EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000177/2023

Final Hearing held in Dundee on 20 November 2023

Employment Judge A Kemp
Tribunal Member K Culloch
Tribunal Member A Shanahan

Ms Antonia Ogilvie	**Claimant** **Represented by:** **Mr J Lawson,** **Solicitor**
Ms Kendra Mann	**Respondent** **Represented by:** **Mr J Smith,** **Retired Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

1. **The claimant was unlawfully discriminated against by the respondent in breach of section 18 of the Equality Act 2010.**

2. **The claimant is awarded the sum of TWENTY FIVE THOUSAND SEVEN HUNDRED AND SEVENTY SEVEN POUNDS FORTY FIVE PENCE (£25,777.45) in compensation for that breach, payable by the respondent.**

3. **The claimant suffered unauthorised deductions from her wages in breach of section 13 of the Employment Rights Act 1996 and she is**

awarded the sum of SEVEN HUNDRED AND SEVENTY SEVEN POUNDS SIX PENCE (£777.06) payable by the respondent.

REASONS

Introduction

1. This case called for a Final Hearing in person at the Dundee Tribunal before a full Tribunal after Notice of the Final Hearing was sent to the parties on 18 August 2023. Mr Lawson appeared for the claimant, who attended in person. The respondent did not attend. Mr Smith was present, in a capacity that we comment on fully below. Various issues arose during the hearing which are set out below. To set that in context the Tribunal sets out some, but not all, of the background to matters first. The details that follow are those considered material to the case.

Claims

2. The claims made are for discrimination on the grounds of pregnancy and maternity, and for unlawful deduction from wages in relation to pay. Further and Better Particulars from the claimant set out the detail of the same, and the quantification sought was confirmed in a Schedule of Loss.

Background

3. There had been a Preliminary Hearing on 15 August 2023 before EJ Kemp. An Order was granted that the claimant provide Further and Better Particulars of her claims. The claimant did so. An Order was also granted that no later than 4pm on 7 September 2023 the respondent shall provide a response to the Further and Better Particulars giving fair notice to the claimant of her defence to the claims made. An order was further made for the parties to exchange documents on which they were to rely by 4pm on 26 September 2023.

4. The respondent wrote to the claimant on 7 September 2023 with a copy sent to the Tribunal asking various questions, which the claimant's solicitor responded to declining to answer on the basis that they were in his view not relevant, and in respect of which the clerk separately responded on

EJ Kemp's instruction on 19 September 2023, which referred to the fact that the claimant was a party litigant, explained the Judge's view that the questions were not appropriate to an Employment Tribunal in Scotland but appeared based on the position in Chicago, USA, and stated that the Tribunal was prepared to allow a further 7 days for her to comply with the Order, which the claimant had also consented to.

5. The respondent then sent a document on 26 September 2023 which did not comply with that order, as it did not give fair notice to the claimant of any competent defence to the claims made. It broadly repeated the same allegations and challenge to the authority and jurisdiction of the Tribunal to decide the issue, referred to the questions earlier submitted, made reference to an US Supreme Court authority and the United Nations Universal Declaration of Human Rights, and stated that "if it is established that I am the respondent, I would only then address the issue of a defence". It sought the dismissal of the case on the basis of a failure to provide an affidavit.

6. No documents to be relied on at the Final Hearing were provided by the respondent, but were by the claimant who also prepared an Inventory or Bundle of them, which was tendered for the Final Hearing.

7. On EJ Kemp's instructions an email was sent to the respondent on 28 September 2023, which after dealing with the lack of the notice to the other party required by Rule 92 stated that the document tendered was not a competent one, there being no defence set out in it, that the case referred to in it from the US Supreme Court had no relevance to the claims before the Tribunal, and that she may wish to seek advice. It stated that the Judge's view was that the respondent could attend the Final Hearing to deny the claim, but not to lead contrary evidence beyond that denial, and to dispute the remedy sought. It stated that if she wished to defend the claims beyond that she may seek to set out a competent defence and seek further time to be allowed to plead that.

