



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Peart

**Respondent:** Care Preference Limited

**HELD AT:** Middlesbrough

**ON:** 3 May 2019

**BEFORE:** Employment Judge J M Wade  
Mr Brewer  
Mr Stead

**REPRESENTATION:**

**Claimant:** Mr Turner (lay representative)  
**Respondent:** Mr Anderson (consultant)

Note: The written reasons provided below, corrected for error and elegance of expression, were provided orally in an extempore Judgment delivered on 3 May 2019, the written record of which was sent to the parties on 9 May 2019. A written request for written reasons was received from the Respondent on 14 May 2019. The typed draft was provided to me on 18 June, for reasons of resourcing constraints in the Tribunals which are well known. For reasons apparent below, I have sought to expedite approval.

These reasons are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 3 May 2019 are repeated below:

## REMEDY JUDGMENT

Unfair Dismissal (assertion of statutory rights conferred by the Working Time Regulations 1998).

In respect of the Tribunal's decision that the complaint of unfair dismissal succeeds, the Tribunal makes a Compensatory Award comprising lost earnings and employer pension contributions of **£15,263.84**.

Equality Act Section 18 complaint (to which recoupment does not apply)

In respect of the Tribunal's decision that the Claimant's dismissal was also unfavourable treatment because of her pregnancy, the Tribunal awards **£18,000** in respect of injury to feelings. **£15,263.84** in respect of pecuniary losses is subsumed in the unfair dismissal award above. The Tribunal awards **£2661.11** in interest on both sums.

Recommendation by consent

Within fourteen days of this Judgment being sent to the parties the Tribunal recommends that the Respondent provide to the Claimant a "to whom it may concern" reference and provides the same in respect of any request in writing from any prospective employer.

Recoupment

The prescribed element is **£4104.38**

The prescribed period is 26 April 2018 to 31 July 2018.

The balance for recoupment purposes which must be paid by the Respondent to the Claimant pending recoupment is **£31,820.57**.

The total award to the Claimant is **£35, 924.95**

# **REASONS**

Introduction

1. This hearing follows a reserved Judgment upholding complaints of unfair dismissal and discriminatory dismissal, sent to the parties on 27 February 2019. The reasons for that reserved Judgment were before us today in a relatively short bundle, also containing payslips, schedule of loss and counter schedule and other limited relevant documents.
2. The issues that the Tribunal identified in previous orders for today's hearing were:
  - 2.1 whether the Claimant sought re-engagement or reinstatement (the primary remedy for unfair dismissal);
  - 2.2 whether she sought any recommendations following her successful Equality Act complaint;
  - 2.3 to what extent if any she had lost earnings as a result of her dismissal;
  - 2.4 to what extent she had suffered injury to feelings arising from the dismissal;
  - 2.5 whether in respect of any Equality Act award it was in the interests of justice for the Tribunal to add interest.

3. This is a case where the Respondent has been represented throughout by professional representatives. Ms Peart has been represented by her partner, Mr Turner, a lay representative. The Tribunal has a duty to put the parties on an equal footing and to properly direct ourselves on the relevant law, including the principles that apply to an award of compensation in circumstances such as these.

#### Evidence

4. We have heard today from Ms Peart again, on her own behalf, and from her partner Mr Turner. We have also heard from her friend, Ms Armstead, and her sister, also Ms Peart. Written statements were also provided on the Claimant's behalf by friends Ms Floyd, and a Ms Young. This evidence went to the impact of her dismissal on the Claimant.
5. We did not hear any evidence on this occasion from the Respondent: there was no evidence lead to suggest that the Claimant has not mitigated her loss, or steps which, had she taken them, would have done so.

#### Reinstatement or re-engagement

6. The Claimant said at the outset in her statements and submissions to the Tribunal that she did not seek reinstatement or re-engagement.

#### Recommendations

7. In this hearing the Claimant sought, and the Respondent agreed, a recommendation in the terms above, to obviate the injury to her feelings arising from her dismissal.

#### To what extent if any had the Claimant suffered lost earnings as a result of her dismissal?

8. We do not repeat wholesale our previous findings but it is convenient to draw on both those and the Schedule, Counter Schedule and emails sent on the Claimant's behalf in preparation for this hearing.

