



EMPLOYMENT TRIBUNALS

Claimant: Miss Ellis Taylor

Respondent: Bingham & Young Optical Ltd

Record of an Attended Hearing at the Employment Tribunal

Heard at: Lincoln

Heard on: 18, 20 and 21 March 2024

Before: Employment Judge Hutchinson

Members: Miss J Hallam
Mr C Goldson

Appearances:

Claimant: Daniel Spear - Smith, Claimant's partner
Respondents: Ayomide Sola-Ogunniyi, Solicitor

JUDGMENT having been sent to the parties on 6 April 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claim of unfair dismissal succeeds. The Tribunal make no award in respect of

this.

2. The claim of pregnancy discrimination under Section 18 Equality Act 2010 succeeds. The Respondent is ordered to pay to the Claimant:
 - 2.1. A compensatory award **£1,259.78**.
 - 2.2. Interest thereon $629 \times £0.28 = \mathbf{£176.12}$.
 - 2.3. Injury to feelings **£10,000**.
 - 2.4. Interest thereon $643 \times £2.19 \text{ per day} = \mathbf{£1,408.17}$.
 - 2.5. Total award of compensation for discrimination **£12,844.07**.
3. The Respondent failed to provide the Claimant with a Statement of Terms and Conditions of Employment in accordance with Section 1 of the Employment Rights Act 1996. The Respondent is ordered to pay to the Claimant the sum of **£1,744.60**.

REASONS

Background to this claim

1. The Claimant presented her claim to the Tribunal on 14 September 2022. She had been employed by the Respondent from 14 January 2022 until 17 June 2022 as a Trainee Dispensing Optician.
2. She claimed.
 - 2.1 automatic unfair dismissal under Section 99 Employment Rights Act 1996 (ERA) and Regulation 20 of the Maternity and Parental Leave Regulations (MPL), and
 - 2.2 maternity discrimination under Section 18 Equality Act 2010 (EqA).
3. Her claim was that the reason or principal reason for the dismissal was because of her pregnancy or because of illness suffered because of it.
4. The Respondent's case was that the Claimant was dismissed because.
 - 4.1 she had made multiple mistakes during her employment,
 - 4.2 she had not complied with the formal dress code,
 - 4.3 she had not completed the appraisal forms,
 - 4.4 that the dismissal had nothing to do with her pregnancy or any time off or illness that she suffered as a result of it.
5. At a Case Management Preliminary Hearing conducted by my colleague, Employment Judge Adkinson, on 20 December 2022, he identified the issues

as follows.

5.1 Unfair dismissal claim

- 5.1.1 Was the Claimant pregnant at the relevant time?
- 5.1.2 Was the reason or principal reason for dismissal connected with the pregnancy of the Claimant?
- 5.1.3 If so, the Claimant will be regarded as unfairly dismissed.

5.2 Pregnancy and maternity discrimination

- 5.2.1 It was agreed that dismissal was unfavourable treatment.
- 5.2.2 Did the unfavourable treatment take place in a protected period?
- 5.2.3 If not, did it implement a decision taken in the protected period?
- 5.2.4 Was the unfavourable treatment because of the pregnancy?
- 5.2.5 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

5.3 Failure to provide written particulars of employment (Employment Act 2002 Section 38 and Schedule 5)

- 5.3.1 When these proceedings were begun was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or a change to those particulars?
- 5.3.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of 2 weeks' pay under Section 38 of the Employment Act 2022? If not, the Tribunal must award 2 weeks' pay and may award 4 weeks' pay.
- 5.3.3 Would it be just and equitable to award 4 weeks' pay?

Evidence

- 6. The Tribunal heard evidence from the following.
 - 6.1 The Claimant
 - 6.2 Chaz Uppal, Director of the Respondent
 - 6.3 Hayley Shaw, Administrative and Optical Assistant for the Respondent.
- 7. There was an agreed bundle of documents and where I refer to page numbers, it is from that bundle.
- 8. Where there was a conflict of evidence, the Tribunal preferred the evidence of the Claimant, whose evidence was consistent with the documentary evidence the Tribunal saw. She was a credible witness. The Tribunal was satisfied that

Mr Uppal's evidence was not reliable, credible or consistent.

