



## THE EMPLOYMENT TRIBUNALS

Claimant  
Ms Rebecca McKeith

Respondent  
Mr Liam Alexander

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ( by Cloud Video Platform)

ON 20 August 2020.

BEFORE EMPLOYMENT JUDGE GARNON (sitting alone)

Attendance

Claimant : in person

Respondent: no attendance

### JUDGMENT on REMEDY

I order the respondent to pay to the claimant compensation of £16819.60 and interest of £ 795.94

### REASONS (bold print is my emphasis and italics are quotations)

#### ISSUE AND FACTS

1. The only issue is what remedy should be awarded for acts of discrimination upon which I gave judgment on 27 May 2020 under rule 21 of the Employment Tribunals Rules of Procedure 2013. The claimant, born 7 January 1997, was employed from 13 December 2017 as a “personal assistant”, which means she cared physically for the respondent who is physically seriously disabled and requires round the clock care . Her claim reads:

*I received a message from my employer (Liam Alexander) saying he could no longer give me any hours as I was a "female" and was posing problems for him, despite being employed for nearly 2 years previously with no problems.*

*This happened while I was roughly 6/7 months pregnant. This also caused me stress during my pregnancy which my doctor made me take sick leave for as the situation was making me very ill and it wasn't good for either me or the baby.*

*Due to this I decided to seek legal advice and resolve the problem through ACAS to no avail. Since going through these proceedings my employer has withheld my wage/statutory maternity pay every month and I have had to chase it up - sometimes receiving it 5 days late. I have also received emails from my employer using vulgar language and making references towards me which are hurtful and disgusting and what I would also class as sexual and extremely unprofessional, all which I have evidence of.*

2. Her Early Conciliation certificate named the respondent as on the claim form but added the words " Direct Payments". The claim was presented on 4 March 2020 and said **employment continued**. As for remedy claimed she wrote:

*I have seen fit to take legal advice on this matter and the person in question believes I should be seeking compensation for sex discrimination and injury to feelings. I have also lost out on maternity pay I was entitled to due to cancellation of shifts and me having to bring my maternity leave forward in fear of losing my job and being left penniless when I was having my son.*

3. She gave evidence on affirmation today her baby son was born on 2 December 2019. He is her first child. The baby had been due on 14 December and she had planned to work until November. She is a student at university and regularly did two twelve hour shifts caring for the respondent on a Friday and Saturday which fitted around her studies. She has a partner. Her own parents and his are willing and able to look after her son as often as needed. Had it not been for the discrimination, she would have returned to working the same shifts as before. I asked her how the respondent would cope if she or her son became ill and she could not attend a shift. She explained if she or any of the carers are sick at short notice, the one on shift transports the respondent to his own family who look after him until the next carer comes on shift. Because the respondent has not participated at all in these proceedings, to be fair to him, I raised all the obvious questions as to how, had it not been for the discrimination, which the claimant now accepts as having brought her employment to an end, she could in practice have returned, and I was wholly reassured she could and would have.

4. She described her relationship with the respondent as one of friendship as well as employment saying she could not understand why his attitude to her changed so dramatically from the time she told him in about April 2019 she was pregnant, but it clearly did.

5. The claim was served by post to the respondent's address, which is known to me as "supported" housing, on 1 April. No response was received by the due date, or ever. An Employment Judge is required by rule 21 to decide on the available material (which may include further information a Judge requires parties to provide) whether a determination can be made and, if so, obliged to issue a judgment which may determine liability only or liability and remedy. The claimant by letter to the Tribunal replying to a query from Employment Judge Arullendran, about "Direct Payments " possibly being a company which employed her, said:

*"Sorry for the confusion regarding my employer. Liam Alexander is my employer not Direct Payments. Direct Payments are a company involved in Gateshead Council's payroll who give Mr Alexander the funding he needs in being able to employ people to care for him.*

*Again, I am really sorry for any confusion this has caused and again would like to ensure it is clear that Mr Liam Alexander is my employer."*

*Hope this helps!"*

6. I have encountered cases where a Local Authority, under a statutory obligation to care for vulnerable adults, funds their care under an arrangement whereby the person receiving the care is legally the employer of his carers. In some such cases I have seen strong evidence the "employer" does not have the mental capacity to enter into any contract, let alone understand his obligations under employment law, or how to put in a response. On consideration of the file

Employment Judge Johnson fixed a preliminary hearing, by telephone due to the pandemic, to discuss if Gateshead Council should be added as a respondent.

7. On 27 May 2020 I conducted that hearing which the respondent did not attend. I asked the claimant about him. She informed me he is about her age, has muscular atrophy which results in him having little movement from his neck down but he is studying for a university degree and has full mental capacity. His carers open his post and he gives instructions how to deal with it. He is IT literate and uses a laptop well despite having little finger movement. He advertised for a carer which is how the claimant got the job. She worked for him without problems until she became pregnant. Three days before the hearing, he had emailed her asking if there was a way they could settle their differences. I was, until I spoke to the claimant, cautious about issuing a Rule 21 judgment in case the respondent lacked the ability to have put in a response. I was reassured he could have. He could still be heard on remedy. The claimant assured me Gateshead Council Social Services Department had said the respondent's actions had nothing to do with them. She told me today her statutory sick, and later maternity, pay came by transfer into her bank account from the respondent's, not from the Council.

8. I had in the claim form sufficient to enable me to find the claims proved on a balance of probability but not enough to determine the sums to be awarded. Therefore, on 27 May 2020, I gave judgment in default of a response that claims of direct sex and pregnancy/maternity discrimination contrary to sections 13 and 18 of Equality Act 2010 (EqA) were well founded. I ordered remedy would be decided at a two hour hearing on a date to be fixed. Notice of it was sent to the respondent. The claimant was to provide to the respondent and to the Tribunal, an itemised statement of outcomes sought to include (a) details of lost earnings (b) state benefits she had received (c) any other outcomes she sought such as an award for injury to feelings. She did so on 10 June by email copied to the respondent. The respondent was to file a response within 14 days thereafter but has not done so.

## LAW

9. The statutory provisions of the EqA as far as relevant are in section 124

*(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;*

*(c) make an appropriate recommendation.*

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

Section 119 says the Tribunal must try to assess what the position would have been but for the discrimination and attempt to restore the claimant to that position Abbey National plc-v-Chagger 2010 ICR 397. I need to compare the financial benefits she would have had if she not been treated unlawfully with those she has had, and will be likely to obtain in the future.

10. Compensation for injured feelings is not meant to punish. What matters is the effect on the claimant. The reason employment tribunals sometimes appear to focus on the respondent's

conduct is best explained thus. If a person has been injured in a car accident, one does not read in a report of the case how bad the defendant's driving was but about clinical findings, X rays and scans of the injury. Feelings cannot be scanned. If one watches a boxing match and sees a punch landing, one can imagine how much it hurts by drawing on experiences one has had of being struck. One can convey that to a person who has not seen it, by describing the blow. However, then one must remind oneself the person being struck is a professional boxer with a higher pain threshold than a frail person who would be hurt more by the same punch. We start by describing the conduct ,next asking "*how would we feel if that happened to us ?*"and finally "*Is this claimant more or less likely than us to feel hurt having regard to all we know about her?*". Just to listen to how a witness says she has been effected, risks giving greater compensation to better actors.

11. Tribunals put awards into at the time : a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 with the most exceptional cases capable of exceeding that.

## **CONCLUSIONS**

12. The liability judgment contains the declaration and the claimant seeks no recommendations. Her pay was £111 per 12 hour shift ie.£9.25 per hour. On various dates from telling the respondent she was pregnant in about April until September 2019, he cancelled 8 shifts for no reason she can think of other than her pregnancy, which he seemed to resent. That caused a loss of **£888**

13. Due to the stress of the situation she was signed off on sick leave by her GP from 13 September -12 October 2019 during which she would have worked 9 shifts at £111. That sum, less statutory sick pay at £98.85 per week, gives a loss of **£603.60**

14. She then brought her maternity leave forward and was paid statutory maternity pay until 10 July 2020. I accept, after all that has happened, she could not be expected to return to the respondent's employment . Her statement of outcomes sought reads

*I believe it could potentially take me 6 months to find a new job that pays the same and also that I am able to accept due to the fact I am a parent now and future employers might not be so accommodating with hours I am able to do. I also believe that coronavirus will play a part in having an effect on this due to reduced recruitments and redundancies. .*

Her estimate of 6 months loss = 48 shifts from 10 July at £111 per shift is conservative **£5,328**

15. As for injury to feelings the claimant had a close connection with the respondent as any carer does. She cannot understand what caused him to turn against her as he did, which is relevant to how much the way she was dealt with affected her at a time in her life which would otherwise have been one of great happiness. She describes that in her statement of outcomes sought:

*"I was extremely upset to lose a job that I had enjoyed and a job I believed was secure, especially when I felt this happened due to my pregnancy and my sex. It affected me hugely in regard to my own personal mental health and it had a huge effect on how I felt during the remaining months of my pregnancy. I was signed off on the sick by my doctor until my maternity leave started. Since my maternity leave has begun Mr Alexander has withheld my wage on more than one instance*

*causing me further distress and worry and I have also received an email from Mr Alexander using derogatory terms that could also be classed as sexual harassment and very unprofessional."*

Having spoken with her solicitor she said the appropriate injury to feelings award would be lower end of the middle band **£10,000. I entirely agree.**

16. I am obliged to award interest at 8% per year but have some discretion as to how to fix the period it should cover. I believe it should for the past loss of earnings ( the first two elements above totalling £1491.60) be from the midpoint between mid April and mid October 2019, that is mid July 2019, to now in mid August 2020 =13 months = **£129.27**. For the injury to feelings (£10,000) which peaked in about mid October 2019 to mid August 2020 = 10 Months. Interest for that period at 8% per year = **£666.67**.

17. Due to having to seek legal advice, the claimant asked me to award £500 in legal and solicitors' fees. I explained to her under the Rules costs can only be awarded in restricted circumstances and none of them apply in my view. The respondent has offered no resistance to this claim at any stage despite myself and other Judges taking every precaution to ensure he could. The claimant's last question to me today was whether he personally would have to pay the award, or could she ask the Council to pay it. She seemed genuinely concerned not only about being unable to enforce payment but for the effect of such liability on the respondent. He and he alone as her employer can be found liable. Being an employer brings with it responsibilities and I have often been concerned that in this model used to empower disabled people, whose care is publicly funded, those people are not sufficiently aware of potential liabilities which may attach to them or how to avoid incurring or insure themselves against such liabilities. I can do nothing to change that model .

**Employment Judge T.M. Garnon**  
**Judgment authorised by the Employment Judge on 20 August 2020**