EMPLOYMENT TRIBUNALS

Claimant: Ms M Sweeney

Respondent: Merseyside Community Rehabilitation Company Limited

HELD AT: Liverpool **ON:** 5 May 2017

BEFORE: Employment Judge Horne
Ms F Crane
Mr B Bannon

REPRESENTATION:

Claimant: In person
Respondent: Ms D Grennan, counsel

JUDGMENT having been sent to the parties on 11 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary

1. The tribunal apologises for the delay in sending these reasons to the parties. The delay was caused by the pressure of work in other cases.

The remedy issues

2. In a judgment sent to the parties on 3 March 2017 the Tribunal unanimously declared that the respondent had breached the duty to make adjustments in two respects ("the two failures"). These were:

   2.1. Failing to train the claimant the claimant in use of OaSys-R prior to the claimant going on sick leave in July 2013; and

   2.2. Failing to delay issuing the stage one attendance notice in September 2013.

3. The judgment rejected the claimant's complaints of other failures to make adjustments, victimisation, harassment, direct discrimination, discrimination arising from disability, detriment on the ground of protected disclosures and unfair constructive dismissal. The purpose of today's hearing was to determine the remedy for the two failures.

4. The issues for us to determine were not reduced into writing. Rather, we picked them out from the parties' oral submissions and from Ms Grennan's cross examination of the claimant. In total, there were six disputes for us to resolve. The first four we decided together. The fifth issue, which related to the award of interest, we determined after we had announced our judgment on the first four.

5. The issues were:

   5.1. Did either or both of the two failures cause the loss of the claimant's employment with the consequent financial loss?

   5.2. Did either or both of the two failures cause any personal injury?

   5.3. What award should the Tribunal make as compensation for injury to feelings?

   5.4. Should the Tribunal award an additional uplift of 10% on top of any award for injury to feelings?

   5.5. What date should be the start of the period for calculating interest? Should it be May 2013 (as the claimant contends) or July 2013 (as contended by the respondent)?

Evidence

6. We heard evidence from the claimant herself who answered questions. She did not supply a written statement but we carefully noted what she told us. We also heard the oral submissions from Ms Grennan and from the claimant.

Findings of fact

7. Prior to April 2013, the claimant had for many years believed that Ms Kuyateh had been bullying her and she also believed that Mr Metherell had covered up what she thought to be protected disclosures. She took a period of extended sick leave in 2009 with symptoms of stress but not of colitis. The claimant started to experience symptoms similar to her colitis symptoms in March 2013. We do not know whether those were actually medically caused by colitis or not. From 15-21 April 2013 she was absent again with similar symptoms including nausea, vomiting, stomach upset and diarrhoea.

8. We accept at this time the claimant was very apprehensive about using the new computer system, OASys-R. There was no evidence before us that at that time she was particularly upset about anything else. The failure to train the claimant affected her more acutely when she first tried to use the new system on 22 April 2013. The following day, as we have recorded in our liability judgment, she was "absolutely devastated", she had a blinding headache and felt physically ill. She told Ms Watkin of her difficulties on a number of occasions and spoke about them to an audience of senior Ministry of Justice and NOMS managers. At this time she felt particularly vulnerable. Everybody was affected by OaSys-R. Many people found it difficult to operate but the claimant found it particularly difficult and it had a particularly severe effect on her working life.

9. We cannot forget in this case that the claimant had a disability which she had made very considerable efforts to overcome. She needed to be able to use the OaSys-R effectively with her assistive technology in order to give her the confidence to do her job properly. Measures such as training her on a new computer system were absolutely vital to giving the claimant the sense of empowerment that she would need (and that other people would not need) in order to do her job. In our words, she needed to be on top of her game to be

able to participate in working life in a way that sighted colleagues did not. We find that the loss of this sense of empowerment had a particularly bad effect on the claimant in April and May through to July 2015.

10. There is no expert opinion as to the cause of the claimant's colitis. In particular, we have no expert evidence as to whether the failure to train the claimant in the use of OaSys-R contributed to any physical symptoms and if so, to what extent.

11. We are satisfied that the development day in May 2013 had a profound effect on the claimant as evidenced by her reference to it in her May 2014 grievance and her substantial reliance on it in her claim. She was angered, in May 2013 onwards, by the respondent's failure to remove Ms Kuyateh from her position, and her perception that the respondent was failing to protect her from Ms Kuyateh. She felt it difficult to do her job from April to July 2013 and we accept that during this period she suffered from some symptoms, such as vomiting at home and at work, before she finally took sick leave in July 2013. These feelings are not attributable to the two failures.

12. In July 2013 the claimant, in addition to feeling as though OaSys-R was preventing her from working effectively, also felt that she was being given too much work; that it was being allocated to her unfairly and that Ms Kuyateh deliberately gave her work to do knowing that she could not use OaSys-R as a means of bullying her. We have not found any unlawful discrimination in this respect. So the claimant's feelings would have been hurt in any event had the respondent made reasonable adjustments.

13. The claimant was not, during the period April to July 2015, particularly fearful for public safety. That is something which she tells us about now but we regard that as being substantially influenced by her viewing events through the lens of her subsequent complaints. There was no mention of any concern for public safety in her grievance in October 2013. Had the claimant been properly trained, she would still have felt angry and upset in particular about the treatment that she perceived she had been subjected to at the hands of Ms Kuyateh. We cannot say that she would not still have developed colitis. There is simply insufficient medical evidence to confirm that. We are satisfied, however, that, had reasonable adjustments been made, she would have coped substantially better than she did. An important piece of evidence in that respect is that she had managed her working relationship with Ms Kuyateh and her perception of a cover up for many years, and at the time she went off sick in April 2015 she had little other than her anxiety over the introduction of the new system to complain about.

14. Between August and September 2013 the claimant was upset and intimidated by the frequency of contact from Churchill. There was no breach of the claimant's rights in that regard. We think that she was more vulnerable to feelings such as these because of her hurt feelings caused by the failure to train her properly on OaSys-R.

15. The attendance notice in September 2013 caused a flare up of the claimant's colitis symptoms. This was one of many she experienced during the period August 2013 to January 2014. As we have already recorded in our liability judgment, the claimant would have suffered colitis symptoms in any event whenever the attendance notice was issued.

16. The duty to make adjustments ceased when the claimant was off sick in July 2013, but the sense of hurt caused by the failure continued. In August 2013 the

claimant had a psychological dread of even entering the building. This was partly, we find, due to the presence of Ms Kuyateh, but also due to the prospect of returning to a system on which she still had not been trained.

17. On 19 October 2013 the claimant, in her written grievance, expressed her genuine belief, even thought it is unsupported by medical evidence, that it was the introduction of OaSys-R without proper adjustments that had made her physically unwell. That sense, whether it is supported by medical evidence or not, compounded her distress and anger which lasted well into her period of sickness absence.

18. The claimant may or may not have suffered a specific colitis attack if the attendance notice had been issued at a later stage. She would, in any event, have suffered from many such attacks. We accept the claimant's evidence that she was particularly hurt by the timing of the attendance notice. She had just asked for less frequent management contact and she was still undergoing tests. As we have already recorded, she would, whenever the notice was issued, have believed that it was deliberate and that her disability was being used as a weapon to attack her, but she would not, perhaps, have been quite so hurt by the timing.

19. We find that the claimant's hurt feelings and ill health from January 2014 onwards were entirely caused by factors other than the two failures. Key to this finding is the fact that from 13 February 2014 the issue about training had been resolved and yet the claimant, for all sorts of reasons, found herself too unwell to work.

20. The claimant resigned overwhelmingly for reasons that were unconnected with the two failures.

Relevant law

Compensation in discrimination cases

21. The starting point is section 124 of the Equality Act 2010:

> (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) 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 a county court … under section 119.

22. It is well established that compensation is not limited to financial losses but can include an award for injury to feelings. In *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 the Court of Appeal gave guidance as follows in paragraphs 65-68:

> 65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for

injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

23. Subsequently in *Da'Bell v NSPCC* [2010] IRLR in September 2009 the EAT said that in line with inflation the Vento bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to *Da'Bell*. In *Bullimore v Pothecary Witham Weld Solicitors and another* [2011] IRLR 18 the EAT chaired by Underhill P said in paragraph 31

> "As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply

too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Uprating" such as occurred in *Da'Bell* is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong."

24. We announced our remedy judgment before the *Presidential Guidance on Awards for Injury to Feelings [etc]* was issued. This Guidance reflects the approach we took, namely to consider the effect of inflation since *Da'Bell* and to recognise that an award, say, at the bottom of the middle band would be worth more in today's money than it was at the time *Da'Bell* was decided.

25. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort (*Hurley v Mustoe (No 2)* [1983] ICR 422*,* EAT). it is on the basis that as best as money can do it, the claimant must be put into the position he would have been in but for the unlawful conduct of his employer (*Ministry of Defence v Cannock* [1994] IRLR 509*,* per Morison J at 517, [1994] ICR 918*, EAT*).

26. Many of the relevant legal principles were set out fairly and succinctly by Ms Grennan for the respondent. These were:

    26.1. Damages for discrimination are compensatory, not punitive.

    26.2. The purpose of damages should be to restore the claimant to the position she would have been in had the discrimination not occurred.

    26.3. Tribunals should not allow any feelings of indignation at the respondent's conduct to inflate the award.

    26.4. Awards for injury to feelings should bear similarity to the range of awards made in personal injury cases. Tribunals should keep awards in perspective and not make them unduly low or high.

    26.5. In assessing the correct sum, tribunals should remind themselves of the value of the award in everyday life.

27. We might add some principles of our own which we have taken into account. One is that the respondent must take the claimant as it finds her. This is sometimes known as the "eggshell skull" principle.

28. We have borne in mind comparable awards in personal injury cases, and in particular we have had regard to the *Judicial College Guidelines for the Assessment of Damages in Personal Injury cases, 13th Edition.* Just to give a couple of examples:

    28.1. A few months' aggravation of asthma or bronchitis could expect an award of £4,000.

    28.2. £3,000-£7,000 would be an appropriate award for food poisoning with acute symptoms of nausea and vomiting and diarrhoea for a couple of weeks with a complete recovery within a year or two. The higher bracket for such awards beginning at just over £7,000 relates to symptoms which have a marked effect on home life include sex life which take a considerably longer period to recover.

29. Just as with other statutory torts, the claimant will not be awarded damages for a loss if that loss would have occurred in any event even if the discrimination had not occurred.

30. On the question of the 10% uplift, Ms Grennan did not formally concede that the Tribunal should make an uplift, but in the best traditions of the Bar she drew our attention to three decided cases which she acknowledged supported the proposition that the uplift should be awarded. Very fairly, and clairvoyantly as it turned out, she conceded that the most recent authority on the point was decided in the claimant's favour. As a footnote, we ought to add that, since we announced our remedy judgment, the matter was settled in favour of awarding the uplift in the case of *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879.

31. We have also taken into account the principle that it is not necessary for there to be medical evidence in order for the Tribunal to make an award for personal injury, but such evidence is desirable.

32. Tribunals must award interest on damages for discrimination. The parties agreed that the tribunal should award simple interest at the rate of 8% on the amount of compensation for injury to feelings.

33. Regulation 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides, so far as is relevant:

> 6—(1) Subject to the following paragraphs of this regulation—
>
> > (a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;
> >
> > …
>
> (3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period … in paragraphs (1) …it may—
>
> > (a) calculate interest, or as the case may be interest on the particular sum, for such different period
> >
> > …
> >
> > as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.

Conclusions

<u>No financial losses consequent on termination of employment</u>

34. For the reasons we gave in our liability judgment, we are satisfied that the two failures did not cause the termination of the claimant's employment. She resigned overwhelmingly for other reasons. Financial losses flowing from termination of employment are therefore not recoverable in damages.

<u>No separate award for personal injury</u>

35. We agree with Ms Grennan that it is appropriate in this case to make a rolled-up award for injury to feelings, taking account of some of the more visceral aspects

of the way the claimant was feeling. She had a medical condition that was aggravated by stress. The lack of medical evidence makes it difficult to attribute particular physical symptoms at particular times to the two failures, as opposed to other environmental factors (including non discriminatory work stresses) and naturally occurring pathology.

36. In a general sense we accept that the claimant had increased levels of stress, worry, upset, hurt feelings, manifesting themselves in headaches and a sense of nausea driving her to the point of vomiting, and that those sensations were worse that they would have been had the respondent made proper adjustments. We think that in those circumstances it is better to make a rolled-up award for injury to feelings rather than try to establish a precise causal connection between a statutory tort and a physical injury.

Award for injury to feelings

37. The claimant was particularly vulnerable, not least because of her visual impairment and her diagnosis of colitis.

38. Turning then to what the level of the award should be, in our view the failure to train the claimant cannot be described within the sense of the *Vento* guidelines as a single isolated act. The consequences of the failure to train the claimant on OASys-R lasted many weeks, both in terms of the claimant's stress and hurt feelings and also her vulnerability to senses that she was being persecuted in other ways. The attendance notice was an isolated act. It caused some physical effects as well as some hurt feelings. For the reasons we have given, we are not going to make a separate award but rather we regard it as aggravating the sense of hurt feelings that the claimant suffered at that time.

39. In this case Ms Grennan quite rightly concedes that the lower band is insufficient to compensate the claimant for the hurt feelings that she suffered. She contends that an appropriate award should be at the bottom end of the middle band. We disagree. We think that the length of time the claimant suffered, the particular vulnerability of the claimant at the time of the two failures, and the increased vulnerability that was caused by the failure to make adjustments take this case away from the bottom of the middle band. We do not, however, believe that it is towards the top end of the middle band, because of the extent to which the claimant would have suffered hurt feelings in any event. Doing the best we can, and bearing in mind that it is always going to be an arbitrary process of trying to put a figure of damages on somebody's hurt feelings, we have decided the appropriate award is one of £11,000.

10% uplift

40. It was our view (and is now clear beyond doubt) that we were obliged to increase the award for injury to feelings by 10%. The uplift is £1,100, making a total of £12,100.

Interest

41. The parties agreed that we had to award simple interest of 8% per annum on £12,100 for a period ending with the date of the remedy hearing. What was in dispute was the start date for that period. The reason for the dispute is that we are compensating the claimant for two acts of discrimination, one of which occurred in May 2013 the other which occurred in September 2013. The claimant contends that the interest should be calculated from the end of May

2013 – the date of the failure to train the claimant in OASys-R. The respondent says it should be calculated from July 2013 – the mid-point between the two failures.

42. In our view it would be over-compensating the claimant to award the claimant interest for the whole of the period beginning in May 2013. Our award of compensation for injury to feelings includes compensation for the hurt feelings caused by the attendance notice. That was issued in September 2013. The claimant could not have suffered any hurt feelings as a result of that notice until that date. If we were to award interest on the entire sum running from May 2013, the claimant would receive a windfall. The precise amount of the windfall is hard to measure, because we have not broken down the damages into two component sums resulting from each of the two failures. But the claimant would inevitably receive a substantial amount of interest on damages to compensate her for the later of the two failures, covering a period before she had suffered any injury to feelings from it. In our view it could cause serious injustice, because even an additional 3 months of interest at 8% on £12,100 is a substantial sum.

43. A pragmatic way of resolving the problem is to take the calculation of interest as starting from the mid-point between the two failures. That is July 2013.

44. We followed the respondent's calculation that the daily rate of interest was £2.65; the annual rate of interest is £967.25. Taking three years and nine months from July 2013 to the date of the remedy hearing, the award of interest is £3,627.18.

Employment Judge Horne

Date: 29 November 2017

REASONS SENT TO THE PARTIES ON

7 December 2017.

FOR THE TRIBUNAL OFFICE

[AF]