



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss J Francis

AND

Respondent
Dr S Chaudary T/A
The Great Barr Dental Practice

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 29, 30 & 31 October 2018

EMPLOYMENT JUDGE Lloyd

MEMBERS Mr R W White
Miss P Pinches

Representation

For the Claimant: In person

For the Respondent: Mr A Famutimi, Consultant

JUDGMENT

The claimant's claim of discrimination because of pregnancy and maternity is unproven and is dismissed in its entirety.

REASONS

Introduction and Background

- 1.1 This is a unanimous Judgment of the tribunal dismissing the claimant's claim of discrimination under s.18 Equality Act 2010 ("EqA").
- 1.2 These reasons, which follow a short judgment sent to the parties on 1 November 2018, aim to present a clear and uncomplicated analysis by reference to the facts and law which have been considered by the tribunal over the course of the three-day hearing.
- 1.3 The claim rests on allegations made by the claimant under Section 18 EqA. That provision deals with discrimination arising on the grounds of pregnancy or maternity.

- 1.4 The respondent practices under the trading name of “The Great Barr Dental Practice”, but the sole proprietor and practitioner of the practice is Dr Sahdia Chaudary. She has given evidence to the tribunal. Dr Chaudary is a qualified dentist of some 20 years standing. She has been the principal dentist of the respondent since December 2009. The practice employs dental nurses. The Claimant was a dental nurse at all relevant times. She was employed in that role from 5 November 2012. Her starting wage was £7.90 per hour. On 1 July 2014 she was awarded an increase of 20p per hour.
- 1.5 The respondent’s evidence was that the claimant had been declined a pay rise she requested in June 2016 on the grounds of lack of performance.
- 1.6 The claimant became pregnant during 2017. She told the practice manager Jasmin Hamilton (“Jasmin”) on 7 June who then informed Dr Chaudary. The evidence suggests, however, that Jasmin and Dr Chaudary had informal knowledge of the pregnancy from about March or April that year.
- 1.7 The claimant made a further request for a pay rise on 3 August 2017. Dr Chaudary was away on annual leave and returned to work on 16 August. The claimant’s request was made to Dr Chaudary’s husband, Assad Hamed, who assists in the management of the practice. She was informed of the claimant’s request by her husband. She says that she concluded that it was not warranted, because of continuing poor performance on the claimant’s part. The claimant questioned Dr Chaudary’s decision. She asked if it was because she was shortly going on maternity leave. Dr Chaudary repeated that it was on the grounds of the claimant’s unsatisfactory work at the practice. The claimant challenged that; suggesting that it was because of her impending maternity leave, which she would now take earlier than planned.
- 1.8 The claimant began her maternity leave in October 2017 with an expected return to work date of November 2018.
- 1.9 The claimant raised a grievance on 24 August 2017. A grievance hearing was arranged for 16 October. The claimant did not accept that her performance was the reason for her being refused a pay rise; although she acknowledged that she was seeking to improve.
- 2.1 By a fully reasoned letter dated 2 November 2017, Dr Chaudary declined to uphold the grievance. The claimant appealed on 24 November 2017. On 11 December 2017, Dr Chaudary issued a decision dismissing the appeal.
- 2.2 The claimant had presented her ET1 alleging pregnancy and maternity discrimination on 6 October 2017.
- 2.3 We heard from the claimant and Jasmin Hamilton, formerly the practice manager. For the respondent, we heard evidence from Dr Chaudary and her husband Assan Hamed. There was a common bundle of documents and written statements had been exchanged for all the live evidence.

