

# THE INDUSTRIAL TRIBUNALS

CASE REF: 857/13

**CLAIMANT:** Nicola McMahon

**RESPONDENT:** John Gribben t/a Gribben & Donaghy Chartered Architects

## DECISION

The decision of the tribunal is that the claimant was constructively dismissed by the respondent, and also that the respondent unlawfully discriminated against the claimant on grounds of her pregnancy and maternity leave from January 2012 until March 2013. The respondent is ordered to pay to the claimant the sum of £19,896.61 as set out at paragraphs 22 and 23 of this Decision, together with the sum of £866.67 in respect of interest.

### Constitution of Tribunal:

**Chairman (sitting alone):** Miss E McCaffrey

### Appearances:

**The claimant appeared in person.**

**The respondent did not lodge a response in relation to this matter and was not represented at the hearing.**

### ISSUES

1. The issue for the tribunal to decide related to whether the respondent had constructively dismissed the claimant in his treatment of her during her maternity leave and in relation to her proposed return to work in March 2013?
2. Whether the respondent had discriminated against the claimant in his treatment of her during her pregnancy and maternity leave in 2012 and 2013?
3. Whether the respondent had failed to provide the claimant with holiday pay during her maternity leave?
4. Whether the respondent failed to provide the claimant with written terms and conditions of employment and with itemised payslips as required by the relevant provisions of the Employment Rights (Northern Ireland) Order 1996?

## THE FACTS

5. The respondent had not lodged a response in relation to this matter and so is debarred from defending these proceedings. I make the following findings of fact of the basis of the claimant's unchallenged evidence.
6. The claimant started work for the respondent in June 1998. At that time, the firm was a partnership comprising John Gribben and a Mr Donaghy. Mr Donaghy subsequently left the firm and Mr Gribben continued to run the architects practice trading as Gribben and Donaghy. I therefore order that the name of the respondents shall be amended to John Gribben t/a Gribben and Donaghy Chartered Architects.
7. The claimant started work as an architectural technician and qualified in this role. She was subsequently appointed office manager. At the date when her employment ended, she had been working 22 ½ hours per week, three days per week and her take home pay was £190.00 per week. She did not receive itemised payslips to show her gross and net pay, and was not in a position to give any evidence in relation to her gross pay.
8. While working for the respondent the claimant advised that she had had three pregnancies. When her first baby was due, she said her employer was extremely positive and supportive, indeed his wife had a baby shower for her by way of a celebration. During her second pregnancy, she said the atmosphere was rather more difficult and at times Mr Gribben did not talk to her. When she became pregnant for the third time, she said that she was concerned about telling her employer and at what his response would be. Her son was born in July 2012 and she told the respondent that she was pregnant early in January 2012. She said that when she told him, he walked out of the room and did not speak to her. Later in the day a male colleague who had been out of the office came in and found her crying and said, "I take it you've told John that you're pregnant?". Thereafter the respondent sent the claimant text messages or left messages for her. She said that she found this very upsetting.
9. She said that she found the working atmosphere extremely stressful, she said that nothing she did pleased her employer. She was also upset because she worked in a largely male environment and she found herself getting very tearful because of the atmosphere. She was concerned that a couple of her younger male colleagues would think that all pregnant women were like this. Her comment was that she felt "completely worthless". The claimant also said that after she told her employer of the pregnancy that her paycheques began to bounce, even before she went on maternity leave. She has asked the claimant to pay her by standing order, but this was not set up. On a number of occasions, she consulted the Citizens Advice Bureau about the fact that her pay was not being made on time and she found this very stressful as well. She said that eventually she stuck it out until 5 June 2012. On that day, she said that nothing she did seemed to please her employer. While she had intended to work until the beginning of July, she told the respondent that she would go on maternity leave from 5 June instead and he did not dispute this. On 6 July the claimant, by this stage eight months pregnant, had to consult the Citizens Advice Bureau again about the respondent's failure to pay her maternity pay. She said that money would show on her bank statement as being lodged to the account but then the cheque would "bounce". A representative from the Citizens Advice Bureau wrote to her employer on her behalf on 6 July 2012 pointing out the difficulties that this was causing the claimant, that she had had to pay bank

charges because cheques had bounced and the fact that the claimant had on one occasion relied on the respondent's assurances that her money had been paid to her bank account when money had not in fact been lodged. The claimant also referred to an incident when she had gone shopping for groceries on the basis that money had been lodged to her account, only to find that the money had not been lodged and she did not have sufficient to pay for the groceries which she found humiliating and embarrassing.

10. Ultimately the claimant contacted a solicitor in relation to the non-payment of her maternity pay and the solicitor wrote to the respondent on her behalf on 21 September 2012. At that point, the claimant was due over £1,100.00 in back maternity pay. The respondent did later make up the claimant's arrears of maternity pay, but the claimant advised that she was constantly having to chase payments after that date.
11. The claimant was due to return to work on 20 March 2013. She indicated that she had tried to contact the respondent on a number of occasions about resuming work. He obviously assumed that her text messages and missed telephone calls were about arrears of SMP, and eventually replied to her indicating that he would pay. The claimant said she was so distressed at this behaviour that she went to see her Doctor. Given that she was tearful and clearly overwrought about the idea of returning to work, her Doctor provided her with a sick line for two weeks showing the nature of her illness as "postnatal debility".
12. The claimant left the certificate (which was dated 15 March 2013) at the respondent's office which appeared still to be functioning. She had heard from a third party that the respondent was working three to four days per week in London and that his office was closed so this was one of the matters which was causing her anxiety about returning to work. However, she was able to deliver the sick line to the office. About 6.30 or 7.00 pm on 19 March she received a telephone call from the respondent asking her to go to a site meeting at Keady the following morning. She said he said in rather a sarcastic tone that the next day was 20 March, the day she was due back. The claimant pointed out to the respondent that she had left a sick line at the office. His answer was that he was not in the office, that it was closed and he had not received the sick line. He went on to say that he had to work in London to provide for his family and pay her statutory maternity pay. The claimant found his tone and manner upsetting. She said she became tearful and the respondent then said it may be better if she worked from home. The claimant pointed out to him that she did not think that was realistic with three small children around the house and that it would not really be feasible. The respondent then ended the call, saying that he was busy, he said he was so busy that he could not see her during that incoming week and he arranged to call with her the following Sunday, 24 March. The claimant texted the respondent regarding the time they would meet and asked if he would provide her with proper working terms and conditions. The respondent texted back "Ok" but did not reply any further and did not arrive at the claimant's home the following Sunday, although she waited in all day for him.
13. The claimant wrote to the respondent on 3 April asking for clarification in relation to what was happening in relation to her job. She noted that she understood the position was difficult at the moment and that the office had been closed, which added to her concerns. She set out in the letter that she had worked for the respondent for the last 14 years and that over the previous 18 months she had been shocked that her paycheques had repeatedly bounced and that this had

caused her great stress and difficulty. She highlighted the fact that the respondent had promised on several occasions to pay money into her account and that on one occasion, taking the respondent at his word, she had actually gone to buy groceries and then had no money to pay for them. She added:-

“It is very hard for me as a person to have to beg each month for what is rightfully mine and that is why I am so worried at the prospects of returning to work as I am afraid it’s just going to go on and on in this manner ... and to be honest I can’t go through the financial stress any longer. That is why I need you to be honest regarding my employment status and whether I have a job to return to or not so that I can make decisions and move on if need be. I tried in vain to contact you prior to my return date of the 20<sup>th</sup> to sort all this out, but it never happened and even when we arranged to meet on Sunday 24<sup>th</sup> at my home you failed to turn up. All I need is clear clarification on my employment status, my working hours and my place of work and I will be grateful if you would provide me with all of the above details in writing within five working days.”

