Case Number: 2204454/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR S FERNS**
MS O STENNETT

BETWEEN:

Ms S Chesterman

Claimant

AND

Goldie Hotels (2) Ltd

Respondent

ON: **10 and 11 July 2019**
Appearances:
For the Claimant: **In person, supported by her mother**
For the Respondent: **Mr B Prajapati, solicitor**

JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is that the respondent shall pay to the claimant the sum of **£13,039.41.**

REASONS

1. This decision was given orally on 11 July 2019. The claimant requested written reasons.

2. By a claim form presented on 3 May 2018, the claimant Ms Sarah Chesterman claims unfair dismissal and disability discrimination.

3. The claimant worked for the respondent hotel as a Reception Manager from 12 May 2012 to 16 February 2018.

The issues

4. The issues were identified at a preliminary hearing before Employment Judge Hodgson on 20 August 2018. The case was originally listed for a full-merits hearing to take place in November 2018. It had to be postponed

due to lack of judicial resource.

5. The issues were identified as follows.

6. The disability relied upon by the claimant is Asperger's syndrome, a form of autism. Disability is admitted.

7. The respondent made admissions of liability. It is admitted that they failed to make the two following reasonable adjustments: providing the claimant with time with an experienced reception manager and by providing a desk/work space specifically for the claimant, with a computer, which would represent a calm space where she could tackle the stress that came with the job.

8. The two failures to make these adjustments continued throughout her employment and culminated in a final meeting on 2 February 2018. It is accepted by the respondent that failing to make the reasonable adjustments was a breach of contract. It is accepted that the claimant faced unfair criticism at the meeting on 2 February 2018 at which she resigned. It is accepted that this was a constructive dismissal which was unfair.

9. This was a remedy hearing on the basis of those admissions. The issue for us was the amount of the award.

10. We raised with the parties the fact that they had both referred in their ET1 and ET3 to without prejudice negotiations. Both sides waived privilege. We explained to the claimant what this meant as she is a litigant in person and made it clear that she was under no obligation to do so.

Adjustments for the hearing

11. At the preliminary hearing in August 2018 Judge Hodgson made it clear to the claimant that she could have any reasonable adjustments she needed for the purposes of the final hearing and that she should raise this with the tribunal at any time either in writing or at the hearing. We checked with the claimant at the outset of the hearing as to what adjustments she might need and told her that she could take a break whenever she needed to.

Witnesses and documents

12. The tribunal heard from the claimant.

13. For the respondent we heard from three witnesess: (i) Mr Hitesh Nagar, an Operations Manager who was the claimant's line manager; (ii) Mr David Croasdale, the Midlands & East Cluster General Manager and (iii) Mr Alex Hewitt, the People and Development Manager.

14. We had a bundle of documents of 276 pages and a counter schedule of loss.

15. The claimant introduced 7 pages of documents on day 1. This was a structure chart and a chronology. She also introduced an up to date payslip from her new employment.

16. We queried why the respondent had presented four witness statements. We made it clear to the respondent that as liability had been admitted, we would not hear evidence on liability. This was a remedy hearing. The solicitor for the respondent said that the evidence had been prepared by a previous firm of solicitors and he would not need to call two of his witnesses. He said that two of his witnesses had relevant evidence to give on the issue of injury to the claimant's feelings. They were Mr Nagar and Mr Croasdale. We asked Mr Prajapati to go through his two remaining statements during the break and delete the paragraphs that he would not be leading in evidence so that the claimant knew she did not need to cross examine on this. After hearing from the claimant, the respondent also called Mr Hewitt to deal with one specific point.

17. We had oral submissions from both parties. Neither party cited any case law.

Agreed facts

18. The claimant's pay varied each month, as in addition to basic pay there were gratuities paid on a three-monthly basis, incentive pay for upselling and holiday pay adjustments. The parties agreed the figures in the respondent's counter schedule of loss for gross weekly pay at £438.77 and net weekly pay at £313.56. The respondent agreed with rounding up to gross weekly pay at **£439** and net at **£314.**

19. The claimant has had two jobs since she left the respondent. The first was with Morley Hayes Hotel which was temporary and the second with Jurys Inn which she started on 22 May 2018. She remains in that employment.

20. After the close of witness evidence and based on her P60 for the year ending 5 April 2019, the claimant accepted that she had earned more in her new employment and therefore had no claim for financial loss.

21. Length of service with the respondent was agreed at 5 complete years. The basic award was agreed at **£2,195.**

22. Loss of statutory rights was agreed at **£300.**

23. There was no claim for pension loss.

Findings on remedy

24. The claimant worked for the respondent hotel from May 2012 in a range of roles. In April 2017 she was offered the role of Reception Manager. At the interview for this role the claimant made it clear that she had Asperger's

Syndrome and would need support. This was a promotion for the claimant. Mr Hewitt, the HR witness, said that he had seen a document from the point of the claimant's recruitment into that role, in which she had declared her disability in a health questionnaire.

