



EMPLOYMENT TRIBUNALS

At a Remedy Hearing

Claimant: Miss S Settersfield
Respondent: Pine View Care Homes Limited t/a Groby Lodge
Heard at: Leicester
On: 20 December 2018 and, in chambers, on 28 January 2019
Before: Employment Judge Ayre
Members: Mrs B Tidd
Mr C Bhogaita

Representation:

Claimant: In person
Respondent: Mr Raja, Director

JUDGMENT ON REMEDY

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The respondent is ordered to pay to the claimant the sum of **£5,904.96** in respect of her claim for automatic unfair dismissal made up as follows:-

a. Basic Award:	<u>£205.95</u>
b. Compensatory Award:	<u>£5699.01</u>
i. Loss of earnings (including maternity pay):	£5,349.01
ii. Loss of statutory rights:	£350

Total award for unfair dismissal £5,904.96

2. The Employment Protection (Recoupment of Jobseekers' Allowance and Income Support) Regulations 1996 apply to this award as follows:

a. Grand Total:	£5,904.96
b. Prescribed Element:	£5,349.01
c. Prescribed Period:	8 January 2018 to 20 December 2018
d. Excess of Grand Total over Prescribed Element:	£555.95

3. The respondent is ordered to pay to the claimant the sum of **£2,056.11** in respect of a series of unlawful deductions from wages for the period 1 September 2016 to 7 January 2018.
4. The respondent is ordered to pay to the claimant **£10,000** injury to feelings in respect of the unlawful discrimination on the grounds of pregnancy and the breach of section 47C of the Employment Rights Act 1996 (“**the ERA**”).
5. Interest on the injury to feelings award of **£1,025.75** being interest at the rate of 8% for the period from the date of discrimination (18 October 2017) to the calculation date (28 January 2019) a period of 468 days.

REASONS

The issues

6. In a judgment sent to the parties on 29 November 2018 following a hearing on 8-10 October 2018, the Tribunal found, unanimously, that:-
 - a. The claimant was unfairly dismissed;
 - b. The claimant was automatically unfairly dismissed for reasons related to her pregnancy;
 - c. The respondent made an unlawful deduction from the claimant’s wages by failing to pay her for one hour for each period of up to one hour that the claimant was wakened by a colleague to assist with a resident, and therefore working, during each twilight shift worked between September 2016 and 7 January 2018.
 - d. The respondent made an unlawful deduction from the claimant’s wages in the sum of £138.75 in respect of the claimant’s final salary.
 - e. The respondent subjected the claimant to a detriment by reason of her pregnancy contrary to section 47C of the Employment Rights Act 1996, by failing to carry out a risk assessment when asked to do so on 2 occasions; and
 - f. The respondent discriminated against the claimant on the grounds of pregnancy by failing to carry out a risk assessment when asked to do so on 2 occasions.
7. The issues that fell to be determined at the Remedy Hearing were what sums, if any, should be awarded to the claimant in respect of the findings at paragraphs 6 above, save in relation to paragraph 6 d which has already been determined.

The proceedings

8. At the end of the final hearing of this claim on 10 October 2018 the Employment Tribunal fixed a Remedy Hearing and made Orders for the preparation of the case through to the Remedy Hearing.
9. The Orders made orally were confirmed in writing and included Orders that:-
 - a. By 14 November 2018 the claimant was to serve a Schedule of Loss on the respondent and send to the respondent any documents that she wished to rely upon at the Remedy Hearing;
 - b. Also by 14 November, the respondent was to send to the claimant copies of any documents that it wished to rely upon at the Remedy Hearing;
 - c. Witness statements were to be exchanged on 3 December;
 - d. The respondent was to produce a single, paginated bundle of documents for use at the Remedy Hearing, including in that bundle any documents that the claimant wanted to rely upon, and to bring 6 copies of the bundle to the Remedy Hearing. This Order was made specifically with a view to avoiding the delays caused at the outset of the hearing in October when the respondent had failed to produce an agreed and paginated bundle.
10. The parties were informed that the Remedy Hearing was listed for 10 am on 20 December, and that they should arrive by 9.30 am.
11. The claimant arrived on time for the Remedy Hearing. The respondent did not. When telephoned by a member of staff Mr Raja said that he believed the Remedy Hearing was due to start at 10.30 am. Clear directions were given at the end of the Final Hearing on 10 October that the parties were to arrive before 10 am on the 20 December. The Notice of Hearing also listed the start time of the Remedy Hearing as 10 am. Whilst the Tribunal accepts that parties are sometimes mistaken about start times, Mr Raja had also arrived late during the final hearing of the claim in October, and this had led to clear directions being given about start times.
12. The start of the Remedy Hearing was delayed until 10.40 am due to the late arrival of Mr Raja.
13. The respondent produced a remedy bundle running to 46 pages and including, at page 41, a witness statement for Mr Raja. The respondent had sent documents to the claimant in advance of the Remedy hearing, but the documents that had been sent were not the same as those in the bundle before the Tribunal. The claimant was therefore passed the copy of the bundle from the witness stand, to ensure that she had the same bundle as everyone else, with an instruction not to mark it.
14. The claimant had produced her own bundle running to 34 pages. The claimant had sent copies of the documents she wished to rely upon to the respondent but the respondent did not, in contravention of the Orders, include them in an agreed bundle. When asked why he had not complied with the Orders given, Mr Raja stated that he had not included the

