EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Pastor	**v**	**Jade Angel Limited**

Heard at: London Central
On: 5 April 2019

Before: Employment Judge Hodgson
Mr I McLaughlin
Mr T Robinson

Representation

For the Claimant: in person
For the Respondent: Ms J Evangelou

JUDGMENT

1. **For unlawful discrimination, the respondent shall pay damages of £5,500.00.**
2. **The respondent will pay interest of £993.00**
3. **The respondent shall pay to the claimant a compensatory award of £659.43.**
4. **The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply.**

REASONS

Introduction

1. By a judgment dated 14 May 2018, we found that the respondent's dismissal of the claimant was an act of direct discrimination because of pregnancy and also that it was automatically unfair. We must now consider the remedy.

2. At the hearing, both the claimant and the respondent produced bundles of documents. The claimant gave evidence and relied on a statement dated 15 January 2019. Miss Evangelou, on behalf of the respondent, gave evidence. She relied on two statements being a statement of 5 February 2019, and a further document headed "Final document the tribunal of inconsistencies." Both gave oral evidence.

The issues

3. We clarified the issues to be considered at the start of the hearing. We needed to determine any compensation for injury to feelings, together with any compensatory award. It was also necessary to consider whether any damages should be subject to an uplift pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

4. It is apparent that there has been significant dispute between the parties. That dispute has been wide ranging; however, the issues that we needed to consider, and therefore the evidence that was relevant, were quite narrow.

The facts

5. Where necessary, we have had regard to our finding of fact from the liability hearing.

6. The claimant started her employment with the respondent as a beauty therapist on 27 September 2016. She was dismissed on 3 March 2017.

7. On 20 March 2017, the claimant secured new employment (albeit she described this as self-employment) with Satsung Ltd trading as Himalayan Boutique Spa. The initial contract was for 25 hours per week at a rate of £10 per hour. That employment continued until 15 September 2017. Thereafter, the claimant left and received maternity allowance, as from 16 September 2017 until 15 June 2018, being the full 39 weeks at the rate of £140.98. The claimant indicated that she left on 15 August 2019; however, it is clear that her actual employment did not come to an end until 16 September 2017. We accept the claimant's evidence that had she returned to work at all, she would have returned on 15 June 2018.

8. The claimant gave birth on 17 October 2017, three days after the expected date of 14 October 2017.

9. During much of her employment with the respondent, she worked five days a week undertaking approximately 38 hours worked. Leading up to February 2017, the claimant indicated she wished to reduce the number of days worked because she wanted to pursue opportunities to work as a personal trainer. On 4 February 2017, the parties agreed that she would then work three days a week.

10. There was some dispute before us as to the claimant's salary on the date she was dismissed. We agreed that in January 2017 the claimant was paid the gross sum of £1,322.75. That was for a five-day week. We agreed the relevant calculation for a three-day week was £1,322.75 times 12 months, divided by 52 weeks, divided by five days, which equals a day's pay. On that basis a day's pay was £61.05. It follows that a week's pay was £183.15 and a month's pay £793.65.

11. Her new employment started on 24 March 2017, at the Himalayan Boutique Spa. The initial contract was based on a 25-hour week, which gave a gross annual income of £13,000, which equates with £1,083.33 per month. We have seen the claimant's payslips for all months other than March. We have seen her bank statements. They confirmed that the March payment (net) was £340. This is consistent with working 25 hours a week, as she worked only part of that month. However, it is apparent that she then reduced her hours. Her evidence to us was that she chose to reduce her hours to 15 hours per week, but sufficient work was available, such that she could have continued to work 25 hours a week. From April to August inclusive, the claimant earned £650 (both gross and net) per month. The final pay received after that period was £300.

12. The claimant says that she did not return to the Himalayan Boutique Spa job because she was covering maternity leave, and the person she was recovering returned.

13. The claimant did not return to work in June 2018; she indicated to us she would have returned to work had she remained employed by the respondent. The claimant gave two reasons for not returning to work. The first was a general assertion that affording child care was difficult because it was expensive. The second reason was that, although she could have provided childcare if she obtained a new job, she could not afford childcare to attend at any interviews, and that prevented her interviewing for new employment. Nevertheless, it was the claimant's case that she had applied for a number of jobs and we understand did attend interviews. She told us that the last job she applied for was approximately three months ago. However, the claimant produced no evidence in support. The bundle contained no job applications. The bundle contained no correspondence with regard to attending at interviews. The claimant gave us no detail of any applications that she

had made. It follows we have no direct documentary evidence proving the claimant applied for any job or attended at any interview.

