Case Number: 2304120/2018/V

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Anastasia Tuchkova		**1) Blackdown Hill Management Limited** **2) Timur Artemev**

Held at London South (By CVP Video) **On 6 April 2022**

BEFORE: **Employment Judge Siddall**
Ms A Sansome
Mr A Peart

Representation

For the Claimant: **In person**

For the Respondents: **Mr T Welch**

JUDGMENT ON REMEDY

The unanimous decision of the tribunal is that:

1. The Claimant is awarded a compensatory award in relation to her claim for unfair dismissal of £4672.66 made up as follows:
    a. 26 weeks' loss of earnings at £625 net per week amounting to £16,250
    b. Loss of statutory rights of £400
    c. Loss of pension contributions over 26 weeks of £341.64
    d. Total £16,991.64

e. Plus a 10% uplift for failure to follow the ACAS Code of Practice in relation to the grievance procedure (£1699)
f. Less a 75% reduction on the basis of the **Polkey principles (25% of £18,690.64)**

2. The Claimant is awarded a total sum of £26,000 in relation to her successful claims for maternity/pregnancy and sex discrimination made up as follows:
   a. £10,000 in relation to loss of earnings over a sixteen-week period at £625 net per week in relation to the Claimant's sickness absence from 21 March 2018 to 23 July 2018;
   b. An award of £16,000 for injury to feelings.
   c. Of the award for injury to feelings the sum of £15,000 is awarded in relation to the allegations upheld against the First and Second Respondents at paragraph 145, 152 and 156 of the reserved judgment on liability and the sum of £1000 in relation to the allegation at paragraph 149 upheld against the First Respondent only.
3. The total award made to the Claimant is £30,672.66.
4. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to this award.
5. The amount of the prescribed element is £4672.66
6. The dates of the period to which the prescribed element is attributable is 20 July 2018 to 15 February 2019.
7. The amount by which the monetary award exceeds the prescribed element is £26,000.
8. This judgment is stayed under rule 66 until 14 days after conclusion of the appeals that the First and Second Respondents have lodged to date with the Employment Appeal Tribunal.

REASONS

1. The hearing on liability in these proceedings took place between 22 and 25 February 2021. On 24 February 2021 the tribunal issued a reserved judgment upholding the claims of unfair dismissal and some of the claims of pregnancy/maternity discrimination and sex discrimination but dismissing the claims of harassment and other claims brought under the Maternity and Parental Leave Regulations 1999.

2. A remedy hearing was listed for 1 July 2021 but this was adjourned on two occasions. It was listed for a new date of 1 December 2021.

3. By the morning of that hearing the tribunal had not received a bundle of documents relating to remedy, contrary to the case management orders that had been made. The Claimant had not provided a witness statement on remedy, again in breach of a case management order. The tribunal took the

view that the hearing could not proceed on that day as the parties were not ready for hearing. The remedy hearing was re-listed for 6 April 2022.

4. The Claimant stated at the hearing on 1 December 2021 that her claim for compensation was confined to:

- **a.** Unfair Dismissal: Loss of earnings for a period of six months between her date of dismissal on 20 July 2018 and the first preliminary hearing before the employment tribunal on 15 February 2019; and
- **b.** Discrimination: Loss of earnings for the period that she was off work due to sickness absence (caused, she said, by the Respondent's discriminatory actions) between 21 March and 23 July 2018; and injury to feelings.

5. The tribunal made a case management order on 1 December 2021 which provided that:

6. The Respondent should provide a digital copy of the remedy bundle to the Claimant by 8 December 2021 and to the tribunal by 31 March 2022;

7. The Claimant should provide a witness statement by 12 January 2022 (the Respondents having indicated that they did not intend to call any evidence at the remedy hearing);

8. The Claimant should disclose copies of her GP records for the period 21 March 2018 to 23 July 2018 (her period of sickness absence during her employment).

9. On the morning of the hearing fixed for 6 April 2022, which took place by video, the clerk informed the tribunal at around 9am that no remedy bundle had been received and that no witness statement from the Claimant had been received.

10. At 9.40am the Claimant served a witness statement by email.

11. The hearing commenced around 10am. Mr Welch informed the tribunal that a remedy bundle had been provided to the tribunal in hard copy but not electronic format. The tribunal had not therefore seen it prior to the hearing. Mr Welch then provided a copy of the bundle by email.

12. The tribunal questioned the Claimant as to why she had not served her witness statement in compliance with the case management order dated 1 December 2021, despite having been explicitly told that she needed to do so at that hearing and despite her statement being dated 12 January 2022. The Claimant was not able to provide a satisfactory explanation. She stated that she had

been distracted by Covid issues and by the health of her son. A tribunal case worker had asked both parties recently if they were ready for the hearing and the Respondent had stated that it was. She therefore did not think that she had to do anything else in preparation for the hearing.

13. Mr Welch indicated that he had only just seen the witness statement. He was not in a position to proceed with the hearing as he had not had the chance to take instructions upon it. The Respondents did not attend the hearing. He stated that he would not be able to contact them that morning. When asked why the Respondents were not available even by telephone, as they must have been aware that the hearing was due to take place today, Mr Welch suggested that they were not obliged to be. He said that if the tribunal decided to proceed with the hearing he would have to withdraw.

14. The tribunal took some time to deliberate on how to proceed. We considered the contents of the witness statement and all the other circumstances. We decided that it was in the interests of justice to proceed with the hearing for the following reasons:

- **a.** The issues related to remedy were relatively straightforward and confined to a short time period.
- **b.** The Claimant had provided documentary evidence about her efforts to find other work in the bundle.
- **c.** The Claimant's witness statement was relatively short: it consisted of thirteen paragraphs and was just under five pages long. The statement went over a lot of matters previously covered by the Claimant in her evidence. The only significant matter referred to in the witness statement was that the Claimant now appeared to be seeking loss of earnings up to the date of the remedy hearing, contrary to what she had said in the hearing on 1 December 2021. Again she gave little detail of efforts to find work over this period although we saw that information about job applications had been included in the bundle. We considered that overall the witness statement added very little that would assist our consideration of the issues related to remedy.

d. We were mindful that the remedy hearing had been adjourned three times already. If postponed it would not be listed for another few months. The liability hearing had taken place over a year previously.

15. The tribunal took into account the overriding objective of the proceedings and decided that, with regard to the need to deal with the case fairly and justly, as speedily as possible and to save expense, the better option was to continue with the hearing. This was subject to two conditions:

a. It was decided that the start time of the hearing should be put back to give Mr Welch the chance to consider the witness statement and to see if he could obtain instructions from his clients. The tribunal proposed a new start time of 1pm but Mr Welch then requested an earlier start. 12.30pm was agreed by all parties. This would also give the tribunal time to read the remedy bundle in full.

b. The tribunal had also noted that in her witness statement the Claimant implied that she wished to claim her loss of earnings from the date of her dismissal up to the date of the hearing on 6 April 2022. This was contrary to the clear statement she had made on 1 December 2021. She had made no application for amendment prior to the hearing. Due to the very late service of her witness statement, the Respondents would not have been aware of this change in her position prior to the start of the hearing. The tribunal decided that the witness statement would be admitted but that the Claimant would only be permitted to present her claim for remedy on the basis she had set out at the hearing on 1 December 2021. In all the circumstances, any application to amend her claim, in so far as she was making one at the hearing, was refused as being far too late and prejudicial to the Respondents.

16. The hearing reconvened at 12.30 as planned. The Claimant gave evidence. Mr Welch indicated that he would not question the Claimant upon the contents of her witness statement, but he did ask her questions about documents in the bundle. The tribunal also asked the Claimant questions about her efforts to find alternative employment and the medical evidence.

17. The facts we have found and the conclusions we have drawn are as follows.

18. The tribunal upheld allegations of pregnancy and sex discrimination against the Respondents in relation to a failure to provide the Claimant with a job upon her return from maternity leave on 5 March 2018; her treatment at meetings on 13 and 26 February 2018 when she was told there was no job for her; and the removal of work folders from her laptop, and failure to restore these upon her return to work.

19. The Claimant went off sick on 21 March 2018 and remained off sick until her dismissal on 20 July 2018. She claims that she was made ill by the Respondents' treatment of her. She was not paid during her period of absence as she did not qualify for SSP following her maternity leave. She is claiming her loss of earnings over this period.

20. The Claimant's evidence is that she experienced significant distress and anxiety after being told, just prior to her return to work, that there was no job for her and that she may be facing redundancy. She had just placed her son in nursery but had to remove him due to the uncertainty about her job role. Her relationship with her child was affected by her distress. When she returned to work she found that she had little to do. She was not given a handover relating to her previous work projects and her work folders had been removed from her computer.

21. The Claimant's GP records show that she consulted her doctor on 21 March 2018. The doctor signed her off for two months with 'work related stress' which is stated on the fit note. The doctor observed that she was in 'floods of tears, wasn't really able to tell me what was going on, very distressed, not sleeping'. The GP also records what the Claimant had told her about her boss being 'unpleasant' and the fact that she was under threat of redundancy. The Claimant was referred to MIND to see if she could obtain some counselling. There is no mention of any prior medical conditions.

22. At a consultation on 29 March the doctor records that the Claimant had been unwell since end of February with sore ears and throat and she was prescribed antibiotics.

23. There was a further GP consultation on 23 May. The Claimant reported that she was 'still awful'. She was not sleeping. The doctor noted that she was struggling to cope with her son and recommended a health visitor appointment.

A fit note was issued for a further two months and the doctor prescribed sleeping tablets.

24. The Claimant's second fit note was due to end on 21 July 2018. She was eventually made redundant on 20 July 2018 after informing the Respondents that she would be returning to work.

25. Other documents in the bundle show that the Claimant was assessed for counselling at the end of April 2018 and was offered eight counselling sessions starting on 1 August 2018.

26. Following her dismissal, the Claimant received a statutory redundancy payment and notice pay.

27. On her schedule of loss the Claimant claims a loss of a bonus. There was one document in the bundle presented at the liability hearing in relation to this, but nothing in the remedy bundle and nothing in her witness statement.

28. The Claimant is a Russian-qualified lawyer but she is not qualified to practice in the UK. There is documentary evidence in the bundle of four job applications made by the Claimant between the date of her dismissal and 15 February 2019, the period for which she has claimed loss of earnings. The Claimant however stated in her oral evidence that her efforts to find new employment were not confined to these. She told us that she had uploaded her CV to online platforms such as Linkedin, registered with recruiters such as Reed and Indeed, sent her CV to Baker and McKenzie, carried out job searches, made telephone enquiries and attended preliminary telephone interviews. She applied for or expressed interest in a wide variety of jobs in and around the legal sector. Her efforts to find work were not successful.

29. In December the Claimant applied for job seeker's allowance. She says and we accept that as a condition of receipt, she had to have regular meetings with her job coach, apply for jobs and keep a record of her job searches.

30. Following conclusion of the evidence and closing statements, the tribunal made the following decisions regarding remedy.

Unfair Dismissal

31. The Claimant is not entitled to a basic award as she received a statutory redundancy payment.

32. In relation to a compensatory award, she claims loss of earnings following her dismissal over a period from 20 July 2018 to 15 February 2019, a period of 30 weeks. She accepts that she received a notice payment which reduces the period of loss to 26 weeks.

33. Mr Welch argues that the Claimant failed to mitigate her losses. He points out that there is only evidence of four formal job applications in the bundle over this six-month period. He also suggested that the Claimant was applying for jobs which she was not qualified to carry out as she is not a UK-registered lawyer. She should have been applying for paralegal roles.

34. The tribunal took judicial notice of the fact that the jobs recruitment market has changed in recent times. It is now very usual to make online applications or to upload your CV to recruitment organisations. Often recruiters will conduct initial interviews by telephone.

35. On balance we accepted the Claimant's evidence that she had made wide-ranging efforts to find new employment in the period after her dismissal. We accept that she had frequently responded to advertisements for specific job roles by forwarding her CV to a recruitment agent. We accept that she had carried out a good deal of research into jobs that were available and had expressed interest in many positions, by telephone or by forwarding her CV. Sadly her efforts were not successful.

36. We noted Mr Welch's point that as a Russian-qualified lawyer the Claimant could not apply for jobs that required her to be eligible for a UK practising certificate. We accept that her ability to find a job in the legal profession was to some extent limited by her lack of a UK qualification. Looking at the documents in the bundle however we concluded that the Claimant had considered a wide range of roles related to the legal sector, such as legal project manager. The Claimant had previously held a well-paid role as in-house lawyer for the family businesses of the second Respondent. Whilst over time we might have expected her to broaden her search to include roles outside the legal profession we find that in the period to February 2019 the Claimant had acted reasonably in confining her search to the legal sector where she had a great deal of experience.

37. We therefore award the Claimant 26 week's net losses at £625 per week to cover the period from 20 July 2018 to 15 February 2019. In addition we award her lost pension contributions over this period of £341.64 and loss of statutory rights at the sum she has claimed of £400. The total comes to £16991.64.

38. The Claimant claims an uplift for the Respondents' breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures. In our decision on liability we noted that the Second Respondent taken it upon himself to make a decision in relation to the Claimant's grievance even though he was the subject matter of that grievance. He had also in effect dealt with the grievance appeal (paragraph 53 of our earlier judgment). We noted that there was a second director available who could have dealt with the appeal at the very least. That director had merely been asked to review the grievance and appeal and confirmed the outcome.

39. We accept that within a small business it can be difficult to find senior managers to deal with both the grievance and any appeal against a grievance division. However paragraph 44 of the Code makes it clear that a grievance appeal 'should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case'. The Respondents have not provided a good reason why the grievance appeal (if not the grievance itself) could not have been dealt with by the independent director AT. We believe an uplift is appropriate we take into account the size of the company. We do not consider that the maximum 25% should be awarded. The tribunal decided that a 10% uplift would be appropriate amounting to £1699.

40. The total amount we come to is £18,690.64. In our earlier judgment we decided however that had a fair process been followed there was a 75% chance that the Claimant would have been dismissed. We therefore award 25% of this total in accordance with the **Polkey** principles, a sum of £4672.66. The recoupment regulations apply to this award and we explained to the parties how this will work.

Discrimination Award

41. The Claimant claims lost pay for her period of sickness absence from 21 March to 20 July 2018, during which the Claimant was not paid as she did not qualify for SSP.

42. We considered whether the Claimant had established that her sickness absence was due to the discriminatory treatment she received at the hands of the Respondents. We concluded that she had. The allegations of discrimination that we upheld relate to the Respondents' treatment of the Claimant at the meetings on 13 and 26 February 2018 and upon her return to work on 5 March 2018. She consulted her doctor and was signed off sick on 21 March 2018. We accept Mr Welch's point that the GP consultation notes record the story of what had happened as presented by the Claimant, as is usually the case. We take into account however:

- **a.** the GP's own observations that the Claimant was in floods of tears and was very distressed;
- **b.** the fact that the fit note clearly describes the reason for the absence as work-related stress.

43. We accept the Claimant's evidence that she experienced significant anxiety after being told just before her return to work that there was no job for her.

44. Mr Welch suggests that there could have been other causes for the Claimant's absence. He points to the fact that the doctor noted that she had a young child and that she seemed to be struggling to cope with this, and recommended a health visitor appointment. We accept that many new parents suffer from lack of sleep and can find the first few months very hard. Having looked at the evidence in the round however we conclude from the GP records and from the Claimant's evidence that it is more likely than not that the Claimant's ability to cope with her young child was exacerbated by the work-related stress that she was experiencing rather than the other way around,

45. We accept therefore that the Claimant's sickness absence was caused by the discriminatory treatment she received towards the end of her maternity leave and upon her return to work. We therefore award her sixteen week's loss of earnings at £625 net per week, a total of £10,000.

46. We make no award for loss of bonus. The Claimant has not made out her case. The commitment to award a bonus is not clear. If the Claimant is alleging that she was promised a bonus but that this failed to materialise when she went on maternity leave that is not an allegation that was included in the List of Issues. In any event, we have not been provided with sufficient evidence to be satisfied that was the case. The claim for loss of bonus fails.

47. We turn to injury to feelings. The Claimant claims £20,000 which is now just above the middle of the middle band of Vento. Mr Welch submits that any award should be in the lower band and he points to the case of **Henery v Quoteline Insurance Services Ltd,** an employment tribunal decision from 2013 (2502542/13) which he submits concerns similar facts. In that case the figure awarded was £5000.

48. We have considered **Henery** but note that at paragraph 50 the tribunal records that 'there was no direct evidence from the Claimant herself as to injury to feelings' apart from her saying in her witness statement that she was 'very upset'.

49. We contrast this with the current case where we have been presented with the following evidence:

- **a.** After the Claimant's treatment prior to and upon her return to work in relation to which we have upheld findings of discrimination at paragraphs 145, 149 and 152 of our decision, she was signed off sick for sixteen weeks with work-related stress;
- **b.** Her GP noted that she was in floods of tears and very distressed on 21 March 2018;
- **c.** In May 2018 she is noted as still feeling 'awful'.
- **d.** In May 2018 she was prescribed medication as she could not sleep;
- **e.** She was assessed and offered counselling in the summer of 2018;
- **f.** The Claimant described distress at being told there was no job for her to come back to. She experienced anxiety, due especially to the uncertainty around her situation. She says and we accept that the treatment she received affected her professional confidence and her relationship with her son.

50. We have taken into account the fact that we found that the eventual decision to make the Claimant redundant did not amount to a pregnancy-related or discriminatory dismissal. Nevertheless we consider that the fact that the Claimant eventually lost her job after the discriminatory treatment she received upon her return to work, and the discriminatory way she was treated during the process (see paragraph 156 of earlier decision) must be considered to some extent. Taking all the factors set out above into account the tribunal considered that an award in the middle band is appropriate.

51. As to the exact amount, the tribunal considered that the amount of £20,000 that the Claimant seeks is too high, recognising our finding that ultimately a genuine redundancy situation had arisen. We also take note of the fact that three of the allegations that have been upheld are against both Respondents but that the allegation of removal of work folders from the Claimant's laptop was upheld against the first Respondent only. Any award for injury to feelings therefore needs to be apportioned.

52. After careful consideration of the evidence we find that a total award of £16,000 is appropriate ie a figure in the lower half of the middle band, and that this should be apportioned as to £15,000 for injury to feelings as a result of the findings at paragraphs 145, 152 and 156, and £1000 as a result of our finding at paragraph 149 against the first Respondent only.

53. The total award for discrimination therefore comes to £26,000. The total sum awarded to the Claimant including the unfair dismissal award is £30,672.66

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Employment Judge Siddall
Date: 22 April 2022