The facts

9. The Respondent is an optician that has three branches at;
 - Retford
 - Gainsborough
 - Lincoln
10. Miss Taylor was employed at the Lincoln store as a Trainee Dispensing Optician and started on 4 January 2022.
11. When she commenced her employment, she worked alongside a qualified Optical Dispenser, Paul Bayfield-Knight, who was dismissed by the Respondent later in January and he was not replaced.
12. Mr Uppal is a qualified Optician and worked across the three stores that he owned. He was in Lincoln two days a week and when he was in Lincoln, he brought with him Hayley Shaw, his assistant.
13. On the other days, the Claimant worked alone.
14. Her duties included dispensing, fitting, and checking spectacles, booking appointments, managing the practice and opening and closing the store. Miss Taylor was managed by Mr Uppal and worked an alternating shift pattern.
15. Week one was 9:30 am to 5:30 pm on Tuesday, Thursday, and Friday and 9:30 am to 3:30 pm on Wednesday and Saturday.
16. Week two was 9:30 am to 5:30 pm on Monday, Tuesday, Thursday and Friday and 9:30 am to 3.30 pm on Wednesday.
17. Miss Taylor was not issued with a contract of employment. Her job offer was confirmed in a WhatsApp message dated 29 November 2021 at page 51. She was told;

“... It will be a 30 hour plus contract and 6 month probation and the £12 per hour we discussed. ...”

We are satisfied that she asked for the contract to be provided on two occasions during her employment.
18. The Claimant was managed by Mr Uppal but after Mr Bayfield-Knight had left the practice, Miss Taylor managed the Lincoln store mostly alone.
19. We are satisfied that at no point were any performance or work-related concerns raised other than those minor matters that are referred to below.

20. We are satisfied that there was a discussion with Miss Taylor on the first day of her employment when she was asked to wear long sleeves at work to hide the self-harm scars on her arms. She was told that this was a potential “*distraction*” to customers and undermined Mr Uppal’s “*dispensing values*”.
21. We are satisfied that during her employment there were no one-to-ones or probation reviews, other than the one held on 14 June, and that when she received feedback it was always positive.
22. Miss Taylor was employed as a Trainee Dispensing Optician and had limited experience and the expectation was that she would require supervision. Mr Uppal was responsible for her professional development and education.
23. Miss Taylor was undertaking a distance learning course which meant that she was supposed to have regular documented supervision sessions. Mr Uppal did not at any time discuss with her the course or course work and case records and did not contribute to her education, training or developing her skills. He was aware that she was attending the course and had agreed that she could have two weeks of paid leave from her holiday entitlement to attend the course in February.
24. On 12 February 2023, the Claimant was wearing what is described as a “fluffy jumper”. We are satisfied that there was a brief conversation with Hayley Shaw about this and she told Miss Taylor that it was not appropriate. We are satisfied that it was never raised again and there is no record of any further discussion about any alleged breach of a dress code.
25. On 2 March, Miss Taylor incorrectly ordered a pair of lenses for a patient. She had not received any training or instruction on how to use the lens ordering platform and she was left to work this out herself. She ordered a more expensive lens than was required and the total cost of these lenses is shown on the invoices screen shot from a WhatsApp exchange on 2 March 2022 at pages 54 and 55. The cost of the lenses was £120 instead of £32.
26. Mr Uppal alleged that this mistake had cost them hundreds of pounds, which is clearly an exaggeration. Miss Taylor was open and honest about the error and apologised for it and even offered to pay for the lenses herself. At the time, Mr Uppal said at page 55 in the WhatsApp message.

“No, its fine Ellis. We will just need to be more careful next time. Thanks”
27. On 22 March 2022, Miss Shaw had a conversation with Miss Taylor about her lateral flow test. During the covid restrictions staff were to have a lateral flow test each day that they were in work. It can be seen from the screen shots provided on 3 March, 9 March, 12 March and 16 March at pages 56 – 59 that the same picture was used of a covid test by the Claimant.