Law

14. Injury to feelings should be assessed as any other claim in tort, subject to the qualification that it is enough that the damage or loss suffered by the complainant was a direct causal result of the discrimination.

15. The Court of Appeal in the leading case of **Vento v Chief Constable of West Yorkshire Police** (No 2) [2002] EWCA Civ 1871, identified three broad bands: (1) a top band between £15,000 and £25,000, for example where there had been a sustained campaign of harassment; (2) a middle band of £5,000 to £15,000 for serious cases falling short of the top band; (3) a lower band of up £500 to £5,000, for example for one-off incidents.

16. The question of the quantification of Vento damages was considered administratively by the Presidents of Employment Tribunals, leading to presidential guidance issued on 11 September 2017 (applying to cases issued on or after that date). The relevant part of the guidance reads as follows:

> **10. 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.**
>
> **11. Subject to what is said in paragraph 12, in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and**
> **where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift).**

17. As the claim was presented on 24 May 2017, the tribunal can use the calculation in paragraph 11. The closest RPI date is June 2017 and the value of 'z' is 272.3. The calculation for the bottom of the lower band is 500/178.5 x 272.34 plus 10%. For the top of the lower band it is 5,000/178.5 x 272.34 plus 10%. This gives the following band (which includes the 10% uplift.

    Lower band - £839 – £8,391

18. The general 10% rise in the level of damages mandated for common law claims for personal injury in April 2013 (**Simons v Castle** [2012] EWCA

Civ 1039) is to be applied to tribunal awards for injury to feelings, the Court of Appeal held that the increase is to be applied: **De Souza v Vinci Construction (UK) Ltd** [2017] EWCA Civ 879. We have taken this into account in reaching our final figure and we have applied it to the band boundaries (see above).

19. In a discriminatory dismissal case, even if the tribunal takes the view that the person would have been properly dismissed (which we don't in this case), the applicant remains entitled to full injury to feelings because of the dismissal: **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615, CA.

20. When calculating the compensation for unfair dismissal, we have applied section 123 Employment Rights Act 1996.

21. In an unfair dismissal case, where an award is made under section 123 (the compensatory award). It is necessary to consider recoupment. Recoupment occurs when the government reclaims from the damages benefits, such as jobseeker's allowance. The claimant should have received maternity pay. Had maternity pay been received, the respondent would have been entitled to reclaim some or all of it. The net result would have been the government would have paid for either all or the majority of the maternity pay. We have to bear in mind the operation of the Employment Protection (Recoupment of Benefits) Regulations 1996 recoupment regulations. Pursuant to the regulation 8, the Secretary of State may serve a recoupment notice requiring the employer to pay total or partial recoupment of jobseeker's allowance, income-related employment and support allowance, universal credit, or income support. There appears to be no provision for the recovery of maternity allowance. This would appear to accord with logic. The employer would be entitled to recovery of maternity pay from the government and so, it would seem illogical that something that can be recovered by the employer, but which is instead, effectively, paid directly by the government, should be recoverable.

Conclusions

22. We should first deal with the claimant's loss of earnings. We will calculate this pursuant to section 123 Employment Rights Act 1996. We accept the claimant had a loss of earnings between 3 and 20 March 2017. This was a period of two working weeks and therefore six days pay at £61.05 per day. The loss is £366.30 for this period.

23. We have considered whether there is a loss of earnings post 24 March until the point the claimant started her maternity leave. During that time she worked for the new employer, Himalayan Boutique Spa. It is apparent that the claimant could have worked 25 hours a week had she chosen, and she would have earned more than she was earning with the respondent company. The claimant chose to limit her hours, as she considered the work too strenuous. We have no reason to believe that the

claimant would not have also limited her hours had she continued to work for the respondent. It is clear that the claimant had previously sought to negotiate, and had negotiated, a reduction in her hours with the respondent. On the balance of probability, we believe that the claimant would also have reduced her hours working with the respondent. We therefore find that there is no loss from 20 March 2017, until the claimant started her maternity leave, on or about 16 September 2017.

24. The claimant did not receive statutory maternity pay from the respondent. Instead, she received maternity allowance for 39 weeks at £140.98 per week.

25. This maternity allowance should be offset directly against any statutory maternity pay. We have considered the effect of recoupment. Had maternity pay been paid by the respondent, it would have been recoverable from the government and hence we can see no loss to the claimant and no proper reason for making an award against the respondent. However, the claimant would have been entitled to an enhanced payment representing 90% of her income for a period of six weeks. It is therefore necessary to work out the maternity allowance of six weeks as against 90% of pay for six weeks. The claimant is entitled to the difference. The relevant calculations are:

    Maternity allowance received – 6 x £140.98 = £845.88

    90% pay for 6 weeks on a 3-day working week – 6×3×61.05×90% = £989.01

    The difference is £143.13, and this sum should be awarded to the claimant.

