EMPLOYMENT TRIBUNALS

Claimant: **Ms Lucy MacKin**

Respondent: **SFJ Tanning (Formerly known as MegaSun International Tanning Ltd.)**

Heard at: **East London Hearing Centre (by telephone)**

On: **19 October 2020**

Before: **Employment Judge Jones**

Representation

Claimant: In person

Respondent: Mr T Dracass (Counsel)

REMEDY JUDGMENT

In a judgment dated 10 January 2020, Employment Judge Lewis decided that the Claimant succeeded in her complaints of unfair dismissal and of discrimination on the grounds of pregnancy and maternity contrary to section 17 Equality Act 2010.

It is this Tribunal's judgment that the Claimant is entitled to the following remedy under section 124 Equality Act 2010:

Basic Award – 2 x £124.80 = **£249.60**

Compensatory Award –

Past losses (between the last pay in April and termination date on 21 May 2019)

Unpaid holiday pay (46 hours @ £8.23ph) = **£378.58**
Loss of pension (5% annually. 8 months loss) = **£216.32**
Unpaid notice pay (2 weeks @ £124.80) = **£249.60**

Future losses

Between end of maternity leave and start of new employment (19.2.20 – 8.3.20)
£374.40 – loss of earnings
£32.84 – holiday pay

£18.72 – pension
Difference between this job and Benhurst Primary School over 29 weeks – 9 March – 28 September 2020 = (£124.80 - £54.45 = £70.35per week) in two segments

17 weeks x 70.35 = **£1,195.95,** and
12 weeks x £45.39 = **£544.68**

(From 23 March for 12 weeks the income from the Respondent would have reduced to 80% of £124.80 (£99.84). The loss is (£99.84 - £54.45 = £45.39))

Expenses incurred in job searching (attending interviews, petrol, train fares) - **£100**

Total = **£3,360.69**
Plus = Injury to feelings **£5,000**

Interest: - £1,680.34 (halfway point) x 8% **= £134.42**
£3,360.69 + £134.42 = £3,495.11

Injury to feelings and personal injury in the total of **£5,000.00 x 8% = £400.**

The Respondent is ordered to pay the Claimant the total sum of **£5,400 + £3,495.11 = £8,895.11** as her remedy for her successful claim.

REASONS

1 The Respondent failed to complete and file a Response to this claim, either in time or at all. The Tribunal issued a judgment for the Claimant on 10 January 2020. Her complaints of maternity and pregnancy discrimination and unfair dismissal were successful. The Tribunal postponed the remedy hearing that had been listed for 20 January 2020, on the Respondent's request, to give it an opportunity to apply for leave to defend the claim but the Respondent failed to do so and today's remedy hearing was fixed.

2 Mr Dracass attended today's hearing and applied under Rule 21(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to be allowed to participate in the hearing to the extent permitted by the Judge. The Tribunal considered the application and granted the Respondent leave to participate in the remedy hearing. Mr Dracass questioned the Claimant on her evidence on the remedy due to her and made written and oral submissions. The Claimant gave live evidence. She also prepared a bundle of documents and a witness statement and made her closing argument.

3 The Tribunal made the following findings of fact from the evidence.

Findings of fact

4 The Claimant worked for the Respondent from 2017. Her sister and mother also worked for the Respondent at another branch. She worked as a salon assistant at the

Respondent's Brentwood branch. Usually this meant that she worked alone during her shifts. On those occasions she was required to answer the telephone, staff the reception, cash up and lock up the salon at the end of her shift.

5 Her set hours were 5pm – 10pm on Thursdays and 9am – 3pm on Sundays. This shift pattern suited her family childcare arrangements. Her husband works from home on Thursdays and was available for childcare at the times that she worked. She worked 11 hours per week. She would also often work overtime on weekends and evenings. Her availability to work overtime would be dependent on her childcare arrangements and would not include the standard 9am – 5pm working hours.

6 The Claimant's evidence was that she would also receive commission whenever clients used certain sunbeds or when she sold certain creams or courses to them. She became ill towards the end of her pregnancy and had occasion to refuse the offer of overtime.

