EMPLOYMENT TRIBUNALS

Claimant:	**Mrs K. Nasreen**
Respondent:	**(1) Dr A. Malik** **(2) Dr A. Malik and Mr I. Ali t/a Malik Law Chambers (in intervention)**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**14 February 2022**
Before:	**Employment Judge Massarella** **Mrs S. Barlow** **Ms P. Alford**

Appearances

For the Claimant:	Mr D. Huang (Adviser at the Whitechapel Legal Advice Clinic)
For the Respondent:	Did not appear and was not represented

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

1. Judgment on remedy having been sent to the parties on 17 February 2022, 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. The Tribunal apologises to the parties for the delay in providing these reasons, which was caused by the demands of other cases.

2. By a judgment on liability sent to the parties on 14 January 2022, the Tribunal concluded as follows:

    2.1. by consent, Ms M. Ahmed and Mr O. Parkash were removed from the proceedings, pursuant to Rule 34;

    2.2. accordingly, the name of the Second Respondent ('R2') was amended to: 'Dr A. Malik and Mr I. Ali t/a Malik Law Chambers (in intervention)';

    2.3. the Claimant's employer was R2;

2.4. she was summarily dismissed on 19 February 2018;

2.5. the decision to dismiss was taken by Dr Malik ('R1'), who was a partner in R2 at all material times;

2.6. alternatively, if he was not a partner in R2 at the material time, he was an agent of R2, within the meaning of ss.109 and 110 Equality Act 2010 ('EqA');

2.7. the dismissal was because of the Claimant's pregnancy-related illness and was an act of direct pregnancy discrimination, contrary to s.18(2)(a) Equality Act 2010;

2.8. R1 and R2 are jointly and severally liable for the unlawful discrimination;

2.9. the Claimant was unfairly dismissed by R2;

2.10. R2 made unauthorised deductions from the Claimant's wages: it failed to pay salary for the period 1-20 January 2018, and failed to pay statutory sick pay from 21 January 2018 to 19 February 2018;

2.11. the Claimant's claim in respect of unpaid holiday pay was dismissed on withdrawal.

3. By a separate order, the Tribunal informed the parties that the Respondents would be permitted to participate in the remedy hearing, to lead evidence and to make submissions in the usual way, strictly limited to issues of remedy, provided there was full compliance by them with the case management orders. If there was not, the Tribunal might reconsider that decision.

4. On the morning of the hearing, no communication was received from the Second Respondent. Written submissions on remedy had been lodged on behalf of the First Respondent by Counsel, Ms Amanda Nanhoo-Robinson. However, shortly before the hearing began, the Tribunal received an email from Ms Nanhoo-Robinson:

> 'I have been instructed to withdraw, therefore have done so at 9.23am this morning. I have sent an email to the tribunal and have advised the Claimant's representative of the same. I shall therefore not be in attendance.'

5. Because this left us unclear as to the status of the written submissions she had lodged, the Tribunal asked the clerk to contact Ms Nanhoo-Robinson to explain the circumstances of her withdrawal from the case. At around 11:30, she attended the hearing and told us that, until the previous day, there had been no indication that she was going to be instructed to withdraw. I asked her whether the written submissions had been approved by Doctor Malik. She replied: 'technically he hasn't approved them'. I asked her to inform Dr Malik that, if the Tribunal did not hear from him, by email personally before 12:30, stating that he wanted us to have regard to the written submissions, we would disregard them because, according to Ms Nanhoo-Robinson, they were not approved.

6. At 11:58 Dr Malik emailed the Tribunal as follows [*original format retained*]:

> 'Although my appeal related to the same matter is pending before the Employment Appeal Tribunal and also I was deprived from my basic right to cross examine the Claimant and to submit my defence, and I intend to appeal against the decision of 14 January 2022, I still request and give consent that to take into account the written submissions of Miss Nanhoo-Robinson.'

7. Accordingly, the Tribunal took into account the written submissions.

The law

Compensation for acts of discrimination

8. Compensation for discrimination is assessed on tortious principles (ss.119(2) and s.124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that she would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable in the circumstances, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

9. In assessing the loss suffered by the Claimant, the Tribunal may take into account the chance of events having occurred following the unlawful act and determine the award on the basis of the loss of that chance (*Wheeler*). Where the chance of a future event is very high, or very low, it is permissible to treat the chance as 100% or 0%, as appropriate (*Timothy James Consulting Ltd v Wilton*, UKEAT/0082/14/DXA).

10. In assessing compensation for discriminatory acts, it is necessary to ask what would have occurred had there been no unlawful discrimination. For example, in a dismissal case, if there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

Mitigation

11. The Claimant is required to mitigate the loss she suffers as a result of the unlawful act. She is expected to search for other work and will not recover losses beyond a date by which the Tribunal concludes she ought reasonably to have been able to find new employment at a similar rate of pay.

12. The burden is on the Respondent to prove a failure to mitigate (*Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331). If the Claimant has failed to take a reasonable step, the Respondent must show that any such failure was unreasonable (*Wright v Silverline Car Caledonia Ltd*, UKEATS/0008/16). The question of reasonableness is to be determined by the Tribunal itself; the Claimant's perception is only one of the factors to be taken into account.

Injury to feelings

13. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).

14. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

15. The bands have since been increased to reflect inflation, recently by way of Presidential Guidance. The Claimant's case having been presented on 31 May 2018, the relevant Guidance[1] provides:

    15.1. lower band: £900 to £8600;

    15.2. middle band: £8,600 to 25,700;

    15.3. top band: £25,700 to £42,900.

16. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation: society has condemned discrimination, and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

17. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

<u>Aggravated damages</u>

18. The leading case on aggravated damages is *Alexander v Home Office* [1988] ICR 685, CA, where the Court it held that they can be awarded in a discrimination case where the Respondent has behaved 'in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination'.

19. Underhill P (as he then was) gave further guidance in *Commissioner of Police of the Metropolis v Shaw* [2012] ICR 464, EAT, identifying three broad categories:

[1] 'First Addendum to Presidential Guidance Originally Issued on 5 September 2017'

19.1. where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in *Alexander* meant when referring to acts done in a 'high-handed, malicious, insulting or oppressive manner';

19.2. where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity; and

19.3. where subsequent conduct adds to the injury — for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the Claimant's complaint of discrimination seriously.

Interest

20. The Tribunal must consider whether to award interest on the sums awarded without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[2]

21. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[3] The interest rate now to be applied is 8%.

22. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

23. Recoupment does not apply to compensation for discrimination.

Findings of fact and conclusions

The Claimant's net salary and benefits

24. The core figures were set out by the Claimant's representative in the schedule of loss, and were not disputed by the First Respondent in the written submissions presented on his behalf:

[2] SI 1006/2803
[3] SI 1996/2803

Gross annual basic pay:	£13,670.28
Gross weekly basic pay:	£262.89
Net weekly basic pay:	£241.71
Contractual notice period:	3 weeks
Claimant's date of birth:	29 April 1993
Claimant's age at effective date of termination (EDT):	24 years
Period of service:	05/12/2014-19/02/2018
Total continuous service:	3 years

Awards for which R2 is solely liable

Basic award and loss of statutory rights

25. The basic award, payable by R2, is **£657.23**, calculated as follows, taking into account the Claimant's age and continuous service:

(0.5 x 1 x 262.89) + (1 x 2 x 262.89)	£657.23

26. The tribunal makes an order for loss of statutory rights, also payable by R2 only, of **£300.**

Unauthorised deduction from wages

27. The Tribunal found in its judgement on liability that R2 made unauthorised deductions from the Claimant's wages: it failed to pay salary for the period 1-20 January 2018, and failed to pay statutory sick pay from 21 January 2018 to 19 February 2018.

28. The loss of salary was agreed as £725.13.

29. The loss of statutory sick pay from 21 January 2018 to 19 February 2018 (the effective date of termination), a period of 4.29 weeks at the weekly rate at the time of £89.35, amounts to £383.31.

30. R2 shall pay C a total award for unauthorised deductions from wages of **£1108.44**.

Awards for which R1 and R2 are jointly and severally liable

31. We award losses flowing from the dismissal under the discrimination claim, and do not make a separate compensatory award under the unfair dismissal claim (which would give rise to double-counting).

32. The Claimant lost a further period of statutory sick pay between 20 February 2018 and 19 April 2018 (8.57 weeks), when R2 was shut down by the Solicitors Regulatory Authority. This produces an award of **£765.73** (8.57 x 89.35).

33. Had the Claimant not been dismissed, she would have received no further pay from the Respondent after 19 April 2018, at which point her losses cease.

Injury to feelings

34. The Claimant was extremely upset by the summary termination of her employment. She had worked for the Respondent for over three years. She had previously had a good relationship with her employer. She was entitled to believe that her pregnancy would make no difference to that relationship and was deeply shocked when she learnt through her husband that she had been summarily dismissed. We accept her evidence that this caused her very considerable distress. That distress was evidenced by the fact that she continued to try and contact Dr Malik with a view to resolving matters. We accept that the prospect of being out of work caused her much stress. It also caused her worry about what the impact would be on her, her family and her unborn child. She was very worried indeed about how the family would make ends meet.

35. The Claimant's child was born two months premature. She subsequently had a miscarriage with her next child. The Claimant asked us to have regard to this when assessing the award to injury to feelings. Although, of course, the Tribunal is sympathetic to these distressing developments, because there was no medical evidence before us to confirm a causal link between then and the dismissal, we did not consider that we could take them into account. Had there been evidence to support such a link, we might have considered making the kind of award which Mr Huang invited us to make, at the top of middle *Vento* band, but there was not. For the same reasons, we do not make a separate award of compensation for personal injury.

36. We reject the primary submission made on behalf Dr Malik that the award should be in the lower *Vento* band. Although it is a single act, dismissal is the among the most serious acts an employer can do. We are satisfied that the award certainly belongs within the middle band. We consider that an award of £14,000 for injury to feelings is appropriate in the circumstances.

37. We also find that there were aggravating factors in the manner in which the discriminatory act was carried out: Dr Malik behaved in the most high-handed fashion, refusing to communicate with the Claimant, and dealing with her husband in a hostile and intimidating fashion, saying words to the effect of: 'whatever you can do, you can do. I am a solicitor myself. I know everything – you can go to the High Court, Supreme Court and I know everything'. We have no doubt whatsoever that this arrogant and dismissive conduct exacerbated the Claimant's hurt feelings and made her feel personally rejected and humiliated. We accept her evidence that the humiliation still plays on her mind to this day.

38. We consider that an award for aggravated damages of £1,500 is appropriate in all the circumstances. The Claimant was already very upset indeed; this conduct undoubtedly rubbed salt in her wounds.

Interest

39. The Tribunal has decided to award interest in accordance with the usual principles. We have considered whether a serious injustice would be done to the Respondent by our calculation of interest including the period of delay caused by Covid-19 and/or because the Judgment Act rate of 8% no longer reflects financial reality. The Respondents did not submit that we should alter our approach from the normal calculation of interest in this case. We have concluded that the delay

has been one of the uncertainties of litigation, for which the Claimant should not be penalised. For these reasons we award interest at the rate of 8% for the period set out in the Regulations.

40. Interest can only be applied to the compensation claim from the discriminatory act. Thus, it can only be applied to the post dismissal financial loss.

41. With regard to the financial loss of £765.73, the period between the date of the discriminatory act (19 February 2018) and the date of calculation (14 February 2022) is 1457 days. Interest applies from the mid-point between those two dates, thus for a period of 728.5 days.

42. Simple interest at 8% is **£122.29** (728.5 days ÷ 365 x 8% = 15.97% x £765.73).

43. With regard to injury to feelings and aggravated damages, simple interest on £15,500 at a rate of 8% from 19 February 2018 to 14 February 2022 (1457 days) is **£4,960** (1457 days ÷ 365 x 8% = 32% x £15,500).

ACAS uplift

44. We were invited to award an ACAS uplift. However, such an uplift only arises where there has been a relevant breach in relation to a disciplinary or grievance procedure. Because there were no such procedures in this case, there can be no uplift.

Grossing up

45. Because the first £30,000 of the compensatory award is tax-free, there is no requirement to gross up any part of the award of compensation in this case.

46. We are grateful to Mr Huang, and to his predecessor Mr Schuscheim, for their clear and helpful submissions, and their assistance throughout these hearings.

Employment Judge Massarella

11 April 2022