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EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss M Marcano v **CAFCASS**

Heard at: London Central **On**: 30 April 2018

Before: Employment Judge Goodman

Representation
For the Claimant: in person
For the Respondent: Mr. R.Hutchinson, solicitor

JUDGMENT having been sent to the parties on 4 May 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure

REASONS FOR REMEDY

1. Today's hearing was to consider the appropriate remedy following an earlier finding by the Tribunal that the Claimant was victimised in the provision of a reference.

2. We heard evidence from the Claimant, and from Mr Morris, the leader of the Public Law Team in which the Claimant had been given a conditional offer of appointment. We had a small bundle of further documents which included his interview notes and an Ofsted report. There was a deficiency in respect of information from the Claimant about her post-employment earnings which she was able to supply over the lunchtime adjournment by forwarding her emailed payslips to the Respondent's representative, so he was able to make some sense of her earnings.

3. Based on the evidence we have heard and the submissions made by the parties we make the following findings.

4. As set out in the written reasons on the liability issues (sent to the parties 21 March 2018), the Claimant was given a conditional offer of employment in the Public Law Team on 8 March 2017. This was subject to references which were provided internally by Katherine Warren on 27 April, and by her prior employer, Westminster Borough Council, where she had worked since 2010, on 24 April. The Claimant resigned on 30 March 2017 but did not cease work until 19 April on

completion of a number of tasks, as agreed with the Respondent. On 26 May 2017 she was told by Mr Morris that she was not to have the appointment offered because her references were not satisfactory. On 12 June the Claimant told the Respondent that she was unable to get a job for lack of a reference, and threatened legal action, which took place in the form of a solicitor's letter of 21 June.

5. In the meantime, the Claimant was exploring other employment opportunities and on 21 July 2017 she started work for another local authority whose identity is known to the Tribunal. The Claimant's evidence is that she was able to get this job without having a reference from her most recent employer because her agency had a good relationship with the team leaders seeking to appoint, and the borough in question is known to have a recruitment and retention problem and was anxious to obtain anyone suitable. She worked in one particular team there for a relatively short period, and then transferred to another team; the second team leader has expressed surprise that she was recruited without a reference from the previous employer but it seems that both team leaders are more than satisfied with her work.

6. There is no evidence that her current agency post is in any way time limited, nor do we have any evidence about the possibility of permanent recruitment at her current borough. In the absence of evidence we assume she will continue to work for the borough.

7. A number of questions arose about the Claimant's prospects and its relation to the provision of poor reference by Ms Warren. Mr Morris' evidence was that when recruiting for a permanent post he would require a complete list of all past employers of a qualified Social Worker, and that he would require references from the most recent employers, but not for every employer during the working life. He would have required written confirmation of the dates of employment to ensure that there were no gaps. In relation to CAFCASS we note there will be a seven-month gap in the Claimant's employment record. Mr Morris said that he was recruiting from an employment agency he would seek an assurance from the agency that the history had no gaps and was confirmed, and would seek a reference from the last employer plus a character reference; in other words he would in effect rely on the due diligence of the agency rather than his own research. This in effect confirms the evidence provided by the Claimant by way of a letter of 27 April 2018 (unsigned, because it appears to be an email attachment) from Associate Director of Eden Brown Synergy, the public sector recruitment business where she is currently registered, which states that as a public sector recruitment agency we supply local authority clients via national frameworks. Most of these frameworks have strict compliance requirements, including having full five years referencing on file, with character references to cover any gaps in employment. "In some cases, our clients will accept confirmation of dates from the previous employers as a form of reference, however as we predominantly deal in placing locums who work with vulnerable children or adults we are often asked to supply a confirmation of dates with a written reference from the Line Manager of previous assignments".

8. This mostly confirms Mr Morris' account of what he looks for when recruiting - the only difference is the full five years. We do not know from Mr Morris how far back he would go, but the parties are agreed that the stress on obtaining a proper reference history for people working with vulnerable children arises from the

recommendations of the Bichard report in to the Ian Huntley murders of two girls in Soham some years ago, that there must be more rigour in checking references.

9. The result is that by not having a satisfactory reference from CAFCASS for the seven months she worked there the Claimant is at some disadvantage in the labour market. Her current employer took a chance, perhaps because they had great need for staff, she cannot rely on another borough being ready to take a chances, and while this is a problem which may diminish over time, as she acquires a reasonable track record with her current employer, it will take some time to work its way out.

10. We take into account arguments made by the Respondent that the actual reference supplied was factual, not related to any allegation of race discrimination, and that as such it would have affected her chance of working with the Public Law team in any event. Mr Morris' evidence was that even if Miss Warren had not written that she would not reemploy her, her saying that she had high dependency and gaps in her safeguarding practice meant that he would still not to have wanted to take her, on the basis that there were two 'requires improvement' markings which were the more recent. In other words, it was being argued that it would have made no difference to the outcome if they had said that they would reemploy, while stating factually what her QAI tool results were. The Claimant has argued that these QAI tool results of March 2017 were in any event unfair. but we are bound by our previous finding on that. She did point to the fact that in answer to questions Mr Morris confirmed that overall between 3 - 7% of CAFCASS staff are subject to RI markings at any one time; within his own teams it is 3% and all of them are now on performance improvement plans which will result either in improved performance or dismissal. The Claimant argues from this that some staff have RI markings in any event, and those markings would not have been significant if the Claimant was otherwise satisfactory.

11. The second argument advanced by the Respondent, relying on the evidence of Mr Morris, is that as she would be changing status from agency worker to a direct employee of the Respondent they would have had to pay a fee to the employment agency, and that as she was a borderline candidate this would have made a difference in the likelihood of taking her on, and she would not have been employed regardless of the reference.

12. We have to assess the merits of these two arguments. In our view, the requires improvement marking and mention of a gap in safeguarding knowledge. would not have been sufficient to change the Respondent's decision. The notes of the interview panel show that she was recommended for appointment in the post, and when asked to "identify any training development needs to be considered", there is a note "transfer to the public from private may need input on being child focussed", that is a reference to some concern rising from answers to interview. There is also a note: "reasons for appointment - is currently agency, what introduction fees? Start in November 2016 in Private Law critical explore with resourcing". Despite the fact that it was two months from then until the Claimant was told that the Respondent was not going to confirm the offer, there is no evidence that this point was explored with resourcing. Given that, and the absence of any witness from Human Resources department about this today, we propose to give no weight to the argument that introduction fees would have meant she would not have got the job, or that the respondent was unaware of any need for filling in gaps in her knowledge when it decided to offer the job.

13. Having considered the arguments about the reference, in our view there was a very high probability but for the unfairness, in our finding, of Miss Warren's conclusion, the Claimant would have been confirmed in the offer of public law team employment, and would have started very soon after.

14. We have to consider the likely effect on appropriate compensation. When working for the Respondent the Claimant earned £791.87 per week gross, which carried with it an entitlement to sick pay if she was off sick and membership of the defined benefit pension scheme. No documents on the pension scheme were available. Mr Morris, who is a member of the Respondent's scheme, confirmed that members of his team would also be in this scheme, managed by the West Yorkshire Pension Fund, and is in all respects similar to the local government pension scheme, with transfers in and out of it as social workers transfer from local authority to CAFCASS and back. It is the new career-average related scheme; the Tribunal was able to access information about this scheme through August 2017 Employment Tribunal Pension Principles document, from which it appears that employees are on retirement entitled to one forty-ninth of earnings multiplied by the number of complete years in the scheme.

15. In her current agency job the Claimant receives £1,075.68 per week gross. This includes rolled-up holiday pay, and there is no sick pay. It is £286 a week more; if she was to pay tax on that extra money it would roughly speaking, having regard to the current bands for personal allowance, 20% and 40% taxation, be taxed half at 20% and half at 40%, so the net figure for extra income would be £7,000 per annum.

16. The evidence of the Claimant was that she has not been at work for much of April so far by reason of stress. We have very little evidence about the Claimant's medical condition, save that it is confirmed that she has a long-standing heart condition which has been controlled by medication; when offered the public law sector job she was assessed by Occupational Health and told them about this condition. She says the stress and anxiety of events since May 2017 have increased the symptoms of this heart condition such that she obtained a referral to a cardiologist which has had to be deferred because of today's Hearing and will now take place tomorrow. We note the fact that the Claimant may take some time off sick in the future as in the past, but that we have no clear medical evidence as to how often that might be and for how long. We decided on a pragmatic basis to assess the fact that she has lost, in effect, a month's earnings so far and therefore to assume that if working for the agency the likelihood is that she will earn eleven twelfths of the amount she is in fact earning. This would reduce the annual wage from £55,930 to £51,269.16, and subtracting the gross annual earnings that she would have earned with CAFCASS public law team of £41,132, means that she will have in the order of £10,000 more per annum. Had that been taxed that would give her £7,000 net after taking half of 20% and half of 40% tax. In her new job she has no defined benefit pension scheme, instead she is enrolled in a NEST scheme which up till this April was 1% each side, and from now on for the next year will be 3% from her and 2% from the employer, followed by a further increase after a year.

17. We note that there was a loss of earnings from 26 May 2018 when presumably had the result been positive she would have gone to work for the Respondent, and instead she has been employed since July. We were urged to

find that she had not mitigated her loss in this period. It seems to us that given that she was in the process of appealing, and was also in correspondence with the Respondent about getting the reference changed or improved, and that she had to discuss with the agency what opportunities might be available given the restrictions on the reference, it cannot be said that she acted unreasonably in looking for work in this period. She does not seek, and we would not award, any loss of earnings between the end of March and 26 May.

18. As to pension, the difference these days between a defined benefit and a defined contribution scheme is very substantial, and defined benefit schemes are now rare outside the public sector. In calculating whether and to what extent there was a loss, we considered how long the Claimant's difficulty with an incompletely referenced history is likely to last, given that at present it seems likely that if the Respondent was asked for a reference they would take their internal reference from Miss Warren, rather than giving a factual reference simply limited to confirmation of employment dates. So far, she has nine months, getting on for a year's track record of employment, she has moved internally, and two team leaders seem to be satisfied with her, still the evidence points to her being at a disadvantage in obtaining a permanent position in social work with children other than as an agency worker, and without employment with a public-sector employer direct there is little chance of membership of a defined benefit pension scheme. Mr Morris seemed not to dissent from the Claimant needing a five year track record, without any other evidence other than that of the agency and Mr Morris about how long employers want to go back, but taking account of knowledge of other sectors that in finance, where past track record is also important to a current employer, it is likely that five years references would have to be checked to see that there was no wrongdoing in the past. We allow three years handicap for loss of earnings; after that date the likelihood is that the Claimant would be able to rely on her current employer for a reference, and that it would be possible for CAFCASS to give simply a reference by dates rather than saying that they would not reemploy.

19. We applied the relevant factors from the Pension Principles document; that she would retire at the age of 67 t(he statutory retirement age for a woman of her date of birth), she is now nearly 52, (in two weeks' time); we asses that she has lost the opportunity to be a member of a defined benefit scheme for three years, that is three forty-ninths of £41,132, or £2,518 per annum. Using an Ogden table -0.75% multiplier, that gives the multiplier as 15.4, and an overall loss after retirement age is £38,827.

20. We then considered what to do with the fact that the Claimant is earning about £10,000 per annum more now than she would have earned with the public law team, and what the effect would be if that £10,000 per annum surplus were paid in to a defined contribution scheme in the private sector. We had access to the gov.uk website which refers to the calculator on the money advice service; if the Claimant paid £10,000 (tax free) into a scheme for three years she would accrue a pension pot at age 67 of £38,479. It is not clear thereafter what annual pension the Claimant could expect from that; it is said that she would get, on that calculator, around £1,500 per annum, but it is not clear how that is arrived at, or for how many years it is projected. If we take the overall pension pot of £38,479 against the loss of £38,837 over retirement age it appears that the Claimant has a loss of only £500. That is the amount that we are prepared to award for loss of

opportunity to be in a defined benefit scheme for three years; it is of course up to the Claimant whether she chooses to use her additional earnings while an agency worker to increase extra money.

21. Returning to loss of earnings for the period 26 May to 21 July, it is very likely that the Claimant would have been paid from 1 June, as there seems to be no other reason why she should not have been engaged from that date. That would have meant a loss of around seven weeks at £700 per week net: £4,900.

22. On injury to feelings, the Claimant's evidence then and now was that she was visibly upset, as noted by Miss Warren in January 2017, although in our finding was not because of any discrimination on the part of the Respondent, though the Claimant suspected that it might be. We therefore discount that element when assessing her injury to feelings resulting in the public law team was undoubtedly a blow, such a sudden reversal would be hard on anyone, but the Claimant appreciated all too well how difficult it would be for her to get work again working with vulnerable children with a reference that said that she would not be reemployed. In our estimation it probably caused acute anxiety for a period of two months, until she did in fact obtain alternative work with the current authority. The anxiety has persisted, both from job insecurity and injustice, from then till now, some of that anxiety must be referred to normal anxiety of litigation and can be expected to settle down as time goes by because the Claimant will appreciate that the longer she has a good employment record with her current employer the greater her chances of being able eventually to live down the disadvantage of the CAFCASS reference, but the impact of this reference is significant. We discount any physical injury or symptoms, for lack of medical evidence or records, or the opportunity for the Respondent to investigate or cross examine. In fairness to the Claimant, she has herself explained how she has always been able to work despite the heart condition, and it is to be hoped that as anxiety settles that will modify too.

23. The injury to feelings was not trivial. Although it is a one-off act, its effect has had a long tail. We place the award in the middle band of **Vento v West Yorkshire Police No 2 2003 IRLR 202,** and have regard to the updating in the light of more recent case law and the 2018 presidential guidelines on uprating placing the middle band now at £8,400 - £25,200. We concluded that the effect of injury to feelings is likely to be in the order of eighteen months to two years from May 2017 and we award £13,000 for injury to feelings.

Compensation

24. Summarising the awards, there is £4,900 loss of earnings, £500 for the impact on future pension, and £13,000 for injury to feelings; an interest calculation will have to be made.

Recommendations

25. Finally, we consider that this is an appropriate case for a recommendation under the Equality Act. It is within the scope of the Respondent to improve the Claimant's position with regard to future employment, and that has been a factor in our assessment of three years future loss.

26. Our recommendation is firstly that in the event of a request from an

employment agency or a potential employer for a reference within regard to the Claimant's time with CAFCASS, that they should not provide a reference that refers in any way to the internal reference of Katherine Warren dated 28 April 2017. Instead our recommendation is that they respond in neutral factual terms with the following information: the dates that she was placed with CAFCASS on an agency contract, a note of any time off sick, her job description, and a description of her duties with CAFCASS, her disciplinary record and a sentence giving her good wishes for the future, to indicate that there was no ill will. Secondly we recommend that the Respondent consider giving a reference in these terms to her agency now in respect of the request made in July 2017 which went unanswered because of the threat of litigation. It was clear from the Claimant's evidence today that she has taken no further steps with regard to activating an action for defamation and that delay will tell against her were she to change her mind. There is therefore no longer any reason for the Respondent to be concerned about litigation when providing a reference.

27. Finally, to if it was not already clear, we will recommend that the Respondent does not use or refer to information contained in the internal reference of Katherine Warren when providing a reference now or in the future to an agency or potential employer.

Note: it is regretted that the parties have had to wait so long for written reasons. This is because the respondent's request on 10 May 2018 was not referred to the judge until 17 December 2018.

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Employment Judge Goodman

Date 2 January 2019

JUDGMENT SENT TO THE PARTIES ON

2 January 2019

FOR THE TRIBUNAL OFFICE