claimant's evidence in the bundle he had prepared because "*I thought that was her job*".

15. With a view to avoiding a postponement of the Remedy Hearing, the Tribunal agreed, exceptionally, to work from two bundles – 1 prepared by the respondent and the other by the claimant.
16. The Tribunal heard evidence from the claimant and, on behalf of the respondent, from Mr Raja. The Tribunal found the claimant to be a credible witness and accepts her evidence.
17. During the course of the claimant's evidence and indeed during the Remedy Hearing generally, Mr Raja repeatedly interrupted others and became agitated and disrespectful. At times he spoke over the Employment Judge, Mrs Tidd and the claimant, and had to be repeatedly asked to calm down. On one occasion the Employment Judge had to ask Mr Raja to be quiet 3 times.
18. Mr Raja consistently showed no respect to the Employment Tribunal or the proceedings through his conduct at the Remedy hearing, his preparation for that hearing and his non-compliance with the Orders issued by the Employment Tribunal. On several occasions the Tribunal adjourned to give Mr Raja time to calm down.
19. It appeared to all members of the Tribunal that Mr Raja was not willing to listen to the Tribunal or the claimant during the course of the Remedy Hearing.

Findings of fact

20. The claimant was employed by the respondent from May 2014 until the 7 January 2018 when she resigned with immediate effect. The effective date of termination of the claimant's employment was the 7 January 2018.
21. At the effective date of termination of her employment, the claimant had 3 complete years' service with the respondent.
22. The claimant was born on 2 March 1995 and was aged 22 at the effective date of termination of her employment.

Earnings and mitigation

23. The claimant was paid an hourly rate of £7.50 an hour from April 2017 onwards. Prior to that date her hourly rate of pay was £7.20. At the time of her dismissal the claimant earned £137.30 a week gross. She seldom paid any tax because she was such a low earner, and she was in receipt of tax credits. The claimant's normal weekly pay at the effective date of termination of her employment was, therefore, £137.30 a week.
24. The claimant was paid up until 7 January 2018. She has not worked or received any income from earnings since leaving the respondent's employment.

25. She claims loss of earnings from 7 January 2018 to 4 February 2018 when she started her maternity leave. She also claims loss of statutory maternity pay from the earliest day she could start her maternity leave, the 4th February 2018, until 1 December 2018. She has calculated her statutory maternity pay online on the government website to be £4,819.43 and we accept that figure.
26. The claimant is not claiming for any loss of earnings beyond 1 December 2018.
27. The claimant did not receive any Statutory Maternity Pay or Maternity Allowance. She does however receive income support of £146.20 fortnightly, or £73.10 a week.

Contributory conduct

28. After receiving the claimant's resignation, the respondent wrote to her asking her to reconsider. The claimant gave evidence, which we accept, that had she not resigned, but had instead attended the disciplinary investigation meeting that the respondent wanted to hold, she most likely would have kept her job as she was a good worker.
29. The respondent's evidence at the Remedy Hearing was that the claimant would have been dismissed had she attended a disciplinary hearing. That evidence was different, however, to the respondent's evidence at the Final Hearing of the claim in October, when Mr Raja said that he had asked the claimant not to resign.
30. On balance, in light of the inconsistencies in the respondent's evidence on this issue, we prefer the claimant's evidence on this point. We find that the claimant was regarded by the respondent as a good worker and that it is unlikely that she would have been dismissed had she not resigned.

Unlawful deduction from wages

31. The claimant worked on average 4 shifts a week. On average she was awakened on one occasion on each shift by a colleague to assist with a resident. She worked an average of one hour each shift between midnight and 5 am and did so on average 4 times a week. She was not paid for those hours. Employees who are on the sleeping night shift, or 'twilight shift' as it was also referred to, as the claimant was, are entitled to be paid for hours that they are awake and working, and are paid for an hour if they are woken up during the night, even if they only work for part of that hour.
32. The claimant is entitled to be paid an extra hour for each twilight shift, at the rate of £7.20 an hour from September 2016 to April 2017, and £7.50 an hour from April 2017 onwards.
33. At the Remedy Hearing the respondent produced what he said was a schedule showing the number of sleeping night shifts that he said the claimant had worked. He also produced 5 timesheets showing 5 weeks in which the claimant appeared to only have worked 3 shifts a week. The claimant said that the respondent had deliberately picked the weeks in which she worked the fewest shifts, and that at one point she was working 5 shifts a week.

34. We have considered this additional evidence and concluded that there is no reason for us to interfere with our original finding of fact that the claimant worked on average 4 shifts a week and is entitled to an additional hour's pay for each of those shifts.

Injury to feelings

35. The claimant gave evidence that the respondent, through its behaviour, made her feel that she had no choice but to leave her job. She was already stressed because she had been diagnosed with low levels of PAP A which can slow a baby's growth pattern in pregnancy and cause complications.

36. The claimant was particularly upset by the laughing face emoji that Mr Raja sent to her by WhatsApp message in response to her suggestion that there had been pregnancy discrimination and that he had put her child at risk. Mr Raja behaved in a very unprofessional way towards the claimant.

37. The claimant was worried about money, upset and caused unnecessary stress by the respondent's treatment of her. She did not however see her GP or seek medical advice about how she was feeling, and there was no medical evidence before us at the Remedy Hearing.

38. The claimant's evidence was that she was also upset by the comments that Mr Raja made about her to Chloe Woolman, and which were contained within the respondent's bundle of documents for the Remedy Hearing. These included comments that the claimant was "*very devious*", that she told "*loads of lies*", that she was "*very manipulating*", that "*she will do anything for money*" and that "*we got all the evidence that she lied but the silly judge actually believed her*".

39. We find that the period of detriment suffered by the claimant in respect of the unlawful discrimination and the breach of section 47C of the Employment Rights Act 1996 ran from the 18th October 2017, when the claimant first asked for a risk assessment, to 7 January 2018 when she resigned.

Relevant law

Unfair dismissal

40. Section 119 of the Employment Rights Act 1996 ("**the ERA**") sets out the rules for calculating an unfair dismissal basic award.

41. Section 123 provides that the amount of an unfair dismissal compensatory award shall be:-

"...such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. "

42. The Employment Protection (Recoupment of Jobseekers' Allowance and Income Support) Regulations 1996 provide, inter alia, that where a claimant has been in receipt of certain benefits, those benefits can be recouped from the prescribed element of the unfair dismissal compensatory award.

Unlawful deduction from wages

43. In relation to the complaint of unlawful deduction from wages, Section 24 of the ERA provides that:-

“(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –

(a) In the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13”

Detriment

44. Section 49 of the ERA sets out the remedies that an employment tribunal may award if there is a successful complaint under section 48 of the ERA, including a complaint that the employer has breached section 47C of the ERA.

Discrimination

45. Section 124 of the Equality Act 2010 (“**the EA**”) sets out the remedies available in a successful discrimination claim. Section 124(2) provides that the tribunal may “*order the respondent to pay compensation to the complainant*”. Section 124(6) states that “*The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court...under section 119*”
46. Section 119 of the EA contains the remedies available to the county court where it makes a finding of discrimination and includes, at section 119(4) the power to award compensation for injured feelings (whether or not it includes compensation on any other basis).
47. In determining the amount of interest, the tribunal must take account of the guidelines laid down by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318*, as subsequently revised, and of the Presidential Guidance on Employment Tribunal awards for injury to feels and psychiatric injury, issued in September 2017 and subsequently updated.
48. The Presidential Guidance provides that : “ *Subject to what is said in paragraph 12, in respect of claims presented on or after 11 September 2017, and taking account of Simmons v Castle and De Souza v Vinci Construction (UK) Ltd, the Vento bands shall be as follows: a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.*”

Interest

49. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases. The tribunal is required to consider whether to award interest, even if the claimant does not include a sum for interest in her schedule of loss.
50. Under Regulation 3 interest is calculated as simple interest that accrues from day to day, and the current rate of interest is 8%. Interest on awards of injury to feelings runs from the date of discrimination to the 'calculation date' on which the tribunal makes its decision on remedy.

Conclusions

Unfair dismissal

51. The claimant was aged 22 at the effective date of termination of her employment. She had three years' service and her normal weekly pay (gross) was 137.30. The appropriate multiplier is 1.5. 1.5 times the claimant's weekly pay of £137.30 gives a total basic award of **£205.95**
52. The claimant is also entitled to a compensatory award. She suffered a loss of earnings for the period from 8 January 2018 to 3 February 2018. This is a period of 3 weeks and 6 days. 3 weeks' loss of earnings (3 x 137.30) is £411.90. 6 days' loss of earnings is £117.68 (6/7 x 137.30). £411.90 plus £117.68 gives a total loss of earnings for that period of £529.58.
53. The claimant also lost statutory maternity pay for the period from 4 February 2018 to 1 December 2018 totalling £4,819.43.
54. The claimant is not claiming any losses beyond 1 December 2018, and her total loss of earnings therefore is 529.58 plus £4,819.43 – a total of £5,349.01.
55. To that sum we have added £350 for loss of statutory rights, giving a total compensatory award of **£5,699.01**.
56. We have concluded that it would not be appropriate to make any deductions from either the basic or compensatory awards for unfair dismissal on the grounds of contributory conduct or to reflect the possibility that the claimant would have been dismissed in any event. In our view, the claimant would not have been dismissed had she not resigned, because she was a good worker, and the respondent invited her to rescind her resignation and come back to work.
57. The claimant was in receipt of Income Support and accordingly the Employment Protection (Recoupment of Jobseekers' Allowance and Income Support) Regulations 1996 apply to the award for unfair dismissal.
58. For the purposes of those regulations, the Prescribed Period runs from the day after the Effective Date of Termination – namely the 8 January 2018 – through to the date of the Remedy Hearing – 20 December 2018.

59. The Prescribed Element is the compensation for loss of earnings, namely £5,349.01.

Unlawful deduction from wages

60. The respondent made unlawful deductions from the claimant's wages for the period from 1 September 2016 to 31 March 2017 at the rate of £7.20 an hour for each shift worked by the claimant. There were on average four shifts a week, giving a total deduction of £28.80 a week (4x7.20).

61. 1 September 2016 to 31 March 2017 is a total of 29 weeks and 3 days. 29×28.80 is £835.20. $28.80 \times 3/7$ gives £12.34. So the total value of the unlawful deduction from wages for the period from 1 September 2016 to 31 March 2017 is £847.54 (£28.80 + 835.20).

62. For the period from 1 April 2017 to 7 January 2018 the respondent made unlawful deductions from the claimant's wages at the rate of £7.50 an hour, or £30 a week (4 x 7.50).

63. 1 April 2017 to 7 January 2018 is a period of 40 weeks and 2 days. $40 \times 30 = £1,200$. $30 \times 2/7 = £8.57$. So the total value of the unlawful deduction from wages for the period from 1 April 2017 to 7 January 2018 is £1,208.57.

64. The total value of the unlawful deductions from the claimant's wages is £847.54 plus £1,208.57 – which gives **£2,056.11**.

Injury to feelings

65. The tribunal found that there were two acts of discrimination and detriment contrary to section 47 of the ERA (failing to carry out risk assessments when asked to do so on two occasions) and that the discrimination against the claimant lasted for the period from 18 October 2017 to 7 January 2018, and that her dismissal was automatically unfair for reasons linked to her pregnancy.

66. Although the discrimination lasted for a relatively short period, it came at a time when the claimant was already feeling stressed due to complications with her pregnancy and ultimately led to her losing her job.

67. We were particularly concerned by the attitude demonstrated by Mr Raja when the claimant complained of pregnancy discrimination, sending her WhatsApp messages containing laughing face emojis, clearly indicating that he was not taking her concerns seriously, and mocking them.

68. It cannot be said, in our view, that this is a case which falls into the lower of the Vento bands. Instead we consider that it falls into the middle Vento band, which at the relevant time was £8,400 to £25,200. It would, in our view, be appropriate to make an award towards the bottom of that band, of **£10,000**. The claimant described feeling very upset by the discrimination, but did not consult her GP or require medical treatment

Interest on injury to feelings

69. We have calculated interest on the injury to feelings award at the statutory rate of 8% for the period from 18 October 2017 (the first of the acts of discrimination) through to the 28 January 2019, the date upon which the tribunal calculated the award – a total of 468 days

70. Applying the statutory formula: $468 \text{ days} \times 0.08 \times 1/365 \times \text{£}10,000$ gives a total interest award of **£1,025.75**.

71. The respondent is therefore ordered to pay the total sum of **£18,986.82**.

Employment Judge Ayre

Date: 13 June 2019

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