EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000162/2023 (V)

Held at Aberdeen on 15, 16 & 17 April and 14 May 2024

Employment Judge J M Hendry
Members D McDougall
S Larkin

Miss Vasilica Lavinia Marin	**Claimant** **Represented by,** **Mr S O Daiagh** **Advocate**
Apardion Limited	**Respondent** **Represented by,** **Mr P Holmes,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claim for direct discrimination not being well founded is dismissed and that the claims for notice pay and other payments having no reasonable prospects of success are struck out.

REASONS

1. The claimant in her ET1 initially raised a claim for unfair dismissal and other claims for race, pregnancy/maternity discrimination, notice pay and other payments. The respondent's representatives opposed the claims and argued

that the Tribunal had no jurisdiction to hear the claim for unfair dismissal because of a break in service. That discrete matter proceeded to a hearing on 20 December 2023 following which a Judgment was issued dismissing the claim for unfair dismissal on the grounds that the Tribunal had no jurisdiction to hear it. A further hearing was arranged in relation to the remaining claims which took place on 15, 16 and 17 April 2024. In the intervening period the claimant's solicitor, Mr Purdie had resigned from acting for her. She attended the hearing assisted by a lay Advocate Mr O Dalagh.

2. Just prior to the hearing the respondent's agents lodged an application to strike-out the claims. The detailed application was intimated to the claimant and the Tribunal advised parties that the issue of strike-out would be dealt with at the start of the hearing on 15 April.

Procedural Background

3. The case had been subject to case management. In particular a case management hearing took place on 22 September 2023 at which the claimant was represented by a solicitor, Mr D Purdie. The claim for unfair dismissal was described as the "principal claim" and it was agreed that a hearing would take place to decide whether or not there had been a break in service the consequence of which the claimant would not have the requisite two years' service to raise unfair dismissal proceedings. As part of this hearing Mr Purdie had lodged Better and Further Particulars (JBp.53-56). These were discussed at the Case Management Hearing and certain short comings in the Better and Further Particulars were pointed out. These unfortunately remained unaddressed as at the date of the strike out application and final hearing.

4. The Tribunal had to deal with a number of matters at the outset. Ms Marin had made an application for the citation of a number of witnesses and there had been correspondence with the Tribunal in relation to that matter. It was

decided that the strike-out application would be heard first and only if refused would we consider the application.

5. We will set out these matters in the appropriate headings related to the claims.

Application

6. First of all Mr Holmes helpfully set out a brief history of the case for the assistance of the Tribunal referring to the Preliminary Hearing on 22 September 2023 which highlighted that no further detail of the pregnancy/maternity discrimination claim had been provided. He suggested that the request from the Tribunal was conditional and that the claimant had failed to specify the basis of her belief in discrimination and that consequently it must be assumed that she was not continuing with the claim. There was, he said, no calculation or basis set out for the notice pay or unauthorised deduction of wages.

Pregnancy/Maternity Discrimination

7. Mr Holmes first of all took us to section 18(2) of the Equality Act. He examined the protections given to women who are pregnant or who are on maternity leave. He drew the Tribunal's attention to section 18(6) which indicated when the protected period in relation to a woman's pregnancy begins and ends. The protection ceases two weeks after the end of the pregnancy (section 18(6)(b)).

Background

8. In the current case, he explained that, the claimant's pregnancy unfortunately came to a premature end on 12 January when she miscarried. Accordingly, his position was that the effective period ended on 25 January 2023 prior to events surrounding the 7 February 2023 leading to the termination of the claimant's employment. Mr Holmes referred the Tribunal to *Madarassy* and

the burden of proof, the necessity for a discrimination complaint to contain "something more" than a difference in status or treatment to suggest that the reason for the treatment was discriminatory. He made reference to the case of ***Efobi v. Royal Mail Group Ltd*** [2021] ICR 1263. He referred us to the requirement of a claimant to establish a ***prima facie*** case in discrimination in order to satisfy the stage one of the burden of proof provisions contained in section 136 of the Equality Act 2010. He examined the pleadings and suggested there was no more than a mere assertion in this case that pregnancy/maternity discrimination had taken place.

