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EMPLOYMENT TRIBUNALS

Claimant: **Mrs Nicola Stower**

Respondent: **C & L Facilities Limited**

Heard at: **East London Hearing Centre**

On: **25 and 26 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

JUDGMENT in respect of Remedy and Costs having been sent to the parties on 26 February 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 Written reasons were requested by the Respondent by email sent on 8 March 2018.

Preliminaries

2 By the Tribunal's reserved liability judgment in this case it was decided that the Claimant had been unfairly dismissed and that there were no deductions to her

compensation due to be made in respect of the *Polkey* principles or by reason of contributory fault by the Claimant. The Tribunal thus reconvened to determine remedy on 25 and 26 January 2018. The Tribunal refers to the Reserved Judgment and Reasons for the background. These reasons are set out only to the extent that the Tribunal considers it proportionate to do so, and only to the extent that is necessary to do so to enable the parties to understand the reasons for the judgment.

3 A full Tribunal was constituted to deal with the hearing as the parties were bringing costs application relating to the liability proceedings which included a number of discrimination allegations and was not restricted to the determination of the unfair dismissal complaint.

Certificate of Correction

4 At the same time as the Respondent requested written reasons for the Judgment, a request was made for reconsideration of various matters. A number of these were arithmetic or typographical errors. Reconsideration in respect of those has been refused, but a certificate of correction and corrected Judgment accompany these Reasons. In addition, in reviewing the Respondent's application for reconsideraton, the Tribunal noted that the wrong figure for the statutory maximum week's pay had been applied, having regard to the date of termination of the employment on 30 November 2015. This clerical error was also corrected.

5 None of the errors constituted an error of law.

6 In these reasons, it is convenient to set out both the figures originally announced, and the corrected figures in bold type face.

Relevant Law

7 Although there is reference where appropriate in these reasons to applicable law, there was no dispute between the parties about the applicable law. For that reason and on grounds of proportionality, these reasons do not contain an exposition of all the relevant law.

Evidence adduced

8 We had the benefit of a bundle of documents which ran to some 150 pages and which included various schedules and counter schedules of loss. In addition, half-way through the morning of the first day, the Claimant's counsel produced a schedule of loss which the Tribunal marked [C2]. She also presented written closing submissions which were marked [C3]. In addition to that the Tribunal had the benefit of a witness statement from the Claimant marked [C1] and which was signed by her on 25 January 2018. The schedules and counter schedules and evidence about mitigation of loss were in the bundle. The Respondent disclosed the part of the employment handbook which made it clear that during maternity leave, employees were entitled to statutory benefits only.

Issues and Conclusions

9 The Claimant confirmed that she did not seek a re-employment order but applied for compensation.

10 The calculation of and the fact of the Claimant's entitlement to the basic award was agreed. The basic award was in the sum of £1,916 and that reflected a multiplier of 4 full years by 1 week's gross pay which is subject to the statutory cap. The Tribunal erroneously used the figure of £479 as the statutory maximum week's pay when announcing the decision. The corrected statutory maximum for the effective date of dismissal on 30 November 2015 was **£475 (SI 2015/226)**. The Claimant's gross weekly pay was £550, above the statutory maximum week's pay. The agreed calculation of the basic award appeared to have been in error, and the figure awarded should have been **£1900**.

11 We next turned to consider the compensatory award. The central dispute here was about whether the Claimant had failed to mitigate her losses. This was a matter which was addressed in some detail 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.

12 We 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. In order to claim those benefits successfully, she needed to establish to the satisfaction of the Benefits Agency that she was making reasonable efforts to find alternative work. We had documents which confirmed her efforts to do so during a period in 2016.

13 After the Reserved Liability Judgment was sent out, a Telephone Preliminary Hearing took place on 27 November 2017. Case Management Orders were made for the preparation for this remedy hearing and this included an Order 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 oral and documentary evidence which was available to us.

14 We accepted the Claimant's evidence as to her efforts to find other work and that she was unable to secure work beyond the positions which she described in her schedule of loss and in her oral evidence. These were three part-time or ad hoc positions including one on which she was still engaged.

15 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 contention was reinforced by the fact, which we also found, that her mother was available to provide substantial, if not full-time, childcare cover at the time of the planned return to work. The Claimant also had the benefit of some back up from her in-laws for up to two days a week.

16 The Respondent produced details of alternative jobs which they submitted the Claimant could have taken. The Claimant readily accepted in her evidence 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 did not have adequate evidence of that.

17 The Claimant's mother was diagnosed as having breast cancer in July 2017. In her oral evidence the Claimant candidly accepted that had she continued working for the Respondent, 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 naturally have wanted to support her mother as well during this time.

18 The unchallenged evidence we heard was that nursery fees were £70 per day.

19 The Claimant's mother-in-law and father-in-law both had to be present on occasions when the Claimant's daughter was being looked after by them. The Claimant's father-in-law worked three days a week therefore he only had two days a week on which he could help with babysitting.

20 We considered that it was likely in those circumstances given that the Claimant would have had to have firm childcare arrangements in place, that she would only have asked them to commit to child care on one day a week, leaving one day of rest for her father-in-law. We assumed that when her in-laws looked after the Claimant's daughter, they would not have charged her anything. This was the position in relation to her mother. We also found that the Claimant would then have placed her daughter in nursery for three days a week which would have incurred fees of £210. That would have allowed the Claimant to work four days a week from July 2017. In the light of those findings we made the calculations set out below.

21 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 representing her gross pay on that document and the figure which had been used in the schedule of loss. The Tribunal considered that the figures were substantially the same and therefore on the grounds of proportionality, and consistent with the approach in section 123(1) of the 1996 Act, we did not adjust the figures that we used for the calculations.

22 In summary therefore, we thought it was likely that the Claimant would have come up with an arrangement whereby she worked for four days out of five per week, on the basis of her in-laws looking after her daughter for one day and her daughter being at nursery for three days.

23 We approached the question of the loss of earnings in terms of analysing what the Claimant would have earned if she had stayed in the employment of the Respondent through to the date of the remedies hearing. The first time-frame was the 33-week period from the end of the notice period through to the start of maternity leave which we took as 17 July 2016 on the basis that it was a likely date for an expectant mother to commence her maternity leave, some two weeks before the baby's due date.

24 In the event the Claimant's baby was born on 3 August 2016.

25 33 weeks x net pay of £434.02 gives the sum of £14,322.66.

26 The next timeframe covered the period of maternity leave which, we found, the Claimant would have taken if she had carried on working for the Respondent. We considered that it was likely that she would have taken just over three months off after the birth of her baby and returned to work on 8 November 2016. The period of absence then from the 18 July 2016 to 8 November 2016 is 17 weeks **(16 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 **(10)** 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 £139.58 x 11 = £1,535.38 **(£139.58 x 10 = £1395.80)**. £2343.71 + £1535.38 **(£1395.80)**. = £3879.09 **(£3739.51)**.

27 The next timeframe was from 9 November 2016 to 13 July 2017 to reflect our findings above about the effect on the Claimant's likely working pattern of her mother's ill health. This was an event which was unrelated to the employer, and which would have affected the Claimant in any event. That timeframe is a period of 35 weeks at full-time pay of £434.02 = £15,190.70 **(£15,120.70)**.

28 Finally, we considered the timeframe during which we found that the Claimant would have worked four days a week from 14 July 2017 to 25 January 2018 (the date of calculation of the remedy), which is 28 weeks. 28 weeks @ 80% of her net weekly salary of £347.22 per week = £9,722.05.

29 The grand total of the loss of earnings in those four timeframes was £14,322.66 + £3879.09 **(£3739.51)** + £15,190.70 **(£15,120.70)** + £9,722.05 = £43114.50 **(£42904.92)**.

30 Thus, if the Claimant had continued in the Respondent's employment, she would have earned or received the sum of £43114.50 **(£42904.92)**. From that sum we deducted the figures which we had been given about earnings from other employment and the Statutory Maternity Pay received. The first was her work for First Data between March and June 2016 which was £2,042.04. Next, we deducted her income from working at the Stockbrook Manor Golf Club which was £628.16. We also deducted the Statutory Maternity Pay which the Claimant had received in the sum of £2372.86. Finally, we deducted her income from her current employment which totalled £1959.98. £43114.50 **(£42904.92)** – £7003.02 **(£7003.04)** (£2042.04 + £628.16 + £2372.86 + £1959.98) = £36111.46 **(£35901.88)**.

31 So those deductions give a figure of £36111.46 **(£35901.88)** which we found to be the loss of earnings figure.

32 The parties were advised that this award would be subject to payment by the Respondent directly to the Benefits Agency of the relevant state benefits. The Employment Protection (Recoupment of Benefits) Regulations 1996 (SI 1996/2349) ("The Recoupment Regulations") apply to this award.

33 There was no future loss of earnings claim. We then considered the award for

loss of statutory employment rights in respect of which we awarded an agreed figure of £500.

34 The next issue, which was the subject of further controversy, concerned the application of an 'ACAS uplift'. Under section 207A of the *Trade Union and Labour Relations (Consolidation) Act 1992*, the Tribunal may either increase or reduce the award by up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS disciplinary code. In her Schedule of Loss dated December 2017, the Claimant sought an increase of 25%.

35 The detailed background findings in our Liability Judgment are relevant to this issue. In short, the Respondent dismissed the Claimant summarily and the only engagement by the Respondent in that process with the requirements of the ACAS Code was to offer the Claimant an appeal, belatedly and on short notice.

36 We reviewed the correspondence between the Claimant and Mr Kelly about an appeal (pp 98 – 102 of the liability bundle). We found that the Respondent put an arbitrary time limit on the time for appealing which, as we found in our judgment on liability, did not reflect what their company procedure stated. 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. Despite that response, the Claimant wrote protesting about the Respondent's decision. There was no response.

37 The Respondent stuck to their position, erroneously we found, that the time for lodging an appeal had expired. We did not consider therefore that there was in the event any area of the ACAS Code with which the Respondent complied.

38 We were also assisted by the authorities produced by Ms Whitehouse on this issue.

39 We concluded that in all the circumstances, the appropriate uplift, to the compensatory award, excluding the basic award, was 25%. The compensatory award, totalling the loss of earnings figure £36111.46 **(£35901.88)**, plus £500, amounted to £36611.46 **(£36401.88)**. 25% of that is £9152.87 **(£9100.47)**.

40 £36111.46 **(£35901.88)** + £500 + £9152.87 **(£9100.47)** = £45764.33 **(£45502.35)**.

41 Finally, in relation to the compensatory award, the Tribunal applied the statutory cap as required by section 124(1)(1ZA) of 52 weeks' gross pay, as the lower figure under that section. This was stated in the Remedy Judgment as £434.02 x 52 = £28647.24. The corrected figure for the overall statutory cap is **£475 x 52 = £24,700**. The Tribunal took the view that this was the appropriate stage at which to apply the cap to the compensatory award, having regard to the applicable statutory provisions and the case of Digital v Clements. There was no contrary authority placed before the Tribunal on this issue.

42 The corrected compensatory award was therefore reduced again, by virtue of the cap, to the sum of **(£24,700)**. With the basic award, the total monetary award was £28647.24 **(£24,700)** + £1916 **(£1900)** = £30563.24 **(£26,600)**.

Costs Applications

43 Both parties made applications 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 the litigation unreasonably. It is not necessary or proportionate to set out the grounds in detail, as these were essentially in the documents which both parties had produced.

44 The Tribunal first reached a decision in principle on each application. 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 in the Tribunal's Rules. The lower threshold is posed by the 'unreasonably' test, so the Tribunal addressed that.

