Case Number: 2500166/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr D Ediale	**AND**	**Greggs Plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **7 & 8 June 2017**
Deliberations: 19 June 2017

Before: **Employment Judge Hargrove** **Members:** **Mr D Embleton**
Mr L Brown

Appearances

For the Claimant: **In person**
For the Respondent: **Mr Ryan of Counsel**

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is as follows:-

1 The respondent is ordered to pay a basic award for unfair dismissal of £1,916.

2 The respondent is ordered to pay to the claimant a compensatory award for unfair dismissal pursuant to section 123(1) for loss of earnings of £20793.73.

3 The respondent is ordered to pay to the claimant an award for injury to feelings for race discrimination pursuant to section 124(2)(b) and (6) of £1,500 plus interest thereon pursuant to regulation 6(1)(a) of the Employment Tribunals (Interests on Awards in Discrimination Cases) Regulations 1996 of £220.

REASONS

1 The claimant's original schedule of loss was dated **22 August 2016** and in it the claimant claimed loss of earnings to the date of the schedule and future loss of earnings totalling 52 weeks, together with a claim for injury to feelings and other ancillary sums. The claimant was at that time represented by solicitors. The solicitors subsequently came off record and the claimant represented himself at the liability hearing which took place in **September and October 2016**. Following that hearing and our deliberations the Tribunal made an order for the remedies hearing and an updated schedule of loss identifying how much compensation he claimed for loss of earnings and for injury to feelings. The claimant then sought further professional advice from a different firm of solicitors who after some delay produced a second schedule of loss on **27 January 2017**, almost exactly one year after the effective date of termination. This schedule of loss claimed the same or a very similar sum for one year's loss of earnings, but then claimed for race discrimination, and future loss of earnings for a further five years totalling £145,000. This was apparently based on the proposition that the claimant was and would continue to be unfit for any employment for that period of time, although that issue had not been raised during the preparatory period leading up to and including the liability hearing. An initial telephone hearing was listed on **27 April** and the claimant was ordered to explain the basis upon which he claimed such a long period of future loss requiring him to identify the illness/injury which he was claiming and how it was connected with the respondent. In response to that the claimant's solicitor produced four pages of printout from the GP records but no more. A second case management hearing was ordered to take place on **24 May** and in it the Employment Judge placed on record concerns about the propriety of such a large future loss claim particularly in the light of the inadequate medical records produced which they did not assist on the question of causation of injury. The claimant was then ordered to produce his full medical records and they are included within the remedies bundle. At the outset of the remedies hearing it became apparent that notwithstanding the extensive note included within the orders made on **24 May**, the claimant's solicitor, who had by now come off record, had not notified the claimant of the order nor provided him even with a copy of it.

2 The finding of the Tribunal following the reconsideration hearing on **7 June** was that only a single act of race discrimination remained as proved but that it had contributed albeit not to any great extent to the claimant's decision to resign and claim constructive dismissal.

3 We now set out the relevant background findings of fact as to the claimant's employment and other history since his resignation on **28 January 2016**:-

3.1 The claimant was paid up to the date of resignation. At that time his net earnings were £399.00 per week. He was working and had been for a number of years the weekend shift generally including Fridays and Mondays. The records showed that the claimant was off work from **Friday, 22 January to Monday, 25 January** just prior to his resignation. The records at page 234 indicate that he self certified sickness absence but we do not have any information as to the nature of the sickness.

3.2 The claimant travelled to Nigeria on **29 January 2016** (the day after his resignation – see page 48 of the remedies bundle). There is no clear evidence when the claimant booked the flight although there is a date on the booking document which might indicate that he booked it as late as **26 January 2016**. Nor is there any evidence that he booked at that time a return flight. Nor is there any evidence that the respondent was informed of his intention to travel to Nigeria before or at the time of his resignation. There is then a letter in the remedies bundle at page 49 from the medical director of a hospital in Lagos, Nigeria dated **24 June 2016** indicating that the claimant had presented at the hospital on **12 February 2016** with complaints of aggressive behaviours and withdrawal tendencies of 10 days duration. An assessment of depression with psychotic symptoms was made and he was placed on medication. The report continued that as of **24 June 2016** the claimant appeared a lot improved with a stable mental state but that he would need further evaluation in a health facility in the United Kingdom. In **late June or early July 2016** the claimant returned to the UK. Despite this, there is no record of him visiting his GP with depression until **October 2016**, some four months later.