8. On 7 November 2023 the respondent sent an email to the Tribunal that "as you have made your position clear regarding the Respondent, I am no longer a party to this dispute and I will not be attending the hearing. You

will be contacted by the relevant party in the coming days and you should now deal with them directly."

9. The clerk sent a reply on EJ Kemp's instruction to seek to explain the position to the claimant.

10. Correspondence from Mr John Smith was then sent to the claimant's solicitor, and copied to the Tribunal, in relation to the case. Messages from the Tribunal sent on EJ Kemp's instructions were sent to Mr Smith, and messages received from him. In Mr Smith's messages, in very brief outline, he claimed that he owned the person of Ms Kendra Mann, raised various issues of what he claimed to be international law, and questioned the authority of the Tribunal. He sought, in effect, the postponement of the Final Hearing. That application for postponement was opposed by the claimant and was rejected by the Tribunal. The Tribunal also sought detail as to Mr Smith's position as representative of the respondent.

Final Hearing - commencement

11. At the commencement of the hearing the Judge referred to the message sent to the respondent as to how this Hearing could be conducted for the respondent, there having been no application by the respondent to receive a proposed amendment to her Response Form. Mr Smith, in brief summary of his position, alleged that he had a court order that he owned the person of the respondent, Ms Kendra Mann, and he alleged that that issue needed to be established first. EJ Kemp stated that under the law of Scotland one person cannot own another person, and that Ms Mann was the respondent (being an individual operating as a sole trader) that issue having been established during the Preliminary Hearing. Mr Smith handed to the clerk a document he said was the basis of his challenge to the authority of the Tribunal (he used the word court, but it is clear that he meant this Tribunal). He was asked whether he was the respondent's representative, but answered simply by stating that he owned the respondent.

Application for strike out of Response

12. The claimant sought an adjournment to take instructions, and then having done so sought a strike out of the Response under Rule 37. The argument for the claimant was, in brief summary, on the basis that the defence was scandalous, vexatious or had no reasonable prospects of success, that the conduct of the case was scandalous and unreasonable, that there had been breach of a Tribunal order, that the claimant had been reasonable throughout in allowing a late Response Form and offering further time for compliance with orders which had not been complied with thereafter, that the respondent had had ample opportunity for representation, including at this hearing, and that it was appropriate to strike out the Response in those circumstances.

13. Mr Smith was offered an opportunity to respond firstly to clarify whether or not he was attending as a representative of the respondent and secondly to respond to the application made. In brief summary of his position he said that he owned the respondent. He referred to the Declaration of Arbroath and to a criminal action in Paisley Sheriff Court involving him. He said that he had been found to be a part (or similar, as it was not clear what he was referring to) of the Embassy of the Common Law Court, as he put it. He said that that court had been used by people in 188 countries and referred to cases in Italy and France, and that there had been correspondence with the Scottish government. At that stage EJ Kemp asked him to address the two points set out at the start of this paragraph. He said that he had fresh information, and that this hearing should be set aside. He referred to UN legislation, the detail of which he did not specify and the Hague Convention on Private International Law. He said that there was a conflict of law that required to be decided, and that that may mean this Tribunal or another forum. He was here to assist with that, but the Tribunal had to comply with the UN legislation and Hague Convention. He was asked to address the issue of representation and repeated that he was the owner of Kendra Mann.

14. The Tribunal adjourned for deliberation and returned to issue its decision orally, and in so doing stated that the full reasons would follow in writing

and that the written reasons are the determinative ones. The reasons are those that follow.

Law relating to strike out

15. The Tribunal Rules of Procedure are all subject to the terms of Rule 2. It states as follows:

> **"2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

16. Rule 37 provides as follows:

> "**37 Striking out**
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospects of success,
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious,

(c) for non-compliance …..with an order of the Tribunal……..”

17. Rule 47 provides that “if a party fails to attend or be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party’s absence.”

18. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan,*** a case as to reasonable prospects of success under Rule 37(1)(a), Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit'.

19. As a general principle, discrimination cases should not be struck out on the grounds of no reasonable prospects of success except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Hope of Craighead stated at paragraph 37:

> " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

20. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was held that there are no *formal* categories here where strike out of a claim is not permitted at all, and there are examples of discrimination cases being struck out, but the EAT suggested that particular care should be taken in these cases: ***Bahad v HSBC Bank plc [2022] EAT 83***.

21. The issue of what is scandalous, unreasonable or vexatious conduct under Rule 37(1)(b) was considered **in *Bolch v Chipman [2004] IRLR 140***, which was later approved by the Court of Appeal in ***Blockbuster Entertainment Ltd v James [2006] IRLR 630***. The EAT in the former case identified four matters to consider. The first question is whether there has been scandalous, unreasonable or vexatious conduct of the proceedings. If so, the second is whether a fair trial is no longer possible. If that is fulfilled the third is whether strike out would be a proportionate response to the conduct in question. The fourth is, if the claim or response is struck out, what further consequences might follow, including consideration of whether a respondent debarred from participation at the liability stage should nevertheless be permitted to appear at the remedy stage. All of these factors are considered further, below. Similar issues were raised more recently by the EAT in ***Baber v Royal Bank of Scotland plc UKEAT/0301/15***.

22. In ***Bennett v Southwark London Borough Council [2002] IRLR 407*** the Court of Appeal considered the issue of scandalous, unreasonable or vexatious conduct. One aspect was the legal meaning of the word "scandalous", which was not the same as its colloquial meaning. The legal meaning was the misuse of the privilege of the legal process to vilify others, the other was the giving of gratuitous insult to the court in the course of the process.

23. Where a question arises as to whether it is no longer possible to have a fair hearing, the third of the questions above, that may not mean whether it could never happen, but whether there cannot be a fair hearing within the time fixed for the hearing to take place: ***Emuemokoro v Crome Vigilant (Scotland) Ltd EA-2020-00006*, *[2022] ICR 327.***

Discussion on strike out

24. The Tribunal was satisfied that each of the three matters on which the claimant founded under Rule 37 were established. The first is the issue of whether or not there are reasonable prospects of success. The Response does not set out any competent defence to the claim, either as originally pled or when the respondent herself sent a document. She raised wholly

irrelevant and incompetent matters, and specifically stated that she would not set out a defence until the issues she had sought to raise were addressed. That was in the context of the Tribunal giving her a further opportunity to do so, and explaining that the points that had been made were not appropriate ones. Whilst in ***Cox v Adecco UK Ltd UKEAT/0339/19*** there is reference to a Tribunal rolling up its sleeves to identify the claim that cannot be done where the respondent refuses to engage with that process. There is nothing that has been pled which could be a defence to the merits of the claim, save the bare denial of the claim. As the issues raised must have been in the knowledge of the respondent, that bare denial is we consider insufficient to dissuade us from finding that there are no reasonable prospects for the respondent in defending the claims made against her.

25. The separate issue is that the document that was provided by the claimant did not comply with the order granted, and despite an explanation and further opportunity to provide further detail in a competent manner, none ever was forthcoming. The respondent is, we consider, in breach of the order granted in that regard.

26. The suggestion that Mr Smith owns an individual person, who had acted as sole trader, is contrary to basic principles of Scots Law. It is we consider scandalous in the word's legal meaning. That the argument made is not correct in law has been pointed out to him in emails and during the hearing.

27. This Tribunal is a creature of statute. It applies the law relevant to the issues before it. It derives its authority from the Employment Tribunals Act 1996. It operates under Rules of Procedure found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Jurisdiction for the Tribunal in Scotland to consider claims is conferred under Rule 8, and is clearly met in this case, as the respondent resides in Scotland and one or more acts or omissions complained of took place in Scotland. Both the respondent and Mr Smith have raised and sought to pursue the issue of the alleged ownership of the respondent by Mr Smith, and a challenge to the authority of the Tribunal to decide the issues before it, without any proper basis to do so, in our view.

28. There is no proper challenge to the authority, or jurisdiction of the Tribunal, and the challenge which has been made is entirely misconceived. The reference to international law, whether UN provisions or what was said to be the Hague Convention on Private International Law, is meaningless. There is a Conference of a similar name, and there are Hague Conventions, for example that on the Taking of Evidence Abroad in Civil or Commercial Matters, but none relevant to the claims before this Tribunal, in our view. It is also a matter that falls within the legal meaning of the word "scandalous" in our view.

29. The conduct both of the respondent and Mr Smith on her behalf is, we consider, properly to be regarded as scandalous, unreasonable or vexatious under the Rule.

30. The Tribunal then considered whether or not it was proportionate under the overriding objective in Rule 2 to grant the application for strike out. The Tribunal took into account each of those matters individually, each of which was regarded as material, and collectively. The magnitude of the overall picture was significant, unprecedented in the Judge's experience.

31. There are two separate aspects in relation to the three matters raised above, one for the issues of reasonable prospects of success, and breach of the order, and the second in relation to the issue of conduct. The first aspect is essentially this - is there any basis to consider that there may be a defence which might have merit? The Tribunal thought that there was not, firstly from the complete absence of any pled defence that could be considered competent as a result of a deliberate decision not to do so by the respondent, and secondly as from a perusal of the documents provided by the claimant within what is normally called the Bundle, with messages from the respondent which are set out further below both as to pay and a dismissal, the position appeared unusually clear both as to the dismissal and the unauthorised deduction from wages.

32. The second issue is whether a fair trial is possible, having regard to the fact that this was the Final Hearing of which Notice had been given in August 2023. The Tribunal considered that if there was no strike out there would be material delay, but in circumstances where no defence on the

merits was apparent from anything before the Tribunal. The respondent had notice of the present hearing from over three months ago, and the correspondence and background is set out above. The present Final Hearing had been fixed after discussion at the Preliminary Hearing, which the respondent attended by telephone as explained in the Note of that hearing. She had had opportunities thereafter to set out a defence on the merits of the claims, had had comment from the Tribunal in relation to the matters she sought to raise, but had failed to set out any competent defence. The respondent has, it appeared to the Tribunal, deliberately not pled any defence but rather sought to take points which are devoid of merit.

33. Given the attitude of the respondent, and that of Mr Smith on her behalf (as addressed further below) we considered that no fair trial of the issues would be possible either at this Hearing or more generally if it was to be postponed. Delay would cause unfairness, disruption and prejudice to the claimant, who would be denied a determination of the claims she made, and suffer increased cost. In all the circumstances the Tribunal considered that granting the application was within the overriding objective. It did not appear to the Tribunal that a lesser sanction would be within the overriding objective given all the circumstances. The Tribunal concluded that it was proportionate in all the circumstances to strike out the Response Form under Rule 37.

34. The Tribunal separately considered what the position ought to be in relation to the remedy part of the hearing, at which there would be no evidence from the respondent who was not present, nor had provided any documents to rely on, she also having stated in an email that that would be her position. Mr Smith had not responded on the point of whether he was a representative, and simply repeated his view that he owned the respondent. His arguments were those set out above, which the Tribunal did not consider were based on the law of Scotland. The Tribunal considered that it was in accordance with the overriding objective in those circumstances that under Rule 21 Mr Smith be offered the opportunity to watch the proceedings but not to participate in them by cross examining the claimant when she gave evidence.

35. The Tribunal then considered the overall circumstances but particularly the position of Mr Smith having regard to the terms of Rule 37(2). Despite being asked three times what his position was on whether he represented the respondent he did not answer that question directly. His position was solely that he owned the respondent. The Tribunal considered that from all that was before it he was acting as her representative. A message had been received from the respondent dated 7 November 2023 as set out above, which had been followed by messages from Mr Smith in similar terms to that from the respondent herself, he had sent a number of messages to the Tribunal in relation to the claim, had attended this hearing, and had made arguments. It appeared to the Tribunal that Mr Smith was acting as representative, and that the respondent had had a reasonable opportunity to make representations at this hearing.

Rule 47

36. The Tribunal then considered matters in the alternative, that Mr Smith was not a representative. In that event the respondent had not attended either herself or by a representative this, the Final Hearing, and that it was appropriate to proceed with the hearing under Rule 47, effectively as undefended, given the history of matters and the circumstances set out above. The reason for the respondent's absence was effectively set out in her email of 7 November 2023, which stated that she would not attend the hearing. It did not appear to the Tribunal that any further enquiry was appropriate to undertake under the overriding objective in all the circumstances.

Offer of attendance to observe

37. The Tribunal informed Mr Smith of its decisions orally, and offered him the ability to stay as a member of the public to hear the remainder of the Final Hearing, but stated that the Tribunal had considered the position under Rule 21 and that in all the circumstances it was not considered within the overriding objective to allow him to participate in the Final Hearing to any extent. Mr Smith intimated that there would not be a purpose in him staying, that he had set out his position, and he left. The hearing then proceeded.

Evidence

38. The claimant gave evidence, and spoke to documents within the Bundle referred to. She was questioned by Mr Lawson, and asked some questions by the Tribunal. The Tribunal was entirely satisfied that she was a credible and reliable witness.

Facts

39. The Tribunal found the following facts to have been established:

40. The claimant is Ms Antonia Ogilvie.

41. The respondent is Ms Kendra Mann. She formerly used the name Kendra Bowman. She operated a domestic cleaning business using the trading name Evora Contracts. It was operated from the respondent's home address in Wormit.

42. The claimant was employed by the respondent from August 2022. The claimant was initially employed on a zero hours' contract as a cleaner. A written contract was entered into which was not before the Tribunal.

43. The respondent thereafter proposed that the claimant work in an alternative role as Assistant Manager or similar. Messages were exchanged between the parties about that on WhatsApp in the period from on or around 12 September 2022. The claimant explained in a reply that she wished a minimum salary of £300 net per week. The messages from the respondent included the following comments

> "Yeah I can definitely pay you £300 a week minimum…Would you be happy starting with £300. …..£350 is £315 after tax so let's aim for that…Are you definitely happy with £350pw? Its £315 after tax? ….[After the claimant confirmed agreement] That's you paid…£314.51 after tax, £350 before tax…..Now that you're salaried……."

44. Payment of £314.51 was made by an account in name of Kendra Bowman to the claimant's bank account on 16 September 2022. It continued at that rate for a period of about six to eight weeks.

45. The claimant found out that she was pregnant with her second child, she then having a son aged four, on 31 October 2022. She informed the respondent immediately. The baby was thought to be due on about 12 July 2023.

46. Payments of £314.51 net per week from the respondent to the claimant continued until around November 2022 when the claimant became sick, suffering sickness due to her pregnancy. She was off work for about five weeks, and received statutory sick pay. She was able to return to work on or around 2 January 2023. Thereafter, from what should have been a pay date of on or around 9 January 2023, the respondent did not pay the claimant at the gross amount of £350 per week, or net equivalent of £314.51 per week. The dates and amounts of the payments made to the claimant [save for 9 January 2023 which was not a date for which a figure was provided] were –

16 January 2023	£165
20 January 2023	£195
27 January 2023	£200
3 February 2023	£145
10 February 2023	£230
17 February 2023	£175.

47. The claimant queried the sums paid to her with the respondent, and was told something to the effect that the business did not have the funds to do so but that they would be made up later. After 17 February 2023 the claimant was signed off sick with back pain due to pregnancy. She again received statutory sick pay.

48. On 7 March 2023 the respondent sent the claimant a message by WhatsApp terminating her contract with immediate effect “due to your medical conditions and your health has to be a priority. Also as you know we have a few issues with customer satisfaction which we’ve discussed before and again I think your health has been (and quite rightly so) your main priority so maybe things have just been getting a little bit too much for you which I do fully understand. I wish you well……..”

49. The only issue of customer satisfaction the claimant was aware of had been when she had not attended a customer's house earlier in or around November 2022, when she had been suffering sickness due to pregnancy. No form of disciplinary action was taken at the time.

50. The claimant was distressed, disheartened and upset by the dismissal. She felt worthless as a result of it. She consulted her GP about increase in Sertraline, an anti-depressant medication. She underwent counselling.