Race Discrimination

9. Mr Holmes reminded the Tribunal that claims for discrimination should be made within three months of the date of the act complained of (section 123 of the Equality Act 2010). He submitted that the claimants undefined claims for race discrimination appeared to be out of time and no continuing act had been pled. He pointed out that the pleadings had made reference to discrimination between "September and November" taking 30 November 2022 as a final possible date for discrimination the limitation deadline would be 27 February 2023. The claimant did not contact ACAS until 10 March 2023. Accordingly, she did not "stop the clock" through the early conciliation process ***(Bank of America v. Merill Lynch*** UKEAT/0067/LA). Mr Holmes made reference to the requirement for the claimant to amend giving details of a written amendment if she intended to clarify these claims. The issue as pled was insufficient for the claims to proceed and they had no reasonable prospects of success. The claimant had been warned about these difficulties by the Tribunal and had not addressed them despite having a lawyer who had provided better and further particulars relating to other matters.

Unauthorised Deduction of Wages

10. Mr Holmes reminded the Tribunal the burden of proof was on the claimant to demonstrate that the deductions were unauthorised. It wasn't clear what the deductions were or what they amounted to. There was reference to the deduction of national insurance and this was a statutory provision and accordingly authorised in law. Secondly, the respondent accepted that some monies deducted were not properly allocated against the claimant's national insurance number through a clerical error but the matter was later rectified. No evidence had been put forward by the claimant to suggest that any particular sum remained outstanding. The burden of proof lay with the claimant.

Notice Pay

11. The claimant, he said, had resigned. It was difficult to understand how any claim for notice arose. Even if the claimant had been dismissed she was paid to the end of the month effectively in lieu of notice and this would satisfy any claim for notice/damages.

Summary

12. Mr Holmes set out what he understood to be the uncontentious facts and sought a strike-out in relation to the pregnancy/maternity discrimination as these had not been properly articulated and because the events leading to termination were outside the protected period. In addition, the claimant had failed to aver "something more" other than the assertion to suggest that discrimination was the issue. He pointed out that the respondent had no knowledge of the pregnancy until the miscarriage. The claimant accepted this. The first time they knew about the miscarriage was on 12 December. Their response had been sympathetic and supportive. It was only on the claimant's return from holiday in December that various difficulties were found with her work which led to the respondent's managers taking action against her.

Claimant's Position

13. Following Mr Holmes setting out the basis of his application Mr O Dalagh made submissions on behalf of the claimant. He had explained earlier that he did not have qualifications in employment law but as a former Housing Officer he had some familiarity with the law and was there in a supporting capacity. He believed that the claimant had been badly treated. The Judge explained to him that if claims for race discrimination were accepted, as I understood they were, as being out of time the claimant would have to amend in the new allegations she wanted to make about incidents of race discrimination. The Tribunal would have to know what the claimant' position was in this regard. He confirmed that he wanted to do so and he criticised the behaviour of the respondent company suggesting that they were trying to avoid scrutiny of their actions by seeking strike-out. Mr O Dalagh was engaged in discussion by the Judge in relation to the more straight-forward issues of notice pay and unlawful deductions,

14. Ms Marin gave further information about these latter claims. She said that the Security Guard would repeatedly ask her where she was from. This had occurred when he put calls through to her. He had also kept coming in to her office for no good reason and trying to engage her in conversation about where she was from. It had made her feel uncomfortable and anxious. She had not done anything about his behaviour because she did not want to cause any difficulties or ill feeling, it was pointed out that these allegtions were not in the ET1 nor had they been added despite the concerns raised at the Preliminary Hearing,

15. The Judge explained that he could not see a legal basis for the claim for notice or unlawful deduction from wages. He asked whether the claimant could explain why she had brought these claims. It became clear from the discussion with the claimant that her position was that the failure by the respondent company to allocate PAYE monies correctly had led her to have difficulties both with an application for Universal Credit and with HMRC.

These had been upsetting, frustrating and difficult to put right. Mr O Dalagh made reference to the duty as he saw it of the employer towards the claimant and their responsibility for the various difficulties that had occurred.

16. The conversation was brought back to the claim for unlawful deductions by the Judge who made reference to section 13 of the Employment Rights Act. He observed that what was being suggested was that the original misallocation of these funds had caused difficulties but that as of today ail the sums due seem to have been paid. Mr O Dalagh's position was that the matter should be left over to allow the CAB to investigate the matter fully and then write to the Tribunal with their findings. The Tribunal concluded that the claimant was not able today to say what was due or nor due and could not gainsay the assertion that all the PAYE monies had now been settled.

