Case Number: 3304684/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Subashini Davuluri	v	(1) Pharmvit Limited (2) Mr Khalid Latif

Heard at: Watford

On: 29-31 July, 12 September, 30 October and (in private) 16 December 2019

Before: Employment Judge Hyams

Members: Ms A Brosnan
Mr D Sutton

Appearances:

For the claimant: Mr Andrew Watson, of counsel
For the respondent: Dr Austen Morgan, of counsel

RESERVED JUDGMENT ON REMEDY AND COSTS

1 The respondents must pay the claimant (1) £26,604.00 by way of compensation for breaches of section 39 of the Equality Act 2010, read with section 18 of that Act, and (2) £2,691.83 by way of interest on that sum. The respondents are jointly and severally liable in that regard.

2. The first respondent must pay the claimant £656 by way of compensation for failing to give her a statement in writing of the reasons for her dismissal.

3. The respondents are jointly and severally liable to pay 60% of the claimant's costs, on the standard basis. If the amount of those costs is not agreed by the parties then it must be determined by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles.

REASONS

Introduction

1 In a reserved judgment sent to the parties on 12 August 2019, we determined that the claimant's claims in these proceedings were well-founded as far as liability was concerned. We held a remedy hearing on 12 September 2019, having arranged it provisionally at the end of the hearing on 31 July 2019. The remedy hearing was adjourned to 30 October 2019 for the reasons stated in our case management record made following the hearing of 12 September 2019. On 30 October 2019, we had time only to hear the parties' submissions on (1) several questions of law and on the facts relating to the losses of the claimant and the amount of compensation that she should receive for the breaches of obligation which we found had occurred, and (2) an application for costs which was made by the claimant. We therefore adjourned the hearing to the first date available for us to deliberate, form conclusions and prepare these written reasons. That date was 16 December 2019.

2 In our reserved judgment on liability, we wrongly stated that Dr Morgan had acted for the claimant and Mr Watson for the respondents. That error does not appear above, and we now formally acknowledge the error in our reserved liability judgment. If the parties wish, we will re-issue the judgment with the correction made.

Remedy

3 The issues of law relating to remedies which were the subject of submissions on 30 October 2019 were these:

3.1 whether or not we could or should take into account the means of the claimant's husband, Dr Kolluri, in deciding whether it was unreasonable of the claimant not to move (with her husband and daughter) to Luton to take up the offer of employment there, made by Bristol Laboratories on 22 February 2019 to start on 18 March 2019 (assuming, that is, that we accepted her evidence that she had been offered shift work there, making it impossible in practice to travel to and from work if the claimant did not move from her current rented home in Harrow);

3.2 whether we could lawfully decide that the claimant's failure to move to Luton at that time meant that she had failed to make reasonable efforts to mitigate her losses if we did not have evidence before us of the availability and cost of rented accommodation in Luton at that time; and

3.3 whether our finding of a breach of section 18 of the Equality Act 2010 ("EqA 2010") added anything to our finding that the claimant was dismissed unfairly contrary to section 99 of the Employment Rights Act 1996 ("ERA 1996"), read with regulation 20(3)(a) and/or (d) of the Maternity and Parental Leave etc Regulations 1999, SI 1999/3312.

4 Having reconvened on 16 December 2019 and considered the above issues and matters, we came to the following conclusions. We deal with the issues of law first.

The effect of a breach of section 18 of the EqA 2010

5 Mr Watson's submissions on the applicability of section 18 of the EqA 2010 included one to the effect that we should formally find in favour of the claimant that section 18 had been breached. In fact, we had already done that. The issue we left to be considered at the remedy hearing was whether that finding of liability added anything to the finding of a breach of section 99 of the ERA 1996. We concluded that it did indeed add something, namely

5.1 the possibility of an award of compensation for injury to feelings;

5.2 the possibility of personal liability on the part of the second respondent; and

5.3 the consequential possibility of an award being made against both respondents, on the basis that they were jointly and severally liable.

