EMPLOYMENT TRIBUNALS

Claimant: Ms H McCarthy

Respondent: Right Choice Services Ltd

Heard at: Watford Employment Tribunal (by video)

On: **27 May 2021**

Before: Employment Judge Quill; Mr W Dykes; Mr D Wharton

Appearances
For the Claimant: In Person
For the respondent: Ms S Younis, consultant

RESERVED REMEDY JUDGMENT

1. The respondent is ordered to pay the claimant the sum of £17,337.83. The breakdown is as follows:
   1.1. Loss of earnings: £2,697.01
   1.2. Interest on loss of earnings £355.12
   1.3. Loss of continuity of service £200.00
   1.4. Injury to Feelings £12,000
   1.5. Interest on injury to feelings: £2085.70

2. The entire sum is awarded for the contraventions of the Equality Act 2010 (nothing separate is awarded under the Employment Rights Act 1996 as that would be double recovery). The Recoupment Regulations do not apply.

REASONS

Introduction

1. This hearing took place by video. It follows the hearing on 11 and 12 January 2021, at which judgment was given orally. The written judgment was sent to parties on 18 February 2021; written reasons were requested on 20 January 2021 and sent 14 April 2021.

The Hearing and the Evidence

2. At the remedy hearing, in addition to the documents from the liability hearing, we had an 80 page pdf (remedy bundle) and a 10 page pdf (further documents – remedy), both of which were supplied without an index. We also had 4 separate pdfs which were copies of the Claimant's bank statements for July, August, September 2019 and April 2021.

3. The Claimant had not produced a new witness statement, but her original statement contained some paragraphs relevant to remedy. She gave oral evidence based on that statement, and answered questions from the Respondent's representative and the panel.

Facts

4. Prior to working for the Respondent, the Claimant worked for Direct to Market Solutions. She did door to door sales and this was commission based. The letter (page 68 of remedy bundle) dated 10 May 2021 is in error when it states that she worked for them for 9 months in "2019"; it should have said 9 months in "2018". The letter correctly stated that the Claimant did 4 days work for this employer starting 20 April 2021. She left after 4 days because she was unable to adapt to doing telephone sales rather than door to door. That is the only employment she has had since ceasing work for the Respondent.

5. The Claimant's intention had been to start her maternity leave on 1 September 2019 and to come back from maternity leave on 1 February 2020. There is no documentary evidence in support of the latter date, but that is not surprising or suspicious and we take the Claimant at her word that that is what she intended to do, taking into account that she was the main wage earner, and that her husband was not in employment. Had she returned to work with the Respondent, she would not have had to pay for child care.

6. The Claimant had her baby in October 2019. On 24 February 2020, the Claimant and her family had to leave their residence; the circumstances were such that the local authority accepted responsibility for providing temporary accommodation. They moved into their new permanent accommodation on 22 June 2020, having stayed in temporary accommodation in the interim.

7. From her employment with the Respondent, the Claimant was paid up to and including 30 April 2019. She was paid the national minimum wage. As per our findings in the liability reasons, her hours fluctuated slightly but were normally 40 hours per week, 8am to 4pm, Monday to Friday (without an unpaid break). Thus her gross weekly salary at termination was 40 x £8.21, which is £328.40. That is equivalent to £291.31 net.

8. Starting from 7 May 2019, she was entitled to Universal Credit of £623.70, which was payable because she was no longer employed. This increased to £1792.58 when she moved into the new permanent accommodation (22 June 2020). The DWP appointed a job coach to assist the Claimant in her search seek work (and to ensure that she was doing so).

9. As shown on the September 2019 bank statement, there was also a payment "Received From Lbnewham – HB". The amount was £312.81. No other documents explained this sum, although the Claimant believes it was a one off payment. Our inferences are as follows:
    a. The Claimant received Housing Benefit from the local authority in addition to Universal Credit from the DWP.
    b. The sum was £312.81 per month.
    c. The start date of this benefit was the same as the start date of Universal Credit, ie 7 May 2019.

d. The end date of this benefit was the date before the Claimant moved into the new property (so 21 June 2020). It appears that, from that date, rather than a separate amount being paid for Housing Benefit, the Universal Credit amount was increased to take account of the rent on the new property.

10. In making these inferences, we are doing the best that we can with the limited evidence that is available. In the absence of any documents from the Claimant which explain the "Received From Lbnewham – HB" payment, and the absence of bank statements for months after September 2019 and before June 2020 which would potentially demonstrate the amount – if any - for later months), we do not think it is just and equitable to ignore this sum, or to assume that the Claimant's recollection is correct that it was a one off payment. On the balance of probabilities, it was not a one off sum.

11. The Claimant did not seek to claim other benefits (including "maternity allowance"). At the time, she had no information that she might potentially be eligible and she was not informed that she was potentially eligible by DWP or anyone else.

12. The Claimant made some attempts to find new work by going to stores and restaurants in person and asking if they had vacancies. There is no documentary evidence of this, but we accept that she did it from time to time. We do not accept that she made more than a handful of such requests.

13. The Claimant made some attempts to find work by uploading her CV to a website/phone app called Indeed. She believes that she applied for 30 to 40 jobs per day by this method. She believes that she no longer has access to some of the applications which she made in the past because – in her opinion – after she changed phones and had to download the app again, she was not able to access the full history. Based on what is included in the bundle (which are the only documents which the Claimant disclosed to the Respondent), our findings are:
    a. In May 2019, the Claimant applied for a job with Hawaiian Choice
    b. On 24 May 2020, the Claimant applied for Customer Support Specialist with Beeline
    c. On 24 May 2020, the Claimant applied for Telesales Executive (employer details not shown in bundle)
    d. On 5 March 2021, the Claimant applied for 10 vacancies

14. From the lists of Indeed vacancies which the Claimant has supplied, there is no evidence that the Claimant applied for those which simply say "Apply to …" or "… have new jobs". This is because for other vacancies (those listed in the preceding paragraph) the text states, "you submitted an application for …".

15. An employer called Evoke contacted the Claimant and asked her if she was interested in work as Residential Support Worker. She replied to say that she was interested, but heard nothing further.

16. In the bundle, there is no copy of the CV lodged with Indeed (which was available to be forwarded to the prospective employers). In the bundle, there is no copy of any bespoke application to Evoke or to any other employer.

17. In April 2021, the Claimant approached her previous employer, Direct to Market Solutions, looking for work. Due to the pandemic, they had no door to door vacancies. (She did not approach them earlier because she knew this.) Things did not work out, and she left.

18. We do not accept the Claimant's assertion that she was applying for 30 to 40 vacancies per day. If she had been applying for that many, then she would have had evidence of many more applications than those mentioned above, even allowing for the fact that some were in person and that some evidence might have gone missing when she changed phone and/or when she was in temporary accommodation.

19. The Claimant was caused stress by the fact that she lost her job at the time that she was pregnant (making finding new work more difficult) and knowing that her husband was not able to work at the time. She expected to (and did, in fact) undergo significant financial hardship.

20. The Claimant was also upset by the knowledge that she would not become a manager with the Respondent (and, as per our liability decision, this was something which was not guaranteed to her, and was only a possible outcome some significant time into the future) and that the Respondent did not progress the NVQ course (which, as per our liability decision, was an act of discrimination in its own right).

21. There is no medical evidence that the stress had any effect on her pregnancy or that she required any specific treatment from her GP (or any other medical adviser) because of the stress related to losing her job and/or the other detriments.

The Law

22. The purpose of compensation is to provide proper compensation for the wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

23. For financial losses, we must identify the financial losses which actually flow from the acts which we found, in our liability decision, to be discrimination. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way. (We would also award losses for unfair dismissal if this were not double of the same loss).

24. In Ministry of Defence v Hunt [1996] ICR 554, the EAT made clear that the duty for a claimant to mitigate loss applies in cases of discriminatory dismissals, and gave general guidance as to calculating future loss. This included the need to take account of the fact that an employee might leave employment for a variety of reasons and that it is important for a tribunal to take account of those reasons (including the possibilities of dismissals which are not unfair and not discriminatory.)

25. When considering whether a claimant has acted reasonably to mitigate their loss, it is for the wrongdoer to show that the claimant acted unreasonably in

failing to mitigate, and the respondent bears a burden of proof when seeking to show this. What is reasonable and unreasonable is a question of fact for the tribunal to determine, and the mere fact alone that there might have been reasonable steps which the claimant could have taken, but did not take, does not necessarily mean that the claimant acted unreasonably. Furthermore, in determining whether the claimant has acted unreasonably, it is necessary to take account of the claimant's own preferences about the activities which they choose to undertake in order to earn money; a claimant's desire to (say) have a career change, or to study for a different career, or to start their own business, should not be ignored; however, the fact that they had a pursued a course of action that was to their liking will not always be something that insulates them against a finding that their failure to mitigate was unreasonable.

26. As per Savage v Saxena [1998] IRLR 182, where a tribunal is satisfied that the Claimant failed to comply with the duty to (attempt to) mitigate their losses, the tribunal should

    (1) Identify what steps should have been taken by the claimant to mitigate her loss;
    (2) Find the date upon which such steps would have produced an alternative income;
    (3) Thereafter reduce the amount of compensation by the amount of income which would have been earned.

27. For injury to feelings, we must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether the loss has been sustained. Some persons who are subjected to detriment or dismissal may feel deeply hurt and others may suffer little, if any, distress.

28. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318*, CA*, and take account of the changes and updates to that guidance for inflation and other matters. Three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury) were identified:
    a. The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
    b. The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.
    c. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

29. In Da'Bell v NSPCC (2009) [2010] IRLR 19, the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in Simmons v Castle [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper

level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

30. There is presidential guidance which takes account of the above, and which is updated from time to time. This claim is one which was issued in July 2019. The relevant guidance applicable to this claim states:

In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: 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(the most serious cases), with the most exceptional cases capable of exceeding £44,000.

Analysis

31. We are satisfied that the Claimant should be awarded her losses for the period 1 May 2019 to 31 August 2019 (17.57 weeks) based on the full net loss (which we calculate below). The Claimant had no intentions of resigning and there were no fair and non-discriminatory reasons to dismiss her at that point. The Respondent has not proven that the Claimant acted unreasonably in failing to mitigate her losses at this stage. We do take into account that there is only documentary evidence of one job application in the period, but the Claimant has provided a partial explanation for that (that she changed phone) and she was making some applications in person. She was also able to satisfy the DWP that she was taking sufficient steps to look for work. The fact that the Claimant was unsuccessful in this period does not demonstrate that she acted unreasonably, and the fact that she was unable to find work might have been connected to the fact that she was pregnant at the time.

32. We are satisfied that the Claimant should be awarded her losses for the period 1 September 2019 to 12 October 2019 (6 weeks) based on the SMP that she would have been entitled to in that period, which is £295.56 (90% of £328.40) per week. The Claimant had no intentions of resigning and there were no fair and non-discriminatory reasons to dismiss her at that point.

33. We are satisfied that the Claimant should be awarded her losses for the period 13 October 2019 to 31 January 2020 (15.86 weeks) based on the SMP that she would have been entitled to in that period, which is £148.68 per week. The Claimant had no intentions of resigning and there were no fair and non-discriminatory reasons to dismiss her at that point.

34. The Respondent's representative argued that there were other benefits which the Claimant could have claimed but failed to claim (including maternity allowance) and this was an unreasonable failure to mitigate. We are not persuaded by this argument. There is no specific evidence about the amounts of additional alleged benefits which the Claimant might have received. However, and in any event, she was in contact with the DWP and the local authority and was not advised to apply for maternity allowance. She has not acted unreasonably in failing to obtain other benefits.

35. We have accepted the Claimant's evidence that she would have returned to work on 1 February 2020. We have considered whether we should try to look at two possible outcomes (the Claimant returning to work on 1 February 2020, as she says she would have done; and the Claimant exercising her right to the full maternity leave period, as she had the right to do) and ascribe a percentage likelihood to each of these. We have decided not to, because neither party invited us to take that approach, and because the Claimant was quite clear in her evidence, including under cross-examination, that she was sure she would definitely have returned to work on 1 February 2020.

36. We are satisfied that the Respondent has proved that the Claimant acted unreasonably in her attempts to mitigate her loss. She has not shown documentary evidence of any job applications at all for the periods February, March and April 2020 or for June 2020 to February 2021. Although, as discussed above, the Claimant has put forward an explanation for that lack of evidence, the explanation is not good enough to explain why she can only evidence 2 applications between February 2020 (both in May) and a flurry of applications on 5 March 2021 (which was after the liability decision and in the period that evidence of mitigation was being sought by the Respondent for the remedy hearing). We are satisfied that if the Claimant had made 30 to 40 applications per day on Indeed, from February 2020 onwards, then she would have been able to provide evidence of several hundred applications to us (even if proof of some applications went missing). The fact that she can only provide evidence of two leads us to infer that the number of applications was very low, even when adding in the in person applications that she believes she made (and she was only able to describe 2 or 3 of those specifically) and applications for which the evidence has been lost.

37. We have taken account of the fact that the Claimant had to leave home for emergency reasons on 24 February 2020 and of the problems that undoubtedly caused. However, there was no evidence of applications in the period 1 to 23 February 2020. Furthermore, since the Claimant was able to make two applications in May 2020, she ought to have been able to make many more than two that month, as well as many in subsequent months.

38. We have also taken account of the effects of the pandemic which led to a lockdown announcement around 23 March 2020. There were was no evidence of job applications in the period 1 February to 23 March 2020. The restrictions began to ease after several weeks (prior to tightening again later in the year).

39. Taking account of the work which the Claimant had performed for the Respondent, the Claimant had skills in the social care sector, which was not obliged to cease operating during the lockdown (notwithstanding the restrictions placed on members of the public from interacting with service users). Some of the other types of job which the Claimant might have been interested in (including sales) were not likely to have been recruiting during lockdowns.

40. Taking account of the above, we are satisfied that if the Claimant had acted reasonably (including by applying for more jobs via Indeed, and/or by signing up for other recruitment apps, and/or by registering with an agency supplying workers in the care sector) then she would have been able to obtain a new

job which paid the same as the Respondent (that is national minimum wage for 40 hours per week) by no later than 1 July 2020.

41. We therefore award the Claimant her losses for the period 1 February 2020 to 30 June 2020 based on 40 hours per week at NMW rates. We do not make a further reduction to this loss to take account of the possibility of a choice of career change (ie leaving the job of her own accord), because she would have only done so had she first been able to find a new job to go to, which was unlikely in this period. We also do not make a further reduction to this loss to take account of the possibility of a fair and non-discriminatory dismissal in this period as we are satisfied that there is no realistic chance of such a dismissal taking place in this comparatively short 5 month period. NMW increased from £8.21 to £8.72 per hour with effect from 1 April 2020. So the weekly gross would be 40 x £8.72 which is £348.80.

42. At the time of her dismissal, the Claimant had worked for the Respondent since September 2018. In other words, she had more than 7 months continuous employment counting towards the possibility of acquiring, after 2 years, protection against (ordinary) unfair dismissal. We award her £200 for the loss of this continuity, because she will have to start again from scratch with a new employer.

43. The Claimant sought injury to feelings compensation of £20,000. In other words, somewhere slightly above the middle of the middle Vento band. The Respondent argued for compensation in the lower part of the middle Vento band.

44. This discriminatory dismissal had a significant effect on the Claimant's emotional wellbeing, but we are satisfied that she had recovered by the time of the hearings in 2021. The dismissal was not the only discrimination. As per the liability decision, the Respondent also failed to progress the NVQ training. For these reasons, an award in the lower band would not be appropriate (and nor has the Respondent invited us to make such an award.)

45. The effects were not long-lasting. The Claimant was able to make some job applications in the period 1 May 2019 to 31 August 2019. There is no medical evidence that she needed specific treatment to counteract the effects of the discrimination (although she was, of course, attending appointments connected to pregnancy). All discrimination is a very serious matter, but we are satisfied that an award in the highest Vento band would not be appropriate in this case (and nor has the Claimant invited us to make such an award.)

46. Our judgment is that the sum of £12,000 (being slightly nearer to the bottom of the middle band, than to the middle of that band) is appropriate in this case in all the circumstances, taking account of all the acts of discrimination, and ignoring those matters which we found did not contravene the Equality Act.

47. This is an appropriate case for us to exercise our discretion and to award interest, both on the financial loss and on the injury to feelings award.

Calculations

Loss of Income

48. We must calculate loss of net income to 30 June 2020 (after which there would be no further loss if there had been appropriate attempts to mitigate).

49. First we calculate gross earnings within tax year 19/20 in order to work out what tax and national insurance would have been payable and hence the net loss.

a. 1 May 2019 to 31 Aug 2019:	17.57 x £328.40	=	£5769.99
b. 1 Sep 2019 to 12 Oct 2019:	6 x £295.56	=	£1773.36
c. 13 Oct 2019 to 31 Jan 2020:	15.86 x £148.68	=	£2358.07
d. 1 Feb 2020 to 31 March 2020:	8.57 x £328.40	=	£2814.39
e. 1 April 2020 to 5 April 2020:	0.71 x £348.80	=	£247.65

50. No P45 or P60 was placed in the bundle, which means that we must estimate the gross pay for 6 April 2019 to 30 April 2019 from the payslip at page 19 of remedy bundle. We take it to be 25/30 x £1469.59 = £1224.66.

51. So, for tax purposes, the Claimant's gross income for 19/20 would have been: £1224.66 + £5769.99 + £1773.36 + £2358.07 + £2814.39 + £247.65 = £14188.12, of which £12963.46 is the gross loss for the period 1 May 2019 to 5 April 2020.

52. The deductions for tax and national insurance for 19/20 would have been £1004.35 of which an estimated 25/30 x £213.78 = £178.15 were paid in April, leaving a remaining £826.20 for the period 1 May 2019 to 5 April 2020.

53. Thus the net income that was not received for the period 1 May 2019 to 5 April 2020 is £12,963.46 - £826.20 = £12,137.26.

54. For the year 20/21, if the Claimant earned £348.80 gross per week then the net weekly earnings would have been £307.19. So net loss in that year is:

a. 6 April 2020 to 30 Jun 2020:	12.29 x £307.19	=	£3775.37

55. So aggregate net earnings for 1 May 2019 to 30 June 2020 would have been £12,137.26 + £3775.37 = **£15,912.63**.

56. The amount of benefits received was as follows. For the in that period 7 May 2019 to 21 June 2020, the benefits were Universal Credit of £623.70 per month and Housing Benefit of £312.81 per month: £936.51. For the period 22 June 2020 onwards, it was Universal Credit of £1792.58 per month

a. 7 May 2019 to 21 June 2020 @ £936.51 per month:	£12685.22
b. 22 June to 30 June 2020@ £1792.58 per month:	£530.40

57. So the total amount of benefits received was **£13215.62**. We have considered whether we should disregard any of the benefits for the periods 1 September 2019 to 12 October 2019 and 13 October 2019 to 31 January 2020, during which it is likely that the Claimant would have been eligible for some Universal Credit even if she had not been dismissed. However, in the absence of solid information about such entitlement (just as we have no solid

information about why the Universal Credit payments did not increase following the birth of the Claimant's baby), we have decided not to disregard any of the amounts.

58. Thus the net loss was £15,912.63 - £13,215.62 = £2697.01.

Interest

59. We are exercising our discretion under Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 to award interest at 8% per annum.
    a. The loss of income accrued between 1 May 2019 and 30 June 2020 and so we award interest from the mid-point, which is 30 November 2019. From 30 November 2019 to the calculation date of 1 June 2021 there are 550 days. At a daily rate of £(2697.01 x 0.08)/365, the interest awarded is therefore £325.12.
    b. In relation to the discrimination, the first act was around early March as described in the liability reasons. The dismissal and its consequences is likely to have caused proportionately more of the injury to feelings than the non-progression of the NVQ, but it would not be appropriate to entirely disregard the earlier discrimination for the purposes of the interest calculation. Our decision is that it is just and equitable to award interest from 1 April 2019. The period to 1 June 2021 is 793 days. At a daily rate of £(12,000 x 0.08)/365, the interest awarded is £2085.70.

Employment Judge Quill

Date: 01 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

8/6/2021

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FOR EMPLOYMENT TRIBUNALS