Appeal No. UKEAT/0617/12/KN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 22 May 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR D BLEIMAN

MR P GAMMON MBE

COSTCO WHOLESALE UK — APPELLANT

MISS Z NEWFIELD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS RACHEL WEDDERSPOON (of Counsel) Instructed by: Messrs Pinsent Masons Solicitors 3 Hardman Street Manchester M33AU
For the Respondent	MR GEORGE MILLER (Representative) (Appearing under the Free Representation Unit)

SUMMARY

Equality – Disability – Duty to make adjustments – PCP – substantial disadvantage

The Tribunal adopted a PCP of its own, different to the PCPs defined by the issues, without addressing important evidence relevant to the existence of that PCP. The Tribunal did not give sufficient reasons for holding that the Claimant was at a substantial disadvantage although there was substantial and conflicting evidence on this issue.

Failure to provide written particulars – section 38 of the Employment Act 2002

The Tribunal did not err in law in its assessment of the appropriate award.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Costco Wholesale UK Limited ("Costco") against a judgment of the Employment Tribunal sitting in Watford, Employment Judge Manley presiding, dated 24 August 2012. By its judgment the Employment Tribunal dealt with claims brought by Miss Zara Newfield, a former employee.

2. Three aspects of the Employment Tribunal's judgment are the subject of this appeal: (1) the Employment Tribunal found that Costco had failed in its duty to make reasonable adjustments under the **Equality Act 2010** (EqA); (2) it awarded her £9,000 by way of compensation for injury to feeling; and (3) there was a further award of four week's pay, pursuant to section 38 of the **Employment Act 2002** (EA), for Costco's failure to provide employment particulars, contrary to section 1 of the **Employment Rights Act 1996** (ERA). The Employment Tribunal dealt with other claims, which are not the subject of this appeal. It upheld a claim for damages for failure to give a week's notice; it dismissed claims for discrimination arising out of disability and for sexual harassment.

The background facts

3. At the age of 14 Miss Newfield was diagnosed with systemic lupus erythematosus, commonly known simply as lupus. This is a disease of the auto-immune system. Fatigue is a well-known symptom. In a letter dated 17 September 2010 Professor Grimbacher, a specialist in clinical immunology, said the following:

> **"The claimant was diagnosed at the age of 14 with SLE. She has had ITP, anemia [sic], joint pain, fatigue and headache […]. She also has hay fever during the summer with rhinitis. She controls this with anti-histamines. […] Miss Newfield reported that she becomes dyslexic intermittently, loses the sense of time, feels spaced out and becomes forgetful. These changes have also been observed by friends and parents. […]"**

4. In her claim form Miss Newfield had described the main side-effects of the condition as being:

> **"Excessive tiredness, joint and muscle pain, dizziness and 'brain fog' (i.e. difficulty concentrating and processing information) […]."**

5. It was admitted by Costco for the purposes of the Tribunal that Miss Newfield was a disabled person. In these circumstances the letter of Professor Grimbacher was the principal medical evidence before the Tribunal.

6. Costco is a substantial business with some 6,000 employees in the UK. Miss Newfield was employed at its warehouse in Watford as an optical advisor with effect from 7 October 2010. She was not given anything that answered the description of employment particulars for the purposes of section 1 of the **ERA 1996**, although there was a 90-page employee handbook which the Tribunal described as "not, in our view, the most user-friendly of documents".

7. When Miss Newfield was employed she provided a CV which described her as being in good health. She may have mentioned lupus prior to being employed, but she did not state clearly that she had a serious health condition. At the time of her induction she completed an emergency contact information sheet that requires her to list health conditions. She mentioned lupus and the names of the medication she took, but this was an administrative document not seen by her manager.

8. Also when she was employed Miss Newfield said that she would work full- or part-time, although she wrote "under 40" on the form, meaning, we think, under 40 hours of work per week. The Tribunal found that neither Miss Newfield nor Costco were entirely clear what

hours were expected. It said that Mr Fleming, Costco's optical manager, "did not realise that she wanted fewer hours rather than more hours". The Tribunal found that she worked between 30 and 40 hours per week during her employment.

