EMPLOYMENT TRIBUNALS

Claimant: **Mr K Linley**

Respondent: **Job Earnshaw and Bros Ltd**

Heard at: **Leeds** **On:** **19 July 2017**

Before: **Employment Judge Bright**
Mr Roberts
Mr Hopwood

Representation
Claimant: Ms A W Nanhoo-Robinson (Counsel)
Respondent: Mrs P Hall (Counsel)

JUDGMENT ON REMEDY

1. The respondent shall pay to the claimant compensation for unfair dismissal of £13,106.30, calculated in accordance with the table below.

2. The Recoupment Regulations apply as follows to the unfair dismissal award:

    a. The monetary award £13,106.30.
    b. The prescribed element £1,806.30.
    c. The period of the prescribed element is 1 July 2016 to 12 October 2016.
    d. The amount by which the monetary award exceeds the prescribed element £11,300.00

3. The respondent is ordered to pay to the claimant compensation for discrimination of £21,539.06, calculated in accordance with the table below and which includes interest of £1,739.06.

4. TABLE

Unfair dismissal		Totals
Loss of statutory rights	Agreed at £500	
Basic award	Agreed at £10,800	

Compensatory award	15 weeks x £198.42 = £2,976.30 (Less earnings £1170) = £1,806.30	**£13,106.30**
Discrimination		
Injury to feelings:	£18,000 (of which £2,000 is to represent aggravated damages)	
10% uplift (Simmons v Castle)	£1,800	
Interest on injury to feelings	1.05 years x 8% x 19,800 = £1,663.20	
Pecuniary loss:	See compensatory award for unfair dismissal	
Interest on pecuniary loss	0.525 years x 8% x 1,806.30 = £75.86	**£21,539.06**
		£34,645.36

REASONS

1. These are the reasons for the remedy judgment set out above, which was delivered at the remedy hearing on 19 July 2017, pursuant to the request of the respondent.

2. The claimant's claims for unfair dismissal and disability discrimination (a failure to make reasonable adjustments and discrimination arising from disability) were upheld by a judgment sent to the parties on 2 May 2017.

Issues

3. The parties agreed the figures of £500 for loss of statutory rights and £10,800 for the basic award for unfair dismissal. The parties also agreed that the Tribunal would calculate interest and the uplift following **Simmons v Castle** 2012 EWCA Civ 1039 on any amounts awarded, as appropriate.

4. The areas of dispute between the parties were:

4.1. the length of time over which the compensatory award for unfair dismissal should be calculated;

4.2. the appropriate band and amount of injury to feelings, following the guidance in **Vento v Chief Constable of West Yorkshire Police** 2002 EWCA Civ 1871;

4.3. whether aggravated damages should be awarded and, if so, how much.

Evidence

5. The claimant gave evidence on his own behalf and called no further witnesses. The respondent called no witnesses. We were presented with a bundle of documents and some documents annexed to the claimant's witness statement.

6. Mrs Hall sought to present a spreadsheet which had been created by the respondent a week before the remedy hearing and which, she said, would assist the respondent's argument in relation to the claimant's entitlement to wages for the purposes of the compensatory award. Ms Nanhoo-Robinson objected to the document because it had only been disclosed that morning and the claimant was unable to check the figures. Having heard the parties' representations and looked over the document ourselves we were unable to understand the document or how it related to the respondent's argument. We therefore offered Mrs Hall the opportunity to put the respondent's argument to the claimant in cross examination, and determined that the spreadsheet would not be admitted in evidence as being of questionable relevance or probative value and disclosed too late.

Findings of fact

7. We accepted the claimant's evidence that he suffered depression and anxiety caused by the respondent's discriminatory treatment of him, including the refusal to allow him to work, the refusal to make the adjustment he requested and his dismissal. Although there was no medical evidence to support his evidence that he continues to suffer from those conditions, there was medical evidence in the bundle before us at the liability hearing which clearly showed that diagnosis and ongoing treatment. In cross examination he repeated his evidence from the liability hearing that he felt "as though someone had given me a good kicking" and described his meetings with Ms Carey leading to his dismissal like being "in an interrogation room answering for a crime I hadn't committed".

8. We accepted the claimant's evidence that his sickness following his depression was largely because of his depression. We find that, but for the discrimination, it was more likely than not that he would have been able to work for the respondent from 29 February 2016 if he had not been suspended and dismissed. In our judgment and reasons sent to the parties on 2 May 2017 we concluded that:

> *the Claimant was fit for work, albeit without heavy lifting, on and after 29 February 2016. Had the Respondent carried out the recommended individual risk assessment and made the adjustment requested, we find the Claimant would, in all likelihood, have successfully returned to work for a sustained period. However, given the history of his condition in our judgment the Claimant would have had further periods of absence, possibly as soon as June 2016. In particular, he would have had a period of absence for the operation in October 2016 and, given what we know about his poor recovery from that operation, we conclude he would not have returned to work thereafter* (paragraph 49).

9. We have seen nothing in evidence today to cause us to change that assessment. We conclude that it is likely that, had the respondent not discriminated against him, the claimant would have continued to work for the respondent and earned his normal wage from 1 July 2016 to the date of his admission to hospital on 13 October 2016. We did not accept, in our judgment and reasons on liability, that the claimant's operation would not have gone ahead had he remained in employment. The operation was already booked before the claimant knew he would be dismissed. We concluded that he would have been off sick from 13 October 2016.

10. It was not disputed that, owing to his previous levels of absence, the claimant's sick pay entitlement would have ended by 13 October 2016 and that he would not therefore have received any wages from that date. The claimant started doing gardening jobs after his dismissal and earned a total of £1170 which we have deducted from his losses.

11. Mrs Hall referred us to our findings of fact about the claimant's credibility at paragraph 18 of the judgment sent to the parties on 2 May 2017. We did not agree with her characterisation of those findings as being deeply critical of the claimant's credibility. Rather we recalled that we concluded: "On balance, we considered that there was insufficient evidence for us to conclude that his evidence generally was not credible, although his unsophisticated and occasionally unforthcoming manner could lead to an impression that he was being evasive and unhelpful".

The Law

12. The Employment Rights Act 1996 ("ERA") sections 118 to 126 provide for the calculation and payment of compensation for unfair dismissal, including a basic award and a compensatory award. The latter is to compensate the claimant for his actual loss proceeding from the dismissal and is subject to the duty to mitigate.

13. Section 119 of the Equality Act 2010 ("EQA") gives the tribunal power to order payment of such compensation as could be ordered by a County Court. Financial loss in discrimination cases is intended to put the claimant, so far as possible, into the position which he would have been in, had the discrimination not occurred. There is no upper limit on the amount that may be awarded. Loss caused by anything other than the act of discrimination is not recoverable and there can be no double recovery where the same loss is the subject of a compensatory award for unfair dismissal. Past financial loss is calculated to its

end or the date of calculation at the remedy hearing. The duty to mitigate loss applies.

14. Awards for injury to feelings are compensatory. We have had regard to the principles for assessing injury to feelings set out in **(1) Armitage (2) Marsden (3) HM Prison Service v Johnson [1997] IRLR 162 EAT** and **Alexander v the Home Office [1988] IRLR 190 CA**. We have also had regard to the bands set out in the case of **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA**, as increased in **Da'Bell v NSPCC [2010] IRLR 19 EAT** and as further increased as a result of the Court of Appeal's decision in the personal injury case of **Simmons v Castle [2012] EWCA Civ 1288**, confirmed to apply in discrimination claims by the EAT in **Cadogan Hotel Partners Ltd v Ozog EAT 0001/14**.

15. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803) give tribunals the power to award interest on award in discrimination cases. Interest is calculated as simple interest which accrues from day to day (Regulation 3(1)). The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 (SI 1669/2013), Regulation 3(2) provides that for claims presented to the tribunal on or after 29 July 2013, the rate of interest payable on the claimant's losses is 8 per cent.

16. For injury to feelings awards interest is calculated over the period beginning with the date of the act of discrimination complained of and ending with the date of calculation. For all other awards, interest is calculated for the period beginning on the 'mid-point date', and ending on the date of calculation. The 'mid-point' date is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the date of calculation.

Determination of the issues

Unfair dismissal

17. Ms Nanhoo-Robinson submitted that because the respondent had caused the claimant's depression it should not benefit from his absences and the claimant should receive compensation for his wages for the full period from his dismissal until 31 December 2016. We disagreed because, although we accepted that the claimant's depression was caused by the discrimination, the condition giving rise to the operation in October 2016 was not. Mrs Nahoo-Robinson made reference in her submissions to the claimant's operation being brought forward because he was no longer in work, but we did not recall that fact having been presented to us in evidence, either at the remedy hearing or at the liability hearing. In any event, we consider that the operation in October 2016 had been planned while the claimant was still employed (as found in our judgment and reasons on liability) and that the claimant would have gone ahead with it had he still been employed. No evidence was presented at the remedy hearing to suggest that the claimant had an ongoing entitlement to statutory or contractual sick pay at the time of his dismissal and it was not disputed that his entitlement had ended. Given his numerous sickness absences before he developed depression, we find that his sick pay entitlement would have expired by the time of the operation in October 2016 in any event. We therefore conclude that he did not therefore have any financial

loss from 13 October 2016 onwards. We have calculated the amount of the compensatory award based on the claimant's figure for his net wages.

18. The claimant's losses are therefore: 15 weeks x £198.42 =£2,976.30 less his earnings of £1,170 = £**1,806.30**

Discrimination

19. We find that the claimant's pecuniary losses arising from his dismissal are the same as (and are to be calculated in the same way as) the compensatory award above. As we have already set out that calculation and made a compensatory award, it would not be appropriate to allow double recovery. However, so as not to under-compensate the claimant, we have calculated the interest on that amount as set out above.

Injury to feelings

20. Mrs Hall argued that the claimant's injury did not justify an award above the lower band of **Vento**. Ms Nanhoo-Robinson argued that it fell within the middle band. We agreed with Ms Nanhoo-Robinson's submission that this was not a case where the discrimination took the form of a one-off comment or act, but took place over a number of months from the claimant's attempted return to work on 29 February 2016 to his dismissal on 1 July 2016. We found, in our judgment and reasons on liability, that Ms Carey did not accept that the claimant might be disabled, did not believe that he had had an accident at work and was aggressive and difficult in meetings. Her treatment of the claimant lacked empathy and that caused him distress. The failure to make reasonable adjustments and failure to carry out a risk assessment must have compounded his feeling that the respondent was not taking his condition seriously.

21. We accepted the claimant's evidence that the respondent's treatment of him and his dismissal caused his depression. He suffered the loss of congenial employment at the age of 61 when it might be more difficult for him to find alternative employment. He had been a loyal employee over a period of 45 years. We agreed with Ms Nanhoo-Robinson that almost any employee would be devastated to be dismissed in that manner after nearly a lifetime of loyal employment and that it was important not to trivialise the claimant's treatment by the respondent. We agreed with her assessment that the figure of £16,000 was an appropriate one reflecting the Vento guidelines and broad guidance offered by comparable cases in the past. Mrs Hall submitted that it was not just and equitable to award the claimant a sum which exceeded his annual salary as compensation for injury to feelings but, other than stating that the discrimination was of short duration, did not offer any other support for that submission. We consider that the sum of £16,000 is a proper evaluation of the injury caused to the claimant's feelings, given his length of service for the respondent, loss of congenial employment and resulting depression and anxiety.

22. Ms Nanhoo-Robinson sought aggravated damages on the basis that the respondent and Ms Carey were intent on discrediting the claimant from the outset and did everything in their power to do so, delighting in video

evidence of him building a fence, displaying an archaic approach to disability, trying to re-write history and that the respondent's behaviour was "disgraceful beyond belief". We did not wholly agree as, in our view, Ms Carey's behaviour to the claimant was not intentionally malicious and the damage resulting from that behaviour is compensated in the award of £16,000 set out above.

23. However, we did accept Ms Nanhoo-Robinson's submission that the manner in which the proceedings were conducted by the respondent up to and including this hearing was unnecessarily oppressive. We agreed with Mrs Hall's submission that an employer should not be penalised for vigorously defending a claim. However, this was an employee with an exceptionally long period of service who was being dismissed for incapability, not misconduct. We consider that, in those circumstances, an employee is entitled to expect to be allowed a graceful departure. There was no concrete evidence that the claimant had lied to the respondent or to the employment tribunal, yet the respondent persisted in seeking to undermine his credibility, refused to accept that he was disabled despite overwhelming medical evidence and even covertly videoed him to try to prove that he was not disabled, while at the same time arguing that he was too sick to carry out his role. We accepted Ms Nanhoo-Robinson's submission that trying to discredit and besmirch the claimant in front of this tribunal in that manner was oppressive and therefore met the threshold for us to consider whether to make an award of aggravated damages.

24. As to the aggravation to the injury suffered by the claimant, we accepted that the respondent's handling of the claim and, in particular, the refusal to accept that he was disabled and efforts to discredit him, compounded his injury, causing the continuation of his depression. We accepted the claimant's evidence about its effect on him set out in paragraph 7 of his witness statement. However, we did not accept that his injury was such as to merit the level of award Ms Nanhoo-Robinson sought. We considered that £2,000 was a more accurate reflection of the increase in the claimant's injury.

25. We therefore award a sum of £18,000 to compensate the claimant for his injury to feelings (of which £2,000 represents aggravated damages).

26. We have calculated the 10% uplift following Simmons v Castle and the interest on the injury to feeling as set out in the table above.

Employment Judge Bright

Date: 26 July 2017