



EMPLOYMENT TRIBUNALS

Claimant: Miss S Matuizaite

Respondent: Korzinka Taste of Europe Limited

Heard at: Nottingham by CVP

On: Monday 29 March, Wednesday 31 March and Thursday 1 April 2021

Before: Employment Judge Hutchinson

Members: Mrs B Tidd
Mr K Libetta

Representation

Claimant: Mr P Storey, Solicitor

Respondent: Mr J Sykes, Advocate

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is: -

1. The claim of unfair dismissal under section 99 Employment Rights Act 1996 succeeds.
2. The claim of pregnancy and maternity discrimination under section 17 Equality Act 2010 succeeds.
3. The Respondent has failed to pay the Claimant her holiday entitlement.
4. The Respondent failed to provide to the Claimant a statement of terms and conditions of her employment.
5. Compensation will be determined at a Remedy Hearing, which will take place by CVP on Monday 17 May 2021 at 10 am.

REASONS

1. The Claimant presented her claim to the tribunal on 25 February 2019. She had been employed by the Respondent as a Sales Assistant from 22 December 2017 until her dismissal on 13 January 2019. She claims;
 - unfair dismissal
 - discrimination on grounds of pregnancy or maternity
 - holiday pay.
2. The claim of unfair dismissal is made under section 99 Employment Rights Act 1996 (“ERA”). The only issue to determine in respect of that is whether the reason, or principal reason, for the dismissal was related to her pregnancy, childbirth or maternity and/or that she was going to take maternity leave. We do not have to consider the fairness of the dismissal.
3. In respect of the discrimination claim, there are two allegations. These were;
 - 3.1 not permitting her to take time off from work to attend antenatal appointments;
 - 3.2 dismissing her.
4. The Respondent accepted on the second day of the hearing that the first allegation was true. That they had changed her shifts so that any time off for attending appointments was not required. She was required to inform the Respondent when she had her antenatal appointments and the shifts would be arranged accordingly so that she was not put on the rota at work on the days the appointments took place.
5. In respect of the dismissal, the same question arises as per the unfair dismissal claim, i.e. was she dismissed because of the pregnancy or because she was exercising or seeking to exercise the right to ordinary or additional maternity leave.
6. In respect of her claim for holiday pay, the tribunal must determine as to whether when the Claimant’s employment came to an end she was paid all of the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998.

Evidence

7. The tribunal heard evidence from the following;
 - 7.1 the Claimant;
 - 7.2 Jonas Keblikas, the Claimant’s finance who is still employed by the

- Respondent;
- 7.3 Mainetas Balciunas, Store Manager;
- 7.4 Deimante Balciuniene, Assistant Manager
8. There was an agreed bundle of documents and where I refer to page numbers, it is from that bundle.
9. It was agreed by the Respondent that the person who decided to dismiss the Claimant was the General Manager, Umid. He is responsible for all the stores owned by the Respondent and was said to be an experienced manager having worked in cash and carry shops for over 20 years with Eastern European staff. It was remarkable that the Respondent chose not to call him to give evidence, especially as the case turned very much on the reason why Miss Matuizaite was dismissed. The only explanation we received was that he was too busy to attend the hearing, although that was surprising since the hearing was being conducted by CVP and he could have attended the hearing remotely.
10. So far as the Respondent's case was concerned therefore, they had to rely on an assertion made by witnesses, particularly Deimante Balciuniene, that she had been told to dismiss the Claimant because of her behaviour and poor performance.
11. No documentary evidence was produced to support any such contention. There were no recorded warnings about the Claimant's conduct and performance and it was conceded by the Respondent that in the 13 months that she worked for them, she was never late or failed to attend work or have a day off sick. The lack of evidence of any warnings and the lack of evidence from the person who decided to dismiss her, led the tribunal to the view that the Respondent's evidence was not credible. This Claimant was dismissed three weeks before she was due to commence her maternity leave, having just told the Respondent that she going to commence maternity leave on 6 February 2019. We are satisfied that the Respondent's evidence is incredible and the Claimant is credible.

The facts

12. The Respondent operates non-specialised stores with food, beverages and tobacco predominating. At the time of the Claimant's dismissal, they had two stores and approximately 50 employees. They opened their first store in Boston at 30 Field Street in May 2015 and the mix of the staff is Lithuanian, Polish, Latvian and a few Turkish. The owner of the Respondent is Turkish, as is their General Manager who was referred to as Umid.
13. In November 2017, a new store was opened at 69 Argyle Street, Boston. Deimante Balciuniene was appointed as Manager at that store. The store opened on 15 December 2017.
14. The Claimant and her finance, Jonas Keblikas, were interviewed and they

both started work as Store Assistants on 21 December 2017. Jonas remains in employment at the store and works as a delivery driver, cleaner and shelf stacker.

15. Samanta (the Claimant) worked initially in toiletries and Deimante said that she had shown potential and enthusiasm and her duties were increased to include daily produce, dealing with fresh products and checking that products were sold within their sell by date or discounted, as the date was neared, to avoid wastage.
16. At the time, none of the employees were issued with a contract of employment and no contract of employment has been produced to the tribunal. The Company does not have any employment policies or procedures and in fact the case was remarkable by the lack of any documentary evidence produced by the Respondent.
17. No proper records were kept of employees' holidays or sickness or other absences. Employees were however issued with payslips and the Claimant's payslips are at pages 146 to 221.
18. A roster was prepared each week by Deimante and these are at pages 67 to 116. We have also seen vacation request forms at pages 64 to 66. They indicate three periods of holiday that the Claimant had which were paid holiday. They were for the periods 28 July 2018 to 12 August 2018; 1 October 2018 to 10 October 2018; and 2 January 2019 to 7 January 2019. The Respondent says that this amounted to 30 days holiday.
19. As can be seen from the payslips, the Claimant was initially paid £5.60 per hour. From 2 March 2018, her pay increased to £7.05 per hour and then from 6 April 2018 to £7.38 per hour, which was her rate of pay until her dismissal.
20. Like all employees, including the managers Deimante and Mainetas, the Claimant was paid the minimum wage. It can be seen that the Claimant worked most weeks approximately 40 hours. Her shifts were normally 7 hours in duration, often 3 pm to 10 pm.
21. As can be seen from the rotas at pages 68 to 69, between May and October 2018, apart from 2 weeks' holiday, her regular shift pattern was to work 42 hours per week with Sundays off. She worked 6 days per week.
22. This changed in October to her having Mondays off, except for days when she had medical appointments/antenatal appointments.
23. A letter from United Lincolnshire Hospitals NHS Trust (page 135) confirms that she had two appointments during her period of employment on 12 October 2018 and 10 December 2018 both at 13:20 hours.
24. The Claimant had told the Respondent about these appointments and Deimante had altered the shifts to make sure that that was treated as a day

off and the Claimant was not rostered to work.

25. The Claimant did not object to this because at the time she had no knowledge of her legal rights and, as was accepted at the hearing, neither did the Respondent.
26. The Claimant did not have any days off other than her holidays and it can be seen from the rotas that she worked mostly 6 days per week. She was never late and had no sickness absence and if required to do so, she willingly undertook overtime.
27. The Respondent accepts that until August 2018, she was an exemplary worker and she was praised in a staff meeting about her performance.
28. Samanta visited her doctor in September 2018 and found out that she was pregnant and told Deimante and Mainetas about this the following day. Everyone knew that she was pregnant because she did not hide this.
29. The Respondent says that the Claimant's behaviour and performance deteriorated now. They say that she became "cocky". They say that she stopped advising about when fresh food needed ordering and stopped discounting the produce near the end date and that Mainetas had to give her several verbal warnings. There is no evidence of these so called verbal warnings and we are satisfied that the Claimant was not warned about her conduct.
30. Mainetas, Deimante, Jonas and Samanta were all Lithuanian and they all got on well together.
31. That was evidenced by the fact that on 23 November 2018, Samanta and Jonas joined Deimante's family at a restaurant to celebrate her birthday party. They brought presents and had dinner with them and they had a good relationship. There is no evidence that their relationship deteriorated or that there were any issues about Samanta's performance at work.
32. We do not believe Deimante when she says that the Claimant failed to check fresh produce or clean fridges or that the stock display was a mess or that when she spoke to Samanta, she spoke back to her rudely or that she would speak rudely to Umid, the General Manager.
33. Mr Sykes expressed the view in his summing up that Samanta's attitude was reflected in the way that she gave evidence to the tribunal and referred to the way that she had been "cocky" when giving evidence and that she had a "smart mouth". This was an untrue and unjustified accusation made by Mr Sykes. Samanta gave evidence in a polite and consistent way to the tribunal. She was not in any way "cocky".
34. We are not satisfied that she was rude to staff or customers or that she was rude to Umid as alleged in December 2018. She is alleged to have said to

Deimante in front of Umid: *“Don’t tell me what to do! I know what to do!”* The allegation is untrue and made to try to justify her dismissal. It was alleged that she was given a warning at that time but no evidence was presented to support this assertion and the tribunal was satisfied that this had not happened.

35. Samanta was on annual leave having visited family in Lithuania between 2 January and 8 January 2019. She had told Deimante at the end of December that she was intending to commence her maternity leave on 6 February 2019.
36. Samanta was rostered to work that week and her rota was to end at 3 pm on Sunday 13 January 2019. She was not rostered for the following week because Umid had told Deimante that she was to be dismissed.
37. On 13 January 2019, Jonas and Samanta worked as normal and at 3 pm at the end of the shift, Deimante invited her to the office with Jonas. She simply handed a letter to Samanta, which is at page 117. The letter says as follows;

“Dear Samanta Matuizaitė,

Re: NOTICE TO LEAVE

This letter should serve as an official notice to you. After a verbal warnings your attendance still has been unacceptable. According to records, you have had the following attendance problems:

- *Rude to other staff members and customers.*
- *Ignoring working rules and all comments from management about your work.*

Considering seriousness of the matter, it has been decided by the company (KORZINKA TASTE OF EUROPE) to dispense you from working with us by immediately effect.

Kind regards

*Deimante Balciuniene
Manager”*

38. It is admitted by the Respondent that no warning of the meeting was given. The Claimant was not told of the allegations or given any right of accompaniment, even though her finance was with her.
39. The letter was prepared prior to the meeting on instruction by Umid, who made the decision but did not see the letter. We are satisfied that he told Deimante to dismiss the Claimant and find a reason for doing so.
40. There are several things about the letter. In particular;
 - 40.1 It refers to verbal warnings for attendance. The Respondent accepts

- that the Claimant never failed to attend work and was never late.
- 40.2 It refers to attendance problems but there were none.
- 40.3 It refers to being rude to staff members and customers but does not give any details of who the staff members were or who the customers were and when it is alleged to have happened.
- 40.4 It refers to ignoring working rules but we have not seen any evidence of any rules.
- 40.5 It refers to ignoring comments from management about her work is not give any details of who from management had made the comments and what the comments were about.
41. The meeting lasted no more than a few minutes, during which the letter was handed over. There was no discussion and no opportunity given for Samanta to defend herself from any allegations and no right of appeal against the decision.
42. Deimante says that Samanta did nothing to mitigate her conduct and that if she had apologised and promised that the behaviour would not recur, she would not have dismissed her. We are satisfied that no such opportunity was given. Deimante says that Samanta said nothing and we are satisfied that she said nothing because she was not given any opportunity to say anything and the dismissal was a surprise to her.
43. Samanta was asked to sign the letter but she refused to do so.
44. At this stage, the Claimant had not provided her MATB1 form. She had not been asked for it by the Respondent.
45. We are satisfied that the Respondent issued Samanta with her P45 and believed that they would not have to pay her maternity pay during her maternity leave. Samanta herself did not know what her legal rights were and she only knew these legal rights after she contacted the Department for Work and Pensions and received their reply at page 136 – 7. She was then paid her statutory maternity pay by the Respondent as she was entitled.
46. The Claimant had her baby in April and remains in the UK with her finance, who remains in the employment of the Respondent.
47. He could confirm in his evidence that he was never aware of any warning given to Samanta about her conduct and behaviour and was as surprised as she was about her dismissal.

The law and submissions

The relevant statutory provisions

Automatic unfair dismissal

48. 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, ...*

(3) *A reason or set of circumstances prescribed under this section must relate to—*

(a) *pregnancy, childbirth or maternity,*

(b) *ordinary, compulsory or additional maternity leave*

...”

49. In a case such as this where a claimant does not have two years' service, it is for the Claimant to show on the balance of probabilities that the reason for the dismissal related to “*pregnancy, childbirth or maternity*”. It does not matter whether the dismissal was fair or unfair just what was the reason for the dismissal and that the reason related to pregnancy, childbirth or maternity. As Mr Sykes rightly says, it is not a question of what the Claimant thought was the reason for the dismissal but was in the mind of the employer.

Pregnancy and maternity discrimination

50. 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) ...

(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.*

...”

51. The burden of proof in respect of these cases is dealt with at section 136 EqA, which provides;

“136 Burden of proof

...

- (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.*

...”

52. Mr Sykes referred us to the principles in ***Igen v Wong*** relating to the burden of proof transferring to the Respondent if the Claimant is able to establish facts from which the tribunal could determine the Claimant has suffered discrimination.

Holiday pay

53. This claim is made under regulation 14 of the Working Time Regulations of 1998.
54. This provides;

“Compensation related to entitlement to leave

14.— (1) *This regulation applies where—*

- (a) *a worker’s employment is terminated during the course of his leave year, and*
- (b) *on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.*
- (2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*
- (3) *The payment due under paragraph (2) shall be—*

- (a) *such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*
- (b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.”

...

55. This involves us making a calculation of the amount of holiday the Claimant accrued during her period of employment and her entitlement to pay after giving credit for holiday pay received during the course of her employment.

Failure to provide written terms of conditions of employment

56. Section 38 of the Employment Act 2002 provides;

“38 Failure to give statement of employment particulars etc.

...

- (2) *If in the case of proceedings to which this section applies—*
- (a) *the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and*
- (b) *when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change) ...*

the tribunal must, subject to subsection (5), make an award of

the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

- (3) *If in the case of proceedings to which this section applies—*
- (a) *the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and*
- (b) *when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 ...*

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

- (4) *In subsections (2) and (3)—*
- (a) *references to the minimum amount are to an amount equal to two weeks' pay, and*
- (b) *references to the higher amount are to an amount equal to four weeks' pay.*

...”

Our conclusions

57. We are satisfied in this case that Samanta was a model employee. She had worked for the Respondent for 13 months and not been late on one occasion or had any days off for any reason, other than holidays. She worked long hours as required by her employer, undertook overtime and agreed to change her shift pattern, including on days when she had appointments in connection with her pregnancy.
58. We note that the Respondent accepts that she was a model employee until August and their allegation that she changed after August is made entirely without foundation. There is no evidence at all to support any contention by them that her performance was unsatisfactory or that she was rude to staff and customers.
59. There were only two appointments that related to her pregnancy, one in October and one in December, and the Respondent altered her shifts to ensure that she did not have paid time off to attend these appointments.
60. We are satisfied that Samanta told her employers that she was going to start

her maternity leave on 6 February 2019 but that she was prepared to stay until the end of that week. We are satisfied that she told them this in December.

61. She went off to Lithuania on 2 January 2019 and returned on 8 January 2019. We are satisfied that the decision was taken well before 13 January 2019 that her employment would be ended that day. It had nothing to do with her performance and we are satisfied on the balance of probabilities that it was because of her taking maternity leave in 3 weeks' time and the Respondent's concern that they would have to pay her statutory maternity pay.
62. The person who made the decision, Umid, we have not heard from. He did not even write the letter himself or even approve it.
63. The letter itself is a nonsense, referring to her attendance when there was no issue and they did not provide any details at all of who it was that she was alleged to have been rude to or which rule it was said that she had broken.
64. In their evidence we were told that it related to wastage of fresh products but the letter does not even refer to that.
65. It is said by Deimante that if the Claimant had appealed against the decision, they would have reconsidered it but no mention was made of any right of appeal in the discussion nor in the letter of dismissal.
66. All the evidence points to the fact that they did not believe that they had to pay SMP and they had no intention of paying it until they were contacted by the Department of Work and Pensions after the Claimant's dismissal.
67. They thought by dismissing her without notice they would not have to pay her anything further and did not pay her any notice pay or any holiday pay.
68. They relied on the Claimant's own ignorance of her own rights. Until sometime after her dismissal she did not know anything of her rights. She did not know that she had the right to paid time off to attend maternity appointments and did not know that her employer could not dismiss her for a reason related to her maternity. She did not know also that she was entitled to notice pay or holiday pay at the time of her dismissal.
69. It was suggested by the Respondent that the reason for this claim was simply because the Claimant wanted to obtain compensation so that she could return to Lithuania. We were also told by the Respondent's representative that Lithuanians regularly take out loans whilst they are working in this country and then return to Lithuania without repaying these loans. The allegation, like so many the Respondent's representative made against the Claimant, is entirely without foundation.
70. We are satisfied that the reason for the Claimant's dismissal was that she was to embark on maternity leave and that she has suffered both unfair

dismissal and discrimination on grounds of pregnancy or maternity.

- 71. The Claimant had also not been paid all the holiday pay that was owed to her.
- 72. We are also intending to make an award under section 38 of the Employment Act 2002 for failing to provide a written statement of terms and conditions of employment.

Remedy

- 73. We will deal with the issue of remedy by CVP hearing on Monday 17 May 2021 at 10 am.

Directions

- 1. The parties are to agree a remedy bundle of documents that are relevant to the remedy hearing by **3 May 2021**.
- 2. The parties are to exchange witness statements of evidence they wish to call in respect of remedy by **10 May 2021**.
- 3. The Claimant will be responsible for producing to the tribunal by email, a copy of the agreed bundle of documents and a copy of any witness statements relied on by **14 May 2021**.

Employment Judge Hutchinson

Date: 22 April 2021

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.