mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Carr**

Respondent: **Weston Homes plc**

Heard at: **East London Hearing Centre**

On: **25 January 2019**

Before: **Employment Judge Jones**

Members: **Mr T Brown**
Mr S Dugmore

Representation

Claimant: Mr P Carr (Family representative)

Respondent: Mrs L Banerjee (Counsel)

JUDGMENT having been given to the parties in court on 25 January 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REMEDY JUDGMENT

1. **The Claimant is entitled to a remedy for her successful complaint of disability discrimination and harassment.**

2. **The Tribunal award the Claimant the following:**

Loss of earnings -	
39 week @ £359.31 =	**£14,013.09**
Mitigation earnings -	
39 weeks @ £248.17 =	**£9,678.63**
Losses for 9 months =	**£4,334.46**

Pension loss for 9 months less 3 weeks = £35.38 x 36 - £51.27=	**£1,273.68**
20% reduction applied to loss of earnings and pension loss leaves total of £3,467.57 + £977.93=	**£4,445.50**
Injury to feelings award of	**£7,000.00**
Interest on loss of earnings =	**£189.24**
Interest on injury to feelings of	**£764.06**
Total award =	**£12,398.80**
Plus 10% DeSouza uplift	**12,398.80 x 10% = £1,239.88**
Total = £12,398.80 + £1,239.88 =	**£13,638.68**

3. The Respondent is ordered to pay the Claimant the total sum of £13,638.68.

REASONS

1. The Tribunal heard evidence from the Claimant and then submissions from both parties.

2. After retiring to consider its decision on remedy, the Tribunal came to the following findings of fact.

Findings of Fact

3. The Claimant was successful in her claims of disability discrimination and harassment.

4. The purpose of today's hearing is to decide the remedy that we award her for her successful claim.

5. The Claimant was dismissed with immediate effect on 14 September and she was paid notice in lieu.

6. She behaved responsibly and, with support and assistance from her family, she secured another job with a company called Coopers; earning slightly less than she was earning at the Respondent. She started on 28 September 2017.

7. The Claimant started maternity leave on 2 January 2019 and there is an expectation that she will take a period of between 6 months to a year of maternity leave and return to her job thereafter, although she may do so in a different capacity.

8. The Claimant says that because of her experience with the Respondent, she did not feel confident enough to go for other jobs once she started at Coopers. Her evidence today was that because her new employers were being supportive to her, she decided to stay with them rather than look for other employment.

9. The Respondent produced documents today related to 41 other jobs that it says she could have secured which would have reduced her claim for loss of wages. After discussing the vacancies in those pages, we find that there were at least 8 or 9 that she could not have applied for as she did not have the experience or qualifications that were stated to be 'essential' such as training in Sage and Eque2. Some were also beyond comfortable travelling distance for her.

10. We find that the Claimant's case today was not that she could not get work but that she had not applied for other jobs once she had secured employment with Coopers because they have not been 'phased' or thrown by her diabetes, they had not made an issue of it. It was important to her that they have been supportive of her.

11. We find that it was reasonable for the Claimant to have made the decision to stay with Coopers even though they pay less than the Respondent. Having had the experiences that we found she had at the Respondent, it is perfectly reasonable that the Claimant would take the opportunity to have a settled period in her life. At the start, things were very difficult for her and her father had to go with her to the agency to register for work. Just after her dismissal, she was unable to go into town on her own. It is understandable that she chose to remain at Coopers for a while even though there was a shortfall in the wages. However, she would be expected to seek other employment to alleviate those losses within a reasonable period of time thereafter.

12. We find that after her dismissal the Claimant reported to her medical professionals that she was suffering from anxiety and stress because of what had happened at the Respondent and as a result of bringing this case. From the medical documents produced to us, the Tribunal finds that shortly after her dismissal, the Nurse practitioner noted after seeing her, that the Claimant was tearful and clearly affected by issues at work. Her GP, Dr Qureshi prescribed Diazepam and Zopiclone for her, both of which are used to treat anxiety and low mood.

13. The medical records that have been disclosed by the Claimant for this hearing have been heavily redacted. We find it likely that as the Claimant is not legally represented she was unaware that she needed to present complete documents to the Tribunal or to only redact after the whole document has been seen by the Respondent. These are documents that are personal to her and it is likely that she assumed that she had the right to redact the items in the medical records that are not relevant to the time she was at work for the Respondent or the issues that arose once she had been dismissed. The Respondent submitted that there may have been matters noted in the GP records that show that the other incidents in her life that may be to blame for any affects to her health.

14. We find it likely that even if there were other stressful events in her life, the medical records we saw today showed that the Claimant reported to her GP that she was suffering stress and anxiety, low mood as a result of what had happened at work.

The Claimant was referred to the wellbeing team and then took a 2-week course to learn strategies to cope with stress. The Claimant was also admitted to hospital where the pains she was experiencing were eventually diagnosed as being physical symptoms of stress.

15. The Respondent does accept that the Claimant was hurt and upset by her dismissal and the circumstances surrounding it. We find that the Claimant was hurt and that she suffered stress, anxiety and low mood soon after her dismissal and most, if not all of that, can be attributed to the Respondent.

16. In respect of injury to feelings, it was the Claimant's submission that since the discrimination resulted in her losing her job, the award should be in the top band of *Vento*.

17. In relation to the Claimant's submission on what she considered to be aggravating features of the Respondent's defence of this case, we find that she relied on the following 4 items: -

(A) The Respondent's Solicitors' letter threatening to apply for costs if she lost the liability hearing;

(B) Facebook printouts of her and members of her family that had been printed out and put in the bundle of documents;

(C) Mr Kuyper's promotion after her dismissal; and

(D) The allegation of stealing Ms Goodwin's mobile phone, made for the first time in Ms Goodwin's witness statement.

18. Dealing with each in turn:

(A) As far as the letter from the solicitor dated 14 December 2017 is concerned, we find that this is the sort of letter that some solicitors write as part of their way of conducting litigation on behalf of their corporate client. This was one of two similar letters the Respondent sent to a lay person about the prospects of her case. We find that the December letter did threaten to seek a costs order against the Claimant if she was unsuccessful with her claim. The letter was strongly worded. We did not find however, that it was out of the ordinary or that it crossed the line into abuse - as the Claimant submitted.

The Respondent submitted today that it genuinely considered that the Claimant had a weak case and this letter was an attempt to give her the opportunity to withdraw her claim before further costs were incurred. The letter was sent to the Tribunal on the same day that the Respondent filed its Response, which contained an application to strike the claim out.

In its correspondence with her, the Respondent informed the Claimant in robust terms that it considered that her case had no reasonable grounds of success. There was also a threat to seek a costs order against her.

The Tribunal is aware that these letters are sometimes sent to parties in litigation and we would expect that a Claimant in those circumstances who was worried about the letter, would take the letter to someone who can give them legal advice.

The Respondent's solicitors are entitled to put their client's case and it was their client's case at the time that the claim had no reasonable prospect of success. They decided to tell the Claimant in writing of the assessment of the case and that if she lost they were going to seek a costs order against her.

(B) The Claimant's Facebook posts were on public pages on the Facebook website. The Respondent apologised today for downloading the Facebook page with the Claimant's father's personal details on it as it had nothing to do with how or if the Claimant chose to let people know that she was a diabetic.

It is likely that the Facebook pages were downloaded in error. The pages were not relied on in the hearing. The Respondent's explanation today was that it's solicitors downloaded the pages from Facebook to use as part of its defence to what it thought was a complaint from the Claimant that she did not want anyone to know that she was diabetic when it was apparent from Facebook that she had clearly, repeatedly said that she was diabetic on her Facebook pages. In the end, that line of argument was not used at the hearing as the Respondent had misunderstood the Claimant's case. The Facebook pages were not referred to by the Respondent in the hearing. At the start of the hearing, the Claimant made it quite clear that she was shocked and upset by the Respondent's action in printing off those pages and inserting them into the trial bundle.

We had no evidence that the pages were downloaded with malicious intent. In the hearing, it was not the Claimant's case that she did not want anyone to know that she was a diabetic. It was her case that she reserved the right to tell who she wanted about her condition and to do so when she wanted. The Facebook pages were not relied on by the Respondent and they were only referred to by the Claimant's representative in the hearing when he asked each Respondent's witness if they had been responsible for downloading the pages.

The Tribunal will destroy those pages from the trial bundle and will ask the Respondent to do the same. We would also state that there should be no reason for anyone from the Respondent to be on the Claimant's Facebook page now.

We took account of the fact that the act of downloading those pages from Facebook was a matter that the Claimant felt strongly about. On the other hand, we concluded that the Respondent did so to defend an aspect of the complaint that they wrongly believed that the Claimant was making. It was unnecessary in relation to the case the Claimant brought

but that was due to a misunderstanding and not to harass or distress the Claimant.

(C) Regarding Mr Kuyper's promotion – this was announced in December. That was a few months after the judgment in this case was promulgated but 15 months after her dismissal. There was no information here today on what had happened to him between those times. There was no evidence produced today or at the liability hearing to show that the decision to promote Mr Kuyper to a new post in a new division was in any way related to this case. A lot is likely to have happened in the business since the Claimant left.

We had an article in a local newspaper in which his promotion was announced. The Respondent confirmed today that he had been promoted. Counsel was unable to give any further information on what, if any, training he had undertaken since the judgment was promulgated, or what steps have been taken to address the issues detailed in the judgment.

Although the Respondent has submitted an appeal to the EAT on the judgment, we were also told today that the Respondent is learning lessons from this case and the judgment.

We did not have evidence from which we could conclude that the promotion was the Respondent thumbing its nose at the Claimant, as described in her submissions.

(D) The allegation at the liability hearing was that the Claimant had taken the mobile from Ms Goodwin's handbag and gone through her inbox and found the email that referred to her.

There was no clear allegation of theft. We remember the Claimant being upset by the suggestion that she would have done as alleged.

That allegation was not accepted by the Tribunal.

We found that to be unlikely and more likely that it happened the way the Claimant explained.

In order for this to be an aggravating feature, it would have to be proved that Ms Goodwin gave that evidence maliciously, with intent to smear the Claimant's good name and knowing that it never happened. Although we found on balance that it was unlikely to have unfolded in the way Ms Goodwin set out in her evidence, we were unable to go as far as the Claimant would like us to go. We did not have evidence that Ms Goodwin knew what had happened with the phone at the time she made the statement and deliberately making up her evidence about the Claimant taking the phone from her bag to mislead the Tribunal and smear the Claimant's good name as opposed to her not being able to recollect or be

clear about what had happened. It was not put to her in evidence that she deliberately lied about this.

Law

Law on Remedy

19. Section 124 of the Equality Act 2010 refers. The remedies a tribunal can award in a successful discrimination complaint are as follows:

19.1 To give a declaration on the rights of the complainant and the Respondent regarding matters to which the complaint relates;

19.2 An order for compensation to the complainant, which can include payments under the headings of injury to feelings, aggravated damages and for pain, suffering and loss of amenity (personal injury) and interest;

19.3 Make an appropriate recommendation, of steps that the employer must take within specified period to obviate or reduce the effect on the complainant or any other person of any matter to which the proceedings relate.

Losses

20. In deciding whether to award compensation, it is enough that the damage or loss suffered by the complainant was a direct result of the discrimination rather than having to be reasonably foreseeable *Essa v Laing* [2004] IRIR 313.

21. The Tribunal can award loss of wages and sums to reflect other losses incurred by the Claimant due to the wrongs she suffered from the Respondent.

