Case Number: 2301156/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS A DONALDSON**
DR RP FERNANDO

BETWEEN:

Ms L Naraine

Claimant

AND

Smart Medical Clinics Ltd

Respondent

ON: **31 August 2017**
Appearances:
For the Claimant: **Mr N Bidnell-Edwards, counsel**
For the Respondent: **Mr M Palmer, counsel**

JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is that the respondent shall pay to the claimant the sum of **£29,821.36.**

REASONS

1. This judgment was delivered orally on 31 August 2017. The respondent requested written reasons.

2. By a judgment sent to the parties on 22 April 2016 the claims for ordinary unfair dismissal, automatically unfair dismissal and pregnancy/maternity discrimination, succeeded.

The issue

3. The issue for this hearing was the amount of compensation payable to the claimant.

Witnesses and documents

4. We heard from the claimant and for the respondent we heard from Mr Mike Parker.

5. We had our original documents from the liability hearing and a remedies bundle of about 600 pages.

6. We had a skeleton argument from the claimant and oral submissions from both parties.

Findings related to remedy

7. The claimant's period of service, based on our findings on liability, was from 9 December 2013 to 24 March 2016, a period of two complete years. She was for all practical and non-regulatory purposes the practice manager at the Wandsworth GP practice.

8. The claimant's maternity leave commenced in the week commencing Monday, 1 June 2015 and but for her dismissal could have run until the start of June 2016. The claimant gave birth on 22 June 2015.

Preliminary and agreed matters

9. It is agreed that the basic award for unfair dismissal is **£948**.

10. Loss of statutory rights is agreed at **£350**.

11. The claimant confirmed that a sum claimed in the schedule of loss as "losses flowing from discrimination" based on failure to allow the claimant time off for ante-natal care during her employment, was not pursued.

12. It is also agreed that the claimant's gross and net pay with the respondent was £480.77 and net weekly pay of £383.79.

13. The appropriate rate of interest is agreed at 8%. The period over which interest is due was in dispute.

14. The claimant was not a member of a company pension scheme. Had she remained in employment she would have been auto-enrolled in September 2017. The claimant has found new employment in August 2017 and therefore does not claim pension loss.

15. We informed the parties that the issue of how the claimant funded her accommodation and any tax credits she might receive were not matters for our consideration under the relevant legislation.

16. The claimant found a new job in a company that works in the area of fire safety. She commenced this job on 22 August 2017 on a gross annual salary of £20,500. Her contract of employment was shown to the respondent in the hearing. It was not in the bundle.

Financial Losses

17. The respondent's case is that the claimant suffered no financial loss because she did not intend to return to work for the respondent. We do not accept this submission. The respondent based this on conversations that they said the claimant had with others in April 2015, fourteen months before the end of her maternity leave. As we found at liability stage, a person's circumstances can change dramatically in 14 months and the claimant was entitled to change her mind.

18. The respondent also submits that the claimant failed to take proper steps to mitigate her loss. We had a large bundle of documents showing job advertisements and some applications. The bundle showed a single job application in September 2016 and thereafter seven in January 2017, six each in April and May 2017, 29 in June 2017 and 21 in July 2017. The claimant found work in August 2017.

19. The claimant said that she had applied for many more jobs and in oral evidence gave numbers of job applications, for example she said she applied for 10 in July 2016, 9 in August 2016 and 17 for September. The claimant's oral evidence was that she had made a consistent job search from June 2016.

20. Other than the jobs referred to at paragraph 18 above, there was no disclosure of documents showing any other applications save for 2 pages (529 and 530) showing a print-out from the claimant's phone disclosing 11 job applications in February 2017. There was only 1 documentary record of a job application in 2016 (ie September 2016).

21. The claimant said that she did not know why these documents were not in the bundle. She said she had disclosed them to her solicitors. The claimant's counsel said that the tribunal and the respondent could inspect the claimant's phone. We considered this most unsatisfactory that we and the respondent should be asked search through the claimant's phone to find these applications. This is unacceptable when the claimant has had legal representation throughout and we made an order for disclosures of documents related to remedy to take place on or before 3 August 2017 (liability judgement paragraph 114).

22. We considered the claimant's oral evidence that she had applied for other jobs set against the failure to disclose the relevant documentary evidence. The burden is on the respondent to show failure to mitigate loss. The respondent said that it discharged this by pointing to the failure to disclose and the fact that, on their case, once the claimant actively sought work, she secured interviews and ultimately a job.

23. The claimant's oral evidence was that the first interview she attended was in May 2017 at an NHS GP clinic in Victoria. She then had an interview in June 2017 with the Priory to be based in Wimbledon. She had another

interview in June 2017 in Harley Street and an interview in July 2017 with a Physio company but this proved unsuitable as it required her to work across 8 clinics. The claimant had an interview at Wandsworth Council in July 2017. The claimant attended an interview in August 2017 and secured the job which she started on 22 August 2017.

24. Despite the production of a supplemental witness statement for the claimant, referring to the February 2017 job applications at pages 529-530, there was no disclosure of any other earlier applications. This was therefore despite having another opportunity to review the evidence and the bundle. The issue of mitigation has been live in the claimant's mind since at least January 2017 when it was raised in a telephone hearing with Regional Judge Hildebrand.

25. Initially the claimant set her sights on a job with a comparable salary providing at least £25,000 gross per annum. She thought she could obtain a job as a practice manager at around £28,000 but was prepared to settle for £25,000. She ultimately settled for a job that paid less, but with prospects for her to advance once she has six months service. The job she has obtained is convenient in terms of location and hours and ties in with her childcare responsibilities. Although her heart is set on the medical field, she has taken a job outside her chosen field.

26. We find that after a period of six months of job searching, therefore by the end of 2016, this was the point at which the claimant should have reduced her aspirations and found work outside the medical field and at a slightly lower salary. In February 2017 (based on pages 529-530) the claimant was continuing to apply for Practice Manager and jobs in the medical sector.

27. We therefore limit the claimant's loss of earnings to a period of six months. She is a highly presentable intelligent woman who has a lot of experience. We find that once she reduced her aspirations the job interviews came thick and fast followed by the offer of a job.

<u>Injury to feelings</u>

28. It was submitted by the claimant's counsel that we should make an award for injury to feelings for a period going back to May 2015 when, it was submitted that Mr Parker first started indicating an intention to dismiss the claimant.

29. We do not accept this submission. The act of unfavourable treatment is the dismissal. At the outset of the liability hearing, the claimant sought to expand the issues (liability judgment paragraph 18) to include matters such as a conversation with Mr Parker in May 2015. We refused leave to amend. We make our award for injury to feelings based on our finding that the act of unlawful discrimination was the dismissal which took place on 24 March 2016. Interest therefore runs from the date of dismissal 24 March 2016.

30. As to the level of the award, the claimant submitted that it should be in the middle Vento band between £12,000 to £14,500 plus the 10% increase following ***Simmons v Castle***. The respondent submitted that the award should be in the lower half of the lower band. This would therefore be £3,000 or below, subject to the 10% uplift. It was submitted that the injury to feelings for dismissal was transient and not enduring.

31. The claimant's evidence was that her dismissal brought her stress and anxiety, she felt shell-shocked not knowing where to turn. It affected the joy she should have experienced with the birth of her son. The claimant was not pregnant when she was dismissed but had a young baby to look after. We do not accept that she was more vulnerable because she was pregnant because she had given birth nine months prior to her dismissal.

32. She was upset and emotional at the prospect of a lack of earning an income to provide for her new baby and her daughter.

33. The purported conduct dismissal placed the claimant under a cloud and she had no opportunity to answer this. The dismissal email of 24 March 2016 referred to the claimant's behaviour as "totally inappropriate and unacceptable" and that it would have resulted in instant dismissal. This would be upsetting for anyone.

34. We find that the award falls within the middle band and just below the middle of that band at £10,000. With the 10% uplift this is £11,000.

35. We have considered whether the claimant should be awarded an uplift for any unreasonable failure to follow the ACAS Code. The respondent accepts the finding that there was a failure to follow any procedure but says they did not do so because the claimant was pregnant. We found that it would have been open to them, if they wished to pursue a conduct disciplinary, to await the claimant's return and follow the procedure at that point. We cannot accept that pregnant employees should be exempt from a fair procedure because of their pregnancy, this would be discrimination of itself.

36. We find that there was an unreasonable failure to follow the ACAS Code and we award an uplift of 25%. There was no attempt to follow any sort of procedure.

37. The respondent submits that the amount of the award should be reduced because of the claimant's failure to appeal. No right of appeal was given. We find that it was not unreasonable for the claimant to fail to appeal in the particular circumstances of this dismissal and where no right of appeal was presented to her.

The relevant law

38. Under section 123 Employment Rights Act 1996,

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall 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.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…...

39. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunal's must remind themselves of the value in everyday life of the award by reference purchasing power or earnings.

40. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*****.** The lower band is £500-£6000, the middle band is £6000-£18,000 and the upper band is £18,000-£30,000. There has been a recent consultation exercise on the ***Vento*** bands but they remain at the date of this hearing as stated here.

41. The Court of Appeal recently confirmed in the case of ***De Souza v Vinci Construction UK Ltd 2017 EWCA Civ 879,*** having reviewed the EAT authorities, that the proper level of general damages should be increased by 10% following ***Simmons v Castle 2012 EWCA Civ 1288.***

42. We are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For financial loss interest commences at a

mid-point.

43. The claimant relied on the case of ***Keohane v Commissioner of Police for the Metropolis 2004 EqLR 386 EAT*** where the award for injury to feelings was £9,000 and ***Stone v Ramsay Health Care UK Operations Ltd 2010 EqLR 93*** where the award was £18,000. The claimant accepted that this case was not as serious as ***Stone*** as this involved a sustained campaign of discrimination.

44. The respondent orally referred to ***Ministry of Defence v Cannock 1994 IRLR 509*** but did not provide a copy of this authority.

45. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows in relation to the uplift in respect of the ACAS Code on Disciplinary and Grievance Procedures 2015.

> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
>
> *(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
>
> *(c) that failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

The award

46. After delivering our decision orally we sought the assistance of counsel with the calculation of the award and collectively (tribunal and counsel) we worked through the following figures.

47. The award for financial loss is 26 weeks at £383.79 = **£9,978.54.**

48. The award for injury to feelings including ***Simmons v Castle*** uplift is **£11,000.**

49. There is no award for future loss of earnings.

50. It is agreed that the basic award for unfair dismissal is **£948**.

51. Loss of statutory rights is agreed at **£350**.

52. We considered with the parties whether the award for financial loss should fall under unfair dismissal or discrimination. We were not aware of and not

taken to any guidance or authorities on this, other than there should not be double recovery. The claimant accepted that we had a discretion on this. The respondent said that for reasons of double recovery, the financial loss should be for unfair dismissal because the interest at the judgment rate of 8% would result in an excessive recovery beyond the actual loss suffered by the claimant by not being in the funds for the six months.

53. This was, on our finding, a clear discriminatory dismissal for pregnancy/maternity related reasons and although the effect of this is that the judgment interest rate applies and is generous, this is the effect of the law and we award the financial loss as an award for discrimination.

54. The respondent accepted that the ACAS Code uplift is part of the "award" under section 207A(2) above and therefore interest should be applied to the uplifted figure.

55. The financial loss is £9,978.54 uplifted by 25% = £12,473.17 and interest at 8% for 263 days at a daily rate of £2.73 is £718. This makes a total of **£13,191.17**.

56. The award for injury to feelings is £11,000 uplifted by 25% to £13,750 with interest for 525 days at a daily rate of £3.01 makes an interest total of £1,582.19. The makes a total of **£15,332.19.**

57. We add the sums of £948 and £350 above.

58. The total award to the claimant **£29,821.36.**

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Employment Judge Elliott
Date: 31 August 2017