7 The Claimant was off on maternity leave between 19 May 2019 and 18 February 2020. She has two older children who are now approximately 4 and 5 years old. The Claimant was willing and able to return to work at the Respondent following the end of her maternity leave. The shift pattern that she worked beforehand would have continued to suit her childcare arrangements and it is also likely that she would have been able to do occasional overtime on weekends and evenings as before.

8 The Claimant was aware that in March 2019 her mother resigned her employment at the Respondent's Gidea Park branch, following disputes with her line manager, Jill Leigh.

9 The last salary the Claimant received from the Respondent was at the end of April 2019. On her return home after giving birth to her baby on 31 May 2019, the Claimant received a letter sent to all staff by Carter Clark, liquidators informing her that she was redundant. There had been no notice given to staff that this was going to happen. There had been no consultation with staff and the letter came as a complete shock to the Claimant.

10 The Claimant immediately contacted her manager, Susan Wheawell and later, the area manager, Jill Leigh to find out if there was any further information and in particular, if they could tell her what was happening with her job. She was told that there was no more information that either manager could provide.

11 The Claimant was told by colleagues that they had been informed by the Respondent who continued the business that it would be business as usual and that they should not worry as they would all continue to be employed. There was another letter to all staff dated 3 June 2019 in the bundle from the Respondent informing them that it was going to 'take on' as many former employees as possible and that new contracts would be issued. Staff were informed that their pay dates would be unchanged. The Claimant is aware that the business did not close and that there was no change to her former colleagues' hours, pay or the salons' opening hours. At the same time, despite sending emails to her manager, to the area manager and to the owner of the business, the Claimant received no information on her position with the Respondent.

12 The Claimant was in a fragile mental state after receiving the news that she had been made redundant and that everyone else was continuing to be employed. This news had a detrimental effect on her abilities and she experienced stress and anxiety about money at a time when she should have been focussed on adjusting to caring for her new born as well as her other children. She applied to the government for maternity allowance which was not paid for 3 months. The situation caused the Claimant and her family to experience financial pressure and she found it difficult to focus on anything other than the anxiety of not having a job or enough money for her family.

13 On 10 July 2019, the Claimant was able to speak to Ms Leigh as she rang her from her husband's phone. She was aware that the Respondent had continued to employ all staff at the Brentwood salon apart from the Claimant. When asked why this was the case and whether she could come back at the end of her maternity leave, Ms Leigh informed her that she was sending out her P45. She then hung up her phone and terminated the call. The Claimant emailed Justin Spellar and Harry Foster-Jones who are the owners of the business. Mr Spellar conducted some correspondence by email with the Claimant but did not answer her question as to why she had been made redundant while everyone else continued to be employed. In an email dated 16 July, the Claimant informed him that she had started the ACAS conciliation service and was taking legal action, as she was entitled to. Mr Spellar replied and accused her of making idle threats and being uncivil. The Claimant was upset by his response to her attempts to find out what had happened to her employment or where she stood with the Respondent. She found his emails insulting and intimidating.

14 The Claimant is aware that her sister who was on sick leave following surgery, was not re-employed at the Gidea Park branch of the business after she received the redundancy letter.

15 The Claimant received her P45 on 31 July. She did not receive any holiday pay or pension pay between the end of April and the termination of her employment on 21 May 2019. The Claimant received her salary up to that date. The outstanding pension and holiday pay form the Claimant's claim for past losses together with notice pay as she had no notice that she was about to be made redundant.

16 The Claimant considered that the reason why she was made redundant and treated in the way that she had been by the Respondent was because she was pregnant and off on maternity leave at the time. She agreed with Mr Dracass that it was possible that it had something to do with her mother's departure from the business back in March 2019 but as she had not had any indication from the Respondent that it was related she could not say for certain that it was and did not see why it would.

17 The Claimant's evidence was that she had previously suffered from post-traumatic stress disorder when her father died, around the time of her first pregnancy and had been through counselling and medical support at that time. She had gained some experience in looking after her mental health through that experience which she used to assist her with coping with the stress of the termination of her employment. However, by the end of 2019, having had no answers from the Respondent, she was very stressed and needed help in coping. She attended her GP's surgery and was prescribed Sertraline which is anti-depressant medication, to help stabilise her anxiety and stress levels. She also accessed Talking Therapies provided by the NHS. By January 2020, the Claimant started the process of searching for new employment as her maternity leave was due to end in

February. The process of completing applications for work, attending interviews and having to explain why her job with the Respondent ended, put additional stress on her. She found it difficult to answer the questions as to why this job ended as she had never been given an explanation by the Respondent and did not think that she had done anything to warrant dismissal.

18 The Claimant's evidence was that the manner of the dismissal, being dismissed for no reason, the Respondent's treatment of her thereafter and the postponement of this remedy hearing which had been listed for a date in January; all contributed to a downward spiral in her health and her attendance at the GP's surgery on 23 January 2020 as seen on page 50 of the hearing bundle. The GP noted that the Claimant was feeling low, anxious and overwhelmingly sad. As everything else in her life was going well, it is highly likely that this was due to the matters listed above, her treatment by the Respondent, its failure to respond to the claim in time and the postponement of the remedy hearing which was done in response to its representations to the Tribunal. The GP's notes record that by February, the Claimant's symptoms had eased but the Claimant also confirmed in evidence that she has not fully recovered and continues to be on Sertraline to date.

19 The Claimant's search for employment resulted in her being offered two jobs in March 2020. The documents in the bundle show that she applied for these jobs in January which means that she lost no time in applying for jobs coming up to the end of her maternity leave. The Claimant was offered a role as a library assistant on 31 January 2020. She then had a conversation with the library about the proposed working hours. She asked whether there was any flexibility in the hours that they needed her to work.

20 The library assistant job was part-time with specified hours and she would have been required to have the ability to work evenings and weekends. She was to work 1 weekday evening and the balance of hours was to be worked during standard daytime working hours i.e. 9am – 5pm. The Claimant looked into childcare that she could arrange so that she could take up this job. Her husband would not have been able to look after the children every day as he would have needed to if she had accepted it. The cost of childcare for her 3 children would mean that effectively, all the money she earned at the job would be taken up to pay for childcare. She came to the decision that it would not make economic sense for her to take that job. The Claimant declined the job at the library.

21 The second job that she applied for around the same time was at Benhurst Primary School. They needed someone to be present on the grounds when a new tenant, a church group used the premises. The contract was for 4.5 hours on a Sunday morning and 3 hours once a month on a Friday evening. There was the possibility of additional cover or more work when other letting agents were on leave but that was not part of her contracted hours. The wages were to be paid at the rate of £13.12 per hour. The average number of hours she would have worked in a week would have been 4 hours 15 minutes. The average wage would have been £54.45per week.

22 The Claimant only did 2 shifts before the UK Government introduced the lockdown in response to the spread of Covid-19 on 23 March 2020. She did no further work for Benhurst. The Respondent were also closed during the lockdown and re-opened around the middle of July. The Claimant agreed that it was likely that she would have been furloughed had she remained in the Respondent's employment. She did not receive any

furlough pay from Benhurst School as she had only just been employed by them and therefore did not qualify.

23 Once the lockdown was lifted the Claimant began searching for employment. She found very little that she could do with the hours that she needed. She was technically still employed by the school. She had been home-schooling her children during the lockdown. The Claimant found alternative employment as a receptionist at a vet's practice, beginning on 28 September 2020. The pay and conditions mean that there is no continuing loss from that date.

Law

24 The Claimant is entitled under section 124 of the Equality Act 2010 to a declaration and an order that the Respondent pay her compensation. As this is a complaint of a discriminatory dismissal, the measure of compensation recoverable under the discrimination complaint will be all the loss that flows from (i.e. is legally caused by) the act of dismissal itself. This was also a claim of unfair dismissal under the Employment Rights Act 1996 as the Claimant had over 2 years' service.

25 The remedy is calculated according to the unfair dismissal headings but awarded under section 124 of the Equality Ac 2010. The Claimant is therefore entitled to her Basic Award, notice pay and a Compensatory Award which comprises of loss of wages and the difference between the wages from the Benhurst School and the wages from the Respondent up to the date she started with the Vets Surgery. 12 weeks of those will be subject to further deduction as the wages from the Respondent would have been reduced by 80%.