#### The period before maternity leave was to have commenced

9. The Claimant was dismissed from her employment on or around 25 April 2018. She was earning at that time an annual salary of £19,000. We reject the assessment of earnings set out in the Respondent's counter schedule. This was a salaried position with a regular monthly salary. It is not sound to assess loss by an averaging calculation of the last three months' pay wages. The last three months of the Claimant's employment were irregular as described in our liability judgment. They were at a time when the Claimant had had a period of two weeks' absence for stress and pregnancy related illness. The last regular earnings were evidenced by a pay slip from February 2018: a gross salary of £1583.33; and her net monthly earnings of £1341.30. That was net of employee pension contributions and we can find from other documentation that the Respondent company was making employer pension contributions of 2% in relation to qualified earnings in 2018/19. From April 2019 onwards that rate was increased to 3% on qualified earnings. Qualified earnings, from the documentation before the Tribunal, were earnings above £5,824 a year.
10. To assess loss, we have to assess what would have happened, had the Claimant not been dismissed. That assessment arises whether we assess loss for the purposes of a compensatory award for unfair dismissal (such amount as the Tribunal considers just and equitable 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); or on normal tortious principles for her Equality Act complaint (see Section 119 (2)(a)).

11. In our judgment, had the Claimant not been dismissed, she would have continued at work in May, June and July of 2018; she would have worked her contracted hours (but no more, beyond the working time regulations hours limit). We know that she feared complications with the pregnancy, but happily the complications she feared did not in fact emerge. She was not signed unfit for work other than for the short period above. On balance it is likely the Claimant would have earned her ordinary salary. Her net loss in May, June and July of 2018 is therefore £4023.90, and a 2% employer's pension contribution, £80.48. That addresses the period 25 April to 31 July of 2018.
12. That is a period when the Claimant quite understandably sought out Universal Credit and was paid such, albeit payments were delayed. The Recoupment Regulations will apply to that period of loss if it forms part of a Compensatory Award for unfair dismissal. That was the Claimant's primary case. The Secretary of State will seek to recoup from that money the money that it has paid out in Universal Credit, but we will come on to that shortly.

#### The period of maternity leave

13. We then come to the period 1 August onwards. We accept the Claimant's case that she would have commenced her maternity leave on or about that time; her baby was late on this occasion, arriving on 24 August or thereabouts, but she would still have commenced leave at the beginning of the month we find. We deploy our industrial knowledge of the difference between statutory maternity pay and statutory maternity allowance, because the Claimant, from her schedule, ultimately received the full entitlement to the latter from the Secretary of State. On the other hand, had she remained employed she would have received 90% of her earnings for the first six weeks as Statutory Maternity Pay. She was dismissed a few days before the qualifying date for being paid statutory maternity pay by her employer. That is an aggravating factor in this case. It worsened her financial security at a time when she needed it most, and the loss that she sustained as a result of that loss of six weeks' salary at 90% was a sum of £987.49, plus a gross pension loss of £37.17.
14. The underlying figure for the calculation of statutory maternity allowance was included by Mr Anderson quite properly in his schedule on behalf of the Respondent and it is around £140 throughout for thirty nine week (and without the amelioration in the first six weeks above). We can conclude that has been paid to the Claimant by dividing the total statutory maternity allowance by 39.
15. For the period of 33 weeks after the initial six weeks from the beginning of August 2018 then, the Claimant had no loss.
16. Coming on to the period towards the end of her maternity leave, the Claimant's evidence was that she would have taken a full 12 months' maternity leave. We accept that evidence. She would have done as she did on her two previous maternity leaves and, as is often the case, used her entitlement to accrued paid holiday for the year's leave (5.6 weeks) to fund some of that additional maternity leave. We accept Mr Ryan's submission that on the termination of the Claimant's employment there is no entitlement to the accrual of future holiday pay as such, but the practicality of the use of holidays to fund leave assists us in our assessment

of what would have happened, absent a dismissal. In these circumstances we accept the Claimant's evidence about when she would have returned to work, **and** that she would have received from the Respondent paid holiday to which she was entitled towards the end of that period of maternity leave to bridge the earnings gap of three months. She would then have utilised her savings to cover the remaining two months or so. The paid holiday period would have resulted in wages of £1734.66. That is 5.6 weeks' holiday pay. In addition to that she would have received £61.38 gross in pension contributions.

17. We have considered whether, had the Claimant been employed throughout this period of maternity leave instead of being dismissed, during the six week 90% phase would she have benefitted from employer pension contributions? Given the earnings threshold, we have concluded the sum is a matter of pence and have not therefore included it in our loss assessment as a separate item.

The period after maternity leave – what would have happened?

18. Since the birth of their son, the Claimant and her partner have been on a steadily evolving journey of understanding his particular needs, which are complex and present different challenges to the needs of many babies. Those circumstances would have happened without the dismissal, or at least it was not suggested otherwise. The respondent therefore suggested to the Claimant that as a result of those needs, she would not have been able to return to work, not because of any action of the Respondent in dismissing her, but solely because of the her son's complex needs. We heard some evidence about that, and about the type of childcare that can be sourced for children with complex needs. We accepted that evidence, to the effect that in early years, a childminder or nursery is equally viable for the Claimant's son, as for all infants, with all agencies and parents working to achieve suitable care; we also accepted that care would not, in this early phase, involve additional cost for the Claimant.
19. Taking all these circumstances into account we find that had the Claimant not been dismissed when she was in April 2018, she would have returned to work after her year's maternity leave came to an end. The Claimant is a mother who had had two previous children and returned to work after re-arranging childcare to enable her to undertake care work at considerable distance from her home for 48 hour shifts. That requires careful organisation, which the Claimant had managed for some time. We have concluded that she would have done the same for herself and her third child, notwithstanding his complex needs. We also recognise that in this endeavour she would have been supported by her partner.
20. Had her employment not been terminated then, at the time that it was, and in circumstances we have found to be an unfair dismissal and a contravention of the Equality Act, she would have returned to the Respondent in or around August or September 2019. That time is yet to come.

The future period from the date of this hearing taking into account what has happened

21. The Claimant's evidence today is that she is not in a fit emotional state to contemplate returning to work now or indeed in the near future. The Claimant has had a very unpleasant knock to her confidence and to her resilience. We are going to say more about that when addressing injury to feelings. Suffice it to say we accept her evidence today she is not in that position, nor would she wish to end prematurely a maternity leave which would otherwise have been 12 months, albeit

her financial circumstances have become strained. She wishes to have the time with her new baby.

22. How long will it be, after the judgment of this Tribunal, before the Claimant recovers to the position of earning a salary of £19,000 a year? The Claimant has exhibited considerable resilience in pursuing this case alongside the other challenges she has faced, and she has a track record of organising difficult matters including her career. We consider that she will recover to do so after six months from the time when her maternity leave would have ended. We therefore assess a net amount of £8053.76, representing six months' salary to which of course she would be entitled to add the pension contributions at the 2019/20 rate, a sum of £285. In our judgment it is more likely than not that she will be in new paid employment or in new self-employment, or other earnings at the level of her previous earnings.

### Injury to feelings

23. The gist of the unchallenged evidence from the Claimant's friends, her partner and her family is that prior to these events she had always exhibited resilience and determination and confidence in managing herself and her family. We accept that evidence, which included that a deterioration in her emotional state started before her dismissal. We know from our liability findings that on 8 March 2018 there was a telephone conversation after which the Claimant became worried about her employment. Unsurprisingly when dismissal came it was a severe blow to her confidence, to her resilience, and to her general emotional state and in particular, and we have indicated this as an aggravating factor, the timing was such that it made her financial circumstances just about as bad as they could be. For this reason while unease about treatment at work causes strain, dismissal was bound to have a considerable additional effect and we accept that it did.
24. In the Claimant's own unchallenged words: *"I constantly try and tell myself that these should be good times with my new baby, the girls growing up and doing well at school, my partner living with us full-time since getting out of the armed forces. Instead I go to bed dreading the next day, the bills that will come and the fact that I don't have the energy or confidence to get through each day. I truly feel like an emotional wreck that is constantly letting my children down as I can no longer face or afford to attend the children's groups they once loved. The whole Tribunal has had a massive impact on me being the worst part being I had to take my baby into the court environment a setting that is unfamiliar with him as well as bringing all my emotions to the surface and having to speak about my ordeal. I believed this was all but over when the Tribunal published its findings only to have the decision challenged which once again added unnecessary stress to me. I said in the last hearing I just wanted to put this to bed so that I can try and move forward with my life and fix myself and all the damage and stress that this has caused my family and to be debt free again and looking forward to the rest of my life.*
25. Nobody could have put things better on behalf of the Claimant. Her partner Mr Turner quite properly took us to the guidance on Vento which says this: *"the matters compensated for by an injury to feelings encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (Vento and the Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102).*
26. It is clear to us that the financial difficulties in which she was put from her dismissal have had a profound effect on the Claimant's emotional state. It is properly a case

that falls in the mid band of Vento. That aspect was not challenged by the Respondent at all. We have to assess this matter on the Claimant's evidence, to the extent that injury to feelings arise from the Respondent's contravention, and were reasonably foreseeable. The contravention was the dismissal and it is of course foreseeable that emotional strain, including concerning finances, arises from dismissal generally, but particularly from someone at this stage in their pregnancy. We have to exclude and disentangle the effect of the strain of the proceedings themselves, and the arrival of a new baby, with all the challenges that presents.

27. It is clear to us that the dismissal has had a profound effect on the Claimant. We have assessed it as such and make an award of £18,000, which in the middle of the band, taking into account the evidence in front of us. We were also helped by Mr Anderson providing us with examples which might assist in his counter schedule.

#### Interest

28. We have conducted our assessment of pecuniary loss and made a Compensatory award in respect of unfair dismissal, and the same sum is due in respect of the Equality Act contravention, but justly there cannot be duplication. We could perhaps have done the assessment in the opposite order, in which case recoupment would not have applied.
29. The total of the amounts that we have announced to the parties is £33,263.84. To that we exercise our discretion to award interest. There was no resistance to that from the Respondent. The rate is 8% from the date of dismissal, that is the sum of £2,661.11; it is almost exactly a year since the Claimant was dismissed.
30. The total sum awarded then is £35,924.95.

#### Concluding remarks

31. On this occasion we have been able to announce to you directly with everybody present the contents of our Judgment. Reasonably quickly you will receive a short summary of the awards that we have made to provide all the parties with written clarity. If you need the reasons for those awards to be typed then you will need to make a request within fourteen days.
32. The Recoupment Regulations to which we have referred will appear in our Judgment and those Regulations have the effect of taking the period that we have identified as the recoupment period, that is before the commencement of maternity leave, when Universal Credit was claimed. That part of the award is not to be paid to the Claimant but to be paid to the Secretary of State. The remainder of the award is to be paid to the Claimant.
33. We have also considered the effect of taxation, taking into account that our total award is above £30,000, typically exempted from tax, and we have largely worked with net loss figures. In these circumstances the excess is some £5,924.95 (from which there will be some recoupment). It is unlikely, taking into account the tax year and allowances when payment is likely to be made, that any tax will be due and we have not therefore undertaken a grossing up exercise.
34. The other matter is that Mr Anderson did not make any application to stay the hearing today. (The application he did make and our decision is explained in separate written reasons). There is correspondence that has been sent to the

Tribunal and indeed to the Employment Appeal Tribunal at around midnight last night which we understand indicates an appeal against the Tribunal's decision not to reconsider its liability judgment. That of course is a matter which will take the ordinary course.

35. For the benefit of the Claimant and her lay representative who do not have the knowledge and experience of Mr Anderson, we have delivered our remedy judgment and the written record will be sent to you shortly. The sums become due and interest starts to accrue if payment is not made within 14 days of the Judgment being sent. Should enforcement of that Judgment be sought in the county court, the Respondent may seek a stay of enforcement pending its appeal, and the outcome of its appeal, which of course cannot be known.
36. At this stage, given the effect of financial strain which we have found above, and without wishing to add to that strain, but to give information which will already be known to the respondent, in the short and medium term this Judgment may not be paid. Our reconsideration Judgment is subject to an appeal and the outcome of that cannot be known.
37. It is a matter of regret to this Tribunal that these proceedings have taken the time they have. Sadly their future conduct is not a matter over which we have control.

Employment Judge JM Wade

Dated: 21 June 2019