



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102699/2023

Held in Glasgow on 30 August 2023

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Employment Judge M Sutherland

Himani Srivastava

**Claimant
In Person**

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Unico Clinics Ltd

**First Respondent
No response and
No appearance**

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Jaskarn Gill

**Second Respondent
No response and
No appearance**

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Unique Clinics Limited

**Third Respondent
No response and
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the complaints of pregnancy and maternity discrimination and for holiday pay do not succeed and are dismissed.

REASONS

Introduction

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1. The Claimant had presented complaints of pregnancy and maternity discrimination and for holiday pay which were not resisted by the Respondent.

2. A final hearing was listed for today to determine all issues including remedy and was conducted by video (CVP).
3. The Claimant gave evidence on her own behalf. Her husband also gave evidence. The Claimant had lodged a bundle of documents. The Second Respondent provided medical evidence regarding her long-term health conditions.
4. To simplify matters the names of the Respondents shall be used instead of making reference to First, Second and Third Respondent.
5. The Claimant stressed that English was not her first language but having regard to both her written and spoken communication she appears to have a very good command of English and was able to communicate in a clear and articulate manner.

Findings in fact

6. The Tribunal makes the following findings in fact:
7. Jaskarn ('Jas') Gill is the Director of a laser clinic in Glasgow offering technical cosmetic treatments. The Claimant was employed as a Clinic Manager in that clinic from 15 August 2021 and remains in that employment. At the same time the Claimant has been studying for a PhD in dentistry.
8. Until November 2022 the clinic operated from premises in Braehead under the name of Unico Clinics. From November 2022 the clinic operated in Renfrew under the name of Unique Clinics.
9. There are three legal entities associated with that business:
 - a. Unico Clinics Ltd which was incorporated on 27 October 2016 of which Jas Gill is a Director and a person of significant control;
 - b. Unique Clinics Ltd (13780189) which was a beauty treatment business incorporated of 3 December 2021 and dissolved on 30 May 2023 of which Jas Gill was a Director and a person of significant control; and

- c. Unique Clinics Limited (SC772041) a beauty treatment business which was incorporated on 8 June 2023 and of which Jas Gill is a person of significant control.
10. The Claimant was first employed under a contract of employment with Unico Clinics Ltd. From August 2022 she was employed under a contract of employment with Unique Clinics Ltd but her payslips continued to refer to Unico Clinics Ltd. She did not provide a copy of her contract with Unique Clinics. The Claimant was paid weekly in arrears. There was sometimes a delay of a few days in her receiving payment.
- 10 11. The Claimant was first employed to work 32 hours over 3 days a week in Braehead at a rate of £12 an hour. She was entitled to 23 days holiday which was pro-rated for part time. The business experienced increasing financial difficulties and from May 2022 her hours of work reduced such that she was working an average of 18 hours over 3 days a week. From May 2022 her holiday pay was based upon 6 hours a day.
- 15 12. The Claimant reported to Jas Gill as Director. The Claimant advised having a good working relationship with Jas who was nice and friendly to her. The financial side of the business was advised and managed by an independent accountant, Naeem Manzoor of Avid Accountants Ltd.
- 20 13. In around June 2022 the Claimant became aware that the business was in significant financial difficulties. Jas was also increasingly unwell with long term health conditions. The number of staff and the available hours of work reduced significantly. Jas would express concerns to the Claimant as Clinic Manager about how she was going to pay everyone.
- 25 14. In November 2022 the Claimant verbally advised Jas of her pregnancy. On 13 January 2023 the Claimant emailed to advise that her due date was 12 June 2023, that she would start maternity leave on 30 May 2023 and that she qualified for 52 weeks maternity leave and statutory maternity pay. The Claimant provided her Mat B1 on 1 February to Jas and her accountant which was acknowledged on 3 February.
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15. The Claimant had a difficult pregnancy and experienced gestational diabetes and severe morning sickness. On 21 February 2023 the Claimant advised Jas and her accountant in writing that her maternity leave would start earlier on 29 March 2023 because of issues with her health and because of her PhD. She sought confirmation of her SMP, and the holiday pay that would accrue during her maternity leave, and made reference to having a 32 hours a week contract.
16. On 2 March 2023 the accountant provided the Claimant with a written statement of his calculations of her SMP and her holiday pay. He provided her with a link to the government's SMP and holiday pay calculators so that she could check the calculations and he advised her that this was an estimate, and he would update the calculations in light of her March wages.
17. On 3 March 2023 the Claimant wrote to the accountant providing her own calculations which showed a discrepancy between their calculations. She also advised that there was a discrepancy with her past holiday pay. She based her calculation of her past and future holiday pay upon the 32 hour a week contract. The Claimant stated in that email "please can you make this a priority as its discrimination to not reply unless I have to email you few times".
18. On 3 March 2023 the accountant advised the Claimant in writing that he had calculated her holiday pay based upon the hours that she had worked, that he had no information about her agreements with Jas and she would need to discuss that with her, he confirmed that her that her SMP will be calculated according to her entitlement and he sought to reassure her that she wouldn't be underpaid.
19. On 6 March 2023 the Claimant wrote to the accountant, copied to Jas, advising that he has been underpaying her holiday pay, that he has been withholding information about how her holiday pay has been calculated, and that this is illegal. She stated that "choosing to pay employees with less SMP and causing distress in working place is 'Pregnancy discrimination' from your end" and that failure to pay the full amount of holiday pay was "wage theft". She advised him "Please refrain from insulting my intelligence any further and

