



EMPLOYMENT TRIBUNALS

Claimant: Mr N Brackley

Respondent: Ramco UK Ltd

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE

By video link

On: 15 July 2024

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: In person

For the respondent: Mr P Bennett

JUDGMENT

After hearing from the claimant in person and Mr P Bennett, director for the respondent, it is ordered that

1. The claimant's claim for unfair dismissal is struck out because it has no reasonable prospects of success;
2. The claimant's claim for pregnancy and maternity discrimination under the **Equality Act 2010 section 18** is struck out because it has no reasonable prospects of success;
3. The claimant's claim for direct discrimination because of sex is not struck out but as a condition of continuing the claim, the claimant must pay a deposit of £100.
4. Details of how to pay the deposit, and directions to prepare are set out separately.

REASONS

5. The hearing was listed to decide if the claims (or part) should be struck out because they have no reasonable prospect of success, by order of Employment Judge Heap on 8 May 2024.
6. There are 2 claims:

- 6.1. Automatic unfair dismissal pursuant to the **Employment Rights Act 1996 section 99**,
- 6.2. Discrimination relying on the protected characteristic of (his wife's) pregnancy. It was not clear if the claim were under the **Equality Act 2010 section 18** (pregnancy discrimination) or **section 13** (direct discrimination).
7. It is common ground the claimant was not employed continuously by the respondent for 2 years immediately before dismissal. Therefore he cannot claim "ordinary" unfair dismissal.
8. The heart of the claim is simple. The claimant says he was dismissed, not for capability like the respondent alleges, but because he told the respondent on 15 August 2023 his wife was pregnant, and since then they have managed him out of the business. In his claim form he wrote it succinctly as follows:

"My job involved travelling which I believe that have thought I couldn't fulfil my traveling duties due to the pregnancy or when the baby arrives. They have gone down the capability route when capability is not the issue. It seems to be the escape route for them to be able to dismiss me as there was no reason for gross misconduct."
9. I have before me the Tribunal's file and a bundle of documents, both of which I have taken into account.
10. The hearing has proceeded by video link and the claimant has represented himself and Mr Peter Bennett, director, represented the respondent. No adjustments were required.
11. I heard oral evidence from the claimant about his mean in case I decided to make a deposit order. Otherwise I clarified the claims with the claimant and I heard submissions from both parties before making my decision. I gave brief reasons for my decision at the hearing. However these are the formal reasons.

Strike out and deposit orders - law

12. The Tribunal may strike out a claim if it has no reasonable prospects of success: **Rule 37(1)(a)**.
13. I must take care not to strike out discrimination claims except in the most obvious cases because they are fact-sensitive and require full examination to make a proper determination: **Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391 UKHL**
14. I should remember:
 - 14.1. where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success,
 - 14.2. the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.
 - 14.3. It is a high test.

- 14.4. The tribunal should have regard not only to material specifically relied on by parties but to the employment tribunal file.
- 14.5. If there is relevant material on file and it is not referred to by the parties, the employment judge should draw their attention to it so that they have the opportunity to make submissions regarding it.

See **Balls v Downham Market High School and College [2011] IRLR 217 EAT**.

15. There is a similar approach in fact-sensitive unfair dismissal claims. They should only be struck out in exceptional circumstances: **Tayside Public Transport Co Ltd v Reilly [2012] IRLR 755, CSIH**. I understand this to be in essence the same test as in discrimination claims.
16. **Rule 39** allows me to make a deposit order of up to £1,000 per allegation if an allegation has little reasonable prospect of success. This is not as high a test as no reasonable prospect of success. The purpose of a deposit order is to make a party stop and think carefully before pursuing it further, because if they lose on that allegation, then the party may face an order they pay some or all of the other's party's costs. I am required to conduct an analysis of disposable income to be able to assess the required deposit: **Carryl v Governing Body of Manford Primary School [2023] EAT 167 EAT**. If a party against whom the deposit is ordered does not pay it, then their claim will to which the deposit relates will be struck out.

Unfair dismissal

17. I have concluded this claim must be struck out for the reasons that follow
18. **Section 99** of the 1996 Act provides (so far as relevant)
- “99 Leave for family reasons.
- “(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
- “(a) the reason or principal reason for the dismissal is of a prescribed kind,
...
- “(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—
- “(a) pregnancy, childbirth or maternity,...
- “...”
19. The relevant regulations are the **Maternity and Parental Leave Regulations 1999. Regulation 20** provides (so far as relevant):
- “20.— Unfair dismissal
- “(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), ...

“(3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with—

“(a) the pregnancy of the employee;...”

20. The claimant was not pregnant – his wife was. She was not the employee.
21. Simply put, he does not fall within **regulation 20**, and so cannot fall within **section 99**. Therefore his claim cannot succeed as a matter of law. There is no other reason that a claim that is bound to fail should be allowed to continue. Therefore I strike it out because it has no reasonable prospects of success.

Pregnancy Discrimination

22. The **Equality Act 2010 section 18** provides (so far as relevant):

“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 or after the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

“...”

23. The only reasonable interpretation of the legislative provision is that it is the woman who is pregnant who is protected, by use of the words “against a woman”, “her” and “of hers”.
24. The claimant was not a pregnant woman. On the basis of statutory interpretation, he cannot directly benefit from the protection of **section 18** of the 2010 Act.
25. I have considered **Kulikaoskas v MacDuff Shellfish and anor [2011] ICR 48 EAT(S)**. K had claimed his dismissal was discriminatory because of association with his pregnant partner. He relied on the **Sex Discrimination Act 1975 section 3A** (now repealed). It provided (so far as relevant):

“(1) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if—

“(a) at a time in a protected period, and on the ground of the woman's pregnancy, the person treats her less favourably...”
26. The Appeal Tribunal considered EU case law and concluded that under the **Sex Discrimination Act 1975 section 3A**, a man could not rely on that section to claim discrimination by association with a pregnant woman.
27. I acknowledge that in **Kulikaoskas**, the Appeal Tribunal considered, briefly, the situation under the **Equality Act 2010** and said the situation was inconclusive. However in my view the wording of **section 3A** (so far as relevant) is in substance identical to **section 18** (so far as relevant). Both refer to “the woman” and “her” and both in my view can only be reasonably

read as protecting the woman who is pregnant. I consider the reasoning in **Kulikaoskas** applies to the relevant parts of **section 18**.

28. The claim under **section 18** has therefore no reasonable prospect of success. There is no other reason a claim that will fail should be allowed to proceed. Therefore I strike it out.

Direct discrimination because of sex

29. In **Brown v Rentokil (C394/96) [1998] ICR 790 ECJ**, the European Court confirmed that under directive 76/207/EEC, it was direct sex discrimination to dismiss someone because of her pregnancy. While EU law eventually evolved to create specific pregnancy discrimination provisions, this line of authorities is still valid and relevant in this case. While **section 18** disapplies sex discrimination in cases of pregnancy and maternity discrimination during the “protected period”, that only applies to claims under **section 18** itself. As set out above, this cannot be a claim under **section 18**.

30. In **Coleman v Attridge Law [2008] ICR 1228 CJEU**, the European Court confirmed that the direct discrimination provisions were wide enough to cover discrimination by association.

31. “Sex” is a general protected characteristic: **Equality Act 2010 section 4**. The **Equality Act 2010 section 13** defines direct discrimination as follows (so far as relevant):

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

32. Recognising that discrimination because of pregnancy is direct sex discrimination, and considering the wording of the statute, I consider the wording of this section is wide enough to encompass a claim where a man is discriminated against because of his wife’s pregnancy, i.e. it is an act of sex discrimination. This is because the legislation requires only that less favourable treatment is because of “a protected characteristic” [emphasis added] – there is no requirement in the legislation for the person B to possess that characteristic themselves. If there were, the legislation would refer to “B’s protected characteristic”. In any event, the case law confirms that it should be interpreted in such a way.

33. In addition the **Equality and Human Rights Employment Code (2011)** provides:

“PREGNANCY OF HERS

“8.16 [s18(2)] For pregnancy and maternity discrimination, the unfavourable treatment must be because of the woman's own pregnancy. However, a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination.”

34. The same argument was accepted by the Employment Tribunal in **Gynes v Highland Welcome (UK) Ltd Case No S/4112392/12**, and as being arguable in **McAuley v Sandvik Materials Limited Case No 4107280/2019**. I do not consider that anything in **Kulikaoskas** points to a

different conclusion. Like those cases I have considered the **Equality Act 2010 section 25** and cannot see it detracts from such a cause of action being available to the claimant

35. Therefore while it is phrased as a claim of direct sex discrimination by association, the factual issue will be whether the claimant was treated less favourably than a comparator because of his wife's pregnancy.
36. After discussing the case with the claimant, the claimant's case is at its heart what he says was a coincidence in timing that when he mentioned his wife was pregnant, he was accused of misconduct and then of not having the capability to perform the role, and his belief it was his wife's pregnancy. He told me though that his team was underperforming generally however in sales. The respondent has produced documents that tend to suggest genuine concerns about the claimant's performance and that they followed a capability process before dismissing him.
37. I have considered the cases that remind Tribunals that discrimination claims are fact sensitive and require full examination to make a proper determination. I consider I cannot say that the claimant's claim of direct sex discrimination has no reasonable prospect of success. It is fact sensitive, and the circumstances are such I cannot say, taking the claim at its highest, it has no reasonable prospect of success. Therefore I refuse to strike it out.
38. However I consider it has little reasonable prospect of success. In the claimant's favour is the alleged coincidence between reporting his wife was pregnant and with criticisms of his work leading to dismissal. However I am persuaded it has little reasonable prospect of success because the claimant's case is in essence a belief it was his wife's pregnancy that was a factor, and the respondent's own documentation strongly suggests it did follow a capability process and had a genuine belief that the claimant was not sufficiently capable at performing the role, rather than his wife's pregnancy playing any part in the decision. I consider that what is before me strongly suggests the claimant will not be able to reverse the burden of proof but that, even if he did, the respondent will show that his wife's pregnancy was not the reason for their treatment of him.
39. The claimant confirmed he received a take-home income of £750 per month from work and £102 per month in child tax credits. He is self-employed as a caravan salesman. His income is commission-based and so can vary. When given an opportunity to provide his outgoings, he confirmed that they were consolidated into one sum of £1,400 he paid into a joint account that covered everything. I accept this is an accurate assessment of his outgoings and believe there is no need to enquire further. He has no debts except a mortgage. He has savings of £6,000. In the circumstances, I considered a deposit of £100 on the sole allegation that a reason for his dismissal was an act of direct sex discrimination was appropriate. I will allow 21 days for payment.

Employment Judge Adkinson

Date: 15 July 2024

JUDGMENT SENT TO THE PARTIES ON

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