



EMPLOYMENT TRIBUNALS

Claimant: Mrs Charlotte Carrabyne

Respondent: The Secretary of State for Work and Pensions

HELD AT: Liverpool

ON: 1 December 2017

BEFORE: Employment Judge Robinson
Mr W K Partington
Dr L Roberts

REPRESENTATION:

Claimant: Mr D Campion of Counsel

Respondent: Mr S Redpath of Counsel

JUDGMENT

The judgment of the Tribunal in relation to this remedy hearing is that the respondent will pay to the claimant forthwith the sum of £.110,165.14 together with 36 months employer pension contributions with interest thereon.

The calculation is set out in the reasons below.

The Recoupment provisions do not apply.

REASONS

1. The issues with regard to remedy related to the amount of compensation due to the claimant. Previously she had succeeded in her claims of unfair dismissal, breach of section 15 of the Equality Act 2010, breach of the duty to make reasonable adjustments contrary to section 20 of the Equality Act 2010.

2. The compensation awarded includes her loss of earnings, injury to feelings which includes an element of personal injury compensation for the psychiatric damage caused by the actions of the respondent, interest and pension loss. Where required we have also grossed up where the sum received by the claimant will be taxed.

The Facts

3 The facts of the case with regard to remedy show that the claimant was happy in her role with the respondent and especially with her colleagues, but was less happy with the way she was ultimately managed. During the course of giving her evidence the claimant clearly demonstrated the stress at her predicament in losing her job. She had to leave the Tribunal room on a number of occasions in tears. The loss of her job has also meant that her mental health has suffered and the relationship with her husband has come to an end, much to her regret.

3. The findings at the liability hearing were that the claimant was disabled from both her hip problem and from depression. The respondent is faced with an individual they have dismissed and placed onto the unemployed registered who is disabled both physically and mentally.

4. The claimant's husband works for the respondent and when the claimant was in work he was able to drive her into work and home again. Because of the claimant's hip condition she finds it difficult to drive distances and therefore her job search has been limited to the immediate locality. The claimant lives in Liverpool.

5. The claimant also had in place at the respondent, a number of reasonable adjustments which allowed her to maintain her employment. That need for reasonable adjustments places her at some disadvantage on the labour market in terms of having to renegotiate, potentially, those reasonable adjustments with a new employer. For example, the respondent allowed the claimant to start work at 10.30am and have a certain amount of flexibility in terms of her working hours. She may not be able have that same flexibility with a new employer.

6. The claimant has looked for jobs after the loss of her employment on 5 March 2016, but since that date a number of issues have curtailed her ability to search. In particular she has suffered from anxiety and depression. She accepts that since her early 20s she has had difficulties with her mental health and is now on a high dose of Sertraline and has been for some time. However the loss of her job has had a deep and profound effect upon her. We accepted the evidence she provided to us in her remedy hearing witness statement. Her account of what she has suffered over the months since she lost her job was believable. There is no necessity to set out all the difficulties the claimant has faced as they are contained in that statement but, for example, she suffered from increased anxiety and stress which manifested itself in her shying away from her social life, refusing to go out with friends and family for drinks, finding it difficult to get up in the morning and staying in bed, she felt worthless, often bursting into tears for no apparent reason and also has intrusive and upsetting thoughts.

7. The claimant has also had physical difficulties since she lost her job. Although she had not been absent with regard to her hip condition for some considerable time before she was dismissed she realised that eventually she would have had to have hip surgery. In employment with the respondent she could have chosen the moment when she could agree some absence with her employer to have that surgery. When she was in work she was managing her pain because she was busy. Once she was out of work she had more time to think about the pain. She went to her doctor shortly after she was dismissed saying that she wanted to have hip surgery.

8. Through a series of unfortunate events the claimant found herself during 2016 suffering from anxiety and depression, her hip pain was increasing, she was taking heavy doses of medication which was increased in September 2016, she was having difficulty sleeping, her marriage was breaking up and from 10 March until 1 June 2016 she was not well enough to work and had to claim Employment Support Allowance (ESA) in March 2016,. She had to wait 12 weeks before she had an assessment. She qualified for ESA due to her hip condition in June 2016.

