



EMPLOYMENT TRIBUNALS

**Claimants: (1) Mr B De Souza Rodrigues
(2) Miss S De Oliveira**

**Respondents: (1) Rancho Brazilian Grill Ltd
(2) Mr Henrique Moura
(3) Mrs Patricia Moura**

Heard at: Leeds

On: 3, 4 and 5 January 2017

11 January 2017 (Reserved)

**Before: Employment Judge Keevash
Ms L Fawcett
Mr L Priestley**

Representation

Claimants: Mrs S Wilkinson, Solicitor

**Respondents: (1) Not present and not represented
(2) and (3) Miss A Dos Santos, friend**

RESERVED JUDGMENT

1 The Claimants' complaints of unlawful deductions from pay, breach of contract (salary and bonus), failure to pay holiday pay, breach of the right to be given written itemised pay statements and breach of the right to be given written particulars of employment fail.

2 The Second Claimant's complaints of direct sex and/or maternity/pregnancy discrimination and unfavourable treatment because of pregnancy/maternity fail.

REASONS

Background

1 By his claim form the First Claimant complained that the Respondents (a) made unlawful deductions and/or acted in breach of contract in respect of pay, bonus and

notice pay (b) failed to pay holiday for untaken leave (c) failed to give him itemised pay statements and (d) failed to give him a statement of particulars of employment. By her claim form the Second Claimant brought similar complaints. She also complained of direct discrimination and pregnancy/maternity discrimination. By their responses the Respondents resisted the complaints.

Issues

2 At a Preliminary Hearing an Employment Judge identified the issues for determination. During the course of the Hearing Mrs Wilkinson contended that the First Respondent's failure to address the Second Claimant's grievance constituted unlawful discrimination. This had been the subject of an application to amend the Claim form made by a letter dated 3 November 2016. That application had not been determined before the Hearing. It was not renewed by Mrs Wilkinson.

Hearing

3 At the Hearing the Claimants gave evidence on their own behalf. The Second and Third Respondents gave evidence on their own behalf and on behalf of the First Respondent. Elizia Pearson and Letitia Albani-Hawe acted as interpreters. The Tribunal also considered a bundle of documents. During the Hearing both sets of parties adduced additional documents in evidence.

Facts

4 The Tribunal found the following facts proved on the balance of probabilities:-

4.1 In or around November 2015 the Claimants began working at the Rancho Brazilian Grill in Selby. They had previously worked at Chiquitos restaurant ("Chiquitos") in York before accepting an invitation from the Second and Third Respondents to move. The First and Second Claimants were to work as head chef and kitchen manager respectively. When the Claimants were employed by Chiquitos their pay was subject to the usual deductions for tax and national insurance ("NI").

4.2 The Claimants helped to prepare the premises for opening on 29 January 2016.

4.3 On 25 January 2016 the Claimants signed contracts of employment which both provided:-

"Start of Employment

The employment will start on 01-Dec-2015

...

Payment Frequency

The Employee will be paid monthly in arrears by Cash..."

Neither contract provided details of the rate of remuneration or the method of calculating remuneration.

4.4 On each Sunday commencing in or about February 2016 the Second Claimant met the Second Respondent to count the weekly takings and discuss the accounts. The Second Claimant would take an agreed amount of cash from the weekly takings in respect of her remuneration and that of the First Claimant.

4.5 In or about March 2016 the Claimants visited an accountant in London together with the Second and Third Respondents. They discussed making deductions for tax and NI and providing payslips starting in the new tax year.

4.6 Shortly before 21 March 2016 the Second Claimant informed the Third Respondent that she was pregnant.

4.7 On 31 May 2016 the Claimants resigned their employment with the First Respondent.

4.8 By a letter dated 27 June 2016 the Claimants made a formal grievance to the Second and Third Respondents. The letter was sent by recorded delivery. It was returned by Royal Mail in an envelope marked “not called for”.

Law

5 Section 1(1) of the Employment Rights Act 1996 (“the 1996 Act”) provides:-

“Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment”.

Section 8(1) of the 1996 Act provides:-

“An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement”.

Section 13(1) of the 1996 Act provides:-

“An employer shall not make a deduction from wages of a worker employed by him ...”

Section 230 of the 1996 Act provides:-

“(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” ... means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment...”

Sections 13(1) of the Equality Act 2010 (“the 2010 Act”) provides:-

“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”.

Section 18 of the 2010 Act provides:-

“(1) ...

(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 ...

(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...”

Section 39(2) of the 2010 Act provides:-

“(1) ...

(2) An employer (A) must not discriminate against an employee of A’s (B)-

(a) ...

(d) by subjecting B to any other detriment.”

Section 123 of the 2010 Act provides:-

“(1) ...proceedings on a complaint ... may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable

(2) ...

(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 (“the 1999 Regulations”) provides:-

“Every employer shall make a suitable and sufficient assessment of-

- (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work...”

Regulation 16(1) of the 1999 Regulations provides:-

“Where –

- (a) the persons working in an undertaking include women of child-bearing age; and
- (b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological, or chemical agents ...

the assessment required by regulation 3(1) shall also include an assessment of such risks.”

Submissions

6 Mrs Wilkinson made oral submissions. She referred to **Queen Victoria Seamen’s Rest Ltd (QVSR) v Ward** UKEAT/0465/08/MAA. Miss Dos Santos made oral submissions. Where appropriate reference will be made to these submissions in the Discussion section of these reasons.

Discussion

The identity of the Respondent

7 The Tribunal found that on 8 March 2016 the First Respondent was incorporated under the Companies Act 2006 as a private company. That evidence was derived from the Certificate of Incorporation provided by the Registrar of Companies for England and Wales. It followed that before that date any liability could only attach to the Second Respondent and/or the Third Respondent.

Complaints of unlawful deductions from pay, breach of contract, failure to pay holiday pay, breach of the right to be given written itemised pay statements and breach of the right to be given written particulars of employment

8 The Tribunal was concerned that throughout their relationship with the respondents the Claimants had been paid in cash. They denied that they had asked to be paid in cash. They gave evidence that the Second Respondent suggested that a £2,000 bonus should be paid to the Second Claimant in cash. They told the Tribunal that they did not understand why this was suggested but they accepted it. They expected the balance to be deposited into his bank. He also expected to be given payslips. They did not explain why all payments of remuneration were subsequently made in cash.

9 The Respondents gave evidence that the Second Claimant had asked for £2,000 to be paid in cash. They did not explain why all payments of remuneration were made in cash. They knew that no deductions for tax and NI were made from the Claimants’

remuneration. They gave the excuse that they had been self employed in their garage business and were inexperienced employers. They confirmed that their accountant had advised that deductions should be made but they had not acted on that advice. They had waited for him to do the necessary work.

10 The Tribunal found that the Claimants well understood that employers were obliged to make deductions for tax and NI. When they were employed by Chiquitos their pay was subject to such deductions as shown by the payslips they were given. When they left Chiquitos, they were given Forms P45 which they gave to the Respondents. The Tribunal also found that the Claimants knew that the Respondents had not made any deductions for tax and NI. Their awareness of this situation was further demonstrated when the First Claimant told the Tribunal that in or around December 2016 he had telephoned HMRC about the level of deductions made by Chiquitos after he returned to work for them in May 2016. He was concerned that he was being taxed too highly. He did not discuss with HMRC the fact that he had not paid any tax or NI for the year ending April 2016 in respect of the work performed and remuneration received after October 2015. It was clear that he and the Second Claimant wanted to benefit from that situation. Further, even after the visit to the accountant no deductions for tax and NI were made.

11 The Tribunal found and decided that the contracts between the Claimants and the Respondents were illegal because they had been performed in an illegal manner. The Respondents and the Claimants knowingly committed an illegal act by way of fraud on HMRC in relation to the payment and receipt of the Claimants' remuneration. That turned the contracts into contracts prohibited by statute and/ or common law. There was no doubt that the Claimants both knew and participated in the illegality. It was unnecessary for the Tribunal to find who was the driving force behind the unlawful conduct. It followed that the Claimants were barred from bringing complaints which were founded on their contracts or which were statutory complaints founded on the contracts. Accordingly the complaints under this head failed.

Complaint that the Respondents discriminated against the Second Claimant when failing to carry out a risk assessment

12 Regulation 3(1) of the 1999 Regulations sets out the general duty of employers to safeguard the health and safety of their employees by making an assessment of risks. By virtue of Regulation 16(1) of the 1999 Regulations the employer must include in that assessment an assessment of particular risks to new or expectant mothers and their babies in certain circumstances

13 The Tribunal found and decided that the Respondents were under a duty to make a Regulation 16(1) assessment. The Second Claimant's work was of a kind which could involve risk, by reason of her condition, to her health and safety, or to that of her baby, from the processes or working conditions in her workplace including among other matters working with cleaning products, hot oils and heavy pans together with the need to stand to perform her duties.

14 The Tribunal understood that an employer's failure to carry out a risk assessment under the 1999 Regulations could, in the case of a pregnant worker, entitle her to bring a complaint of pregnancy and maternity discrimination under s18 of the 2010 Act. It found that by no later than 21 March 2016 the First Respondent was aware that the Second Claimant was pregnant. It did have access to advice from an accountant. It was reasonable to expect the First Respondent to comply with its statutory duty by no later than 4 April 2016. There was no dispute that the First Respondent had failed to carry out a risk assessment. The Second and Third Respondents explained that they did not know that there was such an obligation. They relied on the second Claimant to inform them as to what were their responsibilities. She did not tell them about the need for a risk assessment. They did not ask their accountant for advice on human resources issues. In these circumstances ET decided these explanations could not possibly afford any defence to the complaint.

15 Under s123(1) of the 2010 Act proceedings on any complaint should have been brought by no later than three months starting with the date of the act to which the complaint relates. Under sections 123(3)(b) and 123(4)(b) of the 2010 Act the First Respondent's failure to conduct the risk assessment by 4 April 2016 is to be treated as occurring when they decided on it. Therefore, time ran from that date. The Claimants presented their claim forms on 26 August 2016. Even if any extension under the Early Conciliation Regulations were to be taken into account, it was clear that the Claimants had presented their claim forms out of time to the Tribunal.

16 Mrs Wilkinson submitted that the First Respondent's failure amounted to conduct extending over a period which under s123(3)(a) of the 2010 Act should be treated as done at the end of the period. She relied on **Ward**. The Tribunal decided that it was necessary to consider the remaining discrimination complaints before addressing this submission.

Complaints that the Respondents discriminated against the Second Claimant when (a) making her working conditions strenuous and not alleviating them (b) alienating her by changing their attitude towards her

17 The Second Claimant stated that her work environment posed risks to her and her baby. She explained that, after informing the Second and Third Respondents about her pregnancy, the Third Respondent "stopped talking to me...completely ignored me...became very cold towards me ...told me not to speak to her husband..." On further questioning the Second Claimant clarified that they stopped speaking about personal matters but continued to speak about work matters.

18 The Tribunal found that after she became pregnant the Second Claimant was able to take breaks during her working day whenever she needed; she managed the work in the kitchen and could at any time have requested assistance from other members of staff; she could have taken extra breaks if required; the Respondents provided a chair for her to sit on; subsequently she brought a chair to work for her use; she never asked the Respondents for a change in her working conditions. The First Claimant lifted and carried heavy items such as pans and boxes of food. He carried out the cleaning duties in the kitchen.

19 The Tribunal accepted the Third Respondent's evidence that she reacted very well when the Second Claimant told her that she was pregnant. They talked about the forthcoming birth. During the next few weeks the relationship between the Second Claimant and the Respondents remained much the same as it had been before the Second Claimant told them she was pregnant. She continued to cook lunch in the restaurant for the Respondents and the staff. She and the Third respondent continued to buy clothes together on line. However, in or about the middle of April 2016 the relationship between the Second Claimant and the Respondents did cool because of an incident involving the Respondents' daughter who it was alleged by the Second Claimant had stolen money. The Second Claimant had helped create a very bad atmosphere in the restaurant and relationships had become strained. The Third Respondent explained that she no longer discussed "feminine" matters with her. The Second Claimant stopped preparing lunch after an incident where the Third Respondent left the room crying. In making these findings of fact the Tribunal did not accept the evidence of the Second Claimant where it was contradicted by the Third Respondent. It decided that the Second Claimant had exaggerated her evidence.

20 The Tribunal found and decided that there was no evidence to support these complaints. The Respondents did not make the Second Claimant's working conditions strenuous. They did not change their attitude towards her because of her pregnancy or because she was seeking to exercise her right to maternity leave. Accordingly the complaints under this head failed.

The failure to address the grievance

21 As discussed in paragraph 2 above, the Second Claimant's application to amend her claim form to include a complaint relation to her grievance was not determined before the Hearing. Although Mrs Wilkinson mentioned the matter just before the close of the Claimants' case, she did not renew the application. Nonetheless for the sake of completeness the Tribunal did consider the allegation that the Respondents failed to address the grievance because of the Second Claimant's pregnancy. It found and decided that there was no evidence whatsoever to support such an allegation. There was no basis for concluding that the Respondents' failure was in any way related to pregnancy or her seeking to exercise her right to maternity leave. The Tribunal was reluctant to speculate on why the letter of grievance was not dealt with. It was unable to make a finding of fact that the Respondents were aware of the grievance.

Time limit

22 As set out in paragraphs 15 and 16 above, the Tribunal did not address any time limit issue until it had completed its deliberations on all complaints of discrimination. In the light of its deliberations only the complaint relating to failure to make a risk assessment fell to be considered at this stage. That complaint was presented out of time to the Tribunal. Mrs Wilkinson's submission did not assist the Second Claimant because there was no other conduct to permit any extension under s123(3)(a) of the 2010 Act.

23 Under s123(1)(b) of the 2010 Act the Tribunal had discretion to extend time where it considered it just and equitable to do so. The Second Claimant did not give any evidence as to the reason why she failed to present her claim form in time. That issue was not addressed by Mrs Wilkinson. In the circumstances the Tribunal decided that there was no basis on which it could exercise its discretion to extend time. Accordingly the Second Claimant's complaint that the Respondents discriminated against her when failing to carry out a risk assessment failed.

Conclusion

24 The Tribunal was concerned that the Respondents might not understand their duties as employers in the event that at some stage in the future they engaged employees to work for them. It was vital that they took (and accepted) professional advice. At the very least their statutory duties as employers included the provision of statements of particulars of terms and conditions of employment, making deductions for tax and NI, provide payslips, providing paid annual leave.



Employment Judge Keevash

Date 16 February 2017