Issues

- 3.1 The claimant has ended her employment with the respondent. This claim does not in any way arise from her termination of her employment but rather it is a claim solely based on sex discrimination allegations arising from her pregnancy. I'm grateful for the Claimant's candour in making that absolutely clear from my questioning at the very outset of her evidence on day 1 of this hearing.
- 3.2 The issue in this claim is a very narrow one. It is whether in August 2017 Dr. Sahdia Chaudary refused the Claimant's request for a pay rise on the grounds that she was pregnant but specifically that she would shortly in or about October 2017, or earlier, commence a period of statutory maternity leave. In short whether the Respondent discriminated against the Claimant under Section 18 EqA.
- 3.3 The tribunal has dealt with the issue of burden of proof. Mr Famutimi, for the respondent, in his written submissions has rightly looked at the issue of burden of proof and the provisions in the EqA relating to burden of proof. They are at Section 136 EqA;

136 Burden of proof

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*
- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
- (5) *This section does not apply to proceedings for an offence under this Act.*

3.4 We venture to summarise and paraphrase what Section 136 says as follows;

3.5 The burden of proving his or her case starts with the Claimant, and that is why the tribunal heard from the Claimant firstly in evidence. Once the Claimant has established sufficient facts, which, in the absence of any other explanation, point to a breach of the EqA having occurred, the burden shifts to the Respondent to show that he or she did not breach the provisions of the Act.

Findings and conclusions

- 4.1 We concluded that the burden should shift to the Respondent to explain the rationale for the refusal of the pay rise requests.
- 4.2 The findings of primary facts which have led us to test the evidential explanation

the Respondent gives were;

- 4.3 The Claimant's maternity leave was indeed touched upon and spoken about in the exchange between the Claimant and Dr. Chaudary on the 16 August 2017. Secondly, that discussion was in the context of the Claimant's request for an increase in pay, and thirdly, Mrs Jasmin Hamilton, formally the practice manager at The Great Barr Dental Practice submitted new evidence - amended from the original statement that she had given to the Respondent's advisors. She was now called as a witness for the Claimant. She said firstly that, she had to console the Claimant at the time because she (the claimant) felt the refusal was in some way connected with her maternity leave and pregnancy. But further, Jasmin's evidence appeared to advance the recollection that Dr. Chaudary had in conversation with Jasmin at least alluded to maternity leave in the context of her refusal of the request for a pay rise.
- 4.4 However, having tested the Respondent in evidence to offer an explanation for our primary findings, we have concluded that Dr. Chaudary has satisfactorily discharged her burden to show that her decision was not one motivated by the Claimant's pregnancy. Her reference to maternity leave, which she did make, we find has been taken wholly out of context. It has been something of a feature of this case that the claimant makes certain assumptions which have not been supported by fact.
- 4.5 There may be a number of reasons for that. Not least perhaps is the frustration and the indignity that she probably felt, having been a relatively long server at the respondent dental practice but been refused a pay rise, or pay rises that she perceived she deserved. Further, all this was in circumstances where other members of staff, of less service had been given a pay rise.
- 4.6 However, little can save a claim which is conceived on the basis of speculation advanced as fact and which bears no proof.
- 4.7 One example of that which has prompted discussion during the evidence was the contention by the claimant that all other members of staff were on £10.00 per hour. The evidence now produced by the respondent shows that patently not to be true. We do not say that the claimant has deliberately fabricated evidence, However, we do find that in her eagerness to advance her view that she has not been properly treated, she has made certain speculations and assumptions which are not consistent with the evidence.
- 4.8 We conclude from Dr. Chaudary's evidence and that of her husband that the respondent has satisfactorily discharged the burden to show that Dr. Chaudary's decision not to award a pay rise to the claimant, was not one motivated by the Claimant's pregnancy.
- 4.9 It is the case that the reference to maternity leave and pregnancy was raised by the Claimant herself during the discussion in August 2017; and the respondent was obliged to explain its position as to why the claimant was not eligible for a raise. What the respondent has also shown we find, is the Claimant's failure to improve over an extended period of time. That we conclude was the true reason for Dr. Chaudary's refusal of the Claimant's request on all

occasions; but specifically, the one in issue here, of August 2017. Moreover, Dr. Chaudary's resistance to what she saw as the Claimant's pressure upon her - in fact Dr. Chaudary described it as bullying. It is a strong word to use. However, we can understand why she used it in the circumstances. The Claimant's reference to her maternity leave and the pressure she exerted by virtue of that on Dr. Chaudary to consent to the pay increase could on one analysis give the outward appearance of a deliberate pressure for the claimant's own ends; of duress upon Dr Chaudary.

