EMPLOYMENT TRIBUNALS
at a Remedy Hearing

Claimant: Miss N Croft

Respondent: SWR Energy Smart Ltd

Heard at: Nottingham

On: 21 November 2018

Before: Employment P Judge Britton (sitting alone)

Representation
Claimant: In person
Respondent: Mr R Chaudry, Solicitor - Peninsula

JUDGMENT

1. I reject the application that I should recuse myself which has been made by the Respondent. I have therefore continued to hear this proceeding today, as to why is set out in the reasons below.

2. As to the claim before me of sex discrimination by reason of pregnancy, I make a total award of compensation payable by the Respondent to the Claimant of £14,633.33, which includes interest. The calculation is also set out my reasons.

REASONS

Introduction

1. I heard the Respondent's application that the default judgment in this matter be set aside over a whole day's hearing on 14 November 2018. I refused the application. I there and then listed a remedy hearing for Wednesday 21 November 2018 to commence at 10 am. The reasons for my decision were published and sent to the parties on 19 November.

2. By then, the Respondent Director, David Wilkinson (who is referred to extensively in my aforesaid reasons) had applied on 15 November complaining about this Judge's conduct in the Hearing on the 14th and in

particular alleging collusion with the Claimant. It is to be noted that the email came direct from him rather than Peninsula, who continued to act.

3. On 16 November 2018, this Judge provided an explanation to the parties and in particular rejecting the allegation of collusion/bias and that in particular the CCTC footage had been viewed and could, if the application was still proceeded with, be considered at the remedy hearing.

The adjournment issue

4. On 19 November via Hafizan Arshad, a Senior Litigation Executive at Peninsula and who has been the author of the various emails written on behalf of the Respondent from time to time since Peninsula started to act, now applied for an adjournment of the proceeding on the basis that Mr Hastings, the other senior manager/shareholder of the Respondent and who gave evidence at the reconsideration hearing and is referred to extensively by me in that judgement, would be unavailable today as being out of the country. Inter alia she stated as follows:

> "*… Please note that Mr Hasting's did indicate his unavailability at the Tribunal reconsideration hearing on 14th November 2018. Please find attached evidence to substantiate the dates of unavailability for your consideration. Furthermore as a consequence the Respondents' Director, David Wilkinson cannot attend because he will be running the business by himself on the date of the listed hearing.*
>
> *Both Mr Hasting's and Mr Wilkinson's attendance is crucial because they would need to view the footage of the CCTV in order to give instructions regarding if a recusal application should be made or not.*
>
> *…*"

5. Attached was an electronic ticket record showing that Mr Hastings, together with two other persons, were booked on Sunday 23 September to fly to Dubai today, returning on 28 November.

6. I declined to grant the application given the history of the proceeding, which I fully set out in the judgment to which I have referred. I wish to add the following, which only reinforces my decision.

8. Reverting back to my original reasons and dealing in particular with paragraphs 19-24, I now can add the following from the further visitation of the file. When the application via Hafizan Arshad for the adjournment of the previous hearing from the originally scheduled date of 17th October was made by her on the 12 October having referenced Mr Hastings's unavailability because of the funeral, it was stated at paragraph 6:

> "*In order to assist the Tribunal with the relisting of the hearing, please note Gary has no unavailability dates for the near future.*"

9. Well of course either that letter is disingenuous (and I would not like to visit that accusation on Peninsula) in that it conveys instructions which are simply not true. That is of course because it is now self-evident that as at 12 October Mr Hastings was already booked to fly out for a week to Dubai today.

9. The final point to make on this topic, and which Mr Chaudry has in the hearing today agreed is correct, is that at no stage during the hearing on the 14 November did Mr Hastings inform me direct or via Mr Chaudry that he would not be able to attend today because of the trip to Dubai.

10. Thus, given the history of these proceedings, I formed the view and reinforce it now that to permit an adjournment in those circumstances from today, and which was opposed by the Claimant, would not be in the interests of justice.

11. As to Mr Wilkinson being unavailable to attend the hearing, I will deal with that in more detail in due course. Of course, suffice it to say that the court must come first particularly in circumstances such as this unnecessarily protracted litigation. For the reasons I have already given, the fault in terms of that must lie at the door of the Respondent.

The recusal issue

12. For the purposes of today, Mr Chaudry, who has conducted the case for the Respondent with the utmost integrity throughout, has prepared a written application on behalf of the Respondent that I recuse myself.

13. Essentially it is serious accusation as first made by Mr Wilkinson on behalf of himself and Mr Hastings, and to which I have now touched upon, that this Judge had colluded with the Claimant by being with her for some time alone, the inference being 15 minutes.

14. Today we have had before the hearing and played for the benefit of the parties by a clerk (Mr Hammond) the CCTV footage for the period in question. Mr Chaudry was able to see it. Furthermore, the Claimant gave evidence under oath that at no stage had she been with me outside the building and indeed was unaware that I was in that sense no longer in the court. Furthermore, that her only involvement was that when this Judge returned from making his deliberations prior to giving judgment, and asked her as there was no clerk available if she would mind getting the Respondent, ie Messrs Wilkinson and Hastings and of course Mr Chaudry, from their room and bringing them down for the purposes of all parties attending the court room together in order that this Judge might give his judgment.

15. Suffice it to say that having considered all that evidence and had two periods of seeking instructions from his clients, in particular Mr Wilkinson via telephone, that Mr Chaudry on behalf of his clients abandoned in its entirety the collusion point.

16. I shall therefore deal with the other points in the recusal application. I will take them in sequence.

17. The reference to bringing a claim for dismissal by reason of exercising a statutory right, which is pursuant to section 104 ERA 1996: I commented at the outset, having read the Claimant's pleading and the further and better particulars that she had sent into the tribunal, that had a Judge considered them then it was self-evident, bearing in mind that she is a litigant in person, that on the scenario section 104 would be engaged.

18. However, as there was by now a default judgment issued by Employment judge Evans on 31 May 2018 limited to the sex discrimination claim based upon pregnancy, and which was categorised in terms of box ticking as being the claim that she brought on presentation of the claim discrimination claim, this would not be considered unless the Claimant wanted to seek to amend to add it as a head of claim. I raised this in the interests of justice in accordance with the overriding objective as the Claimant is not represented. Suffice it to say that the Claimant made plain that she would not seek to amend and would limit the remedy sought to the ambit of the default judgment.

19. Use of first name terms. This was a tense case. I have made reference in the first judgment and reasons to the issue of threats against the Claimant. For reasons which are made plain in that judgment and reasons, I decided not to rule on the issue. Self-evidently, if I had been biased against the Respondent, I could have decided to proceed and make a decision on the point. The Claimant today, rather than see another adjournment that she does not want (doubtless because of the stresses in this case) has accepted therefore that I will make an award without adding in any aggravating feature which would require further evidence. This is obviously to the Respondent's advantage.

. 20. Going back to the tense situation in this case where the body language at the back of the room from Mr Hastings and Mr Wilkinson in particular was unhelpful, I decided in accordance with the overriding objective and to try and defuse the situation, that the approach I would take was by and large to try and be as informal as possible and thus on some occasions I used first name terms when addressing either the Claimant or the three witnesses for the Respondent. At no stage did Mr Chaudry object to this course of action and as he has confirmed today I did not just refer to the Claimant as Natasha but in fact used first name terms for all of the persons present: That is to say the three witnesses for the Respondent and the Claimant.

21. That brings me to the pleadings issue. The scenario is as follows and I go back to paragraph 1 of my reasons in the first judgment. It was untenable in the late defence of the Respondent penned by Peninsula to plead that they had not had particulars of the claim thus to be able to defend it. I say this for the reasons I have already made plain as to why that is the case. In that sense, this Judge did refer initially (perhaps in

exasperation) to that particular paragraph of the Response being rubbish. In that respect, that was perhaps an inappropriate word, although it accurately reflects the situation. But later on in the proceeding and having reflected on the word that I had used, I apologised to Mr Chaudry but making it plain that I still stood by that the alleged deficiency as pleaded in terms of lack of particularisation of the claim was untenable. He did not disagree with me and has confirmed today that that is exactly what I said.

22. Threats to Mr Wilkinson and Mr Hastings viz tribunal clerks being called to give evidence. The position there is that in terms of knowledge of the proceeding and the email issue and Claire Johnson (as per paragraph 9), both Mr Hastings and Mr Wilkinson initially challenged that record presumably to try and seek to argue that they did not get the necessary email address. I made plain that the clerk's file note was very full and that she was highly experienced and if there was going to be a conflict on this issue, then I would obviously need to arrange for her to give evidence.

23. There was then a subsequent issue relating to whether or not Mr Wilkinson and Mr Hastings received the email sent by Patrick Edgar (another very experienced clerk) at paragraph 16. Initially they appeared to be querying having received the letter, albeit I do not refer that to that at paragraph 16. But it fits with what I said in the hearing which was to the effect that if it was being said that it was not sent, then of course I would again need to make arrangements for Patrick Edgar to come and give evidence. The same applied in relation to the email sent out by another very experienced clerk on 25 June, namely Michael Hammonds, who incidentally was the clerk in the case before this Judge this morning.

24. As is clear at inter alia paragraph 16, Mr Wilkinson rowed back from any such challenge. To turn it around another way, it was made clear, if it had not been before, that the Respondent accepted receiving inter alia the documents as per my reasons at paragraphs 14,15 and 16.

25. It follows that this Judge rejects that there were threats made to Mr Hastings and Mr Wilkinson.

26. Closing remarks: this Judge was dealing with an unrepresented Claimant. Mr Chaudry made his submissions. The Claimant initially indicated that she did not wish to say anything. This Judge, to make sure that he understood her correct, because of course this would be her last chance to make a submission, asked her if she was sure. The Claimant then indicated that she did wish to say something, as to which was then recorded by this Judge in his notes. My approach in this respect was of course in accordance with the overriding objective and to ensure that the Claimant had that opportunity to have a last word and bearing in mind the eloquence of the submissions which had been made by Mr Chaudry, who is a qualified solicitor.

27. Unilateral decision on the timing of the remedy hearing: Mr Chaudry was informed of the date upon which the Judge proposed hearing the

matter, bearing in mind that it was essential that the matter completed itself at the first available opportunity given how long this litigation had been going on. Mr Chaudry made plain that he could accommodate the date of today. I have otherwise now dealt with the issue of the postponement and the reliance by the Respondent on Dubai.

28. It follows that for all those reasons, this Judge is not going to recuse himself.

Remedy

Injury to feelings

29. I have before me the Claimant's schedule of loss. She provided further explanation and has been cross-examined on the issue of injury to feelings. I bear in mind that from the onset she had not confined herself to one incident (as to which see the ET1); and that she had made plain in her detailed further submissions (ie those of the 20 December 2017 and 1 October 2018) that there were preceding incidents and to which she referred. These documents were copied to the Respondent and indeed the second when sent to the tribunal by the Claimant was also e-mailed by her to Mr Wilkinson.

30. No mention is made of it in the proposed Response form dated 9 October 2018, which is as I have said woefully deficient. I do not see this as the fault of Peninsula and for reasons I have already given: Of course had they been provided with all the information that the Respondent had received from the tribunal or direct from the Claimant, then they would have been able to fully address the allegations in the ET1.

31.There are three issues. In early June 2017 or thereabouts the Claimant had provided her employer with a MAT B1 (see Claimant bundle page 5) which is needed by the employer for the purposes of being able to process statutory maternity leave in due course and of course confirms that there is the pregnancy. The Claimant also informed the employer that she would commence her maternity leave on 18 August 2017. In fact, this was also on the MAT B1. She had actually already informed her employer of her pregnancy (which is not in dispute) circa March 2017.

32. Some weeks thereafter, she was informed that there was no longer a need for a supervisor as Mr Hastings would be now coming into the office rather than being on the road travelling for the purposes of the business. Therefore, she would cease to be the supervisor and thus her pay went down to the normal national minimum wage as prior thereto she had been paid an enhancement. She also received commission payments.