Issues of law relating to mitigation

6 The two issues of law stated in paragraphs 3.1 and 3.2 above were identified by Mr Watson on the basis that the answer to the questions in those subparagraphs should be, respectively

6.1 we could not lawfully take into account Dr Kolluri's means in deciding whether or not the claimant could in practice have been expected to move to Luton in order to be able to work at the Bristol Laboratories factory there; and

6.2 we could not lawfully decide that the claimant had failed to make reasonable efforts to mitigate her losses by failing to move to Luton at that time in the absence of evidence before us that suitable accommodation was available for her, her husband and her daughter to move to there.

7 We could find nothing directly relevant in the case law on those points. It is, however, clear from *Nohar v Granitestone (Galloway) Ltd* [1974] ICR 273 that removal costs are a recoverable loss. In any event, we could see no good reason why we had to consider the claimant's circumstances in isolation from

those of her husband: they were living together and they would jointly benefit from her earnings, just as they jointly benefitted from his earnings.

8 We were referred by Mr Watson to paragraph 9-079 of the 20th edition of *McGregor on Damages*. We read that paragraph and the following two paragraphs. We also read the relevant part of the decision of Farbey J in *Rabilizirov v A2 Dominion London Ltd & Ors* [2019] EWHC 186 (QB). We saw the first sentence of paragraph 9-079 as being concerned with the situation in which a claimant takes active steps to mitigate his or her loss and thereby incurs costs which would not otherwise have been incurred. That is materially different from the situation in which an employee turns down a job offer. We saw as more helpful the first sentence of paragraph 9–081, namely:

> 'in assessing reasonableness, while it has been said that the claimant is "not bound to nurse the interests" of the defendant, it has also, and for long, been said that the claimant must act with the defendant's as well as his own interests in mind.'

9 Mr Watson's submissions on the issue of mitigation of loss included these (at the end of paragraph 36 of his skeleton argument for the hearing of 30 October 2019):

> "I. The standard required of a claimant is not high, but saying that C ought to have moved house (with or without her family) is putting the bar far too high.
>
> j. It is perhaps for this reason that there is no reported case in either *Harvey* or *McGregor* in which a tribunal or court has decided that a claimant acted unreasonably in failing to mitigate their loss by not moving them and their family to a new area in order to take up a job offer."

10 However, the absence of such authority is probably, as it is said in paragraph 9-079 of *McGregor*, that:

> "Whether the claimant has acted reasonably is in every case a question of fact, not of law."

11 Accordingly, there would be case law on the issue only if an appellate court had concluded that it was perverse to come to a particular conclusion (whatever it might have been) on the issue.

12 As for the question whether we could, in the absence of evidence of the availability of suitable premises to rent in March 2019, lawfully conclude that the claimant had failed to make reasonable efforts to mitigate her losses by failing to move to Luton in order (if in fact it was necessary) to be able in practice to work

at Bristol Laboratories' Luton factory, it seemed to us that if we were satisfied by the evidence of the respondents as to the current ready availability of such property, then, given our knowledge of the area and the likelihood that property would be available, we could lawfully infer that there was suitable property available in Luton at the time. Alternatively, we could lawfully conclude that, if the claimant did not look for such, then she failed to make reasonable efforts to mitigate her losses. In fact, as we describe in paragraph 25 below, the claimant had looked for property at the time, as she had given oral evidence to us at the end of the hearing on 13 September 2019 that she had done so.

13 We were referred by Mr Watson to a number of cases and passages in *Harvey on Industrial Relations and Employment Law* ("*Harvey*") on the amount of the compensation that should be awarded for injury to feelings (including aggravated damages) and we considered them carefully before coming to our conclusions on the financial compensation that the claimant should receive. We saw no need to refer to those cases and passages in detail here.

The relevant facts

14 Turning, then to the evidence relating to the claimant's losses, we made the following findings of fact.

15 The claimant was unable to find replacement employment after being dismissed and before her baby was born. Her baby was born on 2 April 2018. She did not claim compensation for her losses from then until 1 January 2019. She sought replacement employment from then onwards, and was fortunate to be offered a job at a salary which was slightly higher than that which she was paid by the first respondent before her dismissal from the first respondent's employment. That offer was made by Bristol Laboratories Limited, and was made formally in writing (by email) on 22 February 2019.

16 At that time, the claimant's husband was negotiating for a renewal of the lease on the property in Harrow which he and the claimant were renting. The property was let under an assured shorthold tenancy. The current tenancy was going to end on 1 April 2019. The claimant's husband had agreed to sign a new lease, but had not done so.

17 The claimant's second witness statement, dealing with issues relating to the remedy which the tribunal should award, was signed on 27 August 2019. In it, she said this about the possibility of moving to Luton in March 2019:

> "18. It was after I was granted a visa extension in November 2018 that I began to actively pursue work again. I started to contact recruiters (pages 31, 33, 36-38 of the mitigation bundle), and applied for all the positions that I came across and matched the employer's requirements in terms of my background and work experience. These involved roles

that required experience in document control, batch review process, updating the training matrix, preparing and reviewing SOPs, archiving master, obsolete documents and MHRA replies, issuing batch manufacturing records and batch packaging records, issuing log books and handling change control. I applied for the positions which were in London and also which were commutable from London. I also informed the recruitment consultants that I was willing to relocate if necessary provided the new area was commutable from London as my husband worked near Euston. I applied for a number of positions online and contacted potential employers by email and phone (pages 32-140 and 151-281 of the mitigation bundle). I also answered a number of calls regarding potential employment from both recruitment consultants and potential employers. ...

20. I was interviewed at Bristol laboratories on 14th February 2019. During the interview they said that the working hours would be in shifts of 6am-2pm and 2pm-10pm alternating every week. On 22nd February 2019, they offered me a job at Bristol laboratories, Luton. They also wanted me to join on 18th March 2019 (pages 110-111 of the mitigation bundle). In order to work at Bristol labs, however, we needed to relocate to Luton as I do not have a UK driving license and was reliant on public transport. However, according to our tenancy agreement we had to give two months' notice to our landlord by the 1st of the calendar month (pages 141-150 of the mitigation bundle). The earliest I could therefore relocate to Luton was May but Bristol labs wanted me to join them on 18th March. It was not practically possible for me to commute from Harrow to Luton by public transport either to start the 6am shift or finish at 10pm. So, I informed Bristol labs that I could not join them before May. They said they would contact me if there were any positions in the future, however they have not and no QA positions relevant to my experience have been advertised on their website."

18 However, that was to some extent inconsistent with the documentary evidence relating to the job offer. That evidence included pages 106-111 of the remedy bundle. The email offering the job was at pages 106-107. At pages 108-109 there was the following email exchange (putting it into simple chronological order).

18.1 The claimant's reply to Bristol Laboratories' job offer was sent on 25 February 2019 and was in these terms:

"Thanks for your email.

I spoke to my landlord to vacate the house we live in Harrow and relocate to Luton.

> When my husband signed the contract till end of May, the landlord said it would be fine to give him a month's notice to vacate.
>
> However, when we informed him on Saturday, he is reluctant to release the deposit unless we finish our present tenancy till end of May.
>
> I appreciate that you are trying to fill the vacancy at the earliest. Unfortunately, I will not be able to join till June as it would be very difficult for me to commute from Harrow to Luton. I am really sorry but I can not accept your offer to join before April. I would really appreciate if you could let me know if there are any potential vacancies (in any department) which will suit me so that I could join in June."

18.2 The response of Bristol Laboratories, sent on the same day, was in these terms:

> "Thank you for your reply and explaining the situation.
>
> You can apply again in May if you are still interested."

18.3 The claimant's response, sent on 26 February 2019, was this:

> "Thank you for understanding my situation. As you suggested, I will apply for suitable positions in May. Hope you don't mind me emailing you after I apply in future.
>
> Once again sorry for the inconvenience caused."

19 However, the claimant told us on 13 September 2019 that she did <u>not</u> approach Bristol Laboratories again in May 2019, or at any time after then. Instead, she said, she simply looked at the company's website to see if there were any relevant vacancies. Since there were none, she did not again approach the company.

20 Moreover, the assertion in the claimant's witness statement that her husband had "signed the contract till end of May" for the flat in Harrow was plainly incorrect. Mr Watson accepted that there was no legally binding obligation to remain in the flat beyond 1 April 2019.

21 Dr Kolluri's witness statement contained this passage about the flat and the possibility of moving from it:

> "14. I have lived at my present address, a one bedroom flat, since April 2016. The tenancy is for 1 year with a 2 month notice period and ends on 2nd

April each year (pages 141-150 of the Mitigation Bundle). I extend it every year. On 18th January 2019, the estate agency emailed me to see if I would like to extend the tenancy; I replied on 23rd January 2019 (pages 43-44 of the Mitigation Bundle) saying that I was happy to renew on same conditions (ie with a 2 month notice period). Following my email, they informed me they would like to increase the rent and after negotiations on the rent had concluded we agreed by exchange of emails on 5th February 2018 (pages 79-80 of the Mitigation Bundle) that we would extend the tenancy. I told her that I would come in on 23rd February 2018 to sign the tenancy agreement.

15. On 22nd February 2018, the Claimant received the job offer from Bristol Labs (pages 110-111 of the Mitigation Bundle). As she does not have a driving license, she was reliant on public transport and needed to either start work at 6 am or finish at I0pm. We checked the time it would take her to get to Bristol Labs in Luton from Harrow and saw that the normal travel time was two hours. However, if she was to get there for 6am, she would have to leave home at 2:49am (pages 477-479 and 480-482 of the Mitigation Bundle). Also, if she finished at 10pm she would not reach home until 12am (pages 486-488 of the Mitigation Bundle).

16. As it was clear that we could not commute from our home, we knew that we would have to relocate to Luton. This would also mean that I would have to commute from Luton to central London which would significantly increase my travel time and expenses compared to my commute from Harrow (travel costs from Luton to London Euston Square are approximately £520.80 per month whereas my current travel costs from Harrow are £160-£170 using my contactless credit card). On 23rd February 2018, I spoke with our estate agent and landlord about this but they said that since I had already agreed to a renewal of the tenancy, I would have to give them two months' notice so that the landlord could find new tenants. I did not believe that I could just say that I would not sign the tenancy agreement; I also did not think it was fair bearing in mind as well I had been living there for three years and if it had been the other way round and the landlord had suddenly changed his mind and said he would not extend the tenancy agreement and I would have to vacate, I would have been left in a vulnerable position and would probably not have agreed to vacate. I therefore thought that for the same reason they would not accept my change of mind about the tenancy agreement; they also hinted that they might give me a bad reference for any future tenancy I wanted to take up.

17. It was also suggested in the Hearing that the Claimant should have rented a house in Luton and claimed the rent from the Respondents as part of her claim for compensation. The Claimant could not have afforded to do this herself; I would have to have provided the money. I

> did not think about it at that time mainly because I did not have enough money to rent another flat or house in Luton as I would have to pay not only rent in Harrow of £995 per month but rent and a deposit in Luton of approximately £750 and £900-£1,000 respectively along with moving costs of at least £100 which would be total costs of about £2,000 (apart from my increased travel costs as well as I have already mentioned above)."

22 In fact, as we state in paragraph 16 above and as could be seen by reference to the example of the tenancy agreement at pages 141-150 of the mitigation bundle, the tenancy ended on 1 April 2019 and not 2 April 2019.

23 Dr Kolluri's financial circumstances were described in the rest of his witness statement, and they showed that he had some flexibility in that regard. In addition, there was no recognition in that witness statement of the fact that the deposit that he had paid for the flat in Harrow would have to be repaid to him. That deposit was (we could see from page 149 of the mitigation bundle) £1250. The new monthly rent for the property in Harrow was (we could see from page 142 of that bundle) £1015.

24 Dr Kolluri's position about the amount of money that he actually paid for getting from Harrow to his workplace (which was near Euston Square, London) and back changed after signing that witness statement, so that it was his evidence that the cost was about £125 per month on average.

25 Towards the end of the hearing on 13 September 2019, the claimant told us that while rents for properties in Luton were cheaper than those for properties in Harrow, the cost of travelling to and from London was higher from Luton than from Harrow. In answer to questions from Ms Brosnan and Mr Sutton, the claimant said that the overall cost to her and her husband of living in Luton with him commuting to Euston Square, was going to be comparable to the cost of them living in Harrow with him commuting to Euston Square. At page 514 of the remedy bundle, there was a statement of the cost of travelling between Luton and London. It is about 10 minutes' walk from St Pancras to Euston Square, and we concluded that it was unrealistic to assess the cost of such travel as including any tube or bus fare from St Pancras to Euston Square in the absence of evidence of the need for such. There was no such evidence before us. Accordingly, the cost of travel would be at most £413.60 per month if Dr Kolluri were able to get to Luton train station on foot and needed a monthly season ticket (i.e. because for example he was unable to get an annual one).

26 As for the manner in which the claimant was treated on 14 December 2017, we accepted her evidence in the following paragraphs of her first witness statement concerning that meeting and its aftermath.

> '19. Just before I was due to leave, at around 2pm, Mr Latif asked me to

come to his room. He was alone and the door shut behind me. He raised his voice and started shouting at me saying, "You can go legally if you want but I will not pay SMP". He threatened to terminate my employment immediately by paying my three months' notice period. He said my email was to make sure I had a written record and to indicate that I wanted to go legally. He said "your husband might know a law graduate but I am the headmaster of that school". He told me to proceed from a legal stance and he would fight with me in the court. He said he dealt with a number of lawyers and he could afford to pay £1,000 to the lawyer but I could not. He also mentioned that I could not afford lawyer's fees as they were expensive. He repeated that he was not willing to give a single penny as SMP. He said that I had less experience than him due to my age, and that as he was older, he had dealt with many things like this. He also made disparaging references to my race, and said, "People from India or from Asia think that rules in this country are going to protect them and they can proceed legally for any disputes, but remember, rules are meant to guide you and not to rule you." He said for every rule there will be an 'against rule', which I thought he meant loophole. He also threatened that he would give me a bad reference when I tried to get a job in the future and he would make sure that I could no longer work in this country.

20. I was very frightened by this behaviour and realised also that I needed to leave for my doctor's appointment. I felt so intimidated that I decided there was no other option but to try and calm him down so I conformed to what he was saying and agreed that I had no financial capability to make a legal claim, and that I wasn't even interested in doing so. I asked him for more details about maternity allowance and how I could obtain this if I had the job until February. However he said that he was going to terminate my contract and that I was not employed in his company anymore. He suggested to contact the Job Centre Plus and tell them that my contract was going to finish in December and that I wished to apply for maternity allowance. He then permitted me to leave for my doctor's appointment and also told me to put all the appointment dates and times in writing. When I left his room, I found out that people had heard his shouting outside the room and they were asking me if I was okay. I left the meeting feeling distressed and gutted; I was alone and in so much grief.'

Our conclusions on the remedies that the claimant should receive.

Initial loss of wages

27 We concluded that the claimant would have been employed by the first respondent until 2 April 2018, when she would have commenced her maternity leave (that being the date that she had told the second respondent in her email

of 14 December 2017 at page 248 that she intended to start her maternity leave period). We concluded also that she had made reasonable efforts to mitigate her losses during that period. Thus, she should receive compensation for the loss of her wages during that period as claimed in the updated schedule of loss at page 431E, i.e. £3,718. (We accepted that the award should be of net losses as far as the first £30,000 was concerned, as that was not going to be subject to income tax.)

Whether the first respondent would have dismissed the claimant lawfully

28 We concluded that the first respondent would not have dismissed the claimant lawfully if it had not discriminated against her in the manner that we have found it did.

Whether the claimant failed to mitigate her losses by declining the offer of a job with Bristol Laboratories in Luton

29 We also concluded that the claimant had failed to mitigate her losses by taking up employment with Bristol Laboratories. Our reasons for saying this are as follows.

29.1 The only reason given by the claimant for not taking up the Bristol Laboratories post was that she could not in practice move to Luton before May 2019 (see paragraph 20 of her second witness statement, which is set out in paragraph 17 above). It was not that she was not willing to move to Luton. Rather, she said specifically to recruiters that she was willing to move to somewhere that was commutable: as she said in paragraph 18 of her witness statement, which is also set out in paragraph 17 above:

> "I applied for the positions which were in London and also which were commutable from London. I also informed the recruitment consultants that I was willing to relocate if necessary provided the new area was commutable from London as my husband worked near Euston."

29.2 The claimant must have been willing to move to Luton, as she applied for the job at Bristol Laboratories. She was almost certainly going to have to move in any event if she was to obtain new employment in her chosen, specialist, field.

29.3 Luton is eminently commutable from London.

29.4 The overall cost to the claimant and her husband of living in Luton and him commuting to Euston was (see paragraph 25 above) going to be comparable to the cost of living in Harrow and commuting to Euston.

29.5 The claimant and her husband could have found accommodation in Luton and moved in the period of nearly a month between the offer of employment with Bristol Laboratories and its start. (In this regard, we noted that in her email of 25 February 2019, set out in paragraph 18.1 above, the claimant actually said that she could not accept the offer "to join before April." That showed that she was aware that in practice she could have joined on 2 April 2019, given that the tenancy of her and her husband's flat in Harrow expired on 1 April 2019.) There would then have been only a short overlap of rents, and the claimant and her husband would have received the claimant's wages to help them meet any additional costs in the short term. In the longer term, those costs would have been recoverable in the event of success in these proceedings. We did not accept that they would have been so onerous as to make it reasonable not to take up the offer of a job at Bristol Laboratories.

29.6 The claimant could have asked Bristol Laboratories to permit her to start 2 weeks after the intended start date of 18 March 2019. She did not ask for that to happen, but simply declined the job.

30 Accordingly, in our view the claimant was entitled to compensation for loss of earnings in 2019 only in respect of the period from 2 January 2019 (not 1 January, as the claimant would not have returned to work then) to 17 March 2019. That was 10.4 weeks' pay. At the rate of £289 per week (as claimed in the final schedule of loss), that was the sum of £3005.60.

Pension contributions

31 We accepted that the claimant should (as she claimed) receive compensation for the loss of pension rights at the rate of £19 per week. In respect of the periods when the claimant would have been at work for the first respondent if she had not been dismissed, that was a total (in the circumstances as we found them to be) of 23.4 x £19, i.e. £444.60. The parties both sent representations on the issue of pension losses to us after the end of the hearing of 30 October 2019 and before we reconvened on 16 December 2019, but we were unwilling to accept either of those representations without hearing from the parties, and we did not consider that it was in the interests of justice to reconvene the hearing for that purpose. We saw that the www.moneyadviceservice.org.uk website that an employer's workplace pension contributions are required to be paid during the period when SMP is paid. At https://www.moneyadviceservice.org.uk/en/articles/protecting-your-workplace-pension-after-having-a-baby#pension-contributions-while-youre-on-maternity-leave, this is said:

> "If you're in a workplace pension scheme and your employer contributes to it, they must continue to do so while you're receiving Statutory Maternity

Pay.

That's up to 39 weeks, and, possibly longer if your employer offers it in your contract."

32 That is borne out by what is said in paragraph J[137] of *Harvey*, which is in these terms:

> "(5) ***Accrual of pension and holiday rights***
> (a) **Pension rights**
>
> The exclusion relating to terms and conditions of employment dealing with remuneration does not stop a woman accruing pensionable service, or other benefits which depend on length of service, during her absence, so long as these do not fall under the heading of remuneration. However s 75 EqA 2010, re-enacting the substance of the Social Security Act 1989, Sch 5 para 5 but by way of introducing a new concept, the 'maternity equality rule', requires that women are not treated less favourably by their employer in relation to pension contributions during any period of paid maternity absence than they would normally be treated when working. Since 'paid' is defined as including the payment of SMP, this has the effect that accrual of pension rights continues during the 27th to 39th weeks of maternity leave, at least where the woman has sufficient qualifying service to be entitled to receive SMP."

33 On the basis that if we have erred in this regard then the parties can ask us for a hearing to reconsider this aspect of our decision, we concluded that it was in the interests of justice to come to a conclusion on the basis of the passages set out in the two preceding paragraphs above. The claimant would have been paid SMP for the full period of eligibility of 39 weeks. Assuming, therefore, that the employer contributions were £19 per week, the additional loss was of £19 x 39 = £741.

The claim for compensation for the loss of statutory rights

34 We could not see how the claimant could properly be awarded any sum for the loss of her statutory rights, as she had not acquired any by the time of her dismissal.

The claim for expenses

35 We accepted the claimant's claim for £20 for expenses incurred in seeking alternative employment.

The claim for loss of Statutory Maternity Pay ("SMP")

36 We accepted the claimant's evidence that she had received a total of £5,030 by way of SMP and a tax rebate, and that she should have received £6,384. Accordingly, the claimant is entitled to the sum of £1,354 for the loss of SMP.

The award for injury to feelings (including, if appropriate, aggravated damages)

37 We concluded that aggravated damages were payable by the respondents because of the high-handed manner in which the second respondent had acted as described in paragraphs 19 and 20 of the claimant's first witness statement, which are set out in paragraph 26 above, and the manner in which the claimant's claim had been responded to (i.e. by the fabrication of the defence that the claimant was dismissed for redundancy; we did not for this purpose take into account the refusal to accept the claimant's grievance, to which we return in the following paragraph below), which had increased the severity of the injury to the claimant's feelings. We concluded (by reference to the updated *Vento* guidelines and the short case reports in *Harvey* to which our attention was drawn) that the right sum to award in this regard was a total of £12,000.

Uplift for failing to consider the claimant's grievance

38 We accepted Mr Watson's submission in paragraph 49 of his skeleton argument for the hearing of 30 October 2019, namely that the refusal of the respondents to entertain the claimant's grievance by refusing to accept her written grievance on 29 December 2017 justified (applying section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992) an uplift in the compensation for the breach of section 111 of the ERA 1996 and section 18 of the EqA 2010. That refusal was manifestly unreasonable as well as having been deliberate, and we considered that it was just and equitable to increase the compensation by the maximum of 25%. That was 25% of £21,283.20, namely £5,320.80.

Failure to give written reasons for the claimant's dismissal

39 As a result of sections 92(4) and 93 of the ERA 1996, given that (as we had found) the first respondent had not given the claimant a statement in writing of the reasons for her dismissal, she was entitled to 2 weeks' gross pay, which was £656.

Interest

40 We concluded that (as claimed by the claimant) the start date for the calculation of interest on the sum awarded for injury to feelings (applying the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996/2803) was 8 December 2017. The day of calculation within the meaning of those regulations was 16 December 2019. The rate of interest was 8%. The interest

payable was therefore for 2 years and 8 days on the compensation for injury to feelings (£12,000 x 0.08 x 2.02192 [i.e. 2 and 8/365] = £1,941.04) and for half that period on the award for losses suffered by reason for the dismissal, i.e. £9,283.20 x 0.08 x 1.01096 [i.e. 1 and 4/365] = £750.79.

Joint and several liability

41 We concluded that in so far as we found that section 18 of the EqA 2010 had been breached, the award should be made against both respondents, jointly and severally. All of the claims arising from the dismissal of the claimant in order to avoid any liability to pay her SMP were of a breach of section 18. The award of an uplift for the failure to consider the claimant's grievance was also applicable to both respondents, as they were both responsible for that failure.

Costs

The law

42 The law relating to costs applications is described in detail in paragraphs PI[1044]-[1120] of *Harvey*, and Dr Morgan relied on what was said there. We took the relevant parts of it fully into account.

43 We referred ourselves in particular to the decision of the Court of Appeal in *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420. We found paragraphs 41 and 52 of the judgment of Mummery LJ of particular assistance.

44 We considered that the passage in paragraphs PI[1067]-[1070] of *Harvey* was an accurate description of the case law concerning the question whether a party had acted unreasonably by making a deliberately false statement to the tribunal where that false statement was fundamental either to the making or to the defence of the claim. That case law suggested that it might be perverse not to come to the conclusion that such a party had acted unreasonably within the meaning of rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013, but we nevertheless approached the question with an open mind.

Our decision on the question whether the grounds for making a costs order had arisen

45 We came to the clear conclusion that the respondent had in the circumstances as we had found them to be acted unreasonably within the meaning of rule 76(1)(a).

What was the impact of that conclusion on the facts?

46 We then considered what the respondents could reasonably have done by way of defence of the claim if they had not (as we found) fabricated the defence that

the claimant had been dismissed for redundancy. We concluded that the respondents should have accepted that the claimant was dismissed in order to avoid the need for the first respondent to pay her statutory maternity pay and that it was at least likely that the dismissal was unlawfully discriminatory. While we accepted that the respondents could argue that dismissing the claimant for that reason was not a dismissal contrary to section 99 of the ERA 1996 or discrimination within the meaning of section 18 of the EqA 2010, we thought that the argument was always going to be weak. That was for these reasons:

46.1 Looking at a parallel situation by way of analysis and illustration, while dismissing someone because you do not want to pay them statutory sick pay is not the same as dismissing them because they are sick, it is at least likely that it constitutes dismissing them for a reason connected with them being sick.

46.2 The language of section 99 of the ERA 1996 read with regulation 20(3)(a) and/or (d) of the Maternity and Parental Leave etc Regulations 1999, SI 1999/3312 (which make automatically unfair a dismissal the reason or principal reason for which is a "[reason] connected with ... the pregnancy of the employee ... [or] the fact that she ... sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave") was not at first sight obviously applicable to a situation in which an employer seeks to avoid the need to pay statutory maternity pay and have the employee receive only statutory maternity allowance. However, the purpose of those provisions was, or, in our view, at least should be, obvious to the objective observer. That is to protect against dismissing pregnant women for any reason connected with the fact that they are pregnant and/or plan to take maternity leave, and SMP is paid only to those who are taking maternity leave.

46.3 Section 18 of the EqA 2010, read in the light of for example the decision of the Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931, was clearly applicable here.

47 Accordingly, it was in our view open to the respondents to take the point that the first respondent did not dismiss the claimant in breach of section 99 of the ERA 1996 or section 18 of the EqA 2010, but it was unlikely that the point would succeed. In our view, the respondents could have argued the point but should have accepted that it was not a good one.

48 However, taking that point was unlikely to lengthen to any great extent the hearing as it would have been if the respondents had not (as we found they did) fabricated the claimant's redundancy. That is because the factual background was always going to need to be the subject of a significant amount of evidence, if only to enable the tribunal to assess and evaluate in money terms the injury to the claimant's feelings caused by her discriminatory dismissal.

49 We concluded that the hearing would have taken two days if the respondents had not (as we found) fabricated the claimant's dismissal for redundancy. The fact that we had to reserve our decisions had an impact on the administration of justice only, and was not relevant to the costs application.

50 What did that mean in practice? In our view the respondent's conduct lengthened the hearing by three days. It also meant that the claim was fought much more widely and more vigorously than it needed to be, or should have been.

51 The claimant had entered into a damages based agreement ("DBA") in relation to her costs. That provided that the claimant would pay her solicitors (1) 35% of the amount awarded to her, and (as we understood the matter), (2) if the tribunal concluded that the respondent had acted unreasonably within the meaning of rule 76(1)(a), such costs as the tribunal decided had been incurred unreasonably (but only those costs).

52 Having considered the matter very carefully (including by reference to the manner in which the claimant had conducted the proceedings, i.e. not just the manner in which the respondent had conducted the proceedings), we concluded that (1) it was appropriate to make an order that the respondents paid at least some of the claimant's costs, (2) the respondents should pay 60% of the claimant's reasonable costs on the standard basis (i.e. not on the indemnity basis), and (3) the respondents should be jointly and severally liable to pay those costs. Since those costs (i.e. the 60% proportion of the claimant's costs) were going to be more than £20,000, we had to make an order in accordance with rule 78(1)(b) of the Employment Tribunals Rules of Procedure 2013. That rule does not specifically permit the making of an order for the costs to be assessed in accordance with that paragraph if they are not agreed, but we saw no reason why we should not make an order in those terms.

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Employment Judge Hyams

Date: 17 January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE