THE EMPLOYMENT TRIBUNAL

SITTING AT: **CROYDON**

BEFORE: **EMPLOYMENT JUDGE J Crosfill**
Mr A Day
Mrs L Austin

BETWEEN:

Mr M SOLTANI

Claimant

-and-

NEW ENGLAND SEAFOOD INTERNATIONAL LIMITED

Respondent

ON: **10 January 2017**

APPEARANCES:

For the Claimant: **In person with the assistance of Mr M Salah**

For the Respondent: **Mr T Adkin (Counsel)**

Judgment

1. The Respondent is ordered to pay the Claimant the following sums by way of remedy:

   1.1. £1,000 in respect of a personal injury suffered by the Claimant on 12 November 2014; and

   1.2. £13,000 in respect of injury to feelings suffered by the Claimant from 1 December 2014

   1.3. £10,740.11 in respect of loss of earnings suffered by the Claimant in the period from 1 December 2014 to the date of the hearing

   1.4. Interest on the sums above in the sum of £3,277.44

2. The Respondent is further ordered to pay the Claimant the sum of £1,200 pursuant to regulations 75 and 76(4) of the Employment Tribunals (Constitution &

Rules of Procedure) Regulations 2013 in reimbursement of the fees he has paid to the Tribunal.

3. In total the Respondent is ordered to pay the Claimant the sum of £28,017.55.

4. The recoupment regulations do not apply to these sums as all awards are made under the Equality Act 2010.

5. The Claimant has liberty to apply to the Tribunal if any demand of tax is made by HMRC. Such application is to be made before 20 February 2019.

Reasons

The issues and procedural matters

6. At the outset of the hearing, and with the assistance and agreement of the parties we identified a list of questions which we needed to decide. It was plain that in the background to this present dispute there are other disputes between the parties. We have heard there are possible pending personal injury claims in the County Court and a further claim has been made in the Employment Tribunal. It is neither our role to decide those claims nor is our role to give any advice on whether they should be brought or indeed could be bought. We restricted ourselves to deciding the following issues.

   6.1. Whether the Claimant had suffered any injury to feelings or personal injury as a consequence of any unlawful discrimination and if so what is the appropriate award to compensate him for such loss?

   6.2. Whether the Claimant had suffered any loss of earnings as a consequence of any unlawful discrimination and in particular:

      6.2.1. whether his employment would have continued indefinitely; and

      6.2.2. whether he would have had periods of sickness absence during which he would have only received sick pay; and

      6.2.3. whether the Claimant failed to take reasonable steps to mitigate any loss.

   6.3. Whether there are any sums received by the Claimant:

      6.3.1. Either: by way of state benefits; or

      6.3.2. By way of earnings

      for which the Claimant should give credit.

   6.4. What interest is the Claimant entitled to on any award made; and

   6.5. Whether the Tribunal should make a fee award in favour of the Claimant.

7. At the conclusion of the liability hearing the Tribunal made provision for the parties to adduce a medical report for the purposes of illuminating the issue of

whether the Claimant would at some future point have suffered such a deterioration in his condition that he could have been lawfully dismissed. The Claimant has agreed to an examination but the Respondent had taken the view that it would not need any medical evidence. We therefore did not have any report expressly prepared for the hearing.

8. The Respondent had prepared a bundle for use by the Tribunal at the remedy hearing. The Claimant had prepared a witness statement annexed to which were some further documents. Having identified the issues the Claimant gave evidence on his own behalf and Serene Pasqualini gave evidence on behalf of the Respondent.

9. Having given an oral judgment which set out the basis of calculation the parties were invited to see if they could agree the sums to be paid. The Tribunal at the same time did its own calculations. There was limited agreement between the parties when they returned but a small dispute as to what sums had been received by the Claimant from the Respondent and whether he ought to give credit for wages to reflect wages "in hand". After some discussion and a useful explanation from the Respondent's new HR representative the Claimant agreed to accept the Respondent's position.

10. We had done our calculations quickly and indicated to the parties that the final figure would be given in these written reasons. There is some slight differences occasioned in the main by slightly inaccurate calculations of interest.

11. These reasons set out the calculations used by the Tribunal. The calculations are made on the assumption that the sums paid by the Respondent will not be taxable in the hands of the Claimant. If that proves not to be the case then for a period ending on 20 February 2019 the Claimant has liberty to apply to seek reimbursement in respect of any demand of tax. This means that he can write to the Tribunal and Respondent and ask for the matter to be relisted if HMRC make any demand of tax.

The law to be applied

12. The power to award compensation for acts of discrimination is found in Section 124 of the Equality Act 2010. The amount of any compensation is that which could be awarded by a judge of the County Court and is calculated on the same basis as a claim in tort. The Respondent should pay the Claimant such sum as would put him in the same position had the unlawful act not taken place. In ***Essa v Laing Ltd*** **[2004] IRLR 313** it was said that the correct approach to the assessment of a claim for damages for the statutory tort of unlawful race discrimination is that the complainant is entitled to be compensated for the loss and damage which arises naturally and directly from the wrongful act. According to the majority, there is no requirement to show that the particular type of loss sustained was reasonably foreseeable.

13. Any assessment of loss should take account of the possibility that the employment might have been lawfully terminated see ***Chagger v Abbey National Plc & Anor*** **[2009] EWCA Civ 1202**.

14. If a Respondent alleges a failure to mitigate loss then it bears the burden of showing that the Claimant has acted unreasonably see ***Cooper Contracting Ltd v Lindsey*** **UKEAT/0184/15/JOJ**

15. Awards for injury to feelings are purely compensatory and not a means of punishing or deterring employers from particular courses of conduct ***Ministry of Defence v Cannock*** **[1994] IRLR 509**.

16. Guidance as to the proper approach to awards for injury to feelings and/or awards for personal injury was given in ***Vento v Chief Constable of West Yorkshire Police*** **(No 2) [2003] IRLR 102**. The Court of Appeal was concerned to ensure that awards for injury to feelings remained in line with personal injury awards generally.

17. The levels of the awards suggested in ***Vento*** must be adjusted to reflect inflation. We must take into account the guidance in ***Da'Bell v NSPCC*** **[2010] IRLR 19** and ***AA Solicitors Ltd Trading v Majid*** **UKEAT/0217/15**.

18. Pending any resolution by the Court of Appeal there is controversy about whether or not the general 10% uplift in personal injury awards mandated by ***Simmons v Castle*** **[2012] EWCA Civ 1039** should be applied in the employment tribunal in discrimination cases. We are of the view that the EAT authorities that say that the uplift should be applied have more compelling reasoning than those which do not and we shall follow the former.

19. An award of damages made under Section 124 of the Equality Act attracts interest under Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Simple interest is awarded at the rate of 8% per annum. In the case of an injury to feelings award interest is awarded from the date of the discriminatory act. For loss of earnings interest runs from the mid-point of the period over which the losses accrue.

Findings of fact

20. These findings of fact must be read together with our judgment on liability. Essentially we have found that the Respondent failed to continue to provide the Claimant with light duties in circumstances where they could and should have done. Instead the Respondent sent the Claimant home without pay on 1 December 2014. The Claimant remained at home with no pay until he was dismissed.

21. The Claimant told us and we accept that he is married and that in late 2014 he and his wife were expecting their first child. In anticipation of the birth of their baby the Claimant decided that they needed to move out of their bedsit accommodation into a proper flat. They had just incurred the responsibility for rental payments of £1000 per month when the Claimant was sent home without pay. The Claimant's wife gave birth to their son Rami on 22 January 2015.

22. The effect on the Claimant of being deprived of his income was serious. He described feeling, with real justification, that he had been thrown on the scrap heap. The Claimant's serious back condition had already placed some strain on

the Claimant's relationship with his wife. One of the symptoms was a degree of impotence. This further strained the relationship.

23. The Claimant was told by Kasia Regulska that if he wanted to obtain sick pay he should continue to provide medical certificates that made it clear that he was unfit to do his original role. With that in mind the Claimant asked his GP to provide fit notes to reflect this. The earlier fit notes made no reference to being fit to work if light duties were available. The Claimant says and we accept that he was fit to do his office based role during this period.

24. The Claimant was desperate to provide for his family. The Claimant started to look for work. He did this by walking around cafes and shops distributing his CV. In August 2015 he obtained a job in a newly opened ice cream shop in Kingston. He described the manager as being extremely sympathetic. He said that he explained his lack of mobility and that she allocated him a role as a "Host". He would meet and greet customers queuing outside the shop. He was also expected to work on the cash till. He did that work until February 2016 when he was forced to give up. He said that he had done his best but at the end of each day he had been crying due to the pain levels he was suffering.

25. The Claimant then tried to find work as a waiter believing that this best matched his skills. He visited various cafes and was able to show the tribunal some evidence of this. The Claimant said that whilst there was work available the fact that he walked with a stick was a reason why he was not offered any work.

26. The Claimant was less proactive in seeking work after the middle of 2016. However, in preparation for the present hearing the Respondent prepared a witness statement from Serene Pasqualini which identified a number of administrative roles advertised locally. In response the Claimant made a number of applications for similar roles shortly before the hearing. He said that he had done so to demonstrate how unlikely it was that he would be offered such work. He explained, that other than the administrative work he had done for the Respondent, he had no track record of such work. He said that the difference between the Respondent and a new employer was that he had proved to the Respondent that he was useful.

27. The Claimant was dismissed by the Respondent in June of 2016. In our liability judgment we have identified that the decision to dismiss was taken when the Respondent's OH advisor was asked whether the Claimant would be fit to undertake his original role. Our findings were that there remained an office based role available to the Claimant and that it was an unlawful failure to make reasonable adjustments not to offer that role to the Claimant. It follows from that that we find that had the duty to make reasonable adjustments been complied with the Claimant would not have been dismissed on that date. We do not decide whether or not the dismissal was a separate act of discrimination but our findings as to loss may have a bearing on any claim arising from the dismissal itself.

Specific findings as to the Claimant's health

28. As stated above we did not have a medical report dealing expressly with the question of whether or not the Claimant's health would have deteriorated to an

extent that he would have been unable to undertake the light duties we have said he should have been offered. We did however have a number of sources of evidence that allowed us to reach the conclusions we set out below.

28.1. For much of the latter parts of 2014 the Claimant was fit enough to do office work. However, he was still very vulnerable as shown by the injury he suffered lifting moderate weights in the stationary cupboard.

28.2. The Claimant was forced to give up his job as a host in the ice cream parlour in February 2016. He did so in circumstances where he was desperate to keep going in order to support his family and we find that he only gave up this job because of the extreme pain that it caused.

28.3. The Claimant's witness statement for the hearing stated that at the date of the hearing he is unable to shop or go out without assistance as he now struggles with bending, walking on staircases and lifting objects. Later on he says "it is important to note that the Claimant's health situation has deteriorated significantly".

28.4. The Claimant's GP records disclose an increase in pain relief treatment and medication including treatment for a depressive illness.

29. We were invited by the Respondent to have regard to the fact that the Claimant was unable to remain seated for any significant period of time and gave his evidence whilst standing. It was said that this was a marked deterioration from the liability hearing during which the Claimant had been able to remain seated. We are very wary of making any judgement about health based on our own observations and assumptions and are not prepared to place any weight at all on these matters.

30. We do accept that the evidence we have set out above which comes from the Claimant himself and from his GP records shows a significant decline in the Claimant's health. We do not think that it is possible to say that a job as a host in an ice cream parlour can be equated with a role in the Respondent's office. The latter would allow some greater flexibility and permit a combination of sitting and standing that was noted in earlier OH reports as being beneficial. That said we find that by no later than the date of the liability hearing, 19 October 2016, the Claimant would have been so seriously incapacitated that, even with all reasonable adjustments, he would have been unable to do any further work for the Respondent for the foreseeable future. We find that the Respondent would have dismissed the Claimant as soon as it lawfully could have done and this is the same date.

Discussions and conclusions

Injury to feelings

31. We consider that the decision to send the Claimant home without pay could not have come at a worse time for him. He was just expecting his first child and because of this he had just taken on the additional financial responsibility of a flat. He was aware that there was work that he could usefully have done. We accept

that the Claimant was hurt and anxious. He did try and reason with Mr Sage and explained his circumstances but was brushed off.

32. In our view the failure to make adjustments, whilst not malicious, was serious. We find that the injury to feelings was also serious. We accept that we need to take care to separate the anxiety caused by back injury itself from that caused by the unlawful conduct. Even if the Claimant had not been sent home without pay he would still have been in pain, he would still have had his impotence and the consequent relationship difficulties. However, there is no doubt that the unlawful conduct made a very bad situation very much worse.

33. We believe that, having regard to the law set out above, this is a case which falls into the middle of the ***Vento*** bands. We consider that the injury is somewhere in the middle of that range. Taking all of the factors into account we believe that the appropriate compensation for the injury attributable to the failure to provide light duties should be £13,000. This also reflects such part of his depressive illness suffered as a consequence of the unlawful acts.

Personal injury – lifting incident on 12 November 2014

34. We considered whether to make a separate award in respect of the pain caused by the lifting injury occasioned when the Claimant suffered pain on 12 November 2014. We have found that this pain was transient and the Claimant was able to return to work within 5 days. There is no medical evidence that this was in any way responsible for making the existing injury worse in anything other than a transient sense. There is no medical evidence linking this incident with the later inability to work. We therefore approach this as a single transient exacerbation of the existing condition. Essentially we should compensate the Claimant for the increase in an already painful condition for a period of about 5 days. This places any award at the very bottom end of personal injury awards. We make a separate award of £1,000 to reflect both the physical injury and the injury to feelings occasioned by this incident.

35. We have reviewed the totality of the non-pecuniary awards that we have made. We have asked whether they are appropriate and reflect the value of money in today's world. The yardstick we found useful as a "reality check" was to compare the total sum awarded with the amount of the Claimant's rent. We consider that the sum that we have awarded is not out of proportion and, doing the best, we can £14,000 is the proper sum to award.

Lost earnings

36. We have rejected the suggestion that the Claimant would have only received sick pay for the periods where his GP's fit notes do not refer to amended duties. Our role in assessing what would have happened had the Claimant been offered the light duties we say he ought to have been offered has been hampered by the Respondent's decision not to take up the suggestion that they obtain a medical report. The fact that the Claimant was able to obtain alternative employment in an ice cream shop, carrying out duties we consider more arduous than his office based duties with the Respondent reinforces our opinion that he would have remained fit to do those duties for some time.

37. As set out above in our findings of fact we have concluded based on the various sources of evidence about the Claimant's condition that there has been a gradual deterioration in the Claimant's condition. That has led us to the conclusion that the Claimant could, and would, have been lawfully dismissed by the date of the liability hearing on 19 October 2016. The effect of this is, applying ***Chagger*** this is the point at which any loss, attributable to the discrimination, ceases.

38. We recognise that selecting the date of the liability hearing might appear arbitrary. We did not select that date at random but did our best with the available evidence. We remind ourselves that the assessment of damages is not always an exact science.

39. We do not accept that there was any failure to mitigate loss. The burden is on the Respondent to show that the Claimant acted unreasonably. We have found that the Claimant was desperate to provide for his family. His approach to finding employment by looking for work by handing out CVs was successful. He argued, and we accept, that it was reasonable to restrict his search for work to customer service jobs, mainly in the food industry, as this was work for which he was best qualified. His argument that the Respondent was in a unique position to assess his skills in an office environment appears to the Tribunal to be a good point. We accept that any other employer might not have been impressed with just a few months of office experience and that it was reasonable to concentrate on seeking work in other areas even where that was, as it proved to be, going to present greater difficulties given his condition. We agree that even if the Claimant had sought office work he was unlikely to have obtained it.

40. There was agreement between the parties as to the rates of pay applicable. In the year ending 31 December 2014 the Claimant would have earned £246.24 net per week. Year ending 31 December 2015 he would have earned £252.58 net per week. Year ending 31 December 2016 he would have earned £257.98 net per week.

    40.1. The loss of wages from 3 December 2014 to 31 December 2014 was £837.22; and

    40.2. The loss of wages for 2015 (full year) was £13,134.16; and

    40.3. The loss of wages from 1 January 2016 to 19 October 2016 was £10,989.95

    40.4. The total of the above is £24,961.33.

41. It was common ground between the parties that the Claimant should give credit for his net earnings received from the Respondent. These were agreed to be £7413.02. It was further agreed that the Claimant should give credit for the net sums he received from his work in the ice cream parlour which were £6,808.20. The Claimant was not in receipt of any benefits as a consequence of the failure to offer him work.

42. The overall loss of earnings less the sums for which credit must be given is £24,961.33 – (£7413.02 + £6,808.20) = £10,740.11.

Interest

43. The wording of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 gives a discretion to an employment to award interest. In the present case there is no reason whatsoever why that discretion ought not to be exercised in the Claimant's favour. If interest is awarded the rate is set at 8% and the periods over which interest is awarded is proscribed.

44. The first injury was the physical injury to the Claimant's back which occurred on 12 November 2014 for which we have made a separate award of £1,000. The period over which interest must be calculated (12 November 2014 to 10 January 2017) is 790 days. The interest is therefore 8% x 790/365 x £1000 = £173.15.

45. The injury to feelings award runs from the date the Claimant was sent home without pay (the date of the contravention of the Equality Act). That is from 1 December 2014 to the date of the hearing 10 January 2017. That is a period of 771 days. The interest on the injury to feelings award that is due is therefore 8% x 771/365 x £13,000 = £2,196.82.

46. The interest on the loss of earnings runs from the midpoint of 1 December 2014 and 10 January 2017. That is over a period of 385.5 days. The interest due on the loss of earnings of £10,740.11 is therefore 8% x 385.5/365 x £10,740.11 = £907.47

47. The total interest payable by the Respondent to the Claimant is therefore £3,277.44.

48. The calculations set out above constitute our decision and calculations for the purposes of Regulation 7 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

Fees

49. The Claimant had incurred fees of £1,200 in order to prosecute his claim before the Employment Tribunal. We make a costs order under Rules 75 and 76 (4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the Respondent repay the Claimant this sum. We do so in circumstances where the Respondent advanced no argument to the contrary and where the Claimant had succeeded in the main aspect of his case.

Employment Judge E J Crosfill
Date: 20 February 2017