



EMPLOYMENT TRIBUNALS

Claimant: Ms A. Thompson
Respondents: Scancrown Ltd, trading as Manors

London Central Remote Hearing

12 August 2021

Before: Employment Judge Goodman
Ms J. Griffiths
Mr D. Shaw

Representation

Claimant: Ms R. Barrett, counsel
Respondent: Ms P. Hall, Peninsula Business Systems Ltd

REMEDY JUDGMENT

1. The respondent is ordered to pay the claimant the sum of £ 184,961.32 as compensation for indirect discrimination because of sex.
2. The detailed calculation appears in the reasons. The award includes interest, past and future loss of income and pension contributions, and £13,500 for injury to feelings. The total has been grossed up for income tax payable by the claimant on receipt.

REASONS

1. This hearing was listed to decide remedy for indirect sex discrimination, after a request to work flexibly on return from maternity leave was refused. In a reserved judgment sent to the parties on May 2021, the claimant succeeded in this claim, but not in her other claims of unfair dismissal, direct discrimination and harassment.

The Conduct of Hearing

2. The claimant applied for reconsideration of the liability decision on 17 May, sending detailed grounds drafted by counsel. Unfortunately, despite chasing emails from both sides, this application was not referred to any

judge until the afternoon of 10 August, and there had been no time before the hearing began to decide it. At the start of this hearing there was discussion of whether to assess remedy as planned, or use the time for the reconsideration and postpone remedy to a later date. It was decided to proceed as planned, because the respondent's representative had not prepared for reconsideration, because it would be necessary to undertake the rule 72 sift first, the application was long and detailed as to both facts and law, so this could not be done quickly, and because if there was a reconsideration it might be possible to decide it by written representations if the parties consented, so avoiding the costs of a further hearing.

What Remedy Should be Awarded?

3. Section 124 of the Equality Act 2010 provides that the tribunal may, as remedy for discrimination, make a declaration, make a recommendation, and award compensation. By sections 124 (4) and (5), where the tribunal has found discrimination under section 19, indirect discrimination, it must not award compensation without first considering a declaration or recommendation unless it finds there was no intention of discriminating when applying the provision criterion or practice. **In Wisbey v Commissioner for City of London Police and another (2021) IRLR 691** the Court of Appeal held that there is no requirement that the application of the provision be found intentional before awarding compensation: "there can be no doubt that employment tribunals have discretion under section 124 (five) to award compensation once the other remedies it is to be expected that compensation will be awarded. Moreover, such compensation should be both adequate to compensate for the loss and damage suffered and proportionate to it."
4. If in this case, we have in effect made a declaration by finding that there was indirect discrimination. As the claimant is no longer employed, and has no wish to return, recommendation is of no benefit to her, and no doubt the respondent will learn lessons from the judgement. With respect to an award of compensation, in exercising discretion to do so, we consider whether there was an injury to feelings caused by discrimination, and what financial loss resulted. The unfair dismissal claim was rejected on the basis of the reasons expressed by the claimant at the time for losing trust in the respondent. We found:

"the reason for resignation was not any breach of the implied term to act with mutual trust and confidence, but that she did not want or was not able to work the contracted hours".

When assessing what damage flowed from the indirect discrimination, the tribunal is to assess what would have happened but for the discrimination, and consider what would have happened in any event. The point was not argued by either side. She did not want or was not able to work the contracted hours which she had asked to be adjusted to fit round childcare. Had the respondent conceded the adjustment she asked for, but still disputed the holiday pay, or treated her grievance in the same way (while conceding the adjusted working hours) it is unlikely the claimant would have left, even if trust and confidence had been weakened by the process.

5. In our finding, it is just to award compensation for injury to feelings and for the claimant's financial loss in leaving her job, and proportionate to discrimination suffered,
6. The claimant's schedule of loss pleaded a full loss of her previous earnings, but when this was queried by the tribunal, counsel conceded that the proper measure of damages should be her putative earnings had she returned on the flexible working pattern she had asked for. Adjustments to the calculation made to reflect that. The respondent's schedule of loss made no reference to loss of earnings at all, only injury to feelings. This has meant that subject to the claimant's concession on the flexible working pattern, all issues have been at large, requiring consideration of what the claimant would have earned had she not left, which is a complicated assessment, given the uneven effect of the pandemic on the London housing market, the effect of lockdown and short time working on the respondent's staff and their earnings made with little information supplied by the respondent, and little assistance from the parties in calculation.

Evidence

7. The claimant, Alice Thompson, and her former employer, Paul Sellar, gave evidence about loss and mitigation issues. The claimant had prepared a bundle of documents. We also referred to material in the original hearing bundle. The respondent added a short promotional video the claimant had put online.

Findings of Fact

8. After resigning her employment with effect from 12 December 2019 the claimant looked for other employment as an estate agent, but without success. In March 2020 she was due to meet her previous employer (Foxtons) to discuss opportunities, but the Covid lockdown supervened. She was not challenged on her evidence about the unsuccessful hunt for work then or later. The documents show a sustained search for work, both in sales and in administrative roles. Initially she looked for jobs advertised with flexible working. Lockdown has meant employers are more prepared to allow some working from home which would cut out commuting time.
9. The claimant had lived in Brixton, but with the birth the family moved to Weybridge, and the Brixton flat has been let. The claimant explained how the journey to work would not have taken more time from Weybridge than from Brixton.
10. By the end of 2020 she decided she must try her luck in self-employment, and from January 2021 has subscribed to an online estate agency business, Keller Williams, which requires a monthly subscription of £222 for online marketing access, but leaves the individual to find and manage properties for sales or letting. The claimant has had very little success in this, earning only £1,552, paid in June 2021, and concedes she will have to resume her search for employment She has already made some applications.

11. During this period her daughter has been at nursery for 5 hours a day on two, latterly three, days a week. She would increase this to allow more time for work but is constrained by lack of income. The nursery will have space for 4 days from September.
12. There was dispute about the state of the housing market in 2020 and now. The tribunal understands that for about three months after the first lockdown (late March 2020) almost no one moved house. Despite the reopening of estate agencies in May 2020, progress was slow. An additional effect of lockdown has been little interest in buying or letting one bedroom flats in central London, and an increased interest in places with more space, and particularly outdoor space and gardens. Separately, the temporary concession on stamp duty for sales of property under £500,000 led to a frenetic market later in 2020 and into 2021, which has now come to an abrupt halt, and a lull is expected, though it may only be temporary. Most expect that with increased vaccination, and the reduced risk of acute cases and hospitalisation, the economy and the housing market will soon return to something resembling the pre-pandemic state, which was an ongoing rise in prices and demand for housing in London because housebuilding does not keep pace with population growth.
13. The respondent's particular market in Marylebone does not follow this general pattern. There are few flats within the price range for stamp duty exemption, and not many with outside space. Many customers are from overseas. Beyond generalities we had little specific information from the respondent. The restrictions on overseas travel may reduce demand in Marylebone, but if property is bought for investment purposes through intermediaries they may have little relevance. The respondent referred to Savills' tables (not in the bundle) showing reduced demand in prime central London, though our understanding is that this has been the case for some time, as a consequence of Brexit uncertainty, rather than the pandemic. He offered no evidence about sales or lettings activity in 2020-2021, whether by volume or fees. We do not know whether to understand that his market was relatively unaffected by the pandemic, or whether he is reluctant to reveal his figures.
14. We were able to review a list, which appears in the original trial bundle, breaking down, with dates, which staff were on furlough and which on short-time working in 2020-21. We assume, in the absence of evidence, that furloughed staff received only CJRS payments and that salary reductions were made for short-time working. The hours and dates worked by the claimant's replacement, JP, are shown.
15. According to Mr Sellar, JP's contract terms do not include a bonus. She is paid commission on sales. He disputed that the claimant would have had continued to be entitled to a bonus had she returned to work. He pointed out that the letter setting a bonus, when her first year fixed salary was reduced and bonus added, was only for a year, and silent as to what would happen next. She had not received bonus while on maternity leave, and neither did her substitute, while she did get commission as her sales went

through. He said JP now gets a fixed salary (£70,000) without bonus. On the claim for commission, had the claimant gone back to work in November 2019, he asserted that sales income in 2020 (and presumably 2021) was “not anything like” 2019, but did not give even rough figures. Asked what JP had received in commission (10% on sales), he replied, without referring to any document, that it was about £25,000 in 2020 and £13,000 in 2021, “but don’t hold me to that”. We are unsure how much we should rely on this.

16. On injury to feelings, the claimant explained how devastated she felt at having built up the team and formed relations with clients, only to lose it because she was pregnant. She said, as she had at the liability hearing, that she was bringing the claim so that her daughter did not have the same experience. She has not had to seek medical help. Challenged on being able to produce a marketing video on Instagram for her self-employment, she explained she had adopted a professional persona so as to appear confident in it, but it had taken numerous takes to achieve.

Discussion and Conclusions

Salary

17. The claimant had earned £60,000 salary when employed 9-6 over 5 days a week. Working 9-5 on 4 days a week would have been a 29% reduction. The salary pro rata therefore would have been £42,667 per annum, which is £3,555 per month or £820.52 per week. She would have earned that for 14 weeks from 12 December 2019 until 19 March 2020, when she would have been furloughed and from then until 18 May 2020, a period of two months, paid 80% of the CJRS cap of £2,500 per month, which is £1,153.84 per month. From 19 May until 7 September 2020 she would have worked from 10-4, a further reduction of 8 hours per week, so £34,667 per annum. From 8 September 2020 until 19 December, normal hours were restored. Furlough would have resumed from 20 December to 3 January 2021, 2 weeks. Then there was a week of full pay, then 13 weeks on short-time (10-4) again, until 12 April 2021. Since then staff have worked normal hours.
18. Pension contributions were paid by the respondent at 5% of basic salary. This is part of the loss of earnings claim, but will not have been subject to income tax. If paid as a lump sum now, the claimant can obtain tax relief by paying the amount into a pension fund, so they are not to be grossed up for tax either.

Bonus

19. When first hired the claimant had a fixed salary of £120,000 and in the next year she received a salary of £60,000 and a bonus related to achieving a sales target, which she met, and was paid in November 2018, about £60,000. In our finding, had she returned to work late in 2019, it is unlikely the respondent would then have refused to renew the bonus, given the

salary cut, though it is quite possible he would have increased the target to incentivise increased activity. We rely on the other of the two managers, Alex Hebditch, having had a bonus for the next year, not just fixed salary, as we had been told it was not paid because he did not meet target. The dispute may be academic, as it seems unlikely, whatever effort the claimant made, that she would have met target for 2020 or 2021, given the extraordinary market conditions. If she had had a bonus term, it is unlikely a bonus would have been paid. We do not know JP was paid £70,000 per annum without a bonus, but nothing about discussion of terms or whether some alteration was contemplated. Mr Sellar was not questioned about this.

Commission

20. Commission for 2020 might be expected to be down on 2019 figures, while allowing for the fact that there is always a delay – say 3-6 months – between agreeing a sale and completion, so ongoing activity from January to March 2020. There is also a question whether she would still have had 12% commission when a substitute sales manager for part of the time may have expected an incentive too. Mr Sellar's evidence at the liability hearing showed he was concerned about demotivating other staff if the claimant worked fewer hours for similar money and got commission for sales to which others had contributed. Doing the best we could, we anticipated that if allowed shorter working hours as requested, the claimant's commission would have gone down to 10% of sales, in order to incentivise other staff in the team to cooperate when she was away. Otherwise resentment may have damaged the team spirit essential for the arrangement to work. It is not reduced pro rata to working time because commission relates as much to the quality of work as to quantity. If still on 12%, based on previous year's commission earnings (£50,000) she would have earned three quarters (£37,500) if it is assumed that all sales stopped for 3 months following the start of the pandemic. Allowing some additional reduction for reduced sales, we estimate £30,000 in commission in 2020. This is more than the £25,000 earned by JP, on 10%, but gives the claimant the benefit of the doubt when Mr. Sellar could have provided more precise information on sales but chose not to, and allows for the lag in payment of commission earnings. For 2021 we estimated commission would have been lower, say, £15,000, compared to the £13,000 said to have been earned by JP on 10% in the 8 months to date, which would be £22,500 on a full year, and reflects a subdued market following lockdown, and continued restrictions on international travel.

Car and Phone

21. The claimant had the use of a pool car, initially from Monday afternoon to Friday morning, leaving it available for weekend staff to use for viewings. This arrangement is not contractual, but appears to predate her pregnancy. She paid tax on it as a benefit in kind. During pregnancy she was allowed to use the car at weekends too. Use of the car was not a contractual provision. Had she returned to work we would have expected use from

Monday afternoon to Thursday morning. Currently, she uses buses to reach Weybridge centre, or trains to central London. It seemed to us best measure of damages for loss of the limited use of the car was a zone 1-3 travelcard, the annual charge of £1,480 (or £192 per month).

22. The schedule of loss included a claim for the phone, but it was conceded that this was provided for business use only.

Mitigation

23. The claimant has a duty to mitigate loss; the burden is on the respondent to establish that she did not. There is adequate evidence she had made attempts to find work; neither the oral or documentary evidence was challenged by the respondent.

Future loss

24. In our finding the housing market has been uncertain through lockdown, and estate agencies will have been cautious in hiring anyone other than temporary negotiators. Though frenetic in the stamp duty exemption band, this has always been regarded as a temporary state of affairs, and is unlikely to have led to additional hiring of anyone other than casual or temporary staff. Although the jobs market has been difficult until now, recovery of some kind of normal can be expected, and with a steadier market, hiring is likely to resume. We anticipate the claimant will obtain work at a comparable salary plus commission at least by the end of October 2021.

25. Many new mothers find returning to work difficult, and we considered whether to discount any award for the risk that she would have abandoned the job on return because of separation difficulty, or discouragement commuting over an hour each way by public transport. The claimant seemed to us determined, and has used a nursery while attempting to make her way as self-employed, so we have not made a discount, expecting that she would have worked on the reduced hours because of the difficulty finding other work (say in Weybridge), and because she knew the team and the local market well.

Injury to Feelings

26. Losing a job unexpectedly is always a cause of unhappiness, shock, and sometimes anger, as shown by the way many employees react to redundancy, even when there has been proper consultation, and even when it is never suggested their performance was not good enough. Here the claimant resented that flexible working appeared not to be considered properly (as in our finding it was not), and felt that this was an injustice because of her sex, which it was. Most mothers find they have difficult feelings returning to work after maternity even when it is a return to a familiar job. The claimant's turmoil will have been worse because she had

to start from scratch finding a job at all. Her lack of success will have led a to a sense of failure, and we do not accept that a confident marketing video means she is unaffected. Most people can overcome nerves if it is professional necessity. The respondent had suggested £10,000. The tribunal concluded the award should be £13,500, within the middle band, as more than trivial or one-off, but something which has subsided after a difficult period.

ACAS Code

27. We were invited to increase the award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 for failing to follow the ACAS Code. We did not identify a breach of the Code on Discipline and Grievance. The grievance covered a refusal of flexible working, but in our finding the investigation and decision making by an independent person was not perfect, but good enough. The award is not to be increased.

Tax

28. The claimant's employment income was such that she must, before maternity leave, have been paying income tax at the highest rate. Her income in 2020 and 2021, had she remained in employment, will have varied considerably. The tribunal has therefore calculated her gross loss in each tax year, and then calculated the income tax she would have paid, to reach a figure for what she lost in net earnings. This then has to be grossed up to reflect the income tax she will have to pay on the award when received by her as a lump sum in tax year 2021/2 -. **British Transport Commission v. Gourley [1955] UKHL 4 .**

Interest

29. Interest is payable on the awards at 8% per annum, the current judgment rate. For injury to feelings this runs from the date of injury. For loss of earnings this is calculated from the mid-point of loss. As the loss continues, this is equivalent to half the rate from the date she left.

Calculation

30. Tax year ending April 2020

To calculate the tax payable we have to estimate (in the absence of exact information) her earnings for the whole tax year.

For the period before the loss commenced, we assume that the claimant after ceasing work on 12 October 2018, received statutory maternity pay at the higher rate for 6 weeks, then 20 of her 33 week entitlement at the lower rate in the year ending 5 April 2019.

Case No: 2205199/2019

In tax year ending 5 April 2020, she will have had the rest of her statutory maternity pay, 13 weeks at the lower rate, £152, which is £1,976. In November 2020 and for half December, she will have been paid £7,500 gross salary, without commission or bonus, before the loss begins, total £9,476. It is an assumption because we did not have precise figures for payments made before termination.

<u>For the period of loss:</u>	£
Salary 12.12.19 to 19.3.20, 14 weeks @£820.52	11,487.28
Furlough 20.3.20 to 5.4.20, 2.4 weeks @£2,500x12/52	1,384.61
Commission- 16.4 weeks @ 30,000 x 12/52	9,461.54
Annual travelcard	1,480
Total loss	<u>£ 23,813.43</u>

Total earnings in the tax year: £33,289.43. Of this, £12,500 is not taxed, the remaining £20,789.43 is taxed at 20% (tax £4,147.88)

Loss of earnings 12.12.19 to 5.4.20 net of tax: (£23,813.43 - £4,147.88):
£19,665.55

31. Tax year ending April 2021

Furlough 6.4.20 to 18.5.20 6.6 weeks @£2,500 x 12/52	3,807.69
Short-time working 18.5.20 to 7.9.20, 16 weeks @£34,667 x1/52	10,666.77
Normal hours 8.9.20 to 19.12.20, 15 weeks @820.52	12,308.00
Furlough 20.12.20 to 3.1.21, 2 weeks @£2,500 x12/52	1,153.85
Normal hours 4.1.21 to 11.1.21, 1 week @ 820.52	820.52
Short-time working 12.1.21 to 5.4.21, 12 weeks @ £34,667 x1/52	8,000.07
Commission- 28.4 x 30000 x 1/52	16,384.61
- 13 x 22,500 x 1/52	5,625
Annual Travelcard	1,480
Total	<u>£60,246.51</u>

Of this, £12,500 is not taxed, the next £37,500 is taxed at 20%. Remaining income over £50,000 (£10,246.51) is taxed at 40%.

Tax payable: at 20%	£7,500
At 40%	<u>£4,098</u>
Tax payable:	£11,598

Loss of earnings 6.4.20 to 5.4.21, net of tax (£60,246.51 – 11,598):
£48,648.51

32. Tax year ending April 2022

Short-time working 6.4.21 to 12.4.21, 1 week @£34,667 x1/52	666.67
Normal hours 13.4.21 to 12.8.21, 18 weeks @ £820.52	14,769.36
Commission 19 x 22,500 x1/52	8,221.16

Deduct earnings from self-employment £1,552

Total loss 22,105.19

Tax payable: nil on first £12,570, then 20% on balance: £1,907.03

Loss of earnings 6.4.21 to 12.8.21 net of tax (22,105.19 – 1,907.03):
£20,198.16.

33. Future Loss

13.8.21 to 31.10.21, 12 weeks @ £820. 52	9,846.24
Commission, 12 weeks @22,500 x1/52	<u>5,192.30</u>

Total: £15,038.54

Tax payable at 20% on this: £ 3,007

Future loss net of tax: £ 12,031.54

34. Injury to Feelings £13,500

35. Interest on injury to feelings
 from 12.12.19 to 12.8.21, 20 months @8% p.a. £ 1,800

35. Loss of Employer Pension Contributions

Assuming the employer paid the 3% statutory minimum on salary,
 and that commission was not pensionable

Gross past loss of salary		
12.12.19 to 5.4.20	12,871.89	
6.4.20 to 5.4.21	36,756.90	
6.4.21 to 12.8.21	<u>15,436.03</u>	
Total, £65,064.82	3% of total	£1,951.94

Future loss of pension contribution
 3% of £9,846 £ 295.38

35. Interest on past loss of earnings and pension contributios:

Net loss of Earnings 12.12.19 to 5.4.20	£19,665.55	
Net loss of Earnings 6.4.20 to 5.4.21	£48,648.51	
Net loss of Earnings 6.4.21 to 12.8.21	£20,198.16	
Past loss employer pension contributions	£ 1,951.94	
Total past loss	£90,759.54	
Interest thereon at 4% for 20 months		£6,050.64

36. Grossing Up for Income Tax

Past loss of Net Earnings (ex pension)	£88,512.22	
Interest thereon	5,900.81	
Future loss award, net, (ex pension)	12,031.54	
Injury to Feelings	13,500	
Interest thereon	1,800	
Total taxable award		<u>£121,744.57</u>

Add: hypothetical income from new employment
1.11.21 to 5.4.22, 22.2 weeks at (say) £45,000 p.a.
19,211.53

All the claimant's income (this award and hypothetical future employment income) liable to tax in year ending 5.4.2022 (121,744.57 + 19,211.53): £140,956

Less £30,000 (tax free concession for payment in termination of employment – (ss.401- 403 Income Tax (Earnings and Pensions) Act 2003) leaves a *taxable* amount of £110,956

(of which £19,211.53 is other income, and £91,745.10 is the tribunal award liable to tax)

In 2021/22, tax is paid at:

nil rate on 12,570

the next £37,700 at 20%,

the next £49,730 at 40%

then at 60% (40%, plus further 20% to reflect withdrawal of personal allowance on income £100,000 -125,000) on £25,000.

From £125,000 the next £25,000 is taxed at 40%.

Anything over £150,000 is taxed at 45%

The lower bands have been applied to the hypothetical income.

37. The table below is adopted from the calculation for grossing up across tax bands approved in **PA Finlay Ltd v H A Finlay UKEAT/0260/14/BA**.

Hypothetical Other Income

Taxable part of tribunal award

Case No: 2205199/2019

	<u>Gross</u>	<u>Net</u>	<u>Tax</u>	<u>Gross</u>	<u>Net</u>	<u>Tax</u>
Nil rate	12,570	12,570	0	-	-	-
20%	6,641	5,313	1,328	31,059	24,848	6,211
40%	-	-	-	49,730	29,838	19,892
60%	-	-	-	25,000	10,000	15,000
40%				25,000	15,000	10,000
45%				21,925	12,059	9,866
<u>Totals</u>	19,211	17,883		152,714	91,745	72,718
Add: tax free concession				30,000	30,000	0
Total				£ <u>182,714</u>	<u>121,745</u>	

This means that for the claimant to be left with £121,745 after paying tax in the current year, tax, she must receive £182,714. To this must be added the loss of pension contributions, past and future, £2,247.32, as it has been assumed she will pay them into a pension fund and tax will not then be charged.

37. The total award for loss of earnings, pension contributions, injury to feelings, and interest, after grossing up so that she will receive that sum after paying tax, is therefore £ 184,961.32.

Employment Judge Goodman

Dated: 24th August 2021

JUDGMENT and REASONS SENT to the PARTIES ON

25/08/2021.

FOR THE TRIBUNAL OFFICE