



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D. Vidal

**Respondent:** Harrow Council

**Heard at:** Watford (by CVP)

**On:** 22 July 2021

**Before:** Employment Judge McNeill QC

## Appearances

**For the Claimant:** No attendance

**For the Respondent:** Mr C. Cuckney, Solicitor

## JUDGMENT – PRELIMINARY HEARING

- (1) The Claimant's claim for automatic unfair dismissal pursuant to s99 of the Employment Rights Act 1996 is struck out because it has no reasonable prospect of success.
- (2) The Claimant's claims for pregnancy and maternity discrimination pursuant to s18 of the Equality Act 2010 are struck out because they have no reasonable prospect of success.
- (3) The Respondent's application to dismiss the Claimant's claims for unfair dismissal and holiday pay today on the basis that those claims have not been actively pursued by the Claimant is not upheld.
- (4) The Claimant having failed actively to pursue her case since 30 April 2021, if the Claimant wishes to pursue her claim for ordinary unfair dismissal, in accordance with rule 37(2) of the Employment Tribunals Rules of Procedure, she must within 21 days of the date on which this judgment is sent to her, set out in writing any representations she wishes to make as to why her claim for unfair dismissal should not be struck out. Any such representations should be sent by email to the Tribunal and the Respondent should be copied in to the email.

- (5) Upon the Respondent admitting that the Claimant is entitled to a payment in respect of leave that had accrued but had not been taken at the time of her dismissal, the Respondent must make such a payment to the Claimant to be calculated on the basis of a sum of £3,206.02 gross from which tax and NI will be deducted by the Respondent.

## **REASONS**

1. This hearing proceeded in the absence of the Claimant or her representative. The Claimant had been notified of the hearing. Attempts were made by both the Respondent and the Tribunal to contact the Claimant's representative by phone on the morning of the hearing and by the Tribunal on the day before the hearing but there was no response to those calls. The Claimant did not contact the Tribunal with any reason for her non-attendance.
2. The Claimant was employed by the Respondent from 3 February 2006 until she was dismissed on a date at the end of May or early June 2019.<sup>1</sup> From 2 October 2007 until the date of her dismissal, she was employed as an Emergency Planning Officer. She presented her claim to the Tribunal on 25 October 2019. Her claims were for automatic unfair dismissal, ordinary unfair dismissal, discrimination on the grounds of pregnancy or maternity and for various monies owed including notice pay and holiday pay. At the time of this hearing, the only outstanding claim for monies owed was in respect of holiday pay.
3. The Claimant notified her claim to Acas on 26 August 2019 and the Early Conciliation Certificate was dated 26 September 2019. There was therefore a time limit issue in relation to incidents complained of which pre-dated the dismissal and occurred prior to late May/early June 2019.
4. The Claimant's claims related both to the circumstances surrounding a final writing warning that she was given in July 2018 and to the decision to dismiss her in late May/early June 2019. The warning was taken into account when the decision was made to dismiss her.
5. The Claimant alleged that the entire process in connection with both the warning and the dismissal was motivated by the fact that she had been pregnant and was on maternity leave during a period that ended on 31 December 2017. In relation to alleged pregnancy discrimination, this was the "protected period" for the purposes of s18(2) of the Equality Act 2010 (EqA).
6. The Claimant further claimed that she was pregnant at the time of her dismissal and that the dismissal was by reason of pregnancy or

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<sup>1</sup> There is some lack of clarity as to when the Claimant was notified of her dismissal but it would appear to have been on 5 June 2019.

maternity. The Respondent denied that it knew that the Claimant was pregnant when it took the decision to dismiss. It contended that it dismissed the Claimant following a finding of misconduct when there was a live final written warning on file.