51. The claimant commenced Early Conciliation on 11 March 2023. The Certificate therefor was issued on 12 April 2023. The Claim Form in this action was presented on 17 April 2023 and accepted on 27 April 2023.

52. Following the dismissal the claimant sought to find alternative positions by searching online sites such as Indeed. She had one interview on Zoom but no outcome from that was intimated to her. She applied for jobs as a cleaner in a hospital but without success. She was pregnant when doing so. She has not found employment, and remains unemployed.

53. The claimant's baby was born on 28 June 2023.

54. Had it not been for the dismissal, the claimant would have worked up to around 11 June 2023, and then commenced a period of one year on maternity leave.

55. The claimant was in receipt of Universal Credit in the period prior to commencing employment with the respondent. She received the first payment on 5 December 2021. After the claimant's dismissal on 7 March 2023 she received further payments which increased from £480.50 which had been paid to her on 5 March 2023 to £529.25 which was paid to her on 5 April 2023. She received further payments on the fifth day of each month in accordance with a document from the Benefits Agency setting out the amounts up to 5 July 2023.

The law

56. Pregnancy and maternity are protected characteristics under Section 4 of the Equality Act 2010. Section 18 of the Act provides that a person discriminates against a woman if in the protected period, which starts

when the pregnancy begins and ends (for the claimant) and the end of her additional maternity leave the person treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it. Section 39(2) states that an employer must not discriminate against an employee …."by dismissing [the employee]".

57. In the event of a breach of the 2010 Act compensation is considered under section 124, which includes the ability to award compensation. It in turn refers to an amount which corresponds to the amount which could be awarded by a sheriff under section 119. Section includes provision for injured feelings under sub-section (4), and otherwise brings in principles of compensation for loss under the law of Scotland.

58. The first issue to address therefore is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "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. This case falls within that band. 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."

59. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of

the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

60. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2023, referred to in the Sixth Addendum, the Vento bands include a lower band up to £11,200, a middle band of £11,200 to £33,000 and a higher band above that (which higher band the claimant does not argue is appropriate).

61. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is "what would have occurred if there had been no discriminatory dismissal ..... If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

62. It was stated in ***Chief Constable of Northumbria Police v Erichsen 2015 WL 5202327*** that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

63. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

64. Interest is due on part of the award under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards made can

include for injury to feelings, and for past financial losses. No interest is due on future losses.

65. There is a right under section 13 of the Employment Rights Act 1996 not to suffer an unauthorised deduction from wages. Wages are defined in section 27 to include "any sums payable to the worker in connection with employment ……" The amount of the unauthorised deduction may be claimed at the Tribunal under section 23.

Discussion

66. Although the Final Hearing proceeded following the strike out of the Response, such that it was undefended, the Tribunal heard evidence in relation to the claims as well as to the remedy sought.

Section 18 Claim

67. The Tribunal addressed first of all the claim for breach of section 18 of the 2010 Act. It was satisfied that the dismissal was unfavourable treatment, that it was for a reason connected with the claimant's pregnancy, and that it was unlawful discrimination. Whilst the claim is not defended, the evidence from the dismissal message of 7 March 2023 was unusually clear on that matter. In any event the evidence of the claimant is accepted. The dismissal was because of the periods of illness caused by the claimant's pregnancy. We then turned to remedy for that breach.

(i) Injury to feelings

68. The first matter we address is injury to feelings. We were satisfied that there was genuine upset caused to the claimant. There was however no GP report, or any medical records, to assist us. The dismissal caused the claimant concern as it came out of the blue, was intimated by message only, and caused her not to be able to rely on her entitlements to statutory maternity leave and statutory maternity pay. We considered that the award was around the cusp of the top of the lower band and the lowest point of the middle band, and concluded that in all the circumstances the appropriate award was £12,000. We estimate that payment will be made on or around 10 January 2024, which is a period from dismissal of 22 months. Taking account of interest on that sum we award the sum of

£1,760, being 22 months at the judicial rate of interest of 8% per annum. The total award is therefore **£13,760.**

(ii) Financial Losses

69. We turn to address financial losses. We were satisfied that she would have worked up to about two weeks before the birth of her child, a period of 14 weeks. At £314.51 net per week that is a sum **of £4,403.14**.

70. The second period is for the six weeks of statutory maternity pay of 90% of salary. No exact net figures were given in evidence, and we have used the gross figure and its proportion to the net figure for £350 per week, and applied 90% to the net figure of £314.51. That is liable to be slightly less than the true net figure, but as the claimant has not presented the evidence we use that lower figure. It is £283.06. For six weeks it is **£1,698.36**.

71. The third period is for the balance of maternity leave, which the claimant claims for being the period to 28 June 2024. 30 weeks of statutory maternity pay is sought at £172.98 per week, although the statutory entitlement is to 33 weeks. As it is 30 weeks within the Schedule of Loss intimated following the Tribunal Order the Tribunal considered that it was that period which should be applied, as the Schedule was referred to in evidence. That is the sum of **£5,189.40**. No financial losses are sought beyond that date. We are satisfied that that is the correct figure to use, and given the facts known to us it does not appear to us that deductions for tax or national insurance are required from that figure. Benefits we address below. We do however require to consider the position on benefits. Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to the awards we make. There was a document spoken to in evidence, but the detail of how benefits were calculated following the dismissal was not set out. What is clear is that the claimant was in receipt of benefits before her dismissal, being Universal Credit, and that although there was an increase in their amount that was not very substantial (from £480.50 per month to £529.25 per month, which then latterly increased in June and July 2023 to £583.01 per month). The January 2023 figure had been £579.49 per month and that for December 2022 £200.61. In all the

circumstances we did not consider it appropriate under the statutory provisions in the 2010 Act to make any deduction for those benefits.

72. We accepted that the claimant had mitigated her losses, even though the evidence of that was limited. She was initially pregnant, and thereafter had two children to care for as a single parent. During the period of losses she would have been entitled to statutory maternity leave. In any event the onus in this regard falls on the respondent, who did not raise the issue.

(iii) Interest on financial losses

73. The conclusion that we reached therefore is that the sums above were payable as compensation, and we assessed the total of that as £11,290.90. Interest is payable on that sum, in so far as it is for the past. The period of loss for maternity pay commences on 28 June 2023, and is for a total (for the reasons given above) of 36 weeks. The period to 10 January 2024 is 28 weeks, which means that 8 weeks of future loss from the notional payment date is excluded from the calculation, being the sum of £1,383.84 (£172.98 x 8). This reduces the total for the purpose of interest calculations to £9,907.06. Interest is calculated from the mid-point of the period of a total of 22 months, at the judicial rate of 8% per annum, which leads to a figure of £726.55. The interest is added to the total for financial losses of £11,290.90 leading to a total of **£12,017.45.**

74. That sum is then added to the amount awarded for injury to feelings, leading to a total award for breach of the 2010 Act of **£25,777.45.**

Unauthorised deduction from wages

75. The Tribunal was satisfied that there had been unauthorised deductions from wages. It was, it considered, very clear from the messages exchanged by the parties and the fact of payment thereafter that the claimant had agreed with the respondent that she would be paid a salary of £350 gross per week, such that she would receive a minimum of £300 net per week, later clarified as £314.51 net per week. Payments started at that level. That level of pay became “payable” for the purposes of the 1996 Act. Payments were not however made as due, and the underpayment was a deduction. The claimant does not seek to make a claim for any

periods of sickness absence, and does not dispute the amount of statutory sick pay paid to her. The Tribunal was satisfied that the sums actually paid to the claimant were proved from the screenshot of her bank account. It noted that the payments were from Kendra Bowman. The amount of the unauthorised deduction was properly quantified in the Schedule of Loss at **£777.06**. That sum is awarded to the claimant.

76. The Tribunal declines to make any recommendation as it understood that the respondent's business has ceased to trade. The Tribunal decision is unanimous.

Employment Judge: **A Kemp**
Date of Judgment: **21 November 2023**
Date sent to parties: **21 November 2023**