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EMPLOYMENT TRIBUNALS

Claimant: Miss S Misiri

Respondents: (1) New Generation Nursery Ltd
(2) Miss Chichi Ikenga

Heard at: East London Hearing Centre

On: 23 August 2017

Before: Employment Judge M Martin

Members: Mr R Rowe
Ms J Houzer

Representation

Claimant: No attendance
Respondents: No attendance

JUDGMENT ON RECONSIDERATION BY TELEPHONE CONFERENCE CALL

The Reserved Judgment dated 13 June 2017, sent to the parties on 20 June 2017 be varied in accordance with the Amended Reserved Judgment attached thereto.

REASONS

1 The Claimant made an application to vary the judgment made on 13 June by way a letter dated 3 July 2017.

2 In accordance with Rule 70 – 72 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Employment Judge determined that there should be a review of the Judgment.

3 The parties agreed that it was not necessary for there to be a reconsideration hearing, but agreed that the reconsideration could be considered on the papers. Both parties sent in written submissions which were considered by the Tribunal, when it convened a reconsideration hearing for the panel by way of a telephone conference on 23 August 2017.

4 The Tribunal decided that Statutory Maternity Pay (SMP) is a statutory entitlement to which the Claimant was entitled. She would have received this irrespective of the termination of her employment. The Tribunal therefore considered that it should not be subject to any *Polkey* deduction or deduction in relation to any contribution on the part of the Claimant to her dismissal. In that regard the Tribunal noted the case of *Whelan & another trading as Cheers Off Licence v Richardson* [1988] IRLR 114 and in particular paragraph 34 thereof which stated that

“Compensation is to be assessed in such a way as to compensate the employee, not penalise the employer... neither party should gain a windfall. Compensation must be that which is just and equitable”.

5 The Tribunal determined that was it just and equitable to provide the Claimant with her SMP without any deductions.

6 However, the Tribunal also decided that a similar view should be taken in relation to any uplift to the compensatory award for failure to follow the ACAS Code of Conduct in relation to the loss which was attributable to the Claimant's SMP. Accordingly in the same way that no deduction should be made for *Polkey* or contribution on the part of the Claimant to her loss relating to SMP, no increase should be made either to that part of the award for failure to follow the ACAS Code of Conduct.

7 In relation to the prescribed element under the Employment Protection (Recoupment of Benefits) Regulation 1996, the Tribunal noted the provisions under Schedule column 7 and concluded that it had discretion in relation to the prescribed period, which the Tribunal determined should be 19 May 2016 to 11 May 2017.

8 As to the prescribed element itself the Tribunal considered Regulation 4(2) of the 1996 Regulations which provides that “where an employment tribunal in arriving at a monetary award makes a reduction on account of the employee's contributory fault or on account of any limit imposed by or under [the Trade Union and Labour Relations] 1992 Act or the [Employment Rights] 1996 Act, a proportionate reduction shall be made in arriving at the amount of the prescribed element.” On that basis, the Tribunal considered that any uplift to the compensatory award for failure to follow the ACAS Code of Conduct should be part of the prescribed element – it comes into effect under the 1992 Act. Furthermore, we also considered that the uplift to the award for failure to follow the ACAS Code of Conduct was part of the overall calculation made under Section 123(6) of the Employment Rights Act 1996.

9 Accordingly this Tribunal determines that the uplift to the compensatory award for failure to follow the ACAS Code of Conduct should remain part of the prescribed element.

10 For those reasons, the Tribunal varied the compensation due to the Claimant in relation to her complaint of unfair dismissal as set out at Schedule 1 of the Amended Reserved Judgment attached hereto.

Employment Judge Martin

Dated: 25 August 2017

Schedule 1

Claimant: Miss S Misiri

Respondents: (1) New Generation Nursery Ltd
(2) Miss Chichi Ikenga

Basic Award	2 x £230.40	£460.80
Loss of wages from 21 May – 30 June 2016 6 weeks @£197.66	£1,185.96	
Future loss 4 weeks from 1 June 2017 – 1 July 2017	£ 790.64	
Sub total		£1,976.60
Less Polkey reduction at 40%	£ 790.64	
Sub total		£1,185.96
Add 25% uplift for failure to follow Acas Code of Practice	£ 296.49	
Sub total		£1,482.45
Less contribution @50%	£ 741.23	
Sub total		£ 741.23
Add loss of statutory rights	£ 250.00	
Sub total		£ 991.23
Add loss of statutory maternity pay	£5,673.48	
Total compensation		£6,664.71
Total compensatory award Basic and compensation	£7,125.51	

The Employment Protection Recoupment of Benefits (Regulations) 1996 apply to this award. The prescribed period is 19 May 2016 – 11 May 2017. The prescribed amount is £5,994.97.