EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Jennifer Benjamin	**v**	**The Markfield Project**

Heard at: Watford **On**: 16 January 2019

Before: Employment Judge Bedeau
Miss J McGregor
Miss H T Edwards

Appearances

For the Claimant: In person
For the Respondent: Ms J Kerr - Counsel

REMEDY HEARING
JUDGMENT

1. The claimant is awarded the sum of £867.07 in compensation for being unfairly dismissed.

2. The claimant is awarded the sum of £4,000 in respect of her injured feelings with interest on that sum at the rate of 6% from 27 June 2016 to the date of this remedy hearing in the sum of £620, giving her the total sum of £4,620.

3. For the avoidance of any doubt the respondent is ordered to pay the claimant the total award of £5,687.07.

REASONS

1. The Tribunal gave judgment on liability following the hearing that took place on 15-17 October 2018. We concluded that the claimant's constructive unfair dismissal, direct race discrimination and a failure to make reasonable adjustment claims were well-founded. In respect of her public interest disclosure claim, we found that it was not well-founded, and it was dismissed.

2. We listed the case for a remedy hearing today and issued case management orders. The claimant was ordered to serve by 21 December

2018, documentary evidence of her search for employment from 28 June 2016 to 17 December 2018; a schedule of loss by 17 December 2018; and a witness statement setting out details of her search for employment as well as any hurt and upset caused by the discriminatory treatment. She was to serve her witness statement by 21 December 2018.

The evidence

3. We heard evidence from the claimant. On behalf of the respondent, evidence was given by Ms Sarah Miller, who also gave evidence during the liability hearing. In addition, we were referred to a limited number of documents prepared for this hearing.

Findings of fact

4. The claimant worked for the respondent as a part-time casual support worker, working 25 hours a week. She was born on the 19 June 1963 and at the time of her resignation, she was 53 years of age.

5. In 2012, she graduated with a Bachelor of Arts degree in Special Needs. At the liability hearing the Tribunal recalled her stating that it was her intention to use her BA degree to work in special needs.

6. The respondent introduced in the work place via a government initiative, a pension scheme effective from June 2016. The claimant had the benefit of that scheme for one month prior to her resignation. The scheme still operates. The respondent's contribution is 1%, the employee's is also 1%. The amount of the respondent's contribution towards the claimant's pension as set out in her June 2016 pay slip, was £9.63.

7. The claimant told us that she registered with her local job centre after leaving in June 2016. As she sustained an injury to her left wrist while at work when operating the door to a mini bus, she disclosed that fact to her local job centre and was advised to claim Employment and Support Allowance because of her injury. She had the benefit of the allowance from 27 June to 23 October 2016.

8. Either in late August or early September 2016, she decided to enrol on a Post-graduate Certificate in an Education course "PGCE". She tried to get in on the course at a local educational establishment but was unable to do so. In early September 2016, she enrolled on the course at Bedfordshire College for 2 years attending 1 day a week for 5 hours.

9. She told the Tribunal that while on the course she spent about 20 hours a week on her studies. She also sought for herself vocational assessment work at several educational establishments. The respondent, we find, do not have the necessary resources to provide work-based placements for those who are on the PGCE course.

10. She had registered with several recruitment agencies specialising in either education and/or teaching.

11. Contrary to what the tribunal ordered, there was no documentary evidence showing that she applied personally for employment positions similar to the one she occupied with the respondent or for any other employment posts. She told us she was open to offers but that does not avoid the fact that there is the absence of documentary evidence apart from a list of recruitment agencies she provided for the purposes of this hearing. The absence of such documentary evidence in the Tribunal's view is critical to the claimant's claim for compensation.

12. The claimant made reference to a chronology covering events from 27 June 2016 to the 7 December 2018. From 2 February 2017 to 15 June 2017, she worked for Overland Day Care Nursery as an early years educator. It was full-time and she was paid. When that employment came to an end she applied for Job Seekers Allowance.

13. On 8 August 2017, she was offered an early years educator post at Mapledene Nursery working full-time from 5 September 2017. She told the Tribunal that it was renewed after 3 months but, unfortunately, on the 15 March 2018, it came to an end because she sustained an injury to her head. She told the Tribunal that her work at Mapledene was well regarded and she felt confident that her employment there would have continued but for her injury.

14. On the 16 March 2018, she applied for Employment and Support Allowance which came to an end on or around 12 June 2018. Thereafter she was in receipt of Job Seekers Allowance.

15. On 27 August 2018, she unsuccessfully applied for a special education needs lectureship post at Hackney College.

16. In October 2018, she sent her curriculum vitae for the post of English as a second language teacher on a voluntary basis and to Education Line Recruitment, a recruitment agency. On 19 November 2018, she registered with Veritas Employment Agency.

17. On 30 November, she applied for a role as a tutor in South-East London and for a post as a Special Educational Needs tutor with Reeds Employment Agency.

18. We were taken to the bundle of documents presented at the liability hearing and to the information sent by Ms Miller to the claimant in relation to senior worker vacancies dated the 24 June 2016. The claimant did not apply for either of the two positions as she had concerns about her treatment and was also concerned about the significant reduction in her weekly hours of work.

19. We were taken to the invitation dated 27 June 2016, sent to the claimant by Ms Miller inviting her to the disciplinary meeting on 6 July 2016. The claimant told us on the last occasion, that she asked whether Ms Karolina

Fraj was also going to be the subject of disciplinary proceedings and when she was told "no", she decided to tender her resignation.

20. With reference to the claimant's grievance, we were taken to an email from Ms Corrigan dated the 22 June 2016, in which it was explained that as Ms Fraj was on sick leave Ms Corrigan could not take the claimant's grievance any further. We did make the statement during the liability hearing that there was nothing that prevented the respondent from meeting with the claimant to discuss her grievance notwithstanding the fact that Ms Fraj had sustained an unfortunate cycle accident during the weekend of the 18/19 June 2016. The respondent could then speak to Ms Fraj when she returned to work.

21. In relation to the claimant's injured feelings, she told the Tribunal and we accepted her evidence, that as a consequence of her treatment, she began to question herself which affected her confidence. She felt disappointed and hurt because of the racially discriminatory way in which she had been treated. She said she gave her best to the company but was not respected. Having to resign had a financial impact on her. She also suffered from sleepless nights worrying about her unfair treatment. Psychologically, in June, job satisfaction in her work had gone and she was no longer eager to go to work because she did not like being there and hated her job.

22. Being dyslexic she has to work harder than someone without her disability or without any disabilities.

23. In her schedule of loss, she stated that in addition to developing many sleepless nights and migraines there were incidents at work which were not part of her claims against the respondent. She was cross-examined and referred to several incidents prior to the incident on the 13 June 2016 and after, all of which involved Ms Corrigan. She was asked what proportion of her sleepless nights and migraines were attributed to the other incidents. Initially she said 80% and then, after further questioning, said 50/50.

24. As regards her current feelings, she told the Tribunal that she feels disappointed at the way she had been treated by the respondent.

25. Ms Miller had communicated with the claimant after the liability hearing and apologised to her for the way she had been treated. She impressed upon her that the behaviour of the respondent was not intentional as the Tribunal found that the treatment was unconscious race discrimination. She also informed the claimant that changes have been in the respondent's procedure to redress the criticisms made by the Tribunal.

26. Those are the Tribunal's material findings of fact.

Submissions

27. We heard submissions from the claimant and Miss Kerr, counsel on behalf of the respondent. We do not propose to repeat their submissions having regard to rule 62(5) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

The law

28. An Employment Tribunal may order a respondent to pay compensation to a claimant under section 124(2)(b) Equality Act 2010.

29. In relation to injury to feelings, section 119(4) of the Act states,

> "An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis.)"

30. We have considered the general principles to be applied when awarding compensation for injury to feelings as set out in the race discrimination case of Prison Service and Others v Johnson [1997] ICR 275, a judgment of the EAT. We have also taken into account the three bands of injury to feelings award in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, a judgment of the Court of Appeal, updated to take into account the effect of inflation since 2003 in the case of Da'Bell v NSPCC [2020] IRLR 19. The EAT held in that case that the lower band should be £600-£6,000; the middle band, £6,000-£18,000; and the top band, £18,000-£30,000, applying a 20% increase to each of the bands.

31. The Joint Presidential Guidance on awards for psychiatric damage and injury to feelings applies to claims presented on or after 11 September 2017.

32. Sections 112-116 Employment Rights Act 1996, are the tribunal's powers in relation to remedy where an unfair dismissal claim is well-founded. It can order reinstatement, section114; re-engagement, section 115 and compensation, sections 118-126.

33. The tribunal must remind the claimant of the options and invite him or her to elect, section, 112(2).

34. The basic award is calculated by reference to age at the date of dismissal and length of service. This would give the number of weeks the claimant is entitled to be compensated for, section 119.

35. The basic award can be reduced based on the claimant's conduct before dismissal and it is just an equitable to do so, section 122(3).

36. The compensatory award provisions are in sections 123 and 124. The award has to be "just and equitable in all the circumstances" having regard to the loss sustained in consequence of the dismissal, section 123(1).

37. The tribunal can reduce the amount of the compensatory award where the claimant has either caused or contributed to the dismissal, if it is just and equitable to do so, section 123(6). The conduct has to be either culpable or blameworthy for it to be taken into account, Nelson v BBC (No.2) [1979] IRLR 346, Court of Appeal.

Conclusion

38. The claimant elected to be compensated.

39. On the issue of contribution, Ms Kerr submitted that the claimant contributed to her dismissal and referred to the fact that the claimant was involved in the dispute with Miss Fraj. The conduct has to be either culpable or blameworthy for it to be taken into account, Nelson v BBC (No.2). Miss Fraj initiated a discussion with the claimant and asked the claimant, on three occasions, the same question. That then led to an argument and various individuals gave their own account as to what occurred which are in our judgment.

40. We have concluded that the claimant's conduct relied on by the respondent could not be described as either culpable or blameworthy.

41. Next the respondent referred to the invitation letter dated the 27 June 2016, inviting the claimant to the disciplinary meeting on the 6 July 2016. When the claimant asked whether Ms Fraj was also going to be the subject of disciplinary proceedings, she was told "no". It was at that point the claimant decided to resign. That formed part of the Tribunal's judgment in relation to the claimant's treatment by reference to race. We do not agree with Ms Kerr that such conduct by the claimant can be described as either culpable or blameworthy.

42. We have come to the conclusion that the claimant is entitled to the full basic award. Her average weekly gross pay was £215.69. She worked 2 complete years, and applying the formula, is entitled to be paid having regard to her age, 2 x 1.5 weeks per year, multiplied by £215.69 per week which gives the figure of £647.07 gross.

43. In relation to the compensatory award, ordinarily, unfairly dismissed employees are entitled to be compensated for loss of salary from the date of dismissal to the date of the remedy hearing as well as future loss of income. However, in the claimant's case, by reason of the injury to her left wrist she was unable to work from 27 June 2016 to 23 October 2016. No evidence had been given in relation to whether the respondent operate a company sick pay scheme or contractual sick pay scheme. The claimant received during that period Employment and Support Allowance, therefore, for that period there was no loss of income.

44. What then was the position from the 24 October 2016? The claimant had to demonstrate from documentary evidence, as she was required to do, that she was actively engaged in looking for work both personally and with the assistance of recruitment agencies, initially looking for work of the kind she was engaged in with the respondent or any other positions within her skills, experience and abilities. Had the claimant demonstrated she attempted to find employment and had been unsuccessful, the Tribunal would have taken that into account in assessing her financial loss.

45. In this case she decided in late August, early September 2016, to change her focus and to qualify as a teacher/lecturer by enrolling on to the PGCE course. In so doing, she spent 20 hours a week studying and the rest of her time looking for positions which allowed her to be assessed as part of the course in the hope that she would successfully complete it. That was her full-time focus. There was no evidence that she was actively engaged in looking for comparable positions like the one she had with the respondent or other roles from the 24 October 2016. As a result, she secured for herself 2 early years educator positions to assist her with her PGCE course which she eventually passed. There was no documentary evidence that she even applied for any part-time positions. We have come to the conclusion that there should be no financial loss from the 24 October 2016.

46. In relation to loss of statutory rights we award here the sum of £350.00. We take into account this was a part-time position of a comparatively short duration.

47. In relation to the ACAS uplift, we have already stated that the respondent could have held a grievance meeting with the claimant and then a meeting with Miss Fraj, following her return to work. This the respondent did not do. The claimant is entitled to an ACAS uplift and we assess the percentage at 20%.

48. In relation to pension loss, the claimant received her employer's contribution in June and in June to October she was unable to work due to sickness. We have found there has been no loss of pension contributions.

49. From the information on her pay slips, holiday pay was rolled up in her salary.

50. As regards injury to feelings, we do take into account the answers given by the claimant in response to the statement in her schedule of loss that there were other incidents which caused her upset as well as sleepless nights and migraines. Initially she said 80% and then thereafter 50/50. There was much more to her case. She had been the victim of racially discriminatory treatment and there was also the failure to make reasonable adjustments, in that she was not allowed adequate time to prepare for the internal disciplinary hearing. These impacted on her injured feelings.

51. Looking at matters globally, her hurt feelings were more acute and more intense shortly after her resignation and lessened once she secured for herself a place on the PGCE course and employment at the two nurseries. Her current state of mind is that she feels disappointed and that is over 2 years since her discriminatory treatment.

52. We have come to the conclusion that the claimant should be awarded the sum of £4,000.00 plus interest on it from the 27 June 2016, at the rate of 6%.

53. The interest on the injury to feelings award from 27 June 2016 to today's date, is £620. The total sum in respect of injury to feelings is £4,620.00.

54. We have decided to award a 20% uplift on the loss of statutory rights of £350.00, which is £70.00, when added is £420.00.

55. The total sum awarded is: £5,687.07, made up of £647.07 basic award; £420.00 compensatory award; and £4,620.00 injury to feelings. This is the unanimous judgment of this Tribunal.

56. We gave our judgment orally at the hearing, but the claimant asked for written reasons. We have combined our judgment with the reasons.

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Employment Judge Bedeau

Date: 1 March 2019

Sent to the parties on: 8 March 2019

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For the Tribunal Office