



EMPLOYMENT TRIBUNALS

Claimant: Miss L J Bannister

Respondent: Commissioners for HM Revenue and Customs

Heard at: Leeds **On:** 15 and 16 August 2017

Before: Employment Judge Keevash
Mrs LJ Anderson-Coe
Mr M Taj

Representation

Claimant: In person

Respondent: Mr A Serr, Counsel

REMEDY JUDGMENT

The Respondent is ordered to pay to the Claimant compensation in the sum of £75,294.89

REASONS

Background

1 By a Reserved Judgment (“the Liability Judgment”) sent to the parties on 30 March 2017 the Tribunal adjudged that the Claimants’ complaints of disability discrimination succeeded. The matter was listed for a Preliminary Hearing to make Case Management Orders to prepare for this Hearing.

Issues

2 The issues for determination were identified at a Preliminary Hearing on 24 April 2017.

Hearing

3 At the hearing the Claimant gave evidence on her own behalf. The Tribunal also considered a bundle of documents.

Facts

4 The Tribunal found the following facts proved on the balance of probabilities:-

4.1 On 30 April 1990 the Claimant was employed by the Respondent and in 2001 she was promoted to the role of Administrative Officer

4.2 By a letter dated 6 January 2014 Ms Sandercock, Occupational Health Adviser, informed Miss Islam, the Claimant's line manager:-

“ ...

Miss Bannister advised me that she has suffered with depression for approximately 3 years. She tells me that she was prescribed medication by her General Practitioner in July 2011 but as she felt she had recovered she stopped taking the medication in January 2013.

Miss Bannister advised me that she became unwell again through 2013 and became anxious again in September when she was asked to move to a different desk in work. She visited her General Practitioner who advised her that she should not have stopped taking the medication for stress and anxiety and medication was commenced again ...

Outlook

Miss Bannister has a long standing history of mental health problems which is currently managed but he remains vulnerable to further episodes of this condition, the frequency or severity cannot be predicted...”.

4.3 On 23 February 2015 the Claimant began a period of sickness absence (see paragraph 11.13 of the Liability Judgment).

4.4 On 9 March, 30 March 8 April and 20 April 2015 the Claimant's GP signed Fit Notes in which he diagnosed “alcohol dependence and depression”. (see paragraphs 11.14, 11.16, 11.17 and 11.20 of the Liability Judgment).

4.5 On 27 April 2015 Ms Scaife informed the Claimant that she would be moving team (see paragraph 11.24 of the Liability Judgment).

4.6 By a letter dated 29 May 2015 Ms Inglis, Leeds City Council Social Worker, informed the Claimant:-
“Leeds Children's Social Work service received a referral regarding you family on 24/03/2015.

A Child and Family Assessment has been carried out and the decision has been taken to take no further action...”.

4.7 In or about June 2015 the Claimant began attending counseling sessions with Leeds Counselling. These sessions came to an end in August 2015.

4.8 On 8 October 2015 the Respondent informed the Claimant that he had decided to dismiss the Claimant. By a letter dated 20 October 2015 he confirmed that decision.

4.9 In or about October 2015 the Claimant was arrested and charged with child neglect and being drunk and disorderly. Her children were placed in the care of other family members. The Claimant came under the care of the Crisis Team before being discharged into the care of Forward Leeds. She was given a “conditional caution” and fine for being drunk and disorderly. The child neglect

charge was dropped.

4.10 By a letter dated 15 January 2016 the Respondent informed the Claimant that her appeal against dismissal had been rejected.

4.11 On 23 May 2016 the Claimant attended the final Family Court Hearing.

4.12 By a letter dated 30 June 2016 addressed to "To Whom It May Concern" Dr Humphris, the Claimant's GP, stated:-

"I am writing to confirm that this 44 year old patient of mine suffers from alcoholism. She also suffers from depression. Her problems with alcohol are long standing and are currently disabling. I am quite sure she is not fit for paid employment at present."

4.13 By a letter dated 11 August 2016 Jobcentreplus informed the Claimant that she had been placed in the Work related Activity group and that, therefore, there was a change in the Employment and Support Allowance rate payable.

4.14 By a letter dated 16 May 2017 addressed to "To Whom It May Concern" Dr Humphris stated:-

"...

I can confirm that Luisa Bannister is a patient of mine and has been since before February 2015. I can confirm that continually since that date to the present day she has suffered from alcoholism ...

I last saw her personally on the 15 May 2017 at which point she was still drinking."

4.15 By a letter dated 30 June 2017 Ms Cunningham, Head of Planning, Performance and Forecasting, informed the Claimant:-

"...

Firstly I would like to make clear that HMRC fully accepts the Tribunal's judgment. Whilst it was noted that managers did implement or attempt to implement some adjustments we failed to permit you to return to work in your existing work space. That was an adjustment that can and should have been made and was likely to have been beneficial to you. That in turn affected the lawfulness of your eventual dismissal. I wanted to express our apologies to you for letting you down in that way..."

Law

5 Section 124 of the Equality Act 2010 provides:-

"(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may –

(a) ...

(b) order the respondent to pay compensation to the complainant...

(6) The amount of compensation which may be awarded under subsection (2)(b)

corresponds to the amount which could be awarded by the county court or the sheriff under section 119...”.

Submissions

6 The Claimant made oral submissions. Mr Serr made oral submissions. He referred to **Cooper Contracting Ltd v Lindsey** [2016] ICR D3; **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] ICR 1170 CA; **Shaw v Metropolitan Police Commissioner** [2012] ICR 464 EAT; **Ministry of Defence v Fletcher** [2010] IRLR 25 EAT

Discussion

Loss of earnings to date

7 The Tribunal found and decided that the Claimant’s absence from work after 27 April 2015 was directly attributable to the Respondent’s unlawful action, namely its failure to make reasonable adjustments. She was paid full pay until 5 August 2015. Thereafter she was paid half pay until 7 January 2016, the date on which her dismissal took effect. Thereafter she received State Benefits.

8 Mr Serr submitted that the Claimant failed to take reasonable steps to mitigate her losses. After the termination of her employment the Claimant did not undertake any job search. In the bundle of documents there were many job vacancies which had been posted during the relevant period. The Claimant ought reasonably to have begun to look for alternative employment by July 2016 at the latest; she would have secured some employment by October 2016; she would have been paid at her pre-dismissal rate of pay by October 2017.

9 The Tribunal found that as a result of the Respondent’s unlawful action the Claimant lost the structure and routine in her life which was provided by work. It found and decided that in view of her medical history and condition it was reasonable for her to be unable to put her life in any order until such time as she knew the outcome of these proceedings. It, therefore, rejected Mr Serr’s submission. It decided that the Respondent had failed to show that the Claimant had failed to comply with her duty to mitigate.

10 The Tribunal found and decided that the Tribunal’s Judgment received by the parties on 31 March 2017 ought reasonably to have contributed to a restoration of the Claimant’s confidence. If she had begun her job search in April 2017, she would have found a similarly paid job by 30 September 2017. She is intelligent, numerate and articulate. Her skills were valued by the Respondent. In the Tribunal’s judgment those skills were readily transferable. It decided that it was not appropriate to make any award under this head in respect of any losses incurred after that date.

Future loss of earnings

11 In the light of the Reasons given in the previous paragraph, the Tribunal decided to make an award under this head to compensate for losses up to 30 September 2017.

Injury to feelings

12 The Tribunal accepted the Claimant’s evidence. It found that her feelings were injured as a result of the Respondent’s failure (over a period of 9 months) to make a reasonable adjustment. She felt belittled by the manner in which Mr

Horne spoke to her on 28 April 2015 (see paragraph 11.26 of the Liability Judgment). Her confidence was undermined. As the process continued and successive attempts to persuade the Respondent to change its mind failed, she was shocked and made to feel worthless (see paragraphs 11.32, 11.35, 11.37, 11.39, 11.40, 11.41, 11.46, 11.49 and 11.51 of the Liability Judgment). She was “gobsmacked” when she was dismissed and when her appeal was rejected. As a result of her dismissal she lost the structure and routine in her life which was provided by work.

13 The Tribunal considered the Court of Appeal guidance in **Vento v Chief Constable of West Yorkshire Police** (No.2) [2003] ICR 318. Three bands of award were established in that decision. Since then, the figures had been revised to take account of inflation (**Da’Bell v National Society for Prevention of Cruelty to Children** [2010] IRLR 19 EAT). It also considered the **Guidelines for the Assessment of General Damages in Personal Injury Cases (13th ed)** Judicial College. It was also aware that in **De Souza v Vinci Construction (UK) Ltd** [2017] EWCA Civ 879 the Court of Appeal decided that the 10% uplift provided for in **Simmons v Castle** should apply to Employment Tribunal awards of compensation for injury to feelings. Further, at the date of this Hearing a judicial consultation launched by the Presidents of Employment Tribunals for England & Wales and Scotland was under way although any new Presidential Guidance would only apply to claims presented after the date of such Guidance.

14 The Tribunal decided that the **Vento** middle band was appropriate for the award under this head. This was a serious case where the Respondent’s unlawful action caused the Claimant considerable distress and ultimately took away from her something which helped bring some order into her life, namely work. After considering the post-**Vento** developments (excluding the judicial consultation process), the Tribunal decided to make an award of £15,000 – an award which it regarded to be within the upper part of the middle band. In making that assessment it took into account the Respondent’s letter dated 30 June 2017. The Tribunal decided to apportion the award as follows:- £7500 in respect of injury suffered before the Respondent initiated the absence management process and £7500 in respect of injury suffered afterwards.

Aggravated damages

15 The Tribunal understood that when making an award for compensation for non-financial losses it could include an added element of aggravated damages. It considered **Shaw** where the Employment Appeal Tribunal identified three broad categories of case where an award might be appropriate:- where the manner in which the wrong was committed was particularly upsetting; where there was a discriminatory motive and where subsequent conduct added to the injury. The Tribunal reviewed its findings of fact in relation to the Liability Hearing and considered the Claimant’s evidence at this Hearing. It was concerned that, if it made any award under this head, it would be over-compensating the Claimant. The aggravating features of the Respondent’s conduct (for example Mr Horne’s behaviour) were already reflected in the award for injury to feelings. Accordingly, it decided to make no award under this head.

Personal injury

16 The Tribunal understood that it had power to award compensation for personal injury caused by unlawful discrimination. It found that the Claimant had suffered with depression for several years – at least from 2011 – and, after a spell in which she enjoyed better health, again in 2013. In February 2015 she

began a period of absence which was not caused by any unlawful action on the Respondent's part. Her GP provided Fit Notes which recorded a diagnosis of alcohol dependence and depression. The first unlawful act of discrimination occurred on 27 April 2015. The Claimant did not return to work as planned on that day. In fact she never returned to work.

17 The Tribunal was unable to find on the balance of probabilities that the Claimant's condition of depression was caused by the Respondent's unlawful action. It was clear that there were other potential competing causes such as her home pressures including the criminal and Family Court proceedings. In the absence of any medical evidence it was not possible to separate out the consequences of these factors from those attributable to the Respondent's unlawful action. In the Tribunal's judgment the Claimant had failed to prove that the Respondent actually caused any psychiatric damage. Accordingly it decided to make no award under this head.

Interest

18 The Tribunal decided that it was appropriate to award interest under the Employment Tribunals (Interest on Awards in discrimination Cases) Regulations 1996. The appropriate rate of interest is 8%. In relation to the injury to feelings award, the period for the award of interest starts on the date of the act of discrimination and ends on the day on which the Tribunal calculates the amount of interest. In relation to the award for loss of earnings to date, interest is awarded for the period beginning on the midpoint date (the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation) and ending on the day of calculation. The Tribunal decided that it was not appropriate to make any award of interest in respect of future loss of earnings, agreed pension loss and agreed expenses.

Pension loss

19 The parties agreed that the Tribunal should order the Respondent to pay the sum of £38,000.00 under this head.

Expenses

20 The parties agreed that the Tribunal should order the Respondent to pay the sum of £21.64 under this head.

Taxation

21 The Tribunal understood that under section 401 of the Income Tax (Earnings and Pensions) Act 2003 certain awards of compensation were taxable in themselves in so far as they exceeded £30,000. In such circumstances it would be appropriate to gross up the award.

22 The Tribunal considered that its awards in respect of pension loss and expenses were not liable to tax. Part of its award for injury to feelings was not referable to the Claimant's dismissal and was, therefore, not taxable. It followed that the total award did not exceed the £30,000 threshold.

Statement of employment particulars

23 The Claimant accepted that she had received a statement of employment particulars even though she had not been able to trace it for the purpose of these proceedings. She stated that she had not received statements setting out changes to those particulars. During her evidence the Claimant accepted that she had been given written notification of the changes to her terms and

conditions when she was promoted. The Tribunal decided that she had not shown that the Respondent had failed to comply with its statutory duty in any respect. Accordingly it decided that it was not appropriate to award any increase in the award of compensation.

Assessment

24 The Tribunal assessed compensation as follows:-

Loss of earnings to date

(a) 6 August 2015 to 7 January 2016

After deducting payments made

by the Respondent, her losses amounted to 3,072.40

(b) 8 January 2016 to 16 August 2017

84 weeks x £261.98 per week

22,006.32

Less state benefits received

7,926.50 14,079.82 17,152.22

Future loss

(c) 17 August 2017 to 30 September 2017

Continuing weekly loss of £159.83

6 weeks x £159.83 per week

958.08

Injury to feelings

(d)

15,000.00

Interest on (a) and (b)

(e) 6 August 2015 to 16 August 2017

$\frac{741}{2}$ days x $\frac{£17,152.22}{365}$ x $\frac{8}{100}$ =

1,394.73

Interest on (d)

(f) 27 April 2015 (see note 1) to 16 August 2017

842 days x $\frac{£15,000.00}{365}$ x $\frac{8}{100}$ =

2,768.22

Pension loss

(g) agreed in the sum of

38,000.00

Expenses

(h) agreed in the sum of

21.64
75,294.89

Note 1 This was the date when the Respondent began to discriminate against the Claimant. When announcing its Decision to the parties the Tribunal mistakenly adopted the start date in (e) for the purpose of its calculation. That error was subsequently found and rectified. As a result the award under this head has been increased.

25 Accordingly the Tribunal ordered the Respondent to pay to the Claimant compensation in the sum of £75,294.89.

Employment Judge **Keevash**

Date: 23 August 2017