



EMPLOYMENT TRIBUNALS

Claimant: Mrs R Hayward

Respondents: (1) Kerbedge Ltd (dissolved) (2) VOIP Communications International Ltd (formerly Kerbedge Restaurants Ltd) (in liquidation) (3) Mr Adam Bryson

Heard at: Hull On: 17 December 2018

Before: Employment Judge Knowles

Representation:

Claimant: In person Respondents: No appearance

RESERVED JUDGMENT

1. No application having been made by the Claimant to restore the First Respondent to the register of companies, the Claimant's claims against the First Respondent are dismissed.
2. The name of the Second Respondent has changed to VOIP Communications Ltd, and their name in these proceedings is correspondingly changed.
3. The Claimant's claims against the Second Respondent are stayed due to the liquidation proceedings.
4. The Third Respondent, Mr Adam Bryson, is ordered to pay to the Claimant £12,147.95 unpaid wages.
5. The Claimant's claims against the Third Respondent of unlawful detriment under Section 47(C) of the Employment Rights Act 1996 and unlawful discrimination under Section 18 of the Equality Act 2010 are well founded.
6. The Third Respondent, Mr Adam Bryson, is ordered to pay to the Claimant £12,000 compensation for unlawful pregnancy / maternity discrimination, namely injury to feelings.
7. The Third Respondent, Mr Adam Bryson, is ordered to pay to the Claimant interest on the award for unlawful discrimination in the sum of £800.00.

8. The grand total of the above amounts which the Third Respondent, Mr Adam Bryson, has been ordered to pay to the Claimant is £24,947.95.
9. The recoupment regulations do not apply.

RESERVED REASONS

Evidence

1. I heard evidence from the Claimant who produced a bundle of documents.

Issues / preliminary matters

2. The first issue which I had to determine was which of the Respondents the Claimant's claims could proceed against today.
3. The First Respondent, Kerbedge Ltd, dissolved 29 May 2018. The Claimant has been given time by the tribunal (see 12 June 2018 case management orders) to indicate whether or not she intends to apply for the First Respondent to be reinstated to the register of companies. She has not done so and in the circumstances, no legal entity presently existing, the Claimant's claims against the First Respondent are dismissed.
4. The Second Respondent, previously Kerbedge Restaurants Ltd, changed its name to VOIP Communications International Ltd on 30 July 2018. I have amended the name of the Second Respondent accordingly. However, an order for winding up has been made on 24 October 2018 and accordingly proceedings against the Second Respondent are stayed.
5. There is no impediment to the Claimant's claims against the Third Respondent proceeding; the remainder of this reserved judgment relates to the Claimant's claims against the Third Respondent.
6. Notice of the Claimant's claim was sent to the Third Respondent 21 June 2018 and the due date for a response was 19 July 2018. No response has been entered by the Third Respondent.
7. The claimant claims that she has suffered unlawful discrimination because of pregnancy / maternity and that she has suffered unlawful deductions from wages.

Findings of fact

8. The Claimant produced a witness statement (4 pages) and gave evidence at the hearing. I made the following findings of fact having heard the evidence and considered the Claimant's bundle of papers. The findings of fact are made on the balance of probabilities.
9. The Third Respondent entered no appearance and did not attend the hearing.
10. The Claimant's commenced employment 10 July 2016.
11. On 26 July 2016 she gave notice to the Third Respondent that she was pregnant.
12. The Claimant was originally paid wages by the First Respondent but the Third Respondent began to pay her wages personally for reasons known only to him. In my conclusion on the balance of probabilities the Claimant was employed by the Third Respondent in his personal capacity rather than through the companies he operated from time to time.
13. On 3 September 2016 her hours of work were reduced from 44 to 20 hours per week. The Claimant complained that that reduction was unlawful and because of her pregnancy. The Third Respondent settled that claim with the Third Respondent and this is no longer an issue in the present claim although it remains part of the historical context of what follows.
14. In or around the middle of December 2016 the Claimant became ill for reasons relating to her pregnancy, and her son was born prematurely 4 January 2017.
15. She contacted the Third Respondent on or around 28 December 2017 concerning her return to work after maternity leave which was due to take place, she understood, on the 12 month anniversary of her son's birth, 4 January 2018.
16. The Third Respondent agreed her return to work 4 January 2018 but that she would then commence annual leave to use her holiday entitlement which had accrued during her maternity leave, 5 weeks and 2 days. The Third Respondent also agreed that the Claimant could return to work on 10 February 2018.
17. The Claimant tried to contact the Third Respondent 9 February 2018 concerning her return to work but he has not responded.
18. The Claimant gave up any hope of ever hearing from the Third Respondent despite repeated attempts to contact him. She sent him confirmation that she resigned 24 July 2018. She commenced new employment 1 August 2018.

19. The Claimant was earning, prior to leaving, £8 per hour. She had, following the previous issues concerning her working hours, agreed a 30 hour working week. Her income was therefore £240 per week gross.
20. She calculates that she has lost income between 10 February 2018 and her resignation 24 July 2018 of 24.5 weeks at £240 per week, equaling £5,880 gross.
21. She also calculates that between 4 January 2018 and 9 February 2018 she lost 28 days of holiday pay, £1,344 gross.
22. The Claimant has also calculated that had the Third Respondent paid her statutory maternity pay, which he has not, she would have received 39 weeks at £145.15, equaling £5,660.85. She actually received a settlement payment of maternity allowance from the DWP of £866.02 and has therefore lost £4,794.83 statutory maternity pay which was not paid by the Respondent.
23. The DWP would not pay her full claim for SMP because the Third Respondent had no validly deducted tax and national insurance or accounted to them for such payments.
24. She also claims that she should have received statutory sick pay from mid-December 2016 to 3 January 2017 before she commenced maternity leave. However she received a payment from the Third Respondent on 7 February 2017 and thinks this may relate to that. The payment was for £600. The Claimant was therefore unable to quantify any claim for lost sick pay or SSP.
25. Due to the absence of pay from the Third Respondent, the Claimant incurred bank charges amounting to £129.12.
26. The lack of pay or contact from the Respondent put the Claimant under immense pressure and she eventually defaulted on her mortgage payments. She was no able to socialize with friends or new mums because she had no income. She suffered mental health problems as a result of the pressure. She suffered low mood, depression, anxiety and a loss of confidence. She did not receive medication for her mental health problems but did receive counselling in the form of CBT from September 2017 to January 2018. She also suffered PTSD from the birth, and whilst not ascribing that condition to the Third Respondent's treatment of her, she does feel that she could have recovered more quickly if the Third Respondent had not treated her the way he did.

Submissions

27. The Claimant confirmed in submissions that she had told me everything that she wished to say.

The Law

28. Section 13 of the Employment Rights Act 1996 contains the right not to suffer unauthorised deductions from wages, and states as follows:

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion....

29. Section 47C of the 1996 Act covers leave for family and domestic reasons and provides:

- (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
- (2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—
 - (a) pregnancy, childbirth or maternity...

30. Section 18 of the Equality Act 2010 sets out provisions covering pregnancy and maternity discrimination in work cases as follows:

- (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
- (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably
 - (a) because of the pregnancy, or
 - (b) because of illness suffered by her as a result of it.
- (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
- (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
- (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
- (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
 - (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
 - (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
- (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
 - (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
 - (b) it is for a reason mentioned in subsection (3) or (4).

31. The Equality Act 2010 sets out remedies for unlawful discrimination and provides:

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- (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
- (2) The tribunal may—

...

(b) order the respondent to pay compensation to the complainant;

...

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by [the county court] or the sheriff under section 119.

32. In *Prison Service and ors v Johnson* 1997 ICR 275, EAT the EAT summarised the general principles that underlie awards for injury to feelings:

- a. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party
- b. an award should not be inflated by feelings of indignation at the guilty party's conduct
- c. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches
- d. awards should be broadly similar to the range of awards in personal injury cases
- e. tribunals should bear in mind the value in everyday life of the sum they are contemplating, and
- f. tribunals should bear in mind the need for public respect for the level of the awards made.

33. In *Vento v Chief Constable of West Yorkshire Police (No.2)* 2003 ICR 318, CA, Lord Justice Mummery described some of the elements that can be compensated under the head of injury to feelings as 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression'.

34. Lord Justice Mummery's gave helpful guidance upon the level of damages for injury to feelings developing three bands of compensation:

- a. a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000
- b. a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and
- c. a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or oneoff occurrence. The Court said that, in general, awards of less

than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

35. In case law since *Vento* there have been increases to the amount of damages which were given in the guidance, cumulating in 2018 in the case of *De Souza v Vinci Construction (UK) Ltd* 2018 ICR 433, CA. The impact of the development of the case law is that the guideline amounts are now:
 - a. top band £19,800–33,000
 - b. middle band £6,600–19,800, and
 - c. lower band £660–6,600.
36. This case preceded the application of Presidential Guidance in which the levels were further updated.
37. In *HM Prison Service v Salmon* 2001 IRLR 425, the EAT gave guidance on award of injury to feelings and the need to ensure that through an additional award for personal injuries there is no double recovery. It stated that although the two awards are distinct in principle, they are not easily separable in practice because it is not always possible to identify when the distress and humiliation suffered as a result of unlawful discrimination becomes a recognised psychiatric illness. The concept of 'injury to feelings' is wide enough to cover anything from minor upset caused by one-off incidents at the lower end of the scale to serious and prolonged feelings of humiliation and depression at the upper end. The EAT saw nothing wrong in practice with tribunals treating the personal injury as having been compensated for under the heading of injury to feelings, as long as the tribunal identifies those aspects of the victim's medical condition that the injury to feelings award is also intended to cover.
38. Regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 states that for injury to feelings awards the award of interest starts on the date of the act of discrimination complained of and ends on the day on which the employment tribunal calculates the amount of interest which is the 'day of calculation'.
39. For all other awards, interest is awarded for the period beginning on the 'mid-point date' and ending on the day of calculation under Regulation 6(1)(b). The 'mid-point date' is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation under Regulation 4(2). No award of interest can be made in relation to losses which will arise after the day of calculation under Regulation 5.

Conclusions and remedy

40. In my conclusion, the Claimant suffered unauthorised deductions from wages as claimed. She was not paid statutory maternity pay, holiday pay or wages as claimed. The Third Respondent has not responded to her

claim. The Third Respondent is liable to pay to the Claimant the sums that she has claimed were deducted as follows:

- a. SMP £4,794.83
- b. Holiday pay £1,344.00
- c. Wages £5,880.00
- d. Financial losses under Section 24(2) of the 1996 Act £129.12
- e. TOTAL £12,147.95

41. In my conclusion the Claimant was not paid and the Third Respondent decided not to answer her attempt to contact him concerning or to facilitate her return to work for reasons of her childbirth and maternity and because of her pregnancy. On the balance of probabilities I find that the determination by the Third Respondent to treat the Claimant this way was made during the protected period. No response has been received from the Third Respondent. The Claimant's complaints under Section 47(C) of the 1996 Act and Section 18 of the 2010 Act are well founded.
42. The Claimant's financial losses have been covered by my order relating to Section 13 deductions.
43. However, in relation to the unlawful detriment claim and unlawful discrimination the Claimant has suffered injury to feelings of low mood, depression and anxiety and loss of confidence. The period of nonpayment was long and compounded by failures to facilitate return to work after maternity leave.
44. In my conclusion an award for injured feelings in the middle band is well founded and I conclude that that award should be in the sum of £12,000.00.
45. I do not consider that a separate award for personal injuries is necessary in this case because the Claimant's illness is at its height depression which she appears to have largely recovered from. I have no evidence of continuing illness or any longer term prognosis before me in evidence. Injury and consequential illness in the form of depression is what the award for injured feelings above covers and I do not consider it appropriate to make an additional award for personal injuries.
46. I added interest to the award of injury to feelings using a broad brush approach reflecting that the non-payment of wages began in December 2017 and the Claimant resigned in July 2018. The treatment complained of extended over a period of 8 months and the injury to feelings accumulated over that period because of the Claimant's worsening financial situation. In my conclusion interest on the award for injured feelings should be taken from a mid-point, which I take as mid-April 2018, and the calculation of interest has therefore been made based on 10 months (304 days) at 8% per annum. The award of interest is therefore in the sum of £800.

Employment Judge Knowles
13 Feb 19

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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