EMPLOYMENT TRIBUNALS

Claimant: Mrs A L Sanderson

Respondent: Bespoke Digital Agency Limited

HELD AT: Manchester **ON:** 24 May 2019 and 9 July 2019 (in chambers)

BEFORE: Employment Judge Slater
Mr Q Colborn
Mr S T Anslow

REPRESENTATION:

Claimant: Ms J Connolly, counsel
Respondent: Mr S Lewinski, counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant the sum of £23,120.48, plus interest of £2010.58, as compensation for the acts of discrimination found in the judgment on liability sent to the parties on 4 March 2019.

2. No separate award is made for unfair dismissal since compensation for loss of earnings has been awarded as compensation for discrimination.

REASONS

Issues

1. This was a remedy hearing following a judgment on liability sent to the parties on 4 March 2019 and confirmed on reconsideration at a hearing on 23 and 24 May 2019.

2. The claimant sought compensation for financial loss and injury to feelings for the acts of discrimination which the tribunal had found to occur. Although the claimant had also succeeded in a complaint of unfair dismissal contrary to sections 94 and 99 of the Employment Rights Act 1996, no separate award was sought for unfair dismissal.

3. The issues to be determined in deciding on the compensation to be awarded were:

3.1. Whether the claimant had taken reasonable steps to mitigate her loss to the date of the hearing.

3.2. The amount of any future loss.

3.3. What, if any, deductions should be made in calculating loss for the cost of childcare.

3.4. Whether any deduction should be made in determining financial loss on *Chagger* principles.

3.5. What amount should be awarded for injury to feelings.

Procedural matters

4. The remedy hearing followed a hearing on reconsideration.

5. There was an issue as to whether the respondent should be allowed to run a *Chagger* argument on remedy, this not having been pleaded, and as to whether Mr Brennan should be allowed to give all the evidence set out in his new witness statement. The tribunal decided, after hearing submissions about these issues, that the respondent should be allowed to run the *Chagger* argument, on the basis of the findings of fact already made by the tribunal. The tribunal decided that paragraphs 3-20 of Mr Brennan's witness statement should be deleted since these were contrary to case management orders made and were an abuse of process, seeking to go behind findings already made by the tribunal.

6. The tribunal heard evidence and submissions on remedy but did not have time to make a decision within the time allocated on 24 May 2019 so advised the parties we would meet in chambers on 9 July 2019.

7. The claimant had not made any reference to childcare costs in her witness statement or schedule of loss. The matter was raised during the hearing. The claimant estimated the cost of childcare at £50 per day, but did not have precise information as to the likely cost. The respondent had brought no information on this to the hearing. The judge raised the question of whether there was any government assistance for childcare costs to which the claimant would be entitled. The parties did not have any information on this at the hearing.

8. An amendment was made at the hearing to the amount claimed on the schedule of loss for monthly pension loss.

9. Following the hearing with the parties, but before the tribunal met in chambers, the respondent, on its own initiative, wrote to the tribunal on 14 June 2019. The respondent wrote about childcare costs. They provided information from a government website about government contribution to costs of 20% of costs up to a maximum of £2000. They also provided information as to the cost of nursery childcare local to the claimant. There were a range of prices. The respondent's solicitors pointed out that, from this information, it appeared the claimant's assessment of nursery costs at £50 per day was possibly a little on the high side. The respondent's solicitors also provided clarification about pension contributions, writing that the respondent made contributions in respect of the claimant's pension throughout her maternity pay period of 22 January 2018 until 22 October 2018. They provided a letter from their payroll providers to support this. The letter said nothing about pension contributions being made for the period from the claimant's dismissal until the start of her maternity leave. The respondent's letter was copied to the claimant.

10. The claimant's solicitors wrote on 21 June 2019. They invited the tribunal to disregard the entirety of the respondent's solicitors letter. They suggested it was unreasonable for the respondent to make additional submissions at this stage, after the tribunal had heard evidence and submissions at the hearing. They wrote that responding to the submissions would put the claimant to additional cost which she could not afford and, in those circumstances, they did not intend to respond to the issues raised within the respondent's solicitors letter.

11. As noted below, the tribunal considered that, as a matter of principle, the cost of childcare should be taken into account when calculating the claimant's financial loss. Since the information provided by the respondent about childcare costs was in the claimant's favour, suggesting that the cost of childcare was slightly less than she had estimated and also providing information about the government subsidy which would affect the calculation of loss to the claimant's favour, the tribunal decided that it was in the interests of justice to take account of this information.

12. The tribunal also considered it was in the interests of justice to take account of the information that pension contributions had been made throughout the claimant's maternity pay period. If the claimant disputes that this information is correct, she should apply for a reconsideration of this judgement.

Facts

13. We rely on facts found in our judgment on liability and make the following further findings of fact.

14. The effective date of termination was 1 December 2017. The claimant had planned to start her maternity leave on 22 January 2018. Her baby was born in February 2018. The claimant does not claim any financial loss for her maternity pay period which would have been 22 January to 22 October 2018.

15. The claimant began looking for work in August 2018. This was handing out 3 CVs to local bars and restaurants for temporary work initially. The claimant then began searching for work in the digital marketing field and making applications.

There is evidence, which we accept, of some applications each month up to and including the month prior to the hearing in May 2019. The respondent provided details of approximately 50 jobs they considered the claimant would be qualified for. We accept the claimant's evidence that she had applied for 15 of these, she had not seen four of them and others she considered too far for a reasonable commute, taking account of the need to collect her child from nursery before closing time.

16. We accept the claimant's evidence that she was looking for full-time work and would, when she got work, find a nursery place for her child 5 days per week. As noted above, she did not come to the tribunal with precise details of nursery costs but estimated these to be around £50 per day. The information provided by the respondent, following the hearing, as to nursery costs, suggests that nurseries local to the claimant charge between £41 per day (if paying for a full-time place) and £52 per day. The average cost appears to be around £45 per day. Taking account of the government subsidy of 20%, this would make the weekly cost after subsidy £180.

17. There is evidence that the claimant gave her husband some assistance with his kitchen fitting business. However, we do not consider the evidence suggests that the claimant was occupied to any significant degree with that business. Mr Brennan accepted that the claimant, whilst employed by the respondent, had, with his knowledge, given her husband some assistance. We find that the level of assistance she was giving was incidental and not incompatible with full-time work. We find that the references by the claimant's husband in marketing type material to a family business and team were "puffery" on his part in the presentation of the business to the outside world and do not persuade us that the claimant working in his business.

18. The claimant gave some additional evidence at the remedy hearing, which we accept, relating to her feelings and health in the period from 1 August 2017 until after her dismissal, during the course of these proceedings. The claimant made reference to her medical records. In particular, reference was made to notes recorded on 6 November 2017 when the doctor diagnosed acute reaction to stress. This included worries about the effect the situation at work was having on the baby and fear of losing her job. Medical notes after the claimant was dismissed in December 2017 record the claimant feeling somewhat better, with pressure lifting and some feeling of relief. However, we accept the claimant's evidence in her witness statement that stress, worry and anxiety continued to the end of her pregnancy. We find that, after her dismissal, she was worrying about how they would, as a family, manage. We accept that the proceedings have caused the claimant considerable financial, physical and emotional stress and pressure.

19. We refer back to our judgement on liability in paragraphs 20 and 21 where we record that, after Ms Grice's comments on 1 August 2017, the claimant spoke to her GP and then telephoned the CAB. The CAB notes recorded the claimant as saying that her manager shouted at her down the phone saying "does this mean you will be off again." Although the claimant has said in these proceedings that Ms Grice did not shout, the seeking of advice and expressing concern that her employer was trying to dismiss her indicates that the claimant was very upset and worried following the telephone call with Ms Grice.

20. The amounts for net pay and employer's pension contributions which we use in our calculations were agreed.

21. We find, based on the letter from the respondent's payroll providers, referred to in paragraph 9, that the respondent made pension contributions during the period 22 January 2018 until 22 October 2018. We find that no contributions were made in the period from the effective date of termination until 22 January 2018. No contributions were made after 22 October 2018.

Submissions

22. The representatives both made oral submissions. We summarise the principal points.

The respondent's submissions

23. In relation to childcare costs, Mr Lewinski submitted that the claimant should be compensated for what she has lost; being put into the same net position as if she had not suffered discriminatory behaviour. As a matter of principle, the tribunal should not knowingly award the claimant a significant windfall. If the claimant works, she needs childcare.

24. In relation to the *Chagger* argument, Mr Lewinski submitted that there was a prospect that the claimant would have been dismissed in any event, minus the discrimination. He referred to paragraph 62 of *Chagger*: the gravity of the alleged discrimination is irrelevant to the question what would have happened had there been no discrimination. Mr Lewinski suggested there was a fairly high chance that the claimant would have been dismissed because of general work issues; he placed the percentage chance at 50-75%.

25. Mr Lewinski submitted that, had the claimant really applied herself to job hunting, she would have found work earlier; before the end of maternity leave. He suggested that her failure to do so may have been because she wished to spend more time with her son or because of her involvement in her husband's business.

26. In relation to injury to feelings, Mr Lewinski submitted that the evidence showed that the claimant's situation got significantly better when she had been dismissed. He submitted that the termination of employment did not cause the upset; it was the disciplinary process. Mr Lewinski submitted that anything over £10,000 would be beyond what was appropriate or reasonable given the short period the claimant was very upset (2 months) and her apparent recovery.

The claimant's submissions

27. The claimant sought compensation of £15,000 to £17,000 for injury to feelings, being just below the mid-point of the middle *Vento* band to reflect the extent and duration of the impact of discrimination on her.

28. Ms Connolly submitted that *Chagger* was akin to *Polkey*; we should look at the nature of the discrimination and consider whether we could reliably reconstruct what would have happened absent that discrimination. She agreed with Mr Lewinski that the gravity of the discrimination was irrelevant to this exercise. Ms Connolly

submitted that this was not the sort of case where the tribunal could assess the risk that the claimant would have been dismissed, absent discrimination.

29. The burden of proving failure to mitigate loss is on the respondent. The respondent had not discharged the burden of showing that the claimant was unreasonable in not taking further steps.

30. The childcare point may be a good point in principle but, since the respondent did not come with costings or put the claimant on warning about this point, Ms Connolly invited the tribunal to make no set off.

The Law

31. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is "the amount which could be awarded by a county court…under section 119". Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: "an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)". The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases) is to compensate for loss caused by the act of discrimination. There is no limit on compensation for discrimination.

32. The Court of Appeal in *Chagger v Abbey National plc [2010] IRLR 47* held that, in assessing compensation for discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss. The gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination.

33. In relation to compensation for injury to feeling, we have regard to the guidelines in *Vento v Chief Constable of West Yorkshire Police (no.2) [2003] IRLR 102.* We note, in particular, the guidance that awards are compensatory and not punitive. *Vento* sets out the bands that we must consider. The Presidents' Guidance sets out the bands, adjusted in accordance with case law and to take account of changes in the value of money. The applicable guidance in this case, since the claim was presented on 22 March 2018, gives a middle band of £8400 to £25,200.

34. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%.

Conclusions

Financial loss

35. We conclude that the claimant took reasonable steps to mitigate her loss in the period beginning towards the end of her maternity leave up until the hearing on 24 May 2019. Although the claimant could have done more to obtain work, the obligation is only to take reasonable steps to mitigate her loss. Particularly given she had a small child to cope with, we consider that the claimant did enough to reasonably mitigate her loss. It would not be reasonable, or financially viable, to expect the claimant to have her child in childcare before she got a job.

36. We reject the suggestions that the claimant was not mitigating her loss because she was, instead, working in her husband's business or choosing to spend time with her young child. As noted in our findings of fact, we found that any help the claimant provided to her husband was incidental and not incompatible with full time work.

37. We conclude that, with reasonable efforts, the claimant could expect to obtain employment at a comparable level within about 3 months of 24 May 2019. The evidence we saw suggests that there are quite a lot of jobs available in the area in the field in which the claimant is qualified. Since we are doing the calculation of past loss at 9 July 2019, this means that we award a further 7 weeks future loss from 9 July 2019.

38. We conclude that, as a matter of principle, it is correct to take account of the childcare costs which the claimant will incur. She would have incurred these had she remained in employment with the respondent. We consider the correct approach to calculating compensation for loss of earnings is to award the difference between the childcare costs and her earnings. We use the figure of £180 per week for childcare costs after government subsidy.

39. We reject the submission that a deduction should be made under *Chagger* principles i.e. on the basis that there was a chance which could be assessed that the claimant would have been dismissed without discrimination due to concerns about her performance. Whilst there were some concerns about her performance, we do not consider these were sufficiently serious that there was any prospect that the respondent would have dismissed her, without unlawful discrimination, before the planned start of her maternity leave on 22 January 2018. We conclude that the respondent would not have dismissed during maternity leave and, after maternity leave, would not have relied on historical past concerns. The evidence of concerns with her work is not sufficient to make us consider that we can properly assess the chance of non-discriminatory dismissal at some time after her return from maternity leave. The claimant would have acquired the right not to be unfairly dismissed on 9 January 2019. From that point, the respondent would be constrained to act fairly and not only in a non-discriminatory fashion. We consider that there is too high a degree of speculation required to make an assessment of the chance that the claimant would have been dismissed by the respondent without unlawful discrimination within the period of loss for which we are awarding compensation to the claimant.