9. By August 2016 she felt better and more confident and was able then to enjoy, once more, social activities.

10. During 2016 a number of sick notes were issued to her which confirmed she was not able to work. The operation on her hip took some time to arrange because she was wrongly referred to Aintree Hospital when she should have gone to St Helens Hospital. On 12 September 2017, over 15 months after her original referral, the claimant had the operation.

11. Not only, therefore, could she have planned her operation better if she had been in work and chosen her moment when to request time off, she would also have been paid her full wage for six months and then three months half pay. Consequently she would have had more financial stability if she had been in work during those 18 months. If still employed she may well have been able to return to work before her full pay ran out. Indeed the opportunity to go back to work during the recovery period would have been a spur to her to return.

12. Because of the above circumstances the claimant decided that she would have a change in career. She obtained an NCFE Level 2 certificate in counselling from the University Centre, Grimsby, "by distance" learning, through the autumn of 2016 up to February 2017. Because of that further qualification she was able to apply for a degree course with the Open University with a view to being awarded a psychology degree in September 2017.

13. The three year course costs £5,728 per year. That might increase over the next two years, but the cost of the course will be £17,184.

14. If she qualifies, the claimant will have the realistic opportunity of becoming a chartered psychologist in 2020. To her credit the claimant has researched her prospects and knows that she will be able to earn somewhere in the region of £26,000 per annum as a psychologist compared with her salary with the respondent at just under £20,000. As the claimant will be looking for jobs in the NHS she will also have the benefit of an NHS Pension Scheme.

15. The claimant was very positive about this new career and has clearly mapped out her future. Having investigated the role as a psychologist she discovered that starting salaries were in the region of £26,000 rising to £35,000. She also recognised that if she did secure a job with the NHS her employer's pension contributions would be 14.38% and the employee's contribution would be 7.1%.

16. In October 2017, in order to help her manage her finances and recognising that her ESA may come to an end, the claimant decided to sell cosmetics through Avon. She can either do this door to door which would be difficult in view her hip pain

when driving, but she can also do it online. She has good computer skills and has already set up her own website from which she will be able to sell products through Facebook and Twitter. She hopes to increase her sales by word of mouth and through contacts on the internet. She suspects that she will average about £300 a month earnings in this regard.

17. Although the claimant is not divorced from her husband she is separated. The cause of the break up of the relationship was, in part, due to her losing her job and the consequent money difficulties.

18. The claimant has lost contact with her stepdaughter, who used to stay every weekend when she was living with her husband. That has been a source of distress to her

19. The claimant's life has moved on, however, since the dismissal and she has mitigated her loss by putting in place all the matters set out above.

20. After the judgment in March 2017 on liability, she was offered reinstatement by the respondent but with the caveat that she would have to go through an Occupational Health assessment. That offer was made after the respondent had lost at the liability hearing and just days before the first remedy hearing date. (the remedy has been postponed on a number of occasions). She declined the offer and decided she did not want to return to her previous workplace. Although she was very happy there with her colleagues she felt that she would not be able to trust management in the future. In view of our findings of fact at the liability hearing we can well understand why that is so. We have no criticism of the claimant for refusing reinstatement in those circumstances.

The Law

21. Section 123(1) of the Employment Rights Act 1996 provides that a compensatory award for unfair dismissal should be such amount which the Tribunal considers just and equitable. There is, however, a statutory cap with regard to such compensation. That does not apply with regard to compensation for discrimination under the provisions of section 124 Equality Act 2010. We ordered compensation to be paid under the auspices of the disability claim because we find the main reason for her dismissal was related to her disability.

22. Section 124(6) of the Equality Act provides that the amount of compensation which may be awarded corresponds to the amount which could be awarded by the County Court in proceedings in tort.

23. In practice what that means is that we must endeavour to place the claimant into the position she would have been if the wrong had not taken place.

24. With regard to injury to feelings, this is an award to compensate for non pecuniary loss and is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she has received. It is compensatory and not punitive. The Tribunal has a broad discretion about what level of award to make consequently we must be just to both parties when making the award.

25. The award should not be too low so that it would diminish respect in the judicial process regarding compensation, and it should bear some broad similarity to awards in personal injury cases.

26. With regard to such awards, there are three bands as set out in the case of **Vento v The Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102**. Those bands were revisited in **Da’Bell v NSPCC [2010] IRLR 19**. The bands have been uplifted. We have also taken into account the principles set out in **Simmons v Castle [2012] EWCA Civ 1288** in that from 1 April 2013 general damages in tort cases should be increased by 10% on existing levels.

27. The discrimination award should bear interest with regard to any award of past financial loss, injury to feelings and medical and psychiatric injury. The interest rate now to be applied is 8%. On the injury to feelings award interest is awarded on injury to feelings from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation.

28. With regard to interest on all other sums potentially awardable by the Tribunal, interest is awarded from the mid point of the date of the act of discrimination complained of and the date the Tribunal calculates the award. In this case the date of the act complained of is the dismissal of the claimant on 5 March 2016.

29. Awards will be grossed up by the Tribunal where the sum received by the claimant will be taxed. The first £30,000 is enjoyed as a tax free lump sum and consequently any award we make over £30,000 should be grossed up in order to avoid disadvantage to the claimant through taxation of the sum payable.

30. We believe that the injury to feelings award should not be grossed up but only the financial loss suffered as a result of the unlawful discrimination. We recognise the different threads of argument, in this area, between, in broad terms, “tax cases” and Employment cases”.

31. There are two methods of calculation with regard to pension loss and that depends on the complexity of the case. In the end we decided that this case should be calculated on loss of contributions. It is not a complex case.

32. We considered Mr Champion’s submissions on behalf of the claimant that we should treat the pension issue as a complex one. But overall we felt that the proper way of dealing with the pension element, even though we are compensating for a considerable period of time into the future (3 years), should be to treat it as a simple case. This is not a career long case in terms of losses, nor potentially are the losses in pension significant if the claimant obtains, as she suggests she will do, a role with the NHS.

33. Finally with regard to mitigation of loss, we noted that it is a fundamental principle that any claimant will be expected to mitigate his or her loss but that the burden is upon the respondent to prove that the claimant has not mitigated his or her loss.

34. It is insufficient for a respondent merely to show that the claimant failed to take steps that it was reasonable for them to take. They have to show that such a failure was unreasonable.

35. In coming to our conclusion we took into account the steps the claimant has taken to mitigate her loss, whether it was unreasonable for the claimant to have failed to take any such steps and the date from which any alternative income could have been obtained.

36. Applying those principles to the facts of this case we came to the following conclusions.

Conclusions

37. There are a number of amounts which the claimant has claimed which are agreed by the respondent. We went through the claimant's Schedule of Loss and the counter schedule at pages 17 to 28 of the bundle and concluded as follows.

38. The only amount that we do not have is the respondent's pension contribution per month. As we are awarding pension loss on the basis of loss of contribution that calculation will have to be made by the parties.

39. However we have set out the principles for the parties. If they wish to come before us again to deal with any of the intricacies of the calculation we will arrange another remedy hearing in Liverpool convenient to all.

40. Dealing now with the detail of Schedule of Loss we came to the following conclusions. We award the basic award of £1,107.69 which was agreed.

41. We award the sum of £738.46 for loss of statutory rights.

42. We did not accept Mr Redpath's arguments that only a small amount of, say, £200 or £250 should be awarded for that loss. When the claimant goes back into employment she will have to build up her employment protections and we therefore think it appropriate to award her one week's gross pay payable to her for each year that she will have to build up that future protection. Therefore we have multiplied her gross week's pay by two making the sum of £738.46.

43. With regard to payment in lieu of notice, we have deducted £1,487.55 (which was the agreed notice pay already paid to the claimant) from the compensatory award. We have not deducted the ESA from the claimant's award. The parties will have to deal with that themselves as we are not sure when the claimant's ESA will cease. We accept, however, that the figure of ESA payable per week to 12 March 2016 is £135.95 and the weekly payment after 11 June 2016 is £186.90. Again the calculation can be made by the parties once the claimant confirms that she is now off that benefit.

44. With regard to the cost of the Open University degree, we order that cost to be paid as an expense to the claimant which she will properly incur over the next few years. We order the respondent to pay £17,184.

45. We accept that as the claimant took out a student loan she would have to pay that back over a number of years and not immediately. The reasons the claimant decided to change careers were compelling. She has researched her future career in the NHS as a psychologist, mapping out what she intends to do. In those circumstances, and in view of what we say below about the respondent placing the

claimant on the unemployed register, we feel that a lump sum due to her so that she can immediately pay for her education is an appropriate award.

46. We then turned to the compensatory award and decided that we would order the respondent to pay to the claimant both her losses to the date of today's hearing and future losses for three years until she qualifies as a psychologist giving her a short period to find a job once qualified. We accept the premise set out in the claimant's Schedule of Loss that she should be compensated to 1 December 2020. We also order her pension loss for three years to 1 December 2020 on the basis, as mentioned above, that she should receive 36 months' contribution calculated on what this employer would have put into the claimant's pension pot over the next three years.

47. We also order that the claimant's past losses of 91 weeks at £297.51 be paid to her which is a sum of £27,073.41. From that sum we have deducted notice pay of £1,487.55 leaving a net sum due to her in relation to those losses of £25,585.86.

48. As the claimant has received a Civil service award of £3,036.45, that past loss sum should be further reduced, leaving a net total of £22,549.41. Interest at 8% will be added.

49. The award for future loss has been calculated from 1 December 2017 to 1 December 2020, a sum of £46,411.56. However, from that sum the claimant has confirmed that she would earn between £100 to £500 per month from selling Avon cosmetics and consequently we have averaged that as a £300 per month earnings over the same period. £10,800 shall be deducted from that sum to give a proper figure for future loss. The figure therefore due to the claimant for future loss is £35,611.56.

50. If one adds that together with the past loss one gets a figure of £58,160.97.

51. Add to that the £738.46 for loss of statutory rights, the compensatory award is £58,899.43. If then one takes £30,000 exemption, the amount that requires to be grossed up is £28,160.97 (for grossing up purposes we have deducted the £738.46 as that will be paid gross in any event). If that first figure is grossed up one gets to a figure of ££35,201.21. If one adds back in the tax free exemption and the sum due for loss of statutory rights the total sum upon which interest is calculated is £65,939.67. The calculation of interest amounts to £4,615.78. The total sum due, therefore, with interest and grossing up added in is £70,555.45 in terms of pecuniary loss.

52. We then turned to injury to feelings and personal injury. We did not have a medical report relating to the claimant's personal injury. It is not essential to have such a report. We had sufficient evidence from the claimant, tested in cross examination to show that the claimant had suffered much because of the dismissal and the manner in which she was dismissed. The treatment of her by her managers has had a profound effect upon her. We felt we could combine an award of injury to feeling with the personal injury award. The evidence, on balance, showed that the claimant has suffered injury caused by the respondent's actions in dismissing the claimant for the reasons that they dismissed. We concluded that this matter fell at the higher end of the middle bracket of the **Vento** bands.

53. We have taken into account the Presidential Guidance relating to cases after September 2017 and even though these proceedings were issued before that date we have taken into account the recent case law and decided to uplift the award taking into account that guidance.

54. We have also uplifted the award by 10% in view of the **Simmons v Castle** decision.

55. Taking all that into account and considering the facts we find regarding the claimant's distress we award her the sum of £17,000.

56. We have not split the award between injury to feeling and an award for personal injury. That would over complicate the issue. The award properly compensates the claimant. We have uplifted that sum by 10% to bring the award into line with other personal injury awards giving a final award of £18,700.

57. The interest on that will be 91 weeks at 8% which comes to £2,618 which leaves a total award of £21,318 for injury to feelings.

58. As we could not calculate the pension loss we cannot deal with interest on that figure but the parties should be able to calculate the sum due on the basis that the principle we would use is that the claimant should receive 36 months of contributions to take her to the end of 2020.

59. To recap, the claimant must receive the expenses of her University degree in the sum of £17,184; a basic award of £1107.69; £70555.45 compensatory award; £21,318 for injury to feelings and 36 months employer pension contributions together with interest thereon.

60. Those are our reasons and no further order or direction need be made.

Employment Judge Robinson

22-12-17

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

4 January 2018

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2401990/2016

Name of Mrs C Carrabyne v The Secretary Of State For
case(s): Work And Pensions

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 4 January 2018

"the calculation day" is: **5 January 2018**

"the stipulated rate of interest" is: 8%

MR I STOCKTON
For the Employment Tribunal Office