Case No. 2404063/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr K McGregor

Respondent: Lancashire County Council

Heard at: Manchester **On:** 6 and 7 September 2018

Before: Employment Judge Sherratt
Mr M C Smith
Mr S Stott

REPRESENTATION:

Claimant: Ms A Niaz-Dickinson, Counsel
Respondent: Mr K Ali, Counsel

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The respondent shall pay to the claimant in respect of past financial loss the sum of £2,983.81 plus interest of £119.35.

2. The respondent shall pay to the claimant in respect of injury to feelings the sum of £19,581.84 plus interest of £1,566.54.

3. The total sum payable is £24,251.54.

REASONS

1. This is a remedy hearing arising out of the Tribunal in November 2017 having found for the claimant in respect of two matters of discrimination based on his disability pursuant to the Equality Act 2010. The parties were invited to apply for a remedy hearing should they be unable to agree matters between themselves, and the fact that we are here suggests that that was not possible.

2. The claimant at the original hearing had his current counsel in the background advising him and preparing his submissions, but she was not present for the original hearing. We are grateful for her coming to the Tribunal now at the remedy stage.

3. The claimant has produced a Schedule of Loss and the respondent a counter schedule. After preliminary discussions yesterday counsel for the claimant made amendments to the Schedule of Loss, removing the claims set out in item 1, loss of earnings from July 2016 until January 2017; item 3, future loss arising out of the termination of employment thus leaving for the Tribunal's determination item 2, loss of earnings for July to December 2017, plus an element in respect of holiday pay; what was item 5, injury to feelings, then aggravated damages upon we have received submissions from both sides and the question of costs, which may or may not arise depending upon the Tribunal's determination and how that is relevant to what may have come before.

4. Looking at the claim for lost earnings, it is in respect of the period from July 2017 to December 2017 when, according to the schedule of claim, the claimant was fit for work but was absent due to the respondent's failure to make reasonable adjustments. The claimant according to the schedule received full pay for the period January 2017 to July 2017 and thereafter received the stated payments, and the claim is for £9,946.03.

5. We feel that to give this proper consideration we must look at the period from 3 January 2017 because the events of that day led to the claimant's absence from work.

6. There was a meeting on 3 January 2017 between the claimant and Jill Cornwell and Stuart Morris, his managers. Unfortunately, the invitation to the meeting had not reached the claimant owing to email difficulties, but when he arrived at work the first day after the 2016 Christmas holidays he was invited to this meeting which was to discuss his work and how things would pan out.

7. We have reviewed the evidence related to the meeting and we note that it dealt with recommendations from a case review carried out in November 2016, the latest Occupational Health report from OH Assist dated 29 November 2016, it went on to discuss the work the claimant was employed to do, the sites over which he was to work, what might be needed, travel plans, and so on. There was then a discussion of recommendations from an Occupational Therapy report of 2 December 2016, and then there were raised various issues concerning display screen equipment, the ability for the claimant to use a computer under the conditions set out in recommendations by Access to Work. Questions of mobility, squatting, sitting, standing, driving, were raised. The workstation was discussed. Questions of adjustments were discussed. In particular the so called "perfect chair", it was suggested, was not appropriate and it was thought Mr McGregor might be better using a standard office chair with lumbar support. Questions were raised as to a tablet being supplied to Mr McGregor to use when he was out on site to make notes rather than the laptop computer that the respondent's IT Department had deemed he should have rather than the Access to Work recommended lightweight tablet.

8. Going through all of those matters, some of which related to the Access to Work report, some of which did not, the conclusion of management was that:

> "Taking into account the demands of the role of health and safety officer and any practical reasonable adjustments (current and future) it is the opinion of HS & R Management Team that the required reasonable adjustments cannot be accommodated within the health and safety officer role."

9. This paragraph may be disputed but it says:

> "During the meeting Mr McGregor indicated that he agreed with this view and that in his opinion he requires a job role with managed risk, which he accepts cannot be accommodated within the role of H & S officer and that he would like to look for alternative employment that better suits his needs within the Lancashire County Council."

10. The result of that meeting was that Mr McGregor was told to go home and he remained nominally an employee of the County Council in that department, but the County Council did not at that time seem to have any work for him.

11. We need to consider the medical information available at that time. It starts with a fit note from 12 January to 13 February 2017 where the GP advised that the claimant may be fit for work taking account of workplace adaptations with the comment being "fit to return to work with reasonable adjustments". There is nothing in the bundle to cover the period from 13 February to 13 March 2017, but based on the documents in the bundle the next statement was dated 17 May and said the claimant "may be fit for work with workplace adaptations, unable to return to work until reasonable adjustments are made" and the period was 17 March to 16 June 2017. Same doctor 1 June to 1 September 2017 "may be fit, workplace adaptations" with "fit to return with reasonable adjustments". We then had the period 1 September to 1 December 2017, "May be fit for work taking account of amended duties, workplace adaptations" and the note "patient has a suprapubic catheter – please make reasonable adjustments". The claimant has had that catheter for a number of years and that has figured in the earlier statements of fitness for work, although I have not mentioned them.

12. In addition to the fit notes, we have been taken to various medical reports: some from Occupational Health Assist and one from the claimant's GP. During the relevant period the first one we have is dated 28 February 2017, and it is the opinion of the Occupational Health adviser employed by OH Assist that, "Mr McGregor is unfit for work due to his ongoing health conditions which cause fatigue and limit his activity levels". The report referred not only to the matters relating to his bowel function but it referred to his immune system which had not improved, and his nutritional levels had been deteriorating over the last 18-6 months:

> "He has been diagnosed with chronic immunodeficiency disorder in the last six months, his nutrition levels have severely impacted on his day-to-day activities. Mr McGregor is under the care of various specialists. He has been prescribed supplements to help support his nutrition levels and he is reviewed every two weeks with regards to this. His poor nutrition causes him to fatigue on minor exertion such as walking around his home."

13. It was on this basis that the Occupational Health Assist person provided their opinion, although it would appear that matters of immunodeficiency and lack of

nutrition etc. do not appear in any of the reports that we have seen from the claimant's GP.

14. Moving on, the second page of that report asks what reasonable adjustments would assist him to avoid the disadvantages of what were found to be reduced energy levels and reduced resistance to infection on the chronic immunodeficiency disorder. At present the Occupational Health adviser was not aware of any adjustments that would support a sustained return to work. She said:

> "Advice on ill health retirement will be given once we have an understanding of the prognosis and on receipt of the GP's report."

15. So the question was raised at that time of ill health retirement, raised by the employer, because it was the employer's request.

16. It is apparent from the documentation that Mr McGregor was asked if he would give consent for his GP or others to provide further information. It would appear that did take place on 9 March, although that may be consent for a later report which dealt with the question of ill health retirement.

17. We move on to 13 April 2017 when the same OH Assist representative reviewed the claimant again through a telephone conversation. In her view he remained unfit for work due to his ongoing health conditions which caused fatigue and limited his activity levels. Unfortunately, they had not received a report requested from the GP and had to provide the opinion on the basis of the available information. The chronic immunodeficiency disorder she found to be a long-term condition that will continue to have daily impact on his activities, and he will need the catheter for the foreseeable future and the stoma will continue to cause pain and discomfort. She concluded that Mr McGregor had been suffering from chronic immunodeficiency disorder for about two years with the last 18-6 months symptoms had become more substantial. Based on available evidence, in her view "Mr McGregor will be incapacitated from the role for a considerable time. It would be reasonable to make an application for ill health retirement. However, it is up to the employer to decide whether to apply for this".

18. That is followed by an ill health retirement pension application form. The first part of the form gives personal details of the claimant, his job title and his hours of work. Employment details give the role profile and then we have a list of the adjustments that had been made for the claimant by the respondent, and reference to various Occupational Health reports. His sickness record was also set out and then the form was dated 5 May 2017 to be signed by Stuart Morris, the claimant's manager. I assume that it was signed although we do not have a signed copy here. Section 2 of the form is headed "Employee Consent" and this would be completed by the employee setting out that the employee wants to tell the person considering the form. It gives details of the various medical people who are attending him, and he declares on 6 May 2017:

> "I have read and understood the ill health retirement fact sheet and can confirm that my manager has discussed this with me. I declare the information I have given is correct and complete to the best of my knowledge."

19. We do not have the ill health retirement fact sheet but we surmise that anyone applying must be stating that they are unfit to continue with their contracted duties.

20. Mr McGregor's GP was invited to give factual information and he provided it, obtained from the medical records, without seeing Mr McGregor. He confirmed that Mr McGregor was diagnosed with chronic urinary retention on 23 October 2006 and as a treatment for this he underwent the insertion of a suprapubic catheter on 9 February 2007 under the care of his consultant neurologist. He then went on to give details of current symptoms and the functional incapacity caused by them. The GP set out matters concerning the suprapubic catheter, how it worked and how there were problems with it which are of a medical nature, personal to the claimant. It is before the Tribunal in the medical report but it is not necessary for the information to be in this Judgment.

21. However, as to current treatments and response the GP noted that the claimant had been seen by the GP with eight urinary tract infections in the last 12 months:

> "On each occasion this has required antibiotic prescription with subsequent resolution of his symptoms. These infections have resulted in him having time off work due to their systemic upsets. They make him feel unwell, nauseated and experience abdominal pain. These recurring episodes also cause him significant stress and anxiety due to the dysfunction caused to his everyday life."

22. The doctor went on to say that no other treatments were being considered and there was no relevant specialist correspondence that he should make known to the Pension Medical Adviser to whom that letter or report was addressed.

23. Moving forward to 15 November 2017, an independent registered medical practitioner to the Local Government Pension Scheme gave advice for the claimant's ill health retirement application. The doctor was in Glasgow and it would appear that her opinion was based upon the medical evidence provided in terms of Occupational Health records and reports, occupational therapist, GP report, consultant colorectal surgeon report, copies of various clinic letters:

> "Question: Is the member suffering from a condition that more likely than not renders them permanently incapable of discharging efficiently the duties of their employment because of ill health or infirmity of mind or body?
>
> Answer: Yes.
>
> Question: Is the member immediately capable of undertaking any gainful employment?
>
> Answer: No."

24. The letter then goes on to give an explanation for the responses to those questions, which again those who are before the Tribunal know what it says, and those who are not do not need to know. It goes on:

“Question: Is the member as a result of ill health or infirmity at tier 1 unlikely to be capable of undertaking gainful employment before normal pension age?

Answer: Yes.”

25. That being the case it was not necessary for the doctor to consider tiers 2 and 3. The reasons were given and in the view of Dr Chapman, occupational physician, “he is likely to be fit for occasional work for a few hours a week when he doesn’t have a urinary infection”. So the medical report favoured ill health retirement for the claimant, and it would appear that it was offered by the Pension Scheme and agreed on the basis of terms that were very favourable to the claimant retiring around the age of 60 rather than 65 without actuarial reduction.

26. We have to consider the claimant's claim for lost earnings over the period July 2017 to December 2017 against that background, where the GP fit note said, “fit for work with adjustments” and various other matters suggested that the position was not as clear as the claimant and his GP were stating, but on the other hand we know that it was the respondent’s decision that the claimant should not work. These matters followed the acts of discrimination that the Tribunal had found.

27. We heard submissions from both parties and one matter submitted on behalf of the claimant was that the Tribunal might consider a percentage award in respect of this wage loss. This is not, in our judgment, a scientific matter. It is for the Tribunal to do the best it can on the basis of the information available seeking to compensate the claimant appropriately, and in our judgment weighing up all of the factors we are of the view that the claimant should be awarded 30% of the sum claimed and by my calculation 30% of £9,946.03 is £2,983.81. Questions of interest may arise on these awards however they can be dealt with afterwards.

28. The second part of this claim for unpaid wages says that the claimant's annual leave entitlement ran from 1 April to 31 March. On 5 May 2016 he was advised his leave entitlement was 46 days. The respondent recorded the claimant as being on annual leave for the periods 4-12 January 2017 and 14 February to 16 March 2017. The claimant only became aware of this during his grievance in December 2017. The claimant asserts that he had taken a total of ten days’ leave only at the end of July 2016, and therefore seeks payment of 36 days’ pay. The claimant deals with this in his witness statement in an economical fashion. He says when his employment was terminated on 13 December 2017 he was made aware that Stuart Morris, his manager, had recorded entries of annual leave on his record for early 2017, “something I’d not been aware of until the grievance outcome”.

29. The Tribunal has looked at the information provided on both sides. We have looked at the grievance outcome, but on the basis of the information available to us we are unable to reach a conclusion as to whether or not the claimant was due any more money in respect of holiday pay. In any event we do not feel it properly comes under the claims that we are dealing with arising out of the two findings that were made in respect of disability discrimination. We do not agree, we do not disagree, we simply do not make an award on the basis that we do not think it is within our jurisdiction and/or because we do not have the evidence to make any findings.

30. We move forward to the question of injury to feelings. This is in respect of the two findings of the Tribunal concerning the claimant's attendance at work on 5 January 2016 to an office where there had been no risk assessment, where he was required to work a full day. He found a PC in a conference room and worked, but says he developed medical difficulties. The claimant, we found, was put at a substantial disadvantage by being asked to work at a workstation on this date without there previously having been a work station assessment and a risk assessment.

31. The claimant says that he was caused injury as the sitting adversely affected his medical devices and how they were connected with him. The claimant did not refer to it when he was speaking to Occupational Health shortly thereafter. It is, however, mentioned in something from the claimant's doctor dated around 8 January 2016. So it may well be that the claimant's physical condition was exacerbated by having to sit for that day doing the rotational duty in the office without proper assessment having been made of his ability to do so.

32. The other matter was number five on the list: failure to make reasonable adjustments in the form of failing to supply the whole of the display screen equipment or adapted work equipment recommended by Access to Work. The Access to Work report came at the end of February 2016. The final piece of general equipment was available around the end of May 2016. A laptop computer came later; the claimant never collected it, but in simple terms there was a failure to provide the claimant with a PC on the desk with the other pieces of equipment recommended by Access to Work until the end of November 2017 shortly after which this Tribunal had made its findings of the respondent's failure. These are the matters for which compensation is being awarded.

33. We have noted the claimant's evidence of a personal nature as to how he was affected by matters from May 2017 onwards. Again these are matters personal to him that it is not appropriate for us to include in this Judgment, but the claimant and respondent are both fully aware of what they were. The claimant is to be taken as he is found by the respondent and that is one of the matters that he claims relates to, or as a consequence of, the findings of the Tribunal.

34. In submission the claimant argues that the hurt feelings award should be in the top band of Vento. The respondent argues that it should be in the lower band of Vento. In our view we are not compensating for a lengthy campaign of discriminatory harassment; we are looking to award compensation to the claimant in respect of the two items which we have found in his favour. However, these two items, the first is on one day but the second goes over a lengthy period when the respondent failed to comply with Access to Work's recommendations. Had the respondent complied there may have been a totally different position because the claimant would have been in work, things would have been rather more positive, he may well have been getting on with things. The substantial delay caused the claimant in part not to be at work, but dividing his injury is a much more difficult question.

35. The Tribunal therefore takes the view that this is appropriately in the middle band of Vento. Taking into account the claimant's physical condition, his mental condition, how he was affected overall, we take the view that the appropriate point is the middle band of the middle point of the Vento bands, and if I am right that the

appropriate middle band for the time this claim was commenced was £6,600 to £19,800, and that would bring a figure of £13,200 but I am quite happy for either counsel to tell me that I am wrong on that and the appropriate figure will be substituted and of course questions of interest will arise on that.

36. Counsel for the claimant in her submissions suggested that aggravated damages were appropriate in this case. Counsel for the respondent made his submissions in response as to why he did not think they. Without reciting the arguments for and against we prefer the submissions of Mr Ali that this is not an appropriate case for an award of aggravated damages.

37. Counsel agree that interest on the lost earnings figure of £2,983.81 is £119.35.

38. Counsel did not agree upon the appropriate way of uplifting the figure for hurt feelings but Ms Niaz-Dickinson for the claimant told us that the way in which she had previously applied the formula set out in paragraph 11 of the Presidential Guidance: Vento Bands meant that the correct calculation was as follows:

£12,000 ÷ 178.5 x RPI, £264.8 = £17,801.68 + 10% = £19,581.84 to which there should be added interest of £1,566.54.

39. The Tribunal accepts that this is the appropriate method of calculation.

Employment Judge Sherratt

1 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 October 2018

FOR THE TRIBUNAL OFFICE

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