THE EMPLOYMENT TRIBUNALS

Claimant: **Miss D Ward**

Respondent: **Northumberland, Tyne & Wear NHS Foundation Trust**

Heard at: **North Shields** **On: 17 & 18 September 2018**

Deliberations: **On: 20 September 2018**

Before: **Employment Judge Hargrove**

Members: **Miss E Jennings**
Mr T A Denholm

Representation:

Claimant: **Mr Y Bakhsh, Employment Consultant**
Respondent: **Mr E Morgan of Counsel**

RESERVED JUDGMENT ON REMEDIES AND COSTS

The unanimous judgment of the Employment Tribunal is as follows:-

1 Under section 118 of the Employment Rights Act the respondent is ordered to pay to the claimant a basic award of £10,513.50 plus £350 for loss of statutory rights.

2 Under section 119 of the Equality Act 2010 the respondent is ordered to pay to the claimant the following:-

2.1 Loss of earnings from the date of dismissal to the date of the remedies hearing. No award. Loss of earnings exceeded by Employment Support Allowance received by the claimant during that period.

2.2 Future loss of earnings: £32,263 (2.9 years x £11,732). It is noted and recorded that the claimant is required to notify the DWP upon receipt of this award and may not be entitled to ESA thereafter.

2.3 Pension loss: it is noted and recorded that the Tribunal has not received the information necessary to perform this calculation; and the parties may apply for further directions if they are unable to agree the calculation.

2.4 It is ordered that the respondent pays to the claimant the sum of £17,500 for injury to feelings.

2.5 It is ordered that the respondent pay to the claimant the sum of £7,000 for injury to health.

2.6 It is ordered that the respondent pay to the claimant interest upon the items at paragraphs 2.4 and 2.5 above totalling £24,500, from 10 May 2017 to date interest thereon at 11.33% amounting to £2,775.85.

3 Pursuant to rules 76 and 79 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Tribunal makes a preparation time order against the respondent amounting to £990.

4 Enforcement of this judgment is stayed pending the outcome of the respondent's appeal to the Employment Appeals Tribunal, but interest thereon will accrue under the Employment Tribunals Interest Order 1990.

REASONS

1 In a reserved judgment sent to the parties on 4 April 2018 the Tribunal unanimously decided:-

1.1 That the claimant's complaints of being subjected to detriments up to and including her dismissal because of something arising in consequence of the claimant's disability and of failures to make reasonable adjustments, and of unfair dismissal were well-founded.

1.2 If a fair procedure had been followed and absent discrimination, there was a 50% chance that the claimant would have been fairly dismissed within four months.

2 A remedies hearing was subsequently listed to take place on 17 and 18 September 2018. Preparatory orders were made including for the submission of a joint bundle of documents and for the exchange of witness statements. The bundle of documents contained 163 pages to which additions have been made. It included the claimant's schedule of loss and the respondent's response. It also included the claimant's GP records which are to be found at pages 123-163 and the following medical or other reports relied upon by the claimant for the purposes of the remedies hearing including the following reports from Dr G P Spickett, Consultant Immunologist, the treating doctor for the claimant's disability of chronic fatigue syndrome; letter 1 to the GP dated 15 August 2016, during the claimant's employment, see pages 112(4) and (5), letter 2, a further letter to the GP dated 16 January 2017, again during the claimant's employment, a third letter dated 1 November 2017 at pages 112(8) and (9), prepared after the claimant's dismissal with effect from 10 May 2017, and a report dated 22 May 2018 at

pages 119-120. The contents of that report are highly material to the issues which the Tribunal had to decide. In addition to those documents the claimant relied upon a letter from Mr Matthew Chase, Long Term Condition Specialist Physiotherapist, who has dealt with the claimant as part of the Rehabilitation Management Team dated 3 November 2017 at pages 113-114. Finally, a letter from her GP Dr Bailey dated 1 May 2018 recounting the claimant's history of CFS and depression. It appears that this letter was prepared for the purposes of the claimant's application for personal independence payments in response to a letter of request from the claimant dated 24 April 2018. The complete record of the outcome of the application for personal independence payments was added to the bundle during the hearing at pages 78A onwards. The outcome of the claimant's application for personal independence payments was notified to her on 24 July 2018, and it was decided that she was entitled to the daily living component of PIP at the standard rate and the mobility component at the enhanced rate dating from 6 June 2017 and continuing to 1 July 2022 on the basis of descriptors which are contained also within the bundle. The payments were backdated to June 2017. It is to be noted however that it is common ground between the parties that the personal independence payments do not fall to be deducted from any award for loss of earnings on the basis that they are not income related benefits. The basis of the awards of PIP are to some extent material in corroborating the extent of the claimant's present level of disability in respect of both of the admitted impairments of CFS and depression. The claimant is also in receipt of ESA from 2 June 2017. The amount of those payments is set out in a letter from the Jobcentre Plus which is also contained within the bundle, dated 1 August 2018. The payments were also backdated to 2 June 2017 and continue to date and will continue subject to the Tribunal's award of future loss of earnings, which must be disclosed to the Jobcentre Plus. It is also common ground between the parties that this benefit is income related and accordingly falls to be deducted from the claimant's claim for loss of earnings to date. The result of that deduction is that the claimant's claim for loss of earnings to date is exceeded by the amount of the ESA paid to date and the whole amount being deductible, no award is to be made for loss of earnings.

