EMPLOYMENT TRIBUNALS

Claimant: Ms K Wright

Respondent: Coupland Cavendish Ltd t/a Gowing Law Solicitors

Heard at: Manchester **On:** 4 February 2020

Before: Employment Judge Phil Allen
Mrs P J Byrne
Mr W Haydock

REPRESENTATION:

Claimant: Mr B Culshaw, Solicitor
Respondent: Mr T Wood, Counsel

JUDGMENT having been sent to the parties on 17 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent from 18 to 25 March 2019. She was employed as a full-time administrator. At the time that she commenced employment the claimant was pregnant and suffering from hyperemesis, which caused nausea and vomiting during pregnancy. On 21 March the claimant was absent from work due to hyperemesis. On 25 March she was absent for the same reason, as she was nauseous and vomiting from early morning. The claimant was dismissed by email on the afternoon of 25 March.

2. The claimant brought complaints in the Tribunal: automatic unfair dismissal (section 99 Employment Rights Act 1996); pregnancy/maternity discrimination contrary to sections 18 and 39 of the Equality Act 2010; that the particulars of the reasons given for her dismissal were inadequate or untrue in breach of sections 92 and 93 of the Employment Rights Act 1996; and that the respondent had failed to provide written particulars, contrary to section 1 of the Employment Rights Act 1996.

3. A preliminary hearing by telephone took place on 28 August 2019 and the issues to be determined were identified and orders made. Witness statements were ordered to be exchanged to arrive on or before 6 November 2019. In fact, witness statements were only exchanged in the week commencing 27 January 2020.

4. On 31 January 2020 the respondent's solicitors wrote to the Tribunal conceding that the principal reason for the claimant's dismissal was a reason connected with her pregnancy. The respondent also agreed that the reason for the claimant's dismissal was the fact that she had been ill, which was the result of her pregnancy. They respondent accepted that the claimant had been unfairly dismissed and discriminated against contrary to section 18 of the Equality Act 2010.

Claims and issues

5. The claim for non-provision of a statement of employment particulars was withdrawn and the claimant agreed that it would be dismissed upon withdrawal.

6. At the outset of the hearing it was confirmed that, in the light of the respondent's acceptance of liability in respect of the unfair dismissal claim and the claim under section 18 of the Equality Act 2010, there remained only one issue of liability to be determined: the claim brought under sections 92 and 93 of the Employment Rights Act 1996, that is a breach of the right to a written statement of reasons for dismissal. It was agreed that, as part of the hearing, that issue would be determined. The focus of the claim was on section 93(1)(b) of the Employment Rights Act 1996, which provides that a complaint may be presented to an Employment Tribunal by an employee on the ground that the particulars of reasons given in purported compliance with the section were inadequate or untrue.

7. The hearing was also to determine the remedy due to the claimant as a result of the claims found, following the respondent's concession.

Procedure

8. The claimant was represented at the hearing by Mr Culshaw, solicitor. The respondent was represented by Mr Wood, counsel.

9. It was agreed that the remaining liability issue and the remedy issues would be heard and determined together.

10. The Tribunal were provided with and read the witness statements of: the claimant; and Ms D McCarthy who was, at the material time, the Business Development Manager for the respondent. The tribunal was also referred to a bundle of documents. The claimant had prepared a schedule of loss which confirmed what she was seeking from her claim. The claimant was sworn in, gave evidence and was cross-examined by the respondent and asked questions by the Tribunal. Ms McCarthy did not attend the hearing, so the Tribunal gave her statement the relevant limited weight as the claimant was not able to challenge her evidence. Each of the parties made submissions to the Tribunal.

Facts - liability

11. The Tribunal heard evidence from the claimant. The Tribunal read the statement from Ms McCarthy of the respondent, although as she did not attend the Tribunal only limited weight could be given to it.

12. In the bundle of documents, the Tribunal was provided with the email of 25 March 2019 which was the email which dismissed the claimant. That email detailed why Ms McCarthy had reached the decision to dismiss the claimant. The conclusion of the email said that the reason for dismissal was that the respondent said it was unable to rely on the claimant.

13. In terms of the truth of this statement, the Tribunal read the statement of Ms McCarthy which explained her decision for dismissing the claimant. As the Tribunal did not hear from Ms McCarthy her evidence was not tested, albeit the statement still recorded the reasons why it was she said she had dismissed the claimant.

14. The Tribunal finds that the reason given – that is that the respondent felt it was unable to rely on the claimant – was the true reason for dismissal, albeit as accepted by the respondent that was an unfair and discriminatory reason.

Law - liability

15. The right to a written statement of the reasons for dismissal is provided in sections 92 and 93 of the Employment Rights Act 1996. Section 92(1) provides that this is an entitlement to:

> "*be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal*".

16. Section 92(4) provides:

> "*An employee is entitled to a written statement under this section without having to request it and irrespective of whether she has been continuously employed for any period if she is dismissed – (a) at any time while she is pregnant*"

17. It was accordingly not in dispute that the claimant had been entitled to such a written statement.

18. Section 93(1) of the Employment Rights Act 1996 provides the following:

> "*A complaint may be presented to an employment tribunal by an employee on the ground that – (a) the employer unreasonably failed to provide a written statement under section 92, or (b) the particulars of reasons given in purported compliance with that section are inadequate or untrue.*"

19. The dispute in this claim was focussed upon section 93(1)(b), as some reasons had been given. The claimant contended that the reasons given were inadequate and untrue, the respondent contended that the reasons were adequate and true. Notably, what is provided in section 93(1)(b) is that a complaint arises from

whether the reasons for the employee's dismissal given were inadequate or untrue, not whether they were unfair or discriminatory.

Conclusions - liability

20. In considering the claim, the Tribunal's view was that the email providing the reason for dismissal was actually lengthier than those which the members of the Tribunal had seen in many circumstances. The Tribunal finds that the reasons given were not inadequate.

21. In terms of truth, what was important was the basis for the decision of Ms McCarthy. Whilst the Tribunal had not heard from her, it did have the statement that explained her reasons. The conclusion of the email said that the reason for the dismissal was that the respondent felt it was unable to rely on the claimant. As confirmed above, the Tribunal finds that this is a true reason, albeit in fact an unfair and discriminatory one.

22. The Tribunal does not uphold the claim brought under sections 92 and 93 because the Tribunal finds that the reasons given were neither inadequate nor untrue.

23. The Tribunal finds that the claim is not well-founded and does not succeed (in respect of the one outstanding liability issue).

Remedy – the law

24. Remedy is governed by Section 124 of the Equality Act 2010 and Sections 111-126 of the Employment Rights Act 1996. Section 126 of the Employment Rights Act 1996 provides that the Tribunal shall not award compensation under either of the Acts, in respect of any loss which has been taken into account in awarding compensation under another Act. Accordingly, the Tribunal initially addressed remedy for discrimination under the Equality Act 2010.

25. Where compensation for discrimination is awarded, it is on the basis that (as stated in **Ministry of Defence v Cannock [1994] IRLR 509**):

> *'as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]*'

26. The Tribunal received submissions from both parties. Both submissions referred to various authorities. Those submissions and authorities were considered by the Tribunal and are not reproduced in this Judgment.

27. In respect of injury to feelings, the Tribunal particularly took account of what is said by HHJ Eady QC in the Judgment of the EAT in the case of **Base Childrenswear Ltd v Otshudi UKEAT/0267/18**, particularly at paragraphs 18-22 and paragraph 36, where the EAT recap the law on this area and the key things to take into account. That Judgment says the following:

> "*When making awards for non-pecuniary losses, it is trite law that an ET must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards nor to allow*

double recovery. The ET should, moreover, not allow its award to be inflated by any feeling of indignation or outrage towards the respondent. On the other hand, awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation. See, generally, the guidance set out by Smith J (as she then was) in ***Armitage Marsden and HM Prison Service v Johnson [1997] ICR 275****, approved by the Court of Appeal in* ***Vento****.*

…In ***Vento****, the Court of Appeal laid down three levels of award: most serious, middle and lower. Specifically, at paragraph 65 of that Judgment, the Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. It was accepted, however, that the precise level of award under any particular head would depend on the facts of the case, which, of course, will depend on the evidence before the ET.*

It is also important for me to keep in mind that an award of compensation for injury to feelings is best judged by the ET that has had the benefit of hearing and seeing the Claimant give evidence….

As a matter of principle, aggravated damages are also available for an act of discrimination, albeit again, the award made must still be compensatory not punitive. As was explained by EAT in ***Commissioner of Police of the Metropolis v Shaw*** *[2012] IRLR 291, Underhill J (as he then was) presiding, such damages are really an aspect of injury to feelings and ETs should have regard to the total award made (i.e. for injury to feelings and for the aggravation of that injury), to ensure that the overall sum is properly compensatory and not - as was held to have been the case in Shaw itself - excessive. Although ETs are not required to make only one global award, it is important that they have regard to the overall sum awarded and, specifically, to the risk of double recovery.*

Finally, for present purposes, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety. To the extent that a psychiatric and/or physical injury can be attributed to the unlawful act, it is again common ground that the ET has jurisdiction to award compensation, subject only to the requirements of causation being satisfied (see ***Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170 CA****).”*

and in a paragraph which the Tribunal has particularly noted, she said:

“Moving on to the ET’s assessment of injury to feelings in this case, it is right to say that, in deciding whether the case should fall within the low or middle Vento bands, an ET might think it relevant to have regard to whether the discrimination in question formed part of a continuing course of conduct (perhaps a campaign of harassment over a long period) or whether it was only

a one-off act. That said, each such assessment must be fact and case specific. It is, after all, not hard to think of cases involving one-off acts of discrimination that might well justify an award falling within the middle or higher Vento brackets, or other cases involving a continuing course of conduct that are properly to be assessed as falling within the lower band. Simply describing discrimination as an isolated or one-off act may not provide the complete picture and I do not read the Vento guidance as placing a straightjacket on the ET such that it must only assess such cases as falling within the lower band. The question for the ET must always be, what was the particular effect on this individual complainant?"

28. The Tribunal also took into account the Court of Appeal Judgment in ***V*ento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102** and the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd.

29. Section 207A(2) of Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"*If, in the case of proceedings to which this section applies, it appears to the employment tribunal that - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*"

30. The ACAS code of Practice on disciplinary and grievance procedures is a relevant Code of Practice. That says that disciplinary situations include misconduct and/or poor performance. What that says at paragraph 4 is:

"whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

- *Employers and employees should act **consistently**.*

- *Employers should carry out any necessary **investigations**, to establish the facts of the case.*

- *Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.*

- *Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.*

- *Employers should allow an employee to **appeal** against any formal decision made.*"

Remedy facts and findings - loss to hearing

31. The first question is what were the claimant's losses to the date of the Tribunal hearing?

32. The claimant told the Tribunal that she had 18½ weeks of loss leading up to 10 August 2019, which is the date when she would have commenced a period of maternity leave. That was 18½ weeks, taking into account the one week of notice.

33. In the bundle of documents, the Tribunal was provided with a fit note (page 151). That recorded the claimant as being unable to work due to ill health between 4 April and 4 May 2019, the claimant having been dismissed on 25 March 2019. It was conceded by the claimant that this period was not a period of full loss. That accordingly reduced the period of full loss to 14 weeks. Using the figure in the schedule of loss of £336.11 per week, that means the claimant lost **£4,705.54** (in that 14 weeks).

34. However, had the claimant been in employment with the respondent, she would have received statutory sick pay for the period between 4 April and 4 May 2019. That means that, in addition to the 14 weeks loss, there would have been 3½ weeks when SSP would have been paid (taking into account the SSP waiting days) at the current SSP rate of £94.25, meaning that the claimant for those 3½ weeks of SSP would have been paid a total of **£329.88**.

35. From those figures is deducted the **£251.77** Universal Credit which the claimant received between 15 May and 14 June. The claimant's evidence to the Tribunal was that this was the period when she received Universal Credit, but will not have to repay it.

36. That makes the claimant's total loss to the date of hearing **£4,783.65**.

37. A question for the Tribunal was whether the claimant did take all reasonable steps to mitigate her loss in the period up until 10 August 2019. The claimant gave evidence of her attempts to find work. At that time, she was pregnant and unwell. The Tribunal find that the claimant did take all reasonable steps to mitigate her loss in that period.

38. The Tribunal do not accept the respondent's argument that the claimant failed to mitigate her loss by not seeking Universal Credit earlier.

39. The claimant has received Maternity Allowance, which is also what she would have received had she remained employed by the respondent. The claimant chose to commence Maternity Allowance earlier than she otherwise would have done but for the fact that her employment had ceased. The Tribunal did not take this into account in the figures calculating loss, because the total amount of Maternity Allowance the claimant receives will be the same, it will just be for a different period. The Tribunal finds that the claimant would have commenced maternity leave on 10 August 2019 had she remained in employment. The period when Maternity Allowance ceases is also factored into the Tribunal's calculation of future loss and

how long it determines that the claimant will take to find work once she decides to do so following her period equivalent to maternity leave.

Remedy facts and findings - future loss

40. In terms of future loss, the claimant was seeking six months future loss, as the period she said it will take her to find alternative employment following the end of a maternity leave period. In fact, the claimant's own evidence in her statement explained that she believed the period would be between 4-6 months. The Tribunal finds that the appropriate estimate of the likely period for which the claimant will be out of work after she ceases to take a period equivalent to maternity leave, will be the four month period which falls at the bottom end of the claimant's own expectation. Therefore, the Tribunal awards four months' future loss, which the Tribunal calculated as 17 weeks at £336.11, giving total future loss of **£5,713.87**.

Remedy facts and findings - injury to feelings

41. In terms of the factors that the Tribunal took into account for injury to feelings, the key factors were as follows:

a. The claimant's period of employment with the respondent was very short;

b. The discrimination was a one-off event, however it was a serious event; and

c. The effect on the claimant is that it did have an impact on her as she evidenced in her witness statement, but the claimant did not seek advice from her GP about the impact and there is no evidence that she sought support.

42. In relation to the impact on the claimant, it was difficult in this case to identify specifically what had an impact on the claimant when considering: dismissal; a difficult pregnancy; and what the claimant very honestly in her own evidence described as "baby blues". The medical records which the Tribunal were provided (page 175) told the Tribunal that by 21 November 2019 the claimant felt well and had no problems with mood. There were a lot of medical appointments that the claimant had, when she would have had the opportunity to raise mental health issues had she wished to do so.

43. In considering injury to feelings, the Tribunal concludes that, particularly because of the duration of the employment and the one-off nature of the decision, this does fall within the lower band of the Vento bands. However, in the light of what was the particular effect on this individual claimant of the discrimination, the Tribunal does believe that the award should be very near the top end of that band, and accordingly awards **£8,000** to the claimant as injury to feelings.

Remedy facts and findings - aggravated damages

44. The claimant also sought aggravated damages. This was particularly based on the respondent conceding liability only very late in the week prior to the hearing (in fact the claimant only found out in the week of the hearing).

45. The respondent's explanation for the late concession was that the relevant witness was no longer with it as an employee, they had only recently taken her evidence, and thereafter they had spoken to counsel.

46. The claimant's evidence about the internal appeal conducted by the respondent was that there was no indication that Ms McCarthy had been asked to give her account at that time.

47. The claimant's point was that this should have been sorted out a long time ago, without her having to go through what she described in evidence as being many months which were scary with the impending Employment Tribunal.

48. The Tribunal has considered aggravated damages very very carefully, but has decided that it will not award aggravated damages in this case.

Remedy facts and findings - failure to follow the ACAS code

49. Under section 207A of Trade Union and Labour Relations (Consolidation) Act 1992, the claimant sought a 20% uplift for the respondent's failure to follow the ACAS Code of practice on Disciplinary and Grievance Procedures.

50. The respondent's position was that the failure was not unreasonable in the light of the claimant's length of service.

51. Looking at the ACAS Code, the respondent did not: inform the employee of a problem; give her the opportunity at a meeting to discuss the problem; or investigate. It did give the claimant a right of appeal and held an appeal meeting, albeit in the absence of Ms McCarthy who was the decision maker.

52. Nothing in the ACAS Code provides that it does not apply to short-serving employees. The Tribunal finds that it was not reasonable for the respondent not to follow the ACAS Code. The Tribunal finds it to be just and equitable to uplift the awards by 20%, particularly noting the absence whatsoever of any fair procedure followed by the respondent prior to dismissal.

Remedy for automatic unfair dismissal

53. The Tribunal did not go on to award any separate award for the automatic unfair dismissal, because the claimant's losses were already covered by the award made in respect of discrimination (as laid down in section 126 of the Employment Rights Act 1996).

The figures

54. Loss to hearing was £4,783.65. With a 20% uplift that increased to **£5,740.38**.

55. Future loss was £5,713.87. With the 20% uplift that increased to **£6,856.65**.

56. The injury to feelings award of £8,000 with the 20% uplift increases to **£9,600**.

57. In terms of interest, on the injury to feelings award interest runs from the date of the discriminatory act to the date of this decision. The Tribunal applied a calculation of 45/52 (being the number of weeks) x 8%, which gives an interest figure of **£664.62**.

58. Interest on the loss that has occurred is calculated from the mid-point of the act of discrimination date, so the Tribunal used 22.5/52 x 8% which gave an interest figure of **£198.71**.

59. There is no interest on the future loss award.

60. That made total interest (putting the two figures together) of **£863.33**, and an overall total award of **£23,060.36**.

Employment Judge Phil Allen

Date: 24 March 2020

REASONS SENT TO THE PARTIES ON

31 March 2020

FOR THE TRIBUNAL OFFICE