EMPLOYMENT TRIBUNALS

Claimants: 1. Miss Hannah Daly
2. Miss Rebecca Green

Respondents: Quality Premier Services Limited (in compulsory liquidation)
2. HR Go PLC
3. HR Go (Liverpool) Limited
4. Pro Pay Solutions Limited

Judgment on remedy having been sent to the parties on 13 January 2017 and the claimants having requested written reasons orally at the hearing, the following reasons are provided:

REMEDY REASONS

The remedy issues

1. On 28 September 2016, the tribunal sent a written judgment to the parties declaring that the third respondent, HR Go Liverpool Limited ("the respondent") had unfairly dismissed the claimants, discriminated against them because of maternity and failed to pay their holiday pay. Reasons ("the Liability Reasons") were subsequently sent to the parties in writing.
2. On 9 January 2017, the tribunal hearing resumed for the purpose of determining the claimants' remedy.
3. The claimants confirmed that they sought compensation for unlawful discrimination under various headings. Only one head of compensation was sought specifically for unfair dismissal. That was loss of statutory protection.
4. In relation to each claimant the issues relating to remedy were as follows:
   4.1. Had the respondent not discriminated against the claimant, would the claimant have returned to work for the respondent?
   4.2. Could the respondent show that the claimant had failed to make reasonable attempts to mitigate her loss?
   4.3. If the claimant had failed to make such attempts, could the respondent show that, by making reasonable attempts, the claimant's losses would have been reduced and, if so, by how much?
   4.4. What should be the claimant's award of compensation for injury to feelings?

4.5. Should that award be increased by 10% in accordance with the rule in *Simmons v. Castle?*

4.6. What award should each claimant receive for loss of statutory protection? Should it be the respondent's suggested figure of £150 or the claimed sum of £450?

4.7. When did the claimant's leave year begin? Did it begin, as the claimants contended, at the beginning of the calendar year? Or, on the respondent's case, the anniversary of the claimants starting employment? It was common ground that, if the leave year began on the latter date, the holiday pay owing to Ms Daly was £436.15 and to Miss Green was £535.90.

Evidence

5. We read a witness statement from each of the claimants. Each confirmed the truth of their evidence and answered questions. We accepted the claimants' descriptions of how their dismissal, and the manner of it, affected them. The respondent called Mr Richards, whose evidence appeared to us to be reliable.

6. We also read documents in an agreed remedy bundle.

Facts

7. There is no need for us to repeat the facts that we have already recorded in the Liability Reasons.

8. In the case of both claimant's we found that they had been affected most acutely during the month or two following 9 November 2015. They were upset and angry at having been cut loose by the respondent.

9. Miss Green initially felt "numb" and confused, having "no Idea…what I was supposed to do." Her enjoyment of Christmas was spoiled by worry and by having to ask family members for money.

10. Ms Daly had been in the process of moving out of her parents' home to set up home with her daughter. She had been trying to find money for a deposit to rent a home. After being dismissed, and having her maternity pay stopped, she could not afford a deposit and found it difficult to find rented accommodation which required the occupant to be employed. As a result, she continued to share a room with her baby. This put strain on Ms Daly's relationship with her mother and caused further upset. Like Miss Green, Ms Daly had to borrow money from her family. Her social life was limited by her inability to meet friends for days out and holidays. This cause of stress, we find, must have substantially dissipated in February 2016 when the claimant was notified of her entitlement to statutory maternity pay from HM Revenue & Customs and paid arrears of pay up to that date. She felt that her hard work in training to work at Contact Co had been a waste.

11. The discrimination detracted from the claimants' enjoyment of what should have been their maternity leave. It was still only a few months after each of them had had their babies. A mother's time with her baby is particularly precious during the early months. One of the purposes of maternity leave is to allow a mother to enjoy that time without worrying if she has a job to return to at the end of it. The respondent's discrimination deprived the claimants of that feeling of security.

12. We were particularly struck by the evidence of Ms Daly. During what should have been her maternity leave, she would put her baby daughter to bed in the evenings and then start looking for jobs on the internet. We ought to avoid sweeping generalisations, but our experience is that most parents of children that age have precious little time for themselves. The evenings, after the baby's bedtime, are one of those few opportunities. They were taken from Ms Daly by the discrimination. It is a loss for which she deserves to be compensated.

13. The claimants' sense of indignation would, we are satisfied, have lessened very substantially once they had received the tribunal's judgment at the end of September 2016.

14. In 2016 both claimants set about trying to find other work. They searched for jobs in the Wirral and Liverpool areas. It is clear that they both made a substantial number of applications, evidenced by some 68 pages of e-mails, letters and online conversations. It is not entirely clear when those applications were made. Doing the best we can, it appears that, until approximately December 2016, the applications was relatively infrequent, somewhere between weekly and monthly. From then on, the frequency increased to more than one application per week.

15. Neither claimant sought to return to work for the respondent or at the call centre. They did not trust the respondent after what had occurred.

16. The claimants limited their job search to opportunities for direct employment. Neither claimant sought to be recruited by a temporary work agency, despite the fact that their employment with the respondent had been as agency workers. Essentially they had two reasons for narrowing their job search in this way:

    16.1. They were very upset at the way they had been treated by the respondent. They thought that if they applied for work with another temporary agency that they might be treated the same way. We find that they are unlikely to have continued to hold this belief once they received the tribunal's judgment at the end of September 2016. From then on, they knew that they would be protected by the tribunal if an agency tried to take them off the books during their maternity leave, or stop paying their maternity pay.

    16.2. Most temporary work would have been difficult to fit alongside their childcare requirements. The claimants both would have depended on finding nursery accommodation for their children in order to return to work. It would not have been worth their while to sign up with an agency and receive offers of assignment, day to day or even week to week. In order to place their children into a nursery they would have to make a commitment of at least a month and possibly longer. Realistically it would only have been worth their while finding work with a temporary agency if they could find an assignment of similar length, and with similarly regular hours, to the one they had been working on before they had been dismissed. At the very least they would need to find an agency that would offer a month-by-month assignment.

17. We believe that monthly assignments are likely to exist. We have accepted the evidence of Mr Richards that there are a number of call centres, for example, in the North Wirral area, and not just Contact Co. We accept his evidence that the respondent offers placements for periods of over a month at a time. We infer from his evidence that other temporary agencies are likely to offer assignments

on similar terms. What we do not know, however, is how long it would take for such an offer to come around. Mr Richards was not able to say what proportion of the respondent's assignments are offered on that basis. Doing the best we can, we believe it would take a matter of several weeks or possibly months from first seeking agency work before the claimants could secure a placement of that nature.

18. In our view, had the respondent not discriminated against the claimants,

    18.1. Miss Green would have returned to work at about the beginning of August 2016. She would have worked 5 days per week.

    18.2. Ms Daly would have returned on 4 days per week at about the beginning of June 2016.

19. It was agreed that both claimants would have obtained benefits to pay for 85% of nursery fees, up to a maximum of £646.35 per month.

20. During the course of the remedy hearing, the tribunal sought to agree a number of calculations with the parties' representatives. It was agreed that, had Ms Daly returned to work on a 4-day week, she would have earned £910.00 net per month and had to pay 393.65 as the balance of her subsidised nursery fees, receiving a surplus of 556.35 per month. Ms Green, on a 5-day week, would have earned a surplus over childcare fees of £516.35 per month. Both claimants would have preferred to work rather than remain on state benefits.

21. We now step back in time to record some further facts relevant to the claimants' outstanding holiday pay.

22. There was no written agreement specifically stating what the holiday year should be.

23. Neither claimant was specifically told when the start of the holiday year would be.

24. Both claimants signed an acknowledgement on starting their employment in the following terms:

> "I have read a copy of the HR Go Recruitment Temporary Workers' Handbook via hard copy of web link. I understand that it is my responsibility to read this document thoroughly and I adhere to the policies contained within."

25. The Handbook to which this acknowledgement referred was the HR Go plc Handbook (see paragraph 17 of the Liability Reasons).

26. The Handbook did not specify a leave year beginning on any particular date. It did, however, contain a paragraph on the subject of annual leave entitlement:

> "Under the Working Time Regulations 1998 you are entitled to 28 days' annual leave (including bank holidays) if you work full-time in an assignment over the year…If you begin your assignment part-way through the year the amount of leave you are entitled to will be pro rata according to the proportion of the leave year that you have worked".

