EMPLOYMENT TRIBUNALS

Claimant: **Ms E Onigbanjo**

Respondent: **London Borough of Croydon**

Heard at: **Croydon** **On:** **19 to 21 July 2017 (Liability) and 8 September 2017 (Remedy)**

Before: **Employment Judge K Bryant**
Ms B C Leverton
Ms T Williams

Representation:

Claimant: In Person (19 to 21 July) and Mr B Uduje (of Counsel) (8 September)
Respondent: Mr S Crawford (of Counsel)

JUDGMENT ON REMEDY

1. The Respondent is ordered to pay to the Claimant the following sums:

   1.1 £12,000 for injury to feelings;
   1.2 £1,000 for personal injury;
   1.3 £317.69 for financial losses;
   1.4 £1,498.74 interest on the above non-financial losses;
   1.5 £18.31 interest on the above financial losses.

2. The tribunal makes no further order on remedy, but notes that the Claimant has paid fees in connection with this claim. In *R (UNISON) v Lord Chancellor* ([2017] UKSC 51) the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service ('HMCTS') to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances the tribunal will draw to the attention of HMCTS that this is a case in which fees have been paid and that they should therefore be refunded to the Claimant. The details of the repayment scheme are a matter for HMCTS.

REASONS

Introduction

1. The tribunal heard evidence and submissions on liability at a hearing from 19 to 21 July 2017 inclusive. In a reserved judgment and reasons the tribunal found in the Claimant's favour on three particular aspects of her claims. The case was listed for a hearing on 8 September 2017 to determine remedy. The above judgment and the reasons set out below were given orally to the parties at the conclusion of that remedy hearing. The parties having asked for written reasons, and the tribunal therefore sets out its reasons in writing below.

2. In addition to the documents available at the liability hearing (as to which see the liability judgment), the tribunal has now been provided with copies of a further bundle of documents, including an Amended Schedule of Loss and a number of medical records and reports, and skeleton arguments / written submissions from each of the Claimant's and Respondent's counsel.

3. The tribunal has also been provided with copies of two further witness statements, one from the Claimant and the other from Debbie Calliste, the Respondent's Head of HR and People Planning since August 2016. The Claimant gave evidence on her own behalf and Ms Calliste gave evidence on behalf of the Respondent.

Compensation – introduction

4. As noted above, the tribunal found in the Claimant's favour on three aspects of her claim. There were a number of other claims made in respect of which the tribunal did not find in the Claimant's favour.

5. The findings of unlawful discrimination, and in respect of which the Claimant is to be compensated, are as follows:

    5.1 The failure to implement Access to Work recommendations which amounted to an unlawful failure to make reasonable adjustments;
    5.2 The failure to carry out a pregnancy-specific risk assessment which amounted to unlawful pregnancy discrimination;
    5.3 The failure to reallocate one particular case as agreed at a meeting on 11 April 2016 which also amounted to unlawful pregnancy discrimination.

Compensation – injury to feelings

6. The tribunal has reminded itself of the guidance given by the Court of Appeal in *Vento v Chief Constable of West Yorkshire* ([2002] EWCA Civ 1871, [2003] ICR 318, in particular at ¶¶65 and 68, per Mummery LJ) and more recently by the Employment Appeal Tribunal *Al Jumard v Clywd Leisure Limited* ([2008] IRLR 345, EAT, in particular at ¶48 et seq, per Elias P).

7. As noted above, the tribunal has made three liability findings in the Claimant's favour, one on the disability aspect of her claim and the other two on the pregnancy side of the case. The findings of pregnancy discrimination concern a failure to carry out a pregnancy-based risk assessment and a failure to reallocate one particular case in and after mid-April 2016. It seems to the tribunal that the two pregnancy findings should properly be considered together when assessing injury to feelings in this case. One of them is effectively a manifestation of, or consequence of, the other.

8. The tribunal has reminded itself that it must compensate the Claimant for injury to her feelings caused by acts or omissions which amount to unlawful discrimination, but only for injury to feelings caused by those acts or omissions. Where injury to feelings was caused by other matters, then that should not form part of the compensation to be awarded to the Claimant.

