Case Numbers: 1400990/2018
1401140/2018

EMPLOYMENT TRIBUNALS

Claimants		**Respondents**
Mrs M Biggs (1)	**v**	Aethelbert Limited (1)
Ms R Stewart (2)		Sir Benjamin Slade (2)
		Mr A Hamilton (3)

Heard at: **Bristol** **On: 20-24 May 2018**

Before: **Employment Judge C H O'Rourke**
Mr H J Launder
Ms R Keeping

Appearances
For the Claimants: Ms L Harris - counsel
For the Respondents: Mr P Jewell - consultant

JUDGMENT

1. The First, Second and Third Respondents discriminated against the Claimants on grounds of their pregnancy or maternity and are jointly and severally liable for remedy in respect of those acts.

2. The First Respondent (and for which the Second and Third Respondents are also jointly and severally liable):

    a. unfairly dismissed the Second Claimant;

    b. constructively unfairly dismissed the First Claimant;

    c. automatically unfairly dismissed both Claimants;

    d. failed to comply with s.13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, as to consultation and information, in respect of both Claimants; and

    e. failed to pay arrears of four days' holiday pay to the Second Claimant.

3. (Note: Reasons for this liability judgment having been given orally at the conclusion of the Hearing, written reasons will not be provided, unless requested in writing by either party within fourteen days of this Judgment being sent to the Parties.)

REMEDY JUDGMENT

1. The First, Second and Third Respondents are ordered, on a joint and severally liable basis, to pay the First Claimant the sum of £62890.65 (all calculations as set out in the attached schedule).

2. The First, Second and Third Respondents are ordered, on a joint and severally liable basis, to pay the Second Claimant the sum of £87,696.43.

RESERVED REASONS

1. The Claimants had filed schedules of loss [400-402 and 445-447]. The essential details as to rates of pay and dates of employment and maternity leave were not disputed by the Respondents, who had filed counter-schedules to that effect.

2. It fell, therefore, to the Tribunal to consider the following heads of loss for both Claimants (less an award of arrears of holiday pay to the Second Claimant):

    a. Unfair Dismissal – to include a Basic Award, Compensatory Award and any uplift for failure to follow the ACAS Code on disciplinary or grievance procedures.

    b. Remedy for Discrimination – to include loss of earnings attributable to the acts of discrimination and awards for injury to feelings.

    c. Failure to comply with the TUPE Regulations – as set out in the liability Judgment, it was found that the appropriate remedy was thirteen weeks' gross pay, at the agreed figure of £6110.26 for the First Claimant and £6,469.71 in respect of the Second Claimant.

    d. Whether there should be an uplift subject to s.207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA), in respect of failure to follow the ACAS Code.

    e. In respect of the Second Claimant only, four days' net holiday pay, of £321.20.

3. Preliminary Issue. Mr Jewell contended that this Remedy hearing should be adjourned generally, due to a supplementary remedy statement from the Second Claimant having only been served on him at the conclusion of the previous day's hearing and for which, therefore, he had been unable to take instructions. In the alternative, he submitted that the statement should not be admitted in evidence. Ms Harris said that she was surprised by this request, as the statement merely spoke to the Second Claimant's mitigation documents, already included in the bundle and to which she could simply take the Second Claimant in evidence. Instead, the Respondents now had her evidence in advance on these issues and nothing in the statement should come as a surprise to them and they were not therefore disadvantaged. She had not

provided the statement earlier, as the Hearing to that point had been focused on liability.

4. Mr Jewell was asked to set out what detriment the Respondents were suffering by the admittedly late submission of this statement and therefore, if there was a substantive adjournment, what further preparation or research he would be able to do, or instructions he would be able to take, in respect of it, which he was not able to undertake for the period that he had sight of the mitigation documents (pre-dating the Hearing), or yesterday evening and this morning (the Hearing started at 11.20), in respect of the statement. He was unable to show any prejudice of any kind in respect of the statement's contents, or explain how any further time allowed to him under a substantive adjournment would permit him to better prepare his case. The statement was typical of its kind: a recitation by the Second Claimant as to her efforts to find work; setting out the details of agencies she had approached; applications made and rejections received. Any respondent advocate will, in the face of such evidence, seek to challenge that the efforts described are sufficient, or set out alternative methods or sources of job-seeking, not pursued by the claimant (and as proved to be the case in the subsequent cross-examination). The former tactic is simply a matter of challenging the claimant's evidence as to efforts at mitigation (for which a few hours' preparation would be more than ample) and the latter is a question of prior preparation by the respondent, by gathering evidence as to alternative sources of employment and which was not dependent on sight of a claimant's remedy statement and therefore something that could be prepared well in advance of a remedy hearing.

5. The Tribunal did not agree to either an adjournment, or to exclude the statement, for the following reasons:

    a. The evidence was relevant and while the statement was no doubt served late, it did not result in the Respondents suffering any real prejudice, which could not be allayed by an hour or two's perusal of it. (In addition to the time already available to Mr Jewell, he requested and was granted a further half hour, before the remedy hearing commenced).

    b. The Respondents could provide no satisfactory detail as to what any substantive additional preparation time would add to their ability to challenge the statement's contents.

The Law

6. Ms Harris referred us to the following precedents:

    a. **Catanazano v Studio Limited Ltd and two others [2012] UKEAT/0487/11**, which held that where there was an uplift under TULR(C)A 1992 s 207A, for breach of the ACAS Code of Practice, if the only fault was that of the employer, no issue of joint and several liability arose: the liability was solely that of the employer. Had the breach of the ACAS Code arisen as part of an act of discrimination on the part of the manager, however, the outcome would be different, with the manager and the employer being jointly and severally liable for the uplift, as much as the other elements of the claim. It also, however, as not spelt out at

the Hearing, permits that if there are several respondents in an action comprising a complaint of discrimination *and* one or more non-discrimination causes of action (in that case, sex discrimination and unlawful deduction from wages) joint and several liability would apply. On the one hand, the non-discrimination claims are not in themselves subject to joint liability, but on the other hand an employer could potentially evade the protection for employees under joint liability, if that liability did not apply and it could categorise the amount as due under the non-discrimination head. The EAT held that the latter is the more important policy consideration and thus ruled that the tribunal should apply joint and several liability under both heads (although making clear that, either way, the amount is only to be paid once).

b. **Commissioner of Police of the Metropolis v Shaw EAT 0125/11**, which identified three broad categories of case, where aggravated damages might be awarded, namely:

   i. Where the manner in which the wrong was committed was particularly upsetting, by acts done in a '*high-handed, malicious, insulting or oppressive manner'*.

   ii. Where there was a discriminatory motive, known to the claimant at the time, i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity.

   iii. Where subsequent conduct adds to injury – for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that he does not take the claimant's complaint of discrimination seriously.

c. **Zaiwalla and Co and anor v Walia [2002] IRLR 697 UKEAT** confirmed that aggravated damages can be awarded where the defence of proceedings was '*deliberately designed … to be intimidatory and cause the maximum unease and distress to the claimant'*.

The Facts

7. We heard evidence from the Claimants, both of whom had provided sections within their main witness statements in respect of remedy, with the Second Claimant, as set out above, having provided a supplementary witness statement.

8. The First Claimant's evidence was not subjected to cross-examination and we are content, therefore, to accept that evidence, as to injury to feelings and efforts at mitigation of loss to date. The First Claimant had commenced her maternity leave on 9 September 2017 and obtained new employment on 1 June 2018, working part-time, for a gross monthly salary of £552.50.

9. In cross-examination, the Second Claimant set out the following:

    a. She went on maternity leave on 5 December 2017 and has not yet found re-employment. She is currently in receipt of Universal Credit, having never previously been obliged to be dependent on benefits and which was a situation she found to be embarrassing.

    b. On being challenged as to how she had been searching for jobs, she said that she had registered with several on-line agencies, providing them with her CV. They approached her when positions arose within the parameters she had set (initially, a role at a roughly similar level to the one she had been dismissed from, in events organisation, or hospitality generally, but now, latterly, also below deputy manager level).

    c. She was challenged as to whether, bearing in mind the ongoing large-scale development at Hinckley Point, at which, apparently, three new hotels are being built, she had sought roles there. She said that she had applied, through an agency (G4S), but not been given an interview. She had been told that there had been numerous applications for roles there.

    d. It was suggested to her that she had not been very pro-active in such searches, simply looking at one website, when instead she should have been visiting such locations and '*banging on doors*'. She responded by stating that nowadays the vast majority of such work is sourced through agencies, on-line. She also stressed that she had worked for the First Respondent, from leaving school at seventeen, for ten years and this was the first time, since then that she'd had to look for work and that in the intervening time everything had changed. It is, she said, very rare now to go direct to an employer. She also said that '*after everything that had happened to me, I no longer had the confidence I used to. It is such a scary process, returning from maternity leave'.* She pointed out that she had no shortage of work ethic, having returned very quickly to her role with the First Respondent, following the birth of her first child, necessitating placing her child in full-time nursery care.

    e. It was also contended that she had too easily assumed that she'd not been offered a role, or not chased up replies, but pointed out that agencies' standard practice was to state to applicants that if they had not heard from the agency by a certain date, they could assume that they had not been considered for the role.

    f. She was asked about provision of records of job applications since February 2019 and said that she had dropped her phone (containing all such records) down the toilet at that point and despite taking it to a repair shop, had been unable to recover data from it.

    g. It was suggested to her that if she had been as good in her role with the First Respondent, as she now asserts in her CV that she was, she would have been 'head-hunted' by now and she said, with some bitterness that she <u>had</u> been head-hunted, while still employed by the First Respondent, by a former chef at Woodlands, now running his own business, but had refused.

h. It was suggested to her that hospitality roles are or were available at Somerset Cricket Ground (but for which no corroborative evidence was provided by the Respondents). The Second Claimant said that she was unaware of such roles.

10. Closing Submissions. The following closing submissions were made:

a. On behalf of the Respondents, Mr Jewell stated, in respect of the Second Claimant that if she was serious about finding work, she would have made a far greater effort and would have obtained some work by now, even if at a lower salary. On being prompted by the Tribunal as to any submissions on his part as to injury to feelings, for either Claimant, he initially said, in respect of the First Claimant that any such award should be '*limited to three to six months'*. On being reminded that that was not how such awards were calculated, he said that he didn't think that the Claimants had been badly treated, that there certainly should not be any aggravated damages and that the '*total quantum was over the top*'.

b. On behalf of the Claimants, Ms Harris made the following submissions:

i. She referred to both Claimants' schedules of loss.

ii. In respect of unfair dismissal, the claimed Basic Awards were not in dispute.

iii. In respect of the Compensatory Award for the Second Claimant, she stressed that she had been at Woodlands Castle since leaving school and was finding it difficult, after ten years, to re-adjust to the job market, particularly as she now had two children, one aged six and the other about a year old. She had sufficiently mitigated to date and it may be that she will need a couple of months more to find another job, albeit at a lower level and salary, with therefore a continuing loss.

iv. In respect of injury to feelings, the figures set out in the schedules (£15,000) pre-date exchange of witness statements and the evidence given at this Hearing and therefore neither the Claimants nor the Tribunal are bound by them. It should be readily apparent from the Claimants' evidence and their reactions to cross-examination that the discrimination they have suffered has had a devastating effect upon them. On that basis, therefore, the awards should be increased to the maximum permitted under the middle 'Vento' band. The acts of discrimination were not 'one-off', but a series of events, with a huge impact on the Claimants, being particularly damaging for the mothers of new-born/about to be born children. In the Second Claimant's case, she states that she considers that the treatment caused her to go into premature labour, resulting in her baby having to go into intensive care, despite which she felt her employment situation sufficiently serious to have to attend a meeting two days later.

v. Aggravated damages can be awarded in exceptional cases and this is plainly such a case, reliant on **Shaw**. In such a case, both the wrongs committed at the time of employment and subsequent conduct can be taken into account. The Respondents' behaviour at the time was extraordinarily callous and the Second Respondent's personal behaviour was vindictive and deliberate. Subsequently, the Second Respondent's conduct at this Hearing has been atrocious. He has attempted character assassinations of both Claimants, making several outrageous accusations. He has made numerous offensive comments, to include the Second Claimant's baby '*dropping out'* and both Claimants giving birth prematurely because '*they had smoked and drank'* during their pregnancies. He has also threatened, firstly, prior to the Hearing, to report them to the police for reliance on the phone transcripts and secondly, in cross-examination, to similarly report them for alleged theft (**Zaiwalla**). The figures therefore of £3000 set out in the schedules should be regarded as baseline ones.

vi. ACAS uplift – there was clearly a complete failure in this case to conduct the Second Claimant's disciplinary procedure in anyway in compliance with the Code and which was an obvious sham. In respect of the First Claimant, she clearly raised a grievance in her email of 3 January 2018, when she alleged sex discrimination, but the Respondents completely failed to address it, with the Third Respondent asserting that he didn't *'have instructions'*. This left her with no option but to resign and claim constructive dismissal. An uplift of 25% is therefore appropriate in both cases. In respect of such uplift all three Respondents can be held liable.

11. Findings. The Tribunal's findings, in respect of those matters that remain contentious (so excluding the Basic Awards, TUPE awards and the Second Claimant's holiday pay) are as follows:

a. First Claimant's Compensatory Award – as previously stated, as she was not challenged on her evidence of mitigation, her evidence to the point of this Hearing is accepted and her claimed loss of earnings, allowing for mitigation, of £12,533.60 is therefore allowed. In respect of future loss, we accepted that such loss as she is currently suffering would continue for another six months, but, at that point, she could be expected to find employment at the same remuneration level as before her dismissal.

b. Second Claimant's Compensatory Award – we were entirely satisfied that she has made all reasonable efforts to find new employment, particularly considering her returning from maternity leave, now with two very young children and having previously only worked for the First Respondent for the ten years since she left school. We considered Mr Jewell's assertions that she should be out 'knocking on doors' to be a somewhat outdated concept, in an era when the bulk of jobs will be advertised on-line and that in the hospitality industry very many employers, we know from our own experience in this Tribunal, will recruit entirely through agencies. We consider that while the Second Claimant will have been entitled, understandably, for at least a while, to attempt to

seek a new role at a similar managerial level to the one she had, it may be getting to the time where she needs 'to lower her sights' and seek employment at a lower level. We consider that if she does so, she should be able, particularly now as these proceedings are behind her, to find such employment within three months. Perhaps after having found such employment, she will, after some time, sufficiently impress her new employer to gain promotion back to where she was before. Therefore, we continue the Second Claimant's future loss of earnings for a year, less that, after three months, we consider that she should be mitigating such loss by 50%.

c. Injury to Feelings – we consider that the awards in respect of each Claimant should be as set out below:

    i. First Claimant - £20,000. We do so for the following reasons:

        1. Conscious of the Vento guidelines, we concur with Ms Harris that this is a case firmly in the middle band. It is a serious case, but does not merit an award in the top band, such as where there might be a lengthy campaign of discriminatory harassment.

        2. The First Claimant's injury to her feelings from the discrimination she had suffered was obvious from her evidence. She was genuinely distressed during much of her evidence, requiring several pauses for her to gather herself and additional breaks when she became too upset to carry on.

        3. From the moment that the Second Respondent was aware of the Second Claimant's pregnancy (6 October 2017), it was clear that he was deeply unhappy with the prospect of his two 'key' employees being on maternity leave and he decided to engineer their departure from their employment. This 'process' took, for the First Claimant, approximately two months, encompassing several events, including non-payment of SMP (particularly so at Christmas); her being 'abandoned' in Offer Limited; being subjected to a spurious TUPE transfer to the First Respondent; having her grievance ignored and finally the insistence as to a formal resignation from the First Respondent. This was clearly a course of conduct, as opposed to a one-off occurrence (as might occur in the lower band).

        4. All of this was occurring at a time in her life, following the (also premature) birth of her child, when any new mother should be at her happiest, taking her maternity leave without concern, receiving SMP as was her due and looking forward, in due course, to a return to her previous employment. Such factor will inevitably exacerbate the injury to her feelings.

ii. Second Claimant - £25,200. We do so for the following reasons:

1. To the extent that the circumstances are similar, we reiterate the points made at sub-paragraphs c.i.1 to 4 above.

2. The Second Claimant's visible distress when giving evidence was even more pronounced than that of the First Claimant. She said (and we believe her) that the Respondents' behaviour had destroyed her confidence and undermined her dignity. She said that having been previously an extremely independent person, she now entirely lacked confidence.

3. The Second Claimant's treatment was however even more egregious than that meted out to the First Claimant, for the following reasons:

a. She had been a very long-serving and clearly loyal and valued employee (hence the Second Respondent's reaction to her prospective absence).

b. She was subjected to an entirely spurious and vindictive 'disciplinary' process, designed to drive her from the business, at a point both before she gave birth prematurely and within the weeks following that birth, when her baby was in intensive care.

c. She was so concerned about both this process and Offer Ltd's failure to pay her that she felt obliged to request a meeting with the Third Respondent, two days after giving birth, at which she was subjected to discriminatory comments and informed, in the event that she should return to work, she would lose the commission she had previously earned.

d. Aggravated Damages – applying **Shaw** and **Zaiwalla**, we find that this is a sufficiently serious case to merit the award of aggravated damages, of £5000 to each Claimant, for the following reasons:

i. The acts of discrimination were entirely deliberate (perhaps less the Third Respondent's discriminatory comments at the 7 December 2017 meeting) and based on the Second Respondent's vindictive desire to get rid of the Claimants for having, he considered, somehow 'timed' their pregnancies to 'spite' him, something of which the Claimants were well aware, his comments having been reported to them at the time they were made.

ii. The acts were carried out in a 'high-handed' and oppressive manner, with the Second Respondent, in particular, seeking to shelter behind shell companies and bogus TUPE transfers. When

contacted by the Second Claimant, seeking payment of her wages, he referred, in disparaging terms, to her seeking her '*fucking entitlements'* or as stated by both Claimants, would get 'nasty' if confronted. The Third Respondent stated that he wished to avoid putting their concerns to the Second Respondent, as it '*would result in a shouting match'*. While the Second Respondent wished to distance himself from his public comments in the TV interview, in which he made belittling comments about women, asserting that he was doing so just for show, or publicity for his business, his behaviour in oral evidence entirely matched that shown on TV, namely arrogant and misogynistic.

iii. The Second Respondent's behaviour when giving evidence was appalling. He made comments casting aspersions on the reasons for the premature births; he threatened to report the Claimants to the police for theft, without any apparent basis for doing so and he referred to the Second Claimant 'dropping' her baby. This behaviour resulted on one occasion in a rebuke from the Tribunal and had a visibly emotional effect on the Claimants, in the Tribunal room, reducing them to tears and on at least one occasion, obliging them to leave the room. This was unnecessarily offensive behaviour and 'rubbed salt in the wounds'.

e. ACAS Code – even had the disciplinary proceedings against the Second Claimant been genuine, they were conducted entirely without regard to the Code: in particular to identify the details of the charges; provide the evidence in support of them; to hold a disciplinary hearing and to offer an appeal against the decision. In respect of the Second Claimant, she had brought an obvious serious grievance about her discriminatory treatment by the Respondents, which was entirely ignored, giving her no option but to resign. Clearly, both failures by the Respondents were entirely unreasonable and an uplift of 25% is appropriate. We consider it just and equitable to apply this uplift to both the awards for unfair dismissal and injury to feelings (as permitted by Schedule A2 of TULRCA), as the two unlawful acts are intimately linked and cannot be distinguished from each other.

12. Calculation of Awards. The calculation of each award is set out in the attached schedules.

13. Conclusion. The First, Second and Third Respondents are ordered, on a joint and several liability basis, to pay the First Claimant the sum of £62890.65 and the Second Claimant the sum of £87,696.43.

Employment Judge C H O'Rourke
Bristol
Dated 30 May 2019

REMEDY SCHEDULE – FIRST CLAIMANT

Unfair Dismissal

Basic Award – 2 years @ £470.02		£940.04
Compensatory Award		
Prescribed Element		
Loss of earnings from 1 June 2018 to date of Hearing (a few days short of a year)		£19,621.92
Less sums in mitigation		(£7538.32)
	Sub-total	£12083.60
s.207A uplift of 25%		£3020.90
	Total Prescribed Element	£15104.50
Non-prescribed element		
Future loss of six months' salary @ £1658.55 per month		£9951.30
Less prospective mitigation		(£3890.10)
	Sub-total	£6061.20
Loss of Statutory Rights		£450.00
	Sub-total	£6511.20
s.207A uplift of 25%		£1627.80
	Total Non-Prescribed Element	£8139.00
	Total Unfair Dismissal Award	£24,183.54

Injury to Feelings

Award	£20,000.00
Interest at 8% from midway point between 16 January 2018 and 24 May 2019 – 246 days @ £4.38 per day	£1077.48
Aggravated Damages	£5000.00

	Sub-total	£26077.48
s.207A uplift @ 25%		£6519.37
	Total Injury to Feelings	£32,596.85
TUPE Award		£6110.26
	Grand Total Compensation	**£62890.65**

REMEDY SCHEDULE – SECOND CLAIMANT

Unfair Dismissal		
Basic Award – 9 years @ £489 (7 factor)		£3423.00
Compensatory Award		
Prescribed Element (to which sum deduction of benefits will apply, as the Second Claimant has been in receipt of Universal Credit)		
Loss of earnings from 5 September 2018 to date of Hearing (9 months 3 weeks @ £1739.84 net per month)		£16,863.06
s.207A uplift of 25%		£4215.76
	Total Prescribed Element	£21,078.82
Non-prescribed element		
Future loss of 12 months' salary @ £1739.84 per month		£20,878.08
Less prospective mitigation of £869.92 per month for nine months		(£7829.28)
	Sub-total	£13,048.80
Loss of Statutory Rights		£450.00
	Sub-total	£13,498.80
s.207A uplift of 25%		£3374.70
	Total Non-Prescribed Element	£16,873.50
	Total Unfair Dismissal Award	£41375.32
Injury to Feelings		
Award		£25,200.00
Interest at 8% from midway point between 23 December 2017 and 24 May 2019 – 258 days @ £5.52 per day		£1424.16
Aggravated Damages		£5000.00
	Sub-total	£31,624.16

s.207A uplift @ 25%	£7906.04
Total Injury to Feelings	£39,530.20
TUPE Award	£6469.71
Holiday Pay – 4 days @ £80.30 net per day	£321.20
Grand Total Compensation	**£87,696.43**