EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Emma Redshaw (formerly Jarvis)	**v**	**Davies & Davies Estate Agents Limited**

Heard at: Watford **On**: 2 and 18 August 2017 (in chambers)

Before: Employment Judge Bedeau
Mrs I Sood
Mrs G Bhatt MBE

Appearances

For the Claimant: Mr G Baker, Counsel
For the Respondent: Ms H Compton, Counsel

RESERVED JUDGMENT ON REMEDY

1. The respondent is ordered to pay the claimant the sum of £23,073.07 in respect of her pecuniary losses.

2. The respondent is ordered to pay the claimant the sum of £22,176 in respect of her non-pecuniary losses.

3. For the avoidance of any doubts the respondent is ordered to pay the claimant the total sum of £45,249.07 as set out in the Schedule at the end of this judgment.

REASONS

1. In our liability judgment promulgated to the parties on 13 June 2017, we concluded that the claimant's claim of: automatic unfair dismissal under s.99 Employment Rights Act; discrimination on grounds of pregnancy, s.18; and victimisation under s.27 Equality Act 2010, were well-founded. The case was listed for a remedy hearing on 2 August 2017.

2. After hearing the evidence and oral submissions, we reserved our judgment and met on 18 August 2017, in chambers, in the absence of the parties.

The evidence

3. We heard evidence from the claimant. On behalf of the respondent evidence was given by Mr Alexander Reach, lettings manager.

4. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 90 pages. (pages 190-280).

Findings of fact

5. The claimant's son, Ollie, was born on 3 September 2016. She told us and we do find that she would have taken maternity leave from 30 August 2016 to 29 August 2017. Had she remained in employment she would have been entitled to statutory maternity pay from 9 May 2016.

6. In relation to her qualifications and employment history, she has eight GCSE's. From September 2008 to March 2009, she was employed as a payroll assistant; from March 2009 to May 2010, as a supplier queries clerk; May 2010 to November 2013, personal assistant to a director; November 2013 to March 2015, personal assistant to the chief executive and senior management team; and from March 2015 to June 2015, as management assistant on a temporary contract. She was born on 4 August 1992 and at the date her employment was terminated she was 23 years of age.

7. In England and Wales, the lettings qualifications are broken down into four Levels, 1 to 4. Level 2 is an introductory qualification. The claimant sat two units at Level 2: Unit 1 was general law and health, safety and security in relation to residential letting and property management; Unit 2 was customer service within the property sector. They are multiple choice examinations and 70% must be achieved to pass. The claimant passed Unit 2 but failed Unit 1. She wrote in her WhatsApp message on 28 January 2016, that she had failed "by miles on health and safety". She sat them again in or around March 2016 and passed.

8. Although Mr Alexander Reach is the respondent's lettings manager, we do accept his evidence on the examination structure and the respondent's promotion process. He told us that in order to be promoted to a senior sales negotiator, the person would have to have passed either the Level 3 or Level 4 examinations and the whole process would take between one and two years.

9. The claimant took the tribunal to an email sent by Mr Richard Stewart, the then sales manager and her direct line manager. He wrote to the directors on 9 February 2016, expressing his opinion on the claimant. He stated;

> "… I carried out Emma's three month/probationary review today and discussed her development over this time.

> I explained the expectations that the Firm now has for Emma and I am convinced that she will be a senior negotiator this year.
>
> In the meantime, I have promoted Emma from junior negotiator to negotiator." (70)

10. The following day the respondent paid for the health and safety unit re-sits as well as for two other units.

11. Mr Stewart left the respondent in February 2016 and was not called to give evidence in relation to his opinion of the claimant's capability and prospects but having regard to the fact that the claimant had failed one unit, as her line manager, the directors needed to be convinced of her capabilities in order to incur the financial outlay in relation to her re-sits and further examinations. It was, in our view, a statement of hope on the part of Mr Stewart that she would be a senior negotiator by the end of 2016 and it was sent to persuade the directors to finance her examinations. There was, however, no clear evidence that she was on such a pathway.

12. A sales negotiator is entitled to commission one month after completion of a sale. Completion of the sale is when the buyer picks up the keys from the agency. The respondent would receive 1% of the sale price and the sales negotiator would be paid 12% commission of the respondent's 1% (56).

13. The claimant successfully passed her probationary period in February 2016 and was employed on a salary of £17,255.00 gross per year but on a guaranteed payment of £25,000.00 for the first three months, thereafter on a salary of £17,255.00 per year plus 12% commission on any fees the respondent earned as a result of her sales.

14. The evidence presented by the parties in relation to her entitlement to commission was in conflict. She said that she was entitled to commission in respect of five sales. The respondent's position is that she was only entitled to commission in respect of one sale in the sum of £182.02. We were not provided with documentary evidence in respect of the sales negotiated by the claimant and when they were completed. We have decided to take a pragmatic view. The claimant, for the first three months of her employment, was entitled to £25,000.00 gross per annum without commission. Thereafter on £17,255.00 plus commission. It is clear she had negotiated sales of properties and is entitled to expect commission equivalent, at least, to her monthly gross salary. In January 2016 she was paid £2,102.08 which equates to £25,225.00 per year. We will give her the difference between that figure on a monthly basis, £2,102.08 and her monthly gross salary on £17,255.00, which is £1437.91. This comes to £664.17.

15. The claimant's gross weekly pay taking into account of her commission, we find was £485.10, netted down came to £389.28.

16. There is no dispute that she mitigated her losses by searching for full-time employment following her dismissal. She would have been entitled to go on maternity leave from 30 August 2016.

17. As regards holiday, she would have accrued her holiday entitlement during her one year maternity leave and would be entitled to 5.6 weeks net pay.

18. Bearing in mind her employment history and what she said in her first witness statement that she would most likely have secured employment within six months following the end of maternity leave, we have accepted her statement.

19. We have not been provided with an employment report highlighting specific problems she is likely to experience which would effectively prevent her from securing comparable employment for the next three and a half years as she is claiming. She is a bright, intelligent, confident and capable young woman who in the past experienced little difficulty in securing for herself employment. She said to the tribunal that she would have returned to the respondent on a part-time basis and we do take that into account in the assessment of compensation.

20. In evidence, she said that she suffers from depression and that her treatment by the respondent had exacerbated the condition which also affected her pregnancy as her son was delivered two weeks prematurely. We were not taken to any medical evidence in support of this aspect of the case nor is there a pleaded personal injury claim against the respondent. We, therefore, do not accept that we could hear and determine this aspect of remedy.

21. As regards her injury to feelings, she felt very sick, violated and devastated following Ms Davies' unlawful invasion of her privacy when she accessed her emails and had taken screenshots. She viewed Ms Davies' conduct as malicious and was clearly intended to hurt her. She called her partner crying hysterically and was very angry. When she read Mr Davies' witness statement to prepared for the tribunal, she was devastated as Ms Davies showed no remorse for her actions and the impact her actions caused her.

22. In her discussion with Mr Reach she wanted answers as she was extremely shocked and traumatised. She felt lonely and isolated following her meeting with him and believed that the management team were pushing her out of the company by suspending her. She suffered from a lack of sleep, particularly when, at the time, she was three to four months pregnant. Her further humiliation was when she became aware that her work colleagues were told about her suspension.

23. During the meeting with Mr Davies on 18 April 2016, she felt as if no-one was taking her grievance seriously. Ms Davies remained quiet in the knowledge that she was responsible for the invasion of her privacy. The claimant could not understand why she tried to keep it a secret for so long and felt after the meeting that her issues and concerns were ignored. Mr Davies had used the meeting to attack her and make up allegations which

were untrue. It left her feeling further confused, isolated and emotional and reaffirmed her belief that she was being pushed out of the company by any means necessary.

24. She was shocked and devastated when she received the letter terminating her employment on 20 April 2016 and crying, called her partner as she could not believe the respondent had dismissed her for no apparent reason. She said that she enjoyed her job as a sales negotiator but did not want the stress brought on by her dismissal to have a negative impact on her pregnancy.

25. Ms Compton, counsel for the respondent, referred to a number of WhatsApp messages which showed the claimant's apparent negative frame of mind and attitude towards the respondent but we have to take them in context as they were her responses to the treatment she suffered while at work. We do, however, acknowledge that earlier on in her employment she did challenge certain aspects of the respondent's operations and had engaged in spreading rumours. We found it difficult to agree with Ms Compton's submissions that the claimant would have left the respondent within six months following on from her maternity leave. The other members in the WhatsApp group also expressed negative views about the respondent and its managers but remain in employment.

26. The respondent has conceded and acknowledged that to have accessed the claimant's emails was a gross invasion of privacy and was highly inappropriate. Ms Davies also acknowledged this in her evidence.

27. We find that the claimant would have returned to work on or around 29 August 2017, on a part-time basis and would have taken her time to get back into the routine of sales negotiation work. Any promotion would have required her to take further examinations at higher levels and it is questionable whether she would have been successful at her first attempt. She conducted her own internet research prior to the remedy hearing and claimed that it was highly probable that she would have been promoted and would have been offered a senior sales negotiator position on a salary of £42,500. This, in our view, is an assumption on her part with very little evidence to support that such an outcome. In our view, it was too speculative.

28. In the claimant's third revised schedule of loss she claims compensation in the region of £157,350.36. The injury to feelings element varied upward each time but we rejected a number of her claims in our findings of fact and judgment.

Submissions

29. The tribunal heard submissions from Mr Baker, counsel on behalf of the claimant and from Ms Compton, counsel on behalf of the respondent, who both provided written submissions and spoke to those as well as referring to authorities. We do not propose to repeat their submissions herein having

regard to rule 62(5), schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

30. An Employment Tribunal may order a respondent to pay compensation to a claimant under section 124(2)(b) Equality Act 2010.

31. In relation to injury to feelings, section 119(4) Equality Act 2010, states, "An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis.)"

32. We have taken into account the general principles in the award for injury to feelings as set out in the race discrimination case of Prison Service and Others v Johnson [1997] ICR 275, a judgment of the EAT. We have also taken into account the three bands of injury to feelings award in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, a judgment of the Court of Appeal updated to take into account the effect of inflation since 2003 in the case of Da'Bell v NSPCC [2020] IRLR 19. The EAT held in that case that should be £600-£6,000; the middle band, £6,000-£18,000; and the top band, £18,000-£30,000, applying a 20% increase to each of the Vento bands.

33. Following the cases of Simons v Castle [2013] I All ER 334 and Beckford v London Borough of Southwark [2016] IRLR 178, the 10% uplift applies to injury to feelings awards.

34. We have also considered the cases of the Commissioner of Police v Shaw [2012] ICR 464, a judgment of the Employment Appeal Tribunal, Mr justice Underhill, President and Holmes v Qinetiq Ltd [2016] IRLR 664, EAT.

Conclusions

35. In relation to our above findings, we do not accept the claimant's contention that she would have been promoted and be on a higher salary of £42,500 including commission. We do not award compensation for depression and for the premature delivery of her son.

36. Any dismissal as a result of discrimination is serious and the claimant was clearly upset by what occurred.

37. Ms Compton submitted that with regard to the guidelines in Vento updated by Da'Bell, injury to feelings should be within the middle band, namely between £6,600 and £19,800.

38. Mr Baker submitted that the claimant should be awarded £15,000 taking into account her dismissal.

39. He also submitted that the claimant is entitled to aggravated damages having regard to the guidance given in the case of Commissioner of Police of the Metropolis v Shaw, arguing that the manner of the claimant's

treatment, the motive, and the respondent's subsequent conduct entitles her to such an award. This contention was objected to by Ms Compton on the basis there is no evidence that the claimant was treated in the manner submitted by Mr Baker.

40. We accept that in relation to the manner in which the wrong was committed, the meeting with Mr Davies turned into a disciplinary meeting without the claimant being forewarned and that he asked her about her pregnancy. Ms Davies' access to the claimant's email account was a gross invasion of her privacy. There was no acknowledgment by her to the claimant of any wrongdoing until after tribunal proceedings commenced and witness statements were exchanged. In relation to the motive behind the discriminatory treatment, the respondent's conduct during the meeting with Mr Davies and the claimant's dismissal, was deliberate intended to disparage the claimant and ignore her genuinely held grievance.

41. In relation to the arguments put forward as to the respondent's conduct at the hearing, this caused the tribunal to spend some time deliberating. In our view Ms Compton was entitled to cross-examine the claimant on matters in the bundle of documents relevant to the issues in the case. During her questioning of the claimant she did not spend too much time putting questions about her miscarriage, her mother's coma and her cancer. It was also perfectly proper to put matters to the claimant pertaining to her performance. She had behaved in certain ways which were challenged by the respondent's managers although we accept that she had not been formally warned about her performance.

42. As regards the remaining points submitted by Mr Baker, we do agree with his submissions. The disciplinary hearing conducted by Mr Davies was misleading as the claimant believed it was to discuss her grievance. Mr Davies had prepared evidence he had gathered about the claimant's conduct beforehand which he then put to the claimant during the hearing while she was pregnant. and asked her about her pregnancy. There was no acknowledgement by him of the genuineness of the claimant's concerns about the unauthorised access to her emails. Ms Davies kept quiet. Her involvement was not disclosed until exchange of witness statements. She admitted orally in evidence that what she did was wrong.

43. On balance, we have come to the conclusion that the claimant is entitled to rely on the above matters as aggravating features.

44. We have taken into account our findings in relation to evidence given by the claimant as regards her injured feelings. Although she had been working for the respondent for five and a half months, the treatment covered the majority of the time she was employed. She still feels hurt and upset at what occurred. As we have already found, in relation to invasion of privacy and the meeting with Mr Davies, she felt humiliated and isolated. Her feelings were still raw as she was able to articulate them before us when she gave evidence. We have come to the conclusion having regard to the increased Vento guidelines that she is entitled to an award in respect of her

injured feelings in the sum of £15,000. This takes into account the aggravating features we have referred to. We do not make a separate award of aggravated damages. Had we done so, we would have given the claimant £12,000 for her injured feelings with £3,000 for aggravated damages. The £15,000 will be uplifted by 10% having regard to the judgment in the case of Simons v Castle.

45. The claimant has not been consistent in relation to injury to feelings as in three schedules of loss she served the figures increased without any apparent reason for so doing.

46. The respondent's argument is that the claimant had not pleaded aggravated damages as part of her case. The claimant, in the tribunal's view, is entitled to claim aggravated damages following receipt of the tribunal's judgment. In any event, having regard to the judgment in the case of Shaw the claimant is entitled to argue that the injury to feelings award should ordinarily be increased to take into account the aggravating features urged upon us by Mr Baker.

47. The injury to feelings award with the 10% uplift is £16,500.

48. The claimant invited the tribunal to award an uplift under the ACAS Code for failure on the part of the respondent to follow the Code at the hearing on 18 April 2016. The respondent's argument is that the Code does not apply as it was not a disciplinary hearing. The claimant had not been in employment for more than twelve months to avail herself of unfair dismissal protection.

49. We accept Mr Baker's submissions that the tribunal could rely on the judgment of Mrs Justice Simler in the case of Holmes v Qinetiq Ltd in which Her Ladyship held that the term "disciplinary" should be accorded its natural meaning, in that disciplinary action involved some sort of culpable conduct alleged against an employee. The ACAS Code is limited to internal procedures relating to a disciplinary situation and is likely to be concerned with the correctional punishment of culpable conduct or performance or some other form of culpable behaviour.

50. In this case the claimant's capability and conduct were called into question by Mr Davies. She alleged unauthorised absence was also a conduct issue. The ACAS Code, therefore, was engaged. There had been failure to comply with the Code. The claimant was not notified of the allegations Mr Davies was going to raise and was not given the opportunity to be accompanied. She was not given, in advance, the opportunity to consider the evidence Mr Davies was going to rely on during their meeting. Further, he terminated her employment for unauthorised absence without conducting a disciplinary hearing. As there had been no compliance, we will award an uplift of 20%.

51. The claimant was paid one week's notice up to 27 April 2016. (154-155)

_____
Employment Judge Bedeau

Date: …1 November 2017…….

Sent to the parties on: .....

.....
For the Tribunal Office

SCHEDULE OF LOSS

Pecuniary Loss

Past Loss

Gross weekly pay £485.10 Net pay £389.28 x 18 weeks	£ 7,007.04
SMP for 6 weeks 1/9/16 – 11/10/16 90% of £389.28 = £350.35	
£350.35 x 6 weeks	£ 2,102.10
SMP	
£139.58 x 33 weeks 12/10/16 – 31/05/17	£ 4,606.14
	£13,715.28

Future loss

30/08/16 – 1/03/17	
26 weeks x 485.10 at ½ pay - £242.55 less tax & NI = £225.84	
£225.84 x 26 weeks	£ 5,871.84

Holiday pay

Claimant would have been entitled to holiday pay. Would take holiday pay when not entitled to SMP after 39 weeks	
5.6 weeks x £389.28 net	£ 2,179.96
ACAS uplift	£ 8,051.80

Total	£21,767.08	

Interest

8% from the mid-point – 9 months
21,767.08 = (£ 1,741.37)

£1,741.37 ÷ 12 = £145.11 per month

£145.11 x 9 months	£ 1, 305.99	
Total compensation pecuniary losses		**£23,073.07**

Non-pecuniary

Injury to feelings

ITF £15,000 to include aggravated feelings	£15,000.00	
10% uplift	£ 1,500.00	
	£16,500.00	

Interest

8% x £16,500 =

£1,320
£ 660 £1,980,00

Interest £1,980 over 18 months	£18,480.00	
ACAS uplift @ 20%	£3,696.00	
Total compensation non-pecuniary losses		**£22,176.00**
Grand total awarded		**£45,249.07**