33. What she pleads, however, is that a few weeks later another employee, Jack O'Keefe, was promoted into this post. Thus, she pleads that this is the first episode of detrimental treatment that she links to her pregnancy.

34. The second issue is that post her return from holiday, the transport arrangements stopped. That is to say post the move of the business from Malton Road in Nottingham to Kirkby-in-Ashfield (which is outside Nottingham), the Claimant was in difficulty in terms of being able to get to work, bearing in mind the school run and also her childminding arrangements. I learned today how in fact most of her relatively small wage went on the childminder. She did the job, not just to put some additional money into the family budget but also because she wanted to remain in work rather than be a stay at home mum, inter alia believing this would set her children a good example for the future. So, the travelling costs would now be about £10 a day out of surplus funds having paid the childminder of not more than about £60 per week. Therefore, it had been agreed that Mr Wilkinson would transport her and it seems at least one other employee from the tram stop near to where the Claimant lived to the new work site. However, when she came back off holiday, the arrangement was stopped. However, she pleads that weeks later she found out that Mr Wilkinson was transporting Jack.

35. The last issue (ie the "final straw") is the events on 26 July 2017, and to which I referred in my first judgment and reasons as per paragraph 1. That is when the employment ended. What was clear today is that the Claimant was very upset in terms of being told that she would no longer receive a guaranteed weekly wage. She was worried as to how in particular she would be able to pay her childminder. She had soldiered on in this job until this last straw because she had loved the work and the relationship with Mr Hastings and Mr Wilkinson had been a very good one until those last few weeks. There is no doubt that therefore her feelings were genuinely hurt by the treatment of her, illustrative is that she had become emotionally very upset on 26 July before she left the Respondent's premises in distress and went home and then wrote the grievance, which is as per her bundle at page 2.

36. The Respondent did reply as per 31 July, albeit the Claimant found the response unsatisfactory. There is then the issue of whether or not threats were made to the Claimant once she decided to involve ACAS and which she set out in her claim and further particulars. I have already said that I will not further address that issue and I will therefore not make any aggravated finding, and the Claimant does not object to that course of action. To turn it around another way, it saves the need for another hearing which, given this case, would of course on the face of it be stressful for at least the Claimant.

37. What it does, however, mean is that insofar as the Claimant might want to argue that there was a breach of the ACAS Code of Practice applicable in this case, I do conclude that in those circumstances, there was not a breach as such in terms of the reply to the grievance and therefore I am not going to make an uplift award.

38. But I have to assess the measure of the award for injury to feelings. I have of course considered the Presidential Guidance in terms of employment tribunal awards for injury to feelings of psychiatric injury

following ***De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879*** and in paragraphs 10 and 11. I am well aware of the jurisprudence on the topic of assessment of injury to feelings.

39. The Claimant puts the award at £12,000. Mr Chaudhry counters that it should be circa £4,000. I conclude that this treatment of the Claimant, which obviously caused her distress, is such as to mean that it is not at the lower of the lower band but gets towards the top of the lower band. I factor in her anxiety and sense of hurt at being unable to obtain further work until she gave birth. I accept that the most important reason for that was because, as she says to me, who would want to employ someone so obviously pregnant?

40. I have therefore concluded the appropriate award for injury to feelings is £7,500. Interest of course must be awarded at 8% from the date of the discrimination (in this case effectively 26 July 2017) up to today's date. This is a period of 69 weeks. The annual rate of interest is £600, thus the total amount for interest is £796.15. Thus, the total award for injury to feelings is £8,296.15.

Loss of earnings

41. Doubtless because it is such a short period between the end of the employment and the commencement of her maternity leave, the Claimant has not claimed for any loss of earnings before the Statutory Maternity Pay would have started.

42. Applying the statutory provisions as to maternity pay, the Claimant would be entitled to 6 weeks at 90% of her average earnings followed by a further 33 weeks of statutory maternity pay, which in her case would be £145.18 per week. At the time of the end of this employment, the Claimant was now working 25 hours per week. She was being paid the national minimum wage, which was then £7.50 an hour and she was also receiving commission for sales which she completed at the rate of £15 per sale. She tells me that in the weeks prior to the end of the employment, she was hitting at least 2 a week, ie £30.

43. The Respondent has provided no pay records for the Claimant, only some time sheets. These have some details of earnings on them but nothing like sufficient. Mr Chaudhry accepts that point.

44. The Claimant did not receive payslips from January 2017, although she had done so in the preceding period; and she clearly was subject to tax and national insurance, certainly up to the end of 2016. Subsequently she has never received any payslips, or for that matter her P45 or P60. This brings in the issue of whether or not she was an employee as argued by the Respondent in the ET3 and to which I shall return on the next sub topic.

45. In any event, it does not matter for the purposes of the compensatory element of this award because of course the discrimination can equally

apply to a worker rather than an employee and Mr Chaudhry has never argued to the contrary.

46. Thus, allowing for £30 a week, the average earnings would self-evidently be £217.50 weekly. 90% of the same is £195.75. Thus, the calculation of loss for the first 6 weeks is £197.75 x 6 = £1,174.50. Thence for the next 33 weeks, she would have received £145.18 per week. This amounts to £4,790.94. Thus, her loss is £5,965.44.

Mitigation of loss

47.The Claimant would not have returned to work for the remainder of the one year maternity leave period that she was taking. Thus, for the remaining period of 13 weeks she would have received no income so she cannot claim for any loss. As to the period thereafter, the Claimant confined herself to applying for cleaning and care assistant jobs. She has no experience in either and she never got any interview. She applied for about 10 jobs. I queried given that she had several years successfully working in sales as to why she had not applied for a job in that area. In terms of the Respondent bundle, there were some adverts at the back of it relating to vacancies in for instance call centres. I am well aware that in the Nottingham area in particular there are several largescale call centres and many industries reliant upon sales. The Claimant essentially told me that she had not really wanted to go back into sales. She also did not apply for any jobs in the retail sector where I am well aware that inter alia many of the supermarkets provide opportunities for mothers with childcaring responsibilities to be able to work hours that suit.

48. Suffice it to say that although I do not condemn the Claimant in this respect, I am not satisfied that she has done sufficient to mitigate her losses. Therefore, what I am going to do is to limit the loss of earnings compensation to the maternity leave period. So, the amount is £5,965.44. Interest must be awarded at 8% from the midway point, which is 19.5 weeks. Therefore, the interest at 8% is £372.22. This makes a total award for loss of earnings of £6,337.68. The Claimant was in receipt of tax credits and thus not subject to income tax, therefore I order that the award is payable gross.

The total award

49. Thus, the total award is **£14,633.33. 56.**

Failure to provide a written particulars of the employment

50. An award for failure to provide a written particulars (in common parlance know as a contract of employment) can be made pursuant to section 38 of the Employment Act 2002. There has always been an issue in this case as per the ET3 as to whether the Claimant was an employee or self-employed. All I would observe is that she clearly received payslips up to the end of 2016 from which PAYE deductions have been made when the Respondent Company then came into existence and traded in

substitution for its predecessor (SW Home Improvements Ltd). She never received any further payslips, but the working arrangement does not appear to have changed. However, in order to make an award for failure to supply a contract of employment and which can be up to 4 weeks' pay and which the tribunal must consider of its own volition even if not applied for by the Claimant, I would need to determine if the Claimant was an employee or not. This would of course mean a further hearing. As the Claimant manifestly does not want this, I have determined that I will make no award as I consider that is the appropriate just and equitable approach in all the circumstances.

Final point

51. Mr Chaudhry has asked me to clarify for the purposes of his clients as to why I sat alone on this case. Firstly and obviously this was because I was seized in hearing the application as to whether the default judgment should be set aside and the listing had made plain that if it was not, then this Judge would go on to continue to determine remedy. If the default judgment had been set aside, then the case would have started de novo and any hearing would have been before a full tribunal panel. But where the default judgment remains, the assessment of remedy is conducted by an Employment Judge sitting alone and that is the usual procedure. At no stage has an application been made by the Respondent for the purpose of the remedy hearing that it should be heard by a full panel.

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Employment Judge P Britton
Date: 12 December 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE