EMPLOYMENT TRIBUNALS

Claimant: **Ms Laura Young**

Respondents: **(1) J-Care Support Services Limited**
(2) Mr Jamie McGregor
(3) Mrs Kelly McGregor

Heard at: **Pontypridd** **On: 20th November 2019 and 16 December 2019 (In Chambers)**

Before: **Employment Judge R Powell**
Members:
Ms S Hurds
Ms C Lovell

Representation:
Claimant: In person
Respondent: Ms Williams, of counsel

REASONS

1. The Tribunal heard evidence and submissions from the parties in relation to Remedy in this case on 15 October 2019. For reasons related to the lack of time remaining after the conclusion of the evidence the matter was adjourned for determination by the Tribunal in Chambers and that date was listed for 16 December 2019. The application for compensation stems from the decision of the Tribunal dated 15 November 2018 wherein the claims for unlawful discrimination contrary to Sections 19 and 26 of the Equality Act were judged to be well founded and a single matter relating to the calculation of maternity pay, was left to be resolved.

2. The discriminatory conduct of the Respondents is evidenced in a text conversation and subsequent dialogue between Mrs. Kelly McGregor and the Claimant on 20 November 2017 wherein, amongst other things Mrs. McGregor stated; “exactly like Jamie said u r the manager & r supposed 2 ensure the smooth running of the service but u can’t exactly do that when u

have got 2 kids" and then went on to make further comments about the difficulties that the Claimant faced in respect of childcare, comparing it with her own experience and suggesting that the Claimant had not made an equal effort. There were subsequent texts later on the same day in relation to assertions that the Claimant had spoken freely of stealing documentation from her previous employer. The tone of the emails slowly degenerated on that day.

3. We have before us a bundle of documents of some 322 pages and from the parties a number of statements.

4. Ms. Young submitted 3 witness statements on her own behalf and 2 supporting statements from former employees of the Respondent. Mr. Jamie McGregor submitted 2 statements as did Mrs. Kelly McGregor.

5. A number of the issues raised in the Respondents' statements related to the personal financial circumstances of the individual Respondents and challenges to the evidence of the Claimant about her personal financial circumstances.

6. As was acknowledged by the Respondents, their own personal circumstances are not particularly relevant to this decision-making process.

7. The Claimant on her own behalf has set out a Schedule of Loss at pages 26 – 28 of the bundle and then restated the content in a different manner in a statement which begins at page 10 titled "Schedule of Loss as of 13 November 2018" albeit it goes on to detail a much longer period. The Claimant seeks compensation for a basic award and also a loss of income following the effective date of termination which was 12 February 2018.

8. The Claimant states in her witness statement that she was and is seeking to work outside of the social care sector in which she had been employed with the Respondent and for the previous 7 or 8 years. With the Respondent her work entailed the management of "care packages"; a tailored service for looking after people who were living in their own home but suffering from significant mental or physical impairments which meant they needed regular visits for personal care and sometimes for provision of medication.

9. She stated that since her dismissal she had deregistered from the relevant Regulatory Boards due "to the impact this has had on my mental health and any attempt for resolution outside of formal proceedings has failed". She then goes on to say that the discriminatory behaviour:

   "had the effect of violating my dignity and creating an unpleasant and intimidating environment. Which included hostile comments about childcare arrangements and my ability to carry out my role. The long-term effects of

my mental health have been ongoing since this incident and I feel that this has been a significant detriment to myself and my family mentally and financially".

10. She then goes on to refer to debts and the bailiffs knocking at her door, that she had continuously worked prior since leaving school and was a person who, by nature, was determined to work hard.

11. She then goes on in a separate paragraph to detail limitations upon her in her search for work quoting again:

"in particular, I suffered from anxiety and depression. I am now on a high dose of Sertraline and Amitriptyline and have been since the incident as a result I have now been diagnosed with sinus tachycardia and carpal tunnel which I did not have prior to the incident"

12. For these reasons she says she is seeking the middle of the highest band of the Vento scale and asks for £35,000 for personal injuries and seeks a further £35,000 for injury to feelings including the stress caused to her family and the loss of career and assertion of a refusal of references and lack of care for her own health during her employment.

13. The Respondent disputes all of those matters and asserts that the claim is overstated. We have the benefit of looking at the Claimant's medical records which, subsequent to a brief moment of contention between the parties, is now agreed to be all that is relevant to this case.

14. We note that during the Claimant's employment she was briefly detained under the Mental Health Act for a short period due to a misdiagnosis of psychosis. We pause at this point to note that it is apparent from the evidence of the Claimant that the matters which had led to her short but acute period of mental ill health, mis-diagnosed as psychosis, related to matters of the birth of her second child and, in particular, the predicted conduct of a third party who, it was reasonably feared, could be a risk to the Claimant and her child.

15. The medical records at page 272, 273 through to 278 confirm that, as a consequence of that diagnosis, she was prescribed Sertraline to help her with her recovery. We do not have a document which describes within the GP notes the decision to prescribe Sertraline, but we have noted that there are references to Sertraline which are present throughout the relevant period. We have also noted on page 255 a summation of the Claimant's GP practice of significant past illnesses. With respect to mental health there was a "stress related problem" between May and June 2009, between April and May 2011 there is a record of depression and between 25 September 2017 and 3 January 2018 there was a period of post-natal depression.

16. The Claimant's medical records which post-date the termination date of the Claimant's employment on 12 February 2018, do not make any significant reference to her mental health. There are references to physical impairments such as shoulder pain and flu and there was reference, on 3 April 2018, to palpitations; "Palpitations, one of her legs are going purple and mottled, and also her arm on the left side. Are the symptoms new, ongoing or recurrent 2y but now spreading up her legs and in her arm?"

17. There is reference again to palpitations on 16 April and, at 246 in the bundle it is recorded that the Claimant told her GP in a telephone call that she felt she was stressed but; "feels palpitation causing stress rather than vice versa. Lots of stressors currently."

18. We then note that there are subsequently references to carpal tunnel on 25 May and pains in hands and wrists as well as a suspected fracture of the wrist on the same day. We noted that by 7 June there is a reference to asthma and other conditions but on 13th the doctor recorded this:

    "would like Sertraline to be increased… wants to know if there's any meds she can take for palpitations… also requesting MED 3… says she doesn't need to come in as is happy with call."

19. We have noted that the medical certificate for that period which is dated 13 June covers the period from 27 May through to 13 July 2018 and states that the Claimant is unfit to work for reasons relating to anxiety which is consistent with another entry on 13 June which states:

    "been getting palpitations the last week and worsening anxiety, discussed possibility of using B/blocker but she has asthma so decided on increasing the Sertraline instead. Review symptoms in 3-4 weeks" and the prescription is at that point raised to "100mg – on acute".

20. By the time her medical certificate had expired she was still taking the Sertraline and on 2 August when she attended the surgery, principally in relation to wrist joint pain, it was also noted with regard to palpitations as follows "and sweats for months HX neg denies anxiety or depression, SSRI hasn't helped palps, gets approx. 1/week when heart beats quick…"

21. There are further references to Sertraline i.e. in September and wrist pain particularly increasing references to wrist pain and the need for analgesia and related matters as well as other physical impairments, but there are no further indications, of mental health impairment nor do the notes record at any time that the Claimant associated her mental health as principally being caused by the respondent's treatment of the Claimant. Indeed, we have noted that on two occasions there has been a record of other "stressors".

22. We have also noted that the Claimant had carpal tunnel and was examined at hospital on the 7 August 2018 which reported “possible bi-lateral carpal tunnel syndrome for nerve conduction studies” and the outcomes were “the result shows electrographically mild right carpal tunnel syndrome. (2) left median nerve conduction studies remain overall still within acceptable and normal limits at this stage.”

23. We compared those matters with the evidence of the Claimant’s applications for employment, the records of which began on page 148 of the bundle.

24. On 29 January 2018, during her notice period, she applied for work as a Young Carers Outreach Worker [155]. On 8 February she applied for QCF Assessor Health and Social Care and on the same day applied for Freelance Health and Social Care Assessor.

25. On 11 February she applied for a job in Swansea as an HR Administrator. On 12th she applied for a job as an NVQ Health and Social Care Assessor. On 15 February she applied for an Operations Manager role with Astrevia. On 15th she also applied for Health and Social Care Assessor with KM Recruitment and on the same day she applied for Assistant Branch Manager with GMF Motor Factors.

26. On 19th she applied for work with Topps Tiles and on 20th she applied to be a General Manager of Redshaw Search Consultants Limited which had a salary between £60,000 to £80,000 plus potential of 30% bonus and car.

27. We also note that she applied to be a Catering Store Manager in a retail environment on 8 March and a Performance Manager for Care Credential Wales on 13 March as well as applying through Alpha One Recruitment to work as a Carer for Swansea City and County of Swansea Council at a salary rate of between £9 and £16 per hour.

28. On 19 March she applied to be Head of Community Solutions for Swansea Council and on 25 March she applied to be a Children’s Support Worker. We also note that she applied around late May to work with Trinity Nursing Services. The emails at 194 to 193 indicate that she had progressed with this application as she was discussing with the agent paying for her DBS Certificate in two tranches and that she was looking for two shifts a week to start with. That chain of correspondence ended on 23 May, four days before the commencement of the aforesaid sick certificate.

29. The Claimant was applying for work again in August as a Customer Retention Team Manager and amongst other things to be a Manager of a Lidl Supermarket and to work in the Co-Op in a less senior role.

30. We undertook a comparison of her descriptions of her impediments as set out in her witness statement the medical records and her confidence to apply for quite senior roles as a Manager of a Supermarket, senior roles in Local Authorities as a Manager or to work in a very highly paid role for a Recruitment Agency.

31. There is a consistency between the medical notes and the Claimant's willingness to stretch herself beyond her past work experience and take on quite taxing and pressurised work in some of the more senior roles for which she applied.

32. We have had some difficulty finding sufficient consistency between those to have full confidence with the Claimant's description of her symptoms in her witness statement.

33. We have no medical evidence which identifies a causal link between the carpal tunnel syndrome or the sinus tachycardia and we are therefore not satisfied that those matters flow from the conduct of the Respondent.

34. In relation to the Claimant's depressive illness we have first noted that the significant periods of depression in the Claimant's medical records precede the Respondents' conduct towards the Claimant on or around 20 November 2017 and we are also aware that the Sertraline, apart from having a positive impact on the Claimant's mental health, appears to have been associated with the Claimant's palpitations, albeit we recognise it describes the palpitations reoccurring after the Claimant's resignation.

35. Taking these matters taken together, we acknowledge that the Claimant did suffer as a consequence of her dismissal. However, the degree to which she had suffered as set out in her statement is one which we do not find persuasive and we have more confidence in the contemporary records of the General Practitioner and the evidence of the Claimant's mental health as displayed through her willingness, and statements of her ability, to take up the diverse aspects of employment which we have noted above.

36. In these circumstances we have considered the Judicial College Guidelines for mental impairments in particular looking at the 14th Edition at pages 11 – 14. We have also taken into account the guidance in the "Vento" and "Da'Bell" case law and the Presidential Guidance relevant to claims issued before 1 April 2018.

37. We have reminded ourselves that we are concerned with the effect of the discriminatory conduct upon the Claimant rather than some theoretical assessment based on the conduct of the employer. Further, that compensation should not be punitive and that the level of compensation

must properly reflect, and not in any way belittle the seriousness of discrimination in our society.

38. Having done so we have concluded that the proper award for the Claimant's injury to feelings is £5,000.

39. The Claimant has also made an application for an award of aggravated damages. Firstly, the Tribunal reminds itself that it must be careful to avoid making an award which might involve double recovery. Secondly, the Tribunal looks at the matters which are raised in the Claimant's case to support an award of aggravated damages.

40. Firstly, she asserts that the Respondents failed to deal with a grievance she raised in a letter dated 28 November 2018.

41. The Tribunal recalled that Mr. McGregor when asked to investigate the conduct of his wife gave evidence that he spoke to his wife and accepted her account. In our judgment on liability we did not make a finding of fact that the respondents' failed to investigate the claimant's grievance. We do not make such a finding now.

42. A second element of the claim of aggravated damages is the failure to reach a resolution of this case through conciliation. This assertion is evidently correct but, as those discussions were conducted on a without prejudice basis, there is no evidence before us would could act as a foundation for an award of aggravated damages.

43. A third is the fact that the Respondents had not apologised and failed to admit that discrimination took place. We find this was not conduct which could be considered aggravating. The fact that the Respondent failed to admit indirect discrimination, of which, in our judgment, it had little understanding prior to the Tribunal hearing, we do not consider to be in any sense aggravating. Nor was the failure to admit discrimination an aggravating feature in those circumstances they are normal aspects of the conduct of well-mannered litigation.

44. The Claimant also asserts that there was a statement by the respondents of a loss of contracts which misled the Tribunal during this hearing and that there had been a critical reference to the Claimant in the voluntary liquidation paperwork of the First Respondent.

45. It is correct that the Respondent did refer to its loss of contracts in the course of this hearing as part of the explanation for why the First Respondent, J-Care Limited, had gone into voluntary liquidation. We understand the Claimant's reference to "I was put as the reason for the closure of the business" to be a reference to the fact that, by the time of the liquidation, in

July of 2019, the Respondent had been aware that for some time that it was to face a Remedy Hearing for the discrimination which had been proven at the liability hearing. It was also aware that the Claimant's Schedule of loss valued her claim at £136,580.96. That was a potential liability which the Respondent would have to alert to its accountants or its advisers when looking at whether or not the business was likely to be able to continue to trade without going into bankruptcy.

46. Taking all of these matters into consideration we do not consider that this is a case where it is just and equitable to make an award of aggravated damages.

Compensation for loss of income

47. We then turn to the Claimant's application for compensation for her losses flowing from the termination of her employment on 12 February 2018.We firstly note the following:

48. The Respondents have put before us documentation which shows that, as of 5 July 2019, the First Respondent ceased to trade, and went into voluntary liquidation. From the witness statements, including matters raised at the liability hearing, but which for the purposes of this Judgment can be largely drawn from the evidence of Mr.Dean McGregor, the following can be noted:

(1) That the Respondents' business had two geographical areas, the second of which had more difficulty in recruiting and retaining carers to service the care contracts that it held.

(2) This was very apparent in part of the exchanges between Mrs. McGregor and the Claimant on 20 November 2017.

(3) By a report from Care Inspectorate Wales dated 5 October 2018, referring to an inspection of the First Respondent on Friday 3 August 2018, it was found that whilst the standard of care provided was considered to be good the level of service was inadequate in respect of timely care and the management. The report concluded the First Respondent was in breach of Regulation 16(a) of the Care Standards Act because of an inadequacy of the number of staff. This is corroborated in the Claimant's witness statement at paragraph 17 where she refers to restrictions being placed on the First Respondent following the report. The restriction to which the Claimant refers is not self-evident in the body of the report but two members of the panel have particular professional knowledge of care businesses and we conclude that it is highly unlikely that any Local Authority would engage in fresh contractual relationships with the Respondent in light of such an assessment.

49. We accept Mr. McGregor's evidence that it is a characteristic of the First Respondent's business that those for whom the Respondent cared might cease to be customers at very short notice for reasons beyond the Respondent's control. Further, for small care packages, where perhaps there was only one or two visits a day, those could be replaced with new customers reasonably easily. However, with larger more detailed care packages, which necessarily represent a larger proportion of the First Respondent's income, those are not so easily replaced.

50. We accept that in November 2018, due to the death of the client, the Respondent lost a substantial "care package" and that happened again on 1 January 2019. That is again consistent with the Claimant's assertion that there was a "restriction" that the Respondent was having considerable difficulty replacing its income streams.

51. The McGregors' evidence confirmed that they reduced their own income from the business post-January 2019 and that they returned leasehold cars in order to try and reduce the business but when a third care package was lost, reducing the company's income by £36,000, the business could no longer survive and it ceased to trade.

52. The question for us to determine in relation to loss of income is how long the Claimant would have remained in employment but for the discriminatory acts of November 2017.

53. We have reached the conclusion that in circumstances where the Claimant was losing care packages and in particular in November and January 2018/19 had lost two large care packages to the extent that the owners reduced their income and reduced all of the costs that could be reduced, it is unlikely that the business would have been able to sustain a Manager on a gross annual salary of £33,000. In those circumstances, we consider it is likely that the Claimant would have been made redundant by 28 February 2019.

Mitigation of loss

54. The Tribunal reminds itself that the burden lies upon the Respondent to demonstrate that a Claimant has not made reasonable efforts to mitigate her loss. We remind ourselves that the test of "reasonableness" in this regard is not a purely objective one.

55. We have addressed some aspects of the personal circumstances of the Claimant above. We noted that the Claimant was, in our Judgment able to obtain employment with Trinity Nursing and, but for an unexplained incompletion of the paperwork, she would have been able to take up

employment, initially at two days a week, from sometime in June 2018, albeit that that her first day of work would have been delayed until the expiry of her MED 3 certificate dated 13 July.

56. We also note that the Claimant had previously applied for care work with Swansea Local Authority through Alpha One Agency and that that offered a rate of pay between £9 and £16 per hour.

57. We have noted that the Claimant has stated that she was unwilling to return to the care work environment for risks to her mental health. We have already expressed some concerns about the degree to which her statement is accurate when she describes that condition. We formed the view based on the fact that the Claimant applied twice, and certainly in respect of one application, appeared to have progressed towards taking up work, in the care sector, that the claimant has demonstrated that she was willing and able to work in the care sector.

58. We also take note of the evidence of the McGregors; that there is a dearth of applicants for care work in South Wales and elsewhere. Again, the Tribunal has particular knowledge of such circumstances and we have concluded the Respondents' evidence is reliable. We have concluded that there was work readily available for someone who, as the Claimant did, demonstrated a willingness to work as a carer.

59. To that extent we find that the Respondents have proven on the balance of probabilities that the Claimant did not make reasonable efforts to mitigate her loss by taking up paid work as a carer within the social care work sphere. In those circumstances. We consider that it would have been reasonable for the Claimant, from 1 August 2018 onwards, to have started work perhaps averaging two days for a period and then increasing her hours up to perhaps a maximum of 25 hours per week to reflect her childcare responsibilities.

60. For the relevant period we have averaged around 22 hours a week and using the lowest rate of pay in the advert before us of £9 per hour that would amount to £183 per week gross from 1st August 2018 to the date on which we have concluded she would have been dismissed in any event; 28th February 2019.

61. That done, we have also applied ourselves to calculate the amount that the Claimant would have earned in her role but for the conduct of the Respondent.

62. We have noted from pages 58 and 36 of the bundle that the Claimant's gross wage was £33,000 per annum, that her gross daily rate was £90.41, that there are 381 days between the effective date of termination and the

28th February 2019 and that the *net* rate of daily pay for the Claimant was £68.

63. Our calculation, on a net basis amounts to £25,908 from that we deduct the net sum which the claimant would have earned if she had made reasonable efforts to mitigate her loses in that same period.

64. We consider that the claimant would have been more likely than not to have had to accept the lower end of the range of hourly rates evidenced before us: £9.00 per hour. Based on our judgment the claimant, working an average of twenty-two hours a week would have earned, over the relevant period, an average of £183.00 gross per week. That weekly sum would be subject to National Insurance deductions of about £2.63 per week but not income tax. Thus, her net day rate, on a five-day week, would have £36.01. The period from the 1st August 2018 to 28th Feb 2019 encompasses 294 days. At the said daily rate the claimant, had she made reasonable efforts to mitigate her losses, would have earned £6,085.69.

65. Having deducted the above sum from the sum of £25,908.00, we have reached the conclusion that the proper compensation for the claimant's loss of earnings between the 13th February 2018 and the 28th February 2019 is the net sum of £19,882.31.

Interest on the discrimination awards

66. Tribunals must award interest on damages for discrimination.

67. The parties agreed that the tribunal should award simple interest at the rate of 8% on the amount of compensation for injury to feelings.

68. Regulation 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides, so far as is relevant:

> 6— (1) Subject to the following paragraphs of this regulation—
> (a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation; …
> (3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period … in paragraphs (1) …it may—
> (a) calculate interest, or as the case may be interest on the particular sum, for such different period … as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.

69. In respect of the injury to feelings award of £5,000.00 we made the following calculation. Interest has accrued at the rate of 8% between the 20th November 2017 and the 16th December 2019; a total of 756 days. We therefore make an award in the sum of £824.49.

70. In respect of the compensatory loss of £19,882.3, we made the following calculation. Interest which has accrued at 8%, is calculated from the midpoint between the first date of loss on the 13th February 2017 and the 16th December 2019; total of 291.5 days. We therefore make an award in the sum of £1,270.27.

The maternity pay claim

71. The claimant asserts that she has not received her full entitlement to statutory maternity pay (SMP"). The claimant states that there has been an underpayment in the sum of £114.14.

72. The respondent defends this allegation. It asserts that the claimant lacked the necessary qualifying period of service to be entitled to SMP.

73. The respondent asserts the claimant's MATB1 certificate stated the expected date of childbirth was Sunday 13th August 2017.

74. The tribunal notes that the definition of "a week" for the purposes of the maternity leave regulations is found in section 171(1) of the SSCBA. A week is defined as a period beginning on a Sunday and ending on a Saturday. Thus, the claimant's week of childbrith commenced on Sunday 13rh August 2017.

75. There are two other dates to consider. The first is the "qualifying date" and the second is the date by which the duration of employment of the claimant must be calculated. Looking then at section 164 (2), (4) and (5) of the SSCBA and regulation 22 of the Statutory Maternity Pay Regulations, the claimant must have 26 weeks continuous service up to and including the qualifying week.

76. The qualifying week is defined as the week immediately preceding the 14th week before the EWC, put more simply, the 15th week before the EWC. The ET note that the compliance to be employed in a week does not require employment throughout the whole week; any part is sufficient.

77. In this case the 15th week before the 13 August 2017 ran from Sunday the 14th to Saturday 20th May 2017. The qualifying period for continuous employment must be 26 weeks prior to, but including, the qualifying week.

78. The Qualifying week commenced on Sunday 24th and ended on Saturday 30th April 2017

79. The period of 26 weeks prior to Qualifying week began on Sunday 30th October 2016.

80. The claimant's employment commenced within the week of the 30th October 2016. Accordingly, the claimant qualified for Statutory Maternity Pay and the claim for unpaid SMP is well founded.

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Employment Judge R Powell
Dated: 27th March 2020

REASONS SENT TO THE PARTIES ON

……28 March 2020…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS