EMPLOYMENT TRIBUNALS

Claimant: Miss F B Yasin

Respondent: Swift Lawyers Ltd

Heard at: Manchester Employment Tribunal **On:** 10 March 2023

Before: Employment Judge Dunlop
Mr I Taylor
Ms L Atkinson

Representation

Claimant: In person
Respondent: Ms L Halsall (counsel)

JUDGMENT having been sent to the parties on 16 March 2023 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:

REASONS

Introduction

1. By a reserved Judgment sent to the parties on 2 February 2023 the Tribunal found that the respondent had unfairly dismissed the claimant and, by dismissing her, had discriminated against her on grounds of her pregnancy. The Tribunal further determined that any compensation for financial loss should be reduced by 35% to reflect the possibility that the claimant would have been dismissed in any event.

2. This was a remedy hearing to determine the compensation due to the claimant. Financial compensation was the only remedy sought.

The Hearing

3. The hearing took place over one day by CVP. There were no significant technical issues. The parties had produced an agreed remedy bundle and we were referred to documents within it, as well as two additional documents provided by email relating to the claimant's job search.

4. The claimant had prepared a witness statement. That focused on the impact the dismissal and discrimination had had on her rather than on her attempts

to mitigate her loss. She had, however, provided documents evidencing her job search and she was questioned on those by Ms Halsall.

5. Mr Ahmed gave evidence on behalf of the respondent. The main purpose of that evidence (although other points were also included) was to introduce documents the respondent had obtained for the purposes of showing that there were a large number of suitable jobs the claimant could have applied for, but did not. There were very few questions for Mr Ahmed.

6. At the invitation of the Tribunal, Miss Yasin and Miss Halsall addressed us on the two major issues of mitigation of loss and the amount of the injury to feelings awards. We announced our decision on those issues, following which the parties took time to discuss the implications of the Tribunal's decision in respect of the mitigation of loss point. Having had those discussions, the parties were able to propose agreed figures in respect of various aspects of the claim which were then included in the Judgment by consent.

Mitigation of Loss

Legal principles

7. Claimants who claim for loss of earnings as a result of successful claims of both unfair dismissal and discriminatory dismissal are under a duty to take reasonable steps to mitigate their loss. It is for the employer to show that there has been a failure to mitigate.

8. The steps that it is reasonable for the claimant to be required to take will depend on her personal circumstances. They may also change over time – for example it might be unreasonable for someone to immediately accept a much lower paying job than the one they have left, but unreasonable for someone else to fail to apply for lower paying roles if they have been unsuccessful in securing employment over a lengthy period. Questions of mitigation are fact-sensitive.

9. If the Tribunal is to make a finding of failure to mitigate, it must consider what additional steps could have been taken, and what the likely result of those steps would have been.

Findings of Fact and conclusions

10. The claimant initially mitigated her loss by obtaining work through her sister, whom we heard is a partner in a personal injury department. The claimant was engaged on a temporary basis to conduct file reviews, working remotely from home. The parties agreed that the claimant had fully mitigated her loss for the period between her dismissal on 16 April 2021 and (what would have been) the start of her maternity leave in early June 2021.

11. The claimant did not seek to recover any losses for her maternity period from June 2021 to June 2022. She says that she would have received the same SMP had she remained in employment and would then have taken a period of unpaid maternity leave. On her case, her losses begin from the date when she would have returned to work in early June 2022.

12. The claimant made a small number of job applications during her maternity period but was not job seeking in earnest. The respondent says that she should have commenced job seeking in earnest in spring 2022, in the run up to the end of her maternity period. We reject the argument that the claimant acted unreasonably by not making wide-ranging applications at this point. An employee on maternity leave would be entitled to prioritise spending time with their child, and we consider that the claimant was acting reasonably by taking the same approach as she would have done as an employee. We note that she is not arguing that she would have returned to work early, or seeking compensation for this period.

13. The respondent did not seek to argue that the events above broke the chain of causation, and that it should not have to compensate the claimant at all for the period after maternity leave. Rather, it argued that the claimant should have obtained a job very quickly if she had been acting reasonably in her efforts to seek alternative employment.

14. The respondent produced a helpful summary of the applications the claimant had been able to evidence, which appeared in our bundle. This demonstrated that the claimant applied for 23 jobs between June 2022 and the date of this hearing, broken down as follows:

June	4
July	0
August	4
September	0
October	5
November	4
December	3
January	2
February	1

15. We accept that the claimant made some further applications which she was not able to provide documentary evidence of. A screenshot from her 'TotalJobs' account indicated 30 applications (although did not give a period). Her evidence was somewhat vague, but she suggested there were other applications which she had not retained any paperwork. We accept the claimant's evidence that she signed up to various job sites and actively looked at the listings to assess their suitability.

16. We also accept that there were restrictions in the roles the claimant could easily apply for. Her eldest child has a serious health condition which means that she needs to be tube fed. This requires one of her parents to be available every few hours. Miss Yasin had previously been the main breadwinner in her family and we find that the majority of this responsibility could have been shouldered by her husband if she secured a good enough role. However, the restriction would prevent her from taking work away from home which was insecure or had long hours.

17. Miss Yasin was also reliant on public transport which meant that some locations (such as central Manchester) were more feasible for her to consider than locations which were closer to her home but less well-served by public transport.

18. Finally, Miss Yasin's experience was in cavity wall insulation claims and there was no real demand for that specialism. She ruled herself out of jobs which required specific experience in other legal areas as an essential requirement, although she was open minded about applying for jobs in a wide variety of legal areas where the advertisement indicated that experience was not essential, or that training could be given.

19. The respondent produced documents which appeared to indicate that there were perhaps three to four times as many suitable jobs within ten miles of Bolton as Miss Yasin had applied for. Miss Halsall questioned Miss Yasin on a selection of the advertisements and Miss Yasin fairly acknowledged that there appeared to have been jobs that she could have applied for, but had missed. She did point out, however, that the actual location of the jobs was not stated and that there are many locations within ten miles of Bolton which would not be practicable for her to reach on public transport.

20. Overall, we are satisfied that Miss Yasin acted reasonably in the period June to December 2022. Using the respondent's table, but taking account of our findings that it does not present a complete picture, we find that Miss Yasin was applying for something in the region of 3-5 jobs per month in this period. We consider that she was taking appropriate steps to identify jobs that met her criteria (which were reasonable) and that this was producing a fairly consistent rate of applications. We do not believe that Miss Yasin was being overly selective, or missing a significant number of suitable opportunities.

21. Unfortunately, Miss Yasin's applications did not meet with much success. She attended an assessment for a job at one firm, but other than that did not progress beyond the initial sift.

22. The Tribunal notes that the rate of applications appears to tail off significantly in the early part of 2023. We also consider that, having spent six months applying unsuccessfully for legal roles (with the exception of a couple of applications in October for customer service roles) it was now reasonable for the claimant to broaden her horizons and make more wide-ranging applications. This might have included non-legal administrative or customer service jobs, both working from home and those based within a reasonable commute using public transport. If she had broadened her search at this juncture, we would expect to see the number of applications overall going up, rather than down.

23. We therefore conclude that the respondent has shown that the claimant failed to mitigate her loss by not taking reasonable steps to secure alternative employment in the period from 1 January 2023 to the date of the hearing. We recognise that even if Miss Yasin had acted in the way we have found she ought to have done, she would not have secured a job instantly. Recruitment processes obviously take time and Miss Yasin's relative lack of mobility, time away from the workplace and niche experience would present difficulties in securing other types of work as well as paralegal work. However, we also accept the respondent's point that the labour market generally has been quite buoyant in this period and that would have been in Miss Yasin's favour. We also take account of the fact that she has said that she is able to commute into central Manchester and that that is an area

where lots of different types of businesses are based and therefore with a broad range of jobs available.

24. Taking everything into account, we formed the view that if Miss Yasin had taken reasonable steps to mitigate her loss from 1 January 2023, it is likely that she would have secured alternative employment by 10 April 2023. That is, one month from the date of this hearing. Given the broadbrush nature of this exercise, we consider it is reasonable to assume that that role would pay at least as much as Miss Yasin's role with the respondent.

25. The figure awarded in the Judgment for loss of earnings was a figure agreed by the parties taking into account the backstop date of 10 April 2023 identified by the Tribunal, and also taking into account the ***Polkey*** reduction determined in the liability Judgment.

Injury to Feelings/Aggravated Damages

Legal principles

26. We directed ourselves according to the guidance set down by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318**. As Miss Yasin was representing herself, the Judge provided information as to the current financial limits of the bands and the distinctions between them as laid out in Mummey LJ's Judgment before inviting submissions from the parties.

27. The award of injury to feelings is not punitive. It must reflect the severity of the injury sustained by the claimant, rather than a judgment on the severity of the respondent's conduct. A more stoic or resilient claimant may suffer less injury than a vulnerable one, but the discriminator must 'take their victim as they find her'.

28. Tribunals may make an award of aggravated damages in certain circumstances. The case law permits aggravated damages to be awarded as a separate and additional award to an award of compensation for injury to feelings. However, a single award for injury to feelings can also be made, taking into account aggravating features. Underhill P expressed a preference for the latter approach, in **Commissioner of the Metropolitan Police v Shaw [2012] ICR 464, EAT**, whilst recognising that the former approach was permissible. If a separate award is made, care must be taken to avoid double counting i.e. compensating for the same injury twice over.

29. In paragraph 22 of the same Judgment, Underhill P set out three broad categories of case where aggravated damages could be awarded, namely:

> "(a) *The manner in which the wrong was committed*….
> (b) *Motive….*
> (c) *Subsequent conduct*. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner…. But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by

> plainly showing that he does not take the claimant's complaint of discrimination seriously….A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages."

Findings of fact and conclusions

30. The conclusion of the tribunal in the liability hearing was that, although the claimant's role was genuinely redundant, she would most probably have been offered other work by the respondent had she not been pregnant. The respondent's submissions appeared to suggest that upset caused by the fact of the claimant losing her job itself should be disregarded, but given the findings of the liability hearing as described, we do not accept that submission.

31. By reason of her pregnancy Miss Yasin was particularly vulnerable at the time of the discrimination. She was further vulnerable due to her eldest child's disability and the fact that her husband required a visa to be in the country. We accept her evidence that her dismissal from the respondent deeply affected her, having a major and sustained impact on her well-being.

32. We also find that a huge amount of stress and anxiety was caused to the claimant by the respondent's failings in relation to how it handled her termination of employment and the aftermath. Some of this was attributable to her concerns around having her appeal heard in a timely way by an appropriate person, but by far the most significant matter was the respondent's delay in arranging her pay her SMP and to communicate with Miss Yasin about this. Many of her communications were ignored, whilst others were passed backwards and forwards within the business. Miss Yasin was in a financially precarious situation, and all the was taking place around the time she was giving birth, it is clear it was a huge source of frustration and anxiety. Although we have not heard evidence about this course of events in as much detail as may have been the case if it was a distinct allegation, we have heard sufficient to draw the broadbrush conclusions expressed above, which are largely documented in email trails in the bundle.

33. The respondent noted, correctly, that the issues around payment of SMP had never been alleged to be an act of discrimination and therefore did not form any part of what the claimant was to be compensated for within this Judgment. Miss Yasin asserted that her complaints about these matters justified an award of aggravated damages, over and above her injury to feelings award.

34. The respondent submitted that this was essentially a one-off act, and that an award in the lower band was appropriate. The claimant submitted that this was a case falling within the highest band. We had little difficulty in

rejecting both of these positions as too extreme and in concluding that this is a case where the correct award for injury to feelings properly falls in the middle band of Vento. Having regard to the date of dismissal, this gives a range of permissible award between £9,100 to £27,400.

35. Absent any consideration of the post-dismissal conduct, we would have determined that the correct amount for the award was towards the lower end of that band, at £13,000. This reflects the fact that this was a one-off act of discrimination which was not egregious or overt, but which nonetheless had serious consequences for the claimant's well-being as we have described.

36. However, we determined that it was appropriate to increase that figure to by £2,000 to £15,000 taking into account the respondent's post-dismissal conduct, particularly in relation to payment of SMP. We consider that this is subsequent conduct which can be taken into account as an aggravating factor in accordance with the principles in **Shaw**. We recognise the respondent's argument that such conduct was not directly related to the underlying discrimination in the way that (say) the manner in which proceedings are conducted, or the failure to issue an apology are. However, the discriminatory act was the termination of the claimant's employment and we find that the failure to properly manager her SMP payments arose directly out of that termination. We are satisfied on her evidence that the upset caused by her discriminatory dismissal was genuinely and substantially aggravated by the respondent's failures in respect of this related matter.

Other matters

Acas Uplift

37. The claimant had sought an uplift to the award under s207A Trade Union and Labour Relations (Consolidation) Act 1992. The respondent submitted, and we accepted, that this was not applicable in this case as the Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals.

Interest

38. The respondent accepted that it was appropriate for interest to be awarded. We had insufficient time to calculate the interest payable and announce it as part of our oral Judgment. The interest awarded, and the method of calculation, was recorded in the written Judgment sent to the parties.

Employment Judge Dunlop

Date: 20 March 2023

WRITTEN REASONS SENT TO THE PARTIES ON
Date: 29 March 2023

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FOR EMPLOYMENT TRIBUNALS