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Employee Pregnancy – Is Ignorance the Best Defence?

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They do say that maternity in the workplace can be an unsettling and confusing time, leaving you confronting new questions and situations that no one has really prepared you for, and where the guidance comes at you from a range of sources as wide as they are inconsistent. Anyway, enough about employers.

In **Really Easy Car Credit Limited –v– Thompson** out this month, we have a case which must surely have its origins in an exam question:

(i) if you take a decision to dismiss someone who, before you do, tells you she is pregnant, can you still deny that the dismissal is pregnancy-related?;

(ii) as a subsidiary question, what if the dismissal were for conduct which was probably or potentially connected to the pregnancy even if you did not know it?; and

(iii) does notice of the pregnancy require the employer to pause before dismissing and revisit its decision?

Taking these in turn:

(i) The Employment Tribunal found as a fact in **Really Easy Car** that the decision to dismiss Ms Thompson was made on 3 August 2016 and that RECCL was not notified of the pregnancy until 4 August. Despite that, it still held that the dismissal on 5 August was pregnancy-related, though largely because it went astray over (ii) and (iii) below. The Employment Appeal Tribunal took a much more direct path – you cannot make a decision which is pregnancy-related if at that moment you do not know or believe the employee to be pregnant.

(ii) The decision to dismiss Ms Thompson was taken during her probationary period because she had fixed a hospital appointment in working hours when RECCL thought it should have been done in her own time, and because she had had a blow-up with a customer and when picked up on this by her employer had shot off to the toilets in tears. Unknown to RECCL, the hospital appointment was actually pregnancy-related and the Employment Tribunal was willing to say that the employer should have guessed from her "emotional volatility" that that was the cause. The EAT saw coming the fairly hideous precedent that would be created if employers became under a duty to assume pregnancy from a hospital appointment and some tears, and side-stepped it with alacrity. "*I am not at all certain it would be reasonable to assume that an emotional outburst must be related to pregnancy*" said the (female) judge, which is almost as definite as what she should have said – "*It is not reasonable to assume …*".

But it was true, objectively, that at least the hospital appointment was maternity-related and that was part of the grounds for dismissal. Didn't that mean that, albeit unknowingly, the dismissal was indeed related to the pregnancy? The EAT moved to squash this argument – there is no parallel in pregnancy discrimination to the terms of section 15 Equality Act 2010 relating to unfavourable treatment "*because of something arising from*" a disability. You either know or believe the employee is pregnant at the time you take the decision to dismiss, or you don't.

(iii) The question then surfaces of whether, having taken the decision to terminate in ignorance of the employee's condition, you are obliged to re-run your considerations in the light of that knowledge. Here the Tribunal concluded that once RECCL knew that the hospital appointment was, and the emotional frailty could be,

pregnancy-related, that should have been seen as mitigation and therefore cast a question mark over the rightness of that decision. The EAT did not buy this – the law "*imposes no positive obligation on the [employer] to then revisit its decision after it learned of her pregnancy*". Indeed, from the employer's perspective, it is potentially better not to do so. The decision made pre-awareness cannot be tainted by the later knowledge, but a subsequent one might. Against that, remember that this was a case where the employee lacked the length of service to claim unfair dismissal. If such a claim had been possible, then the unexpected and last-minute arrival of this potential mitigation would not be a reason for the employer not being seen to take it into account. However, that will only be in circumstances where the pregnancy might genuinely be the cause of the employee's behaviour and not where it is simply a parallel but unrelated state.

Lessons for employers

The key to RECCL's escaping liability for pregnancy-related dismissal was its ability to prove that the vital decision was made on 3 August. To do so it had to beat off allegations from Ms Thompson that this was a lie and that the draft dismissal letter prepared on that date was a fake. The key as always will be the maintenance of appropriate evidence of the decision at the time, but remember the risk of recording the making of a decision which you might later wish to argue (e.g. for unfair dismissal purposes) was actually only a proposal.