9. In this case the position is somewhat complex. As noted above, the Claimant complained in this case of a number of matters, all of which had upset her, but only three of which have been found to amount to unlawful discrimination by the Respondent. Further, there were a number of other stressful matters in the Claimant's life at the material time which were not connected with her work and certainly not to the matters relating to her work for which she is to be compensated. A specific example, about which the tribunal heard for the first time at the remedy hearing, is an investigation that was being undertaken and had been ongoing for some time into allegations against the Claimant of benefit and Council Tax fraud, as a result of which efforts were being made to repossess her house. Such non-work matters must, the tribunal finds, have caused considerable stress and anxiety to the Claimant during the relevant period. Although that fraud investigation has now been completed, the Claimant told the tribunal that she is now subject to a further investigation which has led to her suspension from work with effect from the day she returned from maternity leave, ie 21 August 2017. The tribunal has not been told, and does not need or wish to know, the detail of this ongoing investigation; the parties confirmed to the tribunal that it was not connected in any relevant way with the matters for which the Claimant is to be compensated here. However, the Claimant did confirm that the notes made by a consultant psychiatrist of what she told her, as recorded in her report dated 5 September 2017 (prepared for the purpose of this hearing to support the Claimant's claim for personal injury as discussed below), are accurate; the notes record the Claimant saying that she was suspended from work on 21 August, that she has been interviewed under caution which upset her,

and that various allegations have been made against her including money laundering (although the Claimant told the tribunal that this allegation has now been withdrawn).

10. The tribunal must attempt, as best it can based on the evidence presented to it, to assess to what extent the Claimant's feelings were injured by the acts of unlawful discrimination identified above as opposed to other matters.

11. Looking first at the failure to make reasonable adjustments, ie the failure to implement the Access to Work recommendations, this was a failure that extended over a relatively long period. The Claimant chased a number of times but to little effect. She was told on occasions that items of equipment had been ordered but it then transpired that they had not. The tribunal does not suggest that the Claimant was being deliberately lied to but that there were crossed wires within the Respondent's organisation. The lack of progress caused the Claimant significant frustration and upset.

12. The Respondent says, and the tribunal accepts, that although the recommendations made by Access to Work were not implemented when they should have been, the effects of this were mitigated to some extent because of the informal arrangement between the Claimant and her manager such that she could work with a considerable degree of flexibility, working from home and adjusting her hours as necessary to accommodate her disability.

13. Had the tribunal been looking at this matter in isolation then it would have found that an award for injury to feelings in the top half of the bottom Vento bracket would have been appropriate. However, the tribunal is not looking at this in isolation, and is also mindful of the helpful guidance from the EAT to the effect that assessment of injury to feelings awards is not simply a mathematical exercise; it is more broad-brush. The tribunal has therefore gone on to consider the pregnancy side of the case.

14. As noted above, the tribunal found in the Claimant's favour on two aspects of her pregnancy discrimination claim but since they, and their effects on the Claimant, are so closely linked the tribunal will consider them together. The tribunal finds that the effect on the Claimant of the failure to carry out a pregnancy-specific risk assessment and to reallocate a particular case was more serious than the failure to implement the Access to Work recommendations. The Access to Work recommendations were concerned with the Claimant's disability, ie fibromyalgia, and the physical problems that this caused the Claimant in her work. The Claimant's concerns with regard to the pregnancy matters were not only for her own wellbeing but also that of her unborn child. The level of upset caused to the Claimant was therefore, the tribunal finds, greater.

15. Again, if the tribunal had been considering the pregnancy aspect of the case in isolation then it would have found that an award for injury to

feelings at, or somewhere near, the bottom of the middle Vento bracket would have been appropriate.

16. The tribunal has then sought to bring the two sides of the case together. Although the disability and pregnancy sides of the case are distinct in terms of the specific acts or omissions involved and to some extent also involved different considerations from the Claimant's perspective, the tribunal finds that there is inevitably some significant overlap in the resulting injury to the Claimant's feelings. Stepping back, as the Court of Appeal and EAT say the tribunal should at this stage, and looking at the case in the round, the tribunal finds that an appropriate and proportionate award for injury to feelings in this case is £12,000.

17. The tribunal notes here that the above sum takes into account inflation since *Vento* and an uplift pursuant to *Simmons v Castle* as discussed in the recent response to consultation by the Presidents of Employment Tribunals published on 4 September 2017.