25. The claimant started in the role on 1 April 2017 (offer letter page 65). She filled out the Health Questionnaire on 21 April 2017 in which she declared her disability (page 67). We find that as from this date the respondent had notice of her disability.

26. There are two reasonable adjustments which the respondent accepts it failed to make and for which liability is admitted. These were (i) providing her with a desk/work space specifically for her. It required the obtaining and setting up of a computer for her to use and (ii) providing her with time with an experienced reception manager. This was to give her an opportunity to find out exactly what was expected in the role and to provide her with someone she could contact for assistance as she was a new manager.

27. The claimant started the new role on 1 April 2017. There was a dispute of fact as to when she first asked the respondent for the computer and office space. It was suggested by the respondent that this was not until August 2017; the claimant said it was in May 2017 after she had been in the new role for about a month. The claimant's evidence was that she made the request to a number of people. She said she initially had a conversation with her line manager Mr Nagar and he told her to speak to Ms Sarah Phillips, the Head of Reception, who passed her on to Mr Hewitt, the Head of HR. She raised it verbally and not in writing and said that she was given verbal assurances that this would be dealt with.

28. Mr Hewitt could not recall such a conversation in May and said that he was out of the business for about 4 weeks from around 17/18 May 2017.

29. As part of her condition, it is very important for the claimant and the management of her symptoms that she find her workstation exactly as she left it. She needs a personal area in which to do her work in order to manage her anxiety.

30. There was no written confirmation of any request in May 2017. The claimant said that as a result of her condition, she trusts in authority figures and believed that they would do as they had said. She said it takes a lot for her to override that innate sense of authority.

31. Mr Hewitt's evidence was the first time he knew about the claimant's request for any adjustments was on 6 August 2017. He said in evidence: "*although I did come across a health questionnaire when she started in May [2017]"* and he had a conversation about it with Ms Phillips. We saw this Health Questionnaire completed by the claimant on 21 April 2017 (page 67). It was countersigned by the General Manager.

32. We find on a balance of probabilities that the claimant did raise this with

managers in May 2017 and in the first part of May before Mr Hewitt was away. It mattered a great deal to her so we find that she raised it and left it with them. We find that it mattered less to them and that is why they do not recall it.

33. The claimant did not normally need medication in order to manage her condition. In May 2017 when things became difficult and her symptoms worsened she went to the doctor and was prescribed medication

34. The claimant was struggling without these adjustments being made. She was experiencing bouts of nausea, dizziness and vertigo which led to a day off sick on 12 July 2017 – we saw the respondent's record of this absence at page 52-53. It was not until about 20 July 2017 that the claimant chased up the adjustments that she needed. It led to a meeting on 6 August 2017 a note of which we saw at page 90. This was an email from Ms Phillips copied to Mr Hewitt and Mr Croasdale, the Cluster General Manager.

35. In the meeting note said: "*SC with David [Croasdale] and Alex [Hewitt] to sort out desk space and computer for SC"* and also *"SC to go and see Lee for a coaching session or get lead to come over to* [*the claimant's workplace*]". Lee was an experienced front of house manager who was to help with the second adjustment.

36. No such arrangements with the Lee or any other Front of House Manager materialised. The reason given to the claimant was "*the constraints of the business*".

37. On 8 August 2017 and following the 6 August meeting, Mr Nagar as the line manager began enquiring as to the process for ordering a new additional computer unit for the back office. He received a reply the following morning which he then forwarded on to Mr Croasdale or approval. On 23 August 2017 some two weeks later, he told the claimant that her "*shiny new computer will be with us hopefully w/c 11.9.2017*" (page 92).

38. The claimant returned to her GP in August 2017 and her medication was increased. Her sleep had become badly affected. Initially her sleep was reduced to under four hours per night and then this it built to full insomnia putting her in a position where she was unsafe to drive on a number of occasions. Fortunately her parents live close by and they were able to assist her.

39. The computer arrived from Head Office in the week commencing 11 September 2017. It was placed under the desk of her line manager Mr Nagar which is where it stayed for two months. She could see it. It was not installed because the correct cabling had not been organised.

40. In mid-November 2017 she saw that it had gone from underneath Mr Nagar's desk. She made some enquiries and found that it had been given to a new member of the sales team. We find that no one volunteered this information to the claimant. None of the respondent's witnesses could say

definitively that they told her where and why it had gone so we find that it was left to the claimant to find out what had happened to this computer. This left her feeling unsettled and emotionally flat.

