



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Brophy

**Respondent:** Alverant Ltd (Cartref Residential Care Home)

**HELD AT:** Liverpool

**ON:** 18, 19, 20 September  
2017

**BEFORE:** Employment Judge Rice-Birchall  
Mr Gelling  
Mrs Williams

## REPRESENTATION:

**Claimant:** Ms S Ibrahim

**Respondents:** Mr R Crabtree, Consultant

## JUDGMENT

Judgment having been sent to the parties on 21 November 2017, written reasons were requested and, in respect of liability, sent to the parties on 13 February 2018. Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 in respect of liability, the following reasons are provided.

## REASONS ON REMEDY

### The issues

1. At the remedy hearing, the claimant confirmed that she had no wish to be reinstated or re-engaged. The parties agreed that no further witness evidence was needed in respect of remedy and agreed three issues in relation to remedy in respect of which the determination of the Tribunal was required as follows:-

- (a) What a phased return to work would have been for the claimant;
- (b) The period of future loss; and
- (c) The level of an injury to feelings award;

## Facts

- 2. These facts supplement the fact finding in the liability judgment.
- 3. The claimant's date of birth was 14/10/1962.
- 4. The claimant commenced her employment with the respondent on 1 November 1991. The effective date of termination of her employment was 2 September 2016.
- 5. At the effective date of termination of her employment, the claimant was 54 and had 24 weeks' continuous employment with the respondent.
- 6. The claimant's gross weekly pay before the termination of her employment was £437.31 and her net weekly pay before termination was £358.30.
- 7. One month's net pay for the claimant (£358.30 x 52 then divided by 12) was £1,552.63.
- 8. The claimant's contract of employment entitled her to six months full pay followed by six months half pay in any rolling twelve-month period in the event of the claimant's sickness absence from work.
- 9. The claimant received Employment Support Allowance from 2 September 2016.
- 10. The claimant started to feel better almost immediately after her treatment had concluded in February 2017. The Tribunal accepted evidence from the claimant that she would have returned to work, possibly with some adjustments, by around February/March 2017 (see paragraph 40 of the written reasons sent on 13 February 2018).
- 11. The claimant had, around September 2017, started making some enquiries into possible vacancies. Although she had recently started "to put out feelers" the claimant had not yet made any concerted attempt to find an alternative equivalent role.

## The Law

- 12. The Tribunal was referred to the case of **Morgan v Alpha Plus Security Limited 2005 UKEAT 0438/04/1701** in relation to benefits received by the claimant.

### Injury to Feelings

- 13. Section 119(4) of the Equality Act 2010 specifically provides that Tribunals may award compensation for injury to feelings (whether or not they award compensation under any other head).
- 14. Employment Tribunals have a broad discretion as to the amount for the award for injury to feelings.
- 15. In **Prison Service and others -v- Johnson 1997 ICR 275 EAT**, the EAT summarised the general principles that underlie an award for injury to feelings: - awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party; an award should not be inflated by feelings of indignation at the guilty party's conduct; awards should not be so low so as to diminish respect for the policy of the discrimination legislation. On the other hand,

awards should not be so excessive that they might be regarded as untaxed riches; awards should be broadly similar to the range of awards in personal injury cases; the Tribunal should bear in mind the value in everyday life of the sum they are contemplating; and Tribunals should bear in mind the need for public respect for the level of the awards made.

16. As regards the level of an award, in **Vento -v- Chief Constable of West Yorkshire Police (Number 2) 2003 ICR 318**, the Court of Appeal set down three bands of injury to feelings awards indicating the range of awards that is appropriate depending on the seriousness of the discrimination in question comprising:

- a. A top band to be applied only in the most serious cases which is where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed the top band;
- b. A middle band for serious cases that do not merit an award in the highest band; and
- c. A lower band appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

17. These bands have subsequently been updated by the EAT in **Da'bell -v- National Society for Prevention of Cruelty to Children 2010 IRLR 19 EAT** and by the Court of Appeal in **D'Souza -v- Vinchey Construction UK Limited in 2017 EWCA Civ 879** (in accordance with decision in **Simmonds -v- Castle 2012 EWCA Civ 1288**, a personal injury case) such that the bands were as follows as at the date of the hearing (from top to bottom): £19,800 to £33,000; £6,600 to £19,800 and £660 to £6,600.

18. The claimant asked the Tribunal to take into account that the bands had recently been further updated (the middle band to £8400-£25200). Although the updated figures do not apply to claims unless they were issued after 11 September 2017, the claimant suggested that the recent updating demonstrated that the updating in **D'Bell** was somewhat outdated.

## Conclusions

### Issue 1

19. This issue involved a degree of speculation about what would have happened to the claimant on the expiry of the six-months of half pay which would have come to an end in April 2017.
20. Based on the Tribunal's findings of fact that the claimant started to feel better almost immediately her treatment in February 2017 on the basis that she had already begun, at the time of the Tribunal hearing, to make some enquiries about future job opportunities, the Tribunal concluded that the claimant would have been capable of a slow phased return to work between April 2017 and the Tribunal hearing.
21. The Tribunal considers that this would have involved the claimant sharing responsibility with the then Acting Manager and returning to work on a gradual basis.
22. In so concluding, the Tribunal has taken into account the fact that it is more onerous, stressful and demanding to start a new job and less onerous, stressful and demanding to return to a known workplace with known tasks, people and processes.

23. The Tribunal further concluded that, given how poorly the claimant had been, that phased return is likely to have commenced slowly, probably with only two half days per week at the outset building up to full time by September 2017 (by which time the Claimant was well enough to attend the Tribunal hearing and had started to make some enquiries for jobs).

Issue 2

24. In respect of the period of future loss, the Tribunal's concluded that the claimant would be able to find alternative work, including going through a recruitment process, within four months of the date of the Tribunal hearing.
25. In reaching this conclusion, the Tribunal took into account the claimant's evidence that she had recently started "to put out feelers", but had not yet made any concerted attempt to find an alternative equivalent role. The Tribunal also took into account the fact that care homes are generally in short supply of staff.
26. The Tribunal considered that, given the claimant's broad experience in the role and notwithstanding the circumstances of the dismissal (which the Tribunal considered would not hinder her greatly given the explanation she can now give following the judgment in her favour) four months would be sufficient time within which the claimant would be able to find alternative employment.

Issue 3

27. In considering what injury to feelings award to make the Tribunal took into account the fact that the claimant had given long and loyal service to her employer and that the impact on her of losing her job would therefore be greater than for a person who had shorter service with their employer.
28. The Tribunal concluded that the middle band was the appropriate band within which to make the injury to feelings award, as the middle band should be used for serious cases which do not merit a higher award. A number of factors meant that it was appropriate to put the award into this category, most notably the claimant's long and loyal service and the speed with which the respondent moved to dismiss her.
29. The real injury to the claimant was the hurt of her loyalty not being taken into account and consideration when the respondent was dealing with her illness.
30. For these reasons, the Tribunal makes an award towards the lower end of the middle bracket specifically an award of £8,400 for injury to feelings.

Recoupment

31. Finally, although it is expected that a claimant must give credit for any benefit received in the calculation of their loss, in this case the Tribunal awards compensation from the date of dismissal to the date of hearing based on a contractual entitlement to half pay (with reference to the contractual sick pay scheme). The Claimant would have been entitled to claim contribution based Employment Support Allowance in addition to her contractual sick pay and so no recoupment is necessary. The benefit does not fall within the provisions of the Employment Protection (Recoupment of Benefits) Regulations 1996.

Calculations

32. It was agreed that the claimant was owed **holiday pay** in the sum of £4,742.64 as reflected in paragraph 3 of the judgment dated 21 November 2017.

33. It was agreed that the **basic award** due to the claimant was in the sum of £11,588.45 as reflected by Clause 4 of the judgment dated 21 November 2017.

34. The compensatory award was calculated as follows.

Past loss of earnings.

- a. One month of full pay: £1,552.63 (2 September 2016 – 1 October 2016);
- b. Six months' half pay (contractual entitlement) (£1,552.63 divided by 2 and times 6): £4,657.90 (October 2016 – March 2017);
- c. Six months' half pay during the phased return: £4,657.90 (March – September 2017);
- d. Less for one month's pay (made on 7 October 2016).
- e. Total: £9315.80.

Future loss of earnings

- f. Four months net payment: £6,210.52.

Injury to feelings award

- g. The claimant was awarded £8,400.

Loss of statutory rights

- h. £600

Recoupment

- i. The Employment Protection Recoupment of Benefit Regulations 1996 do not apply.

Interest

- j. Interest on the award was also awarded in the sum of £138.02 as reflected by paragraph 5 of the judgment dated 21 November 2017.

35. The respondent is ordered to pay to the claimant a compensatory award of £24,526.32 plus interest.

36. A mistake has been identified in respect of paragraph four of the judgment dated 21 November 2017, in consequence of which a certificate of correction is being sent to the parties..

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Employment Judge Rice-Birchall

Date: 24 May 2018

REASONS SENT TO THE PARTIES ON

18 June 2018

FOR THE TRIBUNAL OFFICE