27. On 25 February 2015, Ms Daly's sister wrote to Mr Forshaw of QPS in connection with a grievance covering numerous aspects of Ms Daly's employment. Her letter included the following point:

> "I am aware that payments have been made to employees to ensure that no holiday accrual funds are outstanding prior to the end of March. I am concerned that employees are not provided with any guarantee within their contract that any deductions made from employees' wages for this purpose will be returned if they do not use all of their holiday allowance by this date."

28. On 28 March 2015 Ms Daly's sister continued the correspondence with Mr Forshaw. The letter began, "I can confirm receipt of your letter dated 27 March 2015. I note from your correspondence that [Ms Daly] will receive her outstanding holiday allowance of £131.46."

29. It is argued on the claimants' behalf that this letter indicated a shared understanding between Ms Daly and the respondent that the holiday year must have expired shortly before the writing of that letter, and that the most likely date on which had expired was the end of December 2014. We do not see how this inference can or should be drawn. If any inference as to the intentions of the parties is to be drawn from the correspondence, it is from the 25 February 2015 letter. It appears from that letter that Ms Daly believed that the cut-off date for taking annual leave was the end of March.

Relevant law

Compensation in discrimination cases

30. The starting point is section 124 of the Equality Act 2010:

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> …….
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court … under section 119.

31. It is well established that compensation is not limited to financial losses but can include an award for injury to feelings. In *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 the Court of Appeal gave guidance as follows in paragraphs 65-68:

> 65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
>
> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that

band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

32. Subsequently in *Da'Bell v NSPCC* [2010] IRLR in September 2009 the EAT said that in line with inflation the Vento bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to *Da'Bell*. In *Bullimore v Pothecary Witham Weld Solicitors and another* [2011] IRLR 18 the EAT chaired by Underhill P said in paragraph 31

"As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Uprating" such as occurred in *Da'Bell* is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision

> referring to such a case which has not itself expressly included an uprating was wrong."

33. On 26 July 2012 the Court of Appeal delivered a judgment - *Simmons v Castle* [2012] EWCA Civ 1039 - intended to give effect to the reforms proposed by Sir Rupert Jackson in his Final Report on Civil Litigation Costs published in December 2009. The judgment was marginally revised later in the year on application by interested parties in *Simmons v Castle* [2012] EWCA Civ 1288, so that the relevant paragraph reads as follows:

> "Accordingly, we take this opportunity to declare that, with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress, or (vi) loss of society of relatives, will be 10% higher than previously….. "

34. There is conflicting authority at EAT level as to whether it is appropriate for employment tribunals to take into account this judgment. *Beckford v London Borough of Southwark* [2016] ICR D1 supports the inclusion of a *Simmons v Castle* uplift and disapproves of an earlier decision to the cotnrary. Subsequent decisions of HHJ Richardson in *Olayemi v Athena Medical Centre* [2016] ICR 1074*,* and Kerr J in *AA Solicitors Ltd v Majid* UKEAT/0217/15 *(23 June 2016, unreported)*, have both followed the reasoning in *Beckford.* The prevailing view appears to be that a *Simmons v. Castle* adjustment should be made.

35. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort (*Hurley v Mustoe (No 2)* [1983] ICR 422*,* EAT). it is on the basis that as best as money can do it, the claimant must be put into the position he would have been in but for the unlawful conduct of his employer (*Ministry of Defence v Cannock* [1994] IRLR 509*,* per Morison J at 517, [1994] ICR 918*, EAT*). Where there is a chance that the claimant would have suffered the same loss in any event, compensation should be reduced to reflect that chance: *Chagger v Abbey National and Hopkins* [2009] EWCA Civ 1202, [2010] IRLR 47*.*

36. Mr Bidnell-Edwards for the claimant placed before us reports of two previously-decided cases in which employment tribunals had made awards for injury to feelings at first instance. We were only able to place limited weight on these cases. They were highly fact-specific and the facts were different to the present case.

37. A court will withhold or reduce damages for a tortious act if the tortfeasor shows:

    37.1. that the injured party failed to take reasonable steps to mitigate his or her loss; and

    37.2. that, had the injured party taken such steps, his or her loss would have been diminished or avoided.

<u>Compensation for loss of statutory protection</u>

38. Section 123 of the Employment Rights Act 1996 ("ERA") empowers tribunals to make a compensatory award where a dismissal has been found to be unfair. By section 123(1), the award should be "such amount as the tribunal considers just

and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

39. One well-recognised head of compensation is for loss of statutory protection. An unfairly-dismissed employee is forced to find another job, in which they have to work for various minimum periods of time before accruing the equivalent statutory rights that they had acquired in their old job.

40. The following extract from *Harvey on Industrial Relations and Employment Law* is sufficient for our purposes:

> … in *SH Muffett Ltd v Head [1986] IRLR 488*, *[1987] ICR 1*, the EAT held that whilst the notional figure for loss of statutory rights should be extended to £100, it should be only in exceptional cases that half the statutory notice entitlement should be paid as suggested in the *Daley* case. As the EAT pointed out, the significance of such a payment depends upon the double contingency that the dismissed employee will get a new job and that he will be dismissed from that job before building up the same period of notice applicable to the first job. Consequently whilst the *Daley* case has not been overruled, it has certainly been greatly restricted by the *Muffett* decision. It is common for tribunals now to award £250 for loss of statutory rights. In *Corbett v Superdrug Stores Plc [2006] All ER (D) 299 (Oct)* it was held that the tribunal had erred in law in awarding £1,420 for loss of statutory rights.

Leave year

41. According to regulation 2 of the Working Time Regulations 1998,

> 'relevant agreement', in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer;

42. By regulation 13(3),

> A worker's leave year, for the purposes of this regulation, begins—
>
> (*a*) on such date during the calendar year as may be provided for in a relevant agreement; or
>
> (*b*) where there are no provisions of a relevant agreement which apply—
>
> …
>
> (ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

43. Express incorporation of an employer's handbook does not mean that every provision of an employer's handbook will become a term of the contract of employment. The term must be "apt" for incorporation. Provisions of an employer's handbook may be suitable for incorporation even if they are imprecise and do not specify how an entitlement should be quantified: *Keeley v Fosroc Ltd* [2006] EWCA Civ 1277, [2006] IRLR 961.

44. The term of a contract may be void because it is not sufficiently certain. A conclusion that a term is void for uncertainty should be a last resort, once the tribunal has made all reasonable attempts to ascertain the meaning of the term: *Lighthouse Express Ltd v Shaw* [2010] EWCA Civ 161 at [21].

Conclusions

Would the claimants have returned to work?

45. In our view, had HR Go Liverpool not discriminated against the claimants, they would have returned to their assignment with Contact Co.

46. There was an opportunity for them to return to work. There was no suggestion that Contact Co would not have had them back or that the work had disappeared.

47. That was not, of course, the end of the matter. Not every new mother chooses, or is able to choose, to return to the workplace. Some find the cost of childcare prohibitive. Nevertheless, we are satisfied that in this case both claimants would have preferred to return to work. They could meet the cost of childcare and still have a modest amount on which to live. This is based in part on the calculations we have set out above.

Mitigation of loss

48. We examine each of the potential failures to mitigate in turn.

49. *Infrequent applications for direct employment prior to December 2016.* We would normally expect a job seeker to be applying for jobs considerably more frequently than monthly. Nevertheless, we do not think that the respondent has proved an unreasonable failure here. The claimants were having to combine job searches with childcare during what was supposed to be their maternity leave. We take account of our general knowledge of the relatively depressed job market in North Wirral and the claimants' reasonable wish only to apply for jobs that would be compatible with their childcare requirements. Even if we are wrong on this score, the respondent did not provide any evidence of any opportunities for direct employment of the kind that the claimants could do. They cannot therefore show that reasonable efforts to secure direct employment would have made any difference.

50. *Failure to seek temporary work through agencies.* The claimants ruled out agency work. To that extent, they were looking for jobs that would put them into a more secure position than they had enjoyed with the respondent. To put it another way, they were looking to be better off in terms of job security than they would have been had the respondent not discriminated against them. Until October 2016, that was, in our view, a reasonable stance for them to take. They could be forgiven for thinking that other agencies would treat them in the same way as the respondent had done. From October 2016 onwards, however, they ought to have been assured, in the light of the tribunal's judgment, that maternity-based discrimination by agencies is not the norm. Suitable placements would not be easy to find, but we accept the respondent's evidence that they exist.

