EMPLOYMENT TRIBUNALS

Claimant: Mrs B Gbefa

Respondent: Primary Care Recruitment Limited

Heard at: North Shields **On:** 7 January, 2019

Before: Employment Judge Nicol **Members:** Ms L Georgeson
Mrs P Wright

Representation

Claimant: Mr B K Gbefa, husband

Respondent: Ms S Brewis, Counsel

REASONS

1 At the end of this hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The claimant has now requested that the Tribunal should set out its Reasons in writing. The Tribunal is satisfied that the request was made within the prescribed time limit and it is therefore appropriate that the Reasons should be provided in writing. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

2 This is a complaint by Blebinami Gbefa, the claimant, against Primary Care Recruitment Limited, the respondent. The claimant alleges that she suffered a detriment because she was victimised by the respondent as set out in Section 27 of the Equality Act, 2010. At an earlier hearing, this Tribunal found

> the claimant's complaint that she suffered a detriment because she was victimised by the respondent as set out in Section 27 of the Equality Act, 2010, is well founded

and gave directions for the conduct of this hearing to decide the appropriate remedy. Although a date was arranged for this hearing, it had to be postponed through no fault of the parties with a resultant delay.

3 The issue for the Tribunal at this hearing is to decide the appropriate remedy to which the claimant is entitled.

4 The Tribunal heard evidence from the claimant. She gave her evidence in chief by submitting a written statement that was read by the Tribunal at the start of the hearing and, subject to any necessary corrections, confirmed on oath at the start of her oral evidence. She was cross-examined.

5 The Tribunal had before it an agreed bundle of documents, marked 'Exhibit R1'. Both parties made oral closing submissions.

6 From the evidence that we heard and the documents that we have seen, the Tribunal finds the following facts.

7 It is not intended to repeat all of the facts in detail which were found at the earlier hearing as they are set out in the Tribunal's written reasons supporting its previous judgment. However, it is necessary to briefly set out the circumstances of the case to understand the award made by the Tribunal.

8 Following proceedings in an earlier case before the Employment Tribunal (with a differently constituted Tribunal), after a finding in favour of the claimant, the outstanding issues were dealt with through ACAS and the parties signed a COT3 agreement. Among other things, the agreement included provisions that

> The respondent…warrant that they shall use their best endeavours to ensure that neither they…make, publish or otherwise communicate, or cause or induce any third party to make, publish or otherwise communicate, any comments of a disparaging or derogatory nature about the claimant.

And

> The respondent agrees to provide a written factual reference (as attached) to any prospective employer upon request. The Respondent will endeavour to keep to the terms and spirit of this reference should it receive any further or written or oral request…

9 The attached reference recognised that the respondent, as an agency, could not comment directly on the claimant's work with an end user client but would include

> I can confirm that according to our records [the claimant] was a registered member of [the respondent] between 18 August, 2014, and 31 October, 2014, and undertook paid work during this period.

10 Before the events that are the subject of these proceedings, the claimant made two requests for a reference from the respondent and these were provided without any problems. After these events, a further request was made and this was also dealt with to the claimant's satisfaction.

11 On 7 August, 2017, the claimant applied to ID Support Ltd for employment. In the application form, she stated that she had been employed by the respondent from August, 2014, to October, 2014, which was in accordance with the reference attached to the COT3. She gave Mrs Woods', a director of the respondent, email address as the contact details for a reference, which had been agreed with the respondent.

12 On 8 August, 2017, ID Support Ltd wrote to the claimant stating

> '…I am delighted to confirm your offer of a 0 hour Support Worker post subject to receipt of a minimum of 2 written satisfactory references…'

13 On 11 August, 2017, Victoria Hartley, recruitment and admin manager for ID Support Ltd, sent an email to Mrs Wood, headed with the name of the claimant, seeking a reference for the claimant. At that time, Mrs Wood stated that she was 'on holiday' from the respondent as she was setting up a new venture. She stated in evidence that she simply forwarded the request to 'hr@primarycarerecruitment.co.uk'. Although this appeared to be a generic email address, Mrs Wood claimed in evidence that it was the email address of Ms Cowan, alleged to be one of a restricted number of employees of the respondent who knew about the COT3. The email address was not consistent with other personal email addresses within the respondent.

14 This is in contrast to the respondent's response to the claimant's claim form. This states that the claimant sent the email to

> the respondent's generic HR email address…accessible by all members of respondent's HR department and…was subsequently dealt with by one of the temporary administrative workers…

It is also in contrast to a witness statement signed as being true by Mrs Wood and prepared for an earlier hearing in these proceedings. This enlarges on the premise that the generic email address was used and that a temporary worker provided the reference.

15 For reasons that were not explained to the Tribunal, the email was replied to by Andrew Chandler, contracts and audit manager, who was said not to know about the COT3. He stated

> I can confirm that the above named person was engaged by us as a temporary worker, within the meaning of the Agency Workers Regulations, for the following period: start date 21 August, 2014, end date 21 August, 2014.

16 On a hard copy of Mr Chandler's email a note has been indorsed, signed 'V Hartley 14.08.17'. The note states

> Spoke with Primary Care who said there was an issue re B. G. & could not legally inform ID of the issue for another year. They would definitely not re-employ her & would not give a better reference.

17 On 14 August, 2017, the claimant sent an email to Mrs Wood and Ms Cowan, complaining that the agreed reference had not been supplied to ID Support Ltd and

asking that the correct one be sent. The claimant also stated that failure to do this 'may diminish my chances of get the job'.

18 On 15 August, 2017, ID Support Ltd formally withdrew the offer of employment stating that it had received references

> …and one of them has proved to be unsatisfactory.

It was accepted by both parties that this referred to the reference from the respondent.

19 Mr Chandler replied to the claimant's email on 16 August, 2017. He stated

> Further to the below I can confirm that we supplied a reference confirming your previous engagement…within the meaning of the Agency Workers Regulations. This reference did not disclose any matters that are prohibited under the agreement and, as such, was fully compliant with that agreement…

20 The claimant requested a copy of the email that had been supplied on 28 August, 2017.

21 Several days later on 31 August, 2017, Mr Chandler sent another email to Ms Hartley, apparently in response to the original email, setting out the agreed reference. The email did not contain any explanation as what had happened or why this reference was now being provided.

22 Almost at the same time, Mrs Wood sent an email to the claimant complaining that she had given the wrong email address to Ms Hartley and requesting that Mrs Wood's email address be used in future. This was despite the fact that the claimant had used Mrs Wood's email address and Mrs Wood forwarded the email to the address that she told the claimant not to use. Mrs Wood informed the claimant that this had resulted in the agreed reference not being used but that the information given 'was a true reflection of your engagement' with the respondent. The claimant was also informed that the agreed reference had now been sent to ID Support Ltd.

23 The claimant pursued the issue of the reference with ID Support Ltd and was told that the job offer was withdrawn because the reference did not agree with the information that the claimant had provided.

24 The claimant lists four employers before applying to ID Support Ltd. The first was from 2007 to 2010 and the reason for leaving was given as 'family'. No details of the shifts worked were given. In 2014, she applied to the respondent and worked one shift in three months. The reason for leaving is given as 'maternity'. She then worked for two employers from March, 2016, to October, 2016, and from October, 2016, to June, 2017, respectively. No details are given for the number of shifts worked but in each case the reason for leaving is given as 'not having enough shifts'.

25 The Tribunal was satisfied that, following the withdrawal of the offer of employment by ID Support Ltd, the claimant did seek to find alternative employment. She said that she was seeking to work three twelve hour night shifts each week. She had ceased to work for previous employers because they could not provide her with

sufficient shifts of the type that she required. Her offer from ID Support Ltd had been for a zero hours contract without any commitment by the employer as to the number of shifts that might be on offer, their length or their nature. The claimant could not support, with written or oral evidence, her contention that she would have been provided with the shifts that she wanted.

26 The claimant tried to obtain employment with several agents but was unsuccessful. This was partly caused because of delays in resolving an application relating to her immigration status.

