



EMPLOYMENT TRIBUNALS

Claimant:
Ms N Brown

v

Respondent:
Network Rail Infrastructure
Limited

Heard at: Reading

On: 7 August 2018

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mr J Chegwidden (Counsel)

For the Respondent: Mr T Adkin (Counsel)

JUDGMENT having been sent to the parties on **14 August 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS FOR REMEDY JUDGMENT

1. In a judgment sent to the parties on 19 June 2018, the Employment Tribunal found that the Claimant's complaints of direct disability discrimination, discrimination arising from disability, disability harassment and victimisation are well-founded and succeed. A remedy hearing was listed to take place today. The Claimant provided a witness statement; the Respondent provided a witness statement from Ms Pangbourne, Head of Human Resources (Policy, Projects and Performance) for Infrastructure Projects. The parties provided an agreed remedy bundle. We have Outline Submissions on Remedy from the Respondent and a Note on Remedy from the Claimant.
2. The issues that we have had to determine are the level of an award for injury to feelings, whether the Claimant should be entitled to recover for personal injuries, whether an award should be made in respect of aggravated damages, whether the Claimant is entitled to an uplift as a result of any breach of the ACAS Code, the level of interest that the Claimant is entitled to recover, and whether the Tribunal should make any recommendations.
3. The Claimant has also made a claim in respect of loss of bonus. The Respondent conceded this and the Claimant is entitled to recover the sum of £276.90.

Injury to Feelings

4. The Employment Tribunal has come to the conclusion that the Claimant is entitled to recover the sum of £22,000.00 in respect of injury to feelings. In arriving at our award for injury to feelings, we have taken into account the following features of this case.
5. The Claimant's statement relating to remedy has not been contested by the Respondent.
6. We note that in respect of the incident on 4 November 2016, the Claimant states that she "felt a total loss of control", that she "felt anxious" and "started to shake", she "felt sick", she "felt shortness of breath" and she "felt dizzy". The Claimant says: "I wanted to escape to a safe place i.e. home. Later that day, she had a tremendous headache and just wanted to sleep".
7. In respect of the incident on 9 November, the Claimant describes how on the day of the incident, she "was extremely upset. I had a lump in my throat and was desperately trying to hold back my tears and keep myself composed. I felt hot, flustered and angry. I had the shakes, palpitations and ... felt sick. I wanted to escape to a safe place, i.e. home, ... Home is how I distance myself from the outside world when I can't cope".
8. The Claimant described how she was unable to sleep, felt anxious, angry, and worried about what her team would think if her "but also about continuing to work with somebody who did not take my disabilities seriously". The Claimant describes how when she awoke, she sent several text messages to Linda Pham expressing her anger and how upset she felt by Linda Pham's actions.
9. The Claimant describes how she felt emotional and tearful; explained how the matter had damaged her trust; described how she was anxious about her disability and felt as though she had been treated as if she had a disease and had become the laughing stock of the office. The Claimant describes how she suffered an exacerbation of her OCD symptoms. The Claimant, describing the nature of her disability, sets out in her statement a description of the effect of her OCD symptoms.
10. The Claimant was unwell and unable to work because of the effect of the events which had occurred on 4, 9 and 10 November 2016. The Claimant who was prescribed medication to treat various ailments, because of the incidents which occurred, had an increase in her medication.
11. The Claimant explains how the delay in dealing with her grievance caused her further distress. She believes that the way the grievance was dealt with was designed to deliberately cause her distress. The Claimant's GP records indicate that the Claimant's mental health symptoms became worse in the period following the incidents in November 2016. The GP records for 16 November 2016 indicate that the Claimant's medication increased and that at that time she was complaining of not sleeping and being tearful. She was not fit to work.

12. The Claimant describes how her emotions were intense; how on some days she would feel weak and suffer double vision and be hyperacusis¹. The Claimant describes how she was reliant on over the counter sleeping pills. She describes herself as medicating “to switch my brain off and let my brain rest”.
13. The delay in dealing with the Claimant’s grievance had an impact on her health.
14. On the Claimant’s return to work, she was placed in a role where she was not required to work with Linda Pham. She was able to cope better with her work and life, although at times still suffering some symptoms resulting from the way that she had been treated by the Respondent.
15. The Claimant describes how she felt that she had been isolated in the period from November 2016 until February 2017 and states that this was a matter which caused her stress and anxiety. The Claimant explained that moving her from her usual place of work at Davidson House to an office away from Linda Pham left her feeling that she was the one who was considered to be the problem.
16. The Claimant describes how the change in her office environment caused her isolation and how the changed routine resulted in the worsening of her OCD symptoms and triggered panic attacks. The Claimant describes instances where she suffered panic attacks while on overcrowded trains and how she suffered from increased levels of paranoia. We were provided with an Access to Work Mental Health Support Service Plan which described her mental health symptoms at the time.
17. By December 2016, the Claimant was struggling to remain positive, had a mix of emotions, felt angry, tearful, confused and insecure. Her confidence was shattered. She felt extremely tired and was struggling with poor sleep and relying on sleeping pills.
18. The Claimant has set out detriments as she saw them and which arose from the delay in dealing with her grievance. She describes how this caused her stress, anxiety and worry. She describes how during the grievance process she felt excluded from the team and how she suffered nightmares and night sweats.
19. By January 2017, the Claimant was suffering from extreme low mood. She states that the failure to resolve her grievance caused an increase in her symptoms. The Claimant was referred to the mental health service as a result of her symptoms. At the time of her assessment by the mental health services, she described how she was upset, angry, crying and could not get to bed or leave the house.
20. It was not until February that the Claimant was told the outcome of the grievance. The Claimant describes how the outcome to the grievance did nothing to alleviate the impact of the matters that had happened to her.

¹ Hyperacusis is the name for intolerance to everyday sounds that causes significant distress and affects a person's day-to-day activities.

She describes how when she was asked to take garden leave, this left her feeling that she was not wanted. She explained the disappointment that she felt at the outcome of the grievance process and her feelings that complaints that she made had not been taken seriously. She says that she was shocked that colleagues who she considered to be friends had described her in their statements as mentally unstable and portrayed her as “something of a nutter”.

21. The Claimant described events in March 2017 which resulted in her having to attend the A&E department of the hospital; she describes being under considerable stress in about March 2017. The Claimant’s appeal to her grievance outcome was made in April 2017.
22. It was not until June 2017 that she received a response to the grievance appeal.
23. We are referred to parts of the report prepared by a Consultant Psychiatrist. The Claimant describes how she has always suffered with depression, anxiety and OCD but goes on to state that as a result of the work-related issues, she had suffered poor sleep and had to rely on sleeping pills, something that she had never experienced before. She further described how she had suffered panic attacks and suffered breathing difficulties as a result of the treatment at work. She also describes periods when she had over-eaten and under-eaten and suffered flashbacks of incidents. She described how her OCD became out of control, all of these matters she puts down to the treatment that she suffered at work.
24. The Claimant describes returning to work in May 2017 with a new manager who has been supportive and built up her confidence. At one point, it appeared as though Linda Pham was going to resume as the Claimant’s line manager, however, following discussions with the Claimant and her union representative, alternative arrangements are being put in place to allow the Claimant to continue to work under the manager with whom she has enjoyed a successful return to work.
25. Taking these matters into account and also having regard to all of the matters which were set out in our findings of fact in the liability decision, the Tribunal has had to consider what the appropriate level of award is in respect of injury to feelings.
26. The Tribunal has helpfully been provided with an extract from the IDS Employment Law Handbooks, Volume 4, Discrimination at Work, Chapter 7, the section headed “Injury to Feelings, Quantum Vento Guidelines. We have considered the contents of this document which we have found helpful and useful in arriving at our decision.
27. The Tribunal has also had regard to the outline submissions provided by the Respondent and the note on remedy prepared on behalf of the Claimant.
28. The Claimant and the Respondent both agree that the appropriate Vento band in respect of compensation is the middle band as set out in the

original Vento guidelines.

29. The Vento guidelines provided that the top band should normally be for sums between the range of £15,000-25,000 and that 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 grounds of race or sex. Vento stated that the middle band was for cases between £5,000 and £15,000 and should be used for serious cases which do not merit an award in the highest band.
30. Having considered the specific features of this case, we consider that the parties are correct to describe this as a serious case which should merit an award which is not in the highest band. In arriving at our decision in this case, we have regard to the fact that the Vento bands have been revised in the case of Da'Bell v National Society for Prevention of Cruelty to Children (2009) and also have had regard to the guidance of the Court of Appeal in the case of De Souza v Vinci Construction (UK) Ltd (2017).
31. When we considered the circumstances of this case, we are satisfied that the description that the Claimant gives of the impact that the discrimination that she suffered shows that she has suffered serious harm as a result of the discrimination. She has described a significant degree of injury to her feelings. We note that there are features of the way that she was treated by the Respondent which in our view would have resulted in an increase in her injury to feelings.
32. In the manner in which the Respondent dealt with the grievance, we note the delay not only in investigating the grievance but in also promulgating the decision once there had been some investigation of the grievance. We also note that the manner in which the grievance investigation was conducted by the Respondent was inadequate for the reasons that we have set out in our liability judgment and that this had a very real impact on the Claimant.
33. We note the level of distress suffered by the Claimant which we consider amounted to personal injury. She describes her lack of control, the anxiety and illness that she suffered as a direct result of the stress that she was suffering at this time.
34. The Tribunal notes and takes into account the fact that there were other live factors which the Claimant sets out in her evidence which had an impact on the Claimant's condition during the relevant period but the Tribunal is satisfied that the Claimant would have been generally dealing with these stressors which occur in life in a way which enabled her to function normally and appropriately at work but for the actions of the respondent's discrimination. It was only after the problems that arose at work in respect of which she has been successful in bringing this claim that the Claimant was tipped over the edge and suffered harm and damage that resulted in her being unable to function properly and for a significant period of time unable to work.
35. For these reasons, we are of the view that an award of compensation to the Claimant is a matter which should be towards the top end of the middle

band of the Vento guidelines.

36. In arriving at the appropriate level of award in this case, we have looked at the original Vento guidelines and in considering them we are of the view that the Claimant should be awarded a figure which sits at 80% of the middle band, that is a figure of about £13,000.00, applying the original Vento award.
37. We have then gone on to consider the guidance set out in the Presidential Guidance and applied a formula as described in the Presidential Guidance.

“An Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift).”²

38. To arrive at the figure at today's date and we have therefore taken the figure of £13,000.00 and divided that by 178.5 which is the RPI All Items Index Value at the date of the Vento decision. We have then multiplied that figure by 269.3 which is the RPI All Items Index Value for the month of March 2017. We arrive at a figure of £19,612.88. We have applied a 10% uplift as provided for in the case of Simmons v Castle and arrived at a figure of about £21,574.17. The Tribunal has then rounded that figure up to £22,000.00 which we consider to be an appropriate award in respect of injury to feelings.
39. The Tribunal has then gone on to consider whether or not the Claimant should be compensated for personal injury. The Tribunal has had the opportunity of considering the medical evidence which was set out in the trial bundle and also the Claimant's evidence. It is the view of the Tribunal that a fair reading of the evidence that has been presented to us shows that the Claimant was generally affected by a variety of life events which resulted in her becoming ill, in particular during the period from the end of 2016 into the first half of 2017.
40. The cause of her condition is life events which included the difficulties that she faced at work and the discriminatory matters that she suffered. We are satisfied that the Claimant's personal injuries in this case were caused by life events which included the way that she was treated at work.
41. We have then attempted to determine the extent to which the treatment at work had an impact on the Claimant, the extent to which it tipped her over the edge and/or caused the specific injury that she sustained, and we are satisfied that the appropriate level of award should reflect 70% to the impact of events at work. We come to this conclusion because it is clear

² Employment Tribunal awards for injury to feelings and psychiatric injury PRESIDENTIAL GUIDANCE (5 SEPTEMBER 2017)

from the Claimant's evidence that whilst she suffered a variety of difficulties and stresses, it was the impact of the discrimination at work which caused the Claimant to sustain a level of injury which meant that she was not able to operate in a normal way. It damaged her health and made it impossible for her to be able to continue to work in ordinary circumstances as she describes in her witness statement.

42. Having come to the conclusion that the Claimant is entitled to recover a figure representing 70% of the sum which she is entitled to recover by way of personal injury having regard to the medical evidence produced, we note that the parties are agreed that the appropriate point to pitch the Claimant's award for personal injury in this case is the sum of £4,900.00. We arrive at this by reference to the Judicial College Guidelines section relating to psychiatric injuries. Bearing this in mind we consider that an award of £3,500.00 is an appropriate sum to award in respect of personal injury, that being approximately 70% of the sum of £4,900.00.

Aggravated damages

43. There are in this case things that could classically be described as aggravating features: the delay in dealing with the Claimant's grievance investigation; the delay in promulgating the decision once it was investigated; the failure to investigate the complaints properly; the failure to deal with the Claimant's case in a timely way in circumstances where the Respondent was aware of the Claimant's illness. However, all those matters have been expressly taken into account in considering the appropriate level of award for injury to feelings.
44. The question we have asked ourselves is whether this Respondent has in this case demonstrated a highhandedness or oppressiveness towards the Claimant so as to justify an award of aggravated damages. We remind ourselves that aggravated damages are compensatory and to be awarded in cases where the behaviour of the respondent, in causing injury to the claimant, has been high handed malicious or oppressive.
45. In this case we do not consider that there is a level of harm to the claimant caused by the respondent's conduct which has not been compensated in the award for injury to feelings to justify a further award for aggravated damages.

Breach of ACAS Code

46. The Tribunal considers that the manner in which the Respondent delayed in dealing with the Claimant's grievance investigation, the failure to properly investigate the Claimant's complaints, the delay in promulgating the Claimant's decision are all factors that indicate a breach of the ACAS code of practice on disciplinary and grievance procedures.
47. The Tribunal accepts that this was a case where the Respondent made a genuine effort to deal with the Claimant's grievances. We noted in the liability decision the way that the matter was conducted by Phil Mear. The fact that there was a genuine attempt to deal with the Claimant's grievances does not in our view remedy the fact that there was a failure to

deal with them in a way which is compliant with the ACAS code. The Tribunal also notes that in dealing with the Claimant's appeal on the grievance, the actions of the Respondent entirely failed to address the faults and defects which had been identified in the way that they had been originally dealt with.

48. We consider that these were serious breaches. We do not however consider that they were the most serious breaches of the ACAS code but we consider that they were significant and in the circumstances the Tribunal has come to the conclusion that there ought to be an award of compensation to the Claimant which is increased by 15% for the breach of the ACAS code.
49. The parties are agreed that the appropriate level of interest in this case is 8% and the number of days as 643 days. The Tribunal has considered whether in its discretion it ought to make an alternative award in respect of interest and the Tribunal has concluded that the figure of 8% interest over the relevant period of 643 days is appropriate in this case and we would therefore not seek to alter or vary the agreement of the parties in this regard.
50. The Tribunal has gone on to consider whether this was an appropriate case in which to make recommendations. We do not consider that this is a case where recommendations can be made. We note that the purpose of recommendations is to take specified steps for the purpose of obviating or reducing the adverse effect on the Claimant of any matter to which the proceedings related. The general nature of the recommendations sought by the Claimant in our view suggest that it is not appropriate to make the recommendations. We spent some time discussing whether recommendations were appropriate having regard to the nature of the difficulties that the Claimant faced with Linda Pham, especially in view of the fact that there had recently been some suggestion that the Claimant may have ended up once more under the line management of Linda Pham. However, the Tribunal did not consider that it would be appropriate for us to make a recommendation relating to where and when the Claimant works or who is her line manager as we consider that these are matters which are for the determination of the Respondent in the way that they run their business. However, the Tribunal also takes into account that the Respondent itself has very responsibly been alive to the difficulties which have arisen between the Claimant and Linda Pham and that steps and action have been taken by the Respondent in carrying out discussions with the Claimant and her trade union representative in order to find a solution which would mean that the Claimant does not have to work under the line management of Linda Pham. Whilst it is not for the Tribunal to make any determination that the Claimant is never to work under the line management of Linda Pham, we do consider that it is appropriate for the Respondent to be alive to this problem and to continue to seek to take such steps as are necessary in order to avoid the Claimant having the difficulties which have arisen from the line management of Linda Pham occurring in the future. We note the witness evidence which was given by Mrs Pangbourne and the steps that the Respondent has taken since the promulgation of the liability decision in this case. In all the circumstances we are confident that the Respondent would act responsibly in relation to

the Claimant and be alive to the problems that the Claimant being line-managed by Linda Pham might present.

51. For those reasons, we do not consider that it is appropriate to make any recommendations in this case.
52. Having regard to the matters we have set out above, it is the judgment of the Tribunal that the Respondent is ordered to pay to the Claimant the sum of £32,990.56. This award of compensation breaks down in the following way:

Injury to Feelings Award:	£22,000.00
An award for personal injuries:	£3,500.00
ACAS Uplift:	£3,866.54
Interest:	£3,347.12
A payment in respect of bonus In the sum of:	£276.90
Grand Total	£32,990.56

Employment Judge Gumbiti-Zimuto
Date: 20 September 2018

Reasons sent to the parties on
.....16.10.18.....
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For the Tribunal office