51. We now imagine that in October 2016 the claimants had started looking for month-by-month agency placements. The respondent has proved to us that they would, eventually, have found suitable work. Had the claimants made reasonable efforts to mitigate their losses it would have taken them until the end

of March 2017 to find employment to put them in an equivalent position to that which they would have been in had they not been discriminated against.

Calculation of loss of earnings

52. In the light of the tribunal's determination of the issues relating to loss of earnings, the parties agreed that Ms Daly's loss of earnings had been £5,424.42 and Miss Green's loss of earnings had been £4,130.80.

Injury to feelings and 10% uplift

53. Both claimants suffered an isolated, but serious, act of discrimination. We think that an award within the lower *Vento* band would not adequately compensate them. This is because the hurt feelings lasted for several months, the claimants were at a vulnerable time in their working lives, uncertain about the future of their careers having just had their first child and with all the stress and difficulty that can go with that.

54. Doing the best we can we have awarded the sum of £8,500 to Miss Green and £9,000 to Miss Daly. The reason for the difference is because we think that the financial worry that Miss Daly must have suffered during Christmas 2015 would have exacerbated the sense of hurt feelings than was suffered by Miss Green.

55. We consider that the prevailing trend of authority at Employment Appeal Tribunal level is in favour of awarding the 10% uplift. The award is therefore £9,350 for Miss Green and £9,900 for Miss Daly.

Loss of statutory protection

56. In our view, the sum of £250 is just compensation for the claimants' loss of statutory protection. We would normally regard an appropriate award for someone who had lost two years' worth of statutory rights as being something in the region of £475 (the amount of a capped week's pay under section 227 of the Employment Rights Act 1996). By the time of their dismissal, the claimants had not yet acquired protection against "ordinary" unfair dismissal, but they had built up the right to minimum notice of termination and statutory maternity pay. Something in the order of half the usual amount is appropriate.

Leave year

57. We find that in the case of each claimant the relevant leave year began on the anniversary of the start date of employment of each claimant.

58. It is contended by the claimants that there was a relevant agreement in place, providing for the leave year to begin on 1 January. This agreement is recorded, they say, in the HR Go plc Handbook. Although the claimants recognise that no actual date is mentioned in the Handbook, they contend that the word "year" in the phrase, "part-way through the year" must be a reference to the calendar year.

59. We agree with the claimants that parts of the Handbook are apt for incorporation. It contains language of entitlement and obligation.

60. We agree that the Handbook suggests that the leave year began at some point other than the start of the claimants' employment. Otherwise, the phrase, "if you begin your employment part-way through the year" would make no sense. The question is, can the tribunal know what the intentions of the parties were as to when the leave year should start? In our view it is impossible to know. The Handbook admits a number of possibilities. A "year" could mean a leave year

defined in a separate document, which neither party can find. It could mean the financial year. Or it could simply have been inserted without proper thought. We have not been able to find any evidence that made it more likely that the parties meant a calendar year than any other definition of a year.

61. The claimants say that the subsequent conduct of the parties can be taken into account in deciding which of those it is. It should be inferred, they say, from the grievance letter referring to a decision in February that "untaken leave could be paid for" tending to suggest, because of its timing, that the leave year began in January. We disagree. The phrase in regulation 2 of WTR "any other agreement in writing" suggests a written agreement which falls to be interpreted according to the rules relating to the interpretation of written contracts.

62. The subsequent conduct of the parties would not normally be relevant to interpreting what the words in the written document meant. Even if we were to strain to ascertain the meaning of the Handbook by reference to the parties' conduct, we do not find that the correspondence in February to March 2015 helps the claimants' case. If anything, it points towards a different leave year altogether. This may be because the parties were referring to the sham contract of employment between Ms Daly and CPS.

63. In our view, the reference to a "year" in the Handbook is not apt for incorporation as a term defining the calendar dates of the leave year. It is too uncertain. For the same reason, it is not "legally enforceable" within the meaning of regulation 2. There is therefore no relevant agreement. The default position is that the leave year began on the anniversary of the start date of employment.

Interest

64. The parties agreed the interest calculation which was incorporated into the judgment.

Employment Judge Horne

15 June 2017

REASONS SENT TO THE PARTIES ON

28 June 2017

FOR THE SECRETARY OF THE TRIBUNALS