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EMPLOYMENT TRIBUNALS

Claimant: Mrs A Keogh

Respondent: Sunshine & Sunbeams Day Nursery Ltd & others

Heard at: East London Hearing Centre

On: 17 November 2017

Before: Employment Judge Moor

Members: Ms L Conwell-Tillotson
Ms P Alford

Representation

Claimant: Ms I Omambala (Counsel)

Respondent: Mr S Liberadzki (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the Respondents are ordered to pay to the Claimant the sum of £14,716.69.

REASONS

1 On 9 October 2017 our written decision was sent to the parties ('the liability decision'). Our judgment was that the Claimant was discriminated against by the Respondents contrary to section 39(2)(c) and section 18 of the Equality Act 2010 ('EA') by being dismissed because of pregnancy; and was discriminated against by the Respondents contrary to section 39(2)(d) and section 18 of the EA and was subject to a detriment by them contrary to section 47C of the Employment Rights Act 1996 by being discouraged from applying for a Deputy Manager position because of her pregnancy.

2 The Claimant did not succeed in persuading us that she was automatically unfairly dismissed because we did not find that the principal reason for her dismissal was pregnancy. We made this decision because of the more stringent test of causation in automatic unfair dismissal cases.

3 Nor did the Claimant succeed in persuading us that she was automatically unfairly dismissed or subject to a detriment on the ground that she had made protected disclosures.

Remedy Issues

4 The issues for the Tribunal were whether to make an award of compensation for past and future financial losses and for injured feelings. Sub issues, depending upon our findings were whether the Claimant had mitigated her loss.

5 The parties produced competing Schedules of Loss to which they referred in submissions.

6 In essence the Claimant submitted that she should be awarded her full financial losses for the period up to the hearing date and for a year into the future. She submitted her injured feelings should be compensated at £12,000.

7 The Respondents submitted that the Claimant had failed to mitigate her losses from the date from which she would have returned to maternity leave. That she should not be awarded her full injured feelings as they were not all attributable to the discriminatory acts. They submitted the award for injury to feelings should be £800.

Law

8 Section 124(2) of the EA provides that, if there has been contravention of Part 5 (as there has here), the Tribunal may make a declaration as to the rights of the complainant and order the respondent to pay compensation to the complainant. Our judgment made appropriate declarations. The Claimant now seeks compensation.

9 The amount of compensation corresponds to that which could be awarded by the County Court. Section 119 EA provides that it may grant any remedy which could be granted by the High Court in proceedings in tort. This includes compensation for financial loss. Section 119(4) EA provides that an award of damages can include compensation for injury to feelings.

10 Discrimination is a statutory tort. The compensation awarded should to put the Claimant, so far as is possible, in the position she would have been in had the discrimination not occurred. This is not necessarily an all or nothing assessment. The Tribunal may need to make an assessment of the Claimant's prospects absent the discrimination, O'Donoghue-v-Redcar Borough Council [2001] IRLR 615. This is likely to involve the identification, on the balance of probabilities, of a percentage chance of for example not being dismissed or being promoted.

11 Compensation in relation to the section 47C claim can also include injury to feelings.

12 The Claimant is under a duty to mitigate her losses.

13 Awards for injury to feelings are compensatory. The award must relate only to injury to feelings for the unlawful discrimination we have found, not in respect of the other matters complained of. We must beware not to make an award that is too low, which would diminish respect for the policy underlying antidiscrimination legislation;

however, excessive awards can have the same effect. The purpose of an injury to feelings award is not to punish Respondents. We consider the effect of the unlawful discrimination on the Claimant's hurt feelings. We have regard to the severity of the treatment and its duration, but only insofar as this helps us to judge its impact upon the Claimant's feelings. We consider the period of time over which she has suffered or is likely to continue to suffer.

14 The bandings set out in Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA are a useful starting point in assessing the level of injured feelings. We remind ourselves that Vento referred to the acts of discrimination in setting the bands and that our concern is to compensate for the impact of the acts upon the Claimant. The Vento bands refer to injury to feelings at the less serious cases (the lower band), more serious cases (the middle band) and the most serious of cases (the upper band).

15 We have applied the Presidential Guidance dated 5 September 2017 to uplift the original Vento figures to account both for inflation and the decision in Simmons v Castle [2012] EWCA Civ. 879. As at the date of the hearing the middle band was therefore £8180-25000.

16 Where there are multiple acts of discrimination or detriment then it is usual to make a global award of injury to feelings in order to avoid double-counting.

17 The ACAS uplift of 20% we have determined should be applied to each head of loss.

18 Under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, SI 1996/2803 as amended, the Tribunal must consider whether to award interest on past loss of earnings and injury to feelings. Under the Regulations: for past financial loss the interest period begins on the mid-point date (from the act of discrimination to the date of calculation) and ends on the day of calculation. For injury to feelings the interest period begins on the date of the act of discrimination and ends on the day the amount of interest is calculated, reg 6(1). The calculation date is 17 November 2017.

Findings of Fact

19 Having read the further witness statements and heard the evidence of the Claimant, Mr Keogh, and the Second Respondent and having read the documents referred to us at the remedy hearing, and reminded ourselves of the liability decision we make the following assessment of compensation.

20 We have referred back to the findings in our liability decision as to the factors in the Second Respondent's mind when she decided to dismiss (paragraphs 98-101, 183). The principal reason for the dismissal was not pregnancy. Pregnancy was a factor in a mix of other factors which were not discriminatory. The principal factor for dismissal was the Second Respondent's unrealistic expectations.

21 The Claimant is likely to have started her maternity leave on 21 January 2017.

22 We make findings of fact about the undoubted injury to feelings that the Claimant suffered as a result of the discriminatory acts she experienced.

23 The Claimant had moved from other work to this job and was hoping it would be the start of new work in nursery administration. That she did not hold on to the job for very long does not in our view not lessen her injured feelings because there was a hope there that has been snuffed out.

24 Clearly a dismissal is a serious matter and a discriminatory dismissal particularly so and in most cases we would expect discriminatory dismissal to have a large impact on the Claimant's feelings and we find in this case the Claimant's feelings have undoubtedly been hurt. She has identified for us in her very clear witness statement upset and an initial depression, low feelings, panic attacks and anxiety that she places at the door of the dismissal and we find those matters were caused by her dismissal. Her upset was so acute that she required the help of a CBT councillor to ameliorate it and spent six sessions of CBT until about 9 May 2017. In the letter sent by the CBT therapist dated 9 May 2017 (393 liability bundle) it is recorded '*client has successfully completed 6 sessions of guided self-help focussed on depression, client is feeling a lot better and will be discharged from the service. Should she require support in the future she can re-refer herself at anytime.*' It is clear from that letter that by mid-May the Claimant was experiencing some improvement in her symptoms, so much so that the CBT was no longer required.

25 We find that the Claimant still now experiences some low days, she is not as bubbly as she was before the discriminatory dismissal and plainly this emotional change has affected life within her family. We find that the dismissal affected the enjoyment of her pregnancy and all of those matters are corroborated by the statement that we accept by Mr Keogh, the Claimant's husband.

26 The Claimant is sufficiently well to have now started a substantial search for equivalent work (as from the beginning of September 2017 when her maternity leave would have ended) and she has already put in place arrangements, through childminding and family members, so that she can start work straightaway. While she is plainly still upset, her emotional state is not so bad currently that she cannot consider working.

27 In relation to the discouragement from applying for the Deputy Manager position, her forthcoming maternity leave was a factor taken into account in that discouragement (liability decision paragraph 177). The Claimant was plainly upset because she knew this. We find too, therefore, that the Claimant's feelings were injured by this: albeit that that was a much less significant factor in her hurt feelings. We find, however, that there is no likelihood the Claimant would have applied for the job of Deputy Manager because it was at a much lower rate of pay than the job she held with the First Respondent.

28 The figures for gross and net wages, pension loss and car insurance were agreed by the parties and we refer to them in our calculation. The Claimant earned £2040 net prior to her maternity leave in alternative work.

Application of Facts and Law to Issues

29 We have to put the Claimant as far as possible into the position she would have been if pregnancy had not been one of the factors in the Second Respondent's mind. We can decide what would have happened, what is likely to have happened or we can determine the chances of something happening absent the pregnancy factor.

Past Loss

30 In our judgment, at the date of dismissal, 21 October 2016, there was a 75% chance of the Second Respondent dismissing the Claimant in any event because of the other factors in her mind at the time: the non-pregnancy-related factors that we identified in our liability judgment, primarily her unrealistic unreasonable expectations of what was required of a Personal Assistant. While unrealistic they were not pregnancy related and not therefore discriminatory and we consider that, at the time of dismissal, even if pregnancy had not been a factor in the Second Respondent's mind, there was a 75% of the Claimant being dismissed at that stage.

31 It is right that we found pregnancy to be a significant albeit not the main principal factor in our decision but we identified that 'significant' in the context of pregnancy discrimination claims means 'more than minor or trivial'. We were very clear in our liability decision to identify the main and principal factor in the dismissal as being those unrealistic expectations. Because non-discriminatory factors were the principal reason for dismissal, we have discounted for this in the chance of the Claimant remaining employed in any event.

32 We have gone on then to consider the events beyond the maternity leave. We consider while there were some chance of the Claimant remaining in employment up to the point of her maternity leave, there was a 100% chance of the Second Respondent's unrealistic expectations overcoming her thereafter and her dismissing the Claimant in any event. That dismissal would have occurred even if pregnancy had not been one of the relevant factors.

33 We calculate the Claimant's past financial loss of earnings, pension and loss of car insurance at 25% of what she lost up to 21 January 2017, which is when she is likely to have started her maternity leave. The calculation is set out in the Appendix hereto.

34 In relation to past financial losses, we consider it just and equitable to apply interest to those losses and do so according to the Judgment Act rate of 8% per annum for the relevant period i.e. the midpoint date from the date the Claimant was discouraged from applying for the Deputy Manager role on 11 August 2016 until the date of the remedies hearing i.e. 233 days.

35 We apply the 20% ACAS uplift that we found ought to take place in this case to those past financial losses plus interest.

Injury to Feelings

36 We have made findings of fact about the injury to feelings. There was plainly significant injury feelings initially, such that the Claimant experienced initial depression,

low feelings, panic attacks and anxiety so acute that she required the help of a CBT therapist. There is still some injury feelings as evidenced by the low days the Claimant still experiences, that she is not as bubbly as she was before. We take into account the impact of her hurt feelings on the emotional change within her family and the impact upon the enjoyment of her pregnancy.

37 We also take into account the improvement of the Claimant's most acute symptoms, evidenced by the medical letter of 9 May. We take into account the passage of time and that the Claimant is now sufficiently recovered to be engaged in a substantial search for work. We find that this indicates some recovery of her initially significant injured to feelings, which recovery is likely to improve now that this Tribunal has concluded. We think it likely therefore that the injury to feelings the Claimant has described to us will not be long lasting after this Tribunal. This reduces the amount of the award somewhat because the period we find is likely to be relatively short lived from now on.

38 In relation to the other part of the successful discrimination claim (being discouraged from applying for the deputy manager job) we have taken into account the Claimant's hurt feelings about that matter in a global award of injury to feelings.

39 We take into account when we make our decision about the injury to feelings award that the Claimant made a number of unsuccessful claims to us (concerning protected disclosure detriments and ante-natal appointments) about which she must have been upset but which do not sound in damages. We discount for those matters.

40 We have been asked to increase the injury to feelings award to take into account the way in which the Respondents have conducted the proceedings and we have considered those submissions carefully. We however take into account that the Respondent is entitled to put its defence to a claim robustly and we find that, while the Respondent did that, its conduct of the proceedings it was not unduly and unnecessarily aggravating. We deprecate that Ms Sheen prepared and initial witness statement for this hearing, without the benefit of legal advice, in which she continued to make claims about poor performance, which we had found were exaggerated in our decision but we do not consider that this fact alone should increase the injury to feelings award.

41 We have considered the value of money when we have reached the level of our award and the need for public respect in the level of award. Primarily we have fixed our award by reference to the findings of fact we have made about the Claimant's injured feelings in respect of both claims of discrimination in this case.

42 Taking into account all of our findings of fact about the injured feelings the extent of them, the likely period of them and the reference to the fact that they arise from a significant act of dismissal we consider that an award in the middle of the Vento band is appropriate and that is the starting point that we have taken. We have applied the Presidential Guidance to uplift the boundaries of the Vento bands.

43 Taking into account all that we have found about the nature of the injured feelings in this case, we consider an award towards the lower end of the middle band is appropriate and make an award of injury feelings in the amount of £10,000. This is a global award in respect of injured feelings from both acts of discrimination.

44 We have applied interest to that award according to the Regulations because we consider it just and equitable to do so from the start date of those injured feelings, namely the upset over the deputy manager role from 11 August 2016 to the date of the hearing, i.e. 464 days.

45 We have then applied the ACAS uplift of 20% to the award.

46 We set out the calculation of our losses according to the principles we have applied in the Appendix to this decision. We have used the number of days set out in the Claimant's schedule of loss.

Employment Judge Moor

19 December 2017

Appendix

Past Financial Loss

25 % of losses from the day after to dismissal to the start of maternity leave

22 October 2016 – 21 January 2017 = 13 weeks

Net weekly pay £504.00

13 x 504 = 6552.00

Less mitigation (2040.00)

Past total loss of net earnings 4512.00

Annual pension contributions £280.44

13 weeks' pension contributions $280.44/4 = 70.11$

Annual car insurance 659.00/4 164.75

Total loss to start maternity leave 4746.86

25% 1186.72

Interest for 233 days at 8% per annum

$233/365 \times 8 = 5.1\%$ 60.52¹

25% loss plus interest = 1247.24

ACAS Uplift 20% 249.45

TOTAL PAST LOSS **1496.69**

Injury to feelings

Award 10000.00

Interest for 464 days at 8%

$464/365 \times 8 = 10.17\%$ 1017.00

ACAS Uplift 20% 2203.00

Total injury to feelings **13,220.00**

Total award **£14,716.69**

¹ On giving oral judgment of the amounts, EJ Moor mistakenly had added in interest at £605.20. Counsel for the Respondents quickly identified the error which was corrected and the oral judgment was corrected to incorporate the correct figure.