3.3 On **11 July 2016** the claimant signed a temporary worker agreement with the Central Employment Agency in Newcastle. Notwithstanding that he did not report to his GP that he had depression until **October 2016**, appointments were made for him to see a Haematologist in **July**. For three weeks from **18 July to 7 August 2016** the claimant was assigned to work by the agency at Warburton's Bakers. We find that he left that job because the hours were unsuitable for his childcare commitments. The claimant's partner was also working. We find that the claimant's job with Greggs and its weekend shift hours had fitted in with her work commitments because he was able to deliver and collect the children from school during term time. The respondent argues, notwithstanding that reason for leaving the temporary agency work, the claimant could and should have found other employment of a similar manual nature to that which he had been working at the respondent albeit at a lower rate of pay. The basis for that contention was supported by evidence given by Mr Grayson on behalf of the respondent. The claimant says that following his leaving the job at Warburton's Bakers he had a conversation with a representative of the agency enquiring about the availability of further shifts but that he did not receive any response. We accept that he was offered some jobs but did not take them up either because they did not fit in with his continuing childcare commitments, or because he did not feel well enough. We will deal with the medical aspects of this difficult case later. The claimant's case is that because he was registered with an agency he was in effect working. We find that an entirely unrealistic attitude but we do accept that it is likely that the claimant's unusual working hours requirement would have made it difficult for him to have found even the sort of menial job spoken of by Mr Grayson.

3.4 We now turn to the claimant's medical history with particular emphasis on references to episodes of depression. The claimant's medical records from the GP do not predate **2011**. However in **May 2012** there is an entry

"Has been unwell recently with a lot of stress and bereavement. Also daughter has been unwell. Gets flashbacks to death of brother and mother. Difficulty sleeping. No appetite". A sick note was subsequently issued stating that he was not fit for work from **11 June 2012** with depression. There are mentions in the notes of splits with his wife during the **summer of 2012** and he continued on medication for depression and was referred to Talking Therapies. Although the claimant had started his employment with Greggs in **late December 2011** having been an agency worker prior to that date, there are no allegations of race discrimination, or any that have been found proved, at that time. The conclusion which we draw from that is that there was some other cause for the claimant's episode of depression from **May 2012** which had nothing whatsoever to do with his employment with Greggs. There were other periods of time off work with various physical impairments in 2014/15, again not work related. He was diagnosed on **30 October 2014** with a stress related illness and a two day fit note was issued. It was noted that he was intending to start looking for alternative jobs. There is an entry in **October 2015** for work related stress for which a fit note was issued from **19 October to 2 November** of that year. However he was not prescribed any specific treatment nor is there mention of depression. As already indicated, the claimant had some kind of psychiatric episode while absent in Nigeria from **12 February** until some time in **June 2016**. He did not refer to his GP on his return to the UK in late **July/ until early October** and the first mention of any psychiatric condition for which he consulted his GP is on **14 October 2016**, it was mentioned that he was taking his former employer to court for constructive dismissal. The claimant represented himself at the liability hearing in **September/October 2016** and the judgment was issued by the Tribunal on **30 November**. The claimant had been placed on antidepressants as from **14 October 2016** with an initial dosage of 15mgs once per day. This was increased to 30mgs per day from **15 November 2016** and to 45mgs per day from **7 February 2017**.

3.5 Returning to the chronology, there is evidence that as from **6 February 2017** the claimant was applying for jobs in a cleaning capacity (see page 57 onwards). We find that his wife was making enquiries and applications on his behalf online. It is clear that there was tension in the family household possibly because the claimant was not bringing an income into the house. Sometime prior to **22 February 2017** there was a violent argument between the claimant and his wife and he left the house and was made the subject of a restraining order (see page 71A). The claimant has had problems with accommodation since that date. The medical records indicate that the claimant was feeling better following the result of the liability hearing in **December**. However on **10 January 2017** the claimant visited his GP having learned that the respondent had applied for reconsideration of the Tribunal's decision.

4 The principal issues raised by the respondent were that there was no or no sufficient evidence that the claimant's episodic depression was caused by any act of race discrimination and in particular not that single act which remains following the reconsideration hearing; and that the claimant failed to mitigate his

loss by finding suitable alternative employment (similar to that at Greggs) which, on the basis of Mr Grayson's evidence he should have been able to find without much difficulty. We remind ourselves that once a claimant has shown a loss of earnings flowing from his dismissal, it is up to the respondent to prove on the balance of probabilities that the claimant has failed reasonably to mitigate his loss by finding alternative employment or otherwise.

We have a choice here of making an award for compensation either under the provisions in the Employment Rights Act in respect of the unfair constructive dismissal, or for discrimination under the provisions in the Equality Act 2010. The regime under the Employment Rights Act entitles the claimant to a basic award calculated in accordance with section 119. That figure is agreed between the parties at £1,916. Secondly the claimant would be entitled to a compensatory award under section 123(1). That materially provides:-

> "The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".

The equivalent compensatory award provision in the Equality Act is contained in section 124(2):-

> "(2) The tribunal may –
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (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 under section 119".

In short section 119 states that the County Court has power to grant any remedy which could be granted by the High Court –

> "(a) in proceedings in tort …".

And then at subsection (4):-

> "An award of damages may include compensation for injured feelings …".

We have a choice here of making an award of compensation for loss of earnings either under the provisions of section 123 of the Employment Rights Act or section 124 and section 119 of the Equality Act 2010, except that an award for injury to feelings can only be made for an act of discrimination and cannot be

made for unfair dismissal. We have concluded that it is more appropriate to make an award for the loss of earnings under section 123 for unfair dismissal not least because the single act of race discrimination which we have found only played a relatively small part in the claimant's decision to resign and claim constructive dismissal. The repudiatory conduct was only to a lesser extent connected with race discrimination.

5 On this basis, these are the awards which we have decided to make.

So far as the unfair dismissal is concerned, the claimant is entitled to a basic award of £1,916 as stated above. So far as the compensatory award is concerned, we have decided that it would not be just and equitable to award the claimant any sum for loss of earnings whilst he was absent from the UK in Nigeria from **29 January until the end of June 2016**. The claimant clearly during that period was taking himself outside the employment field. We are not satisfied that the breakdown that he had in **February 2016** was causally related to his employment. In view of our conclusions as to the lateness of the claimant's decision to go abroad, we accept that he had already made the decision to resign from his employment. We do not conclude that the decision broke the chain of causation however between the unfair dismissal and the loss of earnings. If the claimant had not been treated in the way that he was he would not have resigned and he would not have visited Nigeria or certainly not done so without taking some form of leave of absence. We do not consider however that it would be just and equitable to expect the respondent to pay for that absence nor for its length. Upon his return, the claimant registered with the agency and indeed found work. As we have stated already that work finished after three weeks but it finished we find because the hours of work did not suit his personal circumstances of his commitment to his children which he had been able to accommodate during his weekend shifts with the respondent. We have accepted that he was not in fact offered hours after **August 2016** which were suitable for him. By **October 2016** he had become again affected by depression which may very well have influenced his ability to find work and in any event the claimant was approaching the substantive hearing at which he was to represent himself. The claimant's antidepressant medication was increased particularly after the respondent's challenge to the judgement in **early 2017**.

Despite the claimant's attempts to find alternative employment outside agency work from **February 2017** he has been unsuccessful to date, although he fully recognised at the hearing that he should be able to find work in the reasonably near future. His personal circumstances have changed since he is no longer living with his partner and children and has not since **February 2017** had the restrictions placed upon any work by his obligations to his children. In all of these circumstances, we consider that it would be just and equitable to award compensation for loss of earnings from **10 July 2016** to the date of the remedies hearing on **8 June 2017**. It is agreed that the weekly loss of earnings is £399 net. The job which the claimant had with the respondent is, in comparison with other manual jobs, generously paid. We are not satisfied that the claimant has failed to mitigate his loss save in the following respects in that period. The claimant failed to apply for benefits during his period of unemployment either in the form of Employment and Support Allowance or otherwise. He states that he

does not believe in applying for help from the State but that does not make the decision not to apply a reasonable one. The respondent has not produced any authority for the proposition that a failure to apply for social security benefits can be a failure to mitigate loss and thus deductable from any loss of earnings claim. Surprisingly there is no reported case on the topic (or none the Tribunal can find). The point was expressly left open in **Morgans v Alpha Plus Security Limited [2005] ICR page 525** – see paragraph 19 on page 536. It is to be noted that different rules apply to the situation where the claimant has actually applied for and received benefits according to whether the claimant is claiming compensation for unfair dismissal under section 123 of the 1996 Act, or for a discriminatory dismissal under the Equality Act. In the former case, the recoupment of benefit provisions apply. The claimant is entitled to receive the net amount of his loss of earnings less any benefits received, but the employer is bound to account for the amount of the benefits to the Secretary of State. That does not apply however if the claimant has not claimed any benefits. In the latter case the employer is entitled to deduct any benefits received. Some passages in the short EAT judgment in **Secretary of State for Employment v Stewart [1996] IRLR page 334** suggest that a failure to apply for benefits, if unreasonable, may constitute a failure to mitigate.

We have decided that it would be appropriate in the circumstances of this case to deduct from the claimant's loss of earnings claim the amount of the benefits to which he would have been entitled at least from **1 July 2016 onwards**. We also conclude that the respondent has not established that the claimant failed to mitigate his loss because he did not find alternative employment prior to the date of the remedies hearing on **8 June**. The circumstances in which he gave up the assignment to Warburton's did not break the chain of causation for the dismissal. The claimant was entitled to look for employment on the same restricted hours which he had worked for the respondent, at least until his marital breakdown occurred in **February 2017**. He was ill with depression from **October 2014**, although the medical evidence does not establish that he was too ill to work; nor does it establish that he was fit to work. Clearly from early **February 2017** he was looking for wider jobs inside the agency and without the restricted working hours. We record that even if we are wrong in concluding that there was no proven failure to mitigate his loss during this period the claimant would never have found any alternative job at the same rate of pay as he was earning at Greggs nor was it likely that he would find any job at any rate above the national minimum wage. There would have been a continuing loss in any event.

We are satisfied that the claimant will find employment within 12 weeks of **8 June** albeit at a rate of pay at the national minimum wage rate. Thereafter we award a further 12 weeks partial loss of earnings. After that time any further loss will not be attributable to his dismissal in **January 2016**.

In these circumstances we award the following sums for the following periods:-

5.1 **1 July 2016 to 8 June 2017**

49 weeks x £399 less £73.10 = £325.90	-	£15,969.10
Less amount earned in July/August 2016	-	£ 478.17

	SUBTOTAL		£15,490.93
5.2	**8 June 2016 to 31 August 2017**		
	12 weeks x £325.90 SUBTOTAL	-	£ 3,910.80
5.3	**31 August 2016 to 23 November 2017**		
	12 weeks partial loss of earnings £399 Less £283 (£7.07 net per hour) x 12 SUBTOTAL	-	£ 1,392.00

The total compensatory award for loss of earnings is thus:

1 + 2 + 3	-	**£20,793.73**

The claimant is also entitled to £350 for loss of statutory rights.

6 There remains only the claim for injury to feelings. The only remaining claim of race discrimination was that relating to the deliberate delay in approval of the claimant's application for extended leave for his trip to Nigeria from **9 September to 15 October 2016**. We found that it had played a material but lesser part in the claimant's decision to resign and claim constructive dismissal in **January 2016** albeit that there were a number of other incidents of repudiatory conduct which were not acts of race discrimination. To that very limited extent the claimant's discriminatory treatment extends to his dismissal. He is not entitled to any damages for injury to feelings in relation to those elements of the dismissal which were not acts of discrimination. No award for injury to feelings is payable for unfair constructive dismissal. Nonetheless, we accept that the delay did cause the claimant significant anxiety and upset which he raised by way of a grievance. The claimant's witness statement for the remedies hearing did not reflect the limited extent to which he was discriminated against on racial grounds. In our view it is appropriate to award a sum at the lower end of the lower band in **Vento** which we assess at £1,500. To that must be added interest pursuant to regulation 4 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
12 July 2017
JUDGMENT SENT TO THE PARTIES ON

14 July 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL