



EMPLOYMENT TRIBUNALS

Claimant: Miss S Croly

Respondent: Kelly Ann Smith

Heard: in Nottingham

On: 28 March 2022

Before: Employment Judge Ayre

Appearances

Claimant – in person

Respondent – did not attend and was not represented

REMEDY JUDGMENT

1. The respondent is ordered to pay **£24,432.26** to the claimant, made up of the following sums:
 - a. Injury to Feelings of £15,000
 - b. Interest on the Injury to Feelings award of £3,346.85
 - c. Compensation for financial losses as a result of discrimination of £3,802.32.
 - d. Interest on compensation for financial losses of £406.69.
 - e. £1,876.50 in respect of unpaid wages and holiday pay.

REASONS

Background

2. The claimant was employed by the respondent as a personal care assistant from 18 May 2019 until 28 July 2019. She began Early Conciliation on 28 August 2018 and the ACAS Early Conciliation Certificate was issued on 28 September 2019. On 30 September 2019 the claimant presented a claim to the Employment Tribunal alleging that she had been unfairly dismissed, discriminated against on the grounds of race and pregnancy or maternity, and that she was entitled to notice pay and holiday pay. She also referred in the claim form to being a whistleblower and to not having been paid for all of the shifts that she had worked.

3. On 4 November 2019 the claim form was sent to the respondent. The deadline for presenting a response was 2 December 2019 and was set out in the Tribunal's letter of 4 November. The case was also listed for a Preliminary Hearing for case management on 22nd January 2020 and for a Final Hearing on 25, 26 and 27 January 2021.
4. The respondent did not file a response to the claim, and on 30 December 2019 Employment Judge Adkinson entered judgment in default in relation to the claims. The Preliminary Hearing was converted to a Remedy Hearing on 22nd January 2020, with a time estimate of one hour, and the Final Hearing was cancelled.
5. On 13 January a 'Kelly Passam' (who it appears is the respondent) wrote to the Tribunal stating that she had received a letter on 30th December about the respondent failing to respond to the claim, and that she was not able to attend the hearing on 22nd January. She subsequently submitted a letter from a doctor at Sheffield Teaching Hospitals NHS Foundation Trust, stating that the claimant had been admitted to hospital as an inpatient on 24 October 2019 and was likely to be in hospital for a further 7-8 weeks.
6. Employment Judge Hutchinson ordered that the hearing on 22nd January 2020 should be postponed, that the proceedings should be stayed for two months, and that the respondent should contact the Tribunal when she had been discharged from hospital.
7. On 30th January 2020 the respondent appears to have sent copies of the claimant's pay slips to the Tribunal. She has made no other contact with the Tribunal since then.
8. On 7 April 2020 the Tribunal wrote to the parties asking for them to provide certain information to the Tribunal. Neither party replied to the Tribunal's correspondence or provided the required information, and on 12 September 2020 a strike out warning was issued warning the claimant that the Tribunal was considering striking out the claim because it had not been actively pursued.
9. The claimant responded to the strike out warning the very same day, indicating that she did wish to pursue her claim. The claim was not struck out and was instead listed for a remedy hearing to take place on 23 April 2021. That hearing was however postponed because the claimant could not attend in person as she is clinically vulnerable and was isolating, and was not able to attend a remote hearing.
10. The remedy hearing was relisted for 16 July 2021 but postponed on the day of the hearing as the claimant was unable to attend the hearing centre on time as the support she needed with the hearing due to being pregnant with a high-risk let her down at short notice.
11. On 19 July 2021 Employment Judge Butler made Orders to prepare the case for the remedy hearing and gave the claimant until 27 August 2021 to comply with those Orders. On 25 August the claimant telephoned the Tribunal to say that she had been rushed into hospital on 21 August, had given birth prematurely and would be remaining in hospital. She was granted an extension of time to comply with the Orders to 17 September 2021, and the case was relisted for a remedy hearing on 4 February 2022.
12. The claimant did not comply with the Orders issued by Employment Judge Butler, and on 2 February 2022 a further strike out warning was sent to her. The hearing listed for 4 February was also postponed.
13. On 4 February the claimant wrote to the Tribunal seeking to comply with the Orders and sending in a number of documents relevant to her claim, and to the question of remedy in particular.

14. The claim was not struck out and was listed for a remedy hearing on 28 March 2022.

The proceedings

15. The respondent did not attend the hearing today and was not represented. She has not contacted the Tribunal for more than two years. No response has been presented and the respondent has not applied for an extension of time to do so.

16. The claimant attended the hearing with copies of the documents that she had sent into the Tribunal previously, which I have considered. She gave evidence under oath.

Findings of fact

17. The claimant worked for the respondent as a Personal Care Assistant from 18 May 2019 until 28 July 2019 when she was dismissed with immediate effect. On her claim form the claimant wrote that she was dismissed on 26 July 2019. In evidence today she told me that she had been dismissed by way of a text message that the respondent sent to her on the evening of 28 July 2019, and that the reference to 26 July was a mistake. I accept her evidence on that issue.

18. The respondent is paralysed from the chest down and requires care 24 hours a day. The claimant was one of five Personal Care Assistants employed by the respondent, and her work involved washing the respondent, assisting with toileting, dressing, administering cream and medication, shopping, household chores and looking after the respondent's children. At the time of the claimant's employment the respondent lived alone with her two children who were aged nine and eleven.

19. The claimant enjoyed her work very much and described it as her 'perfect job'. The claimant had very sadly lost her own child in 2017 and looking after the respondent's children helped her with her mourning. The claimant told the respondent, when she was interviewed for the role, that she had lost a child and was suffering from PTSD and anxiety as a result.

20. The claimant worked shifts on a rota. She was initially employed to work part time three days a week, but within two weeks of starting work she was offered full time employment. She was paid £8.57 an hour when working day shifts, which lasted 11 hours, and £9.77 when working night shifts, which lasted 12 hours. The claimant was required to stay awake during the night shift to check that the respondent was still breathing and take emergency action if she stopped breathing. She also turned the respondent every three hours during the night as the respondent had bed sores.

21. The claimant describes herself as black and was the only black Personal Care Assistant working for the respondent. The other Personal Care Assistants made her feel very unwelcome. They excluded her from WhatsApp chats, didn't involve her in their conversations, and excluded her. They made snide comments about her and gave her 'dirty looks'. Within the first month of her employment they falsely accused the claimant of smoking cannabis at work, an accusation that the claimant says they made because they assumed that she smoked cannabis because of the colour of her skin.

22. The claimant was called to a meeting to discuss the allegation and told me that she would have lost her job but for the fact that the respondent's children said that the claimant had not been smoking at work.
23. In June 2019 the claimant became concerned that two of the other Personal Care Assistants employed by the respondent were allowing the respondent's 11 year old child to do night shifts caring for the respondent. The claimant contacted Social Services and asked to speak to the respondent's social worker. She told the social worker that she did not feel comfortable with the situation because two carers were allowing an 11 year old child to do night shifts, and that she had proof of this. The social worker asked the claimant if she would be worried if the respondent knew that she had reported the respondent to Social Services, and the claimant said that she was not concerned about this.
24. The claimant believes that the social worker reported what the claimant had told her to the respondent, although has no direct evidence of this. Her belief is based on the fact that the respondent's attitude towards her changed after the claimant had spoken to the social worker, and she no longer laughed and joked with the claimant. The claimant says that the report to social services was a protected disclosure.
25. The claimant was asked to attend a meeting with the social worker and the social worker's manager to discuss what the claimant had told the social worker. This meeting took place a few days after the claimant's employment had terminated.
26. A few days before her employment was terminated, the claimant told the respondent that she was pregnant. The claimant's previous pregnancy had resulted in a premature birth and the subsequent death of her daughter. The claimant's pregnancy was therefore considered to be high risk, and the claimant was understandably anxious about it, not wanting to do anything that may put her unborn child at risk.
27. As part of her role the claimant was required to help the respondent get in and out of bed. The respondent had a hoist to lift her in and out of bed but refused to use it. On one occasion, shortly before the end of the claimant's employment, the respondent asked the claimant to lift her up her bed. The respondent is much bigger than the claimant, and the claimant said that she could not lift her because she was pregnant, and the respondent was too heavy for her to lift. The respondent replied that if the claimant would not lift her, there was 'no point' in the claimant being there because she was 'useless'.
28. The claimant lifted the respondent on that occasion, because she needed the job. Leaving work that day the claimant was bleeding. She was very anxious and contacted her GP, who signed her off work for 8 weeks. The claimant tried to give the respondent her fit note but the respondent twice refused to accept it. A few days later the claimant was dismissed.
29. The claimant was paid every four weeks on a Friday. Her first pay was on 31 May 2019 and was £1,291 gross, £1,183.58 net. She was next paid on 28 June, for the same amount. Her June pay was less than she was expecting.

She worked a weekend at the beginning of June and between the 24th and 30th June but was not paid for those days.

30. She was due to be paid again on Friday 26 July but when she checked her bank account on the morning of 26 July, no money had been paid in. She rang the respondent and spoke to her. She asked why she had not been paid and was told that the respondent did not have enough money in the 'pot' to pay the claimant, because she had to pay holiday pay to two other carers that month.
31. The respondent received funding of approximately £5,000 a month to pay for her carers. This money is paid directly to the respondent's carers by an organisation called 'Disability Direct' which operates the payroll. Each month the respondent tells Disability Direct what hours her carers have worked, and Disability Direct then pays the carers.
32. On Friday 26 July, after she had been told by the respondent that she would not be paid that month, the claimant rang Disability Direct. She was very worried because she had her rent and bills to pay. She told Disability Direct what the respondent had said to her, and they told her not to panic and that she would be paid, but that they could not authorise any payment without the respondent's approval.
33. Later that day the claimant was paid her wages, although not the full amount as she was not paid the back pay she was owed for June nor for the overtime she had worked in July.
34. The claimant did not work on the 27th or 28th July as it was her weekend off. On the evening of 28th July, at 8.42 pm, the respondent sent the following text message to the claimant:

*"Hi Sandy
The PA's have been discussing about you returning back to work and they're not happy about you returning back to work due to the way you spoke to me on the phone and my mum heard it all. I try my utmost best to get things sorted when it comes down to the wages, and all the other girls know that, and they know they get paid that day. Angie ended up doing a 36hr shift, so she's not happy. Then as for myself I'm such a laid back boss that you'll ever meet, I help any PA out where I can, I lent you £75 so I can't be that bad of a boss. So unfortunately I'm going to have to dismiss you from my employment...."*
35. The claimant panicked when she received this text. She rang the respondent and asked her why she'd been sacked. The respondent said that it was because the other Personal Care Assistants didn't want her back, and that it was nothing to do with her work.
36. The next day the respondent's stepmother sent the claimant a text message saying that the respondent was sorry and asking her to return to work. The claimant telephoned the respondent and tried to discuss the situation. The claimant told the respondent that she would like to come back to work but would like to work nights only because it was much easier for her with her pregnancy and did not involve any lifting. The respondent refused to give the claimant her job back.

37. After she was dismissed by the respondent, the claimant lost her confidence and did not carry out any work for many months. In November 2019 she had to have a cervical stitch to protect her unborn child. She was signed off by her GP as unfit to work from the date she had her cervical stitch until her son was born at the end of March 2020.
38. After her son was born the claimant worked for 12 weeks in the catering team at Queen's Medical Centre. She left because her son was not settling in childcare with her family and because she had health problems which are ongoing. In January 2021 she became pregnant again and her daughter was born two months early on 22 August 2021.
39. The claimant is now a full-time mother. She suffers from anxiety, PTSD and post-natal depression and since November 2019 when she had her cervical stitch has received approximately £1,333 a month in benefits, including housing benefit.
40. The claimant's evidence, which I accept, is that the respondent discriminated against her because of her pregnancy by:
- a. Telling her that she was 'useless' and that there was no point in her having a job a few days before the claimant was dismissed;
 - b. Dismissing her; and
 - c. Not giving the claimant her job back.
41. The claimant also told me that the respondent discriminated against her because of race by:
- a. The other carers excluding her;
 - b. Falsely accusing her of smoking cannabis;
 - c. The other carers making snide comments about the claimant and giving her 'dirty looks'; and
 - d. Brushing off the complaints that the claimant made and not treating them seriously.
42. The claimant was not paid any notice pay. She was paid holiday pay but a deduction of £200 was made from that pay. She calculates that her unpaid wages and holiday pay come to £1,876.50 gross. I have no reason to doubt that the figure calculated by the claimant is correct.
43. After she was dismissed by the respondent, the claimant did not receive any benefits until October, when she received universal credit of £320. In November she received universal credit of £320 and housing benefit of £292. The claimant tried to claim benefits earlier, but the respondent told HMRC that she was still paying the claimant. As a result, the claimant was refused benefits.
44. The claimant was very upset by the way she was treated by the respondent and the other carers employed by the respondent. She lost her confidence and has not worked as a carer since. After she was dismissed in July she did not receive any benefits for weeks. She went into rent arrears and feared that she would lose her home. She has only just finished paying back the rent arrears. She did not have enough money to buy food. She used foodbanks and walked to her grandmother's house as she could not afford

the bus fare. Her grandmother gave her food and the bus fare home. The impact of the discrimination upon the claimant has been significant.

The Law

Discrimination

45. Section 124 of the Equality Act 2010 (“**the EQA**”) sets out the remedies available in a successful discrimination claim. Section 124(2) provides that the tribunal may “*order the respondent to pay compensation to the complainant*”. Section 124(6) states that “*The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court...under section 119*”
46. Section 119 of the EQA contains the remedies available to the county court where it makes a finding of discrimination and includes, at section 119(4) the power to award compensation for injured feelings (whether or not it includes compensation on any other basis).
47. In determining the amount of interest, the tribunal must take account of the guidelines laid down by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318*, as subsequently revised, and of the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury, issued in September 2017 and subsequently updated in March 2018 and April 2019.
48. The Presidential Guidance provides that for claims presented on or after 6 April 2019 the Vento bands are 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.

Interest

49. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases. The tribunal is required to consider whether to award interest, even if the claimant does not include a sum for interest in her schedule of loss.
50. Under Regulation 3 interest is calculated as simple interest that accrues from day to day, and the current rate of interest is 8%. Interest on awards of injury to feelings runs from the date of discrimination to the ‘calculation date’ on which the tribunal makes its decision on remedy. Interest on other awards of compensation for discrimination, such as compensation for loss of earnings, runs from the mid-point between the date of discrimination and the calculation date.

Conclusions

51. On 30 December 2019 Employment Judge Adkinson entered judgment in favour of the claimant in all of her claims.

Injury to feelings award

52. Having heard evidence from the claimant today, I find that the respondent discriminated against the claimant because of her race and because of her pregnancy. The acts of discrimination are:

- a. Telling the claimant that she was 'useless' and that there was no point in her having a job a few days before the claimant was dismissed;
- b. Dismissing the claimant;
- c. Not giving the claimant her job back.
- d. The other carers excluding her from their conversations and generally;
- e. Falsely accusing her of smoking cannabis;
- f. The other carers making snide comments about the claimant and giving her 'dirty looks'; and
- g. Brushing off the complaints that the claimant made and not treating them seriously.

53. The discrimination lasted for a number of weeks and resulted in the claimant losing her job. It had a substantial impact on the claimant, causing her to lose her confidence, fear that she was going to lose her home and have to resort to foodbanks and receiving food from her grandmother. She had not worked as a carer since.

54. Given the number of separate acts of discrimination, the fact that one of them was the claimant's dismissal and the impact of the discrimination upon the claimant, this is a case which in my view falls into the middle Vento band. At the relevant time the middle Vento band was £8,800 to £26,300 and I make an award of **£15,000** for injury to feelings. There was no medical evidence before me of any illness caused by the treatment, and it lasted for a few weeks rather than months.

Interest on injury to feelings award

55. I have calculated interest on the injury to feelings award at the statutory rate of 8%. I have taken the date of the first act of discrimination to be 15 June 2019. Understandably, as approaching three years have passed since the discrimination occurred, the claimant could not be certain of the exact dates of each of the acts of discrimination. She told me that the false accusation that she had been smoking cannabis at work was made within the first month of her employment. Her employment started on 19 May 2019 and 15 June falls within the first month of her employment.

56. I have calculated interest on the injury to feelings award from 15 June 2019 through to the 28 March 2022, the date upon which the Tribunal calculated the award ("the Calculation Date") – a total of 1,018 days. Applying the statutory formula: $1,018 \text{ days} \times 0.08 \times 1/365 \times £15,000$ gives a total interest award of **£3,346.85**.

Compensation for financial losses arising out of the discrimination

57. The claimant's gross pay whilst employed by the respondent was £1,291 every four weeks, and her net pay was £1,183.58. In November 2019 the claimant began receiving benefits of £1,333 a month, which were higher than her net pay whilst she worked for the respondent.

58. It would, in my view be appropriate to compensate the claimant for lost earnings for the four pay periods between the date of termination of her employment and November 2019, at the rate of £1,183.58. This gives a total of £4,734.32 (4 x £1,183.58). From that sum the universal credit (£640) and housing benefit (£292) must be deducted, giving a net loss of earnings of **£3,802.32**.

Interest on compensation for financial losses

59. Interest on compensation for financial losses should run from the midpoint between the date of discrimination and the Calculation Date. The financial losses are caused by the discriminatory dismissal which occurred on 28 July 2019. There are 976 days between 28 July 2019 and the Calculation Date of 28 March 2022. The midpoint therefore gives 488 days.

60. Applying the statutory formula: 488 days x 0.08 x 1/365 x £3,802.32 gives a total interest award of **£406.69**.

Unpaid wages and holiday pay

61. I accept the figures provided by the claimant for unpaid wages and holiday pay and order the respondent to pay the sum of £1,876.50 gross to the claimant.

Compensation for unfair dismissal

62. Based on the claimant's evidence I find that the dismissal was an act of discrimination rather than automatically unfair under section 103A of the Employment Rights Act 1996 (protected disclosures). The claimant does not have sufficient service to bring a complaint of ordinary unfair dismissal. I have therefore awarded the claimant compensation for her dismissal by way of compensation for discrimination, as set out above.

63. In any event, even if the claimant had been unfairly dismissed under section 103A she would not be entitled to a basic award, given her length of service, and any compensatory award would be covered by the award for compensation for financial losses arising from discrimination, so no additional compensation would have been awarded.

Summary

64. For the reasons set out above, the respondent is ordered to pay the claimant the following sums:

- a. Injury to Feelings of £15,000
- b. Interest on the Injury to Feelings award of £3,346.85
- c. Compensation for financial losses as a result of discrimination of £3,802.32.
- d. Interest on compensation for financial losses of £406.69.
- e. £1,876.50 in respect of unpaid wages and holiday pay.

65. This results in a total award to the claimant of **£24,432.36**.

Employment Judge Ayre

Date: 29 March 2022