Injury to Feelings

26 Section 124 also gives the Tribunal power to award non-pecuniary damages which consist of injury to feelings, compensation for pain, suffering and loss of amenity (personal injury 'general damages'), aggravated damages and exemplary damages.

27 The Court of Appeal has given guidance on the assessment of compensation for injury to feelings. In the case of *Vento v Chief Constable of West Yorkshire police (No.2) [2002] EWCA Civ 1871* the Court set bands within which they held that most tribunals should be able to place their awards. Those bands have been amended through subsequent case law and more recently, they have been the subject of Presidential Guidance, after the consideration of the President of the Employment Tribunals The 2017 Guidance was uprated in March 2018 so that awards for injury to feelings in exceptional cases can be over £42,900. In cases of the most serious kind, the injury to feelings award would normally lie between £25,700 – £42,900. In the middle band, in less serious cases the award would be between £8,600 - £25,270; while for less serious cases such as for one-off acts of discrimination or otherwise, the award would be between £900 -£8,600.

28 Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, as stated in *Harvey*, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The issue is whether the discriminatory conduct

caused the injury, not whether the injury was necessarily a foreseeable result of that conduct. (*Essa v Laing* [2004] IRLR 313).

29 In making an award for injury to feelings a tribunal needs to be aware of the leading cases. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

30 The Tribunal considered the following case where a senior member of staff within the employing entity engaged in discrimination against the employee or aggravated the situation and how that featured in the level of compensation awarded to the employee. In the case of *Browne v Central Manchester University NHS Foundation Trust* (Manchester) (Case Nos 2407264/07, 2405865/08, 2408501/08) (8 December 2011, unreported) the claimant who was quite senior, suffered discrimination over two months until the termination of his employment. The relevant facts as far as our case was concerned were that some of the discriminatory acts were done by the deputy chief executive, that the treatment brought him close to mental breakdown and led to him having suicidal thoughts and that his personal and family life was affected. He was awarded £20,000 for injury to feelings and a sum for aggravated damages.

31 A tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We can consider it whether or not a party has asked us to do so. The interest is calculated as simple interest which accrues daily at the rate of 8%. For past pecuniary losses interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation. For non-pecuniary losses interest is calculated across the entire period from the act complained of to the date of calculation. The tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

Psychiatric injury

32 In the case of *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 the Court of Appeal held that if a victim of unlawful discrimination suffered stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to that unlawful act then the employment tribunal has jurisdiction to award compensation, as long as the requirements of causation are satisfied. In that case, the court's view was that in such a situation it would be wise for the complainant to obtain a medical report to show the extent of his injuries.

Judgment

33 On 10 January 2020, Employment Judge Lewis gave a judgment that the Claimant's claim succeeds. The Claimant's claim was of unfair dismissal and maternity and pregnancy discrimination. Those claims succeed.

34 The Tribunal's judgment on remedy is as follows:

35 The Respondent dismissed the Claimant on the grounds of redundancy having not consulted with her about it or given her any notice of it. The Claimant was entitled to be consulted and given notice of the termination of her employment. She was also entitled to be paid notice pay and to be paid wages, accrued holiday pay and pension between the end of her maternity leave and the date of termination of her employment.

36 As the Claimant accepted, it is likely that had she remained in the Respondent's employment, she would have been furloughed during the lockdown period of March – July/August 2020 as the Respondent's business was in a sector that was required to shut. The Respondent re-opened in July and has since expanded, refurbished and taken on new staff. In this Tribunal's judgment, it is unlikely that there was a true redundancy situation and had she not been dismissed because of her pregnancy, the Claimant would have remained in employment.

37 The Claimant was under a duty to mitigate her loss after the end of her period of maternity leave. She began looking for alternative employment before her maternity leave period ended. I accepted her evidence that she made applications for work, attended interviews and spent time and money on petrol and trains to do so. She was offered one job but it was not suitable for her and her family's needs. The Claimant has responsibility for her children and the Tribunal would not expect her to jeopardise their care by accepting employment that would mean that she was not able to care for them or arrange for a responsible adult to care for them.

38 The Claimant accepted the next post that she was offered that would have allowed her to do so. It is not unreasonable for the Claimant to seek employment that fitted around her caring responsibilities to her children. The Respondent failed to show that there were other jobs that she could have done in the area that would have also fitted in with her childcare and family responsibilities, as well as the job with the Respondent had. In this Tribunal's judgment, the Claimant wanted to work and was doing all she could to find employment. She accepted the first job that she was offered that fitted in with her skills and abilities and her family responsibilities. The offer of work with Benhurst School was received approximately one month after the offer of work with the library which shows that the Claimant wasted no time in obtaining suitable work.

39 In this Tribunal's judgment, the Claimant mitigated her loss.

40 The judgment was also that the Respondent had discriminated against the Claimant on the grounds of her maternity and pregnancy.

41 This caused the Claimant some stress and anxiety. That was compounded by the Respondent's actions in the way it communicated with the Claimant after she was informed that she had been made redundant. On many occasions after she received the letter she tried to speak to her managers but they would not speak to her. Her attempts to reach out to the owners of the business were met with no information but her legitimate queries were met with insults and intimidation. At a time when she had just had a new baby and should have been busy with it and looking after her family she was instead worried about money and left having to chase the Respondent for answers.

42 Although the medical evidence is limited, it does support the Claimant's live evidence that the postponement in January, which had been done at the Respondent's request so that it could defend the proceedings; had a significant impact on her already

upset mental state. She was already on prescription medication and had accessed mental health services for stress and anxiety.

43 The Respondent was not under a duty to comply with the ACAS Code of Practice as it was purporting to dismiss for redundancy.

44 Having considered the facts as found above and the Claimant's evidence, it is this Tribunal's judgment that the way in which the Respondent treated the Claimant by: -not consulting her about her redundancy, failing to give her notice of her redundancy, failing to speak to her on the telephone when she called and instead, hanging up on her; failing to answer her queries about why she was no longer employed by the company and instead, the owner of the company accusing her of being uncivil and threatening; all caused her injury to feelings. All of that and the way in which the Respondent conducted their response to this litigation by failing to respond to the claim and by seeking a postponement of the hearing in January and then still not defending or engaging with these proceedings until the remedy hearing, continued to hurt the Claimant's feelings and to cause her personal injury in the form of stress, anxiety about money and generalised anxiety.

45 This Tribunal's judgment is to award the Claimant £4,000 as injury to feelings and £1,000 as damages for personal injury.

<u>The total remedy due to the Claimant is as follows:</u>

Employment dates: 22 February 2017 – 21 May 2019 (2 years' service)
Age at effective date of termination – 32
Annual salary - £6489.53
Average weekly earnings £124.80

Basic Award – 2 x £124.80 = **£249.60**

Compensatory Award –

Past losses

Unpaid holiday pay (46 hours @ £8.23ph) = **£378.58**
Loss of pension (5% annually. 8 months loss) = **£216.32**
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Future losses

Between end of maternity leave and start of new employment (19.2.20 – 8.3.20)
£374.40 – loss of earnings
£32.84 – holiday pay
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Difference between this job and Benhurst Primary School over 29 weeks – 9 March – 28 September 2020 = (£124.80 - £54.45 = £70.35per week) in two segments

17 weeks x 70.35 = **£1,195.95,** and

12 weeks x £45.39 = **£544.68**
(From 23 March for 12 weeks the income from the Respondent would have reduced to 80% of £124.80 (£99.84). The loss is (£99.84 - £54.45 = £45.39))

Expenses incurred in job searching (attending interviews, petrol, train fares) - **£100**

Plus = Injury to feelings **£5,000**

The Claimant started her new employment in September 2020 so there is no claim and no compensation for losses after that date.

Total award = **£3,360.69**

We award the Claimant interest on her remedy. The Respondent did not submit that we should not do so. The Claimant is entitled to interest on her award. We calculate interest at the rate of 8% from halfway point - £3,360.69/2 = £1,680.34 x 8% **= £134.42**
£3,360.69 + £134.42 = £3,495.11

Injury to feelings and personal injury in the total of **£5,000.00 x 8% = £400.**

The Respondent is ordered to pay the Claimant the total sum of **£5,400 + £3,495.11 = £8,895.11.**

Employment Judge Jones
Date: 13 November 2020