28. Whilst we are satisfied that Miss Shaw mentioned this to her, it was no more than that and the Claimant was not given any formal or informal warning in respect of it.
29. As part of her course, the Claimant had to attend a residential element for a period of two weeks in February 2022. This had been agreed with Mr Uppal prior to her commencing her employment and the Claimant had other days off in April and May and the first two days in June, which were bank holidays. No complaint was ever made in respect of this by Mr Uppal.
30. Apart from one or two minor matters, Mr Uppal was entirely satisfied with the Claimant's performance up until 24 May 2022.
31. We have seen the diary entries at pages 221 to 261 but insofar as they make criticisms of the Claimant, we are not satisfied that these were made contemporaneously and have been prepared for the purposes of these proceedings. We are satisfied that the entries are not credible because they are inconsistent with the other documentary evidence and in particular the WhatsApp messages which indicate that there were no significant problems with Miss Taylor's performance.
32. On 24 May 2022, Miss Taylor had a conversation with Mr Uppal when she explained that she was suffering pain and discomfort in her abdomen. She explained that she might have to take some time off. That evening she messaged him at 19:28 to say that she had an appointment at 9 am on Thursday to see a doctor and that she would start late. The message is at page 87 and Mr Uppal said that it was fine. The note explained that she needed to have an urgent ultrasound to try and locate her coil and investigate whether she was having an ectopic pregnancy.
33. On 25 May, Mr Uppal told Miss Taylor that he wanted to conduct the probation review on 14 June. This was bringing the review forward from the six month review date, which would have been on 4 July. Miss Taylor was given a probation review document which she completed prior to the review and is at pages 92 – 93.
34. On 9 June 2022 Miss Taylor sent Mr Uppal a text message to confirm that she was pregnant (page 215). In his response Mr Uppal said.

"Hi Ellis

Thanks for letting me know. I have just picked up your message.

As discussed yesterday we have your probation period review booked for next week Tuesday. We can discuss it then as I am in clinics all day.

There is an email of questionnaire to be completed before Tuesday. It's in the

*Bingham Young inbox. If you could start working through it.
Thanks
Chaz*

35. The following day, 10 June, whilst at work Miss Taylor began to feel unwell. She called her GP, and she was referred to the Early Pregnancy Unit and then told to go home and rest. She did not go home immediately but finished seeing customers before she left. She texted Mr Uppal that evening to explain the position at page 101. She said.

“Hi Chaz, I’m so sorry I had to leave today. I’ve spoken to both my gp and the early pregnancy unit and both have said that I need to rest for the next few days in case it’s a threatened miscarriage so unfortunately I won’t be able to come in tomorrow, I’m really sorry”.

36. Mr Uppal replied.

*“Hi Ellis
I will check the diary and move things around if anyone is booked in.
Chaz”*

37. Later the Claimant texted again to say.

“Okay thank you, I will need to be off Monday as well as I’ve been booked in for an emergency scan to confirm the miscarriage. It’s in the middle of the day in Boston otherwise I’d come in for a part day”.

38. Mr Uppal replied.

“Okay, see you on Tuesday”.

39. On Monday 13 June, Miss Taylor attended hospital. The scans were inconclusive, but it appeared that she may well have miscarried. She needed to have further blood tests on that day and on the Wednesday, 15 June, which was a non-working day.

40. On 14 June 2022, the probationary review was undertaken. The notes are at pages 98 – 100. The notes are not contemporaneous, and we are satisfied that no notes were taken at the meeting. There was no one else in attendance to take notes or witness the meeting.

41. It can be seen from the notes that.

- 41.1 no mention is made of the issue with the lateral flow test;
- 41.2 no mention is made about her absences;
- 41.3 no mention is made about any issues over dress code;
- 41.4 no mention is made of any issue regarding ordering lenses.

42. There is no real criticism of Miss Taylor's performance at all.
43. Mr Uppal decided to extend the probationary period by three months and refers to improvement but not to what exactly she needed to improve. No mention was made of any rolling review and no document was produced, either by letter or otherwise confirming the outcome.
44. On 15 June 2022, it was confirmed by the hospital that Miss Taylor had suffered a miscarriage. She was told to take time off work but still went into work on 16 and 17 June.
45. On the morning of the 17 June 2022 Miss Taylor confirmed to Mr Uppal that she had had confirmation of her miscarriage and she said that she was struggling; that she had booked a doctor's 'phone appointment in the afternoon. Her message is at page 216.
46. Mr Uppal was sympathetic. In his reply also page 216 he says that he was sorry to hear about the confirmation of her miscarriage and reassured her that she had done all that she could by having time off and resting. He asked her to let him know what happens, referring to the doctor's appointment.
47. After she had spoken to her doctor at 12:37 on that day, she confirmed that she had been signed off for a week from the following day. She said that she would work the rest of the day and that she was sorry to let him down but she was struggling to come to terms with her miscarriage.
48. Mr Uppal in his evidence says that he spoke to Miss Taylor on the 'phone at 11:30 that morning saying that he had decided that he would have to terminate her employment because of complaints from customers. We are satisfied that he did not have any such conversation. It is entirely inconsistent with the message that was sent by him at 10:42 and the Claimant's message to him at 12:37. He had not terminated her employment by 12:37 nor had he mentioned any complaint from any customer at the time. He did though remove Miss Taylor from the work WhatsApp group chat during the course of the afternoon.
49. We are satisfied that at 5:29 pm on 17 June at the end of Miss Taylor's shift, whilst she was getting ready to close, he telephoned her and told her in a brief call that she was dismissed. He explained that it was because she had been signed off for a week and he would have to find cover for the shop and therefore he had decided not to extend the probation period after all and give her a weeks' notice instead. In that conversation he made no mention of any complaints from customers. We are satisfied that the reason for the dismissal had nothing to do with any complaints from customers but because she was going to be off the following week because of her miscarriage and he would have to have obtain cover for her.
50. He did not confirm the dismissal in writing,

51. Not only did she receive no confirmation in writing, but she also received nothing but her P45 and final payslip.
52. Miss Taylor was not told of any right of appeal.
53. We are satisfied that the Claimant was extremely upset about her dismissal because it was clear to her that the only reason that she was being dismissed was because of the time off that she was taking because of her miscarriage. She was also worried about the loss of her employment and the effect that it might have on her qualifying as a dispensing optician.
54. We are satisfied that the incident has affected her self-esteem, her confidence and her feelings of self-worth and her unjustified dismissal has caused her considerable upset.
55. She was able to find new employment by 14 July 2022. This was with David Myers opticians and later she was able to obtain employment with Specsavers.
56. The Respondent's case is that the final straw which led to the Claimant's dismissal was that on a date before 7 June 2022, a customer had brought in some spectacles with a mark on them. The customer had had them for two years and was asking for a refund. We are satisfied that Miss Taylor contacted the manufacturer who indicated that they would probably be able to deal with the matter under the warranty. Miss Taylor told the client about this and then sent the lenses back to the manufacturer. The manufacturer on inspection of the lenses decided that they were not covered by the warranty.
57. Mr Uppal has provided us with limited disclosure in respect of the customer's complaint.
58. It can be seen at page 112 that on 7 June 2022, Miss Taylor wrote to the customer assuring them of her understanding that the spectacles would be replaced free of charge under warranty.
59. We have seen Mr Uppal's email of 29 June 2022 at page 111, which is twelve days after the Claimant's dismissal. We note that the email refers to other emails which were not disclosed. There is no evidence in that email that Miss Taylor was at fault in any way in respect of the issue with the lenses. She had acted in good faith and simply told the customer what she had been told by the manufacturer and it was the manufacturer who would not accept the matter under warranty that led to the complaint from the customer.
60. We are satisfied that this had nothing to do at all with the Claimant's dismissal. That Mr Uppal is retrospectively looking for an excuse for dismissing Miss Taylor for a reason that did not have anything to do with her pregnancy. Interestingly, it can be seen that the reason that the customer was complaining related to Mr

Uppal's attitude and had nothing to go with the Claimant.

Unfair dismissal claim

61. Section 99 ERA provides.

“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, 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—*
 - (a) *pregnancy, childbirth or maternity,*
 - ...

62. The Maternity and Parental Leave Regulations 1999, Regulation 20, provides for that protection in the same terms.

Burden of proof

63. As with ordinary unfair dismissal, the burden is on the employer to show the reason for the dismissal. In this case, the Respondent says the reason for the dismissal related to capability/conduct.

64. In the circumstances of this case, the employee has the evidential burden to show, without having to prove, there is an issue which warrants investigation and which is capable of establishing that she was automatically unfairly dismissed. Once the employee has satisfied the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. See ***Maud v Penwith District Council [1984] ICR 143.***

Discrimination

65. Section 18 EqA provides;

“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, or*

(b) *because of illness suffered by her as a result of it.*

...

(5) *For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*

(6) *The protected period, in relation to a woman’s pregnancy, begins when the pregnancy begins, and ends—*

(a) *if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;*

(b) *if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.*

Our conclusions

66. We are satisfied in this case that the Claimant’s pregnancy ended on 15 June 2022 when it was confirmed that she had had a miscarriage. We are satisfied that she was dismissed on 17 June 2022 at about 5.30 pm at the end of her shift, which was two days after her pregnancy had ended.

67. We are therefore satisfied that the Claimant at that time was in the protected period.

68. We are also satisfied that the Claimant was dismissed on 17 June because she was going to be absent for the following week and that absence was a direct result of her miscarriage.

69. We are satisfied that the Claimant succeeds with her claim for automatic unfair dismissal because she was dismissed for a reason that related to her pregnancy.
70. We are also satisfied that the Claimant has suffered pregnancy discrimination. We are satisfied that during the protected period in relation to her pregnancy she was treated unfavourably, i.e. dismissed because of an illness suffered by her as a result of her pregnancy.

Remedy

71. The Claimant earned net pay from the Respondent of £364.62. Her gross pay was £436.15 per week.
72. She was paid up to 25 June 2022.
73. She gained alternative employment with David Myers on 14 July 2022 and that continued until 5 November 2022 and then worked for SpecSavers from 14 November 2022 by which time she was on better pay.
74. Her total loss of earnings is £1,259.78.
75. She is entitled to interest thereon of 629 days at 28 pence per day, which is £176.12.
76. In respect of injury to feelings, we are satisfied that in the circumstances of this case, the award should be at the bottom end of the middle band of **Vento** and we have decided in all the circumstances to make an award of £10,000. We consider the effect this has had on her and the upset that was caused to her by the manner in which she was dealt with.
77. Again, interest is payable on this sum.
78. In interest is 643 days at £2.19 per day, which is £1,408.17.
79. The total award of compensation for discrimination is £12,844.07.
80. We emphasise that we have decided to make the award under the discrimination claim and it would not be appropriate to make a further award under the unfair dismissal claim, even though she has succeeded with it.
81. The Claimant was only employed by the Respondent for a short period of time. As a result, there is no basic award due to be paid and no loss of statutory rights because she had not obtained any. We have decided that it would not be appropriate to uplift the award for a breach of ACAS in the circumstances in this case.

82. We are satisfied that the Respondent failed to provide the Claimant with a statement of terms and conditions of her employment in accordance with the provisions of Section 1 of the Employment Rights Act 1996. There is really no excuse for the Respondent in not providing an employee with a contract of employment. The Claimant has asked for the contract of employment, and none had been provided within six months of her joining the business. In the circumstances, we have decided to make an award of four weeks pay at the gross pay of £436.15, which amounts to £1,744.60.
83. The total award of compensation payable by the Respondent to the Claimant is therefore £14,588.67.

Employment Judge Hutchinson

Date: 8 May 2024

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE