EMPLOYMENT TRIBUNALS

Claimant: Miss C Creasey

Respondent: VPS PVT Limited

Heard at: Lincoln Magistrates Court **On:** 15 February 2023

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: Mr F Mortin, Counsel
Respondent: Mr A Singh, Director

JUDGMENT

1. The respondent's response dated 21 June 2021 was dismissed on 31 October 2022 for failing to comply with an unless order dated 22 September 2022.

2. The claimant was unfairly dismissed.

3. The respondent discriminated against the claimant because of sex and/or pregnancy and maternity by:
   a) failing to carry out a pregnancy-related health and safety risk assessment;
   b) refusing to suspend her on maternity grounds; and
   c) dismissing her.

4. The claimant was victimised by
   a) failing to pay her wages on 1 April 2021; and
   b) dismissing the claimant.

5. The claimant's claims for holiday pay, breach of contract (notice pay) and unlawful deductions from wages are all well founded and succeed.

6. The respondent must pay the claimant compensation and damages assessed in the total gross sum of **£23,823.50**, made up as follows:

   a) Unfair dismissal compensation of £966.40, consisting of;
      i) a basic award of £566.40; and
      ii) a compensatory award of £400;

   b) Compensation / damages for discrimination of £15,000 being a global injury to feelings award;

   c) Holiday pay in the sum of £84.92

   d) Unlawful deductions from wages in the sum of £708.00;

   e) Notice pay in the sum of £566.40;

   f) An uplift of 25% on compensation for failure to comply with the ACAS Code of Practice in the sum of £4,189.83; and

   g) Interest at 8 percent per annum on injury to feelings award from 15 March 2021 (the date of discrimination) to 15 February 2023 (being the date this Judgment was made), totaling £2,307.95

REASONS

Background

1. The claimant brings claims of unfair dismissal, direct sex discrimination, or alternatively pregnancy and maternity discrimination, victimisation, unlawful deductions from wages, breach of contract for her notice pay, and failure to pay holiday pay. The claim form was presented on 21 May 2021 following a period of early conciliation from 18 to 19 May 2021.
2. The claim was initially defended by the respondent who presented a response on 21 June 2021.
3. On 9 August 2021, the respondent failed to attend a case management preliminary hearing before Employment Judge Faulkner.

4. The respondent was ordered to explain its non-attendance by 23 August 2021. In addition, the Case Management Order went on to state, *"[t]he respondent should be aware that if it does not reply by that date, or if it does reply but does not provide an adequate explanation of its absence from today's hearing, an Employment Judge may then move to consider whether its response should be struck out, which would result in Judgement being entered for the claimant*."
5. On 8 October 2021, a strike out warning was issued to the respondent for its failure to comply with Employment Judge Faulkner's Order. The respondent was given until 22 October 2021 to give objections to the response being struck out. An acceptable explanation was provided by the respondent in an email sent at 11:28pm on 22 October 2021. The case was not, therefore, struck out at this stage and the respondent was informed of this on 29 October 2021.
6. At a relisted preliminary hearing for case management on 1 March 2022, the claimant and respondent both attended a hearing before Employment Judge Butler. The respondent conceded in this hearing that the claimant was owed unpaid wages, notice pay and holiday pay, although the respondent confirmed in the hearing today that this had still not been paid to the claimant. The respondent's reason for this failure is that it does not have the bank details of the claimant, a fact strongly disputed by the claimant, and which is unsupported by the documentation provided to me for the remedy hearing.
7. At this preliminary hearing, further Case Management Orders were made in order to progress the case to a final hearing.
8. The Tribunal wrote to the parties on 1 July 2022 stating that the parties must confirm by 8 July 2022 that they had disclosed relevant documents to each other and that the trial bundle had been finalised. The claimant confirmed the position on 8 July 2022 and stated that, at the time of writing that email, they had not received the respondent's list of documents or copies of the same. The respondent failed to comply with this Order.
9. On 28 July 2022, the claimant applied for an Unless Order in respect of the respondent's failure. On the same date, the respondent sent an email to the Tribunal and the claimant

stating, "*We (responded) are yet to receive the docs claimant is claiming from 08/7/22*." The claimant also the same day sent a reply confirming that the claimant's list of documents and copies had been sent by email to the respondent on 8 and 11 July 2022 and that they had not received any documentation from the respondent.

10. An Unless Order was issued on 11 August 2022 in the following terms:

"*The respondent is **Ordered** to write in to the Employment Tribunal (copying in the claimant's representative) by no later than **18 August 2022** and confirm;*

1. That it has sent to the claimant all the documents in its possession and/or control which are relevant to the issues to be determined in this case, to be included in the joint bundle and the date this was done;

2. If this has not been done, the respondent is to explain why not.

*If the respondent has not complied with the case management directions for disclosure, and/or fails to respond in time to this Order, it's response to the claim may be **struck out** and Judgement entered for the claimant*."

11. The respondent replied to this by email dated 22 August 2022 stating that that the writer (not identified in the email) was abroad until 3 September 2022 with very limited access to the internet. It therefore requested that an extension be granted to the deadline, which had already passed.

12. Having reviewed the file, employment Judge Clark did not strike out the response at this stage, but instead, issued a further Unless Order. Full reasons were provided for doing so, and were sent to the respondent on that date. The Unless Order required the respondent to either confirm that all documents relevant to the issues to be determined had been sent to the claimant or provide an explanation as to why this had not been done.

13. The Unless Order made clear that should the respondent fail to comply with its terms, "***The respondent's response to the claimant's claim will be struck out without need for further order***."

14. The respondent subsequently did reply on 5 September 2022, albeit again slightly after the time limit for compliance, but I note that it was recognised that the respondent had provided some limited information about its failure to provide documentation and the response was again not struck out at this stage.
15. A further Unless Order was therefore issued against the respondent by Employment Judge Broughton on 16 September 2022 which stated that the "*limited response*" from the respondent had been considered. The Unless Order required the respondent to send copies of all relevant documents to the claimant (if it had not already done so) and confirm to the Tribunal in writing, copied to the claimant, that it had done so. The date for compliance was by 4pm on 29 September 2022. Reasons were again provided by the Employment Judge as to why the reply from the respondent was not sufficient, as it had not addressed when it would comply with its obligations on disclosure.
16. The respondent failed to comply with this Unless Order. Therefore, on 31 October 2022, Employment Judge Adkinson confirmed that the response had been dismissed for failure to comply with the Unless Order and issued directions in connection with today's remedy hearing. Orders were provided for the provision of a witness statement by the claimant together with documents for the purposes of today's hearing. Subsequent correspondence from the Tribunal confirmed that the directions relating to evidence and documents related to remedy only and not liability.

Today's hearing

17. This was an attended hearing, held in person. I was provided with a bundle of documents, which the claimant had prepared, together with a witness statement from her, both dealing with remedy only, as had been directed by the Tribunal.
18. Mr Singh, a director of the respondent, attended the remedy hearing although was aware that the response had already been dismissed. Having considered the Tribunal file, and in light of the response being dismissed, I had regard to the Employment Tribunal Rules of Procedure 2013, particularly rules 21 and 28 which provide:

"***21 Effect of non-presentation or rejection of response, or case not contested***

(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. Where a Judge has directed that a preliminary issue requires to be determined at a hearing, a judgment may be issued by a Judge under this rule after that issue has been determined without a further hearing.

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."

"***28 Dismissal of response (or part)***

(1) If the Employment Judge considers that the response to the claim, or part of it, has no reasonable prospect of success the Tribunal shall send a notice to the parties—

(a) setting out the Judge's view and the reasons for it;

(b) ordering that the response, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the respondent has presented written representations to the Tribunal explaining why the response (or part) should not be dismissed; and

(c) specifying the consequences of the dismissal of the response, in accordance with paragraph (5) below.

(2) If no such representations are received, the response shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the response (or part) to stand or fix a hearing for the purpose of deciding whether it should be permitted to do so. The claimant may, but need not, attend and participate in the hearing.

(4) If any part of the response is permitted to stand the Judge shall make a case management order.

(5) Where a response is dismissed, the effect shall be as if no response had been presented, as set out in rule 21 above."

19. I therefore considered on the papers that it was entirely appropriate to issue Judgment for the claimant's claims, which had been appropriately set out and fully pleaded, for which, the effect was that no response had been presented. There were no jurisdictional issues and the claimant had made out all of her claims. Therefore, Judgment was entered for the claimant as set out above.
20. Having heard submissions from both parties, and the claimant's objection to the respondent's involvement in the hearing, I allowed Mr Singh to make representations to me prior to coming to a decision on remedy, despite the claimant's objection to his involvement in the hearing.
21. I heard oral evidence from the claimant and found her to be an honest and credible witness.
22. The claimant's evidence was that she had not been paid her outstanding salary, holiday pay or notice pay, something which was not disputed by the respondent. These sums were therefore awarded as set out in the judgment.
23. Her weekly pay was £141.60 (both gross and net due to the amounts involved) and was not disputed by the respondent. Her notice pay entitlement was calculated at 4 weeks' pay, being £566.40. Her basic award was also 4 weeks' pay again totalling £566.40.
24. I award £400 for the loss of the claimant's statutory rights, reflecting that it will take the claimant some years before she can claim unfair dismissal and/or redundancy pay from a new employer.

25. The claimant went on to give evidence about her financial losses to date. She confirmed in evidence that she had not looked for alternative work from when she would have expected to return to work, ie when her baby was 9 months old. The reason for this was that the cost of childcare made this prohibitive.
26. Her statement suggested that she was claiming losses for two years from the date of her dismissal i.e. to 29 April 2023, although acknowledged that no loss of earnings had occurred from the end of her notice period until 29 April 2022, since she would have been on maternity leave for this period and HMRC had paid her the equivalent of statutory maternity pay as the respondent had failed to do so.
27. When asked whether she would have returned to her job with the respondent at the end of what would have been her maternity period, i.e. 29 April 2022, she honestly answered that she could not have afforded to do so due to childcare costs. Whilst she had the benefit of her partner's wage until December 2022, after which her circumstances had changed, she confirmed that, as her partner was self-employed, he did not have a regular wage, and she would not have been able to return, even part time, at this stage due to prohibitive childcare costs.
28. The claimant said that she had not looked for alternative work since her maternity leave would have ended, a fact which supports my findings. I accept that the respondent has the duty to prove a failure to mitigate, but my findings are that the claimant would not have returned to work at the end of her maternity leave, due to the evidence that she gave today.
29. Therefore, I find that her losses in respect of earnings ceased at the end of her maternity leave period, namely 29 April 2022, when the claimant's baby was nine months old. This means that there is no loss of earnings award for her complaints of discrimination and/or unfair dismissal.
30. In relation to compensation for discrimination, I do not propose to deal with injury to feelings for each separate act or allegation of discrimination, but considered them as a whole, focussing on the effect the discrimination had on this particular claimant.

31. I note that awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the respondent) for unlawful discrimination for which the respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect.
32. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power.
33. I had regard to the band into which the injury falls, following the case of Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102. In Vento, the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of a protected characteristic. The middle band should be used for serious cases which do not merit an award in the highest band and the lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.
34. The Claimant's claim was presented on 21 May 2021. The relevant Joint Presidential Guidance provides, "*In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows:* ***a lower band of £900 to £9,100*** *(less serious cases); a* ***middle band of £9,100 to £27,400*** *(cases that do not merit an award in the upper band); and* ***an upper band of £27,400 to £45,600*** *(the most serious cases), with the* ***most exceptional cases capable of exceeding £45,600***." These bands take account of the 10% Simmons v Castle uplift.
35. The claimant was pregnant at the time, and so was more vulnerable in respect of the discrimination and her dismissal than might otherwise have been the case. I accept her evidence contained within her statement of the degree of hurt, distress and upset caused to her, when she was denied her pay, so that she was left with no pay and dismissed without any procedure being followed.

36. The claimant's evidence, which I accept, was that she had to undergo an additional scan for her baby due to the discriminatory treatment she received from the respondent. Whilst there is no additional medical evidence to support this, it was clear but the claimant, having miscarried previously, and being pregnant during the COVID pandemic, was undoubtedly concerned, stressed and anxious as a result of the discriminatory treatment. Also, that this has affected her confidence and therefore her ability to re-enter the workplace.
37. I am satisfied that this case falls clearly within the mid-range of bands as originally set out in Vento referred to above, since this was not a one-off incident of discrimination, and had a serious impact on the claimant, as it resulted in the immediate loss of her job. There were a number of acts of discrimination, including her dismissal, taking place over a few weeks and, therefore, in light of the evidence that I have seen and heard I consider it appropriate to award injury to feelings in this middle band.
38. I assess the claimant's injury to feelings award in this case at £15,000. This is a global injury to feelings award for the effect of the discriminatory treatment on this claimant, and no separate award is given for victimisation. I consider that this amount is entirely justified in this case, but award no separate amount in respect of aggravated damages.
39. The claimant claims an uplift in compensation for a failure to follow the ACAS Code of Practice both in respect of her grievance dated 18th March 2021, which received no reply from the respondent, and the failure to follow any form of disciplinary procedure in respect of her dismissal.
40. The Tribunal can make an uplift of up to 25% pursuant to section 207A Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C)A). The uplift applies to complaints listed in Schedule A2 of TULR(C)A. These include discrimination, unfair dismissal, detriment, unlawful deductions from wages, holiday pay and breach of contract complaints.

41. In this case, there was a complete failure to follow the grievance procedure or any fair process in relation to the claimant's dismissal. I consider that the claimant is entitled to an uplift in respect of this claim since the threshold has been met.
42. Turning to the level of the uplift, I am again satisfied that the respondent was in substantial and significant breach of the ACAS Code of Practice on both the disciplinary and grievance elements, and therefore I consider that it is entirely appropriate to award a maximum 25% uplift in these circumstances. There has been a complete disregard to the procedures which should have been followed, and this is not just a minor or technical breach. I have considered whether this gives any form of double recovery for the claimant, but am satisfied that it does not.
43. Finally, I award interest on the discriminatory compensation I have awarded, in the sum of £2,307.95. This is calculated on the £15,000 injury to feelings award only for the entire period from the discriminatory act on 15 March 2021 until 15 February 2023, being 702 days.

Employment Judge Welch
Date: 16 February 2023

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