26. We need to consider whether there is a future loss of earnings. This is dependent upon whether the claimant would have returned to work at all, and if so, whether she has failed to mitigate her loss by not finding alternative employment.

27. We have considered carefully the claimant's explanation for not obtaining alternative employment. We do accept that there may be difficulties in obtaining childcare when attending at interviews. However, the claimant does have a partner who has attended with her at this hearing, and at previous hearings. Whilst we understand that he was working, we do not accept that the potential difficulty in securing childcare in order to attend interviews was such that they were insurmountable. We do not accept the claimant's assertion that the cost of childcare whilst attending at interviews is so prohibitive that she could not mitigate her loss by obtaining a new job.

28. We do accept that it is very likely that her earning capacity is such that obtaining childcare whilst working may have made it very difficult for her to

work at all, albeit she does not allege that this prevented her getting work. Any impact on her ability to secure work as a result of the need to pay for childcare results from economic reality, not from any action by the respondent. The claimant would have had exactly the same earning capacity and difficulty affording childcare had she been working for the respondent. We find, on the balance of probability, that if the true reason the claimant is not working now is because it is not financially viable, she would have reached the same conclusion about the viability of her initial employment, and would not have returned to work with the respondent. If the true reason is not economic reality, there is a total failure to mitigate her loss. The claimant could have obtained alternative, equivalent employment at the same time she would potentially have returned to the claimant's employment.

29. In summary, we take the view that if the claimant had wished to obtain alternative employment, she could have done so, and she would have been able to start at exactly the same time she would have returned to the respondent's employment. We find that either the claimant would never have returned to employment with the respondent, or if she had intended to return, her failure to obtain alternative employment is a failure to mitigate her loss. We decline to award any compensation for the period after June 2018.

30. Finally, the claimant argues loss of statutory rights. The claimant had not reached two years' full employment and so had not gained protection against ordinary unfair dismissal. However, she was approaching a year's employment and therefore was in the process of obtaining statutory rights. Had she taken maternity leave, she would have almost reached two years by the proposed date of return. An award of £400 or more is commonly made for loss of statutory rights, in particular the general right not to be unfairly dismissed. Frequently no order is made, if the two year period had not been reached. We take the view that it would not be right to make no order in this case, but what may be seen as a full loss would be too high, but as the process of securing statutory rights had begun, and she should receive a reasonable proportion and we award her £150.

31. It follows a total compensatory award is £659.43.

32. As the claimant did not have two years' employment she is not entitled to a basic award.

33. As we have awarded loss of earnings in the context of unfair dismissal, we do not make a loss of earnings award for discrimination.

34. Finally, we need to consider the award for injury to feelings.

35. The claimant's evidence is that she felt distressed and upset by the initial dismissal. She describes that she was very saddened, stressed out, and concerned that she may lose her baby. Her evidence says she "Had to visit the hospital a couple of times to check that the baby is fine, as baby

did not move for a day." We have no more detail. We have no medical evidence.

36. At the time of the claimant's dismissal, she was in the early weeks of pregnancy (we understand she was about 7 weeks pregnant) and it is unlikely that she could have been aware of the baby moving at that stage.[1] It follows that the claimant must be referring to a time after the dismissal, and in all probability, a time after she had started her new employment. We have no doubt that the claimant did have some concerns, but her evidence does not establish the exact cause of her concern, and it appears to relate to a time after the dismissal. By that time, any stress may have been ameliorated to some degree by the fact she had obtained new employment, but we have no detail. Whilst we do not doubt that there was some stress, we must have regard to all the circumstances.

37. The claimant does say that she has lost hair at the front of her head as a result of stress. She says that has not grown back. The only medical evidence produced by the claimant is a note of a consultation from 25 January 2019, which says that the claimant is under stress having been dismissed from her job. It does not say which job. It is unclear what the GP knew of the history. It records her son is now 15 months old and that she is awaiting the tribunal's decision. It is said she is not sleeping properly, and that she has nightmares and fatigue. There is reference to being anxious and it states, "Recently found out that her previous employer went to her landlord to ask for information about which has only exacerbated stress as she feels like she is being stalked." It follows it is not clear when the hair loss occurred, and whilst the note makes reference to exacerbation of stress and the ongoing tribunal claim, its conclusions about causation are tentative. It is possible that the claimant has suffered some hair loss as a result of stress, and certainly that is what she believes. We have no doubt that the claimant has found these proceedings stressful, as indeed has Ms Evangalou. However, it is also apparent that the claimant has been able to cope with these proceedings, and she is shown a degree of resilience. The medical record does not adequately demonstrate the cause of the hair loss, and the claimant has not proven the cause on the balance of probability.

38. As regards the tortious act, this was a one-off act without, in itself, any aggravating circumstances. The respondent sought to deny that there was discrimination and suggested that true reason was the claimant's misconduct. It is common for a respondent to continue to dispute alleged acts of discrimination.

39. We take the view that this is a serious act of discrimination. Any act which leads to an employee losing his or her employment is serious, and it is likely to cause significant distress. In this case it has caused distress, albeit the claimant was able to obtain new employment relatively quickly,

[1] We have not received direct evidence on this, but we can take judicial notice of what is common knowledge as to when it is likely that it is possible to feel a baby's movement. Seven weeks is too soon.

and at a level which was in excess of, or at least as much as, that which she was earning with the respondent.

40. Taking all this into account, we reach the view that this one-off act of discrimination falls into the lower Vento bound. It is a serious act of discrimination leading to injury to feelings. We do not consider the injury to feelings to be such that it warrants an award towards the upper end of the bracket, but is nearer to the middle of the bracket we consider the correct sum, having regard to the relevant adjustments set out above, is £5,500.

41. Finally, we have considered whether there should be a uplift pursuant to section 207A. In our approach we have regard to **Allma Construction Ltd v Laing** UKEATS/0041/11 (25 January 2012, unreported). Lady Smith suggests a general approach: 'Does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Was that failure unreasonable? If so, why? Is it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? By how much ought it to be increased? Why do we consider that that increase is appropriate?

42. First, does a relevant code of practice apply. We must first ask whether the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies. The only relevant possible code is the ACAS Code of Practice: Disciplinary and grievance procedures (2015). The code is designed to help employers and employees deal with disciplinary and grievance situations in the workplace. Disciplinary sanctions include those for misconduct and poor performance. It does not apply to redundancy dismissals or non-renewal of fixed term contracts. The code envisages carrying out necessary investigations, informing an individual of potential misconduct, and thereafter holding appropriate meetings, before reaching decisions.

43. It is possible to argue that the code applies in this case. However, we have significant reservations about that. Whilst the respondent has sought to argue that the true reason for dismissal was misconduct, we found that this was not the case. We do accept that there were some concerns about the claimant's employment and there had been some difficulties. There had been discussions following a client complaint about chipped nails. There was some concern raised when a client complained her eyebrow had been burned. However, all these matters had been resolved informally, and had not resulted in disciplinary action. The respondent sought to suggest that these resolved matters were the true reason for dismissal, but they were not. They would not have been considered again, but for the fact that the respondent sought to persuade us that the true reason was not because of the claimant’s pregnancy, but was because of the claimant’s misconduct. It was not. We find that as the respondent's concerns about the claimant’s conduct had been resolved, the ACAS code of practice 2015 was not engaged, at the material time.

44. It follows we cannot say that the respondent has failed to engage with any part of the code of practice when dismissing. Had the respondent started disciplinary proceedings on the basis of alleged misconduct, this would have been a smokescreen designed to obscure the true reason for dismissal, which was because the claimant was pregnant. It would have been a disingenuous process. It cannot be said that the failure to start a disingenuous disciplinary procedure was a failure to apply the code, as it must be assumed that the code is entered into in good faith.

45. It follows we cannot say that the failure to enter into a disciplinary procedure was unreasonable. It was not the claimant's conduct which was of concern to the respondent. It is not unreasonable to fail to enter into a disingenuous procedure.

46. In the circumstances, we reach the view, because this is not a disciplinary dismissal, that no code applies. If we were wrong in that view, we would still take the view that it was not just and equitable to increase the damages for failure to enter into a procedure which would have been engaged to obscure the true reason. We therefore decline to make an award.

47. Finally, we need to consider interest the position is as follows.

48. The Employment Tribunal's (Interest on Awards in Discrimination Cases) Regulations 1996 applies to interest. The interest to be applied is simple interest. It accrues on a day-to-day basis from the date of the contravention. The current rate is 8%. Contravention occurred at the date of dismissal which was 3 March 2017. The interest is calculated 8% until 6 June 2019. This is a period of 824 days. This equates to a percentage of 18.06%. The appropriate interest calculation is £5,500 x 18.06% = £993.

49. It follows that we reach the following conclusions:
    a. basic award nil;
    b. compensatory award £393.13;
    c. injury to feelings £5,500.00 and pounds; and
    d. interest £993.00.

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Employment Judge Hodgson

Dated: 7 June 2019

Sent to the parties on:

12 June 2019

For the Tribunal Office