



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. L Rock

**Respondent:** Department for Work and Pensions

**Heard at:** Sheffield **On:** 19 April 2017

**Before:** Employment Judge Brain  
**Members:** Mr D Fell  
Mr A J Senior

**Representation**

**Claimant:** Mr. P Mead (Counsel)  
**Respondent:** Mr. T Sadiq (Counsel)

## JUDGMENT ON REMEDY

**The judgment of the Employment Tribunal is that:-**

- 1 The respondent shall pay to the claimant the sum of £15,000 as compensation for injury to the claimant's feelings.
- 2 The respondent shall pay to the claimant interest in the sum of £455.10. The applicable interest rate is 0.5 per cent. Accordingly:-

- 2.1 Interest upon the injury to feelings award is in the sum of £311.25 calculated at the applicable interest rate for the period between 22 February 2013 and 19 April 2017. This is a period of 4.15 years. The calculation is:-

$$4.15 \times 0.5 \text{ per cent} \times £15,000 = £311.25$$

- 2.2 Interest upon the claimant's loss of earnings is calculated by reference to the mid-point between 27 May 2013 (being the date of expiry of the claimant's notice to terminate his employment with the respondent) and 16 December 2016 (the date upon which arrears of pay were paid to the claimant following his reinstatement). This is a period of 2.12 years. The arrears of pay were in the sum of £13,570.98 net. Hence, the calculation is:-

$$2.12 \times 0.5 \times £13,570.98 = £143.85$$

- 3 The judgment sum inclusive of interest in the sum of £15,455.10 shall be paid by the respondent to the claimant on or before 17 May 2017.

# REASONS

- 1 These reasons are provided at the request of the respondent's Counsel.
- 2 In a reserved judgment promulgated (with reasons) on 29 April 2016, the tribunal determined that: the claimant's complaint of disability discrimination by reason of a failure on the part of the respondent to make reasonable adjustments succeeded in part; that the respondent had treated the claimant unfavorably because of something arising in consequence of his disability (and which treatment could not be justified); and that the claimant had been unfairly dismissed by the respondent. The complaint that the claimant was dismissed upon grounds related to trade union membership or activities failed and was dismissed.
- 3 The claimant was employed by the respondent between 14 October 1985 and 22 February 2013. His contract of employment was terminated upon notice effective from 27 May 2013.
- 4 The case was heard on 28, 29 and 30 April 2014, and on 1 May 2014. The delay in the promulgation of the reserved judgment was by reason of matters referred to in paragraph 1 of the reasons.
- 5 The respondent reinstated the claimant with effect from 5 September 2016. The claimant was accorded continuity of employment. He was also paid arrears of pay for the period between 27 May 2013 and 5 September 2016. Arrears of pay were in the sum of £17,069.81 gross and £13,570.98 net. This sum was paid on 16 December 2016.
- 6 Two issues fell for determination by the tribunal at this remedy hearing. The first of these was the claimant's claim for compensation for injury to his feelings. The second issue was the question of interest upon compensation awarded for injury to feelings and upon the arrears of pay that were paid to the claimant on 16 December 2016.
- 7 We heard evidence from the claimant. The claimant was cross examined by Mr. Sadiq. The tribunal then received helpful submissions from each Counsel.
- 8 By section 124 of the Equality Act 2010, where an employment tribunal has determined there to have been an act of discrimination within the work place, the tribunal has jurisdiction to (amongst other things) order the respondent to pay compensation to the claimant. The amount of compensation which may be awarded corresponds to the amount which could be awarded by the county court under section 119. That provision empowers the county court to grant any remedy which could be granted by the High Court in proceedings in tort. An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

- 9 The principles to be determined when assessing awards for the injury to feelings for unlawful discrimination are summarised in Armitage & Others v Johnson [1997] IRLR 162. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
- 10 An award of injury to feelings is to compensate (citing from Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA CIV 1871) for "*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression.*" Lord Justice Mummery said (when giving guidance in Vento) that "*the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise..... tribunals have to do their best that they can on the available material to make a sensible assessment.*" In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson.
- 11 In Vento, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one off occurrence.
- 12 The appropriate sum for each band has been up-rated cases subsequent to Vento to take account of inflation and also to take account of the 10 per cent uplift for personal injury awards based on the Court of Appeal decision in Simmons v Castle [2012] EWCA CIV 1039. It was fairly accepted by the respondent that the weight of present Employment Appeal Tribunal authority is that the Simmons v Castle uplift applies to injury to feelings awards in the employment tribunal. Therefore, the amount appropriate for the lower band is now £660 to £6,600 and the amount appropriate to the middle band is £6,000 to £600 to £19,800. The amount appropriate for the top band is £19,800 to £33,000.
- 13 The claimant fairly accepts this to be a case not attracting an award in the top band. The first question for the tribunal therefore is whether as the claimant contends, his case falls in the middle band or whether, as the respondent contends, it falls in the lower band.
- 14 It is our judgment this is a case that appropriately falls into the middle band. The various kinds of discrimination that constitutes prohibited conduct (to be found in chapter 2 of part 2 of the Equality Act 2010) are made unlawful in the workplace pursuant to the provisions to be found at part 5. By failing to make reasonable adjustments and by dismissing the claimant the tribunal determined that the respondent was liable for the

conduct prohibited by sections 15 and 21 of the 2010 Act. Where that prohibited conduct constitutes and extends to the dismissal of the complainant then, in our judgment that cannot be said to be a less serious case falling within the bottom band of the Vento guidelines.

- 15 This is all the more so given the resources and standing of the respondent. The respondent has as one of its mission statements the supporting of disabled employees in work and the maintenance of disabled employees in the work place. We refer to paragraphs 81, 97 and 110 of the reasons.
- 16 We agree with the claimant's submissions that the respondent's attempts to downplay their conduct to one only a failing to allow there to be a trial period of the claimant working 10.5 hours per week is inappropriate in circumstances where not only was the claimant not permitted to avail himself this trial period but he was dismissed from his post.
- 17 Further, the respondent's conduct was contrary (as we say) to its own mission statements, constituted a failure to follow its own well drafted and clear policies, procedures and guidelines and was poorly managed. Those dealing with the matter on behalf of the respondent exhibited closed minds contrary to those policies, procedures and guidelines and contrary to proper decision making and principles of natural justice.
- 18 For these reasons, it is the judgment of the tribunal that this is a serious case. On the one hand, there is no question the respondent had not embarked upon a lengthy campaign of discriminatory harassment such as to merit an award in the top band. On the other hand however, the respondent's failings were so egregious that it cannot be properly categorised as a less serious case falling within the lowest band. This places the case therefore, in our judgment, firmly within the middle Vento band.
- 19 We find credible the claimant's account of the impact of the respondent's prohibited conduct against him. We remind ourselves that the claimant has a history of depression. Indeed, the respondent conceded that the claimant was a disabled person not only by reason of his physical impairment but also by reason of the mental impairment of depression. The history of mental impairment is significant and serious. We refer in particular to paragraph 36 of the reasons.
- 20 In that context claimant's account in his remedy witness statement of the matters of which he successfully complained causing a number of visits to see his general practitioner, of a loss of confidence, suffering disturbed sleep, impacting upon his relationship with his family and impacting upon his social life is entirely credible. The claimant has given an account consistent with his medical history. He has not sought to introduce a new feature not referred to at merits stage. He is a credible witness.
- 21 The subjective feelings described eloquently by the claimant in his witness statement are rendered all the more credible by two further features. The first of these is his length of service with the respondent. He worked for the respondent from 14 October 1985 until May 2013. This is a period of 27 complete years. In those circumstances, it is entirely plausible and credible that the claimant would suffer from hurt feelings consequent upon

the respondent's conduct towards him. The other feature is the claimant's role as a trade union official. Jayne Jordan found the claimant to be an effective trade union official (paragraph 87 of the reasons). Jayne Ellison-Briggs said that the claimant had "been around forever" in that role. We refer to paragraph 122. Therefore, the loss of the claimant's position with the respondent also led to his derecognition as a trade union official and the loss of not only of his principle role but also the trade union element of that role. In our judgment, that being a significant feature of the claimant's role within the respondent, it is entirely credible that he would suffer subjective to feelings of upset, frustration and anguish being the kinds of emotions for which an injury to feelings award is meant to compensate.

- 22 In our judgment what brings this case back from the very top of the middle band is the decision taken by the respondent to re-instate the claimant with effect from 5 September 2016. This was some 3 ½ years following his dismissal. The claimant had had to vigorously contest the decision which was resisted in the employment tribunal by the respondent. The claimant had a lengthy wait of a decision. That being said, the respondent's decision to agree to the reinstatement of the claimant in our judgment mitigates the respondent's position to some degree and prevents the case being properly assessed as one meriting an award at the very top of the middle band. The respondent's actions were belated, but it can be properly said on the respondent's behalf that they were at least prepared to countenance the re-instatement of the claimant and to take steps to bring this into effect. The respondent also agreed to restore the claimant's continuity of employment and to arrange for him to be paid remuneration that he would have earned had he worked over the period in question.
- 23 Mr. Sadiq prayed in aid further mitigation additional to the reinstatement and payment of back pay. We do not hold any of the following three points to be mitigation of the respondent's position:-
- (1) It was argued that there was a lack of clarity or consistency upon the issue of whether a trial period can amount to a reasonable adjustment. We accept that the Employment Appeal Tribunal cases of Environment Agency v Rowan [2008] IRLR 20 and Smith v Salford NHS Primary Care Trust UK EAT/0507/10 muddied the clear waters of Smith v Churchill Stairlifts Plc [2006] ICR 524. In the final analysis however, Churchill Stairlifts is Court of Appeal authority which, as Mr. Mead put it, trumps the EAT authorities. For that reason, in our judgment, the position was always clear and given the size and financial resources of the respondent a trial period objectively may well have served to alleviate a substantial disadvantage caused to the claimant by his disability.
  - (2) The respondent's disinclination to take formal action against the claimant between 2009 and 2011 (referred to paragraphs 36 to 48 of the reasons) is nothing to the point. The spotlight in this case was upon the respondent's conduct towards the end of 2012 and into the early part of 2013. However the respondent had chosen to handle matters prior to then cannot detract from the fact that the respondent is liable to the claimant arising out of the prohibited conduct towards him in the workplace.

- (3) The respondent also argued that it should be given a credit in an assessment of injury to the claimant's feelings for the fact that the respondent did not seek to claim credit against the back pay for the state benefits received by the claimant between May 2013 and September 2016. In defense of the claim for interest upon the back pay, the respondent sought to argue that the claimant had simply failed to negotiate the terms of settlement making provision for the payment of interest. The same argument can therefore be said to apply in respect of the respondent's failure to negotiate credit for the state benefits received by the claimant over the material time. The respondent's failure to seek that credit should not be held against the claimant when it comes to a non-pecuniary award. That would be unjust. Further, the payment of back pay without credit being given cannot in our judgment properly ameliorate the sense of frustration, worry and anxiety engendered by the respondent's discriminatory acts in any event.

24 In summary therefore, the tribunal's judgment is that this is a serious case and it falls within the middle Vento band. That band (uprated as appropriate) now has a value of between £6,600 and £19,800. The respondent has mitigated its position to some degree by the reinstatement of the claimant albeit that this came some 3 ½ years after the dismissal of him. We agree with Mr Sadiq that this tells against an award towards the very top end of the middle band. Against that by reason of: the claimant's length of service; the respondent having acted contrary to its mission statement; the respondent having failed to act pursuant to its own well written policies, procedures and guidance; and the close-minded approach of the respondent's managers the tribunal takes the view that this is a serious case. The circumstances gave rise to the claimant credibly portraying as an individual who has suffered injury to feelings and who experienced a range of subjective feelings and emotions such as those alluded to in Vento. That evidence is rendered credible by the claimant's history of mental impairment accepted by the respondent as a disability for the purposes of the 2010 Act. Taking all of these factors into account it is the tribunal's judgment that an appropriate amount to award in the claimant's favor to compensate for injury to his feelings is £15,000.

We now turn to the question of interest. The claimant presented his complaint on 17 May 2013. The employment tribunal is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by Regulation 3(2) is the rate fixed for the time being by section 17 of the Judgments Act 1838. This is currently an amount of 8 per cent. However, that rate only applies in respect of cases presented to an employment tribunal office after 29 July 2013. Accordingly, the claimant may only claim interest at the appropriate rate formerly prescribed by Regulation 3(2). At the relevant time this was 0.5 per cent.

25 By Regulation 6, in the case of any injury to feelings award, interest shall be for the period beginning on the date of the contravention or end of discrimination complained of and ending on the day of calculation. In the case of other sums for damages or compensation and arrears of

remuneration, interest shall be for the period beginning with the mid-point date and ending on the day of calculation.

- 26 For the purposes of both awards of interest, the day of calculation is today's date (that is to say, 19 April 2017 being the date of the remedy hearing). Mr. Mead urged upon us that Regulation 6(3) empowers the tribunal to alter the interest rate where otherwise there would be a serious injustice. The tribunal does not accept that submission. Regulation 6(3) empowers the tribunal (where it considers that there may be a serious injustice otherwise) to calculate interest for a different *period* to those prescribed for the injury to feelings and other awards of compensation. In our judgment, had it been the intention to empower the tribunal to alter the rate of interest then Parliament could easily have been made suitable provision. As Regulation 6(3) is confined to a power (where otherwise there would be a serious injustice) only to amend the periods in question (as opposed to the rate of interest) then, in our judgment, properly construed the claimant's submission upon this point cannot be upheld.
- 27 Accordingly, the appropriate interest rate is 0.5 per cent. For the injury to feelings claim, therefore, interest is awarded from 22 February 2013 to 19 April 2017. This is a period of 4 years and 56 days, that is to say 4.15 years. The correct approach therefore is to multiply 4.15 years by 0.5 (being the appropriate interest rate). That gives an effective non-compounded interest rate of 2.075 per cent. That percentage figure is applied to the award of £15,000 to give rise to an interest award in the sum of £311.25.
- 28 Interest upon back pay is calculated for the period for 27 May 2013 (being the date of expiry of the notice served upon the claimant by the respondent to bring his contract of employment to an end) and 16 December 2016 (being the date upon which the back pay was paid to the claimant). This is a period of 3 years and 203 days. One has to determine the mid point for that period which is 7 March 2015. From that date to 19 April 2017 is 2 years and 43 days (2.12 years). Again, one simply multiplies 2.12 by 0.5 to give non-compounded interest of 1.06 per cent upon the net back pay of £13,795.98. That is in the sum of £143.85.
- 29 Therefore, the judgment sum is in the total of £15,455.10. That sum shall be paid to the claimant by the respondent on or before 17 May 2017.

Employment Judge Brain

Date: 11 May 2017