EMPLOYMENT TRIBUNALS

Claimant: Ms F Dolcy

Respondent: Beautiful Body Company UK Limited

Heard at: London Central **On:** **8 October 2021**

Before: Employment Judge Joffe
Ms D Olulode
Mr J Ballard

Appearances
For the claimant: Mr K Harris, counsel
For the respondent: Mr A Williams, solicitor

REMEDIES JUDGMENT

1. The claimant is awarded a basic award for unfair dismissal of £2103.08.
2. For unlawful deductions from wages in respect of pay for accrued but untaken holiday, the claimant is awarded £129.
3. For compensation for unfair dismissal and unlawful discrimination the claimant is awarded:

    a) An award for injury to feelings for unlawful discrimination of £25,000
    b) For past and future loss of earnings and maternity pay: £35,585.28
    c) For loss of pension: £865.64
    d) For loss of statutory rights: £500.

4. For interest on the compensation for unlawful discrimination, the claimant is awarded:
    a) £3157.21 interest on the injury to feelings award
    b) £2348.62 interest on the financial compensation.

5. To take account of tax on the parts of the award which are taxable (£12,500 of the injury to feelings award which is attributable to termination and £14,689.83

in excess of the £30,000 of compensation due to termination which is not subject to tax), the claimant is awarded: £3654.95

6. The claimant is awarded a total sum under all of the above heads of £73,343.78.

WRITTEN REASONS

Issues

1. Many of the issues and the underlying figures were not in dispute. There had appeared to be an issue between the parties about mitigation of loss but ultimately the respondent indicated that it was not pursuing an argument that the claimant had failed to mitigate her loss.

2. There was a disagreement about the amount of bonus which the claimant would have earned had she remained in the respondent's employment which we were required to resolve in order to calculate both the basic and compensatory awards.

3. There was an issue between the parties as to the periods when the claimant would have been on furlough and the periods when she would have been at work had she not been dismissed, which had an effect on the sums which she would have earned during those periods.

4. The respondent in its counter schedule suggested that the claimant would have worked only two days per week had she not been constructively dismissed by the respondent. The claimant said that after the end of March 2020, she would have been working full time.

5. The parties disagreed as to the amount of the award for injury to feelings. The claimant was not seeking a separate award for psychiatric injury and the respondent argued that there were other factors causing the claimant's depression.

6. There was an issue between the parties as to whether there should be an uplift because of the respondent's alleged failure to follow the ACAS procedure in respect of the claimant's two grievances.

The hearing

7. The claimant gave evidence on her own behalf and we heard evidence from Mr R Fieldgrass, director, on behalf of the respondent. We had a bundle of some 419 pages.

8. After we decided the points of principle between the parties, the parties were able to agree the effect of our decisions on the figures. By the end of the day set aside for remedy, there remained interest and grossing up for taxation to

be determined. The parties were able to agree these figures in correspondence.

Findings of fact

9. These findings should be read in conjunction with the detailed findings in our liability judgment.

10. The claimant asserted that had she had the pay review she should have had in 2019, she would have been on a salary of £25,000 per annum, as this was the figure which Ms De Leon was paid for working in the same role as the claimant in 2019.

11. The claimant said that she received a bonus of £2575.41 per annum on average. We saw a variety of payslips and P60s covering the claimant's employment.

12. Mr Fieldgrass told the Tribunal that the bonus system had changed in recent times and that employees were now receiving something in the order of £40 per month. Historically the figure fluctuated depending in how well a particular clinic was doing. Mr Fieldgrass was unable to explain in detail how the claimant's bonus would have been calculated. No bonuses had been paid to front of house employees from the start of the pandemic until about September 2021.

13. The claimant said, as she had said at the liability stage that, absent the discrimination the Tribunal found occurred, she would have worked two days per week until the end of March 2020, when her mother would have been able to provide childcare, at which stage she would have worked full time.

14. The claimant gave evidence that she had pursued her second grievance after she had left her employment. A Zoom meeting was set up for 28 April 2020 to be chaired by Mr V Fieldgrass. The claimant had not been able to arrange for a trade union representative on that date. When she dialled in, she was surprised to see that Mr R Fieldgrass was also on the call and she told the Trobunal that she did not feel able to continue. She said that the grievance hearing was never rescheduled.

15. Mr R Fieldgrass explained to the Tribunal that he was on the 28 April Zoom call because Mr V Fieldgrass had never used Zoom before and needed assistance. The claimant had indicated that the problem was the lack of her trade union representative and not the fact that he was also on the Zoom call. They would have been happy to reorganise the Zoom call for another convenient time but the claimant had not reverted to them.

16. We saw an email from Mr R Fieldgrass to the claimant dated 30 April 2020 in which he said:
I thought the best way to proceed was to get a variety of dates from your rep that they would commit to, and then I could try and schedule the grievance

appeal meeting accordingly. If this is proving somewhat difficult to rearrange the Zoom meeting please contact me as soon as possible

17. The claimant replied on 11 May 2020:
Many thank for your email dated 30/4/20. I apologise for the delay in responding. I have been dealing with some family health matters and have not had the time to sit down and respond.

I am still waiting for confirmation for a date that a trade union rep is available. They are dealing with an extreme volume of cases, equally finding it difficult to work remotely.

18. On 15 May 2020, the claimant wrote to Mr V Fieldgrass:
As you are aware we are having some difficulties in arranging for my delayed grievance hearing during the period of the Coronavirus lockdown. After careful consideration, and to move things along, I feel that it would be better to move forward with the grievance in writing. Would this be acceptable to you?

If you are agreeable, I would be grateful if you could provide a list of questions you would ask in order to seek clarification around the issues I raised in my grievance

19. Mr V Fieldgrass replied that day:
I have considered your request but feel I would get better clarity and understanding of some of your issues if we arranged to have our Zoom call meeting.

Please let me know a suitable date and time for your Trade Union representative and I will then finalise the arrangements with you.

20. The claimant then wrote:
I would prefer to do things differently as well, but unfortunately due to the virus it just is not possible at the moment. I would like to try and do things in written at first. If we cannot make this work we can consider Zoom again. Hopefully restrictions will be reduced in coming weeks as well.

21. There was no further correspondence about the grievance.

22. The claimant was hindered from looking for new employment after her dismissal by the fact that the country went into lockdown. She said and we accepted there were no suitable vacancies advertised until about May 2020. The claimant then applied for a number of vacancies unsuccessfully. We saw a significant number of applications which the claimant had made which included applications both within the beauty industry and in other spheres where the claimant perceived her skills to be transferable.

23. In August 2020, the claimant learned she was pregnant with her second child. She suffered from hyperemesis gravidarum and was hospitalised with that condition on three occasions between August and October 2020. She told the Tribunal that she would have had to have had some periods off work for

and around these hospital admissions. By Christmas of 2020 she was feeling better and managing her condition.

24. She continued to look for work but, by November 2020, suitable opportunities had again dried up because of the pandemic. The claimant's second child was born on 7 April 2021. Had she been employed the claimant would probably have commenced her maternity leave in March 2021 with a view to returning to work in March 2022.

25. The claimant told the Tribunal that her confidence and self-esteem had been affected by her time out of the job market. She estimated that she would take six months to achieve comparable alternative employment. She explained to the Tribunal that she had never historically been out of work and when she had looked for work since her dismissal by the respondent she found she was not getting the interviews she had expected and hoped for. She needed time to rebuild her confidence and get into the right mind frame to be successful in obtaining work.

26. The claimant did not receive any Universal Credit because she was studying for a criminology BSc at Birkbeck College in the evenings and receives student finance for that. This is a full time degree but study takes place in the evening. She had commenced this course whilst working for the respondent.

27. The claimant had suffered from mixed anxiety and depression for which she was receiving treatment. The isolation caused by her dismissal and the financial and other effects had placed a strain on her personal and family relationships. We saw GP records and a letter from the claimant's GP dated 15 September 2021. Although one of the reasons identified for the claimant's depression was her crowded living conditions (the claimant lives with her mother and her children), the claimant said that had she been in work, she could have afforded rental accommodation. The claimant also had bereavements during the period in respect of her grandparents and the stress of her mother's health issues.

28. The claimant's GP reported that the claimant had attended on 23 January 2020, tearful and stressed about the issues at work. She was also affected by overcrowding at home. On 6 February 2020, the GP diagnosed the claimant with mixed anxiety and depression. The claimant spoke about the issues at work. The GP discussed possible medication with the claimant but the claimant did not want to take antidepressants at that time.

29. The claimant's GP notes showed that she had seen other GPs at her practice at various times from early 2020 to date to discuss her anxiety and depression. She received counselling.

30. Mr Fieldgrass told the Tribunal that the respondent's clinics were closed from 23 March 2020 due to the first lockdown. The closure of the St John's Wood clinic lasted until 28 July 2020. Initially all staff were laid off. They were then furloughed when the Job Retention Scheme was introduced. The clinics were subsequently opened on a staggered basis and some employees remained

on furlough with others on reduced hours. An employee who was pregnant remained on furlough as she was concerned about the risks to pregnant women and the clinics were not busy.

31. The clinics closed again for the second lockdown from 5 November 2020 until 2 December 2020.

32. The clinics closed for the third lockdown between 20 December 2020 and 12 April 2021.

33. We could see from the respondent's furlough returns that 50% plus of the staff remained on furlough throughout the period

34. Mr Fieldgrass said that the claimant would have been furloughed throughout the period from March 2020 apart from when she was on maternity leave.

35. Mr Fieldgrass said that the beauty industry was short of staff and that the claimant is highly skilled.

Submissions

36. We heard oral submissions from the parties which we considered carefully. I set out a precis of the respondent's submissions to illustrate which issues were in fact in dispute ultimately.

37. Mr Williams did not argue that the claimant had failed to mitigate her loss. He argued that the injury to feelings award should be at the low end of the middle band of *Vento*. The discrimination was not malicious, arose from ignorance and had only lasted a matter of months.

38. Mr Williams said that the respondent had endeavoured to hear the second grievance and there was no failure to comply with the ACAS code.

39. Mr Williams said that the claimant's figure for the bonus was inflated but did not have an alternative figure backed by calculations to offer the Tribunal.

40. Once we had given judgment, the respondent agreed the claimant's calculations for interest and for grossing up for tax.

Law

<u>Compensation for Unfair Dismissal</u>

41. Compensation for unfair dismissal is in two parts, a basic award and a compensatory award.

42. The basic award is calculated in accordance with section 119 of the Employment Rights Act 1996. Gross weekly pay is used in the calculation subject to the relevant maximum cap in place at the date of the dismissal.

43. The basic award can only be reduced in accordance with section 122 of the Employment Rights Act 1996.

44. Section 123 of the Employment Rights Act 1996 provides for the compensatory award to be "*such amount as the tribunal think is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*." It is subject to the relevant maximum cap in place at the date of the dismissal.

Failure to follow 2009 ACAS Code of Practice 1 on Disciplinary and Grievance Procedures

45. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances

Compensation for Discrimination

46. The tribunal's power to award a remedy in a discrimination case is governed by section 124 of the Equality Act 2010.

Compensation for Financial Loss

47. The measure of loss is tortious with the effect that a claimant must be put, so far as possible, into the position that he would have been in had the act of discrimination not occurred (Ministry of Defence v Cannock [1994] IRLR 509, De Souza v Vinci Construction UK Ltd [2017] EWCA Civ 879). Thus, the tribunal must ask itself, 'If there had been no unlawful discrimination, what would have happened?'

48. Compensation for unlawful discrimination is uncapped.

49. The duty to mitigate loss applies.

50. An employee is not entitled to double compensation where there is an overlap between the compensatory award and compensation awarded for financial loss in discrimination.

Injury to Feelings

51. The tribunal has the power to award compensation to an employee for injury to feelings resulting from an act of discrimination by virtue of sections 124(5) and 119(4) of the Equality Act 2010.

52. In determining the amount of the award, we are required to follow the Vento guidelines in place at the date of the discrimination.

Interest

53. Interest is payable on any compensation we award for discrimination pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803). It is ordinarily calculated in accordance with those regulations, although the tribunal does have a degree of discretion with regard to the ability to calculate interest by reference to periods other than those set out in the regulations in exceptional cases.

Tax

54. When making an award of compensation, the tribunal must take account of tax payable on the various elements of the award. It may therefore be necessary, in accordance with the principles in *British Transport Commission v Gourley* [1955] 3 All ER 796, once the amount of the award has been calculated using net figures for earnings and pension loss to 'gross up' the award so as to ensure that the claimant is not left out of pocket when any tax required to be paid on the award has been paid.

Conclusions

Basic salary

55. We concluded that the claimant's basic salary would have increased to £25000 in line with that of Ms De Leon for the relevant period, had the respondent not failed to review her salary whilst she was on maternity leave.

Full-time or part-time

56. We concluded that, absent unlawful discrimination, the claimant would have returned to work part time for four weeks and then full time once her mother was able to provide childcare. This was based on our findings at the liability stage.

Bonus

57. The Tribunal calculated that the past bonus the claimant had been receiving was £195 pcm or £45 per week. We used the payslips and P60s to perform this calculation.

Basic award

58. Adding the figure we calculated for the claimant's bonus to the agreed gross figure for the claimant's weekly pay gave a total figure of £525.77. The claimant had four complete years' service so the total basic award is £525.77 x 4 = £2103.08

Compensatory award

59. Some parts of the compensatory award were ultimately uncontroversial such as the loss of Statutory Maternity Pay. There was a disagreement about whether the claimant would have been on furlough throughout the period from March 2020 until she went on maternity leave in March 2021. If that were the case, her losses would be 80% of her basic salary and no bonus.

60. We bore in mind that the claimant was unwell with hyperemesis from August until around Christmas 2020. The respondent did not require large numbers of staff to return during this period and Mr Fieldgrass' evidence suggested that another pregnant employee was not pressed to return, It seemed to us overwhelmingly unlikely that the claimant would have been pressing to be one of the employees to return from furlough given her ill health and also unlikely that the respondent would be encouraging her to return. We concluded that the claimant would have remained on furlough until she went on maternity leave at 80% of her pay and no bonus.

61. The parties were able to agree the calculations for loss of earnings and SMP to date and pension loss based on the findings the Tribunal made.

Loss of statutory rights

62. The respondent did not object to the figure of £500 which seemed to us to be appropriate.

Future loss

63. We concluded that the claimant's estimate of a further six months to find comparable employment once she finished maternity leave was a realistic one. She had struggled to find work after her constructive dismissal and had had several years out of the workplace at home with small children. Her confidence had been knocked and she would be looking for work at a point when, looking at March 2022 from the perspective of October 2021, there must be considerable economic and other uncertainty.

64. The parties were able to agree the calculation for future loss.

Holiday pay

65. The parties agreed this figure at £129.

Injury to feelings

66. The middle band of Vento, which both parties agreed was the appropriate bracket, was £9,000 - £27,000 at the relevant time.

67. We looked carefully at our findings and the claimant's evidence. The claimant suffered very unpleasant discriminatory treatment whilst she was pregnant and vulnerable and thereafter a failure to deal with the grievance she had raised. The treatment in relation to the claimant's personal appearance was particularly undermining and humiliating. This behaviour predated her maternity leave, and she was left with an unaddressed grievance throughout her maternity leave. She had several months at the end of her maternity leave which would have been very stressful when she was trying to resolve the issue of her return before her eventual constructive dismissal. When she sought to return, we found that she encountered repeated difficulty and obstruction. This occurred at a time when she was vulnerable economically and personally as a new mother and at a time when she was coping with the ill health of her own mother.

68. She had suffered from ongoing anxiety and depression, which we assessed as part of the injury to feelings award. It was clear from her own evidence and that of her GP that the discrimination, the loss of her work and the consequential housing issues had played a very significant role in her depression.

69. The claimant's confidence and sense of self-worth have been particularly badly affected by the course of conduct she was subjected to and she gave eloquent evidence about the many aspects of her life which have been adversely affected. It is to be hoped that with these proceedings resolved, she will be able to rebuild her confidence and her career.

70. We looked at various quantum reports in Harvey and concluded that an award towards the top of the middle band was appropriate in the sum of £25,000.

Failure to follow ACAS code

71. In respect of the claimant's 12 January 2019 grievance, there was a total failure to follow the ACAS code since nothing at all was done by the respondent to respond to the grievance. We had no explanation for the failure and were bound to conclude it was an unreasonable failure particularly as we also found it was discriminatory.

72. However, this was one of the claimant's complaints of discrimination which we upheld and in respect of which we have awarded compensation. It did not seem to us to be just and equitable that the claimant should be compensated twice in respect of this failure by the respondent.

73. So far as the claimant's second grievance was concerned, the claimant complained of the failure to hold a formal meeting in accordance with the

ACAS Code. Ultimately no meeting was held but we did not conclude that there was an unreasonable failure by the respondent to hold such a meeting. The meeting on 28 April 2020 did not go ahead because of the absence of the claimant's trade union representative. The claimant was offered a further Zoom meeting on a date convenient to her trade union representative. She could have asked that Mr R Fieldgrass be absent and that someone else assist Mr V Fieldgrass with the technology.

74. In those circumstances we did not award any uplift.

_____

Employment Judge Joffe
London Central Region
24 November 2021

Sent to the parties on:
25 November 2021

.....
For the Tribunals Office