# EMPLOYMENT TRIBUNALS

**Claimant:** Miss N Grant

**Respondents:** Price Hunter International Limited (R2)
Mr Joshua Eden (R4)

**Heard at:** Manchester **On:** 10 September 2019
24 October 2019
(in Chambers)

**Before:** Employment Judge Hill
Ms M T Dowling
Mrs S J Ensell

**REPRESENTATION:**

**Claimant:** Mr Norman - Counsel
**Respondents:** Mr Zatman – HR Consultant

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondents (R2 and R4) jointly and severally is ordered to pay the claimant total compensation in the sum of £73,852.85 as compensation in respect of the Judgment on Liability sent to the parties on 4 July 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 in chambers following a Judgment on Liability sent to the parties on 4 July 2019 and a remedy hearing held on 10 September 2019.

2. The claimant sought compensation for financial loss and injury to feelings for the acts of discrimination and victimisation; failure to provide a statement of main terms and conditions and unpaid commission payments. Although the claimant also succeeded in a claim for unfair constructive dismissal, no separate award was sought for unfair dismissal.

3. The Claimant provided a written witness statement and gave oral evidence. The Respondents did not attend and did not provide any written evidence.

4. The issues to be determined in deciding on the level of compensation to be awarded were:

(1) Whether the claimant had taken reasonable steps to mitigate her loss to the date of hearing;

(2) The amount of any future loss;

(3) What amount should be awarded for injury to feelings;

(4) Whether any deduction should be made when determining financial loss on **Polkey** principles.

**The Facts**

5. The Tribunal relies on the facts found in our Judgment on Liability and make the following further findings of fact.

6. On 14 December 2017 the claimant informed the respondent that she was pregnant. No risk assessment was carried out.

7. On 4 January 2018 the claimant was informed that she was being investigated in relation to an allegation of gross misconduct.

8. On 15 January 2018 was invited to a disciplinary hearing in respect of gross misconduct and allegations for failing to provide a master spreadsheet.

9. On 19 January 2018 the claimant was declared as unfit for work due to stress and anxiety. At that time no risk assessment had been carried out.

10. On 1 March 2018 the claimant resigned.

11. The claimant then commenced ACAS early conciliation on 9 March 2018, and on 30 March 2018 the claimant's commission payments are withheld from her wages.

12. On 1 June 2018 the claimant expected to start her maternity leave. In July 2018 the claimant's daughter was born.

13. As referred to in the Liability Judgment, the claimant had previously suffered from two miscarriages and this pregnancy had been considered to be high risk. The claimant gave evidence that the treatment she received from respondents (R2) and (R4) substantially increased her stress levels both during her pregnancy and

afterwards. The claimant also considered that the respondents (R2) and (R4) had compromised her safety and that of her baby by failing to carry out risk assessments and subjecting her to unnecessary disciplinary proceedings.

14. The claimant gave evidence that the effect of having to undergo a disingenuous disciplinary process after informing the respondent that she was pregnant caused her a great deal of upset, stress and anxiety. The claimant told the Tribunal that as a result of the upset and anxiety this also caused her to feel depressed. The claimant considered that the treatment she had experienced had meant that she had been unable to enjoy her pregnancy and that the lasting effects of the anxiety, stress and upset also massively impacted on her emotional wellbeing throughout her pregnancy and throughout her daughter's first year of life. The Tribunal accepted this evidence.

15. The claimant was due to start her maternity leave at the end of June/beginning of July 2018 and had intended taking nine months off work. However, the claimant started to look for work shortly after her daughter was born because of the financial pressures that had been placed on her as a single mother. The claimant started her search for work in earnest in January 2019 and would apply for jobs on a daily basis. The claimant had anticipated that she would be able to secure alternative employment quickly, however she has found it extremely difficult to even secure interviews. To the claimant's credit, she has widened her job search to cover a wide range of roles, and she has joined up to several various temp and permanent recruitment agencies. The Claimant is now the mother of a small child and therefore location and travel distances is a consideration when looking for work.

16. The claimant provided the Tribunal with a mitigation bundle illustrating her attempts to find alternative employment. The Claimant sold goods on eBay during this period and received income of £1600.

17. The respondent did not give oral evidence at the remedy hearing and relied upon submissions from their representative, Mr Zatman.

18. The Claimant was cross examined on the recordings she made of conversations she had with Mr Eden in November 2017, January 2018 and the disciplinary hearing. The Claimant said that she made recordings because she had lost trust and confidence in the Respondents and that she was worried and concerned about the meetings.

19. The Claimant also stated that she had never been given any guidance that she was not allowed to record the meetings. She said the reason she recorded the meetings was to protect herself. The Claimant admitted that she had said that she was not making a recoding when asked at the beginning of the disciplinary meeting and that there appeared to be confusion over who was being asked the question. However she agreed she did say that was not recording the meeting. Her purpose for recording the meeting was to protect herself because of the events that had occurred leading up to the meeting. Whilst the recording continued during an adjournment it was not her intention to obtain confidential information but an oversight when she left the room. The only reason she made the recordings was because she considered that she was being discriminated against.

20. The claimant's purpose was to have an accurate recording of meetings and discussions and was not to entrap the respondent/s. The Tribunal accepted this evidence.

21. The Respondent did not give evidence. However, during the liability hearing Mr Eden gave evidence in respect of the covert recordings that had been made by the claimant during the disciplinary process. Mr Eden said that he had been deeply upset by discovering that covert recordings had been made and that had he known he considered it was beyond acceptable and amounted to gross misconduct. Mr Eden also told the Tribunal that it was "wrong to record the boss". Mr Eden did not provide the tribunal with any evidence regarding their policies and or procedures in respect of recording meetings; whether disciplinary action would have been taken; his or R1's views on whether the claimant would have been dismissed for making the recordings and or making a recording during the disciplinary hearing.

**Submissions**

Respondent's Submissions

*Polkey Reduction*

22. The respondent argued that the Tribunal were required to look at the conduct of the claimant during employment and in particular the covert recordings made in November 2017, January 2018 and February 2018. The respondent accepted that these covert recordings were not automatically classed as misconduct and referred the Tribunal to the case of **Phoenix House Limited v Mrs Tatyana Stockman UKEAT/0284/17/00** and in particular paragraph 79 of that Judgment. The respondent argued that the claimant had made three separate covert recordings and therefore they amounted to three acts of misconduct. The respondent argued that the claimant had recorded sensitive confidential information, in particular during the disciplinary in January 2018, when the recording was left on while the claimant had left the room and the respondent was having private discussions. The respondent also alleged that by making the covert recordings the claimant was trying to entrap R4 during the conversations that she had with him. The respondent's argument was that the claimant's behaviour had amounted to a breach of trust and had they known that this had taken place during employment they would have dismissed her.

23. In addition the respondent refers to pages 221 and 22 of the bundle where the claimant was directly asked during the disciplinary hearing whether she was recording the hearing and she said no. The respondent states that this was a lie and therefore a further act of gross misconduct where the respondent would have been entitled to dismiss fairly.

24. The respondent suggested a reduction of 80%-90%. The respondent further suggested a reduction in the basic award of 25%.

*Future Losses*

25. The respondent accepted the claimant was entitled to 100% of her losses up until the date of the liability hearing. The respondent argued that the claimant was due to return from maternity leave on 9 February 2019 and that future losses of 12

months were disproportionate. The respondent also argued that the claimant's income had been low during her period, having earned £1,600 from sales of goods on eBay, and they would say that she had the ability to have earned substantially higher. The respondent did not provide any mitigation evidence and did not challenge the claimant's attempts to find work.

*Injury to Feelings*

26. The respondent argued that the claimant's assessment of the injury to feelings award, being near the top of the middle band, did not reflect the Tribunal's findings and the acts had been on a misunderstanding on the part of the respondent. The respondent argued that the whole series of events had been about one thing that the company was trying to do, but that the company had gone about getting it the wrong way, and that they apologised to the claimant. However, they did not consider it was the middle band but the lower band.

*Statement of main terms and conditions*

27. The respondent did not dispute that this had not been provided and that it may not have been helpful but that they were not trying to hide anything and therefore the award should only be three weeks.

**Claimant's Submissions**

*Polkey Reduction*

28. The claimant argued that it was wrong to suggest that the claimant had in any way contributed to her dismissal and that it would not be just and equitable to make any reduction. Further, the claimant argued that had there been no discriminatory behaviour/dismissal the covert recordings would not have occurred and therefore there was no parallel for the Tribunal to draw, and therefore no reduction could be made.

29. The claimant went further and said that there had been no evidence from the Respondents as to how the conduct had been viewed and how serious it was thought it had been. In addition the claimant argued that as the claimant had had no contract, no policies or procedures, no standards, that the claimant did not know the consequences of any actions or that the recordings would have been viewed seriously. The claimant argued that she had been concerned and worried about the meetings that had been held and that she had lost confidence in the respondent, which is why she had recorded the meetings. The claimant argued that she was entirely justified in recording the meetings: the respondent did not produce notes and those that were produced were not accurate. In addition, the claimant's purpose was to keep an accurate record of events and not to try and entrap or gain an advantage by recording the meetings.

30. Further, the claimant submitted that the Tribunal should not consider whether it was misconduct but whether it is just and equitable to reduce the compensation and that in her view it was not just and equitable and therefore no reduction of the award should be made.

*Injury to Feelings*

31. The claimant argued that the amount of award should be £20,000. The claimant argued that this was not a one-off act and that the Tribunal is entitled to take into account the series of acts of discrimination and a further act of discrimination after the claimant left her employment. The claimant argued that the claimant was already concerned about her pregnancy, with it being a high risk pregnancy, that no risk assessment had been carried out and that the treatment by the respondent amounted to her having to go off sick. The claimant has had continuous stress and anxiety coupled with financial difficulties and it had had a profound effect on her.

*Mitigation*

32. The claimant argued that she had been looking for work but that she had suffered from a loss of confidence as a result of the treatment by the respondent. In addition, the claimant was a single mother with childcare responsibilities and when looking for alternative work had to consider childcare arrangements. The claimant relies on her mitigation evidence that was not refuted by the respondent.

*Statement of main terms and conditions*

33. The claimant argues for four weeks' pay and that failure to provide it was a serious concern particularly in respect of having no guidance, no contract to assist her during the disciplinary process, risk assessment and the covert recordings.

34. The parties agreed that the respondents would be jointly and severally liable for any award made.

35. **The Law**

Section 124 of the Equality Act makes provision for an award of compensation:

1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

36. The aim of damages in tort is to put the Claimant in the position they would have been in, had the act/s of discrimination not occurred. There is no limit on compensation for discrimination.

37. When considering compensation in respect of discrimination the Tribunal is assisted by the Presidential Guidance in relation to injury to feelings and psychiatric injury. In ***Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA***

***Civ 1871***, the Court of Appeal identified three "bands" of potential awards for discrimination claims:

a. £500 - £5,000 - The lower band applies to "less serious cases, such as where the act of discrimination is an isolated or one off occurrence".

b. £5,000 - £15,000 - The middle band "should be used for serious cases, which do not merit an award in the highest band".

c. £15,000 - £25,000 - The top band is appropriate for "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment…".

The court also went on to determine that it would only be in "*the most exceptional cases*" that an award would exceed this top band.

The "bands" have been uprated by ***Da'Bell v NSPCC 92009) EKEAT/0227/09 IRLR 19*** and taking account of ***Simons v Castle and De Souza v Vinci Construction (UK) Ltd***, are currently set at: lower band, £800 to £8,400; middle band £8,400 to £25,200 and upper band £25,200 to £42,00. These bands apply to cases presented after 11 September 2017.

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

39. The Court of Appeal in ***Chagger v Abbey National plc [2010] IRLR 47*** held that, in assessing compensation for a 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 the loss.

## Conclusions

Mitigation

40. The Tribunal finds that the claimant has taken reasonable steps and has clearly demonstrated her attempts to find alternative work. The claimant has signed on with temporary agencies and has also tried to earn money by selling goods via eBay. The claimant has a young child and so her flexibility is constrained in respect of travel and therefore we considered that the claimant is entitled to her losses up to the date of the hearing.

41. The respondent provided no evidence that the Claimant had failed to mitigate her losses and indeed nobody from the respondent company or Mr Eden attended the remedy hearing to give evidence in respect of mitigation.

Mitigation – Future Losses

42. The Tribunal concludes that the claimant having made concerted attempts to find alternative work from January 2019 is likely to secure work within six months and therefore awards future losses of six months.

Injury to Feelings

43. The Tribunal refers to its Liability Judgment where it details the acts of discrimination. The Tribunal has found that the claimant was subjected to acts of discrimination from December which continued until after her employment ended. She was then subjected to an act of victimisation by the Respondent/s in that her commission payments were withheld and to which she was entitled.

44. The Tribunal accepts that this had a profound effect on the claimant. The claimant had had a difficult pregnancy, no risk assessment had been carried out, disingenuous disciplinary proceedings were commenced against her, the search of a master spreadsheet which did not exist, and the Tribunal has found that the respondents were aware that there was no master spreadsheet. The pressure upon the claimant resulted in her eventually having to go off with stress and anxiety. The claimant set out quite clearly in paragraphs 4, 5, and 6 of her witness statement for the remedy hearing the effect that the respondent's discriminatory had on her, and this was not challenged in cross examination.

45. The Tribunal therefore makes an award of £20,000 in respect of injury to feelings being at the higher end of the Vento guidelines. The Tribunal considers this is an appropriate level of compensation for the stress; distress and upset that the claimant suffered over a period of several months.

Statement of main terms and conditions

46. The Tribunal makes an award of four weeks' pay for failure to provide a statement of main terms and conditions. The Tribunal considered that the claimant had been employed for a period of four years and that it was systematic in the respondent's approach to their employees of not providing details of their contract of employment, disciplinary procedure, and that this failure contributed to the events that occurred, with the claimant having no contract of employment to assist her during the period of December 2017 to March 2018.

Polkey

47. The Tribunal is making an award in respect of the discrimination suffered by the Claimant. The Respondents has argued that Polkey applies however, the Tribunal does not consider that Polkey is applicable in this case because the award is not being made in respect of the unfair dismissal element of the claim. The Tribunal has however, set out below its conclusions in respect of the Respondents submission.

48. The claimant gave evidence that she was trying to protect herself and that this was the reason she recorded the meetings. She was very concerned and she had lost confidence in the respondent. The Tribunal accepted this evidence and considers that it was plausible explanation as to why she had made the recordings.

49. In addition, when cross examined on the point of making the claimant said, "I was never given guidance it was not allowed". The respondent had provided no contract of employment, no rules or procedures around disciplinary procedures or meetings, and had not set out anywhere the grounds on which it considered making recordings would amount to gross misconduct.

50. The Tribunal was assisted by the case of **Phoenix House Limited v Stockman** where it found that covert recording of a meeting does not necessarily always undermine trust and confidence between an employer and employee to the extent that an employer can dismiss an employee for gross misconduct. It sets out a number of factors to take into consideration when an Employment Tribunal is required to look at this:

(1) The blameworthiness of the employee – in this case we find the employee was not warned against making recordings and that there were no procedures in place in this respect. We accept that the claimant was simply worried and upset and had not thought through the consequences of making such a recording. However, the Tribunal finds that the claimant when asked directly whether she was making a recording did lie and said that she was not. The claimant also accepted this during cross examination.

(2) The nature of the recording – the Tribunal finds that certainly in the meeting of November 2018 the respondent should have taken notes and it did not. Whilst notes were taken at the disciplinary hearing, when the claimant started her recording she was not aware that this was going to be the case. The claimant made a third recording when she had a private conversation with Mr Eden but again the Tribunal accepts her argument that this was done because she trying to protect herself because she had lost trust and confidence in them. The Tribunal does not find that the reason that this was done was in order to entrap the respondent or to seek confidential information.

(3) Attitude of the employer – the Tribunal finds that the employer did not expressly include as an act of gross misconduct covert recordings in their disciplinary procedure. Further the Respondent did not give evidence of what action it would have taken. The Respondent's previous attitude to alleged wrongdoing by the Claimant [in the first meeting in November 2017] does not indicate that the Respondent had procedures in place and would have taken disciplinary action. The Respondent only decided to take disciplinary action after the Claimant informed them that she was pregnant and was discriminatory.

51. The **Phoenix House Limited v Stockman** case related to an unfair dismissal claim. Mr Norman argued that in this case because the award has been made in respect of discrimination and not unfair dismissal that the **Polkey** reduction should not apply. Mr Norman argued that this was a discriminatory dismissal and therefore there is no parallel, and a reduction should not be made on just and equitable grounds. The claimant was making these recordings because she considered herself to being subject to discriminatory behaviour by the respondents. The Tribunal accepts this argument.

52. Whilst the Tribunal accepts that Mr Eden was upset when he found out that these recordings had been made, the tribunal does not find that the respondent has been able to show that it would have amounted to gross misconduct leading to dismissal. Further, in respect of the fact that the claimant did not tell the Respondent when asked about whether she was recording the disciplinary meeting, the Tribunal accepts that this may have amounted to misconduct it is clear from the evidence before this Tribunal that the Respondent/s concern was the actual recordings themselves and not the fact that she denied she was recording. Although Mr Zatman in his submission referred to this, no evidence was given to this Tribunal on the view that the respondent held in this regard.

53. The Tribunal, has also considered this point under the Chagger principles and considered what would have happened had there been no discrimination? Would the Claimant's conduct have resulted in dismissal? The Tribunal concludes that the Claimant would not have been dismissed because had there been no discrimination the Claimant would not have recorded the meeting in January 2018 with Mr Eden or the disciplinary because they would not have happened.

54. Even if we are wrong the Tribunal has considered whether any reduction to the award because of the conduct of the claimant is just and equitable and considers that in these circumstances, and in particular the circumstances which caused the claimant to make the recordings, it is not just and equitable to make a reduction to the award.

55. The Tribunal therefore makes the following award:

| | | |
|---|---|---|
| Basic Award | | £1,956.00 |
| Compensatory Award: | | |
| Loss of earnings from the date of commencement of sickness leave (19/1/2018 to 10/9/2019) | £36,081.47 | |
| Commission payments | £563.49 | |
| Loss of pension contributions 1% (agreed by the parties) | £420.35 | |
| Less earnings during this period | -£10,373.35 | |
| Total losses from start of sickness to date of remedy hearing | | £26,691.46 |
| Future losses 26 weeks | | £15,384.46 |
| 1% pension contribution for 26 weeks | | £185.44 |
| Less expected earnings for eBay sales | | £1,600.00 |
| Total financial loss | | £40,661.36 |

| | | |
|---|---|---|
| Injury to feelings | | £20,000.00 |
| Failure to provide a written statement of main terms and conditions | | £2,853.00 |
| Loss of statutory rights | | £600.00 |
| Interest: | | |
| Injury to feelings 8% from the first discriminatory act to date of judgment on remedy | £3,099.17 | |
| Interest on financial losses 8% from the midpoint between the start of the loss 19/1/2018 and judgment on remedy 24/10/2019 | £2,135.05 | |
| Total interest | | £5,234.22 |
| As the losses exceed £30,000 Grossing up | | £2,548.27 |
| Total | | **£73,852.85** |

Employment Judge Hill

Date: 9 December 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

10 December 2019

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**
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# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410479/2018**

| Name of case: | **Miss N Grant** | v | **Price Hunter International Limited (R2)**<br>**Mr Joshua Eden (R4)** |
|---|---|---|---|

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: **10 December 2019**

"the calculation day" is: **11 December 2019**

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

For the Employment Tribunal Office