EMPLOYMENT TRIBUNALS

Claimant: Mrs C Voice

Respondent: ALM Electrical Solutions Ltd (1)
Mr Smith (2)

Heard at: Birmingham **On:** 27 April 2023

Before: Employment Judge Maxwell
Mrs R Forrest
Mr P Davis

Appearances
For the claimant: Mr Ahmed, Counsel
For the respondent: Mr Ramsbottom, Consultant

RESERVED REMEDY JUDGMENT

1. With respect to her successful claim of pregnancy discrimination, the Claimant is entitled to damages and interest:

   1.1 injury to feelings: £16,500;

   1.2 loss of earnings: £5,079.13;

   1.3 loss of pension: £496.17;

   1.4 interest £2,955.58.

   1.5 **total £25,030.88**.

2. With respect to her successful claim of unfair dismissal, the Claimant is entitled to:

   2.1 basic award: £20.90;

   2.2 compensatory award: £500;

   2.3 **total £520.90**.

3. With respect to her successful claim for unlawful deductions, the Claimant is entitled to **£79.42.**

4. With respect to her successful claim for accrued untaken annual leave, the Claimant is entitled to **£9.41.**

5. We also make an award with respect to the Respondent's failure to provide a statement of initial employment particulars, in the sum of **£980.08**.

REASONS

Pregnancy Discrimination

Injury to Feelings

6. The Claimant was deeply hurt and upset by her dismissal, both the fact and manner of it. She did not believe the stated reason for her dismissal was true and from as early as her appeal was convinced this had been brought about by her disclosing she was pregnant again. The Respondent lied about the reason for dismissal and fabricated a false explanation. This is not merely our finding, the Claimant felt this way at the time and has laboured under this belief ever since. The appeal hearing was a sham. The Claimant's reasonable representations were dismissed or evaded and her evident distress is recorded in the transcript. Being pregnant, the Claimant was emotionally vulnerable. This was also a stage in her life when she should have been able to enjoy the good news and yet it was marred by the Respondent's treatment of her. Whilst this could be described as a one-off act, her dismissal was not effected in a single moment, rather a sham process was followed by the Respondent leading to that end. In June 2021, having lost her job and desperately searching for new employment without success, the Claimant's GP prescribed antidepressants. Going onto medication of this sort would be a major event whenever it happened, let alone when she was pregnant with and following a miscarriage the year before. In this way, the Respondent's treatment of her added worry upon worry. It was necessary for her to continue taking antidepressants throughout the remainder of her pregnancy. It is clear she has found it difficult to put this experience behind her. The Claimant's feelings of hurt and distress have been long lasting. The Respondent did nothing following termination to reduce or limit this effect. She could draw no comfort from the Respondent stance in this litigation. The Claimant described the Tribunal's decision today as finally giving her peace. She said felt as though she as being accused of lying and only now has validation of her feelings, as she knew they had been aware of her pregnancy all along. The Claimant was still upset by her treatment at this hearing, becoming tearful and distressed when recounting these events.

7. We believe the extent of the Claimant's injury calls for an award near the middle of the middle band. Whilst we are assessing the damage done by one act of discrimination, as set out above it was not completed in a single moment and had ongoing and long-lasing consequences for the Claimant. Furthermore, whilst the Vento bands discuss the conduct of the Respondent as a delineating factor, it is the injury caused for which compensation is required. Our focus must,

therefore, be upon the injury done to the Claimant in this case. Doing our best, we consider the appropriate award to be **£16,500**.

8. We do not make any separate award for aggravated damages. We have taken the aggravating features into account when assessing the extent of the Claimant's injured feelings. An award of aggravated damages is not a punitive measure, it is merely a means by which a Tribunal can be sure to have fully compensated a Claimant for the injury done to them. We have reflected all of the material factors in our assessment. Neither party will be assisted by us partitioning the award, saying this part is for the basic injury to feeling and that for the additional aggravating features.

Loss of Earnings

9. There was a small difference between the parties about the extent to which the Claimant should recover for her loss of earnings. The amount and fact of her recovering this loss for the period from termination to 21 July 2022, being the end of her maternity leave period, was agreed. The Claimant also sought this loss from that later date through to 7 September 2022, when she started new employment as a hotel receptionist. The Respondent said she ought not to be able to recover the entirety of this last period because she could have taken up employment before she did, either with a different hotel or the same employer a little sooner.

10. The Claimant in evidence said she had a trial at another hotel but the position was not suitable for her. She also told us that her current employer on offering her the position asked when she could start and she said September when her children went back to school. We accept her evidence. Whilst is it possible she could have gone to work in the other hotel or told her new employer she wished to start in August, we are not satisfied it was unreasonable for her to start in September. She was then a young mother of three. That she chose to spend a last few weeks with her children before starting this new employment is entirely understandable. The Claimant was only in the position of needing to find new employment at all because of her unlawful dismissal. The burden is on the Respondent to prove an unreasonable failure to mitigate and it has not done so.

11. It is appropriate to award the Claimant her loss of earnings as compensation for unlawful discrimination rather than as part of the compensatory award for unfair dismissal. The discrimination claim with respect to dismissal appeared to be the most grave complaint we upheld. The parties agreed with this view. Furthermore, one of the matters we took into account when deciding it was just and equitable to extend time for the Claimant's claim against the second Respondent, was the prospect of being able to enforce any award against him and this end would be defeated if the lost earnings were awarded for unfair dismissal.

12. Adopting what were agreed figures, subject to our ruling on the small area of dispute, the Claimant is entitled to:

Losses

12.1 from 28/05/2021 to date of commencement of maternity period 22/10/2021, 20 complete weeks at £237.07 per week = £4741.40;

12.2 from difference between Maternity Allowance and Statutory Maternity Pay from 22/10/2021 for 6 of 39 weeks, 6 complete weeks at £61.39 per week = £368.36;

12.3 while seeking further employment from 21/07/2022 to 07/09/2022, 7 complete weeks at £237.07 per week = £1659.49;

12.3.1 Sub-total £6,769.25;

Giving credit

12.4 for earnings in other employment from 10 September 2021 until 22 October 2021 £825.72;

12.5 for JSA from 18 June 2021 to 7 September 2022 £864.40;

12.6 making a total loss of earnings of **£5,079.13.**

Pension

13. This again was an agreed figure. We award loss of employer pension contributions, being 3% of £245.02, from 28 May 2021 to 7 September 2022, 67.5 complete weeks at £2.45 per week = **£496.17**.

Interest

14. The relevant dates, rates and periods are:

14.1 contravention: 28.05.21;

14.2 calculation: 27.04.23;

14.3 period since contravention: 699 days;

14.4 period since mid-way 350 days;

14.5 judgment rate: 8%.

15. The interest due is:

15.1 Injury to feeling: £16,500 x 0.08 x 699/365 = £2,527.89;

15.2 Loss of earnings: £5,079.13 x 0.08 x 350/635 = £389.63;

15.3 Loss of pension: £496.17 x 0.08 x 350/365 = £38.06;

15.4 Total interest **£2,955.58**.

Unfair Dismissal

Basic Award

16. Notwithstanding our finding that the reason for dismissal was not redundancy, it is agreed the redundancy payment actually made by the Respondent to the Claimant must go toward discharging the basic award. In calculating that some, however, the Respondent failed to account for the recent increase in the national minimum wage. The shortfall between the payment made and the basic award to which the Claimant is entitled is £20.90. This was a figure upon which the parties agreed and we are satisfied it is correct. The Claimant is entitled to a basic award in the amount of **£20.90**.

Compensatory Award

17. The parties agreed **£500** with respect to the Claimant's loss of statutory rights and we find that is the appropriate sum to award.

18. The Claimant has recovered her loss of earnings as part of the compensation for pregnancy discrimination. She cannot have that awarded again for unfair dismissal because that would amount to double recovery.

Unlawful Deductions

19. The parties agree the Claimant was underpaid with respect to furlough and during her notice period by reason of a failure to increase her pay in line with the national minimum wage and that the sum due to her in this regard it is **£79.42**. The claim is well-founded and we uphold it to that extent.

Holiday Pay

20. The Claimant was entitled to accrued annual leave on the termination of her employment. Again, there was an underpayment by reason of a failure to account for the increased national minimum wage. The parties agree the amount due to her is **£9.41**. The claim is well-founded and we uphold that extent.

Initial Employment Particulars

21. When the Claimant commenced her employment, she was not provided with an initial statement of employment particulars. The parties agree she should recover 4 weeks' pay in this regard. Given the complete absence of such particulars, we are satisfied that 4 weeks' pay is the appropriate amount, namely **£980.08**.

Uplift

Law

22. So far as material, section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA ") provides:

207A Effect of failure to comply with Code: adjustment of awards

> **(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
>
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—**
>
> > **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**

23. Schedule A2 includes:

> **Sections 120 and 127 of the Equality Act 2010 (discrimination etc in work cases)**

24. When determining whether there should be an uplift under section 207A, the first question will be whether the claim to which the proceedings relate (or one of them) concerns a matter to which a relevant Code of Practice applies. The only relevant code for these purposes is the **Code of Practice on Disciplinary and Grievance Procedures (2015)** ("the ACAS Code"), which includes:

> **The Code of Practice**
>
> **Introduction**
>
> **1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.**
>
> > **- Disciplinary situations include misconduct and/ or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.**
> >
> > **- Grievances are concerns, problems or complaints that employees raise with their employers.**
>
> **The Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry.**
>
> **[…]**
>
> **Provide employees with an opportunity to appeal**
>
> **26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.**
>
> **[…]**
>
> **Grievance: Keys to handling grievances in the workplace**

Let the employer know the nature of the grievance

32. If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

Hold a meeting with the employee to discuss the grievance

33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

34. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.

[…]

Overlapping grievance and disciplinary cases

46. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

Disciplinary Situations

25. Not every dismissal will engage the ACAS Code with respect to disciplinary situations. Redundancy dismissals and the non-renewal of fixed-term contracts are expressly excluded. Nor does the ACAS Code apply to dismissals for incapacity because of ill-health; see **Holmes v QinetiQ Ltd [2016] ICR 1016 EAT**, per Simler P:

> **11. […] In my judgment, the word "disciplinary" is an ordinary English word. A disciplinary situation is a situation where breaches of rules or codes of behaviour or discipline are corrected or punished.**
>
> **12. When an employee breaks rules or codes of behaviour, that is generally described as misconduct and gives rise to a disciplinary situation. Equally, an employer may have expectations about the way in which a job is to be performed and the minimum standards to be maintained. Where those expectations or standards are not met, that also gives rise to a disciplinary situation in respect of the poor or inadequate performance that arises. It is obviously correct […] that the Code is silent on the question of whether capability dismissals are encompassed within it and makes no express reference to these as either included or excluded. However, paragraph 1 in particular and the subsequent paragraphs of the Code demonstrate that it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee. If the employee faces an allegation of culpable conduct that may lead to disciplinary action, whether because of misconduct or poor performance or because of something else, the**

> **Code applies to the disciplinary procedure under which the allegation is investigated and determined. In other words, the Code applies to all cases where an employee's alleged actions or omissions involve culpable conduct or performance on his part that requires correction or punishment. Where there is no conduct or performance on the part of an employee that requires correction or punishment giving rise to a disciplinary situation, and most obviously that will be where no culpability is involved, disciplinary action ought not to be invoked and would be unjustified if it were.**
>
> **13. While misconduct obviously involves culpable conduct, poor performance is capable of involving both culpable and non-culpable conduct. Where, for example, the poor performance is a consequence of genuine illness or injury, it is difficult to see how culpability would be involved or disciplinary action justified. Where an employee is absent through illness or ill health leading to dismissal, disciplinary action cannot ordinarily be invoked, and without more, the Code does not apply. The position is different where the ill health leads to a failure to comply with sickness absence procedures or an allegation that the ill health is not genuine. In those cases, however, any disciplinary procedure invoked would be invoked to address the alleged culpable conduct on the employee's part rather than any lack of capability arising from ill health. That conclusion is supported by the unreported decision of the Employment Appeal Tribunal (Keith J) in Lund, which, as the Employment Tribunal observed, emphasised the presence or absence of culpability as central to the question of whether the Code applies.**
>
> **[…]**
>
> **14. […] In my judgment, if an employer chooses to proceed by reference to the ACAS Code on the basis that the situation with which it is concerned is a disciplinary situation, whether that is right or wrong, or if the employer ought to have treated the situation as a disciplinary situation, the Code of Practice concerning disciplinary and grievance procedures is engaged, and any failure to comply may be met with an uplift in compensation.**
>
> **15. […] the Code of Practice does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill health or sickness absence and nothing more. It is limited to internal procedures relating to disciplinary situations that include misconduct or poor performance but may extend beyond that, and are likely to be concerned with the correction or punishment of culpable behaviour of some form or another.**

26. Where the reason for dismissal involves no culpability on the part of the employee, the ACAS Code with respect to disciplinary situations will not apply; see **Ikejiaku v British Institute of Technology Ltd UKEAT/0243/19/VP** where the Claimant was dismissed for making a protected disclosure, per Soole J:

> **47. In the circumstances of this case the Tribunal was clearly right to hold that the Discipline section of the Code had no application. First, as it held, because a protected disclosure could never be a ground for disciplinary action, i.e. for an allegation involving the culpability of the employee. Secondly, because culpability formed no part of the Respondent's unsuccessful case on the true reason for the dismissal.**

27. The application of the disciplinary provisions of the ACAS Code was further considered by the EAT in **Rentplus UK Ltd v Coulson [2022] ICR 1313**. In the view of HHJ Tayler, the substance of the employer's reason for dismissal and whether this included at least an element of culpability on the part of the employee was key, rather than the label attached:

> **25. Is it necessary that, as a matter of fact, the claimant is guilty of misconduct or is providing poor performance? I consider that cannot be the case. What is necessary is that the employer considers that there is an issue of potential misconduct or poor performance that must be addressed.**
>
> **26. This point is most easily analysed by considering misconduct. If an employer believes an employee has stolen money, but is wrong, it would be very surprising if that meant that the Acas Code did not apply because as a matter of fact there was not a disciplinary situation. There is a disciplinary situation because the employer believes that there may be misconduct; that is why the employee should have the benefit of the safeguards of a fair procedure that accords with the Acas Code. The protection of the Acas Code is particularly important for innocent employees.**
>
> **27. Similarly, if an employer believes that an employee is rendering poor performance I consider that the Code applies even if, as a matter of fact, the employer is incorrect and the employee's performance is satisfactory. That should become apparent if a fair procedure is operated.**
>
> **[…]**
>
> **30. If an employer considers that an employee is guilty of misconduct or has rendered poor performance, I incline to the view that the Acas Code is applicable even if it said that dismissal is for SOSR because it resulted from the response of fellow employees to the misconduct or poor performance that had led to a breakdown in working relationships. However, it is not necessary to determine the point in this appeal. I consider it is clear that the applicability of the Acas Code is a matter of substance rather than form. I do not consider that an employer can sidestep the application of the Acas Code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy.**
>
> **31. What if the employment tribunal concludes that there was unlawful discrimination? I do not consider that would preclude the Acas Code from applying. For direct discrimination to be established it is not necessary that the protected characteristic is the sole, or even principal, reason for the treatment, it need only be a material cause: Nagarajan v London Regional Transport [1999] ICR 877; [2000] 1 AC 501 . Accordingly, if an employer considers that there is an issue with the conduct or capability of an employee, but that is to some extent a result of discriminatory assumptions, that would not prevent the Code applying, because it would still be what the Acas Code refers to as a disciplinary situation. In a dismissal case, the principal reason for the dismissal could be conduct or capability, but nonetheless direct discrimination would be established if it was a material factor in the treatment. An example of unconscious discrimination is where a person is genuinely thought to be guilty of**

> **misconduct or poor performance, but is not given the benefit of the doubt because of a protected characteristic, whereas the benefit of the doubt would have been applied if the person had been more like the decision-maker.**

28. It would appear to follow, in light of **Ikejiaku** and **Coulson**, that the disciplinary provisions of the ACAS Code would not be engaged where a dismissal was discriminatory if the sole reason for dismissal an employee's protected characteristic or in a case where there was more than one reason, if no part of that involved any culpable behaviour.

Grievances

29. Grievances are described broadly within the ACAS Code as "concerns, problems or complaints that employees raise with their employers". There are, however, some limitations on the scope of this formula.

30. Grievances must be raised in writing; see **Cadogan Hotel Partners Ltd v Ozog UKEAT/0001/14/DM** per HHJ Eady QC:

> **52. We turn then to the ACAS uplift point. First, we should say we do read the ACAS Code as requiring grievances to be in writing. It is true that the word "should" is used - which can import some ambiguity - but we consider the intent to be plain. Employers need to understand that a grievance has been raised; hence the general requirement that it should be in writing. It would otherwise be too easy for confusion to arise. […]**

31. Such a written communication need not only contain a grievance, it might also make a protected disclosure; see **Ikejiaku**:

> **48. […] the protected disclosure of 12 July 2017, which founds the successful claim of automatic unfair dismissal, constituted a Grievance within the Code's definition of "concerns, problems or complaints that employees raise with their employers" ; and so as potentially to engage s.207A. […]**

32. The position is not, however, that each and every concern in writing, irrespective of content or context, will amount to the employee raising a grievance with their employer. Per **Ozog**, employers need to understand that a grievance has been raised. In connection with disciplinary situations, paragraph 26 of the ACAS Code provides that an employee seeking to challenge the action taken by their employer should provide their grounds of appeal in writing. Necessarily, any such ground will involve the employee raising a complaint or concern. It does not, however, follow that in addition to following the ACAS Code with respect to disciplinary situations, the employer must also treat the appeal as a grievance and follow the provisions in that regard. Of course, in some cases, the employee may make it clear that they are both appealing against the disciplinary decision and raising a grievance. In such circumstances, it may be necessary for the employer to first address the grievance as a separate matter or consider whether it can deal with both grievance and appeal concurrently. The ACAS code addresses this situation in paragraph 46.

Conclusion

33. Turning to the present case, Mr Ahmed argued that dismissal was a sanction imposed on the Claimant, as a result of which the disciplinary provisions of the ACAS Code were engaged. We do not agree. Not every dismissal involves a disciplinary situation. The Respondent's stated reason for dismissal (which we did not accept was true) would not engage the ACAS code because redundancy dismissals are expressly excluded. Nor, however, would the true reason for dismissal, namely the Claimant's pregnancy and her job having been given to Ms Rudge. Neither of these involve any culpability on her part whatsoever, whether viewed objectively or subjectively from the Respondent's perspective.

34. In the alternative, Mr Ahmed argued that the Claimant had raised a grievance in writing, by way of her fourth ground of appeal against dismissal, alleging that pregnancy had been part of the reason for this. Again, we do not agree. The Claimant did not raise a grievance, rather she made an appeal against dismissal. Her grounds of appeal do not say they are also a grievance and there is nothing in what she wrote from which that could be implied. Having been given notice of dismissal and advised of her right to appeal, she exercised her right to use that procedure. Neither the Claimant nor anyone else believed she was raising a grievance at the time. The Claimant did not say, either in her witness statement or oral evidence that her appeal was also a grievance. This proposition was not put to either Mr Smith or Mr Collins in cross-examination. It was instead raised for the very first time in argument on remedy. The characterisation of her appeal grounds as raising a grievance appears to be a recent afterthought and is not one we can accept. Whilst we have criticised the Respondents, severely, in many respects, they could not have understood the Claimant to be raising a grievance by her grounds of appeal against dismissal.

35. Accordingly, the claim for an uplift fails.

EJ Maxwell

Date: 15 June 2023