17. The Tribunal indicated that the hearing today was the opportunity for the claimant to set out what she thought was due. It was explained that if she wanted to amend her pleadings in relation to any matter (particularly the question of why she thought there had been discrimination) she would have to do so by seeking a short adjournment in the first instance to write out what the amendments were. Mr O Dalagh suggested that the case could be postponed to allow this to happen and to allow the claimant to take advice. The Judge indicated that at this stage if there was anything missing from the pleadings it would be of a factual nature and that the claimant was in a position to set out the facts she relied upon if she thought the pleadings were not fully representative of her position.

18. Mr Holmes' brief response was to remind the Tribunal that there was very little factual basis for the claims being made. They appeared to be out of time and that he maintained his position on strike out.

Further Procedure/Adjournment

19. The Tribunal was conscious that the claimant was not at this stage legally represented and agreed to adjourn to allow her to speak to her representative and consider the submissions that had been made and the observations

made by the Employment Judge. Before the adjournment the claimant was asked to consider her position carefully as the respondent's solicitor had set out clearly the difficulties she faced. It was suggested that the starting point would be the facts of the case and whether the pleadings reflected those facts. If there were facts or information missing then the claimant needed to ask for these to be added by amendment. The amendment should be in writing. The Judge asked the claimant to consider why the race discrimination claim should be heard at this stage and she should consider questions such as: Why had she not acted sooner about the incidents she complained of? When had she first taken advice about the matter? Why had her solicitor not addressed these matters in the BFP lodged by him?

20. The Tribunal then turned to consider the maternity/pregnancy discrimination claim and asked the claimant to consider whether she accepted that the events around the time of her dismissal were or were not protected by the Section 18 and if she could say whether there was any detriment that she could point to in the protected period. If not then looking at the matter more widely was she able to say whether or not there was a basis for a claim for sex discrimination in the way she was treated. It was explained that this would mean she would have to have come to the view that a comparator employee, a male employee, in broadly the same circumstances (although obviously not having been pregnant) would have been treated more favourably than she had been because of her sex. In relation to the notice and unauthorised deductions the Judge suggested that they should consider the submissions made by Mr Holmes and the observations that the Judge had made in the course of the day. The onus was on the claimant to show what sums were actually due and it seemed as if she could not do this.

Second Day

21. The Tribunal reconvened and Mr O Dalagh indicated that he had taken instructions from the claimant overnight. The notice pay position was that she had been dismissed and entitled to notice. Ms Marin intervened explaining

that the notice to which she was referring was the failure to forewarn her about the capability/competency issues that the employer had raised. In relation to the ciaim for unlawful deductions Mr O Dalagh's position was that there was ample evidence and the claimant had produced information from HMRC about the payment of PAYE or rather the non-payment of PAYE. The document showed that in the period from 6 April 2020 to 5 April 2021 the claimant's income was £7,294.50 but no income tax had been paid. The Tribunal explained that this in a way was the opposite of an unlawful deduction in that no deduction had been made when one should have been made.

22. The claim for race discrimination was discussed for a period. The claimant's position was that she wanted to proceed with it. She had not taken any action at the time. She had not raised any grievance. She wanted to add detail that the Security Guard concerned pestered her to speak to her about where she came from when she was transferring calls from him to others. He also came in uninvited to her room. She was not sure why the pleadings prepared by Mr Purdie did not mention these points. She seemed prepared to accept that no incidents that she could rely on had occurred after November 2022. The claimant in the course of the discussion backtracked a little finally putting her position as she was certain that nothing untoward happened after she had left on holiday on 15 December.

23. Mr Holmes' position was that the amendment shouldn't be allowed. He explained that the claimant had had an opportunity overnight to set out in writing what the amendment would be and had not done so. Any amendment would be prejudicial to the respondent. There was demonstrable real prejudice. For example, the claimant was now saying that Security Guard's behaviour she complained of took place by telephone. The respondent has a recording facility and if this information had been given to them at an earlier point they could have checked the recordings. The recordings are now deleted. There had been a number of hearings and various procedures had taken place and the upshot was that it was only now some 18 months or so after these events that the claimant was promising to give more detail. From

what she said there was still no answer to the deficiencies that he had pointed out in the various claims.

Adjournment and Decision

24. The Tribunal adjourned to consider the position and review the state of the case and which claims should, if any, proceed. It reviewed the Employment Tribunal Rules in relation to strike out and the legal authorities to which it had been referred.

25. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

> "37. *Striking out*
> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;…..*
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal …"*

26. In applying the Rules the Tribunal must have regard to the overriding objective in Rule 2:

> *"Overriding objective*
> *2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable-— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

27. It has been recognised that striking out is a draconian power that must be exercised carefully. If exercised it would prevent a party from having their

claim determined by a Tribunal. The legal principles applicable in relation to the striking out of discrimination complaints pursuant to this Rule are well-established. In the House of Lords case of Anyanwu & Ano v South Bank Student's Union and Ano 2001 ICR 391, Lord Steyn said as follows:

> *"24. … Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university."*

28. At paragraph 39 in the judgment of Lord Hope of Craighead, said as follows:

> *"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."*

29. In ***Ezsias v North Glamorgan NHS Trust*** 2017 ICR 1126,CA, a case referred to by both sides, the Court of Appeal was considering a case involving public interest disclosure and held that a claim should not ordinarily be struck out where there was a:

> *". … crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. …"*

30. In the more recent case of ***Ahir v British Airways pic*** [2017] EWCA Civ 1392, Underhill LJ said as follows:

> *"16. … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps*

> *particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be ' little reasonable prospect of success'."*

31. The Tribunal concluded that the claims for notice claim and claim for unlawful deductions should be dismissed as they had no reasonable prospects of success. The claimant had not articulated viable claims. It seemed to the Tribunal that the claim for notice was misconceived.

32. The claim over the incorrect allocation of PAYE was unclear and the claimant at the hearing despite being given an opportunity to do so, could not articulate what sums she believed were still outstanding. The impression the Tribunal was left with was that these sums had probably now been paid but the claimant was trying to seek compensation for the original error and the difficulties she had no doubt experienced.

33. In relation to the race discrimination claim it was clear from what the claimant had said both in her pleadings and during the hearing that the claim she hoped to make was one of harassment. It was out of time. The claimant seemed to have made a conscious decision not to pursue any claim at the time and had only raised it when her employment ended. The claimant had not prepared a written amendment clarifying her claim, nevertheless, the Tribunal considered that it had the essence of her amendment which she had articulated during the hearing.

Amendment

34. The claimant in her email dated 16 April had asked to add further allegations. The first was about being asked to work as a Security Guard without proper accreditation. This occurred prior to her receiving her Licence in December 2022. The second allegation was that asking the claimant to work as a Security Guard in early February 2023 just after her miscarriage had a 'huge impact" on her physical health. We could not see how these matters could add to the claims the claimant already had. Asking her to work without proper accreditation occurred prior to her pregnancy. It is not clear what claim would arise. The claimant did not resign and seemed to have carried out the work willingly. The second matter was also new and again the Tribunal was unconvinced what the actual employment claim might be. The respondent's position was that this was especially chosen 'light work' which the claimant as asked to do and did voluntarily.

35. The second amendment related to further incidents involving he Security Guard referred to by the claimant in her ET1.

36. The Tribunal has wide powers of amendment. The fact that an allegation might be time barred is only one factor in the Tribunal considering any amendment. The second amendment was not, despite the guidance given, reduced to writing by the clamant but it was short. All she could say is that the Security Guard, would try and engage her in conversation regularly (once a week or so) about where she came from including when putting call through to her. She had no dates or times. She had not complained about this at the time and there was no corroboration.

37. The starting point is with the proposed amendment. They both come very late in the day. The second one on the second day of the hearing. We considered the balance of hardship or prejudice in granting or not granting the application. We considered the principles set out in the case of ***Selkent*** and also the recent guidance in the case of ***(Choudhury v Cerberus Security and Monitoring Services Limited [2022] EAT 172}.***

38. Although the proposed amendments were short it they had far reaching consequences. There was a lack of detail which would make investigation difficult. It was unclear of there were legal wrongs being alleged in relation to the emailed amendment. They would all cause the respondent to suffer prejudice if allowed. They might have been able to refute the allegations involving the transfer of calls if these allegations had been made earlier and the transcripts retained and examined. The claimant had decided at the time not to pursue such a claim despite being upset by the Guards actions. The claimant was unsure of the exact legal basis of any claim but was clear that the behaviour was unwanted and made her feel uncomfortable.

39. The Tribunal was not convinced that the claimant had persuaded it to allow the amendments at this late stage for several reasons. The additional incidents were out of time. The incidents were not particularised. It was mindful that allowing an amendment at this stage would require the allegations to be formulated in more detail and this would almost certainly lead to an adjournment, as Mr Homes suggested, to allow the claimant to better particularise her claim and for the respondent to then make further enquiries and instruct their solicitors appropriately. We accepted that there would be real prejudice to the respondent not only in expense and delay but because of the deletion of the telephone recordings.

Strike Out/Sex Discrimination

40. In relation to the claim for sex discrimination either direct (Section 13) or Section 18 the Tribunal was conscious that the authorities suggest that's only in the most obvious cases that claims for discrimination should be dismissed. It considered that the claimant was not legally qualified and had been unrepresented when she had "ticked" the box marked pregnancy/maternity. She was doing no more than indicating that she thought that she had been discriminated against or treated unfairly because of her pregnancy. In exploring this and considering the pleadings the claimant's position seemed to be that she was unaware of any difficulties in her work that could justify her

dismissal. She thought that her work was up to scratch and of good quality. She believed that the only matter that had changed was her pregnancy and that the conjunction of events was significant. She told us that she had a discussion briefly with a second Security Guard in the office where she discussed with him that she wanted to continue to try and have a child. She believed that this would have got back to her employers who did not want to employ someone who might leave work on maternity leave. She believed that her managers were unhappy with the fact that she was off ill and only able to work half days and that this all related to her pregnancy.

41. The pleadings contained some basis for a claim but on a different basis. Paragraph 15 (p.56) it stated:

> *"She believes that the respondents were seeking to replace her due to the perceived impact her miscarriage had on her."*

and paragraph 16:

> "The *claimant avers that the decision to threaten the claimant with a capability procedure was motivated by concerns about her health following her miscarriage"*

42. We accept that there are deficiencies with this claim but the common thread for the claimant is that there was no basis for the disciplinary matters and her suspicions that the respondent's manager were concerned at the absences that had occurred and if aware of her hope to try and have a child the future the prospect of her absence on maternity leave. Crucial to this is the claimant's belief that the disciplinary issues were a sham. The claimant believes that she was discriminated against for these reasons and that by receiving by e-mail on 7 February threatening her with the capability process (which she believed was wholly unjustified) or inviting her to resign was discrimination. Although we accept that the respondent is correct that the difficulty with a Section 18 claim is that the protections afforded to the claimant by that section would have elapsed by the time of the email dated 7 February depending on when decisions were made it could possibly be

argued that the claimant might be able to show some detriment occurred in the protected period and that even if she couldn't there might be a remedy under Section 13.

43. On this basis, and with some considerable hesitation, we indicated that we had concluded that we could not say that this such a claim had no reasonable prospects of success. The evidence of the respondent's manager would be vital to show when and why he had taken the actions he had.

44. We then proceeded to hear evidence from the claimant. Following the claimant's evidence Mr Holmes called Mr Neilson who gave evidence on behalf of the respondent. We would add that Mr O Dalagh latterly asked for Miss MacLeod, the Office Manager, to give evidence. She was the claimant's line manager and the author of the e-mails. However, we took the view that she would add little to the factual background that we had to consider and as the decision maker who authorised the e-mails was Mr Neilson his evidence was the crucial evidence we had to consider. Mr O Dalagh also indicated that he wanted to lead evidence in relation to the deletion of the claimant's e-mails on 29 December and in relation and issue that had arisen from Mr Neilson's evidence in relation to the whereabouts of the "pile of papers" that Mr Neilson said had not been dealt with by the claimant. The Tribunal rejected this application: firstly, these events took place prior to anyone being aware of the claimant's pregnancy and secondly, such matters seemed to be of relatively little relevance.

Facts

45. The Tribunal found the following facts established or agreed.

46. The claimant is Romanian. She has good command of spoken and written English. She had worked at Apardion as a Security Guard/Receptionist in 2020.

47. In July 2022 she was asked to fulfil the role as Administrator at their office in Aberdeen. This was a junior role, It involved straightforward and simple administrative tasks. The first two sets of tasks involved reporting to clients any alarms that had been set off in their premises overnight and secondly, reporting on any maintenance issues needed for vacant properties (Vacant Property Inspection Reports). There would generally be four or five alarms each night and it was important for these to be intimated quickly to clients. The respondents wanted this done by 10.30am in the morning. They wanted the Vacant Inspection Reports to be done by 12 o'clock. The claimant also had to process paperwork to ensure new employees were paid.

48. The claimant had a good relationship with Hannah Macleod the Office Manager. They initially shared an office together. It was easy for the claimant to ask Miss MacLeod questions and for her to provide support. There was a re-organisation in the office which led to Miss MacLeod being given her own room and the claimant working in a room generally on her own. The claimant found it more difficult to ask Miss McLeod routine questions about work.

49. The claimant would often become anxious or stressed about her work and this led to her finding it difficult to make decisions.

50. The claimant had a good and supportive relationship with Miss MacLeod.

51. Unknown to the claimant prior to the end of 2022 Miss MacLeod and Mr Neilson had become aware of difficulties with the claimant's work. She seemed to be unable to deal with the work quickly. Difficulties had arisen on occasion when she had to take telephone messages. She did not accurately relay the information from the call to the intended recipient.

52. The claimant went on holiday in mid December. While on holiday Miss MacLeod discovered the claimant had left work uncompleted. The papers contained miscellaneous administrative work including information required by payroll for new employees and information required for Security Guards' Certification which had not been dealt with. As a consequence of this Miss

MacLeod spoke to Mr Neilson and it was agreed that they would reluctantly have to put matters on a more formal footing. They both liked the claimant and had made allowances for her in the past as she was relatively new to the job but believed that they now had to act. Mr Neilson instructed Miss MacLeod to contact the claimant about their concerns and expectations.

53. As a consequence, Miss MacLeod e-mailed the claimant on 9 January 2022 (JBp.134). The e-mail was in the following terms:-

"Hi Lavinia,

As discussed, / would like to summarise what we went over this morning so we are all on the same page.

- *Morning reports - Morning reports are taking too much time, but Lavinia is prioritising the alarm activation reports and there are no issues regarding saving/sending/recording these reports. Student call outs are sent out after. A reasonable deadline for the next week at least is to have all reports sent to clients before 10.30am in the morning with the intention of reducing this time over the next month. Editing should be done on Big Change, if any editing needs done.*

- *VPI's - The property inspections are a source of stress for Lavinia, as she is concerned with the timings of them and worried about missing reports. The VPI's in Aberdeen have now been scheduled on a Monday, so the majority of them should be completed before the end of the week. Editing reports is taking too much time. Editing requirements need to be identified, as it may be a template issue, which can be sorted quickly which will save time for future reports. It has been recommended that if there content that needs editing, that it is done on Big Change as it is quicker than Adobe. Another goal set for Lavinia is to try and get VPI's sent out before 12.30pm, which again, the intent is to reduce this time if possible.*

- *Personnel forms have been neglected over the last few months, which have meant that many employees have not been vetted quick enough, their documents have not been collected on time which had an effect on payroll, and employees who have worked for months do not have a completed pack. I will write up a procedure on all of the steps on how to manage the personnel forms. Every security office needs to be vetted, their files to be sent to FRG ASAP. A deadline of two weeks has been put in place,*

from the time a starter pack has been handed in to when it needs to be completed if the employee has been deployed.

* *A phone template message has been created by Derek to help record messages, which has been helpful so for. Lavinia needs to keep calm on the phone, and the templates will hopefully increase her confidence.*

* *Overall focus needs to be kept on admin tasks, not so much what is happening in other areas of the business. General security responsibilities do not lie with Lavinia, but with the security team.*

For the time being, these are the areas we will be monitoring over the next week, I will carry out a review on Monday the 16th of January. The overall aim is to help Lavinia manage her time more effectively and keep stress levels to a minimum and improve her organization with the aim to be taking on more work.

Lavinia, if there is anything here you don't agree with, please let me know. In the meantime, before the next review, if there is any support you need, please let me know.

Thank you
Hannah

Hannah MacLeod

Office Managed

54. The claimant responded to the e-mail of 9 January on 10 January (JBp.133) in the following terms:

"H/ *Hannah*

Thank you for your review and ongoing support.
TH try my best to get better and successfully meet the requirements below.
I understand the impact of my limitations, especially regarding the stress, which I fail to manage.
I apologise for any inconvenience created.

Kind regards,
Lavinia Marin

Administrator

55. Unfortunately, shortly after receiving the email from the respondent the claimant became aware that she was pregnant and suffering a miscarriage. This occurred on 12 January. The claimant reported this to her employers and Miss MacLeod e-mailed her on the morning of 13 January:

> *"Mobile told me what happened last night, I'm so sorry to hear that. I know the next while is going to be difficult for you. I can't imagine what you're going through right now.*
> *Please take as much time as you need, if there is anything that we can do for you please let me know."*

56. Miss MacLeod kept in contact with the claimant through WhatsApp.The claimant told her that she was still unwell. On 20 January the claimant indicated that she was thinking of coming back to work on Monday. Miss MacLeod responded: "Ok *let me know if you feel up to it on Monday."*

57. On 23 January the claimant texted that she didn't feel well enough to come back to work. Miss MacLeod asked if she would be off for the rest of the week.

58. Miss MacLeod txted the claimant on 24 January. In response the claimant indicating that she was going to come back to work on 25th:

> "/ was *wondering if you wanted to come back and do halfdays? Just for a while, I don't want you to be uncomfortable"*

59. The claimant accepted this and returned to work half days. The claimant's duties were reduced. She wasn't given any reporting to do. She asked for more work. On one occasion she was still in the office until 4 in the afternoon. Mr Neilson became aware of this and was told by Miss MacLeod that this was the second occasion where the claimant had effectively worked for a full day. He was surprised at this and told her to go home.

60. The claimant had Security Guard Certification allowed her to work as a Security Guard. When she was fit enough to return to work she was asked

to work in this role at premises at AB1 in Aberdeen for a short period. She agreed to do so. The duties were 'Tight" involving the claimant working with a small team and guarding a secondary entrance. The claimant gave no indication that she would find the work difficult.

61. In the interim period Miss MacLeod had reported to Mr Neilson that there had been no improvement in the claimant's work. She discussed with him the fact that during her latest period off work she'd discovered further papers which had not been dealt with. She believed that the claimant was responsible. As a consequence the business took advice prepared an e-mail dated 7 February (JBp. 136) the e-mail is in the following terms:

"Hi Lavinia,

I hope you are well,

Thank you again for covering AB1 this week, it has been a great help to us.

Following on from our conversation we had a few weeks ago regarding your work performance, I have been monitoring your work in general and I am sad to find that things haven't improved. Targets were set, which were agreed were reasonable, but don't seem to be met. Furthermore, I found a large amount of important paperwork that was concealed in your cupboard that contained personnel files and check lists that had been left unattended which caused a lot of work to go through and bring up-to-date, since then I have had to fulfill this part of your job myself.

After seeking advice from a Human Resources consultant, we have been advised to look at two options. The first option is that we arrange with you, a capability hearing. This is a meeting, which will be arranged with at least 48 hours' notice where we go over your role, the targets and why they are not being met, which can possibly result in a disciplinary hearing regarding overall performance and failure to carry out your job description.

The second option is that due to your loyalty and service to Apardion, we would pay your full-time wages up to February 17th and end your employment with immediate effect. You would not have to work these hours we would just pay you up until that date.

I understand that neither of these may be appealing to you, so we will go with your preferred option of course. We feel given the time you

have been in post that Apardion cannot offer any changes to your role, mentoring or additional training that would have a significant impact on your ability to carry out this role, so we have had no option other than to look at ways to address this.

Thank you

Hannah

Hannah MacLeod
Office Manager"

62. The claimant responded on the 8 February 2022 indicating that she understood and would bring in her office keys and other items which she did (JB p138). The respondent took this as her resignation.

Witnesses

63. The respondent's witness Mr Neilson was a credible and reliable witness who gave his evidence in a clear and straightforward manner. He showed no antipathy towards the claimant. Indeed, quite the reverse it was clear that the claimant was well thought of, hardworking and well liked.

64. The claimant held honest and trenchant views. She did not believe that there was aby difficulty with her work and accordingly was searching for answers as to why she ended up losing her job. Although claims were made for discrimination it would be fair to say that in her evidence she said that in fact she was not sure what was behind events. We also noted that she did not seek to argue at any point with the criticisms of her work responding to the email dated 9 January (JBp133) that she understood the impact of her limitations. The claimant argued that she was not a confrontational person but her failure to challenge the criticisms went further than not being confrontational it seemed an acceptance of them and was taken as such by the employer. Overall, we did not find her evidence persuasive.

Submissions

65, The respondent's solicitor first of all pointed out that the claimant had not been dismissed. She had chosen to resign. There was no dismissal. She could have persevered with the competency process. The claimant could not demonstrate less favourable treatment on the grounds of her sex. Ther was no detriment she could point to. The only evidence suggestive of discrimination that the claimant could point to was the timing of the email about difficulties in her work with the unfortunate miscarriage she had. The matters were unrelated. The txts, emails and evidence of Mr Neilson and indeed of the claimant herself show that there was a good relationship between the claimant and Miss MacLeod and Mr Neilson. He referred to the strike out application and to the cases of ***Madarassy*** and ***Efobi*** to which it referred. There was he submitted no "something more".

66. Mr O Daiagh made a brief response. The claimant's position was that there was no cause to put her on a competency process and no forewarning of her about any alleged difficulties before January. These emails had a huge psychological impact on the claimant. The email she received effectively forced her to resign and was oppressive.

Discussion and Decision

67. Section 13 of the EA is in these terms:

> *"13 Direct discrimination*
> *(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."*

68, The relevant parts of Section 18 of the EA are in these terms:

> *"8 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) 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

(b) because of illness suffered by her in that protected period as a result of the pregnancy.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave or on equivalent compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave or a right to equivalent maternity leave.

(5). . . . . .

(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;

(aa) if she does not have that right, but has a right to equivalent maternity leave, at the end of that leave period, or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have a right as described in paragraph (a) or (aa), at the end of the period of 2 weeks beginning with the end of the pregnancy".

69. The Tribunal had little difficulty in concluding that the respondent company believed that they had cause to raise work issues with the claimant. This happened before anyone knew of the pregnancy. We accepted Mr Neilson's evidence that Miss MacLeod had previously brought problems with the claimants work to him but because the claimant was popular and well thought of it had been hoped that her performance would improve in time. He was at pains to stress that there was no doubt that the claimant was conscientious and hardworking but seemed to get stuck on routine tasks. This seems to accord with the claimant's own views expressed in her email (JBp133) where she makes reference to her own limitations and to stress that she cannot manage.

70. The claimant's own BFP that were lodged when she had legal assistance were somewhat unclear as to what the role her pregnancy had played in the respondents actions referring as it does (JB56) in paragraph 15 to "perceived impact her miscarriage had" and at 16 "a capability procedure was motivated by concerns about her health following her miscarriage" These assertions run contrary to the evidence we accepted and indeed to the emails and texts that were produced which disclose a generally friendly and supportive environment.

71. The claimant had to show that the competency process was driven/caused by discriminatory attitudes. The difficulty she had was that the process started before the pregnancy. We find no evidence that the claimant's sex or pregnancy had played any part in events that led to her resignation. The claimant's resignation was not forced on her. She was given the option of arguing her case at an interna! hearing and chose not to do this. We appreciate that she was in a dilemma not wanting to be dismissed and preferring to leave but that it is still surprising that if she believed that she had done nothing to deserve these criticisms then why did she not argue her case. At the hearing she denied responsibility for any work that had not been done saying that it must have occurred when she was on leave and another employee covering her role. She could not show that the competency process was baseless or trivial or being conducted in bad faith or being used against her because of a discriminatory motivation on the part of her managers. We did not have to consider the burden of proof in this case because the claimant was unable to demonstrate that she had a prima facie case of discrimination. She also lacked the "something more" that the law requires to indicate discrimination. In these circumstances the claims must fail.

Employment Judge: J M Hendry
Date of Judgment: 17 May 2024
Entered in register: 17 May 2024
and copied to parties