get back to me with all the correct calculations with regards to my previous holiday pay that needs to be compensated, SMP, and post maternity holiday pay for 22.5 days that I am entitled to as per my [32 hour] contract”.

20. On 8 March 2023 the accountant wrote to the Claimant to advise that he is an external accountant who takes instructions from Jas, he is unable to resolve her holiday pay dispute and she should take this up with Jas rather than contact him about it.
21. The Claimant followed up with Jas in meetings and phone calls who confirmed that she would be paid SMP per the government regulations and that she would discuss the holiday pay issue with the accountant. The Claimant was aware that the business had paid SMP in the past to other women.
22. The Claimant had a final in person meeting with Jas on 21 March. The Claimant was aware that the business was in significant financial difficulty and owed significant funds to HMRC. The Claimant was concerned that the business would not have the funds to pay her SMP and the business would only receive a reduction of its debt to them rather than repayment of SMP. Jas advised the Claimant that there was a risk that the business would go into liquidation and she was concerned that the Claimant would not get paid.
23. On 21 March the Claimant discussed her concerns with HMRC. Of her own volition she explored with them the option of resigning and claiming maternity pay from the government. She rejected this option because if she resigned she would lose the opportunity to accrued holiday pay which she had calculated was worth £2,150. The Claimant was frustrated that Jas had not raised the financial issues with her in January or February when she could have resigned.
24. On 21 March the Claimant asked Jas to let her know whether she would be able to pay her maternity pay and if not she would ask her to fill in a SMP1. Around 22 March the Claimant asked Jas to complete an SMP1 form to enable her to claim Maternity Allowance instead of SMP if she was not going to pay her maternity pay. On 23 March Jas advised that she was unable to complete the SMP1 because the options did not apply.

25. On 23 March the Claimant was experiencing stress and was signed off by GP from 23 to 29 March when her maternity leave would commence.
26. On 24 March the Claimant wrote to the Jas to advise that she “has been thoroughly harassed by both you and Naeem (the accountant) on this agenda from the last couple of months...Its quite distressing, demeaning and shameful on both your accounts to make me circle between both of you without giving any concrete answers...You get on harassing me which has finally traumatised me”. She noted that they had failed to respond formally to her MATB1. She advised that contact should be made with her husband who was authorised to discuss matters on her behalf.
27. On 24 March Jas called the Claimant’s husband. She raised the financial difficulties of the business, that there was no money to pay SMP, the business may be liquidated and she expressed concern that the Claimant might not get paid. She proposed that one option would be for the Claimant to resign and claim maternity pay from HMRC. Jas and the Claimant’s husband discussed this option. The Claimant’s husband rejected that option on the basis that she would be deprived the opportunity to accrue holiday pay. He expressed frustration she had not been made aware of the difficulty in paying her maternity pay in January 2023 when resigning might have been an option.
28. This discussion was confirmed by email from the Claimant’s husband to Jas on 25 March “Good morning. As discussed yesterday on phone [the Claimant] won’t be accepting the offer of receiving a P45 from you”. He asked her to discuss matters with the accountant and provided a link to government guidance on payment of maternity pay when the company liquidated.
29. On 29 March Jas provided the Claimant’s husband with details of how her holiday pay entitlement had been calculated which was based upon her working an average of 6 hours a day.
30. On 29 March Jas provided the Claimant’s husband a copy of an email from her accountant and noted that it was not too late. The email advised that she would be eligible for Maternity Allowance only if she has left employment. Her husband replied thanking her for the information and confirming that she won’t

be resigning, they should stop forcing the issue, and that if they are unable to pay SMP or give an SMP1 he will explore other options. He explained that because this issue has been raised post 3 March 2023 the business is liable for SMP and they will explore other options including getting the maternity payments from the government without taking a P45.