22. The Court of Appeal has given guidance on the assessment of compensation for injury to feelings. In the case of *Vento v Chief Constable of West Yorkshire Police* (No.2) [2002] EWCA Civ. 1871, the Court set bands within which they held that most tribunals should be able to place their awards. Those bands have been amended through subsequent case law and more recently, after the consideration of the President of the Employment Tribunals, have been the subject of Presidential Guidance. The 2017 Guidance was uprated in March 2018 so that awards for injury to feelings in exceptional cases can be over £42,900. In cases of the most serious kind, the injury to feelings award would normally lie between £25,700 – £42,900. In the middle band, in less serious cases, the award would be between £8,600 - £25,270; while for less serious cases such as for one-off acts of discrimination or otherwise, the award would be between £900 -£8,600.

23. In the case of *De Souza v Vinci Construction (UK) Ltd* [2017] IRLR 785, it was held that the general 10% rise in the level of damages mandated for common law claims for personal injury should also be to awards for injury to feelings.

24. Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from a particular course of conduct. On

the other hand, as stated in *Harvey*, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct (*Essa v Laing* [2004] IRLR 313).

25. In making an award for injury to feelings a tribunal needs to be aware of the leading cases. Much will depend on the facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

26. In respect of aggravated damages, which the Claimant seeks; the Tribunal were aware of the case of *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162. In order to award aggravated damages, the necessary aggravation can come from the way the case has been handled, the way it has been defended or even from oppressive conduct post-termination.

27. In the case of *HM Land Registry v McGlue* UKEAT/9435/11/RN the EAT upheld the Tribunal's decision on the injury to feelings award where the claimant felt unhappy and bullied; but did not uphold the award of aggravated damages. In that case, the court discussed the circumstances in which an award for aggravated damages can be awarded. One circumstance that will need to be considered is the manner in which the wrong was committed. The distress caused by an act of discrimination may be made worse (a) by being done in an exceptionally upsetting way i.e. in a high-handed, malicious, insulting or oppressive way; (b) by motive: i.e. conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress as long as the claimant is aware of the motive; lastly (c) by subsequent conduct: for example where a case is conducted in an unnecessarily offensive manner or a serious complaint is not taken seriously or there has been a failure to apologise where that is an issue.

28. Other cases refer to aggravated damages being appropriate where there was evidence in the hearing that an employer has treated/rewarded the perpetrator of discrimination, for example promoting him before knowing the result of an inquiry into his conduct. In *HM Prison Service v Salmon* [2001] IRLR 425, aggravated damages were awarded and the EAT held that this was appropriate in circumstances where the employer had treated a complaint about harassment in a trivial way.

29. The Claimant referred to the case of *Patel & Harewood v T & K Home Improvements Ltd* [1994] EOR 22 DCLD but the Tribunal was unable to find the case. The Claimant submitted a quote from the judgment. It was submitted that this was a case in which aggravated damages were awarded because the employer had not understood the gravity or what had occurred and had apparently maintained at the hearing that it had been a joke. The quote from the judgment is that the employer had shown nothing but callous disregard for the employee's feelings.

30. A tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

We can consider it whether or not a party has asked us to do so. The interest is calculated as simple interest which accrues daily. For past pecuniary losses interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation. For non-pecuniary losses interest is calculated across the entire period from the act complained of to the date of calculation. The Tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

Decision

Loss of earnings

31. In our judgment, it was reasonable of the Claimant to seek to stay in the job at Coopers where she is treated well, considering her experiences at the Respondent.

32. Our decision is to award her loss of wages for 9 months. It is our judgment that after 9 months she would have been able to look for other work at an increased rate that either matched or bettered the wage she was receiving from the Respondent.

33. We make no award for ongoing or for future loss as she is likely to secure a better paying job at either the same rate or an increased rate from what she was being paid at the Respondent. The Claimant is young and at the start of her working life. She is keen to work and to progress. The Tribunal considers it highly unlikely that she will stay at Coopers for much longer when she returns in November 2019 from maternity leave.

34. This was a short employment and although it was not successful and the Claimant experienced discrimination on the grounds of her disability and harassment there, it was a short period of time in her working life. We would commend her on her diligence in getting new employment soon after and in our judgment, that demonstrates that she will recover and be able to move to a better paying job soon after she returns to work from maternity leave.

35. She is entitled to pension loss over the same 9 months. Looking at the Claimant's contract of employment with the Respondent, the contributions to the pension scheme do not start until the employee has been in post for 3 weeks. That would mean that the Claimant is entitled to 36 weeks pension contributions.

36. The Respondent submitted that in any event, there should be a reduction reflecting the fact that there was a possibility that she would have been dismissed for failing her probation. It is our judgment that the Claimant wanted to keep her job and was quite keen to do so. She would have done everything in her power to keep it.

37. We found and set out in the liability judgment that it was highly likely that she would have passed her probation and been confirmed in post. However, we accept the Respondent's submission that there was a percentage chance that that might not have happened and that she might have been fairly dismissed some time later.

38. It is our judgment that the loss of earnings should be reduced by 20% to reflect that chance.

Injury to feelings

39. In our judgment, the Claimant had hurt feelings from what happened at the Respondent and suffered from stress and anxiety at the time and during the litigation. It also affected her mental health for a short period of time. It is therefore our judgment that the Claimant is therefore entitled to an award for injury to feelings.

40. However, it is also our judgment that the matters which the Claimant rely on as aggravating features were not so. They are part of the reason she was successful in her claim. Those matters were not at the level that the case law envisage to earn an award of aggravating damages.

41. The Respondent downloaded the Facebook pages from the Claimant's account because of the way it understood the Claimant's case. Once it was clear that the case was put in a different way, the Respondent did not refer to or invite the Tribunal to look at the pages in the hearing.

42. It is entirely possible and likely that the Respondent's decision to promote Mr Kuyper had nothing to do with the Claimant's case. It may well have been agreed before the Respondent received the judgment in this matter. It may have been decided afterwards. The Tribunal had insufficient evidence on which to base a conclusion that it was directly related to the Claimant and her case as she submitted.

43. There was no evidence that his promotion represented the Respondent laughing at her or thumbing its nose at her (*Patel*). It was not our judgment that the Respondent had conducted itself in a high-handed manner or behaved in a vindictive or spiteful way. There was disability discrimination and harassment and the award for injury to feelings compensates the Claimant for the hurt feelings caused.

44. As far as the solicitor's letter is concerned, it is our judgment that it did not amount to abuse. It was not an example of the Respondent conducting the case in a high-handed, malicious, insulting or oppressive way. The Respondent believed that the case had little merit which is why at the same time as writing to the Claimant in those terms it also wrote to the Tribunal to ask for the claim to be struck out. That was consistent with the legal advice it had received. It was also an effort, a strongly worded one, to save costs and expense for both parties.

45. It is our judgment that the allegation contained in Ms Goodwin in her witness statement that the Claimant must have taken the phone out of her bag and that is how she came to see the email was not an allegation of theft. It was never put to the Claimant that she had stolen the phone. It was not a matter that came up at her dismissal hearing.

46. We award the Claimant an injury to feelings award of £7,000.

47. We do not make an award of aggravated damages.

48. The Claimant is entitled to a payment for interest on all elements on her award for discrimination.

49. The Claimant did not ask for any recommendations.

50. We gave the parties this judgment and adjourned to allow the parties to calculate the remedy due to the Claimant.

51. The parties agreed the following remedy:

Loss of earnings - 39 week @ £359.31 =	£14,013.09
Mitigation earnings - 39 weeks @ £248.17 =	£9,678.63
Losses for 9 months =	£4,334.46
Pension loss for 9 months less 3 weeks = £35.38 x 36 - £51.27=	£1,273.68
20% reduction applied to loss of earnings and pension loss leaves total of £3,467.57 + £977.93	
Injury to feelings award of	£7,000.00
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Interest on injury to feelings of	£764.06
Total award =	£12,398.80
Plus 10% DeSouza uplift	12,398.80 x 10% = £1,239.88
Total = £12,398.80 + £1,239.88 =	£13,638.68

52. The Respondent is ordered to pay the Claimant the total sum of £13,638.68.

Employment Judge Jones

5 April 2019