41. By this time, in November 2017, the claimant was just working and sleeping. Her anxiety had led to depression and meant that she was unable to continue with her outside interests such as being an officer in the Girls' Brigade, athletics and taekwondo training. Her sleeping medication meant that she had difficulty waking up. If she was on an early shift she would stay at her parents' house overnight so that they could help wake her up in the morning.

42. In late December 2017 the claimant went for a further appointment with her GP and there was a discussion about further increasing her medication. She and her GP balanced against this the risk of the side effects, such as increasing drowsiness and memory problems; or alternatively to sign her off sick whilst she waited for the respondent put the adjustments into place. The claimant was not happy with either of these options and the GP decided to leave the medication at its current level and she decided she would push for the adjustments to be put in place.

43. When the claimant raised the matter with her line manager and the General Manager she was told that things were scheduled for January 2018 so she continued to wait. The claimant at all times had to instigate and chase for these adjustments to be made and for any information about it. In early January she asked the IT maintenance team about the situation and they told her they knew nothing about it.

44. The claimant returned to her GP on 23 January 2018. The GP signed her off sick and she did not return to the workplace prior to her resignation on 16 February 2018. The claimant's resignation email was sent to Mr Hewitt (page 133). She said in her resignation email that her decision to resign had not been made lightly but had been made due to the ongoing issues. She told Mr Hewitt she was happy to meet with him off site to discuss the events leading to her departure. Two meetings were arranged with Mr Hewitt. He was not able to attend either meeting. He said on one occasion that it was because his diary had changed for the day (page 136). The claimant was not told the reason for the other cancellation.

45. To her credit the claimant began looking for work almost immediately after her resignation. It was put to her that she could have gone back to the doctor but she said it was a case of necessity to find work.

46. On Monday 19 February 2018 the claimant saw an advertisement for a job with a hotel called Morley Hayes. It was a temporary position for about 3 months. She attended an interview and a work trial day on Monday, 26 February 2018 and we find based on her evidence and the payslip, that she started in post four days later on 2 March 2018.

47. The claimant was covering for an absent employee who was initially due to

be away for 3 months. That employee returned after 2 months and she was given a week's notice. The claimant left Morley Hayes in early May 2018.

48. The claimant then applied to work with Jury's Inn where she now works. She commenced work with Jury's Inn on 22 May 2018. The claimant accepts having seen her P60 for the year ending 5 April 2019 that she has no claim for financial loss.

Submissions

49. In submissions the respondent reminded us that we needed to identify the date upon which the act of discrimination occurred. It was the respondent's position that the claimant did not make any request for an adjustment until around the end of July 2017. The Judge asked the respondent whether they said the duty to make reasonable adjustments only arose when the claimant asked for the adjustment. The respondent's submission was that without knowledge of the adjustment the respondent was not in a position to make it.

50. The respondent admits that the two adjustments were not made. They submit that the date of the act of discrimination must have been at the end of July 2017 and no earlier.

51. It was submitted for the respondent that the computer arrived in the week commencing 11 September 2017 but it was not just the question of the arrival of the computer but also the cabling they obtained a quote for that on 22 September 2017 – page 101 – at a cost of £435.

52. In relation to injury to feelings the respondent submitted that the claimant only took one day off sick in July 2017, they questioned whether it related to her disability and she had no other sickness absence until 23 January 2018.

53. As to the Vento band it was submitted that this was not a course of conduct over several months and that it was three or four months at the most. The claimant was able to apply for another job promptly and got another job within a week or two of leaving the respondents employment. Respondent submitted that this was not indicative of the middle band and they submitted that we should award in the lower band.

54. In relation to medication the respondent submitted that there was no medical evidence to assist the tribunal with this.

55. The claimant submitted that this was a middle band case because it led to the loss of her job. She considered that this placed it in the middle band.

56. The claimant submitted that the length of time over which the respondent failed to make the adjustments left her feeling very isolated, it damaged her confidence and increased her anxiety. She said she had always been proud of how she managed her anxiety and this set of circumstances was

unnecessary. She said she tried to be as reasonable as she could and she felt that to a degree she had been taken advantage of. She said she left the respondent's employment because she felt she had no choice.

The relevant law

57. Section 124 of the Equality Act 2010 provides that where a tribunal finds that there has been a contravention of a relevant provision the tribunal may make a declaration as to the rights of the parties; an order requiring the payment of compensation and an appropriate recommendation.

58. We are required to take into account any part of the EHRC Equality Act 2010 Employment Code of Practice that appears to us to be relevant to any questions arising in proceedings.

59. The Statutory Code of Practice does not impose legal obligations but we must take it into account. Chapter 6 of the Code deals with the duty to make reasonable adjustments. Paragraph 6.24 says: *"There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask)."* Paragraph 6.32 says "*It is a good starting point for an employer to conduct a proper assessment in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion……"*

60. In assessing financial loss the aim is to put the claimant in the position that he would have been in, but for the discriminatory act. Loss caused by anything other than the discrimination is not recoverable.

61. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference purchasing power or earnings.

62. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*****.**

63. Presidential Guidance was issued on the ***Vento*** bands on 5 September 2017 to which an addendum was published on 23 March 2018. In respect of claims presented on or after 6 April 2018 (as in this case), the Vento bands are as follows: a **lower band of £900 to £8,600** (less serious cases); a **middle band of £8,600 to £25,700** (cases that do not merit an award in the upper band); and an **upper band of £25,700 to £42,900** (the most serious cases), with the most **exceptional cases capable of exceeding £42,900**.

64. We are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment***

Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803 (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For financial loss interest commences at a mid-point.

Conclusions

65. There is a statutory duty upon employers to make reasonable adjustments for disabled employees. This is not a duty which only arises if the employee tells them that there is an adjustment which they need. Of course, it is helpful if the employee makes clear what he or she needs. We have taken account of chapter 6 of the Statutory Code of Practice as set out above.

66. Knowledge of disability was not in issue.

67. In any event our finding of fact above is that the claimant began asking for the adjustments in the first half of May 2017. We also find based on her health questionnaire that the respondent was on notice to her disability from 21 April 2017 at the latest.

68. The duty to make reasonable adjustments arises in respect of a disabled employee. As the Code of Practice states, the onus is not on the employee to suggest what adjustments should be made. It is for the employer to have a discussion with the employee and find out what adjustments they may need to make. These were reasonable adjustments, this is not denied by the respondent.

69. We find that with some proper urgency applied to the situation we find that at the outside, both adjustments should have been made within 28 days. We find that the act of discrimination took place on 19 May 2017 and this is the relevant date for the interest calculation.

70. The claimant's disability was overlooked by the respondent. They were focussed on other business issues and she trusted them to deal with her adjustments. She was not the sort of personality to make a big fuss. She told the tribunal she is a loyal employee and we find that she was. She pushed on for as long as she could, but unfortunately the failure to address the issues led to an increase of her symptoms and a substantial deterioration of her health. Ultimately she lost her job over this because she was put in a position where she had no option but to resign.

71. We have considered comparable authorities such as ***Clark v East London Bus & Coach Co Ltd 2012 EqLR 1162***, ET case, in which the claimant was a bus driver with type 2 diabetes. The respondent failed to make reasonable adjustments over a period of nearly 2 years. The respondent should have (a) provided him with an appropriate room to take his medication and test his blood sugar levels, (b) facilitated shift swaps within his required shift pattern and (c) allocated stable and predictable

shift times. This was a cause of considerable concern and worry for the claimant. The appropriate award was found to be at the lower end of the middle Vento band.

72. In ***Da'Bell v NSPCC (above)*** the claimant was a charity fund raiser. She had a heart condition and a pacemaker. The respondent obtained medical and OH reports as to the way in which she could be supported, eg; reducing the geographical area that she covered. Despite a certain amount of talk and consideration, nothing was done. The respondent failed to make reasonable adjustments over a period of 8 months before she went off sick with stress and anxiety. The tribunal made no error of law in making an award at the midpoint of the middle Vento band.

73. We find based on these comparable authorities that this is a lower middle band case. It was not a bullying or harassment case and it was not a campaign against her. Nevertheless the claimant was substantially affected by the discrimination, her health deteriorated, her medication was increased, the symptoms and side effects worsened and she lost her job as a result. She had been employed by this respondent for over five years. Similar to ***Da'Bell*** the failure to make the adjustments went on over a comparable period from May 2017 to February 2018, 9 months.

74. It is of great credit to the claimant that she did not stay off sick but made efforts to find another job as soon as she could. Although the respondent suggested to her that she could have done this, we find that she would likely have been criticised for failing properly to mitigate her loss. It is difficult for most people financially to be out of work and she told us finding another job was a matter of necessity.

75. We find that this is a lower middle band case and we award injury to feelings at £9,000. The period for the interest calculation is from 19 May 2017 to 11 July 2019. This is a period of two years and 53 days. One years interest at 8% is £720. For two years this is £1,440.

76. The daily rate of interest is £720 divided by 365 at £1.97 x 53 days is £104.41.

77. The total amount of interest is therefore £1,544.41. Adding this to the award for injury to feelings produces an award of **£10,544.41.**

78. Added to this is the basic award of **£2,195,** loss of statutory rights at **£300.**

79. The total award to the claimant is **£13,039.41.**

_____

Employment Judge Elliott
Date: 11 July 2019

Judgment sent to the parties and entered in the Register on: 15 July 2019.
_____ for the Tribunals