EMPLOYMENT TRIBUNALS

Claimant: Mr P Withenshaw

Respondents: Department for Work and Pensions

HELD AT: Liverpool **ON:** 23 Match 2017 & 24 March 2017 (in chambers)

BEFORE: Employment Judge Shotter
Mr G Pennie
Mr PC Northam

REPRESENTATION:

Claimant: Mr S Eastwood, Counsel
Respondent: Ms C Palmer, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. Leave is given to the claimant to apply for a reconsideration of the Judgement & Reasons promulgated on 21 December 2016 out of time.

2. The claimant's application for reconsideration is successful. Paragraph 93 "On 7 August 2014 MyCSP confirmed the claimant was unlikely to meet criteria for injury benefit" is revoked and replaced by "On 7 August 2014 Capita confirmed the claimant was unlikely to meet criteria for injury benefit. The 7 August 2014 final report from Capita on the claimant's injury benefits included the following proviso; 'There is no formal appeal application in respect of this recommendation. The decision to award or deny any injury benefit lies with the delegated authority' i.e. MyCSP. The final decision was set out beyond doubt in a letter dated 17 October 2014 as follows 'Our actions are now complete as the application for Injury Benefit Award was unsuccessful. Mr Withenshaw's injury does not qualify for injury benefit under the rules of CSIBS.'" Paragraph 162 and the reference to the dismissal taking effect on

14 August 2014 is revoked and substituted by "24 October 2014." Paragraph 163 and the reference to the date 7 August 2014 is revoked and substituted by 17 October 2014, and the date 14 August 2014 is revoked and substituted by 24 October 2014.

3. The respondent is ordered to pay compensation for unfair dismissal in the sum of £7509.23 consisting of a basic award in the sum of £3267.90 and a compensatory award in the sum of £4241.33 comprising loss of earnings 27 May 2014 to 24 October 2014 @ £3533.98 and loss of pension contributions @ 16.7% £707.35. No compensation has been awarded for loss of statutory rights.

4. The respondent is ordered to pay compensation for unlawful disability discrimination in the sum of £1000 injury to feelings together with interest at 8% in the sum of £228.20 totalling £1228.20 (£1000@ 8% 2 years, 10 months & 1 week).

5. The respondent is order to pay to the claimant Tribunal fees totalling £1200.00.

REASONS

1. This is a Remedy Hearing following promulgation of the Tribunal's judgment and reasons sent to the parties on 21 December 2016, the Tribunal having found the respondent had unfairly dismissed and unlawfully discriminated against the claimant under Section 15 of the Equality Act 2010. The Tribunal also found the claimant would have been fairly dismissed under the principles set out in Polkey v AE Dayton Services Ltd [1988] ICR 142 HL on 14 August 2014.

2. The Tribunal has before it an agreed remedy bundle incorporating the claimant's Schedule of Loss and respondent's Counter-Schedule of Loss together the witness statement of the claimant, respondent's note on remedy, case law form both parties and the results of applying an inflation calculator produced on behalf of the claimant.

Application for a reconsideration of the promulgated judgment on liability

3. On behalf of the claimant an application was made for the Tribunal to revoke their Judgment in respect of the 14 August 2014 termination date and substitute it for a letter dated 17 October 2014 from the Civil Service Pensions MYCSP (enclosed within the original bundle) to the respondent confirming the application for Injury Benefit award was unsuccessful. It was submitted the Tribunal's judgment at paragraph 163, that by the 7 August 2014 the claimant's application for injury benefit was unsuccessful, is inaccurate as a result of the 17 October 2014 letter. Further, there was a discrepancy in the Tribunal's findings at paragraph 93 that on 7 August 2014 MYCSP confirmed the claimant was unlikely to meet criteria for injury benefit. Reference was made to the Occupational Health report dated 7 August 2014 (pages

384-385 in the bundle) that confirmed the decision to award or deny any injury benefit lay with the delegated authority.

4. Mr Eastwood submitted the reconsideration entailed the Tribunal considering the documents on their face; it was a “discrete point” and a matter of fact that did not hinder the Tribunal assessing the claimant’s injury to feelings award. His view was the documents before the Tribunal took precedence and the respondent should reasonably have waited until the 17 October 2014 letter, a matter of some 2 months, and this would have fallen within the band of reasonable responses. Mr Eastwood applied for the reconsideration to be considered out of time on the basis that the claimant was a litigant in person until February 2017 when solicitors were instructed.

5. On behalf of the respondent it was confirmed it was in a position to deal with the reconsideration application, despite receiving no notice of the same before today’s hearing, with a view to saving costs. No adjournment was sought. It was on this basis the Tribunal heard the application relating to the extension of time and the substantive merits. It was agreed the Tribunal could, if it were so inclined, revisit the evidence before it. It was suggested by Ms Palmer the Tribunal should not “remake” its overall assessment as to what would have happened and when the claimant could have been fairly dismissed, and no new evidence has been adduced to address this point. The correct test is what would have happened not what did happen.

6. Rule 70 of the Tribunal Rules 2013 provides Tribunal with a power to reconsider any judgment where it is necessary in the interests of justice to do so. Rules 71–73 set out the procedure. A judgment will only be reconsidered where it is ‘necessary in the interests of justice to do so'. An application for reconsideration of a judgment can be made during the course of a hearing. If the application is not made at a hearing, it must be presented to the employment tribunal in writing and copied to all the other parties. A Tribunal is empowered by rule 73 to reconsider a judgment on its own initiative.

7. Except where made at a hearing, an application for reconsideration must be presented in writing and copied to all other parties within 14 days of the date that written reasons were sent. The application must set out why a reconsideration of the original decision is necessary - rule 71. An application must set out why reconsideration of the original decision is ‘necessary' i.e. ‘necessary in the interests of justice' and why the original decision is regarded as wrong. There has been no such application by the claimant, but the point has not been taken up by the respondent to its credit..

8. The 14-day time limit may be extended (or indeed shortened) by virtue of the Tribunal's general power to do so under rule 5 of the Tribunal Rules 2013. It is not disputed the claimant, who was represented by solicitors from February 2017, was well-outside the time limits for making an reconsideration application. The reason for the late application is that no person, including the claimant, picked up the error until counsel received the papers prior to the remedy hearing.

9. Taking into account the error in dates, and the fact that the 17 October 2014 letter was before both parties at the time of the liability hearing and at no stage has

the respondent disputed its contents, acknowledging in evidence the claimant was advised of his unsuccessful injury benefit application following dismissal, it is just and equitable for the Tribunal to exercise its discretion to extend the time. It is notable had the claimant picked up the error earlier, which he did not, it is likely an application would have followed as the claimant was aware and had used the reconsideration process in the past.

10. The Tribunal acknowledges, with reference to the information set out in the 17 October 214 letter, paragraphs 93, 162 and 163 are incorrect. The Tribunal must give effect to the 'overriding objective' set out in rule 2 of the Tribunal Rules 2013 requiring it to deal with cases fairly and justly and on this basis the Tribunal revoke the original decision in paragraphs 93, 162 and 163 as set out below recognising also the interests of justice ground and overriding objective to deal with cases justly included finality of litigation, which was in the interests of both parties. It is notable from perusal of the hearing notes and statements, the document at page 399 of the bundle was referred to in the claimant's supplemental witness statement at paragraph 103 comprising of a total of 59 close typed pages of written evidence. There was no reference to the document in any other witness statements and nor was the Tribunal taken to it during the liability hearing by any party, including the claimant. The Tribunal has revisited all the statements, handwritten notes of the evidence given and witness statements in addition to the reading list and there is but the one reference to page 399 in the claimant's supplemental statement.

11. It is notable when giving evidence on cross-examination the claimant when asked the following in relation to injury leave; "…Dealt with by MyCSP…you fill in the form and it goes off to MyCSP…refused on 7 August the claimant answered "yes." The evidence pointed to the 7 August 2014 report amounting a refusal of the claimant's application for injury leave, and this was not a matter in dispute between the parties. In oral closing submissions Mr Williams, counsel appearing on behalf of the respondent at the liability hearing confirmed the claimant made his injury leave application end of May and "Capita made decision on 7 August…" However, it is now clear to the Tribunal from a close scrutiny of the 17 October 2014 letter sent from MyCSP to the respondent that this cannot be right. The letter confirmed; "Our actions are now complete as the application for Injury Benefit Award was unsuccessful. Mr Withenshaw's injury does not qualify for injury benefit under the rules of CSIBS." This communication can be contrasted to the 7 August 2014 final report from Capita on the claimant's injury benefits that includes the following proviso; "There is no formal appeal application in respect of this recommendation. The decision to award or deny any injury benefit lies with the delegated authority" i.e. MyCSP.

12. The Tribunal recognises the interests of justice should be exercised consistently with the right to a fair trial under Article 6(1) of the European Convention on Human Rights, which is incorporated into UK law by the Human Rights Act 1998. It took into account the fact the claimant was a litigant in person, and any failings by him to bring to the Tribunal's attention during cross-examination to the 17 October 2014 letter does not automatically entitle him to a second bite of the cherry and re-argue his case. Given the fact the claimant did refer to the 17 October 2014 letter in his supplemental witness statement, it is the Tribunal's view the reconsideration was justified on the basis that the import of the letter should have been clear to both

parties and the Tribunal; it was not. The information set out in the 17 October 2014 letter was important, despite the clear conflict between its contents (and the claimant's supplemental witness statement) when compared to the oral evidence given by him on cross-examination.

13. The relevant paragraphs to be revoked and substituted within the promulgated judgment sent 21 December 2016 are as follows;

Paragraph 93

14. "On 7 August 2014 MyCSP confirmed the claimant was unlikely to meet criteria for injury benefit" is revoked and replaced by "On 7 August 2014 Capita confirmed the claimant was unlikely to meet criteria for injury benefit. The 7 August 2014 final report from Capita on the claimant's injury benefits that included the following proviso; "There is no formal appeal application in respect of this recommendation. The decision to award or deny any injury benefit lies with the delegated authority" i.e. MyCSP. The final decision was set out beyond doubt in a letter dated 17 October 2014 as follows "Our actions are now complete as the application for Injury Benefit Award was unsuccessful. Mr Withenshaw's injury does not qualify for injury benefit under the rules of CSIBS."

Paragraph 162

15. The reference to the dismissal taking effect on 14 August 2014 is revoked and substituted by "24 October 2014."

Paragraph 163

16. The reference to the date 7 August 2014 is revoked and substituted by 17 October 2014, and the date 14 August 2014 is revoked and substituted by 24 October 2014.

Remedy

17. The parties are largely in agreement save for the issue of loss of statutory rights and assessing injury to feelings, although it is not disputed the claimant's case falls within the lower band.

Unfair dismissal

18. It was agreed the claimant was entitled to a basic award in the sum of £3267.90, a compensatory award of £1533.74 loss of earnings and £373.31 pension loss together with Tribunal fees in the sum of £1200 totalling £6374.95.

19. The claimant, having succeeded in his application for reconsideration is entitled to compensation for unfair dismissal from 21 May 2014 to 24 October 2014, an additional 10 weeks and 1 day to the loss of earnings agreed between the parties (amounting to £2000.24) in accordance with the agreed figures at paragraph 6 of the

respondent's note on remedy. Accordingly, the Tribunal has calculated the claimant's loss of earnings on full pay as opposed to half pay given the claimant's appeal against his injury benefits scheme succeeding. The pension contributions by the respondent of 16.7% have increased the claimant's pension entitlement by a further £334.04 in addition to the agreed sum of £373.31.

Statutory rights

20. On behalf of the respondent it was argued the claim of £435.75 representing 2 weeks gross pay capped and the statutory minimum for loss of statutory rights was not payable given the finding the claimant would have been fairly dismissed in any event. The Tribunal was referred to Puglia v C James & Sons [1996] IRLR 70 in which it was held if the Tribunal concludes that had the employee not been unfairly dismissed, he would have been fairly dismissed in any event at a later date, it will not be appropriate to give any compensation under this head. The employee would have had to look for a new job without statutory protection even if there had been no unfair dismissal.

21. The respondent also relied upon the fact the claimant, according to his own evidence, was unlikely to be on the labour market for some time. The claimant in oral evidence confirmed he had tried, it did not work out and he was "always hoping."

22. Mr Eastwood relied upon the EAT decision in Mr B Wolff v 1.) Kingston Upon Hill city council, 2) The Governors of Pickering High School Sports College UKEAT/0631/06/DA submitting a loss of statutory rights award was made when Mr Wolff had obtained employment and accrued service to obtain new protection for employment rights, and on this basis the claimant should also receive payment of loss of statutory rights compensation. The Tribunal agreed with Ms Palmer that Wolff can be differentiated from Puglia and the claimant's situation, in that the claimant would have been fairly dismissed by 24 October 2014 in any event, he would not have been in a position to acquire statutory rights before the fair dismissal on 24 October 2014 when he would have lost the statutory rights.

23. Had the respondent's argument been limited to Ms Palmer's second argument, namely, the claimant was unlikely to be on the market for some time due to illness or other reason, the Tribunal would have awarded compensation for loss of statutory rights on the basis that the claimant may well have worked sometime in the future, who can say when? If that eventuality were to pass the claimant would now need to be in continuous employment for 2 years before he acquired his statutory rights and it would not have been just and equitable to deprive him of compensation for such losses. It is notable at the liability hearing the claimant indicated he had been refused benefits on the basis that he was well enough to work, evidence that was not questioned by the respondent.

24. The claimant received benefits and these have been taken into account below.

Injury to Feelings

25. At the liability hearing the Tribunal had found the claimant's evidence to be unreliable and he was not always credible. Nevertheless, it accepted, with provisos, at this remedy hearing the claimant did suffer some injury to feelings, but they were not as substantial as in description set out within paragraphs 10 and 11 of his signed witness statement, and oral evidence. The Tribunal, on the balance of probabilities, concluded he was upset when the respondent dismissed as a result of his back condition, which the claimant believed, it could not legally dismiss him for. It is accepted by the claimant the medical records are silent; there is no evidence apart from the claimant's oral statement that he complained to his GP following dismissal, evidence the Tribunal did not accept as believable. There is no reference in the medical records to anxiety, distress, sleepless nights, and loss of libido; had there been complaints the Tribunal is of the view there would have been references to this by the GP, and the claimant's explanation that he had mentioned the complaints but they were not noted in his records is not credible.

26. The Tribunal considered the medical evidence from 27 May 2014 onwards and it is notable a number of sensitive medical issues were discussed; there was clearly an opportunity to raise loss of libido and it was not despite the claimant being prescribed medication and creams for rashes relating to physical ailments. An entry made on 11 September 2014 specifically records the claimant had lost his job and there were "no new problems." The Tribunal finds the claimant has exaggerated his symptoms to bolster up the injury to feelings claim.

27. The parties are not at odds as to which band of Vento applies, the claimant maintaining that an award within the bottom Vento band was appropriate. The respondent's position is that the case falls into the bottom of the bottom Vento band.

28. An award for injury to feelings is provided for by Section 119(4) of the Equality Act 2010 ("the EQA"). In the Prison Service and others –v- Johnson [1997] ICR 275 (a well-known race discrimination case) the EAT summarised some general principles underlying awards for injury to feelings, principals which the Tribunal in the case of the claimant had in mind. Injury to feelings are designed to compensate but not punish the respondent, it should not be so low as to diminish respect for the policy of the discrimination legislation or be so excessive as might be regarded as untaxed riches, with awards broadly similar to the range of awards in personal injury cases. The Tribunal took into account the value of everyday life of the sum (including a broad definition of inflation as submitted by Mr Eastwood), and the need for public respect for the level of the award made. It accepted the respondent must take a claimant as they find him, referred to by Mr Eastwood as the "egg-shell" rule; this was not disputed by Ms Palmer, although the extent of the claimant's injury to feeling was.

29. Mr Eastwood submitted the claimant did not take his dismissal lightly; he was "deprived of the sense" that the respondent did not go that "extra mile" given the accident had occurred at work; this had a "knock on effect" and was "contagious"

which resulted in the claimant's claims for age and sex discrimination. He argued had the respondent waited until October 2014 that would have given the claimant time to come to terms with the condition and have "exhausted every avenue to him." The Tribunal did not agree. Had the claimant been dismissed on 24 October 2014 and not 21 May, it would have made no difference to his feelings as the claimant believed he should not have been dismissed following an injury at work and was entitled to injury benefit and ill-health pension evidenced by the succession of appeals; the claimant's appeal against injury benefit succeeding this year.

30. In Vento –v- Chief Constable of West Yorkshire Police (Number 2) [2003] ICR 318 (referred to above as Vento) the Court of Appeal set down three bands of injury to feelings award describing some of the elements that could be compensated under this head encompassing subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression. The onus is on the claimant to establish the nature and extent of his injury to feelings. The Tribunal accepted the claimant experienced anger and upset as a result of losing his job and pay when he should not have done so because he was injured at work, but this was the full extent of his injury to feelings.

Inflation and the effect on Da'Bell

31. Since the Vento guidance was laid down in December 2002 the figures set out have been increased by 20% in accordance with Da Bell –v- National Society for Prevention of Cruelty to Children [2010] IRLR 19 and further increased by 10% following the Court of Appeal's decision in Simmons –v- Castle [2012] EWCA Civ 1288, a personal injury case. It was submitted on behalf of the claimant there should be a further increase in accordance with the inflation calculator produced adjusting the sum of £600 referred to in Da' Bell on 1 September 2009 to 1 January 2017 to £739.90. The respondent was taken by surprise by the claimant's argument for what appeared to be an increase to the Vento bands to take into account inflation over and above Da'Bell and Simmons.

32. Mr Eastwood referred the Tribunal to the EAT decision AA Solicitors Limited T/A AA Solicitors v Mr A Ali UKEAT/0217/15/JOJ inviting the Tribunal to increase the award on the basis that it does not need to wait for the "next Da'Bell," suggesting the lower banding should be £830 to £8130 taking into account a 10% uplift and adjustment for inflation. Mr Eastwood also proposed later in his closing submissions, when Ms Palmer had disputed the validity of the Retail Price Index relied upon by the claimant citing the Consumer Price Index (to which the Tribunal did not have details as it was held on Ms Palmer's phone, the respondent having been taken by surprise with the argument) the Tribunal would not need to set out a calculation and merely take into account that money in 2009 is worth less than today. The Tribunal has done so when assessing injury to feelings at £900 plus the 10% Simmons –v- Castle uplift.

33. The Tribunal is aware of Beckford –v- London Borough of Southwark [2016] ICR D1 EAT, the President of the EAT, Mr Justice Langstaff, held the 10% Simmons uplift does apply to awards for injuries to feelings made in the Employment Tribunal, quoting that Section 124(6) EQA requires in effect, awards to be comparable in the Employment Tribunal to those given in the County Court. The Tribunal is also

aware of the recent decision in Olayemi –v- Athena Medical Centre and another EAT 0140/15 where the Appeal Tribunal concluded that an Employment Tribunal had correctly applied the 10% Simmons uplift and the decision in Beckford, the most recent decision in the EAT and the most detailed in its review of the existing authorities, should be followed unless and until there was an authorative decision of the Court of Appeal. It is notable none of these decisions suggested the Vento bands should be increased further following Da Bell.

34. Taking into account the 10% uplift and with reference to other Employment Tribunal awards it was just and equitable given the particular circumstances in the case to award injury to feelings near the bottom of the bottom band in the sum of £1000.00

35. Interest was due on the award for injury to feelings at the sum of 8%, in accordance with the Employment Tribunals (Interest on awards in discrimination cases) (amendment) Regulations 2013. Claims presented to the Tribunal on or after 29th July 2015 attract a rate of interest at 8% on the claimant's losses up to judgment, Regulation 6(1)(a) the Employment Tribunals (Interest on awards in discrimination cases) Regulations 1996 provides that the period of the award of interest starts on the date of the act of discrimination complained of and ends on the date on which the Employment Tribunal calculate the amount of interest - the date of calculation. The Tribunal has assessed interest on the claimant's injury to feelings award of £1000 at 8% from, a period of 2 years, 10 months and 1 week at £228.20.

36. The respondent is ordered to pay compensation for unlawful disability discrimination in the sum of £1000 injury to feelings together with interest at 8% in the sum of £228.20 totalling £1228.20

37. The Recoupment Regulations apply the information required under Regulation 4(3) is as follows:

(a) the monetary award: £7509.23
(b) the amount of any prescribed element: £3533.98
(c) the dates of the period for which the prescribed elements relates; 21 May 2014 to 24 October 2014
(d) the amount, if any, by which the monetary awards exceeds the prescribed element: £3975.25

38. The following is a schedule setting out the calculations above:

Schedule

Basic Award

Agreed at £3267.90

Compensatory Award

Loss of net earnings of £196.10 per week

21 May 2014 – 14 August 2014

Agreed	£1533.74	
15 August – 24 October 2014 (10 weeks 1 day @ £196.10)	£2000.24	
Total loss of earnings:		£3533.98

Pension contributions

21 May 2014 – 14 August 2014

Agreed:	£373.31	
15 August 2014- 24 October 2014 £2000.24@16.7%	£334.04	
Total pension contributions:		£707.35

Injury to feelings	£1000
Interest on injury to feelings (21 May 2014 to 27 March 2014 @ 8%	£228.20

Total injury to feelings: £1228.20

Employment Judge Shotter
27.03.2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 March 2017

FOR THE SECRETARY OF THE TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2403203/2014

Name of case: Mr P Withenshaw v Department for Work and Pensions

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 31 March 2017

"the calculation day" is: 1 April 2017

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL
For the Employment Tribunal Office