Case Number: 3401940/2015

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Ginger	**v**	**Department for Work and Pensions**

Heard at: Cambridge **On:** 27 November 2017

Before: Employment Judge Ord

Members: Dr S Gamwell and Mr M Reuby

Appearances

For the Claimant: Ms C Rayner, Counsel.
For the Respondent: Miss G Parke, Counsel.

REMEDY JUDGMENT

The unanimous decision of the employment tribunal is that the claimant is awarded the following sums:-

1. £17,500 for injury to feelings.

2. Interest at 8% per annum for 885 days amounting to £3,394.52.

3. £2,919.20 being financial losses caused a result of the discriminatory acts of the respondent.

4. Interest thereon from 18 May 2015 (897 days) at 8% per annum amounting to £573.92.

The total award, for which the claimant has judgment, is therefore £24,391.64.

REMEDY REASONS

1. This matter came before the tribunal today for consideration of the remedy to which the claimant is entitled following the judgment herein dated 12 April 2017 and sent to the parties on 19 April 2017.

2. The unanimous decision of the tribunal was that the claimant's complaints that she was the subject of unlawful discrimination on the grounds of sex on 9 April and 15 May 2015 were upheld. Her remaining claims were dismissed.

3. The context of those discriminatory acts were set out at length in the original judgment but it is worth repeating the salient points here.

4. On 9 April 2015 the claimant confirmed to her manager, Mr Mills, that she would need time off at short notice to undergo IVF treatment. Mr Mills questioned the claimant's ability to cope with what would be her second child, and questioned whether it was a 'good idea' for the claimant to have further IVF treatment.

5. On 14 May 2015 the claimant was advised by her treating consultant, based in Athens, that donor eggs were being collected and her attendance would be required on 18 and 19 May 2015 to undergo her course of IVF treatment. On 15 May 2015 the claimant requested leave for those two dates which was refused on the basis that without her attendance in the office the respondent (the decision being taken by Mr Mills) could not provide a full and effective service and the request, made under the short notice leave policy, was made at 'too short notice'.

6. It was also said that a number of staff were training on those days but none of the reasons Mr Mills gave for the refusal of leave could be justified on the evidence. The result was that the claimant was unable to attend for IVF treatment on the days the donor eggs were available.

7. In relation to the claimant's claim for injury to feelings we have reflected upon the following matters:-

    7.1 First the comment made by Mr Mills on 9 April 2015 was interpreted by the claimant as being a criticism of her parenting skills. The claimant is a single parent and was raising one child who had been conceived through earlier IVF treatment and had until late 2014/early 2015 been caring for her terminally ill mother. She received Mr Mills comment, questioning the wisdom of her seeking to look after another child as extremely hurtful. The respondent put it to the claimant in cross examination today and she accepted that prior to this (an indeed subsequently both before and after the claimant was under Mr Mills line management) the respondent had been supportive of the claimant in relation to her IVF treatment, pregnancy and maternity. We can well see that the change of

approach evidenced by Mr Mills would therefore come as a substantial surprise and shock to the claimant. His comment was received as a thinly veiled criticism of her parenting skills and we accept that the claimant reasonably interpreted the words in that way.

7.2 As set out in the original judgment (in particular, see paragraph 64) Mr Mills was at best ambivalent towards and at worst critical, of the claimant's desire to try for another child. We also found that his subsequent decision not allow the claimant to take leave which she sought for the specific purpose of having IVF treatment was further evidence of that attitude.

7.3 The claimant has described how she had gone through a process of grieving for her late mother (and also over her loss through an incomplete pregnancy when she suffered miscarriage in September 2014). In January 2015 she was seen by occupational health who confirmed that she was suffering a stress reaction due to recent traumatic events and that she as she adjusted to a change in circumstance and with the ongoing help of the support group she was involved with and counselling which she was receiving her condition would continue to improve.

7.4 The claimant confirmed that there was indeed an improvement and she had a phased return to work over a period of six weeks whereafter she returned on full duties which she carried out thereafter.

7.5 In those circumstances the claimant has described the prospect of a fresh cycle of IVF treatment with fresh embryos as being a light at the end of her tunnel. In those circumstances the questioning of her ability to cope with a second child, and the refusal on no good ground whatsoever of her short notice leave which Mr Mills knew as specifically to enable her to undergo IVF treatment (which treatment he at least questioned if not proactively disapproved of in the claimant's case) was a substantial blow. On behalf of the respondent it has been accepted that the conduct was serious and the apology for it to the claimant on the respondent's behalf by counsel this morning was something which the claimant doubtless welcomed, albeit late in the day.

7.6 The claimant subsequently underwent treatment with frozen ova (it had been necessary for them to be frozen when the claimant could not attend for IVF treatment in May 2015) in June and July 2015; underwent a hysteroscopy to prepare for a fresh IVF cycle in December 2015 and finally underwent a fresh IVF cycle on 14 July 2016 with non frozen ova which was successful. As a result the claimant gave birth to her second child on 23 March 2017.

7.7 The claimant referred to a period of approximately two years following the initial comments of Mr Mills before she 'felt like herself again'. The turning point as she described it was in late 2016 when her eldest child had started reception class at school and his teacher made, unprompted, complimentary remarks to the claimant regarding her parenting of her child. That would have been between 18 and 20 months after Mr Mills comments of 9 April 2015.

7.8 To have had her ability to parent her children questioned in the way it was, and for Mr Mills to have made wholly inappropriate comment regarding perfectly natural desire which the claimant had to have a second child as well as to question her ability cope with it caused the claimant substantial injury to feelings as she has described it. That was compounded by the subsequent refusal to allow the claimant leave to attend for IVF treatment and thus the loss of what the claimant described as the light at the end of her tunnel meaning the prospect of successful treatment with fresh ova in May 2015.

8. We have taken into account the guidelines set out in Vento v Chief Constable of West Yorkshire Police [2003] ICRB 318, the subsequent amendment to the bands of compensation as set out in Da'Bell v NSPCC [2010] IRLR 19 and the general uplift in awards for discrimination following the decision in Simmons v Castle [2012] EWCA Civ 1288.

9. We have also had assistance from the examples of awards made as reported in Harvey on Industrial Relations Law provided by counsel for the claimant.

10. We reflect upon the fact that the found acts of discrimination took place on two separate occasions, but were clearly connected and were products of what we found was Mr Mills attitude towards the claimant's desire to have a second child and undergo further IVF treatment. We have reflected on the impact which those acts of discrimination clearly had upon the claimant as she has described them, and we accept her description. The claimant was already in a vulnerable albeit coping position following her grieving for the loss of her mother and having suffered a miscarriage.

11. In our unanimous view it is appropriate to compensate the claimant for that injury to feelings at a figure towards the upper end of the middle band of damages as described in Vento (with appropriate adjustments). The appropriate figure as an award for injury to feelings is, we find, £17,500 to reflect the serious nature of the discriminatory conduct, its' substantial effect on the claimant and the period of time over which the claimant suffered her injury to feelings. She was treated for depression and had anti-depressive medication prescribed to her. We can understand and accept that the endorsement of her parenting skills in late 2015 would have come as a substantial fillip to her.

12. The claimant is entitled to interest on that sum. The period calculated by the claimant and not challenged by the respondent of 885 days at the rate of 8% which amounts to a further sum of £3,394.52.

13. The claimant also brings a claim for financial losses and seeks recovery of the following costs:-

    13.1 First the costs incurred due to the refusal of the request for leave on 18 and 19 May 2015 which directly related to her inability to attend for IVF treatment on those days are £2919.20. Those are set out in the schedule of loss and are limited to the money lost as a result of flights she could no longer take, and the payment which she was required to make for the freezing of embryos as she could not attend for IVF treatment before the need for them to be frozen arose. We found that those losses flow directly from the acts of discrimination and the total sum in respect of those two heads of loss amount to £2,919.20. Interest thereon from 18 May 2015 to date (897 days) amounts to £573.92.

    13.2 The claimant has also sought to recover the costs which she incurred preparing for and attending treatment in June and July 2015, a subsequent hysteroscopy on 8 December 2015 to prepare for a fresh IVF cycle, the cost of abandoned cycles in February and April 2016 and the cost of a fresh IVF cycle in July 2016.

14. In order to establish those further losses as being appropriate for compensation in these proceedings the claimant has to show that those losses are a consequence of the respondent's discriminatory conduct. In fact that would only be the case if the claimant had been able to show that in the event that she had been able to attend for IVF treatment in May 2015 she would have had (or had a stated prospect of having) a successful full term pregnancy which would have meant that none of the subsequent costs would have been incurred or at least might have been avoided.

15. We have been invited to consider compensation on the basis of a 'lost chance' that that would have been the case and therefore make some discount to the claims at large to reflect the prospect of treatment being successful. We have unanimously concluded that we have insufficient information to enable us to do that and if we had approached the matter in that way we would have also had to consider the proportionality of the likely success of the treatment in May 2015 had it proceeded and the likely prospects of success in each subsequent treatment.

16. We are not satisfied on the evidence before us that we can attribute any of those losses to the discriminatory conduct which we have found, beyond the initial losses in May 2015. The claimant may well have required further treatment even if she had attended in May. The chance of IVF treatment in May being successful has not been set out to us in any meaningful way other than relying upon the claimant's own personal experience, namely that her first child was conceived after a second round of IVF treatment with fresh

embryos, that when she eventually undertook a second round of treatment with fresh embryos she successfully carried to full term her second child and that treatment with frozen embryos had on all but one occasion been unsuccessful (the pregnancy which sadly led to her miscarriage).

17. However we have had no evidence put before us to explain why (if indeed it is the case) these frozen embryos are less likely to result in a successful course of treatment. The prospect of successful treatment, even expressed as a crude percentage, had treatment taken place in May 2015 given the circumstances of the claimant, have not been set out by way of any expert or other evidence. It is for the claimant to prove her loss and in the circumstances we do not find that she has done so beyond the financial losses which she suffered in May 2015. The costs to which she was then put of freezing the embryos which would otherwise have been used 'fresh' in May is included in those recoverable but for the reasons we have set out above we limit the losses to those sums.

18. Accordingly the claimant should have judgment for financial losses of £2,919.20 and the sum of £17,500 for injury to feelings plus interest as set out.

19. The claimant has paid fees in connection with this claim. In the case of R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court held that it was unlawful for Her Majesty's Courts and Tribunals Service to charge fees of this nature. The tribunal service has undertaken to repay such fees and the claimant and her advisors are directed towards the online re-imbursement process which is now in place for the recovery of such fees.

20. The tribunal records its thanks to counsel for both sides for the sensitive and understanding way in which they have conducted themselves in dealing with this case.

_____
Employment Judge Ord

Date: 29 November 2017

Sent to the parties on: ……..….

.....
For the Tribunal Office