



EMPLOYMENT TRIBUNALS

Claimant: Ms K Clarke

Respondents: 1. Randstad CPE Limited
2. David Gill
3. Martin Mower

Heard at: Leeds **On:** 30 October 2017

Before: Employment Judge Davies
Members: Mr M Brewer
Mrs V Griggs

Representation

Claimant: Ms K Jeram, counsel
Respondents: Mr M Warren-Jones, solicitor

JUDGMENT

1. The First Respondent shall pay the Claimant £15,620.91 in respect of losses to date and interest.
2. The First Respondent shall also pay the Claimant £19,283.11 in respect of future losses.
3. The First Respondent shall further pay the Claimant £17,575.38 in respect of injury to feelings and interest.
4. The Claimant's application for costs is unsuccessful.

REASONS

1. Introduction

1.1 This was the remedy hearing to determine the appropriate remedy for Ms Clarke in respect of her successful claims of discrimination and unfair dismissal. The Claimant was again represented by Ms Jeram and the Respondent by Mr Warren-Jones. The Tribunal was provided with a schedule of loss and counter-schedule, some further documentation and a witness statement from Ms Clarke, who gave evidence.

1.2 The parties reached agreement about the following matters:

- 1.2.1 The Claimant's past losses to the end of September 2017, which should be recovered in full, were £12,240.65 net.
- 1.2.2 Her net weekly pay when working for the Respondent was £596.97.
- 1.2.3 Compensation for pension losses should be awarded by calculating 1% of her net losses.
- 1.2.4 For the purposes of the statutory interest calculation, interest on an award for injury to feelings should be 64 weeks' interest and interest on financial losses should be 28 weeks' interest.

1.3 The First Respondent made clear that it would pay the remedy award in full and by agreement we have made the award against the First Respondent only on that basis.

2. The issues

- 2.1 The remaining issues for the Tribunal were:
 - 2.1.1 For what, if any, period of future loss should the Claimant be awarded compensation?
 - 2.1.2 What is the appropriate level of compensation for injury to feelings?
 - 2.1.3 Should the Claimant receive a separate award of aggravated damages?
 - 2.1.4 Should the Claimant be awarded an element of compensation to fund career coaching and support?

3. Future loss

3.1 We begin by making the following further relevant findings of fact. The Claimant had her daughter in early 2017 and was ready to return to work six months later i.e. at the end of September 2017. She had made some attempts to find work in preparation for that in the preceding two months but her attempts to find a new job started in earnest in September 2017. She is registered with the 'Indeed' app and receives alerts of suitable vacancies. She carries out a range of job searches and has used her contacts to try and find suitable work. She is not limiting herself to work in the recruitment sector but has also considered work in a number of sectors. So far she has been applying for something between one or two jobs a week or five or six jobs a week. We note she has been looking for work in earnest only for a relatively short period. Although initially she was focused particularly on work at an equivalent salary level to the job she lost with the Respondent, more recently she has lowered her sights and is looking at jobs at a lower level of pay and status with a view to getting into a company and progressing from there. It seemed to the Tribunal that in reality that is where her emphasis now lies. Her plan is to look for a slightly lower level of work so that she can get into a company, build up her confidence, build up a reputation with them and progress to an equivalent position to that she held with the Respondent. That seemed to the Tribunal to be an entirely sensible and reasonable approach for her to take to mitigating her losses and the Respondent did not suggest otherwise.

3.2 It is clear that the Claimant is keen to return to work, which is something she regards as important. Mr Warren-Jones for the Respondent produced a wide range of job adverts. He was very fair in acknowledging that

that did not mean that each of the adverts he identified translated into a job that was suitable for the Claimant. Nonetheless, the Tribunal finds that it does support the view that there is a relatively strong market and that there are jobs available that the Claimant could and no doubt will apply for. She is plainly a motivated individual and has a range of skills, which it seemed to the Tribunal will assist her in her search for a new job. On the other hand, rather than returning to work with an existing employer after having her baby, she is in the position of having to find new work from scratch after a period of maternity leave and to some extent that will be something of an obstacle.

3.3 Taking all those factors into account, the Tribunal has to decide when the Claimant is likely to find work at an equivalent level to the work she had with the First Respondent. Obviously, that cannot be calculated precisely, but the Tribunal considered that the most likely scenario is that within six months the Claimant will have secured work at a lower level along the lines of graduate recruitment consultant level. There are jobs available, but the Claimant is returning from maternity leave and with her confidence somewhat low.

3.4 Looking at the information the Respondent provided, the rate of pay for that kind of work is around £23,000. We therefore find that after six months the Claimant will have secured work at an income of £23,000.

3.5 The Tribunal considers that it will take her a further six months to reach the equivalent salary level to that which she was earning at the Respondent. We have not tried to do a calculation that allows for a sliding scale of increasing income or for commission to be earned in particular months at increasing levels. It seemed to us that a realistic and proportionate appraisal of the Claimant's future losses is to allow her a period of six months of full loss and then a period of six months being the difference between the graduate recruitment consultant level of £23,000 and her salary at the Respondent.

3.6 Having made those findings, the Tribunal calculated the Claimant's losses from the end of September 2017 and future losses as follows.

3.7 One month's full loss to today's date is £2,586.87 net. Five further months' full loss is $5 \times £2586.87 = £12,934.35$.

3.8 Turning to the six months' partial loss, the figure of £23,000 is a gross figure. Using the publication "Facts and figures" the net equivalent is £18,727 per annum or £360.13 net per week. The difference between that and the Claimant's net salary with the Respondent is £236.84. The partial loss for six months is $6 \times £236.84 = £6,157.84$.

3.9 Dealing with pension and interest: the agreed losses to the date of the liability hearing plus the one month's additional loss to bring us to today's date amount to £14,827.52 (£12,240.65 + £2,586.87). We have added 1% to that to allow for pension losses to date. 1% is £148.28. So the total loss to date is £14,975.80.

3.10 The Tribunal has calculated interest in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations.

Twenty eight weeks' interest on £14,975,80 at a rate of 8% gives £645.11 interest. Total losses to date including interest therefore amount to £15,620.91.

- 3.11 Turning to the future losses, the total future loss is five months' full loss (£12,934.35) plus six months' partial loss (£6,157.84) = £19,092.19. Again, it is necessary to add 1% in respect of pension loss, giving a figure of £19,283.11.

4 Injury to feelings

- 4.1 That then brings us to the question of injury to feelings. Again, the Tribunal started by making the following findings of fact. The Claimant has given full and detailed evidence about her injury to feelings both in her original statement at the original hearing and in her further statement and evidence to us today. We have no hesitation in finding that the discrimination found by the Tribunal had a significant and substantial impact on her. The starting point was that she was having a difficult and complicated pregnancy and needed more than usual time off because of that. She also had to deal very sadly with the loss of one of her babies at an early stage. We have been careful to separate the inevitable upset to which those aspects would have given rise in any event, from the injured feelings arising from the discrimination.

- 4.2 The Tribunal took the whole of the Claimant's evidence into account. The following are some of the key features.

4.2.1 The Claimant said, and we accept, that she constantly played over in her mind Mr Gill's comments about her being emotional and erratic. She said that that "haunted" her and continued to do so. She was worried about showing any emotion at work because Mr Gill and Mr Mower would think she was behaving emotionally and erratically. That meant she avoided talking to people at work about the pregnancy or the complications because she did not want to be criticised for being emotional. She described a particular occasion when she had started to bleed at work and how she was in the toilets shaking and crying and feeling overwhelmingly worried about how she would tell Mr Mower that she needed to leave without seeming emotional. She should have been more concerned with the baby but she was so pre-occupied with the situation at work and the impact on her job that her main concern was anticipating Mr Mower's reaction.

4.2.2 It was clear to the Tribunal that the Claimant had worked hard to get where she was in her career and wanted to be seen as professional and credible and to continue to make a success of her job. We took account of the description the Claimant gave of dreading each time she had a scan appointment because she was so worried about telling work that she needed time out of the office and that each time she was given a sick note her first reaction would be fear that she could not take time off work. She said that she wanted to be at work for the distraction but that she was anxious about what would happen if she was not there and what would be being said about her to her colleagues and clients. She described driving to work every day in tears and often calling her partner on her way to work in floods of tears and telling him that she did not think she could go in. He would encourage her to turn the car round but she did not feel like she could. She was worried about leaving and about who

would employ her while she was pregnant and the thought of not having a job made her feel physically sick. She did not want to have to depend on anyone and she found the thought of not having a job embarrassing. Her anxiety about work became so bad that she stopped driving herself into work and her partner would drop her off and collect her in the evening. Mr Kinsey had provided a written statement which supported that evidence.

4.2.3 The Claimant gave evidence at the last hearing about the events of 8 September 2016 and the impact of those on her. She described Mr Mower shouting and swearing at her and she said that he had never behaved like that before. She was so upset by the meeting and she could not understand how Mr Mower could treat her that way, particularly when she was five months pregnant and when they had been such good friends. She said that following the meeting she was so upset and worried how this level of upset would impact on the baby and her pregnancy. She was feeling really unwell and vomiting and that was when she was signed off work with work-related stress and pregnancy-related complications. As indicated she did not return to work after that. The Tribunal recognised there were a number of factors causing the Claimant anxiety and upset at this time, but we accepted her evidence that in one sense she wanted her job to be a positive thing and a distraction from her concerns about her pregnancy and the health of her baby. The fact that they were not and that she was being treated in the way she was almost made that treatment worse because it meant that she could not have the distraction of coming into work and getting on with her job.

4.2.4 The Claimant described in her statement what happened after she resigned from work, how the worry and anxiety about the health of her baby increased as her pregnancy developed, and how this was compounded by the fact that she was at home all day alone. Again we have taken into account the fact that she sadly suffered another bereavement at that time and she was also supporting her sister who was also suffering with a difficult pregnancy, so there was more than one factor in play.

4.2.5 The symptoms the Claimant described during those weeks after her job came to an end and before she had her daughter were, as she says in her statement, akin to a depressive illness. She described not being able to do the household chores, struggling to get out of bed and being anxious about socialising or speaking to people. However, the Tribunal did not see any medical evidence.

4.2.6 The Claimant told the Tribunal about her feelings about her job. Before her resignation she felt like her career and ambition defined her and made her who she was. In losing her job she felt like she had lost a sense of herself. When she had become pregnant she pictured being on maternity leave, keeping in touch with her work and her clients, popping into the office with the baby regularly and returning to work as soon as she could. She had always had a plan for where she wanted to be in the future and without her job to return to she felt utterly lost. The uncertainty has meant she has lost her confidence and feeling of security and career progression. She finds the loss of her career progression very difficult to deal with because she worked so hard to get where she was and she will have to start all over again. She loved her job and felt like she had lost all the positive aspects she got from it, including self-confidence, self-worth,

structure and financial independence. She described the past 12 months as one of the worst years of her life.

4.3 The Claimant's evidence was persuasive and it was consistent with the Tribunal's experience of listening to the Claimant give evidence both today and at the liability hearing. The Tribunal accepted it. Accordingly, we found that the Claimant has suffered a significant level of impact, with a very real and ongoing injury to her feelings and a level of upset bordering at times on depression. Even allowing for the fact that there were other factors contributing to her anxiety and to her mental wellbeing, the particular features we have identified above to a very significant extent arose from the discriminatory treatment, culminating in a discriminatory constructive dismissal.

4.4 Against those findings of fact the Tribunal has to decide on what the appropriate level of compensation for injured feelings. The relevant legal principles are well-established:

4.4.1 An award of compensation in a discrimination case is designed to put the individual so far as possible in the position he or she would have been in but for the discrimination.

4.4.2 Awards for injury to feelings are compensatory, not punitive. The aim is to compensate the Claimant fully for the proven, unlawful discrimination for which the Respondent is liable. The crucial consideration is the effect of the unlawful discrimination on the Claimant. The Tribunal will have regard to the well-established bands of compensation for injury to feelings: see *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, as upgraded in a number of cases, most recently *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879. The recently issued Presidential Guidance on awards for injury to feelings does not apply to this case, but it reminds Tribunals to bear in mind changes to the value of money as of today's date.

4.5 The parties were agreed that this was a case that fell within the middle band of *Vento* taking into account the recent uplifts and the Tribunal decided that £16,000 was the appropriate figure to compensate the Claimant. The primary focus is, of course, on the individual's level of injured feelings. For the reasons set out above, the Tribunal considered that the Claimant suffered a particularly serious level of injury to her feelings as a result of these events, although they took place over a relatively short timescale, measured in months. Further, although the events lasted only a number of months, the injury to her feelings continues some 12 months later. That is why the Tribunal found that a figure in the upper half of the middle band of *Vento* was appropriate.

4.6 Interest on the award for injury to feelings at the rate of 8% for 64 weeks amounts to £1,570.38.

5 Aggravated damages

5.1 The Tribunal considered whether to make a separate award of aggravated damages. However, in deciding on the level of compensation for injured feelings we took care to ensure that the Claimant was compensated fully for those features she identified as being particularly aggravating, that is to say the conduct on 23 June and on 8 September 2016. So, although there is no

separate award under the heading of aggravated damages, the injured feelings that was caused by those features has been compensated for.

6 Career counselling

6.1 The Tribunal did not consider it was appropriate to award the Claimant compensation for career counselling. She has only been looking for work for a relatively short period of time. She was in the recruitment industry herself and it seemed to the Tribunal that given a reasonable amount of time she is likely to succeed in finding a job. We did not accept that the impact of the discrimination on her is such as to put her in a position that she needs career counselling or advice to enable her to get another job.

7 Costs

7.1 That brings us briefly on to the costs application.

7.2 Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides, so far as material, as follows:

76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order ..., and shall consider whether to do so, where it considers that –

- (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
- (b) any claim or response had no reasonable prospect of success.

...

7.3 The Tribunal had regard to principles derived from some of the cases. In particular, the Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA;

7.4 The Tribunal was not satisfied that the threshold of unreasonable conduct was met in this case. We did not consider that it was unreasonable for the Respondent to defend the claims. There was one letter before claim, written at an early stage. It received a robust response. That by itself does not mean that the Respondent was not, behind the scenes, giving careful or reasonable thought to how to conduct the proceedings. There were features that the Respondents were entitled to take into account in deciding whether to defend the claims, including that there was a limitation point which remained live until the liability hearing. There were also parts of the claim on which the Claimant did not succeed, either because they were withdrawn or, in one respect, because the Tribunal did not uphold it. There were, as Ms Jeram submitted, some documents within the First Respondent's possession that perhaps ought to have set some alarm bells ringing. In particular, the minutes of 23 June 2016 meeting and Ms Jack's handwritten notes of her conversation with the Claimant. But the Tribunal did not consider that those documents alone were

such as to make it unreasonable for the Respondent to defend these extensive discrimination complaints and the constructive dismissal complaint to which they gave rise. In reaching that view the Tribunal noted that once those documents were disclosed to the Claimant, no further steps were taken on the Claimant's behalf, for example applying for a deposit order or sending a further costs warning letter or contacting ACAS.

7.5 In all of those circumstances, and bearing in mind that costs do not follow the event in the Employment Tribunal, we were not satisfied that the necessary threshold of unreasonable conduct was met.

Employment Judge Davies

Date: 22 November 2017