7. This (second) preliminary hearing was listed at a (first) preliminary hearing on 9 March 2021. The issues to be determined at this hearing were set out at paragraph 47 of the record of that first hearing and are as follows:
  - i. What elements of the claim are “out of time” and in respect of those that are, should the Claimant be permitted to take them forward? This could not refer to the claims relating to dismissal, which were brought in time, but only to the discrimination claims.
  - ii. Should the Claimant be granted leave to amend the claim in order to take forward the claims referred to in paragraphs 44 and 46 of the case management summary? Those claims are (1) a claim for sex discrimination in relation to the events leading to a final written warning given to her in July 2018; and (2) a claim that Mr Grover provided the Claimant’s personal details to occupational health.
  - iii. Should any claims be struck out on grounds that they have no reasonable prospect of success, alternatively be subject to a deposit order on the ground that they have little reasonable prospect of success?
8. On 30 April 2021, in an email to the Tribunal, to which the Claimant’s representative was copied in, the Respondent stated that it would seek orders for strike out/deposit orders only in relation to the Claimant’s claims for pregnancy/maternity discrimination and automatic unfair dismissal. It would not seek such orders in respect of the claim for unfair dismissal or in respect of the claim for holiday pay, which appeared to be the only money claim which remained live.
9. The Claimant did not notify the Respondent or the Tribunal before today of any application to amend her claims and there was no application to amend for me to consider. The second issue for consideration at this hearing therefore falls away and the claims before the Tribunal remain those identified at the first preliminary hearing. They do not include any claim for sex discrimination.
10. I first considered whether any of the Claimant’s claims should be struck out pursuant to rule 37 of the Rules of Procedure on grounds that they had no reasonable prospect of success. I took into account that it is unusual for a discrimination claim to be struck out when no evidence has been heard and that strike out should be reserved only for the clearest cases.
11. In relation to the claims for pregnancy and maternity discrimination relating to the final written warning and the circumstances surrounding the final written warning, as summarised at the first preliminary hearing,

none of the matters complained of by the Claimant fell within the protected period, which ended on 31 December 2017. Under s18(2) of the EqA, the alleged acts of discrimination must fall within the protected period and they did not. None of the allegations related either to the Claimant being on maternity leave or exercising a right to maternity leave. This is therefore a clear case where it can be said that the discrimination claims have no reasonable prospect of success and I have concluded that they should be struck out.

12. The first preliminary issue, which related to whether the claims for discrimination were in time, fell away because the claims for discrimination were struck out.
13. In relation to the claim for automatic unfair dismissal, insofar as that claim involves an allegation that the final written warning and its surrounding circumstances involved pregnancy or maternity discrimination and that such discrimination constituted the reason for dismissal, that claim could have no reasonable prospect of success because no pregnancy or maternity discrimination could be established, for the reasons stated at paragraph 11 above. That claim could therefore have no reasonable prospect of success and I have determined that it too should be struck out.
14. As for the claim for automatic unfair dismissal on the basis that the Claimant was pregnant at the time of dismissal and that the Respondent dismissed her because of that pregnancy, there was no evidence before me that could support the allegation that the Respondent knew of her pregnancy when it made the decision to dismiss her. It was suggested at the first preliminary hearing that the Respondent should have known that the Claimant was pregnant because of her statements of fitness for work. These statements were produced at this second preliminary hearing by the Respondent but they made no reference to pregnancy, only to "stress at work". The Claimant did not appear at this preliminary hearing to explain why she alleged that the Respondent knew about her pregnancy and has produced no evidence to substantiate the bare assertion of knowledge.
15. I concluded from this that the Claimant had no evidence that would support her allegation that the Respondent knew that she was pregnant. The Respondent should not have to meet a claim based on mere assertion and cannot have dismissed the Claimant because she was pregnant if it did not know that she was pregnant. In all the circumstances, I concluded that this was a clear case where there was no reasonable prospect of the claim succeeding and that this claim too should be struck out.
16. In relation to the two remaining claims for ordinary unfair dismissal and holiday pay, the Respondent invited me to strike these claims out on the basis that the claim had not been actively pursued by the Claimant. Not only had the Claimant, without any explanation, failed to

attend this hearing but the last correspondence from the Claimant, through her representative, was on 30 April 2021. This was an email to the Respondent, copied to the Tribunal. The Claimant had not provided the Schedule of Loss that she was due to provide by 30 April 2021.

17. I accepted that the Claimant had not actively pursued her claims. However, the Respondent had not given the Claimant notice that it would be seeking to strike out her claims for ordinary unfair dismissal and holiday pay at this hearing. Further, it admitted that it was liable to pay holiday pay to the Claimant. I concluded that there should be judgment for the Claimant in relation to her claim for holiday pay and that she should be given the opportunity to make representations in writing to the Tribunal as to why her claim for ordinary unfair dismissal should not be struck out. She would have 21 days from the date this judgment is sent to her to provide written representations.
18. The Respondent confirmed that the amount due to the Claimant in respect of holiday pay was £3,206.02 gross and there will be judgment for the Claimant for that amount, to be paid to the Claimant after deduction of tax and national insurance contributions.
19. The case has been listed for a final hearing over three days from 29 November to 1 December 2021 and the Respondent confirmed that it would notify the Tribunal if those dates could be vacated.

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Employment Judge McNeill QC

Date: 22 July 2021

Sent to the parties on: .18<sup>th</sup> August 2021  
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For the Tribunal

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