45 We considered that the Claimant was just on the right side of the line of not being unreasonable in bringing her sex discrimination allegations which were ultimately unsuccessful. The Tribunal referred to our findings and conclusions in the liability judgment about the sex discrimination allegations. It is fair to say that there were no applications for strike out or for the payment of a deposit order in respect of the discrimination allegations. It is unusual in a discrimination case for such an application to be countenanced, in the light of the authorities on this issue. In the circumstances therefore, quite a burden rests on the person bringing the claim to assess the merits of the claim being pursued realistically. The courts have long recognised that discrimination complaints are fact sensitive. Taking all of that into consideration however, we did not conclude that the Respondent had established that it was unreasonable for the Claimant to have brought the sex discrimination complaints.

46 The grounds for the award of costs against the Claimant were therefore not made out, and the Respondent's application was dismissed.

47 The second application for costs was by the Claimant against the Respondent. The application was made on the basis that it was unreasonable to resist the unfair dismissal complaint. The Tribunal considered that the Claimant had established that it was indeed unreasonable of the Respondent to have resisted the unfair dismissal complaint and we awarded the maximum increase of 25% as a result of the Respondent's non-compliance with the ACAS Code. This was consistent with the Tribunal's view that the complaint was effectively unanswerable. The Respondent had dismissed the Claimant without resorting to any procedure. The procedural minimum standards now contained in the ACAS Code have been a feature of good employment practice for decades. The failure to comply with them at all was not simply a procedural error, but, it deprived the Respondent of the opportunity to examine in the cold light of day whether there were indeed adequate grounds for belief in the Claimant's misconduct, and whether dismissal was the reasonable sanction.

48 We referred to the findings in our liability judgment in which we noted that the Respondent clearly had little or no expertise in proper employment practices. They therefore had no reasonable basis for any expectation of victory in relation to the unfair

dismissal complaint.

49 On behalf of the Claimant, the further point was made that the sex discrimination allegations added nothing extra to the trial. This Tribunal dealt with the hearing and we did 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. We considered that the unfair dismissal case on its own including consideration of *Polkey* and contributory fault issues could and should have been concluded within two days including the Tribunal giving its judgment.

50 We also took into account that costs do not automatically follow the event in the Employment Tribunal. 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.

51 We considered that the Respondent acted unreasonably in resisting the unfair dismissal complaint, and that this constituted unreasonable conduct of the proceedings.

52 It was also urged upon us that we should find unreasonable conduct by reference to consideration of discussions with a view to settling the case and approaches and responses to ACAS and the manner or nature of those discussions. We rejected that contention.

53 We also addressed, when considering whether to award costs, and if so, at what level, the fact that earlier in the proceedings Employment Judge Warren made a costs order in relation to the postponement in November 2016 which arose because of late disclosure by the Respondent which the Claimant had not had an opportunity to address. That order for costs had been complied with and we did not consider that it was appropriate for the Tribunal to revisit that issue. There was no appeal against Employment Judge Warren's order and there was no application within time to vary it.

54 After we announced our decision in principle in terms of the applications for costs, we adjourned for Ms Phillips to take instructions, apparently by telephone, 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 in the last year they returned a profit of about £20,000 but that in the three preceding years the business produced losses of varying degrees. No-one had attended on behalf of the Respondent to give evidence on this issue.

55 The Tribunal considered that in all the circumstances consistent with our findings 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 the exercise of the Tribunal's discretion, that a remedy hearing would still have been needed. Whilst we regretted that the hearing had taken as long as it had, and been as keenly contested by the Claimant as it had, we considered that in all the circumstances the costs that we awarded to the Claimant should reflect the fact that she had to pursue something in the order of a two-day hearing in order to succeed in the unfair dismissal claim. We assessed costs in the sum of £1600 plus VAT which comes to £1,920.

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

Employment Judge Hyde

2 August 2018