Compensation – personal injury

18. The tribunal next considered the claim for personal injury, or to use the Claimant's phrase 'injury to health'. The claim is put in three ways: the Claimant says that the unlawful discrimination caused the following:

    18.1 A psychiatric / psychological injury;
    18.2 Pregnancy-related problems;
    18.3 Exacerbation of her fibromyalgia.

19. It was submitted to the tribunal on behalf of the Claimant that it was not necessary for her to adduce expert medical evidence to support a claim for personal injury. The tribunal accepts that in a suitable case it may conclude that a claimant has suffered personal injury and that it was caused by unlawful conduct by a respondent without the need for expert evidence. However, there does need to be sufficient evidence, whether or not from relevant experts, before such a finding would be justified.

20. The Claimant has put forward an expert report in support of her claim for psychiatric / psychological injury, namely a report dated 5 September 2017 from Dr V R Pandita-Gunawardena, Consultant Psychiatrist, who examined the Claimant on 4 September 2017. The report was prepared for the specific purpose of the remedy hearing in this case and it is noted in the report that the expert had been provided with a copy of the tribunal's liability judgment.

21. The report reaches a clear conclusion that the Claimant was (at the time of examination) suffering from a depressive illness. The report does not indicate when that condition first manifested itself. Nor does the report give any clear indication as to what caused the condition. The report refers to 'workplace issues' but does not give any further elaboration as to what that means. In particular, there is reference in the report to the initial

fraud investigation in terms of it being a 'work investigation'; although it seems that the investigation was being undertaken by a fraud team within the London Borough of Croydon it was not something instigated or taken forward by the Respondent in its capacity as the Claimant's employer and it is nothing to do with the unlawful discrimination found in this case. It is therefore impossible to tell from the report to what extent, if any, the unlawful discrimination as opposed to other 'work' issues caused the Claimant's depressive illness.

22. The tribunal has also considered the other available evidence. The Claimant's statement for the remedy hearing refers to a number of matters which caused her to be 'low in mood' some of which relate to the unlawful discrimination but others of which do not. She refers, for example, to something that occurred in November 2016 (¶2.10 of her statement) which she attributes to the Respondent as a 'continued … act of victimisation', but she has given no detail of what occurred in November 2016 and, in any event, the tribunal cannot see any link to any of the acts or omissions of unlawful discrimination that are the subject of the remedy hearing. The tribunal also notes the Claimant's reference (¶2.6) to 'post-natal depression' following the birth of her son in September 2016.

23. The tribunal has also examined the GP records included in the remedy bundle. These indicate, and the Claimant confirmed, that although she had had a few sessions of workplace counselling in the latter part of 2016, she was first given anti-depressant medication in February 2017 at which time it was recorded by the GP that the issue was 'stress at home' and that attempts were still being made to repossess her house. Again, in April 2017 the GP notes record that the main source of stress in her life was to do with her housing situation.

24. In all the circumstances, the tribunal has concluded that there is insufficient evidence for it to find that the Claimant has suffered any psychiatric or psychological injury, over and above injury to her feelings as discussed above, as a result of the acts or omissions of unlawful discrimination by the Respondent.

25. The tribunal next considered the claim relating to pregnancy-related problems. The Claimant has given evidence that she suffered from pregnancy complications. This is supported by references in GP fitness to work certificates at the material time. However, there is little, other than the Claimant's assertion, to suggest that these complications were caused by any conduct on the part of the Respondent. The tribunal notes that the expert psychiatrist was specifically asked for her opinion as to the impact of unlawful actions by the Respondent on the Claimant's physical and mental health during pregnancy and after birth but she provided no response on this particular issue.

26. The tribunal has concluded again that there is insufficient evidence to establish any causal link between unlawful discrimination and any pregnancy complications from which the Claimant suffered.

27. Finally, the tribunal has considered the contention that the Claimant suffered from a flare-up of her fibromyalgia as a result of the failure to make reasonable adjustments. Taking all of the evidence into account the tribunal has concluded that there is sufficient evidence to establish that the failure to implement the Access to Work recommendations caused a relatively minor increase in the Claimant's physical symptoms and that this continued for a period of about 3 months or so until she went on leave prior to the birth of her son. The tribunal has concluded that an award of £1,000 is appropriate in this case for pain, suffering and loss of amenity in this regard.

Compensation – financial losses

28. The Claimant has claimed two types of financial loss, namely (a) loss of earnings during two periods of sick leave and (b) loss of earnings to reflect a delay in completing her ASYE course.