40. We found that pension contributions had been made throughout the period 22 January to 22 October 2018 but no contributions were made in the period from the

claimant's dismissal until her maternity leave began. The claimant had been dismissed on 1 December 2017. In our calculations, therefore, we include pension loss for a period 1 December 2017 to 21 January 2018 and then for the period from 23 October 2018 until the end of the future loss period.

Injury to feelings

41. In deciding on compensation for injury to feelings, we are seeking to compensate the claimant for the injury she suffered as a result of the acts of discrimination which we found to have occurred. These acts are the act of dismissal on 1 December 2017, the comments of Ms Grice on 1 August 2017 about the claimant being off work, the decision to dismiss the claimant in the period 28 November 2017 and 1 December 2017 without having a disciplinary meeting with the claimant where she was unable to attend because of pregnancy compilations exacerbated by stress and, on 19 January 2018, Ms Moville dismissing the claimant's appeal against dismissal.

42. The CAB notes indicate that the claimant was very upset and worried following the telephone call with Ms Grice.

43. The medical evidence of the most severe stress reaction comes at a period sometime after the first act of discrimination and before the decision to dismiss i.e. the notes from 6 November 2017. Given that this was some months after the act of Ms Grice on 1 August 2017, the only act of discrimination relied upon prior to 6 November 2017, it does not appear that this severe stress reaction can be wholly attributable to that act of discrimination.

44. The claimant did not learn of the next acts of discrimination until her dismissal on 1 December 2017. The medical evidence suggests that her mood then improved somewhat. However, as noted above, we accept that stress, worry and anxiety continued to the end of her pregnancy. We found that, after her dismissal, the claimant was worrying about how they would, as a family, manage. We accept that the proceedings have caused the claimant considerable financial, physical and emotional stress and pressure.

45. Taking the claimant's reaction to all the acts of discrimination which were found, we conclude that the injury to feelings is properly assessed as being in the middle *Vento* band. The applicable band at the time the claimant presented her claim was £8400-£25,200. Had we been able to attributable the claimant's most severe reaction to the acts of discrimination which she relied on and we found, our award might have been higher. We conclude that the injury suffered, as a result of the acts of discrimination we found, was serious but properly falls in the lower part of the mid-band. We conclude that an award of £12,000 for injury to feelings is appropriate for all the acts of discrimination found taken together.

Interest

46. We see no reason to depart from the normal interest rate of 8% on awards. For the loss of earnings, the starting point is normally interest from the midpoint from the start of the period of loss to the date of calculation. In this particular case, most of the loss occurred after the period of maternity leave. We consider it appropriate,

because of this, to adjust the midpoint to being between a date 7 weeks prior to the start of maternity leave and the calculation date.

47. In relation to injury to feelings, interest normally runs on the entire period beginning with the act of discrimination. Here, we are awarding compensation for injury to feelings for a number of acts of discrimination. The first one was on 1 August 2017 and the next in the period 28 November to 1 December 2017. We consider it appropriate to start interest running on a date between these and take the date of 9 October 2017 for these purposes.

Calculation

Financial loss to date of calculation (9 July 2019)

7 weeks from dismissal to beginning of maternity leave

7 x £339.92	=		£2379.44
23 October 2018 to 9 July 2019 (37 weeks)			
37 x £339.92	=	£12,577.04	
Less childcare costs			
37 x £180	=	£6660.00	
			£5917.04
Pension loss for 7 weeks pre ML plus 37 weeks post ML			
44 x £33.42	=		£1470.60
Total financial loss to 9 July 2019			£9767.08

Future financial loss – 7 weeks from 9 July 2019

7 x £339.92	=	£2379.44	
Less childcare costs			
7 x £180	=	£1260.00	
			£1119.44
Pension loss 7 x £33.42	=		£233.96
Total future financial loss			£1353.40

Interest on past financial loss

8% on £9767 for 22 weeks (from mid point between 4 Sept 2018 and 9 July 2019)

8/100 x 22/52 x £9767 = £330.58

Interest on compensation for injury to feelings

8% on £12,000 for 21 months (from 9 October 2017 to 9 July 2019)

8/100 x 21/12 x £12000 = £1680.

Total compensation

Loss to 9 July 2019	£ 9767.08
Future loss	£1353.40
Injury to feelings	£12000.00
	£23120.48

Total interest

Interest on financial loss	£330.58
Interest on injury to feelings	£1680.00
	£2010.58

Employment Judge Slater

Date: 18 July 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

24 July 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2405377/2018**

Name of case(s): **Mrs AL Sanderson** v **Bespoke Digital Agency Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **24 July 2019**

"the calculation day" is: **25 July 2019**

"the stipulated rate of interest" is: **8%**

MRS L WHITE
For the Employment Tribunal Office