Case No: 1600619/2017

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
DR A DAVIES	**V**	**CRESCENT DENTAL LTD.**

HELD AT: **CARDIFF** **17, 18, JULY 2018**

SWANSEA **29, 30, 31 JANUARY 2019**

BEFORE: **EMPLOYMENT JUDGE W BEARD**
MEMBERS: **MRS J KIELY**
MR M PEARSON

REPRESENTATION:

FOR THE CLAIMANT: **Mr Manley (Counsel)**

FOR THE RESPONDENT: **Mr Bromige (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is: The respondent is ordered to pay the claimant the sum of £61,590.52 in compensation of discrimination as calculated below:

Combined losses	£48,954.31
Grossing up for tax	£12,636.21
GRAND TOTAL	**£61,590.52**

REASONS

Preliminaries

1. The claimant was represented by Mr Manley the respondent by Mr Bromige both of counsel. This judgement should be read in conjunction with the tribunal's judgment of February 2019. The tribunal is to consider the appropriate remedy for our previous findings of detriment on the grounds of the claimant having made a protected disclosure. The tribunal heard oral evidence from the claimant on her own behalf. We were provided with a bundle of documents, running to 169 pages, we were also referred to some documents used in the substantive hearing.
2. The following issues were identified by the parties as requiring resolution by the tribunal.

2.1.1. Should there be a deduction from any award on the grounds that the claimant contributed to the termination of her contract.
2.1.2. Is it inevitable that the claimant's contract would have been terminated lawfully in any event? Mr Bromige described this as a point analogous to a ***Polkey*** deduction in unfair dismissal but related it to the just and equitable award required by statute.
2.1.3. What is the correct weekly net rate for calculation of losses?
2.1.4. What items should the claimant give credit for against her losses? the respondent contends that the claimant should give credit for statutory maternity allowance.
2.1.5. What was the correct level of award for injury to feelings?
2.1.6. Was the claimant entitled to aggravated damages and if so at what level should the award be made?
2.1.7. Should the claimant have a separate award for loss of statutory rights, the claimant relied on losing maternity pay.

3. The respondent did not contend that the claimant had failed to mitigate loss, and the claimant conceded that the statutory uplift did not apply to

4. Once the tribunal outlined the principles of its findings on remedy orally the parties agreed the figures set out above.

The Facts

5. The claimant had been considering other employment in the Swansea area before the termination of employment in June 2017. She had already, unsuccessfully, sought employment with one other practice.

6. Following the termination of her contract with the respondent on 23 June 2017 the claimant sought and gained employment as an associate with the Crendon practice in September 2017. Had the claimant's contract not been terminated by the respondent or had moved smoothly from one NHS practice to another the claimant would have been contractually entitled to NHS maternity pay. This is set out (pp. 83/84) which indicates that the employer of a "dental performer" of two years, which the claimant was, would be entitled to claim back maternity pay paid to the claimant. However, the second requirement was that the last 26 weeks of NHS work should be continuous. The claimant had a period approaching 13 weeks out of work, that broke the continuity and meant the claimant could not be paid maternity pay by the new practice under the scheme.

7. Under the scheme the following is also set out (pg 84) "*claims for maternity pay in respect of a performer who is entitled (SMA) as a self-employed individual will have an amount equal to this deducted from the amount paid. If the performer is not entitled to SMA or receives less than £145.18 from DWP, evidence in the form of a confirmation letter from DWP also needs to be provided."*

8. The claimant took just two weeks maternity leave before returning to work receiving £290.36 in statutory maternity allowance. The claimant indicated that she had given no thought to the length of maternity leave she would have taken had her contract not been terminated before 23 June 2017. However, she considers, now, that the likelihood was that she would have taken nine

months leave. The tribunal conclude that with availability of maternity pay it is vanishingly unlikely that the claimant would have limited herself to two weeks leave and that on the balance of probabilities she would have taken no less than six months and a maximum of nine months maternity leave.

9. The claimant was contacted by Ms Anyadike after her wedding in July of 2017 and after the birth of her child in February 2018. There was an indication that the respondent had been, to some extent, monitoring the claimant's social media traffic. However, this monitoring was of the open media that the claimant used on a professional basis. The claimant told us that she felt the respondent was "not quite stalking" her but that this was intrusive, and she found it distressing. In respect of the monitoring the tribunal accept that the respondent had a legitimate interest in the claimant's professional work given that she was pursuing a claim against it. However, the tribunal consider there are sinister undertones in Ms Anyadike contacting the claimant about her wedding and the birth of her child given the ongoing dispute and the poor relationship between the claimant and Ms Anyadike in particular.

10. The respondent had also provided further evidence to the General Dental Council in respect of a complaint that had been made about the claimant by the respondent. That complaint had been in abeyance whilst tribunal proceedings were underway. The tribunal's judgment was promulgated towards the end of February 2019. The GDC wrote to the claimant in April 2019 for her evidence. In cross examination the claimant accepted that the process meant that the respondent would also have been written to by the GDC at about that time. The claimant's perception was that the respondent was providing information as a form of victimisation after the judgment. The tribunal consider there is insufficient evidence for us to draw that conclusion and it is more probable than not that the respondent was responding to a request by the GDC. As to the contents of the additional evidence we do not consider it appropriate to comment further given the outstanding professional conduct issues.

The Law

11. Section 49 Employment Rights Act 1996 provides:

> *(1) Where an employment tribunal finds a complaint of (*detriment because of a disclosure*) well-founded, the tribunal—*
>
> *----------*
>
> *(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.*
>
> *----------*
>
> *(2) Subject to subsection ------(6) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—*
>
> *(a) the infringement to which the complaint relates, and*
>
> *(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.*
>
> *(3) The loss shall be taken to include—*
>
> *----------*
>
> *(b) loss of any benefit which he might reasonably be*

> *expected to have had but for that act or failure to act.*
> *----------*
> *(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.*
> *(6) Where—*
> *----------*
> *(b) the detriment to which the worker is subjected is the termination of his worker's contract, and*
> *(c) that contract is not a contract of employment,*
> *any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A.*

12. On that basis the tribunal is required to consider whether it is just and equitable to make any award. If it decides to make an award it must be evaluated using general principles applied in tort cases. That means that the particular act must have caused the loss in question and, as best as money can do this, the claimant is to be put in the same position as he would have been but for the unlawful conduct. The principle of taking your victim as you find them is also applicable. Mr Bromige submits that we should consider that subsection 2(a) which relates loss to the infringement, in this case, requires us to consider the approach set out in ***Devis & Sons v Atkins [1977] IRLR 340*** that there should be no compensation where there has been no injustice (he argued that in this case the mixed motivation of the respondent means the claimant would be dismissed in any event, his ***Polkey*** argument). In ***Chagger v Abbey National and Hopkins [2009] EWCA Civ 1202*** the Court of Appeal upheld the EAT's decision that an employment tribunal should assess the likelihood that an employee would have been dismissed even if there had been no discrimination and to then assess any consequential reduction in compensation necessary, this in effect follows the ***Polkey*** approach in unfair dismissal. The tribunal see no reason why in respect of detriment arsing from a public interest disclosure (which Elias LJ accepted equated to a form of discrimination in ***NHS Manchester v Fecitt & Ors [2011] EWCA Civ 1190***) we should not follow a similar reasoning.

13. In ***Virgo Fidelis Senior School v Boyle [2004] ICR 1210*** it was made clear that detriment falling within section 47B ERA 1996 should be treated as a form of discrimination. As such the tribunal should consider awards for injury to feelings (applying the ***Vento*** guidelines), and where appropriate aggravated damages.

14. In ***Scope v. Thornett [2007] IRLR 155 the Court of Appeal*** reminds the tribunal of its need to engage in a certain amount of speculation in the appropriate circumstances (albeit in that case dealing with unfair dismissal and not detriment) in the words of Pill LJ at paragraph 34:

> *"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to*

> *the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."*

And at paragraph 36

> *"The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."*

15. Aggravated damages can be awarded if there is an aggravating feature in the actions of the respondent which increase the injury to the claimant. It can arise in manner of the wrong itself, it can arise out of the motive for the wrong and/or it can be based on subsequent conduct. It is compensatory to the claimant and not punishment for the respondent. It can be awarded in case where there is any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress. It is important to remember the danger of overcompensating when dealing with injury to feelings awards and aggravated damages as both (generally) compensate for intangible injuries e.g. anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem; care should be taken to avoid double recovery. ***In HM Land Registry v McGlue UKEAT/0435/11*** Langstaff J held:

> *"A Tribunal in examining whether there is a case for aggravated damages has to look first as to whether objectively viewed the conduct is capable of being aggravating, that is aggravating the sense of injustice which the individual feels and injuring their feelings still further. The three categories which are set out by Ms Wheeler all give examples rather than an exhaustive list of the behaviour which will qualify under each head. We note however that the emphasis is one of degree. Thus under (a) the word 'exceptionally' is used to qualify the word 'upsetting'. The expression 'high-handed' and 'insulting' occurs in a general phrase involving four words, all of which characterise the phrase, including "malicious" and "oppressive". Aggravated damages certainly have a proper place and role to fill, but a Tribunal should also be aware and be cautious not to award under the heading "Injury to Feelings" damages for the self same conduct as it then compensates under the heading of "Aggravated Damages" It must be*

> *recognised that aggravated damages are not punitive and therefore do not depend upon any sense of outrage by a Tribunal as to the conduct which has occurred."*

Analysis

16. Should there be a deduction from any award on the grounds that the claimant contributed to the termination of her contract? Mr Bromige submitted that as the tribunal had found that the reasons for the termination of the claimant's contract were multifactorial and the other reasons demonstrated blameworthy conduct on her behalf. On that basis he asked the tribunal to say that this contributed to the termination of the claimant's contract. Whilst in principle Mr Bromige's submission has force in practical terms it is not possible for the tribunal to treat this multifactorial situation as severable for the purposes of calculation. The respondent gave a false reason for the termination of the claimant's contract. The tribunal are aware that the respondent had in mind, in a general sense, the history of the claimant's employment with it, however that included the discrimination complaints which we found were advanced in response to the claimant's disclosure. We have heard no evidence from the respondent as to the truth, or otherwise of those allegations. In the circumstances the tribunal is unable to separate the strands of that Gordian Knot.

17. Is it inevitable that the claimant's contract would have been terminated lawfully in any event? Whilst the tribunal do not consider that the claimant's contract would inevitably have terminated, we consider that there was certainly a prospect that it would. The claimant had herself been looking for alternative employment. This had arisen from her own recognition that her relationship between herself and her employer and between herself and other with whom she worked was not as it should have been. In addition, the respondent had concerns, particularly reflected in the "card game" episode, that the claimant did not properly recognise the nature of her status within the hierarchy and its importance to the smooth running of the practice. In our judgement given that the claimant was pregnant and therefore would have wished to secure employment before giving notice and that the respondent was not noted for its swift response to problems, we consider there was a30% chance that the claimant's employment would have ended in any event.

18. What is the correct weekly net rate for calculation of losses? The claimant had 11 months of earnings. In her calculations she had extrapolated that to 12 months and made the division into weekly sums to reflect her earnings. The respondent argued that 11 months of actual earnings were sufficient for the weekly figure to based on those actual sums. The tribunal concluded that the least mathematical manipulation that takes place the better for the purpose of such a calculation and as such we preferred the method advanced by Mr Bromige on behalf of the respondent.

19. What items should the claimant give credit for against her losses? We did not, however, find favour with Mr Bormige's suggested construction for statutory maternity pay. His position was whether or not the claimant received the statutory maternity allowance, or not, the sum should be deducted from nine months of lost earnings. We found fault with that argument in two ways:

19.1. Firstly, the claimant did not take maternity leave for nine months. Therefore, in terms of the credit the claimant gives the respondent is for working that period. Consequently, the claimant has reduced her losses for that period to the advantage of the respondent. To reduce them further on a notional basis would be advantage the respondent further.

19.2. Secondly, the construction which Mr Bromige places on the wording i.e. that SMA will be deducted automatically whether received or not does not reflect the second sentence of the relevant terms. That demonstrates that the position will alter if evidence is provided of a lower or nil sum of SMA is claimed by the performer.

20. What was the correct level of award for injury to feelings? In our judgment this fell into the lower end of the middle band of ***Vento***. Termination of a contract is a one-off event but with significant ongoing consequences, any award should reflect this. The claimant was pregnant when the contract was terminated, this would be bound, objectively, to increase the blow particularly as it would affect contractual rights to maternity pay. In addition to this the false reason given for termination at the time was one which impacted on the claimant's professional conduct. This would objectively increase the claimant's fearfulness about the future. On this basis the tribunal consider that the correct award is one of £10,000.

21. Was the claimant entitled to aggravated damages and if so at what level should the award be made? In our judgment it is of particular importance that the respondent not only accused the claimant of professional failure as the reason for dismissal but maintained that at the hearing pressing it with force. This clearly falls into the category of oppressive in our judgment given its particular relationship to the claimant's professional status, we reflect that it is the deployment of this line in the tribunal proceedings which falls into that category separately from the injury to feelings aspect we have set out above. In addition to this we consider that there was conduct which we have described as having sinister undertones. In our judgment this was certainly capable of and did increase the claimant's sense of injustice in this case and can properly be described as falling into the category of malicious. On that basis we consider it is appropriate to award the claimant £3,000 in aggravated damages.

22. Should the claimant have a separate award for loss of statutory rights, the claimant relied on losing maternity pay. We considered that this is a specific award which recognises the time it takes for an employee to regain some employment rights e.g. two years for unfair dismissal. The claimant relied on maternity pay, however that was, in her case, a right specifically emanating from contractual terms not statutory terms. In our judgment it would not be appropriate to add a sum for loss of statutory rights in those circumstances.

23. Having dealt with the non-pecuniary losses as set out above it is necessary to draw a distinction between the losses which arise as injury to feelings and those which arise from aggravated damages. The injury to feelings award is properly subject to the reduction of 30% as it is intimately related with the chance that the claimant's contract could have been terminated lawfully at some point. However, the award for aggravated damages does not arise in that way but arises out of the conduct of proceedings, and the post termination conduct of the respondent. On that basis we consider there

should be no deduction in respect of aggravated damages. In contrast all other damages should be reduced by 30% to reflect the chance of that lawful termination. Once that figure is calculated the sum should be "grossed up" to reflect the tax burden on the claimant.

24. The parties having calculated and agreed the relevant figures the tribunal orders the respondent to pay to the claimant the sum of £61,590.52 (sixty one thousand, five hundred and ninety pounds and fifty two pence) in damages.

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Employment Judge

Date: 28 November 2019

JUDGMENT SENT TO THE PARTIES ON 29 November 2019

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FOR THE TRIBUNAL OFFICE