29. The figures claimed for loss of earnings during sick leave are agreed as set out in the Amended Schedule of Loss. The only question is, therefore, whether the tribunal is satisfied on the evidence that unlawful discrimination caused the Claimant to take sick leave and therefore to suffer this loss of earnings.

30. The first period of sick leave in question was from 16 to 26 July 2016. The GP certificate covering this period gives pregnancy complications as the reason for absence. The tribunal has already found that the evidence does not support a finding that pregnancy complications were caused by unlawful discrimination in this case. This aspect of the claim therefore fails.

31. The second period of sick absence in question was from 22 to 28 August 2016. The certificate for this period gives work-related stress as the reason for absence. The tribunal finds that this was due to the ongoing effects of unlawful discrimination, in particular the continued failure to implement the Access to Work recommendations. The agreed sum of loss for this period is £317.69 and this will be awarded to the Claimant.

32. The second type of financial loss claimed is based on the Claimant's contention that she would have completed her ASYE course before or shortly after she started maternity leave and would thereafter have been moved to a higher grade with a higher salary. The claim as set out in the Amended Schedule of Loss is based on the Claimant completing the course in October 2016, ie one year after she started. The 'Y' in ASYE stands for 'Year' and so it would make sense that she could have completed the course in October 2016 at the earliest, ie a year after she started. However, she was already on maternity leave by then, her son having been born in early September 2016 and so it is unclear how she says she would have been able to complete the course in October 2016.

33. In any event, the tribunal finds that the Claimant was never realistically going to be able to finish the ASYE course before starting her maternity leave given the adjustments that were necessary (and which the Respondent had made, albeit informally) to the Claimant's working pattern. As noted in the liability judgment, there was an inevitable tension between the Claimant's desire to complete the course as soon as possible, which required her to have a full workload and regular interaction with her team and managers, and the need for her to work from home and/or take time off work to accommodate her fibromyalgia. The result, the tribunal finds, is that she would not have been able to complete the course before her maternity leave even had the unlawful discrimination not taken place.

34. A further question is when the Claimant would have completed the course but for the unlawful discrimination and when will she in fact complete it. The Claimant's maternity leave ended on 21 September 2017; it had originally been intended to end some months earlier but the date was put back at the Claimant's request. She was immediately suspended pending an investigation into matters that are not connected with the subject matter of this case and which, therefore, would have arisen in any event. It is wholly unclear when the Claimant is likely to return to work. When the Claimant does return to work she will, the Respondent says, be given an extension to complete her ASYE to reflect the time she has taken off as maternity leave. The tribunal cannot say, from the evidence presented to it, when the Claimant is likely to complete her ASYE or when she would have been likely to complete it but for the unlawful discrimination. The essential question for the tribunal is whether it can say that any or all of the unlawful discrimination has caused an identifiable delay in the Claimant completing the ASYE course. The tribunal finds that there is insufficient evidence to support such a finding.

Compensation – aggravated damages

35. The tribunal has reminded itself of the relevant case law concerning aggravated damages in the tribunal. The tribunal clearly has the power to award aggravated damages but it is a power that is exercised relatively rarely. The cases suggest that such an award may be appropriate where the Respondent has acted in a high-handed, malicious, insulting or oppressive manner, or where a Respondent is motivated by prejudice or where a Respondent's subsequent conduct is such as to have aggravated the effects of its previous discriminatory conduct, for example where the trial has been conducted in an unnecessarily offensive manner. The above is not an exhaustive list of circumstances when aggravated damages may be appropriate.

36. In this case the tribunal has found that the Respondent committed acts, or rather omissions, which amounted to unlawful discrimination and that its failures continued for some time; the effects of those failures have already been the subject of compensation as set out above.

37. The tribunal did find in its liability judgment that Ms Tomlinson, the Claimant's second line manager at the material time, had effectively relied on others, including the Claimant, to progress matters rather than becoming directly involved even when it seemed that matters had not progressed for some time. However, the tribunal has not found, and does not find, that the actions or inactions of Ms Tomlinson or anyone else within the Respondent's organisation were motivated by prejudice or malice or anything sufficient to support an award of aggravated damages. To borrow a phrase used during the course of the hearing, this was a case of 'cock-up' rather than conspiracy.

38. The tribunal has examined the evidence given at both hearings with care, but finds that the circumstances of this case fall some way short of what is required to justify an award of aggravated damages.

Recommendations

39. The Claimant has asked the tribunal to make two recommendations. In any event, the tribunal has considered whether recommendations should be made in this case.

40. The first recommendation suggested by the Claimant is to the effect that the Respondent should implement the Access to Work recommendations. As noted in the liability judgment, some, but by no means all, of the recommendations had already been implemented by the start of the Claimant's maternity leave. Another, the provision of a specialised chair and foot rest, has now been implemented; the Claimant says that she went to be fitted in August 2017.

41. The remaining recommendations were for a dedicated workstation, a health and safety assessment of that workstation and training in Dragon dictation software. The Respondent has assured the tribunal that the dedicated workstation is now in place awaiting the Claimant's return, that an initial assessment of the workstation has been undertaken which will be reviewed when the Claimant is back at work and that the software training has been lined up and a date will be set when the Claimant's return date is known. In other words, the Respondent has assured the tribunal that all matters that can be put in place before the Claimant is back at work have been put in place and arrangements have been made in respect of the outstanding training such that it will be provided as soon as she returns.

42. On that basis, the tribunal has concluded that a recommendation to implement the Access to Work recommendations should not be made. It would effectively recommend that the Respondent do things that it has assured the tribunal it has already done, or which cannot realistically be done until the Claimant is back at work. If, however, it transpires that everything is not in place when the Claimant returns to work (and the tribunal notes again the previous assurances given to the Claimant that items had been ordered when they had not) then it has been made clear

to the parties that this may result in further consequences either in the context of this case or by way of a further claim by the Claimant.

43. The second recommendation sought by the Claimant is for equalities training to be given to the Claimant's line managers. As recorded in the liability judgment, the Claimant's line manager at the material time is no longer employed by the Respondent and her second line manager has moved to a different role albeit still with the Respondent. The tribunal has considered whether it would be appropriate to recommend that Ms Tomlinson and/or the Claimant's new line managers should undergo equalities training but has concluded that the contents of this remedy judgment and of the previous liability judgment are sufficient sanction.

44. The tribunal has considered whether any other recommendations would be appropriate in this case but has concluded that they would not.

Tribunal fees

45. The Claimant has asked the tribunal to order the Respondent to pay her sums equivalent to the tribunal fees that she had to pay to bring these proceedings and to take them to a final hearing.

46. In light of the judgment of the Supreme Court in *R (UNISON) v Lord Chancellor* ([2017] UKSC 51), HMCTS has announced that it will refund tribunal fees to any party who has paid them since their introduction. The detail of the refund scheme is a matter for HMCTS rather than this tribunal. However, since the fees paid by the Claimant will be refunded by HMCTS the tribunal makes no order in this respect, but will, as set out in the remedy judgment above, draw to HMCTS's attention the fact that fees have been paid by the Claimant in this case and that they should be refunded to her.

Interest

47. Finally, the tribunal has considered, as it must, whether to award interest on the above compensation awards pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('the 1996 Regulations'). The parties have agreed that if interest is to be awarded then the date of the acts of discrimination should be treated as 31 March 2016 and that the appropriate rate of interest is 8% per annum.

48. The tribunal has concluded that interest should be awarded on all of the sums of compensation set out above. Interest on non-financial losses will run from 31 March 2016 to the date of the remedy hearing. Interest on financial losses will run for half of that period pursuant to regulation 6(1)(b) of the 1996 Regulations.

49. Interest will be awarded as follows:

    (a) Total award for non-financial loss = £13,000

Interest to be awarded for period of 526 days
526 ÷ 365 x 8% x £13,000 = £1,498.74

(b) Total award for financial loss = £317.69
Interest to be awarded for period of 263 days
263 ÷ 365 x 8% x £317.69 = £18.31

Conclusion

50. In summary, the tribunal has concluded that compensation and interest should be awarded in the following sums:

50.1 £12,000 for injury to feelings;
50.2 £1,000 for personal injury;
50.3 £317.69 for financial losses;
50.4 £1,498.74 for interest on the above non-financial losses;
50.5 £18.31 for interest on the above financial losses.

51. There will be no other award of compensation and no recommendation or order in respect of tribunal fees will be made.

Employment Judge Bryant

9 September 2017