3 It is noted and recorded that during the preparation for this remedies hearing the respondent applied for and was granted leave to obtain its own medical evidence following the disclosure of the claimant's medical evidence. The claimant was seen by the respondent's medical expert and a report was prepared which has not been relied upon by the respondent or disclosed to the Tribunal. The Tribunal draws no conclusions from the report's non-disclosure but it is a matter of record that the claimant's medical evidence is not disputed by any medical evidence adduced by the respondent although the Tribunal still has to decide what weight to give to the claimant's medical evidence.

4 The claimant relied upon two witness statements provided to the Tribunal dealing with remedies issues including the amount of the award for injury to feelings, and loss of earnings. The respondent relied upon a witness statement from Emma Rushmer with an appendix attached containing details of occupational therapist jobs, and other jobs which, it is claimed, the claimant could have applied for following her dismissal by the respondent. The respondent also relied upon a witness statement from Michelle Evans which contained a further appendix of

four other such jobs. Michelle Evans was called to give evidence to the Tribunal, Ms Rushmer was not because of her incapacity to attend the Tribunal for personal reasons. This evidence was adduced by the respondent in support of its argument that the claimant had failed to make reasonable adjustments in failing to apply for any of these jobs since her dismissal. It is also common ground that the burden of proving on the balance of probabilities that a claimant has failed to mitigate her loss lies upon the respondent not the claimant. On the other hand, the burden lies upon the claimant to establish her loss, both for loss of earnings and injury to feelings and injury to health.

5 The Tribunal here sets out the matters which are agreed between the parties. It is agreed that the claimant is entitled to a basic award calculated at £10,513.50. It is also agreed that the claimant's level of net earnings after deduction of tax and national insurance as of the date of dismissal amounted to £1,955.33 per calendar month. In fact, up to the date of dismissal the claimant was in receipt of a slightly lower net figure because of salary sacrifice in exchange for the use of a lease vehicle by her which she returned soon after her dismissal.

Based on the Tribunal's **Polkey** findings, the claimant's net loss of earnings claim for the four month period from 10 May to 10 September amounted to £7,821.32. There was a further period of one week's loss of earnings between 10 September and the date of the Tribunal hearing during which the claimant's loss amounted to 50% of her net pay, a further figure of £225.62. The total figure for loss of earnings to the date of hearing is therefore £8,046.64. On the basis of the ESA received by the claimant during that period as evidenced by the letter from the Jobcentre Plus, the claimant was in receipt of more ESA than the earnings she would have earned. Accordingly, the claimant is not entitled to any sum for loss of earnings to date.

6 We next considered the claimant's claim for future loss of earnings. The claimant has not in fact worked or been in receipt of any earned income from employment or self-employment since her dismissal. She also agrees that she had not applied for any job although she has undertaken an online mindfulness course from about November 2017 until August 2018, which resulted in the award of a diploma, as evidenced by documents at pages 112.2 and 112.3 dated 13 August 2018. The claimant expressed an interest in pursuing mindfulness training courses as a source of income during the hearing. We also find however that the claimant has not abandoned the possibility of returning to work as an occupational therapist and, we accept, intends to renew her registration with the relevant qualifications body prior to its expiry. Whether she is or will be fit to undertake such employment in the future remains the subject of contention at this hearing. The respondent's primary contention is that the claimant has failed even to apply for jobs as an occupational therapist, her principal career, and that failing to do so she has demonstrated a failure to mitigate her loss. In the light of her medical evidence however, in particular letters 3 and the report from Dr Spickett, and the letter of Mr Chase, both postdating the claimant's dismissal and the latter report from Dr Spickett being dated comparatively recently, 22 May 2018, we are satisfied that the claimant has not been physically or mentally fit to pursue such employment even on the limited hours of 30 per week which she was working latterly for the respondent prior to and up to her dismissal. We also

accept that there is another different reason why she has not applied for any such job even for such period, that is out of concern that she would not receive a favourable reference from the respondent. That is also the reason why the claimant, having made, we accept, enquiries of agencies concerning occupational therapy and other jobs in the care sector, has not formally registered for such job opportunities.

7 The principal issue which this Tribunal had to decide was whether or not the claimant's current lack of employment was attributable to her state of health and if so, whether her current state of health was to any extent caused or contributed to by the acts of the respondent which the Tribunal has found amounted to discrimination on grounds of either or both of the impairments constituting the disability. We refer to the second and third paragraphs of Dr Spickett's report of 22 May 2018 as very clearly pointing to a deterioration of the claimant's condition noted by him in 2016 when he prepared the first report, letter 1, of 15 August 2016:-

> "When I saw her in August 2016 it was clear that there had indeed been a clear deterioration in her condition compared to the records of her assessment in 2009. This relapse was precipitated by the pressure she had been put under by her employer to meet and maintain revised targets on her sickness, following the removal of the reasonable adjustments in relation to sickness absence. The pressure continued despite medical advice that these revised targets were not achievable. This led to continuing deterioration in her health, causing a significant impact on her ability to work and threatening her employment. My clinic letter from the appointment in 2016 indicates that I was not happy with the approach to managing her long-term health issues by her employer, in particular, phased returns after periods of sick were too short and her workload, although reduced was actually higher than when she was first diagnosed. It is noteworthy that at no stage from 2016 onwards has there been a request to me from her employer's occupational health services for a medical report on her condition and advice on management. The cycle of continuing this threat to her employment and deterioration in her CFS led to a secondary diagnosis of depression, requiring additional treatment".

There is a passage in the second paragraph on the second page of Mr Chase's letter at page 114 to similar effect. In summary we find as a fact that the claimant's conditions of CFS and depression were aggravated by the respondent's breaches of the Equality Act 2010. They were not however caused by those breaches neither in relation to the CFS, which was diagnosed as long ago as 2009 (and we note and it is significant that the claimant was able to continue with her employment with the original adjustment to the SAMP). In addition, there is a record of the claimant consulting her GP with low mood and of depression, according to the last paragraph in Dr Bailey's report from 2014 predating the first act of detriment by the respondent in relation to the SAMP. We do not consider it material that Dr Spickett's reports do not differentiate specifically between the effects of CFS and of depression. We recognise that there is likely to be an overlap of symptoms attributable to both conditions particularly relating to tiredness and fatigue. It is highly material that Dr

Spickett's reports date back to 2016 and that he has been the claimant's treating physician for a number of years. This is not a case of a single one-off report prepared by a medical specialist after the event.

8 The next major issue we had to decide was how long the aggravation was likely to continue and a separate issue of whether she is likely to recover to the extent that she is in the same state of health as she was prior to the onset of the aggravation following the respondent's discrimination. The first part of this issue is dealt with in Dr Spickett's last report in the final paragraph at page 120:-

> "I am hopeful that, once the current circumstances improve and after further work with the therapy team, a return to work after a further six months is a reasonable expectation. However, travelling time will need to be minimised as this is exhausting, using up her reduced energy levels and impacting negatively on the hours that she might reasonably expect to work. Clearly it is essential that a return to work takes into account her chronic health problems".

Mr Morgan raised an issue in his closing submissions as to how the expression "a return to work after a further six months" was to be interpreted. It is not entirely clear because Dr Spickett does not explain what he meant by "the current circumstances improve" and "after further work with the therapy team". We certainly accept that the resolution of the Tribunal proceedings is likely to lead to some improvement in her health, although we note that whilst the Employment Tribunal's proceedings are now concluded, and the claimant will be in receipt of judgment for a not insubstantial amount of compensation, there is still an outstanding appeal with the accompanying uncertainty for the claimant. The respondent is of course perfectly entitled to appeal, but it will extend to an extent the uncertainty. We do not read use of the term "six months" as dating from the date of the letter of 22 May 2018. We conclude doing the best we can, that the claimant's health will substantially improve within the next 12 months and that she will by then be fit to return to some form of work but it will never be full time work although it could well be work for a similar number of hours per week as she was working for the respondent at the time of the dismissal. There is certainly no evidence that she will <u>not</u> recover to the state she was prior to the discrimination.

9 With these findings in mind, and taking into account the description in her witness statement as to her state of health since her dismissal, we referred to the Employment Tribunal Remedies Handbook 2015-2016 and in particular to page 55 the reference to awards of damages for personal injury, both physical and psychiatric injury. We noted the caution expressed to avoid, when making awards for injury to health as well as injury to feelings, double counting. We noted the eight point checklist established by the JSB as factors needing to be taken into account when valuing claims of psychiatric injury. These have also some application to claims for injuries such as CFS. The Guide then sets out four categories of award. We considered that the claimant's case would justify a moderate award of between £3,875 and £12,500 which "can be made in cases where, while the claimant has suffered problems as a result of the discrimination significant improvement has been made by the date of the hearing and the

prognosis is good". Although there has been some improvement it is certainly not significant improvement. We have however made a finding that it is likely to take place by June 2019 making the period of aggravation some four years. In these circumstances we find that the claimant is entitled to a award for injury to health of £7,000.

10 **Future loss of earnings**

We conclude that he claimant may be capable of some work in the mindfulness field in the Spring of 2019. It is to be noted that the claimant has provided no indication of how much she expects to earn if she started running mindfulness courses but we consider it highly unlikely that she would be able to earn anything like the same amount as she was earning latterly with the respondent or even at the 50% continuing loss rate of £11,732. We next considered the claimant's prospects of returning to her chosen career of occupational therapy. We do not accept that the evidence contained in the added appendices of vacancies available for occupational therapists in the North East demonstrates that she will find it easy to find alternative employment in that field. Many of the local vacancies were vacancies with the respondent Trust, the sole Trust providing occupational therapy services in the Tyneside area. Others were from 20 to 40 miles away from where she lived and used to work. It is to be noted that the claimant worked within some three miles or so of her home when she worked for the respondent. There was medical evidence that travelling was and remained a particular source of fatigue for the claimant. It is not reasonable for the claimant to be expected to travel more than a few miles to work. Furthermore, it is clear that because of her disability she is unlikely to be able to work full time; and probably not more than 30 hours per week. There are likely to be fewer jobs available for part time occupational therapists; and we cannot ignore the fact that she is likely to require other adjustments and to have significant periods of time off work if she has relapses which will not make her an attractive prospect to a prospective employer. Furthermore, as stated above almost all of the local occupational therapy jobs are with the respondent. We accept however that there will be occupational therapy vacancies with non-NHS employers including local authorities. The essential issue is when ought the claimant reasonably to be able to obtain employment at a rate of pay equivalent to £11,732 per annum. We firmly reject the claimant's contention that she is entitled to compensation from now until a prospective retirement age of 67. There are a series of discounting factors:- amongst them the prospect of a deterioration in her health not attributable to the respondent; the possibility, remote at the moment, that she may make a full recovery from CFS; the possibility that she would have given up work anyway long before retirement age and the loss of any new job for a number of other reasons; or for example her choice to engage in mindfulness as a career choice at a substantially lower rate of pay at which stage she would be failing to mitigate her loss. In these circumstances we consider it just and equitable to award a further two years' loss of earnings in addition to the remaining nine month period of recovery from the aggravation attributable to the respondent. We calculate the claimant's future loss at 2.9 years x £11,732, totalling £32.263. We do not take into account the probability of pay rises in that period because the pay rises will be more than offset by the accelerated payment of the award, which could be invested.

11 **Injury to feelings**

Injury to feelings: the claimant's representative has urged that the appropriate award is one in the highest band in **Vento**. Mr Morgan realistically concedes that the claim does fall within the middle band and invites us to make an award of £14,000. We think that that figure is a little low and that it does not reflect the aggravating features in this case and in particular the lengthy history of discrimination described in the original judgment of the Tribunal commencing in April 2015 and ending with her dismissal in May 2017. A particular aggravation was the respondent's failure to acknowledge to the claimant that she had in fact been in receipt of relaxed thresholds under the management of a previous manager. As the Tribunal identified at paragraph 4.10 of the judgment, there was an e-mail exchange, at pages 275-279 of the bundle, which amounts to an admission that the respondent was aware of a previous agreement as to the relaxed treatment of absences before hitting the flag but they chose to rely upon the contention that no documentary evidence could be found to prove it when, as it subsequently transpired, the respondent was in possession of the documentary evidence all the time but did not disclose it until receipt of an SAR request by the claimant after the commencement of the proceedings. Notwithstanding that, there was a suggestion during the original Tribunal hearing that the claimant might have been partly responsible for its absence because for some reason, which the Tribunal does not understand, she herself was responsible for removing the document from her own personnel file. On this particular issue, raised by Mr Bakhsh in his application for costs against the respondent we find that overall it constituted unreasonable conduct of the proceedings pursuant to rule 76(1)(a) on the part of the respondent. Although we do not accept that the response as a whole had no reasonable prospect of success the respondent's attempts to gainsay its relevance and to defend the point was doomed to failure. That fact is accordingly relevant both to the quantum of compensation for injury to health and the costs application. Looking at the matter as a whole, it was a very serious matter that the claimant should lose an employment which she had held for 15 years and gave her financial security, albeit with its element of pay protection which was to remain available to her for ten years and the treatment was ongoing for two years up to and including her summary dismissal. In those circumstances, whilst the claim clearly does not fall within the highest band, we find that it would justify an award of £17,500.

12 **The claimant's application for costs**

The claimant makes a claim for costs in the form of a preparation time order amounting to 1980 hours:- 60 hours @ £33.00 per hour. The relevant rules in the 2013 Regulations are as follows:-

Rule 75(2) provides:-

> "A preparation time order is an order that a party (the paying party) make a payment to another party (the receiving party) in respect of the receiving party's preparation time while not legally represented. Preparation time means time spent by the receiving party (including by any employees or

advisers) in working on the case except for time spent at any final hearing".

Rule 76 provides:-

"When a costs order or preparation time order may or shall be made:

(1) A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) a party or that party's representative has acted … otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted; or

(b) any claim or response had no reasonable prospect of success …".

Rule 79 provides:-

"The amount of a preparation time order:

(1) The tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of –

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate of £33.00 …".

It is to be noted that unlike a costs order under rule 75(1), a preparation time order may be made if the receiving party's adviser has spent time on the case. It is unnecessary that the representative should actually have been paid anything by way of costs. That disposes of one objection from the respondent. The other is a novel contention on the part of the respondent that Mr Bakhsh who trades under the name Lifeline Employment Law Advocacy Services Limited is or maybe providing regulated claims management services in contravention of section 4 of the Compensation Act 2006 without being authorised or exempt. There is no evidential basis for that contention. We then pass on to the merits of the application for a preparation time order. There are four grounds relied upon by the claimant. The first is that the respondent acted unreasonably by disputing that the claimant was a disabled person in respect of her depression; the second is that the denial of disability had no reasonable prospects of success; the third is that the respondent acted unreasonably in denying the contention in paragraphs

4 and 5 of the claimant's particulars of claim that in 2011 by a previous manager of the claimant that the Trust had agreed a reasonable adjustment to relax the trigger point of 3 in 12 to no more than 5 episodes of absence in 12 months. The fourth was that the response ceased to have any reasonable prospect of success once the claimant had obtained and disclosed the document which proved that that adjustment had been in place from 2011 and which, disclosed late in the proceedings by the respondent only in response to a subject access request from the claimant. Grounds 1 and 2 fail on the basis that although the concession of disability in respect of depression was made late in the day, only at the outset of the substantive hearing, the fact is that the respondent was entitled to put the claimant to proof as to the adverse effects of her depression and it must be balanced against the fact that the respondent had made from the outset of the proceedings a concession of disability in respect of CFS.

Ground 3 in our view is established. We have already stated the basis upon which we find that the conduct was unreasonable in the preceding paragraph to the present one. The vital document dated 10 May 2011 and proving incontrovertibly the relaxed threshold for absences is described in detail at paragraph 4.3 of the original decision in the judgment of the Tribunal. Even after its unearthing, the respondent continued to dispute its relevance when it was in fact highly relevant and tended to undermine the respondent's case that to remove it and not continue it was not either a failure to make reasonable adjustments or a breach of section 15. We stop short however of concluding from that point the respondent's defence had no reasonable prospects of success although we did conclude that it had little reasonable prospects of success. The threshold of no reasonable prospects of success is a high one. In these circumstances we have concluded that the claimant has established one of the threshold criteria for the making of a preparation time order; we exercised a discretion to make such an award and consider it to make an award of half the preparation time claimed by the claimant.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
27 September 2018