- 5.1 The circumstances as we have described them, shall not in our conclusion amount to a ground for finding that the decision was one associated with discrimination under Section 18 EqA. We have found the claimant to be a very articulate, very intelligent young woman; and she engaged with the Court with a proper courtesy. We are grateful for that. However, this is a case which is misconceived in many respects.
- 5.2 The Claimant now seeks to minimise the role which her performance issues played in the meetings and exchanges which she had with Dr. Chaudary during her employment. However, the evidence of the Respondent clearly and repeatedly identifies those deficiencies. Moreover, there is corroboration in the evidence that the Claimant herself unequivocally acknowledged that she had made mistakes and had not met the Respondent's expectation - and indeed that she would try to improve.
- 5.3 The reality is sadly that she did not. By August 2017 her position in terms of her merit to obtain a pay rise was the same as it had been in August 2016.
- 5.4 This was the Claimant's second pregnancy during her employment with the Respondent. She had previously taken maternity leave and had returned to her job with no controversy at all. The claimant had discovered that she was pregnant again in or about March or April 2017.
- 5.5 We conclude that the decision had been made by the respondent not to grant the claimant a pay rise, without any reference to or influence from the claimant's pregnancy or the prospect of her taking maternity leave.
- 5.6 Mr Famutimi on behalf of the Respondent has cited the case of **Really Easy Car Credit Limited v Thompson [EAT/3.01.18/0197/17]**. We agree that it has a relevance to the issues in this case. An Employment Tribunal had been mistaken in finding that an employee was dismissed because of her pregnancy having already found as a fact that the decision to dismiss was taken before the employer became aware of the pregnancy. A slightly different set of circumstances, we acknowledge. Of course, in the case before us, the claimant's pregnancy was already known. However, what is clear from the evidence we think is that the decision to refuse the pay rise because of performance had already been made before the claimant confronted Dr Chaudary on 16 August 2017. The claimant herself chose to raise the question of her maternity leave. For Dr. Chaudary and her husband Mr Hamad, we believe that the decision had been taken solely on the grounds of performance and for no other reason.

5.7 We accept that all nurses who worked at the practice were judged according to their competence. We identified two of the dental nurses, namely Sutna and Sydne who had been given pay rises, Dr. Chaudary was clear that the criteria for awarding those pay rises was performance and performance alone. Even though there may have been hiccups in disciplinary and performance terms with these two nurses in the past, a period of sustained improvement gave good grounds for considering a pay increase. In Sydne's case, she intended to emigrate to Australia in 2017. But at a time of great difficulty for the practice Dr. Chaudary was able to come to the conclusion that Sydne had made a substantial contribution to the practice and had attained a substantial improvement in her expertise as a dental nurse during the relevant time.

5.8 As we observed in the earlier paragraphs, it has become progressively apparent during the taking of evidence that this case rests upon a very narrow issue; namely did Dr. Chaudary in refusing the Claimant's renewed request for a pay rise look to the Claimant's maternity leave as a reason for refusing the increase in pay; and did it lead the Claimant reasonably to perceive that she was being refused a pay increase because she was pregnant.

5.9 There was no basis on which the refusal can be perceived to be one related to pregnancy. Dr. Chaudary had made that clear not only in August 2017 and subsequently in the grievance but had also made that clear on previous occasions where the issue of a pay rise was raised. The claimant had accepted that her performance was inadequate in a number of respects. She undertook to improve it, but in Dr. Chaudary's assessment, she had not. That assessment was not in our finding connected with her pregnancy. The Claimant's case of sex discrimination has not been proven.

6.1 We dismiss the claim in its entirety.

Employment Judge Lloyd
Reasons signed and dated: 20 December 2018