9. Costco allocated hours per week to employees on a rota. It is relevant at this point to note a paragraph within the witness statement of Mr Fleming about which the Tribunal does not seem to have made any specific findings:

> **"Zara completed a variety of different hour and shift combinations during the course of her employment. Within the Optical department, I communicate the rotas one week in advance, which gives the team the opportunity to raise any issues with me in good time. At no stage did Zara raise any concerns with me regarding the level of her rota hours or request for these to be reduced. In fact, Zara would routinely request for her rota hours to be increased in order that she could earn more during a particular week. Zara never raised any health issues with me or advised that she needed to work a limited number of hours for medical reasons. Had this been the case, I would have been more than happy to support Zara and ensure that her rota hours did not exceed her 24 hour minimum. However, Zara's approach was always 'the more hours the better' and, as with the other members of my team, I did my best to allocate the hours under the rota in the fairest way possible."**

10. Within a relatively short time of the start of her employment, Costco noticed that Miss Newfield was making mistakes in her work. A review document signed by Mr Fleming on 21 December recorded that she needed to reduce the hours she made. A further progress review dated 8 February 2011 again raised the question of errors, saying that an improvement was required.

11. Costco operated a system of counselling notices to cater for cases where the job performance of an employee did not meet its expectations or where an employee's conduct was in violation of its policies. At the time of each counselling notice there would be an interview. The employee would have an opportunity to comment on the notice itself. Miss Newfield received five counselling notices between February and June 2011, four of which related to poor performance and mistakes: two in March, one in April and one in June. Miss Newfield commented on at least one occasion to the effect that there was a lack of training. On no

occasion did she comment that the mistakes had anything to do with lupus or tiredness or the hours she was working.

12. On 26 June 2011 Miss Newfield made a further mistake, concerning the ordering of a frame for spectacles. This time she was suspended. A disciplinary hearing took place on 29 June, which she attended with her father. At this hearing Miss Newfield said, as set out in the record of the meeting:

> **"I have a long term illness (Lupus) which I had made aware to David in my first interview [sic]. I told him that I can't work full time because I get tired easily. I have been doing a 40 hour week since I've been here. I said to David I'm exhausted. I've worked every weekend for the last three months and on a part time contract. That is the reason I am making mistakes. Sometimes I lose focus and don't know what I'm doing."**

13. Mr Khan was handed letters, including the letter of Professor Grimbacher, which we have quoted. He adjourned for half an hour. When he returned he said he had checked the records for the past 15 working weeks. She had worked 36 hours or more on 4 weeks and 32 hours or less on the other 11 weeks. She disputed these times; however, he proceeded to dismiss her. He told the Tribunal that this day was the first time he had heard of lupus, that it was very late for her to raise it, and he decided not to look further into the matter. His reasons for dismissal included his opinion that she "lacks concentration and focus in the department".

14. Miss Newfield appealed against the decision. The appeal was determined on paper without a hearing. Her submissions mentioned her disability and said that her treatment was disability discrimination. Beyond stating that her CV said her health condition was good and that her emergency contact details said nothing about any request for restriction on hours, Costco's determination of the appeal did not address the question of disability.

The Tribunal's Reasons

15. The Tribunal set out in its Reasons a list of issues that had been discussed and agreed at a case management discussion. As regards failure to make reasonable adjustments, the list identified the PCPs in the following terms:

> **"6.1.1. What the relevant provision, criterion or practice is. The claimant contends there were two:**
>
> **6.1.1.1. R1's refusal to limit the claimant's working week to part-time hours even though she told R1 that she had to work part-time because of her disability, and even though another disabled employee (with diabetes) at the claimant's workplace was allowed to work part-time.**
>
> **6.1.1.2. R1's practice of dismissing employees with a prescribed number of counselling notices. The reason the claimant received the notices and was thereby dismissed was due to exhaustion caused by excessive hours."**

16. Concerning this duty the Tribunal's conclusions were as follows:

> **"58. Turning then to the failure to make reasonable adjustments at 6, the question here is whether the claimant has been put at a substantial disadvantage in comparison with people who are not disabled by the application of any provision, criterion or practice. The provisions criteria or practices identified in the Case Management Discussion at 6.1.1.1 and 6.1.1.2 are slightly different from our findings. We find that the first provision criterion or practice is the requirement that the claimant worked whatever hours she was on the rota which were on a large number of occasions between 30 and 40 hours a week rather than the 24 'guaranteed minimum'. The second provision criterion or practice is, and we accept that it is one, the first respondent's practice of dismissing employees with a prescribed number of counselling notices without looking behind that. Both these provisions criteria or practices did put the claimant at a substantial disadvantage for reasons related directly to her health condition. It is clear from all the evidence that tiredness was a symptom of her condition and likely to lead to her making errors. We have found that she was put at a substantial disadvantage by the requirement to work hours of between 30-40 per week and to receive counselling notices for mistakes made.**
>
> **59. We therefore go on to the next question, namely whether the first respondent took such steps as were reasonable to avoid that disadvantage. The two reasonable adjustments put forward by the claimant are those set out at 6.3.1 and 6.3.2, namely allowing her to work no more than 24 hours per we4ek and secondly disregarding mistakes made when working in excess of 24 hours per week. We are quite satisfied that the first respondent failed to take such steps as were reasonable with respect to the requirement to work those hours on the rota. In fact, there was no consideration at all at the point Mr Khan learned the disability on what adjustments might be made. What is more, on Mr Khan's evidence alone, he has said that it would have been possible for the claimant to have worked 24 hours. It was done for other people and there seemed to be no difficulty with it. We have no explanation for why that was not considered at the time. It is clear to us that on the claimant's evidence and there is no evidence to the contrary, it would have alleviated the disadvantage to her namely the disadvantage of feeling tired when working those hours. That led to the issuing of counselling notices and eventually to her dismissal.**
>
> **60. We are not sure what we can say about disregarding mistakes she made when working in excess of 24 hours per week. Plainly mistakes were made. It is conceivable that a reasonable adjustment could have been made with respect to that but we have heard few detailed suggestions. In any event, we are more than satisfied that a reasonable adjustment would have been to allow the claimant to restrict her hours to 24 hours and not require her to work more. We have heard really no explanation as to why that was not properly explained.**
>
> **61. The first respondent's last point is that they knew of the disability but did not know of the disadvantage and they could not be expected reasonably to know of that disadvantage. Our**

> **finding on that is that given that we are concentrating on the dismissal, it is quite clear to us that the first respondent did know of the disadvantage at the time Mr Khan took the decision to dismiss. He was told of the disadvantage by the claimant and it was contained within the medical reports which he had read. Mr Wishart on appeal clearly knew of the disadvantage, it was set out in detailed documents to him and he appeared to take no notice of it. Both those individuals could have sought further information by way of further medical evidence which we would normally have expected, possibly a referral to occupational health which is also very common for large employers. None of these matters were carried out and we find there was a clear failure to consider or make a reasonable adjustment."**

17. It is also relevant to a submission of Ms Wedderspoon, on behalf of Costco, to set out a part of the Tribunal's reasoning on Miss Newfield's claim of discrimination arising from disability. The Tribunal dealt with an issue that the dismissal of Miss Newfield was discrimination arising out of disability in the following way (paragraph 57):

> **"As for 5.1.2, that is the dismissal, we cannot find that there was unfavourable treatment connected to her disability in Mr Khan's decision to dismiss the claimant. In fact, if anything, Mr Khan largely ignored what he had been told about that health condition and we therefore cannot say that the unfavourable treatment alleged, namely the dismissal, was *because* of the claimant's disability. We therefore don't need to consider 5.2 whether the respondent can show a proportionate means of achieving legitimate aim, as we cannot find that there was discrimination arising from the disability."**

18. Concerning compensation for injury to feelings, the Tribunal referred to the leading cases – **Vento v Chief Constable of West Yorkshire Police** [2003] ICR 318 and **Da'bell v NSPCC** UKEAT/0227/09 – and said (paragraph 70):

> **"First, we considered what remedy to award for the disability discrimination failure to make reasonable adjustments. Whilst we accept that it was a one off incident as we cannot be sure that those decision makers at the first respondent knew of the Lupus until the dismissal interview, we take the view that the consequences of the failure were serious. It led to the dismissal of the claimant rather than an opportunity for her to continue in employment on fewer hours per week. Dismissal is always a serious matter and we take the view that the appropriate level is within the middle band of *Vento* and that the amount ordered should be £9,000."**

19. The Tribunal dealt with failure to give a written statement of employment particulars in paragraph 65 of its Reasons. It said there was a clear breach of section 1 of the **ERA 1996**. It said that the failure to provide written particulars had led to "clear confusion in the hearing", which was, in context, a reference to difficulty in establishing what contractual arrangements there had been concerning hours to be worked. It found that the provision of a handbook

containing more than 90 pages was "not a satisfactory way to communicate with employees". The Tribunal concluded as follows:

> **"This is a large employer. It should have documents which are clear and certain where possible and cover, as they are supposed to, all matters plainly as set out in s.1 of the [ERA]. We can see no excuse for their failure to do so and we intend to award the maximum of four weeks' pay for this failure."**

Statutory provisions

20. Sections 20 and 21 of the **EqA 2010** set out the basic framework of the duty to make reasonable adjustments. it is sufficient to set out the following:

> **"20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A´s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **21 Failure to comply with duty**
>
> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."**

21. The duty applies as between employer and employee by virtue of section 39(5) of the Act. Schedule 8 contains further provisions applicable to the duty under section 39. Paragraph 20 of Schedule 8 provides as follows:

> **"20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know–**
>
> > **(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
> >
> > **(b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

22. It is also relevant to set out section 15 of the Act, which deals with discrimination arising out of disability:

> **"15 Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if–**
>
> **(a) A treats B unfavourably because of something arising in consequence of B´s disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

23. The effect of section 38 of the **EA 2002** was that in the circumstances of this case the Tribunal was (1) obliged to increase its award by two weeks' pay unless there were exceptional circumstances that would make it unjust or inequitable to do so and (2) entitled if it considered it just and equitable in all the circumstances to increase the award by four weeks' pay (see section 38(3)(v)).

The PCP

24. It is logical firstly to consider a ground of appeal concerning the PCP that the Tribunal found to exist. Ms Wedderspoon's submission is that the Tribunal impermissibly changed the PCP from what had been agreed at the case management discussion: compare 6.1.1.1, quoted above, with paragraph 58 of the Reasons. This, she said, was a significant change, unheralded prior to the oral Reasons, on which no submissions had been heard. It brought into sharp focus the importance of Mr Fleming's evidence to the effect that the hours put into a rota were not set in stone. Mr Miller, on behalf of Miss Newfield, argued that there was not in substance any change in the PCP and that the Tribunal was entitled, having regard to the width of the claim form, to adopt the PCP that it did.

25. We prefer Ms Wedderspoon's submissions on this point; our reasons are as follows. The original claim form had put Miss Newfield's case quite widely and in more than one way. It had alleged "refusal to limit my working week to part-time hours" as a PCP, but it had also alleged that other disabled persons had been employed part-time and that there was a failure "to apply the same reasonable adjustment to my hours". The question of the PCP had been considered at a case management discussion. In respect of hours the PCP was alleged to be a refusal to limit the working week to part-time hours. No doubt there would be implicit in any such refusal a requirement to work longer hours, but the requirement would arise out of an express refusal.

26. It was, indeed, Miss Newfield's case that she specifically told Costco that because of her lupus she needed to work part-time. It was her case that this was agreed and that the agreement was not then honoured. The Tribunal's reasons fall some distance short of making a finding upon this case. A feature of its reasoning as a whole is that it tends to avoid resolving conflict between the evidence of Miss Newfield and Mr Fleming; rather, the Tribunal simply found that there was a requirement to work 30 to 40 hours and in this way altered the PCP that was under consideration.

27. However, in changing the PCP in this way the Tribunal, in our judgment, did not see the importance of the evidence of Mr Fleming about the rota. His evidence, in essence, was that an employee was not required to work hours merely because they were on the rota; that the rota was set out in advance; that an employee could request changes; and that Miss Newfield in fact did this by requesting additional hours. The Tribunal did not give an opportunity to the parties to make submissions as to whether the issue concerning the PCP should be altered, and it has made a finding on the issue without considering key evidence that would have been drawn to its attention.

28. In deciding whether a PCP placed Miss Newfield at a disadvantage compared to others, it is in our judgment essential to decide whether she was required to work hours on the rota or whether she was, as Mr Fleming says, entitled to come back to him and request changes. This has an impact on whether the PCP placed her at a substantial disadvantage. It is one thing to say to an employee who suffers from fatigue, "You must work the hours we put in the rota", another to say, "The hours we put on the rota are subject to discussion and alteration". The one faces an employee with a fait accompli; the other allows an employee to say if the hours are causing her difficulty, for example by reason of tiredness. It is impossible to decide whether the PCP placed her at a substantial disadvantage without first resolving precisely what the PCP was.

29. For that reason alone this appeal would have to be allowed and the matter remitted for consideration by a Tribunal. When the Tribunal comes to reconsider the matter, it is of course bound by the pleadings unless an application to amend is made and granted. It is not bound in quite the same way by the definition of an issue. If as a case develops it appears to the Tribunal that an issue derived from the pleadings should be put slightly differently, it can raise that matter with the parties and the issue can be redefined, so long as it can be done without unfairness and injustice. It will be for the Tribunal to consider whether in this case it is appropriate to redefine the PCP within the issues or indeed to decide any application for permission to amend, which there may be.

Substantial disadvantage

30. Ms Wedderspoon submitted that the Tribunal's finding that any PCP of Costco placed Miss Newfield at a substantial disadvantage compared to persons who are not disabled was open to challenge. The burden of proving such a substantial disadvantage lay upon

Miss Newfield (**Project Management Institute v Latif** [2007] IRLR 579). The Tribunal said only that:

> **"It is clear from all the evidence that tiredness was a symptom of her condition and likely to lead her to making errors."**

31. This, Ms Wedderspoon submitted, was an inadequate analysis. Miss Newfield had never blamed her tiredness, still less lupus, for her errors. If the Tribunal had analysed the individual errors, it would have found no basis to conclude that they were related to tiredness. The medical evidence did not link fatigue to the making of mistakes at work; the Tribunal's reasoning was perverse, or else it was not **Meek v City of Birmingham District Council** [1987] EWCA Civ 9 compliant.

32. Ms Wedderspoon further submitted that the Tribunal's findings on the question of the duty to make reasonable adjustments were in fundamental conflict with its findings concerning disability-related discrimination.

33. On behalf of Miss Newfield, Mr Miller submitted as regards the question of whether PCPs placed her at a substantial disadvantage compared to persons who are not disabled the appeal really amounted to no more than an argument that the Tribunal's decision was perverse or insufficiently reasoned. As to perversity, he argued that the Tribunal had evidence that it was entitled to accept both that the condition of lupus caused tiredness and that Ms Newfield was at a disadvantage in that she was likely to commit errors. This was her evidence, and it derived support from the medical evidence. As to reasoning, he argued that while the Tribunal's conclusion was to the point the parties knew perfectly well why it was reached. The Tribunal must have accepted Miss Newfield's evidence, including her evidence as to why she did not mention the matter at the time of the counselling notices.

34. It is convenient first to address Ms Wedderspoon's submission that there is a conflict between the Tribunal's findings on the question of the duty to make reasonable adjustments and its finding on the question of discrimination arising out of disability. In our judgment, there is a clear error of law in the Tribunal's reasoning concerning discrimination arising out of disability, which we have already quoted. The Tribunal rejected this claim on the grounds that it could not say that the dismissal was "because of" the disability, but this is not the test for disability-related discrimination. The question that the Tribunal should have addressed under section 15 is whether Costco dismissed Miss Newfield because of "something arising in consequence of her disability". If it had addressed this question, its conclusion would in all probability have been closely aligned to its conclusion on the duty to make reasonable adjustments, as will generally be the case.

35. We agree with Ms Wedderspoon that there is an apparent conflict or tension between the Tribunal's decisions on these two aspects of this case. This, in our judgment, is because the Tribunal erred in law on the section 15 question, but it does not follow that it erred also in law on the reasonable-adjustments question.

36. We turn, then, to Ms Wedderspoon's first and principal submissions on this issue. Here, to our mind, the Tribunal asked the correct question derived from section 20(3) of the **EqA 2010**. It answered that question in the last seven lines of paragraph 58 of its Reasons. The appeal can only to our mind succeed if the Tribunal's answers can be characterised as perverse or if it has not sufficiently complied with its duty to give reasons.

37. We are entirely unpersuaded that the Tribunal's conclusion was perverse. It was the Claimant's evidence at the Tribunal hearing that the errors she made were simply due to fatigue

and the long hours she had to work. This, coupled with the medical evidence and the admission of disability, was sufficient for the Tribunal to reach the conclusion it did without that conclusion being perverse. The test for perversity is a high one; see **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93.

38. However, although we consider that the Tribunal *could* properly reach the conclusion it did, we consider that there were powerful points also in the other direction and that the Tribunal's conclusion on an issue that was critical for the resolution of the case is not sufficiently reasoned. As to reasons, in **English v Emery-Reimbold & Strick Ltd** [2003] IRLR 710 Phillips MR stated that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The essential requirement of a judicial decision must meet this requirement; see also **Meek v City of Birmingham District Council** [1987] IRLR 250.

39. It is apparent that there was an important dispute at the Tribunal hearing as to whether Miss Newfield's errors were really anything to do with tiredness. There was substantial evidence both ways on this issue. Just as the Tribunal could properly have found in favour of Miss Newfield, so it could properly have found in favour of Costco, which could point to: (1) the CV, which said she had no health problems; (2) the failure to mention any question of tiredness, still less hours of work or lupus, when counselled about errors; and (3) asking for additional hours, as Mr Fleming said in his witness statement she did. We do not think the Tribunal's brief conclusions tell the parties how it resolved these issues.

40. When the matter is remitted, we think that the Tribunal will need to consider carefully the credibility of Miss Newfield and Mr Fleming, whose evidence on this, as on other issues, really cannot be entirely reconciled. It will need to factor into its reasoning the evidence and the points made by both sides. It will then be able to reach a conclusion that properly tells the

parties why it resolved the case as it resolves it. This task is, we think, best undertaken by a freshly constituted Tribunal that can hear evidence afresh on the reasonable adjustment issues and reach conclusions of its own.

Injury to feelings

41. Since the finding on primary liability is being set aside, the award for injury to feelings will fall with it. The Tribunal to which the matter is remitted can and should take evidence on this question and assess injury to feelings, if liability is established, for itself.

42. On the question of the award for injury of feelings, there is one point with which we should deal. Ms Wedderspoon submitted that the Tribunal erred in placing the award in the middle **Vento** band. She submitted that any breach was a one-off occurrence that belonged in the bottom band.

43. We would only say that it is not, in our judgment, an error of law of itself to locate a one-off occurrence in the middle band. Indeed, we would think that a discriminatory dismissal may be a good example of a one-off occurrence that will fall into the middle band. As Underhill J, then President, said in **Virgin Media Ltd v Seddington and Eland** UKEAT/0539/08, the **Vento** bands are in the nature of guidelines; they are not set in stone, and a one-off occurrence may fall in a higher band.

Section 38

44. An award under section 38 will fall to be made in this case in any event, because the Tribunal found proved a claim for breach of contract with which we are not concerned on this appeal. As regards the award under section 38, Ms Wedderspoon submitted that the Tribunal failed to consider how culpable Costco's failure was and failed to bring into account the fact

that Costco provided a comprehensive employee handbook. She submitted that an award of four weeks' gross pay was disproportionate, perverse and unfair and that it was irrelevant that Costco was a large employer.

45. We disagree with this submission. In our judgment the Tribunal made no error of law in its assessment of the award under section 38.

46. Although a statement under section 1 may refer to other documents, it is essentially person-specific; it is to tell a specific employee what his or her terms are in the required respects. Section 2 of the Act sets out how and to what extent particulars may refer an employee to other reasonably accessible documents. The provision of a massive 90-page handbook failed to meet the straightforward requirements of these provisions. The Tribunal had an example in point. Miss Newfield could not tell by reference to the handbook or anything else what the contractual term was concerning her hours of work. The Tribunal did not err in law in taking into account that Costco was a substantial employer. Inadvertence might to some extent have excused a small and inexperienced employer with limited resources, but no such excuse existed for Costco. We hope that Costco now provides for all its employees statements that comply properly with section 1 of the **ERA 1996**, and we see no error of law in this respect in the Tribunal's reasoning.

Conclusion

47. It follows that the appeal will be allowed in part. The question of whether Costco has failed in its duty to make reasonable adjustments will be remitted for reconsideration by a freshly constituted Tribunal.