, I am satisfied that a worker who contends that an employer has exercised its discretion irrationally or unreasonably (whether or not such an argument ultimately succeeds) is entitled to claim that a legal entitlement exists and is thus can bring a claim for an unlawful deduction of wages. Whether that claim succeeds depends on other factors but that at least gives the Tribunal jurisdiction to hear the complaint. The Claimant is certainly arguing that the discretion was exercised unreasonably in her case.

Was the Claimant entitled to maternity pay under the Remploy scheme?

29. I am satisfied that at no stage did anyone at Maximus point out to the Claimant the very severe detriment if she accepted promotion and that she would lose a significant benefit she had under the Remploy contract by signing up to Maximus terms and conditions. The wording of the FAQs is certainly not clear and at best is confusing and potentially misleading.

30. During the course of this case I drew to the attention of the parties to the House of Lords decision in **Scally v Southern Health And Social Services Board** [1992] 1 AC 294 and invited representations on it. I am conscious of the dangers of a point being is raised by the tribunal of its own motion, and then deciding upon it, but given that the Claimant is a litigant in person, it seemed to me appropriate to do so. It was no more than what the overriding objective would require.

31. As the introduction of the **Scally** case during the hearing did not alter the facts, nor was further evidence needed, I am satisfied that the Respondent who has throughout been legally represented, and represented by experienced counsel was not in any way prejudiced. They have been afforded adequate time to make submissions on the point and have done so. Certainly no prejudice has been identified.

32. In **Scally** the House of Lords held that the employer was under an implied duty to take reasonable steps to bring to the employee's attention a right which he or she had (in that case to purchase extra years' service for superannuation purposes) that would be lost unless they took certain action in circumstances where the employee could not reasonably have been expected to be aware unless the relevant contractual term was drawn to their attention.

33. In the subsequent Court of Appeal case of **Crossley v Faithful & Gould Holdings** [2004] EWCA Civ 293, Dyson LJ (at paragraphs 21 and 22) quoting Lord Bridge from the House of Lords in **Scally**, set out an explanation of the legal principles as follows:

"The relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is brought to his attention."

He [Lord Bridge] considered that it was not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he was in a position to enjoy its benefit."

34. There are thus three elements necessary to engage the **Scally** term all of which must be satisfied for the relevant principles to apply. I will deal with each of them in turn:

35. Firstly, the terms of the contract of employment must have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference;

36. I am satisfied that the Maximus contract was a product of consultation and agreement with the recognised trade unions and not with the Claimant direct. That is clear both from Ms Fiore's witness statement as well as the letter to the Claimant of 29 January 2020 and the FAQs section.

37. Secondly, a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by them to avail themselves of its benefit.

38. I am satisfied that the relevant term in the Remploy contract made available to the Claimant a valuable right contingent upon action being taken by the Claimant to avail herself of the benefit. Clearly, an enhanced maternity payment which in gross terms would be in the region of £15,000 was a valuable benefit. The right was contingent on the Claimant going on maternity leave.

39. Thirdly, the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is brought to his/her attention.

40. I am satisfied that the Claimant was not aware of the existence of the relevant term. It is suggested that Remploy terms were 'a hot topic' of conversation. That may have been so but there is no evidence that other than the general feeling that Maximus terms and conditions were less attractive than the Remploy terms, that the Claimant knew of this specific provision and what she would lose. I accept that it was well known that redundancy payment arrangements with Maximus were significantly worse than with Remploy, not least because that was spelt out clearly (as the provisions on maternity should have been) but there were others, such as pension rights which were not adversely affected.

41. I am satisfied that it was not reasonably likely that the relevant provisions would have come to the Claimant's attention unless it was drawn to her attention. The wording of the FAQ is potentially misleading. The impact on colleagues moving to the new entity was certainly neither 'minimal' nor 'largely administrative'. It would have been much more candid to say that if you apply for promotion there *will* be fundamental changes to your terms and conditions and not *may*. Moreover there is a potential breach of the 'policy' as the FAQ answers suggest that it will be made clear what the

position will be so that 'the individual can decide if the move is the right one for them'. That did not happen in this case. No-one informed the Claimant that promotion would adversely affect maternity pay if the Claimant became pregnant.

42. I am therefore satisfied that the conditions set out in **Scally** apply to this case and the Respondent is in breach of the relevant implied term. Mr Singer points out that in **Crossley** the Claimant failed. However that was in part because the Court of Appeal was not prepared to extend the **Scally** principle further to extend it to a duty to consider the economic well-being of an employee. The Claimant in this case does not need to go that far.

43. A corollary issue is whether the Claimant can rely on a principle in the law of contract for a claim of an unlawful deduction of wages. At the material time the Claimant was still employed by the Respondent. A claim for breach of contract is not open to her as the claim does not arise or was outstanding on the termination of employment – see Article 3 of the Extension of Jurisdiction Order (England & Wales) 1994.

44. There is often an overlap between claims that can be brought under either section 13 ERA 1996 as unlawful deduction of wages claims or complaints under the 1994 Order. There is no hard and fast dividing line between the two.

45. A breach of the **Scally** term is a breach of an implied term in the contract. There is nothing to say that a breach of an implied term cannot lead to an unlawful deduction of wages. For example, if an employer pays a discretionary bonus based on custom and practice but irrationally or capriciously fails to do so, the breach of the implied term in such a case could lead to an unlawful deduction of wages.

46. Another more obvious example might be where an employer fails to pay an agreed contractual salary. That would be a breach of a contractual term leading to an unlawful deduction of wages. I am not aware of any authority, and none has not been cited to me, to the effect that the **Scally** term is limited to complaints of breach of contract only.

47. I am satisfied that the so-called 'enhanced maternity pay' was properly payable and the Respondent has made an unlawful deduction of wages. The Claimant's complaint of an unlawful deduction of wages is therefore well-founded and succeeds.

48. I have not at this stage considered the issue of remedy. That will be dealt with at a further hearing which was listed in the presence of the parties for 28 March 2024. Case management orders are issued in a separate document.

Employment Judge Ahmed

Date: 1 March 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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