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31. The Claimant has been on maternity leave since 29 March 2023. There was only one person working there when she left and she does not know if the business continues to trade.

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32. The last payment she received from the business was on 7 April 2023 which was payment of her earnings in arrears. She received payment of SMP from HMRC and not from the business.

Relevant Law

Direct Discrimination

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33. Direct discrimination arises where a person is treated less favourably than other(s) because of a protected characteristic (Section 13 Equality Act 2010).

34. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

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35. Under Section 18(7), a woman may not claim direct sex discrimination under Section 13 where Section 18 (2), (3) or (4) applies (see below). Furthermore, and although it is competent to bring a complaint of direct pregnancy and maternity discrimination under Section 13 rather than under Section 18, there is no advantage to doing so given the need for a comparator under Section 13 which is not required under Section 18.

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36. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering

the reason why issue. “It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why” (*Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

5 *Less favourable treatment*

37. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.

10 38. Under Section 23 EA 2010 there must be no material differences between the relevant circumstances of the Claimant and their comparator. The comparison must be like with like (*Shamoon*).

15 39. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

Pregnancy and maternity discrimination

20 40. Pregnancy and maternity discrimination arises where a women is treated unfavourably:

a. during the protected period because of pregnancy or a pregnancy related illness. The protected period begins with the pregnancy and ends at the end of maternity leave or when she returns to work (if earlier) (Section 18 (2))

25 b. because she is on or seeks to take or has taken maternity leave (Sections 18(3) and (4))

41. This requires unfavourable treatment rather than less favourable treatment - there is no requirement to identify how a male comparator (say absent on grounds of ill health) would have been treated. As the ECHR Code of Practice

provides, evidence of how others have been treated may be useful to determine the reason for the treatment.

42. The pregnancy or maternity must be the reason for that treatment. It is not sufficient for it to be the context in which the treatment occurred – it must be the effective cause of the treatment. The issue to be determined is the reason why she was subjected to unfavourable treatment.

The reason why

43. For direct discrimination, and for pregnancy and maternity discrimination, it is necessary to determine the reason for the treatment.

44. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In “reason why” cases the matter is dispositive upon determination of the alleged discriminator’s state of mind. In “criterion cases” there is no need to consider the alleged discriminator’s state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).

45. Such discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering ‘but for’ the protected characteristic would the treatment have occurred (*Shamoon*).

Burden of Proof

46. Section 136(2) EA 2010 provides that “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions”.

47. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37*,
5 SC).

48. The burden of proof is considered in two stages.

Stage 1 – prima facie case

49. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).
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50. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc [2007] ICR 867*). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of "something more".
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51. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport [1999] 4 All ER 65*). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.
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52. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal" (*Efobi v Royal Mail Group [2019] EWCA Civ 19*,
25 CA).
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53. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the respondent's explanation, or the absence of any such explanation (*Laing v Manchester City Council* [2006] ICR 1519, EAT and *Efobi*). (The respondent's explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts" (*Madarassy*). "In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" (*Igen v Wong* [2005] ICR 935; *Hewage*).

Stage 2 – rebutting inference

54. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).
55. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be "in no sense whatsoever" because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).
56. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Holiday pay

57. Under Section 13(3) ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than

the total amount of the wages properly payable by him to the worker on that occasion.

Submissions

58. The Claimant made brief oral submissions which were in summary as follows-

- 5 a. She has been treated badly by Jas since January 2023 because she delayed in raising the inability to pay SMP (she should have mentioned resigning in January when it was still an option); it was rude and dismissive of her accountant to advise that the holiday pay issue should be raised with Jas; her and her accountant failed to respond to her promptly; they failed to provide the SMP1 form; they discussed her taking a P45 in order to get SMP from the government; this treatment happened when she was pregnant and therefore amounted to pregnancy discrimination.
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- 15 b. From May 2022 she was given holiday pay based upon her working 6 hours a day when she has a contractual entitlement to holiday pay based upon 8 hours a day. She is due £600 in respect of the difference.
- c. She believes that she will not be paid for the holidays she will accrue on maternity leave (following discussion at this hearing the Claimant accepts that she is not yet due to be paid for any such holidays).
- 20 d. The Respondents have failed to respond to these claims and accordingly they do not deny them.
- e. English is not her first language.

Discussion and decision

59. The Claimant made two complaints in her ET3 claim: that she received an offer to resign as a result of her pregnancy and/or because she sought to take maternity leave and that this amounted to pregnancy and/or maternity discrimination; and that her holiday pay from May 2022 to March 2023 had been based upon 6 hours a day when her contract provided for 8 hours a day.

Her claim also provided what was expressly described as background information. Her claim was drafted in clear and cogent terms.

5 60. The business had been in increasing financial difficulties since June 2022. The Claimant and Jas Gill, Director/Owner were both concerned that the Claimant would not be paid maternity pay because the business had no money. On 21 March 2023 the Claimant had of her own volition considered resigning because of these concerns and had explored this option with HMRC. During her sick absence from work the Claimant asked Jas Gill to discuss matters with her husband. On 24 March 2023 Jas Gill shared her
10 concerns with the Claimant's husband that the Claimant might not get paid maternity pay because the business had no money and may be liquidated. She proposed that one option would be for the Claimant to resign and claim maternity pay from HMRC. Her husband rejected that option because she would be deprived the opportunity to receive holiday pay. He expressed
15 frustration that she had not been made aware of these concerns in January when her resignation might have been an option. On 29 March 2023 Jas Gill emailed to advise that she had explored matters further with her accountant and it was not too late for her to resign and claim maternity allowance. Her husband declined and said they would explore other options including getting
20 maternity pay from the government without taking a P45.

25 61. Jas Gill, Director/ Owner's proposal that one option would be for her to resign and claim maternity pay from HMRC did not amount to unfavourable treatment in the circumstances. Jas Gill and the Claimant were both concerned that that the business would not have sufficient funds to pay maternity pay. Both Jas Gill and the Claimant were exploring options for the government to pay. Furthermore, Jas Gill's repetition of that proposal did not amount to unfavourable treatment in the circumstances. Jas Gill repetition of the proposal was accompanied by information from the accountant that it was not too late which was provided in response to the Claimant's husband having
30 said that the proposal should have been made in January 2023.

62. In any event the reason for the proposal was not that she was pregnant or on maternity leave but that both the Claimant and Jas Gill were concerned that

the business had no money to pay maternity pay and they were both exploring how best to obtain maternity pay from the Government.

63. The Claimant was not therefore discriminated against on grounds of her pregnancy and/or maternity.

5 64. It is of note that the following events occurred before the acts relied upon as an act of pregnancy and maternity discrimination: she had a job in a business that was experiencing increasing financial difficulties such that her hours and pay were reduced; she was at the same time undertaking a PhD; the Claimant had a difficult pregnancy; the Claimant was in dispute with the Respondent regarding her holiday pay; in early March she twice described their response to her queries regarding holiday pay and SMP as amounting to discrimination; 10 on 21 March she was in contact with HMRC because of concerns that the business would not be able to afford maternity pay and had explored the option of resigning; and on 23 March she went off sick with stress. It appeared that the cause of her understandable upset was not the phone call of 24 15 January or the email of 29 January but was the reduction in her pay and the risk that she would not get paid.

65. The Claimant was first employed to work 32 hours over 3 days a week. She was entitled to 23 days holiday which was pro-rated for part time. From May 20 2022 her hours of work reduced such that she was working an average of 18 hours over 3 days a week. Having regard to the terms of her contract her holiday pay was due to be pro-rated having regard to her reduced hours of work. She was entitled to be paid based upon 6 hours a day (and not based upon 8 hours a day as asserted by her). There was accordingly no unlawful 25 deduction from her wages in respect of holiday pay.

66. Her complaints do not succeed there is accordingly no requirement to determine the issue of the identity of her current employer. The Claimant continues in employment and it appears on the face of it that she is employed by the Third Respondent, Unique Clinics Limited, by virtue of the Transfer of Undertakings (Protect of Employment) Regulations 2006 but this issue
5 requires to be determined and the Claimant may wish to take legal advice.

Employment Judge: M Sutherland
Date of Judgment: 28 September 2023
10 **Entered in register: 02 October 2023**
and copied to parties