



EMPLOYMENT TRIBUNALS

Claimant: Mrs K. Amin

Respondent: Calvary Pre-School Limited

Heard at: East London Hearing Centre

On: 5 November 2019

Before: Employment Judge Massarella
Mrs A. Berry
Mr P. Quinn

Representation

Claimant: In person

Respondent: Ms T. Bailey (Respondent manager)

REASONS (REMEDY)

1. Following a remedy hearing on 5 November 2019, the Tribunal awarded the Claimant £24,950.95 compensation for unfair dismissal and discrimination. Oral reasons were given at the hearing. The written judgment was sent to the parties on 5 November 2019. The Claimant requested written reasons by email dated 20 November 2019. The Tribunal apologises for the delay in sending these reasons out: this is due to increased pressure on judicial resource.

The law

Compensation for acts of discrimination

2. Compensation for discrimination is assessed on tortious principles (ss.119(2) and s.124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that she would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable in the

circumstances, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

3. In assessing the loss suffered by the Claimant, the Tribunal may take into account the chance of events having occurred following the unlawful act, and determine the award on the basis of the loss of that chance (*Wheeler*). Where the chance of a future event is very high, or very low, it is permissible to treat the chance as 100% or 0%, as appropriate (*Timothy James Consulting Ltd v Wilton*, UKEAT/0082/14/DXA).

Mitigation

4. The Claimant is required to mitigate the loss she suffers as a result of the unlawful act. She is expected to search for other work, and will not recover losses beyond a date by which the Tribunal concludes she ought reasonably to have been able to find new employment at a similar rate of pay.
5. The burden is on the Respondent to prove a failure to mitigate (*Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331). If the Claimant has failed to take a reasonable step, the Respondent must show that any such failure was unreasonable (*Wright v Silverline Car Caledonia Ltd*, UKEATS/0008/16). The question of reasonableness is to be determined by the Tribunal itself; the Claimant's perception is only one of the factors to be taken into account.

Injury to feelings

6. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).
7. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

- i. **The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. ... Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
- ii. **The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
- iii. **Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**

There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'

8. The bands have since been increased to reflect inflation, recently by way of Presidential Guidance. The Claimant's case having been presented on 6 November 2018, the relevant Guidance¹ provides:
- 8.1. lower band: £900 to £8600;
 - 8.2. middle band: £8,600 to 25,700;
 - 8.3. top band: £25,700 to £42,900.
9. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

Interest

10. The Tribunal must consider whether to award interest on the sums awarded without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').²
11. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.³ The interest rate now to be applied is 8%.
12. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

Compensation

13. With the exception of the basic award, all figures below have been calculated by reference to net earnings.

Loss of earnings by reason of the discriminatory decision not to implement the Claimant's pay rise from 29 June 2017 onwards

14. The parties have agreed the following figures in respect of the losses incurred by the Claimant as a consequence of the discrimination found by the Tribunal during the currency of her employment:
- 3.1 £1291.97 for the period 29 June 2017 to 9 November 2017;
 - 3.2 £1100.74 for loss of statutory maternity pay between 10 November 2017 and 27 June 2018;
 - 3.3 £1445.07 for the period 28 June 2018 to 28 September 2018.

¹ 'First Addendum to Presidential Guidance Originally Issued on 5 September 2017'

² SI 1006/2803

³ SI 1996/2803

15. This produces a total of **£3837.78**. The parties further agree that this extinguishes any loss in respect of unauthorised deduction from wages and holiday pay.
16. Because the Tribunal has found that this amounted to conduct extending over a period, we consider it just to award interest from the midpoint of that period, which is 11 February 2018, to this date of calculation (5 November 2019).
17. That is 173% of a year. At 8% simple interest per annum, that produces an interest figure on this sum of **money**.

What is the chance that the employment would have terminated in any event so that the Claimant could take up her university course?

18. The Tribunal rejects the Claimant's evidence that she would not have gone to university when she did, had there been no discrimination. We have regard to the fact that the Claimant's credibility on this issue was undermined by the fact that she sought to give the impression at the liability hearing that she was not starting her University course until October 2019. That was the basis on which she claimed a full year's loss of earnings. In fact, she started her course in October 2018, shortly after resigning from her employment.
19. We find that the course that the Claimant is doing is of considerable benefit to her in developing her skills and career prospects and is something which she would have done at the point when she did, notwithstanding the discrimination. We noted that the Claimant returned to work relatively early from her period of maternity leave and was plainly keen to get back to work and further her career.
20. We also had regard to the fact that the Claimant sought a reference from the Respondent in mid-2018 and applied for her course in August 2018, that is to say during the summer holiday period. We find that, had there been no discrimination, the Claimant would have sought to combine her studies with work for the Respondent, just as she later did with her new employer.
21. We find that, during the period when she is studying, she is only able to work two days a week and, on the balance of probabilities, we find that that is what she would have done with the Respondent, had she not resigned.
22. Insofar as the Respondent has sought to suggest that the Claimant could have found work earlier we accept the Claimant's evidence that it took her several months to recover from the discrimination she had experienced before she could seek work in January 2019. The Respondent has not discharged the burden on it to show that she unreasonably failed to mitigate her loss.
23. We conclude that the Claimant is entitled to be compensated for the loss of two days' wages per week between the beginning of October 2018 and the end of April 2019, minus the sums she earned by way of alternative employment. We conclude that she is not entitled to compensation beyond that point as she found alternative employment which replaced her earnings with the Respondent.
24. For these purposes the parties have agreed a weekly net figure of £203.90. Over 30 weeks, at two days a week, that produces a net loss of £2446.80.

25. The Claimant gives credit of £609.26, which produces a sum of **£1837.54**.
26. The Claimant is entitled to interest at 8% from the mid-point of that period (14 January 2019) to this date of calculation on 5 November 2019, which is 80% of one year: **£117.60**.

Injury to feelings

27. The discrimination which we have found to have occurred is plainly more than a single act. Indeed, we have made a positive finding that there was conduct extending over a substantial period. We consider that an award in the lower *Vento* category, as the Respondent urges on us, would be insufficient.
28. We accept the Claimant's largely unchallenged evidence that she suffered considerable anxiety and depression as a result of the way that she was treated. She required support from her GP, who referred her to talking therapy. We accept her evidence that the Respondent's conduct had a significant impact on her confidence. The explicit, derogatory remarks made about her and which we have found were connected to her pregnancy also had a significant impact on her. We accept that it was humiliating in the circumstances.
29. On the other hand, we reject the Claimant's submission that this is a case where compensation should fall into the upper *Vento* bracket. We do not consider that the impact on her was sufficient to justify that. We note that it did not prevent her from starting her University course in October 2018, although it did impact on her ability to apply for work.
30. We conclude that, having regard to the impact on the Claimant, the case falls within the middle of the middle *Vento* bracket and we conclude that a total award of £15,000 is appropriate in the circumstances, composed of **£10,000** for the impact of the conduct during employment and **£5,000** for the impact of the dismissal itself.
31. The Claimant is entitled to interest on these awards. In respect of the discrimination during employment we think it appropriate that interest should be applied from the midpoint of the discrimination, that is 11 February 2018, which is 173% of a year at 8%. This produces an award of interest of **£1,384**. Interest on the dismissal award should run from the date of dismissal, which is 110% of a year and produces an award of interest at 8% pa of **£440**.
32. An award for injury to feelings in respect of a dismissal is taxable. Accordingly, we award an additional **£1,088** to offset that liability by way of grossing up at the basic rate of tax.

Aggravated damages

33. We make no award for aggravated damages. The Claimant has not discharged the burden on her to persuade us that there are additional factors such as to render our award for injury to feelings insufficient to compensate her for the impact on her of the Respondent's discrimination.

Basic award

34. The Claimant was under 22 years of age as at the effective date of termination and had three complete years of service. The parties have agreed that she is entitled to a basic award of **£364.88**.

Loss of statutory rights

35. The Tribunal considers that a sum of **£350** is just to compensate the Claimant for the loss of her statutory rights, given that her length of service was relatively modest.

Employment Judge Massarella
Date: 9 March 2020