JJE

EMPLOYMENT TRIBUNALS

Claimant: **Miss K Harvey**

Respondent: **Summercare Limited**

Heard at: **East London Hearing Centre**

On: **14 May 2018**

Before: **Employment Judge Russell**
Members **Mr G Tomey**
Mr J Quinlan

Representation
Claimant: **In Person**
Respondent: **Mr G Ridgeway, consultant**

JUDGMENT having been sent to the parties on 3 July 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 By a liability Judgment sent to the parties on 3 April 2018, the Tribunal found that the Claimant's claims of unfair dismissal, failure to make reasonable adjustments, section 15 discrimination and for notice pay each succeeded. We dismissed the claims for disability discrimination arising out of working a longer period of notice.

2 In deciding the appropriate remedy to award, we have had regard to our findings of fact and our conclusions in the Liability Judgment. In particular:

2.1 Paragraph 3: the Respondent has one day care centre, four residential homes and seven schemes. The managing director is Dr Raja, to whom reported three managers. Each scheme and residential home has its own manager, undertaking some managerial work and some direct care or support work. We found that the amount of management work was on average around 15%.

2.2 Paragraph 6: on 7 November 2016, the Claimant told Ms Morgan that she needed to be office based and have a more managerial role. Ms Morgan did not see this as a problem.

2.3 Paragraph 7: in her email to Dr Raja sent the same day, Ms Morgan suggested a move after Christmas to change the Claimant's job title/role to that of area coordinator.

2.4 Paragraph 14: Dr Raja's evidence to the Tribunal was that schemes required some local management, ten of the twelve schemes were geographically close whereas the Claimant was based in an outlying site.

2.5 Paragraph 24: in December 2016, Mr Hart saw no issue with the change to job duties requested by the Claimant. Dr Raja's evidence was that once he became an employee, sometime between 22 December 2016 and 7 February 2017, Mr Hart had the authority to agree an alternative role for the Claimant.

2.6 Paragraph 52: the optimistic tone of Ms Morgan's initial email and Ms Sutton's comments on 12 December 2016 suggested that the variation of duties to office-based or management only requested by the Claimant would not be unreasonable or unduly different. In particular, that there was scope to combine some of the management duties across all of the schemes or care settings, even if not all to be consolidated in one employee. We considered the objections of Dr Raja which we note were largely repeated today and we concluded that a substantial amount of management work, could reasonably have been consolidated in one of the ten settings, even if the Claimant had changed her usual place of work.

2.7 Paragraph 53: it would have been a reasonable step to have adjusted the Claimant's job duties.

2.8 Paragraph 59: the refusal properly to consider the Claimant's request for a variation of job duties, to be conduct amounting to a dismissal, breach of the implied term of trust and confidence.

2.9 Paragraph 63: We also concluded that the Claimant was entitled to payment for notice from the period of 10 February 2017 until 31 March 2017.

2.10 Paragraph 65: in advance of a remedy hearing, the parties may wish to consider points relating to double recovery, whether the Claimant's work would have been full time or part time after an adjustment, what the Claimant would have been paid and what the effect of her medical condition was.

3 At paragraph 64, we gave directions for the proper preparation of this remedy hearing. Disappointingly, there was a failure to comply with those directions in a timely manner, such that witness statements were only exchanged on Friday. We understand that this was due to pressure of work upon Mr Ridgeway. We make no direct criticism of Mr Ridgeway but Tribunal Orders and Directions are more than merely aspirational targets. Companies who hold themselves out and charge clients for the provision of legal service are responsible for ensuring that they have sufficient staffing levels to ensure sure that Orders are complied with. There is a worrying trend among some representatives to regard compliance with dates given in Orders as a matter within their gift. It is not. Failure to comply with Orders may impact adversely upon the ability to have a fair hearing. In this case, the Claimant had very little time to consider the Respondent's evidence. However,

the Claimant was keen to have remedy decided and therefore did not seek a postponement in order properly to prepare. We have accepted Mr Ridgeway's explanation for the delay, there was no malice or contumelious default and a fair hearing was still possible. We did not hold the failure of the representatives against the Respondent.

4 We heard evidence from the Claimant, Mrs H Slater (her sister) and Dr Raja. We were provided with an agreed bundle of documents and read those pages to which we were taken in evidence.

Financial Loss

5 At the time of the Claimant's resignation in November 2016 and up until the termination of her employment in February 2017, her eyesight was particularly poor. The Claimant underwent operations on 4 July 2017 which have fortunately been successful in significantly improving sight in one of her eyes. This is some months after the employment terminated and we consider it right and proper also to take into account the Claimant's health at the point at which the adjustment should have been made. The Respondent has produced a number of risk assessments in respect of various activities which the Claimant would have been required to undertake. We treat these with some degree of caution as the Claimant had no input into their production.

6 Nevertheless, there was a substantial degree of agreement in the evidence as to what the Claimant could or could not have done. For example, she frankly accepts that even now, she could provide direct care. The greatest disagreement in the assessment of the Claimant's ability to undertake work was in respect of on call and emergency work. On balance, we accept that Claimant's evidence that she had never been required to provide back-up cover whilst employed and Dr Raja's evidence that he had only done so once, and then due to the particular complexity of the situation. Whilst we accept that there was a requirement that a scheme leader be available for on call back up cover, the need arose infrequently and there were alternatives such as the use of additional carers or more senior managers. In the circumstances, we do not accept that this was any real obstacle to a combined managerial role for the Claimant. The same applies to the attendance of staff at appointments.

7 The Claimant also suggested that she should have been considered for a role at head office, referring to a number of individuals who had left the Respondent and whose duties she could have undertaken. We were provided with a list of employees leaving between 1 August 2016 and 18 August 2017; they were not replaced. Due to the financial pressures upon the Respondent, which were consistent with those of the care sector generally, a decision was taken to absorb the management activities of the departing employees into the workload of remaining employees at a more local level. It would not have been a reasonable step to have required the Respondent to employ the Claimant in one of those roles as this would have been too onerous a financial burden upon such a small business in a sector where profit margins are tight.

8 The real alternative to resignation in this case, as we identified in our liability Judgment, would have been to remove the management activities from scheme leaders and residential home managers and consolidate them into the Claimant's workload. Although the Response pleads that the Claimant was doing 16 hours per week of management work, the Claimant accepted in evidence today that it was in fact only 8

hours per week and during the period when she was Sadlers scheme leader. Dr Raja frankly accepted on behalf of the Respondent today that they could have done more to assist the Claimant, suggesting that she could have continued with her 8 hours of weekly management work on Sadlers until the new scheme leader was appointed and then for a couple of months thereafter, shadowing and training up the new scheme leader.

9 On balance, we are satisfied that it would have been a reasonable step to retain the Claimant and not to replace her with a new scheme leader. The Claimant could still do her management work on Sadlers and was familiar with the service users and staff involved. The direct care element of her work could be provided by a carer at no additional cost to the Respondent as the carer would be paid the amount that the Claimant would otherwise have earned for working those direct care hours. As a starting point therefore, we conclude that a reasonable adjustment would have been to have permitted the Claimant to work at least her 8 hours per week on the Sadlers scheme.

10 The Claimant asked to move to more managerial duties prior to the termination of her employment. Ms Morgan and Mr Hart saw no difficulties with this proposal at the time. In our liability Judgment, we agreed and concluded that a substantial amount of management work could reasonably have been consolidated for the Claimant in one of the ten settings, although the Claimant may have been required to change her usual place of work. The dispute is how many hours a week these consolidated duties would have taken. The Claimant's evidence is that she could also have taken 3 hours from each of the four residential home managers and the six scheme leaders, an additional 30 hours a week. The Respondent disagrees that this would have been a reasonable step and submits that there was little that could be transferred to the Claimant.

11 . At paragraph 6 of his statement, Dr Raja set out the managerial functions required. We heard evidence from the Claimant and Dr Raja as to what she could have done and what was required on site. The Claimant was overly optimistic; Dr Raja overly pessimistic. On balance, we conclude that there were some tasks which would continue to be required of local managers; these include creating staff rotas (the local manage drawing on their knowledge of any possible conflicts or problems with carers and service users), confirming shifts and preparing payroll, attending meetings, reporting maintenance issues, producing care plans and conducting staff appraisals and training. In each of these the input of local staff was important to the nature of the work and the Respondent's need to ensure that quality of care is not compromised even inadvertently. There were other tasks, however, which did not reasonably require local management principally on data input. These tasks included reviewing and recording locally created records (such as appraisals or rotas) and inputting them onto the IT system, managing paper financial records and assisting with some of the other local work.

12 Doing the best we can, accepting that the amount of work would vary according to the setting and that the Claimant demonstrated a very positive, adaptable attitude towards work, we conclude that initially the additional tasks would been relatively limited but would have increased as parties became more familiar with the process. Whilst some managers may have been reluctant to lose too much of their management work, we accept the Claimant's evidence that data input tasks were regarded as being boring or mundane and would willingly have been given up. On balance, we find that it would have been reasonable to have varied the Claimant's job duties and to have employed her for three days a week, comprising 8 hours management at Sadlers and the balance of 16 hours being management duties given by other members of staff. The cost to the Respondent

of the additional 16 hours would not have been unreasonable as the scheme leaders who gave up some duties would have additional time to provide direct care to service users.

13 As set out above, the Claimant's eyesight in one eye had improved significantly within four or five months of the employment terminating. We considered whether and to what extent this may have led to an increase in the amount of work which she could reasonably have done. The Respondent has terminated the Southend contract and the overall management work has diminished. Balancing the Claimant's increased ability to carry out activities against the reducing need of the Respondent for core management work which the Claimant could properly have undertaken, overall we conclude that her employment would have remained part-time, at 24 hours a week.

14 The Respondent submits that the Claimant has failed to mitigate her losses. The correct approach for the Tribunal to such an issue is set out by Langstaff J in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15/JOJ. The burden of proof regarding failure to mitigate is on the wrongdoer and it is not for the Claimant to prove that she acted reasonably. The Claimant must be shown to have acted unreasonably, which is not necessarily the same as 'not reasonably'. Determination of unreasonableness is a question of fact taking account of the Claimant's views and wishes although the assessment must be objective. The Tribunal should not put Claimants on trial as if losses were their fault, but bear in mind that the central cause of loss is the act of the wrongdoer.

15 The Respondent has adduced no evidence of any actual job which would have been suitable for the Claimant. We take into account the limited opportunities available to her on Canvey Island and the effects of her dismissal on her health and her confidence. We accept the Claimant's evidence that she has being trying very hard to find alternative paid employment, including broadening her existing skills, seeking the support of the Job Centre with mock interviews, attending a building self-confidence course at Basildon Adult Learning Centre in June 2018 and she has enrolled to undertake a number of additional courses from September 2018. These courses are appropriate to the Claimant's skill set, including IT and Microsoft Office, to show that she can still do computer work, plus higher maths and an introduction to counselling to build upon her psychotherapy degree. These are reasonable steps for the Claimant to take in the circumstances. The Tribunal consider that the Claimant is likely to benefit from her training and a move into counselling work, not least as we considered her to have a demeanour which is well suited to interaction with other people. There has been no unreasonable failure to mitigate her loss.

16 The Claimant was entitled to notice pay from her dismissal on 10 February 2017 until expiry of her notice period on 31 March 2017 in the sum of £2,492.55. From 1 April 2017, the Claimant would have worked 24 hours per week at a rate of £9.50 gross per hour. Using the HMRC calculator for a 24 hour week this gives a gross weekly pay of £228 and net weekly pay of £220.08. The period from expiry of notice to today's hearing is 58 weeks. Loss of earnings to date is therefore calculated as £12,764.64.

17 We considered the Claimant's future prospects for earning, having regard to the impact of her disability upon the suitable alternative work available to her, the restrictions on physical work in her previous area of care and the time which it will take for her to retrain. Whilst the Claimant will undoubtedly be helped by the good reference which the Respondent has indicated it is prepared to give, without which we would say that the period of future of loss would have been far longer, we conclude that the appropriate period of future loss is one year, namely the period required to complete her further

training courses. Damages for future loss of earnings is £11,444.16.

18 We took into account the Respondent's submissions as to whether we should make any reductions to take into account the possibility of earlier termination for redundancy or on capability grounds. The Claimant's eyesight has improved and there is no reason to believe that she would not have been able to give satisfactory service in the revised job that we have identified would have been a reasonable adjustment. As for redundancy, we accept that times can be hard and financial pressures weigh upon the care sector generally, however other than an advocacy role (entirely unconnected to the Claimant's work) there have been no departures since October 2017. There is no evidential basis for such a reduction.

19 On the unfair dismissal we have awarded the Claimant the basic award of £2,547.72; an agreed sum based upon her length of service and age at dismissal. Loss of statutory rights is significant for this Claimant who will have to work a considerable period of time or two years before she gains them and she is vulnerable in employment. Even if the law says that one cannot discriminate on grounds of disability, as out liability Judgment set out, employment may still in practice be at risk through inadvertence and error even if not through malice or wrongdoing. The appropriate award is £500.

Injury to feelings

20 An award for injury to feelings is compensatory. It should be just to both parties: fully compensating the Claimant without punishing the Respondent. Awards for injury to feelings must compensate only for those unlawful acts for which the Respondent has been found liable. An award should not be so low as to diminish respect for the legislation; on the other hand, it should not be excessive. An award should bear some broad similarity to the level of awards in personal injury cases. In deciding upon a sum, we should have regard to the value in everyday life of that money, being careful not to lose perspective.

21 We take as a starting point the guidance given in **Vento v Chief Constable of West Yorkshire Police (No.2)** [2003] IRLR 102, in which the Court of Appeal identified three bands for awards: the top being for the most serious conduct, such as a lengthy campaign of harassment; the middle band for those acts which are serious, but not within the top band; and the bottom band for those acts which are less serious, one-off or isolated. Recent Presidential Guidance takes into account the combined effect of inflation uprating and the **Castle v Simmons** uplift. The Guidance suggests an increase to the bands so that the bottom band now goes from £800 to £8,400, the middle band to £25,200 and the higher band up to £42,000. Some adjustment may be required where the claim is presented before 12 September 2017.

22 We are satisfied that this is a case which has a starting point in the middle band, between £8,400 and £25,200. This is a case in which the Claimant was not only dismissed, but was dismissed in circumstances where her request for varied duties was not considered adequately or at all. In her evidence, which we accept as truthful, the Claimant described being extremely saddened by the refusal to offer her assistance to enable her to remain employed in something that was not "just a job" but a career. The Claimant felt isolated and alone, believing that things were her fault as she was no longer "normal" and describing herself as "broken and useless". The Claimant began to contemplate how much better people would be without having to help her. The Claimant became withdrawn and from February 2017 developed anxiety and depression for which

she has received medication and counselling. The Claimant had no prior medical history of either problem but, fortunately, is now improving with treatment. Mrs Slater gave evidence about the impact upon the Claimant which we found to be restrained and genuine, despite being the Claimant's sister. Mrs Slater described the Claimant becoming a shell of the person she once was, no longer able to engage spontaneously in social activities and requiring a lot of family support.

23 The Respondent did not seriously challenge the Claimant's evidence save that Mr Ridgeway notes the paucity of medical evidence and the reliance on Mrs Slater's evidence (which we found credible and reliable as above). The Respondent submitted that there were other causal factors which were not acts of discrimination, in particular the original diagnosis of severe and declining eyesight and the manner of dismissal.

24 The Claimant candidly accepted in evidence that the initial diagnosis of a serious problem with her sight on 7 November 2016 came as a shock to her. It was, as she said, "devastating" however, she felt reassured by her initial conversation with Ms Morgan manager and relieved that she could continue her career at the Respondent. We accept her evidence that it was when Ms Homan told her on 18 November 2016 that she had no future with the Respondent that her sense of security and self-confidence was destroyed. It was this discriminatory conduct, and not the diagnosis itself, which caused the upset. We take into account the importance of work to this Claimant and how bound it was in her sense of self-esteem and social interaction.

25 The manner in which the Respondent dismissed the Claimant in February 2017 is described by her as cold and cruel. It was a significant cause of upset and materially exacerbated the Claimant's existing sense of being let down by her employer. The Claimant said in evidence that were it not for her dismissal, she would not have brought the claim. However, this was because it was only when speaking to ACAS about her dismissal that she became aware of the claims which may arise out of the failure to make reasonable adjustments and it caused her to reflect again on the way in which her request for adjustments had been refused out of hand. On balance, whilst the upset caused by the dismissal was significant it did not outweigh that caused by the discrimination itself.

26 For these reasons, and having regard to all the circumstances, we decided that this was a case which would have warranted an award of around £20,000 within the **Vento** middle bracket. To reflect the significant upset caused by the manner of dismissal which was not an act of discrimination, we concluded that the award should be reduced to £12,000.

ACAS Uplift

27 The ACAS Code applies to disciplinary and grievance procedures, it does not apply to dismissals for health reasons, capability, redundancy or other business reasons. Mr Ridgeway candidly accepts that the Respondent got things wrong in this case. We have found that to be so, not least in the failure to consider adequately or at all the Claimant's request for varied duties when first made. Be that as it may, we are not persuaded that there was an unreasonable failure to follow the Code at that time as there was no grievance or disciplinary procedure in play. The Claimant did raise a grievance, in February 2017 in response to her dismissal. Mr Hart was appointed, investigated and held a grievance hearing after which he reached a decision to reject the grievance. Although the Claimant did not agree with the decision, there was to that point no

unreasonable failure to follow the Code. Dr Raja was appointed to hear the appeal and there was a meeting. We are not satisfied that the appeal was full and fair and, most significantly, for the purposes of the ACAS Code, the Claimant did not receive a decision. The conduct of the appeal stage was an unreasonable failure to comply with the ACAS Code. Given the extent of the breach and the size of the employer, we consider that the appropriate uplift is 10% but applicable to the notice pay only as this was the substantive issue in the grievance.

Employment Judge Russell

21 September 2018