EMPLOYMENT TRIBUNALS

Claimant: **Miss J Witherspoon**

Respondent: **SGA Forecourts Limited**

Heard at: **North Shields** **On: 10 May 2018**

Before: **Employment Judge Beever**

Representation:

Claimant: **In person**
Respondent: **Mr A Hussain - Director**

REASONS

1. This matter was listed to deal with remedy, following a Rule 21 default judgment given in circumstances set out in more detail below.

2. The remedy hearing took place on 10 May 2018. The tribunal gave an oral judgment on 10 May 2018 and subsequently sent to the parties a written and signed judgment on 30 May 2018. On the same date, the respondent asked for written reasons.

Procedural Background

3. On 9 January 2018, under Rule 21 of the Employment Tribunal Rules 2013, EJ Garnon gave judgment on liability in the following terms: "Claims of unfair dismissal, wrongful dismissal (breach of contract), sex discrimination and/or pregnancy discrimination and harassment, unlawful deductions of wages and failure to pay compensation for untaken annual leave are well founded. There will be a remedy hearing fixed at which the respondent may attend to be heard on remedy only".

4. EJ Garnon gave detailed reasons, at the end of which he stated "I have in the claim form sufficient information to enable me to find the claims proved on a balance of probability but not enough for me to determine the remedy to be awarded".

5. The case was then listed for a remedy hearing. The hearing took place on 12 February 2018. EJ Garnon dealt with that hearing: Ms Witherspoon attended in person; Mr Gulshan,

director, attended on behalf of the respondent. EJ Garnon was asked to re-consider his decision on liability. He treated it as an application for reconsideration, which he refused, and he gave detailed reasons for the refusal. He then re-affirmed that it was for the remedy hearing to attach the correct "label" to the type of conduct relied on by the claimant. However, it was apparent that the matter was not in fact ready for determination as to remedy and it was adjourned as a result.

6. It was in these circumstances that the determination of the appropriate remedy to be awarded in this case came on for hearing on 10 May 2018.

The Remedy Hearing

7. Ms Witherspoon again attended in person. Mr Hussain, a director of the respondent attended and spoke on behalf of the respondent. The tribunal also gave permission to the respondent's witness, Miles Cole, to speak at times during the remedy hearing and to make submissions on behalf of the respondent.

8. At the outset of the hearing, it was explained to both parties that the tribunal was not looking at questions of liability; and that the tribunal could not re-open the question of liability because the previous Employment Judge had made a Rule 21 decision on liability and he had already decided that the facts complained of by the claimant in her claim form happened on a balance of probabilities. The task of tribunal at the remedy hearing was to hear evidence and submissions as to remedy and to examine how to put a value on the claim in which she has succeeded.

9. Both parties accepted that this was the scope of the tribunal's decision making at the remedy hearing on 10 May 2018.

10. The tribunal re-emphasised that the respondent was allowed to take part in the proceedings but only to the extent of the remedy claimed– e.g. as to extent of injury to feelings - but not for example to seek to re-open questions of liability.

11. As for evidence received, the tribunal was provided with 2 bundles, one from the claimant and one from the respondent. There were sufficient copies for each party. The tribunal received a witness statement from the claimant and from Miles Coles, both of whom gave oral evidence and were cross examined. There were additional witness statements from directors of the respondent although little weight attaches as they did not give oral evidence. The tribunal took into account oral submissions from Ms Witherspoon and both Mr Hussain and Mr Cole for the respondent.

12. In evidence, the claimant described how she had received no support from the respondent during her pregnancy, the examples she gave included a lack of any risk assessment and no advice on the circumstnaces in which she could take maternity leave. Subsequently during her maternity leave and in conversation (including by text message) with her manager, Miles Cole, at least from January 2017, the claimant was told that staff at the respondent were not happy with the claimant and that they were not happy covering her shifts. This resulted in comments being made at the respondent about the claimant's absence. At this time, it appeared that the claimant was contemplating an (early) return to work but in the event she was not well enough and her doctor advised her to use her full maternity entitlement. She stated that, "it all started to get awkward from January onwards". The claimant felt under pressure to return as a result. Her evidence was expressly that as a result of the unfair pressure that she felt that the respondent had

brought to bear prior to the end of her maternity leave she felt that she could not return to work and had no option but to resign. The impact that the claimant describes was a loss of confidence and a loss of self-esteem. The tribunal finds as a fact that, on the basis that the facts on liability were judged to be well founded and cannot be re-opened, a material influence in the claimant's decision to resign was the pressure consequent upon the discriminatory actions of respondent.

13. Mr Cole in his evidence complained that he had been "painted in a bad light" and that he considered that he had not harassed her and that he had considered that they had previously had a good friendship. He accepted that the claimant had not been provided with any Keeping In Touch days and in terms of the earlier risk assessment he stated that he didn't realise that it needed to be done. There had been no offer of a phased return to work. This was, according to Mr Cole, because the claimant had not indicated that she was ready to come back to work. This is inconsistent with the claimant's evidence that she had arranged a potential return to work in February 2017 but at the last minute had not done so on her doctor's advice.

14. Both the claimant and Mr Cole gave detailed evidence on the circumstances of payment of holiday pay and this is reflected below.

Discussion and Conclusions

15. The description of the conduct complained of by Claimant in her claim form was sufficient for the Employment Judge to enter judgment on liability.

16. The tribunal has taken into account the fact that the claimant was entitled to ordinary and additional maternity leave. Her claim form describes being asked about returning to work and refers to text messages and in her words being pressured into returning to work. She gave an example also of being told by a manager that staff at the respondent were not happy with the claimant and that they were being made to cover additional shifts. These facts in the claimant's claim form meant that the claimant felt continuously unfairly pressured into returning to work. In her claim form, she states, "I have been discriminated against because I was on maternity leave and was forced to resign because returning to work was no longer an option". These are the facts on liability which the tribunal is working with at this remedy hearing. Whilst the tribunal accepts that Mr Coles gave evidence in an attempt to assist the tribunal, at times Mr Coles' evidence touched upon matters of liability which the tribunal had to remind the parties was beyond the scope of the remedy hearing.

17. In terms of approaching remedy, EJ Garnon correctly identified that it is for the remedy hearing to apply the correct "label" to these facts as outlined in the claim form. In doing so the tribunal makes the following conclusions:

    17.1. Unfair pressure upon the claimant during her maternity leave can constitute unlawful maternity discrimination contrary to s.18 of the Equality Act, see s.18(4): On the facts of this case, pressure including unfair pressure into returning to work amounts to unfavourable treatment as a result of taking an entitlement to maternity leave;

    17.2. When the claimant resigned, she did so because for her returning to work was no longer an option as a result of the Respondent unfairly pressurising her. These facts fit within s.99 ERA. EJ Garnon has already concluded that a claim of unfair dismissal is well founded, and it is this tribunal's decision that the correct description

of that is that the resignation of the claimant was an unfair constructive dismissal within s.95 (1) and s.99 of ERA because the reason or the principal reason for the dismissal related to maternity or the ordinary and additional maternity leave taken by the claimant.

18. The tribunal therefore turns to its conclusions on remedy:

Unfair dismissal:

19. The claimant is entitled to a Basic Award which, by virtue of her 7 years' continuous service at an (agreed) weekly gross pay of £112.50, amounts to £787.50.

Compensatory award for unfair dismissal:

20. It is fortunate that the claimant has been able to mitigate her loss because shortly after the termination of her employment she obtained alternative employment which she acknowledged was at higher rate of pay. As a consequence, the claimant is not seeking any compensatory award based on loss of earnings.

21. The claimant is awarded £300, which is a conventional sum to reflect the fact that by reason of this dismissal, she had lost her statutory right not to be unfairly dismissed, which she cannot regain until she has been in her new employment for 2 years.

Holiday Pay

22. The claimant seeks holiday pay. During the course of evidence, the situation became much clearer. The relevant holiday year period is the same as the calendar year. The claimant makes a claim in relation to both the 2016 year and the part of the 2017 year up to termination.

23. As to 2016, the respondent agreed that the claimant had an annual entitlement of 84 hours (which is 15 hours x 5.6 weeks) and it was also agreed that the claimant could (by virtue of her maternity leave) carry over into 2017 any shortfall in her holiday entitlement from 2016. Relevant pay slips show payments to the claimant during 2016 reflecting a total of 60 hours (4 different payments reflecting 15 hrs). The tribunal finds these to be payments in respect of the claimant's 2016 entitlement to holiday pay. This leaves a shortfall of 24 hours.

24. The respondent gave evidence that a further 9 hours was paid in May 2017 as this was the respondent's understanding at that time of the claimant's residual entitlement from 2016. The respondent has subsequently acknowledged that its understanding was wrong and that it had understated the claimant's full entitlement. The tribunal accepts that there was an additional payment in May 2017 relating to 9 hours holiday pay.

25. This left a shortfall of 15 hours, which the tribunal finds was due and payable on termination, at (an agreed rate of) £7.50 per hour, amounting to £112.50.

26. Turning to 2017, the tribunal finds that there was a single occasion when payment for holiday pay was made prior to termination. This was following a request by the claimant. There are two pay slips which together with the content of the claimant's P45 indicate that the respondent made payment for 30 hours in addition to the 9 hours carry-over from 2016. At the time of payment, an amounting reflecting 30 hours was thought by the respondent to be the amount then due to the claimant for 2017. However, by the time of termination, on 7 July 2017, the claimant's entitlement had risen in effect to 52% (it being 27 weeks

into 2017) of her annual entitlement: the claimant was therefore entitled to payment of 43 hours at the time of termination.

27. This left a shortfall of 13 hours, which the tribunal finds was due and payable on termination, at (an agreed rate of) £7.50 per hour, amounting to £97.50.

Wrongful dismissal:

28. The claimant was not in repudiatory breach of her contract of employment and was entitled to pay during any notice period that the respondent should have given. In her case, it was agreed between the parties that the claimant would have been entitled to 7 weeks' notice. The claimant was not working at the time of termination due to sickness absence but it does not follow that the claimant would have remained on sickness absence in circumstances where the respondent was not in breach of contract:

29. The tribunal therefore finds that the claimant was entitled to 7 weeks' notice of termination. The claimant is awarded a sum to reflect that entitlement less the 2 weeks' notice that she did in fact give and for which she did in fact not work due to sickness and was not entitled to full pay.

30. The tribunal awards the sum of 5 weeks x (an agreed rate of) £112.50 as damages for wrongful dismissal, amounting to £562.50.

One week lying on:

31. Properly understood, this is a claim in respect of the fact that pay is made in arrears so that there needs to be a catch up payment at the end of employment. Indeed, that was the advice given to the claimant by ACAS.

32. In the present case, the pay slip evidence provides the answer. The claimant commenced her maternity leave on (or about) 9 May 2016. Subsequent to that date, she received a further pay slip (with a pay date of 13 May 2016). Initially, the claimant could not understand why, but during the course of evidence and questions from the tribunal the claimant acknowledged that this was payment in arrears.

33. In the tribunal's judgment, this was in fact a payment for what in the claimant's words was her one week lying-on. The tribunal therefore awards nothing in respect of this element of her claim.

Injury to Feelings

34. The level of an injury to feelings award is an inexact science. The case of Vento v Chief Constable of West Yorkshire Police provides a starting point of three bands for potential awards: lowest band of £500 - £5,000; middle £5,000 - £15,000; top £15,000 - £25,000. The guidance provided by these bands has been subsequently updated and developed both by the EAT in the 2010 case of Da'Bell v NSPCC and the Court of Appeal in the case of De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 which invited the President of the Employment Tribunals in England & Wales to issue fresh guidance to adjust the Vento figures for inflation and to incorporate the Simmons v Castle 10% uplift.

35. The tribunal takes into account that the Presidents of the Employment Tribunals have produced Presidential Guidance on the matter, applicable to claims presented on or after 11 September 2017. The present claim was issued on 13 November 2017. The

applicable bands are: lowest £800 - £8,400; middle £8,400- £25,200; top £25,000 - £42,000.

36. In determining the appropriate band, the tribunal has taken into account the guidance in Armitage, Marsden and HM Prison Service v Johnson [1997] IRLR 162 EAT that such award must be compensatory just as an award in relation to loss of earnings should be compensatory. The award needs to be just to both parties and to compensate the claimant fully without penalty or punishment of the respondent. The tribunal takes into account that the award must not be so low as to diminish respect for the equality legislation nor so excessive as to be seen as awarding untaxed riches.

37. The tribunal has also kept in mind that the claimant has had significant trauma in her personal life and it needs to keep separate in its deliberations such elements of the evidence that might properly relate to that.

38. The claimant in evidence reaffirmed that her decision to resign was the result of what she regarded as the unfair pressure imposed by the respondent. The resignation in particular was the consequence of a significant loss of confidence and loss of self-esteem. This is how the claimant described it in evidence and the tribunal has accepted her evidence. Discrimination which results in dismissal is not a trivial matter and is not usually a one off or isolated occurrence. See: Voith Turbo Limited v Stowe [2005] IRLR 228 EAT.

39. The tribunal concludes that this case justifies a middle band award and it reflects the claimant's statements made in her claim form and corroborated in her evidence that she had concluded that returning to work at the respondent was no longer an option. At the same time, the tribunal continued to take account of the fact that the claimant has been able to obtain alternative employment within a short period of time and has to her credit been able to move on with her life.

40. The appropriate award in the tribunal's judgment is in the middle band, which in accordance with the Presidential Guidance falls at a minimum of £8,400. The tribunal considers that the appropriate award in the present case is £8,500. The claimant is also entitled to interest albeit a small sum which the tribunal calculates at the rate of 0.5% since July 2017 (10 months), amounting to £354.16. Interest will accrue separately and additionally on the sum at a rate of 8% per year if not paid within 14 days of the written judgement date. The parties will be sent a separate notice in that respect by the tribunal.

41. No separate award to reflect financial loss or personal injury is appropriate.

EMPLOYMENT JUDGE BEEVER
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

7 June 2018

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