27 In October, 2017, the claimant joined another employer, Care Outcomes, on her understanding that she would be given the shifts that she required. In fact, she worked six shifts in four weeks for that employer. These were all day shifts because the employer wanted to be able to assess her suitability to work with clients which could be more easily done in the daytime. Over the next two or three months she was not offered any shifts that she considered suitable and so did not work during that period. The Tribunal considered that the claimant was not credible in explaining what she believed was on offer from employers.

28 The claimant sought work from another employer. She was unsuccessful in an application to Service Care Solutions but was successful in an application to Home Care Plus. This employer was prepared to give the claimant work but, because she was pregnant, it suggested that she did not start working for it until after the birth of the child. The claimant accepted this and has yet to start working for the employer. She has not worked for any other employer.

29 The claimant sets out in her statement the effects that she said the withdrawal of the job offer and the actions of the respondent had on her. She suffered sleepless nights, stress, anxiety, confusion and distress. It also revived painful memories of the previous discrimination that she had suffered. In addition, she has had the stress of dealing with these proceedings.

30 The contentions of the parties were set out in their closing submissions. Briefly, the claimant contends that she suffered injury to her feelings to a significant level and also suffered financial loss to the present day. The respondent disputes this and contends that this was an isolated mistake by the respondent, which has acted correctly both before and after the incident in question. Accordingly, she suffered minimal injury to her feelings. Further, she failed to take adequate steps to mitigate her losses so that the amount claimed is unreasonable.

31 The Tribunal found that, with the lack of evidence, the claimant was unable to clearly establish the extent of the losses that she might have suffered and her efforts to mitigate her losses were insufficient. The Tribunal accepted the respondent's contention that there were more potential employers available than those which the claimant chose to approach. Whilst appreciating the claimant was pregnant and gave birth recently, she chose not to seek work when she might have been able to work for another employer. Her expectation concerning the shifts she wanted were unachievable as is shown from her work history referred to above.

32 The Tribunal accepted that the claimant might have initially received work from ID Support Ltd. Although a start date had not been agreed, allowing time for obtaining

a DBS check and any other necessary preparatory steps, it assessed that she might have actually started this work around 31 August, 2017, and that it might have continued for eight weeks, the period until she commenced work for Care Outcomes on or around 26 October, 2017. The Tribunal was not satisfied that the claimant would have continued in employment with ID Support Ltd for more than twelve weeks having regard to the claimant's previous work history.

33 The Tribunal had little evidence on which to base its assessment of the claimant's losses. It decided to base its calculation on the amount that the claimant had received from Care Outcomes.

34 The Tribunal calculated the claimant's losses as follows

Earnings during four week period with Care	
Outcomes	£292.65
Period for which loss calculated 31 August, 2017,	
to 25 October, 2017, (eight weeks)	
Estimated earnings loss	
2 x 292.65	£585.30

35 To this is added interest calculated as follows

The mid-point of the period for which the loss was calculated is 27 September, 2017,	
The end date is 7 January, 2019	
The rate of interest is 8 per cent per annum	
Period 467 days	
Interest payable	
585.30 x 8/100 x 467/365	£59.93

36 The Tribunal noted that the respondent sought to argue that the interest period should have ended at the date when this hearing was originally listed to take place because the adjournment was not caused by any act or default on the part of the respondent. This argument was not accepted by the Tribunal. There was always a risk that the hearing might not have been completed on the expected date and the date when the payment was due from the respondent had been extended.

37 Having regard to the claimant's employment history, the Tribunal was not satisfied that the claimant would have qualified for statutory maternity pay if her employment with ID Support Ltd had proceeded.

38 With regard to injury to feelings, the Tribunal finds that the respondent's conduct did cause the claimant distress and injury to her feelings. The respondent did not dispute this but did contest the level of compensation. The Tribunal had regard to Vento v Chief Constable of West Yorkshire Police (No 2) 230 ICR 318 and the bands of compensation ('the Vento bands') referred to therein as subsequently updated and to the cases referred to by the respondent in its closing submission. The claimant argued that she was entitled to compensation in the mid-Vento band, towards the top end. The respondent contended that it should be towards the lower end of the lower band.

39 This was the second time that the respondent had been held to have committed a discriminatory act against the respondent. The respondent had breached the terms of the COT3 and then sought to deny that it had to done so and to blame the claimant for what had happened. Whilst the respondent had eventually complied with the terms of the COT3, it had done so slowly and without really explaining its actions. The claimant had lost the opportunity of employment through no fault of her own. In addition, the claimant had been put to proving her complaint in the face of blatantly unsupportable evidence on behalf of the respondent. The respondent sought to argue that, effectively, this was a small slip between occasions when the terms of the COT3 had been complied with. The Tribunal did not accept this as it was a significant event for the claimant. However, the respondent's actions had not had a long term effect on the claimant's employment options and she found alternative employment relatively quickly, especially having regard to the minimal attempts to find it.

40 The Tribunal considered that the conduct of the respondent and its consequences fell to be considered in the mid-Vento band but low down in it. As a result the Tribunal awards the claimant £10000.00 as compensation for injury to feelings.

41 To this interest is added, calculated as follows

The start of the actions is 11 August, 2017,

The end date is 7 January, 2019

Period 514 days

The rate of interest is 8 per cent per annum

Interest payable

10000.00 x 8/100 x 514/365 £1125.00

42 The claimant claimed aggravated damages because of the manner in which the respondent had conducted these proceedings. The claimant had not made any other application in these proceedings concerning the respondent's conduct. Although the Tribunal had criticised the respondent's conduct during the course of these proceedings, the Tribunal unanimously finds that this is not a case where it is appropriate to award aggravated damages.

43 The claimant had intimated that she was seeking compensation for miscellaneous expenses but this was not supported by any evidence and so no award is made in respect of this.

44 The Tribunal therefore orders that the respondent pay to the claimant

44.1 the sum of £585.30 in respect of her loss of earnings in respect of the period 31 August, 2017, to 25 October, 2017, together with interest in the sum of £59.93 on that amount for the period 27 September, 2017, to 7 January, 2019, at the annual rate of eight per cent, making a total of £645.23

44.2 the sum of £10000.00 in respect of injury to her feelings together with interest in the sum of £1125.00 on that amount for the period 11 August, 2017, to 7 January, 2019, at the annual rate of eight per cent, making a total of £11125.00

45

46 After the Tribunal gave its decision on compensation, the respondent made an application that the claimant contribute towards the respondent's legal costs under Regulation 76 as set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013. This was on the basis that the respondent had made an offer to the claimant which exceeded the amount awarded by the Tribunal coupled with a warning as to costs and that the claimant had acted unreasonably in continuing with the proceedings after that offer was made.

47 The respondent's final offer of settlement is set out in a letter dated 2 July, 2018. This letter shows that the respondent had made several previous offers, each one doubling the previous one. This was the second letter written by the respondent in these terms but the previous one was of a lesser amount. The amount offered was £12515.00 of which only £3500.00 relates to compensation for injury to feelings.

48 The claimant opposed this application.

49 The Tribunal finds that this is not a case where it should make an award of costs in favour of the respondent. The respondent's conduct throughout these proceedings was never likely to create an atmosphere of trust and it has put forward evidence and arguments that it knew, or should have known, could never be supported. The respondent's assessment of the award for injury to feelings is substantially less than the relevant part of the award. Although the estimate in respect of loss of earnings is much higher than the actual award, there was a genuine dispute over how much this award might be. With all due respect to him, the claimant's representative is not an experienced representative and could not be expected to exercise the same degree of judgment in assessing the likely outcome. It is accepted that the actual award is less than the final offer but it is not so different that the claimant should be penalised in costs. The Tribunal therefore finds that the claimant has not acted unreasonably but that, even if it had, this is not a case where an order should be made in respect of costs because of the respondent's own conduct.

50 The Tribunal therefore unanimously found that the application was not well founded and should be dismissed.

_____
Employment Judge Nicol

Date 7 February, 2019

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.