14. There was no reply to this letter and following this the claimant wrote to the respondent to give him one week’s notice of her resignation. She set out in that letter that she had never received a work contract nor had she received a P60 or a payslip.
15. There was no reply to this letter either. The claimant said she had contacted the respondent’s accountant who, perhaps understandably, refused to provide any information direct to the claimant without the respondent’s permission.
16. Following the ending of her employment with the respondent, the claimant sought Jobseeker’s Allowance but was told that she was not entitled to anything, she indicated that she has done some private cleaning work earning an average of £70.00 per week between the date of her termination of employment and the date of the hearing.

## **THE RELEVANT LAW**

17. The relevant statute law is Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 which provides as follows:-
  - (1) For the purposes of this Part, an employee is dismissed by his employer if (and, subject to paragraph 2(2)... only if -
    - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.

This is usually referred to as constructive dismissal. In a case of constructive dismissal I have to consider the following:-

- (1) What are the terms of the contract of employment?
- (2) Do the facts found by me as a tribunal constitute a breach of contract by the employer?

(3) Was that breach a fundamental breach of contract?

18. In this case, it seems to me that the claimant is alleging a breach of contract in that the respondent failed to pay her on time. It is arguable too that there had been a breach of the implied duty of trust and confidence which should exist between employer and employee regarding the treatment of the claimant during her maternity leave and that this breach which was sufficiently serious to justify the claimant's resignation.
19. The duty of implied trust and confidence was affirmed by the House of Lords in **Mahmud and Malik v Bank of Credit and Commerce International SA [1997] ICR 606** in the following terms:-

"The employer shall not without reasonable and proper cause conduct itself in the manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee."

Lord Steyn commented that:-

"The implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."

20. In **Mahmud and Malik** the House of Lords rejected three suggested limitations to the scope of the duty of trust and confidence. It will be recalled that this was in the context of a claim by two former employees of BCCI who said that they considered that they had suffered loss and damage when that bank collapsed as they had been tainted by BCCI's poor reputation and had been unable to find other work. First of all, the House of Lords held that the duty of trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee. Secondly, the court held that it was not necessary for the employee necessarily to be aware of the wrongdoing whilst still employed, however the question of when the breach is discovered is highly relevant to the question of remedy: if a breach is not discovered until after the employment ends, the employee cannot rely on it as a ground for terminating the contract and thus it will not provide a basis for an unfair dismissal claim. Thirdly, the duty of trust and confidence may be broken even if an employee's trust and confidence is not undermined. Similarly, it follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (**Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 EWCA**). In **Omilaju** the Court of Appeal noted that many constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time, and as Lord Justice Dyson stated:-

"Suppose an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment instead he soldiers on and affirms the contract. He cannot subsequently rely on these acts to enable him to do so. If the later act he seeks to rely on is entirely innocuous, it is not necessary to examine the earlier conduct in order

to determine that the later act does not permit the employee to revoke the final straw principle.”

21. It has been noted by a number of commentators that the standard of the repudiatory contract required here is such that it must - objectively speaking - if not destroy, then seriously damage, trust and confidence. Mere damage is not enough, the term is there to protect the employee's interest in not being unfairly and improperly exploited. The most recent authority on this topic to which we were referred is **Buckland v Bournemouth University [2010] 4 All ER 186**, where the Court of Appeal in England cited with approval the comments of HHJ Clarke in the EAT as follows:

*“In summary, we commend a return to settled authority , based on the following propositions. (1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished **Mahmud** test should be applied. (2) If, applying the **Western Excavating(ECC) Ltd v Sharp [1978] ICR 221** principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed. (3)It is open to the employer to show that such dismissal was for a potentially fair reason. (4) If he does so, it will then be for the employment tribunal to decide whether dismissal for that reason, both substantively and procedurally (see **J Sainsbury plc v Hitt [2003] ICR 111**) fell within the range of reasonable responses and was fair.”*

## **SEX DISCRIMINATION**

22. In relation to discrimination on grounds of pregnancy and maternity leave, the relevant legislation is found in the Sex Discrimination (Northern Ireland) Order 1976 (as amended) and in particular in Article 5A which provides as follows:-

- “(1) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if -
- (a) at a time in a protected period, and on the grounds of the woman's pregnancy, the person treats her less favourably than he would treat her had she not become pregnant; or
  - (b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably than he would treat her if she were neither exercising nor seeking to exercise, and had neither exercised nor sought to exercise, such a right.
- (2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if, on the ground that Article 104(1) of the Employment Rights (Northern Ireland) Order 1996 (Compulsory Maternity Leave) has to be complied with in respect of the woman, he treats her less favourably than he would treat her if that provision did not have to be complied with in respect of her.

- (3) For the purposes of paragraph (1):-
- (a) in relation to a woman a protected period begins each time she becomes pregnant, and the protected period associated with any particular pregnancy of hers ends in accordance with the following rules:-  
  
...
    - (ii) if she is entitled to ordinary and additional maternity leave in connection with the pregnancy, the protected period ends at the end of her period of additional maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;
  - (b) where a person's treatment of a woman is on grounds of illness suffered by the woman as a consequence of a pregnancy of hers, that treatment is to be taken on the ground of the pregnancy;..."

## DECISION

23. On the basis of the evidence heard and the documents provided by the claimant, I am satisfied that the claimant was constructively dismissed by the respondent in his failing to pay her statutory maternity pay and in his failure to contact her or to return her calls and arrange for her return to work after 20 March 2013. His behaviour during her maternity leave (about which I shall say more later) indicates a lack of support for the claimant throughout her maternity leave. The fact that she had contacted him on a number of occasions regarding her return to work, and he failed to reply, contributed further to undermining the relationship which should exist between the employer and the employee in this situation. The failure of the employer to pay the claimant's maternity pay on time, putting her in a situation where she had to chase him on occasion to receive payment is simply outrageous, and, in my view, constitutes a fundamental breach of the contract of employment between the respondent and the claimant. There is no doubt in my mind that this fundamental breach not only entitled the claimant to resign but was also an unfair dismissal. Certainly no other reason appeared from the papers before me.

The claimant's evidence was that from the time when she told her employer of her third pregnancy, his attitude to her changed. He found her work to be unsatisfactory, his attitude towards her personally changed and he did not speak to her directly, which indicates that he did not treat her with the normal courtesy and consideration one is entitled to expect in the workplace. Accordingly, I am satisfied that the claimant has been unfairly dismissed.

24. I accept the claimant's unchallenged evidence in relation to her difficulty in finding other work within the construction industry at present. She indicated that she had taken on private cleaning work which earned her somewhere between £60.00 and £80.00 per week, just enough to buy some groceries. I find as a fact therefore that her average income is £70.00 per week.
25. In relation to the unfair dismissal claim, I order the respondent to pay to the claimant the following amounts:-

£

**Basic Award**

The claimant worked for the respondent for 14 years, 4 of which she was aged under 22 and 10 of which she was aged over 22. She is therefore entitled to a basic award of 12 weeks net pay, i.e., £190.00 x 12 = £2,280.00

**Ongoing Loss**

The claimant's current income is approximately £70.00 per week and she therefore has an ongoing loss of £120.00 per week (£190.00 - £70.00 = £120.00 per week).

From the date she should have returned to work, i.e., 20 March 2013 to 22 July 2013 = 18 weeks at £120.00 per week = £2,160.00

**Future Loss**

In this case I believe it would be appropriate to award future loss at 26 weeks at £120.00 per week = £3,120.00

**Loss of Statutory Rights**

£500.00

The claimant did not have any holidays during the year leading up to her maternity leave and during it. She advised that there was no proper holiday regime within the workplace. On the basis that she was entitled to statutory entitlement of 28 days per year pro-rata, and she worked three days a week, her holiday entitlement for the year would have been 17 days. On the basis that her daily rate of pay was £62.33 net, she is entitled to a sum in compensation for holidays accrued but not taken as follows: £62.33 x 17 = £1,076.61

The claimant indicated that she had received no written terms and conditions of employment. The maximum award which can be made to her in relation to this matter is 4 weeks gross pay. As I do not have an exact figure for her gross pay I award her net pay at £190.00 per week x 4 = £760.00

On this basis the claimant's total award for her unfair dismissal claim, holiday pay and no written terms and conditions of employment is as follows:- **£9,896.61**

26. As regards the claimant's sex discrimination claim, I am satisfied that the claimant was subjected to discrimination on grounds of her pregnancy and maternity from the date when she advised the respondent that she was pregnant with her third child, throughout her pregnancy and through her maternity leave. This was



demonstrated in the way that the respondent walked out of the room when the claimant told him she was pregnant, refused to speak to her, found fault with her work, did not communicate with her, failed to pay her statutory maternity pay promptly and failed to communicate with her in relation to her return to work. On the basis of the claimant's evidence, this was an ongoing course of conduct and ran from January 2012 until March 2013, and it only started when the claimant told the respondent she was pregnant. His comment to her in March 2013 that he was working in London to support his family and pay her SMP is highly offensive, given that her SMP is statutory entitlement. Although there is no medical evidence in relation to this matter apart from the sick line which the claimant produced in relation to her return to work, I am satisfied from the claimant's demeanour and the evidence she has given that this treatment of her during her pregnancy and maternity had a profound effect on her. The claimant presented at tribunal as a pleasant, personable and highly competent young woman. She was clear in her evidence, had her paperwork well-organised and initially hesitated when asked to explain how she felt about the way she had been treated. She first said it was difficult to explain, and then became visibly emotional, which seems to me significant, almost a year after her baby's birth. She summed it up by saying that she felt "completely worthless". She was obviously deeply concerned about returning to work. Her employer had not advised her of any changes within the business and she was tense and distressed about the idea of resuming work having left in such a difficult atmosphere.

27. In my opinion, this case falls squarely within the middle range of awards under the guidelines given in the *Vento* case. I have assessed the appropriate damages to be awarded to the claimant in this matter as £10000 in respect of injury to feelings.
28. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990 and for the purposes of the Sex Discrimination claim, Regulation 3 of the Industrial Tribunals (Interest on Awards and Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996. Given that the acts of discrimination were ongoing from the date when the claimant advised the respondent of her pregnancy and continued through her maternity leave by the respondent's failure to ensure that she was being paid her statutory maternity pay promptly, I consider that it would be appropriate to award interest on the award from 1 July 2012 to date. I award the sum of £866.67 in respect of interest from 1 July 2012 to 31 July 2013.
29. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

**Chairman:**

**Date and place of hearing: 22 July 2013**

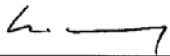
**Date decision recorded in register and issued to parties:**

**INTEREST NOTICE**  
**INDUSTRIAL TRIBUNALS**  
**INTEREST ON AWARDS IN DISCRIMINATION CASES**

In relation to awards made under the Equal Pay Act (Northern Ireland) 1970, the Sex Discrimination (Northern Ireland) Order 1976, the Disability Discrimination Act 1995, or the Race Relations (Northern Ireland) Order 1997, the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 and the Race Relations (Interest on Awards) Order (Northern Ireland) 1997 interest shall accrue from the day immediately following the day the decision containing the award is issued to the parties. However, no interest is payable on the award if the full amount of the award is paid within 14 days after the day of issue of the decision to the parties. Interest does not accrue on costs or expenses awarded by the tribunal.

In this claim, please note that -

1. the decision day is 2<sup>nd</sup> August 2013 being the day the decision was sent to the parties;
2. the calculation day is 3<sup>rd</sup> August 2013 being the day immediately following the decision day; and
3. the stipulated rate of interest is 8% being the rate of interest in force on amounts awarded by decree in the county court on the decision day.



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**Secretary of the Tribunals**