RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Nicola Stower**

Respondent: **C & L Facilities Limited**

Heard at: **East London Hearing Centre**

On: **25 January 2018**

Before: **Employment Judge C Hyde**

Members: **Ms V Nikolaidou**
Mrs GA Everett

Representation

Claimant: Ms C Whitehouse, Counsel

Respondent: Ms S Phillips, Consultant

REMEDY & COSTS JUDGMENT

The unanimous judgment of the Tribunal is that

1. **the Claimant is entitled to the total sum of £30563.24 as compensation for the unfair dismissal, calculated as follows:**

    a. **basic award of £1916 (4 full years x 1 week's gross pay subject to the statutory maximum - £479).**

    b. **Loss of earnings – the difference between what the Claimant would have earned (£43114.50) and what she earned/received (£7003.02) = £36111.46**

        i. **33 weeks to 17 July 2018 x £434.02 net = £14322.66 net**

ii. **Maternity Leave Period (18/7/2016 – 8/11/2016) = £3879.09, i.e. 6 weeks at 90% of average weekly net income + 11 weeks at £139.58.**

iii. **9/11/16 – 13/7/17 = £15190.70 (35 weeks at £432.02)**

iv. **14/7/17 – 25/1/2018 = £9722.05.**

LESS

First Data earnings Mar – June 2016: £2042.04

Stockbrook Manor Golf Club: £628.16

Income from current job: £1959.98

Statutory Maternity Pay received: £2372.86

c. **Loss of statutory employment rights = £500**

d. **The ACAS uplift of 25% awarded on (b) + (c) above = £9152.87 (25% x £36611.46)**

Total compensatory award (b) + (c) + (d) = £45764.33 calculated above is subject to the cap imposed by section 124(1)(1ZA) of £434.02 x 52 weeks = £28647.24

TOTAL MONETARY AWARD = £30563.24 (basic + compensatory award).

The Recoupment Regulations apply to this award as set out in attached Notice.

In calculating the prescribed element, the Tribunal applied the proportion by which the figure of £45764.33 was reduced by the application of the statutory cap (37.4%), to the figure which would otherwise have represented the prescribed element i.e. £36611.46.

2. The Respondent's application for costs against the Claimant was dismissed.

3. The Respondent was ordered to pay to the Claimant the sum of £1920 (£1600 plus VAT) in respect of costs incurred.

Employment Judge Hyde

19 February 2018

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

REASONS

1 Following the Tribunal's judgment in this case the Claimant had been unfairly dismissed and that there were no deductions due to be made in respect of the *Polkey* principles or by reason of contributory fault by the Claimant. The Tribunal convened to determine remedy. There were various schedules of loss and counter scheduled that we considered in various consideration. We had the benefit of a bundle of documents which ran to some 150 pages and in addition to that half way through the morning the Claimant's counsel produced a schedule of loss which the Tribunal marked C2 and then she also provided written closing submissions which were marked C3. In addition to that the Tribunal had the benefit of a witness statement which was signed 25 January 2018 from the Claimant which were marked C1. The schedules and counter schedules and evidence about mitigation of loss were in the bundle. We also had from the Respondent the disclosure of the part of the employment handbook which made it clear that during maternity leave employees were entitled to statutory benefits only.

2 The first issue was agreed was the question of the basic award. The parties agreed that in the sum of £1,916 and that reflects a multiplier of 4 full years by 1 week's gross pay which is subject to statutory cap is a figure of £479.

3 We next turn to consider the compensatory award and the central dispute here was about whether the Claimant had failed to mitigate her losses. This was a matter

which was addressed in some detailed in the written submissions of counsel for the Claimant and we accepted the statement of the relevant law as set out in those written submissions. We then considered the evidence which we had heard about this. The evidence was that the Claimant had either been claiming job seekers allowance or statutory maternity pay for most of the time that we were concerned with an in order to claim that successfully she needed to establish to the satisfaction of the benefits agency that she was making reasonable efforts to find alternative work. We had the documents about some of that period of time which confirmed her efforts during a period in 2016. After the judgment was sent out a Telephone Preliminary Hearing took place in November 2017 and Orders were made for the preparation for this remedy hearing and this included for the provision of disclosure about remedy or loss from the Claimant there were no further requests for orders from the parties. We therefore had to decide the issue of failure to mitigate on the balance of probabilities based on the law which I have referred to already and on the evidence both oral and documentary which was available to us. The Claimant gave evidence as I have said and relied on her witness statement.

4 We accepted the Claimant's evidence as to her efforts to find other work and that she was unable to secure work beyond the post which she described in her schedule of loss in her oral evidence and these were three part-time or adhoc positions including one which she is currently working on.

5 Our findings on liability about the Claimant's approach to work were consistent with her evidence that she valued her career and would have wanted to return to work by three months after the delivery of the baby. This was reinforce by the fact which we also found that her mother was available for most of the period or something at the time of return or planned return to work to have provided full-time childcare. The Claimant also had the benefit of some back up from her in laws for up to two days a week. The

Respondent produced details of alternative jobs which they submitted the Claimant could have taken. The Claimant accepted in her evidence readily that these were the sorts of jobs generally speaking that she had applied for but the evidence from the Respondent did not however constitute proof that the Claimant had acted unreasonably and thereby failed to mitigate her loss. We simply had not adequate evidence of that.

6 The Claimant's mother was diagnosed as having breast cancer in July 2017. In her oral evidence the Claimant frankly accepted that had she continued working for the Respondent that this event was likely to have had an effect on her working although it was difficult to be precise what that would have been she would of course had wanted to support her mother as well during this time. The evidence we heard was that nursery fees was £70 per day. The Claimant's mother-in-law and father-in-law had to be present on occasions when the Claimant's daughter was being baby sat, the Claimant's father-in-law work three days a week therefore he only had two days a week on which he could baby sit. We consider that it was likely in those circumstances given that the Claimant would have had to reach firm arrangements that she would have only asked for a commitment from them for one day a week and we have assumed that when her in-laws looked after her daughter that they would also not have charged to anything as was the case in relation to her mother and that she would then have placed her daughter in nursery for three days a week which would have incurred a costs of £210. That would have allowed the Claimant to work four days a week from July 2017. In the light of those findings we reached the following calculations.

7 The Tribunal called a short break in the middle of giving judgment and the Claimant produced the document which had been shown to the Respondent which was a payslip in relation to her work with First Data there was a slight difference between the figure on that document of her gross pay and the figure which had been booked in the

schedule of loss that the Tribunal considered that it was in the same ?? and on the grounds of proportionality we did not adjust our figures that we used for the calculations. So I think I am saying that we thought it was likely that the Claimant would come up with an arrangement whereby she did not work for one day but worked for four on the basis of her in-laws looking after her daughter for one day and the daughter being at nursery for three days. We therefore against those findings made the following calculations.

8 We approached this in terms of analysing what the Claimant would have earned if she had stayed in the employment of the Respondent through to today's date. The first time frame was the 33 week period from the end of the notice period the termination date through to the start of maternity leave which we have taken as 17 July on the basis that again that is fairly likely date for an expectant mother to commence her maternity leave and the baby was born on 3 August 2016. 33 weeks x net pay of £434.02 gives the sum of £14,322.66. The next timeframe covered the period of maternity leave which the Claimant we found would have taken if she carried working for the Respondent we thought that this was likely that she would have worked taken just over three months off after the birth of her baby and return to work on 8 November 2016. The period of absence then from the 18 July 2016 to 8 November 2016 is 17 weeks. For the first 6 weeks the Claimant would have been entitled to 90% of her net income which we calculated was £390.62 x 6 = £2,343.71 for the remaining 11 weeks that we found she would have taken off she was entitled to £139.58 per week or 90% of her previous salary whichever was the lower and that gives a sum of £139.8 x 11 = £1,535.38.

9 The next timeframe was the timeframe from 9 November 2017 to 13 July 2017 and we have taken that timeframe to reflect our findings above about the Claimant's mother ill health which is of course unrelated to the employer. That is a period of 35 weeks at full-time pay of £434.02 which gives £15,190.70.

10 Finally the timeframe when we found that the Claimant had worked four days a week from 14 July to 25 January 2018 equals a period of 28 weeks at 80% of her net weekly salary = £347.22 and that totals £9,722.05. So what we found is that if the Claimant had been in employment she would have earned the sum of £43,114.50 from that sum we deducted the figures which we had been given about earnings from other employment. The first was her work for First Data between March and June 2016 which is £2,042.04. Next we deducted her income from working at the Stockbrook Manor Golf Club which was £628.16 and finally we deducted her income from her current employment which totalled £1959.98. So those deductions give a figure of £38,484.32 which we found to be the loss of earnings figure. The parties have already been advised that this award would be subject to payment by the Respondent directly to the benefits agency of the relevant state benefits which I believed to be the actual maternity benefits received and also the Claimant's job seekers allowance but that is our award in terms of loss of earnings. The recoupment regulations will apply.

11 Then in addition to that there was no future loss of earnings claim so we then considered the award for loss of statutory employment rights which we awarded an agreed figure of £500.

12 Then the next issue which was the further issue of controversy was about the application of Acas uplift. We have set out our findings in detail and in summary the Respondent dismissed the Claimant summarily and the only engagement if I can put it that way with the Acas Code or the requirements of the Acas Code was to offer the Claimant an appeal belatedly on short notice. However, we reviewed the correspondence between the Claimant and Mr Kelly at pages 98 – 102 of the original bundle the Respondent put an arbitrary time limit on that which as we found in our judgment on liability did not reflect what their company procedure stated and when the Claimant wrote

requesting a copy of the handbook the Respondent refused to supply it on the ground that it had been supplied previously the Claimant despite that wrote protesting about that but then relied on the Acas Code on 23 November 2015 and making her points but there was no response. The Respondent taken the view that the time had elapsed. We did not consider therefore that there was any area of compliance by the Respondent with the Acas Code. We were assisted as well by the authorities produced by Ms Whitehouse and so we concluded that the appropriate uplift was 25%. That is an uplift on the compensatory award not the basic award so totalling the loss of earnings figure plus £500 gives a subtotal of £38,984.32. 25% of that is £9746.08 and that gives a total of £48730.40 and of course to that has to added the basic award. [Note to self the new amended figures about remedy including the effect of the cap and the confirmation that the Claimant did not want a re-employment order and about how we treat the statutory maternity pay will be dictated after this additional text so bring it from further down the judgment]

13 Both parties made application for costs which the Tribunal considered after concluding our deliberations and judgment in relation to remedy. Both parties had been directed to set out their applications and the grounds for them in writing and these documents were in the bundle. The Tribunal heard oral submissions on behalf of each of the parties as to why costs orders should be made and both applications broadly were on the basis that the other party had conducted themselves unreasonably. The Tribunal reached a decision on principle first of all. In relation to the application by the Respondent for costs against the Claimant primarily on the basis that the sex discrimination claims were unreasonably brought or vexatious the Tribunal had regard to the definition of those words under the Rule and considered that the Claimant was just over the line of not being unreasonable in bringing her sex discrimination case or allegations and the Tribunal refers

to our findings and conclusions in our judgment about the sex discrimination allegations. It is fair to say that there were no applications for strike out etc as the Tribunal commented it is unusual in a discrimination case for such an application to be considered and the burden is really on the person bringing the claim to asses the merits of the claim being pursued but we feel that the Respondent has not established that it was unreasonable for the Claimant to bring the sex discrimination complaints.

14 The second application was by the Claimant against the Respondent for costs and this will be on the basis that it was unreasonable to resist the unfair dismissal complaint and the Tribunal considered that the Claimant had established that that it was indeed unreasonable of the Respondent to resist the unfair dismissal complaint and I award in relation to the Acas uplift which was at the maximum of 25% is also a reflection of the fact that the allegation was pretty much unanswerable. We also refer to the findings that we made in our judgment in which we noted that the Respondent clearly had little or no expertise in proper employment practices. There was a further point made on behalf of the Claimant that the sex discrimination allegations added nothing extra this Tribunal dealt with the hearing and we do not agree with that assessment. The case was listed for three days and we ran out of time in terms of the presentation of closing submissions and we consider that the unfair dismissal case on its own with live *Polkey* and contributory fault issues could and should have been concluded within two days including the Tribunal giving its judgment. We have also take into account the costs do not follow the event in the Employment Tribunal. We consider that the content in resisting that unfair dismissal was unreasonable conduct of the proceedings and it was also urged upon us that we should find unreasonable conduct by reference to discussions with a view to settling the case and approaches to Acas and responses to Acas and the manner or nature of those discussions. We rejected that contention also Employment Judge Warren made a costs

order in relation to the postponement in November 2016 which arose because of disclosure which was made very late and which the Claimant had not had an opportunity to address ahead of time. That order for costs has been complied with and we did not considered that it was appropriate or legitimate for the Tribunal to revisit that issue there was no appeal against Employment Judge Warren's order and there was no application within the time to vary that so those bases for finding that there was unreasonably conduct or that the threshold for making costs order were rejected by us so our finding is that there has been unreasonable conduct by the Respondent but that was in relation to resisting the unfair dismissal case.

15 After we announced our decision in principle in terms of the application for costs by the Claimant and the Respondent indeed we adjourned for Ms Phillips to take instructions as to any relevant circumstances in terms of the Respondent's ability to pay an award of costs. She told the Tribunal about the number of staff employed by the Respondent and that the Respondent had an annual turnover of about £800,000 and that the last year that they returned a profit of about £20,000 but that in the three proceeding years there were losses varying degrees. The Tribunal considered that in all the circumstances consistent with our finding about the length of hearing we considered that even if the Respondent had accepted liability for the unfair dismissal it was likely because of the calculation of remedy involving areas where the Tribunal has to make a decision which are discretionary that a remedy hearing would still have been needed anyway and we have also commented during the hearing and earlier in this judgment about concerns about points being taken unnecessarily and we regret that the hearing has taken as long as it has but we considered that in all the circumstances that the costs that we award to the Claimant should reflect the fact that she had to or would have had to pursue something in the order of a two day hearing in order to succeed in the unfair dismissal

claim and we have assessed that to the sum of £1600 plus VAT which comes to £1,120.

16 The Tribunal reiterated that the Employment Tribunal is not a jurisdiction in which costs are routinely ordered. There are many cases in which Claimants do not succeed in respect of any of their claims and no orders are sought or made against them for costs.

17 The Claimant's application for costs had included a claim in respect of costs incurred earlier on in the case where a firm of solicitors among other matters had prepared effectively a letter before action. The Tribunal did not consider that it was necessary to reflect those costs which ran into some £3,000 in the order made. It was relevant that the Employment Tribunal is not a regime in which costs are usually awarded.

18 A full Tribunal was constituted to deal with these days as the parties were bringing costs application in respect of costs and it was not restricted to the determination of the unfair dismissal.

Employment Judge C Hyde

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE