Case Number: 2301635/2015

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Ms J Batchelor		**Abellio London Limited**

Held at London South **On 14 May 2019**

BEFORE: Employment Judge J Nash

MEMBERS: Ms L Grayson
Mr M Sparham

Representation

For the Claimant: **Mr J Neckles, representative**

For the Respondent: **Mr A Lord, Counsel**

JUDGMENT ON REMEDY

1. The Respondent shall pay to the Claimant the sum of £8,699.82 as compensation for disability discrimination under the Equality Act 2010.

2. The Respondent shall pay to the Claimant the sum of £3,104.29 as interest on the compensation under the Equality Act 2010.

3. There is no award made under section 13 Employment Rights Act 1996.

4. Accordingly, the total sum due to the Claimant from the Respondent under this judgment is £11,804.11.

REASONS

Procedural History and Preliminary Matters

1. The Tribunal sent a liability judgement in these proceedings to the parties on 12 October 2017. By way of this judgement, the Claimant succeeded in her claim for unfair dismissal under section 98 Employment Rights Act 1996 and under section 15 of the Equality Act 2010. In addition, the Tribunal found for the Claimant under section 10 of the Employment Rights Act 1996 respect of the right of accompaniment and made a nominal award to the Claimant of £2. The Tribunal dismissed the claim under section 13 Employment Rights Act 1996 in respect of unauthorised deduction from wages.

2. This remedy hearing was listed before a new Tribunal as the Employment Judge at the liability hearing had since retired.

3. There was some delay at the beginning of the hearing as the Tribunal did not have any bundles. However, the Claimant had with her a bundle and all documents on which both parties wish to rely were before the Tribunal.

4. The Claimant had made a request to postpone this remedy hearing the night before the hearing. However, this was not pursued before the Tribunal.

5. The parties informed the Tribunal that the unfair dismissal remedy had been settled between them prior to this hearing. Accordingly, no award need be made under this judgement.

6. There was a dispute between the parties as to whether or not this remedy hearing should consider the Claimant's claim for remedy under Section 13 of the Employment Rights Act 1996. The procedural history of the section 13 claim was somewhat complex.

7. According to the liability judgment, the Claimant was entitled to all contractual entitlements up to the effective date of termination on 29 November 2015. However, the liability judgment also stated that the Section 13 unauthorised deduction from wages claim was dismissed. The Tribunal, following an application from the Claimant, reconsidered its dismissal of the section 13 claim on 28 November 2017. This Tribunal accordingly agreed with the Claimant that it should consider what contractual entitlements pre-dismissal were due under section 13.

8. However, the Respondent contended that the Claimant had effectively settled any section 13 claim and accordingly the Tribunal no longer had jurisdiction to consider it.

9. By way of an email on 9 November 2017, the Respondent had offered the Claimant a payment equivalent to 9 weeks full and 9 weeks half pay in respect

of sick pay. The Respondent requested payment details so the payment could be arranged and chased the Claimant's representative on 28 November 2017. On 28 November 2017, the Tribunal reconsidered its judgment, thus bringing the Section 13 claim back into play. The Claimant's representative on 30 November 2017 emailed the Respondent asking that a cheque in the sum offered be forwarded to the Claimant. The Respondent duly sent a cheque on 11 December 2017 and confirmed its calculations under the judgment. The Claimant cashed the cheque. By the time the payment was agreed and certainly by the time the payment was made, the Tribunal had reconsidered the judgment.

10. This Tribunal considered whether or not the section 13 claim had been settled. The word "settlement" appeared nowhere on the emails between the parties. The Respondent had written to the Claimant stating what it believed was the sums due under the liability judgment. The Claimant requested that she be sent this sum of money. However, both parties were silent as to whether or not this included the Respondent's liability under Section 13. The Tribunal took the view that the Claimant did not extinguish her ability to ask for the full sums due under the judgment, by accepting payment of the sum offered by the Respondent.

11. Nevertheless, the Respondent had in the view of the Tribunal reasonably assumed the Section 13 claim had been paid. The Claimant had provided no Schedule of Loss prior to this hearing, which might indicate otherwise. Although none was directed, the Claimant was represented and should know that a Schedule of Loss would be required for a remedy hearing. The Tribunal informed the parties that it would take into account that the Respondent might be unprepared and accordingly, if appropriate, the Tribunal would draw no adverse inference because of any lack of evidence on the Respondent's part.

Issues

12. The sole issue under section 15 Equality Act 2010 was what compensation was due from the Respondent to the Claimant.

13. It was agreed there was no future loss of earnings. The only issue was how much compensation should be awarded in respect of injury to feelings.

14. It was agreed that the Section 13 remedy turned on whether the Respondent had already paid 9 full plus 9 half weeks sick pay or 8 full plus 8 half weeks sick pay. If the Respondent had paid 9 plus 9, then nothing was due. If it only paid 8 plus 8, then 1 week's full pay plus 1 week's half pay was due.

The Law – Equality Act

15. The law on remedy is set out at s124 Equality Act as follows

> (1)This section applies if an employment Tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2)The Tribunal may—

(a)make a declaration as to the rights of the complainant and the Respondent in relation to the matters to which the proceedings relate;

(b)order the Respondent to pay compensation to the complainant;

(c)make an appropriate recommendation.

16. The general principles set out by appeal Tribunal in *Prison Service v Johnson* [1997] IRLR 162

a. An injured feelings award is compensatory and should be just to both parties. They should compensate fully without punishing the discriminator indignation at the discriminator's conduct should not be allowed to inflate the award.

b. Award should not be too low, as this would diminish respect for the policy of the antidiscrimination legislation. Society has condemned discrimination and was must ensure that it is seen to be wrong. On the other hand, award should be restrained as excessive be seen as the route to untaxed riches.

c. The should there some broad general similarity to the range of personal injury, not to any particular type of personal injury but the whole range of such awards.

d. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings.

e. Tribunal should bear in mind the need for public respect of the level made.

17. The Court of Appeal stated in *Vento v Chief Constable of West Yorkshire Police (Number 2)* [2003] IRLR 102, that injury to feelings award will include subjective feelings of upset, frustration, worry, anxiety, mental distress and the fear, grief, anguish, humiliation, unhappiness, stress and depression.

18. The Court of Appeal identified 3 board bands of compensation for injury to feelings and gave the following guidance. These are now known as the Vento bands.

a. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discrimination or harassment on the grounds of [sex or race]. Only in an exceptional case should the compensation for injury to feelings exceed £25,000.

b. The middle band of between £5000 and £15,000 should be used for serious cases, which do not merit an award a high standard.

c. Awards of between £500 and £5000 are appropriate for less serious cases, such as where the act of discrimination as an isolated a one-off occurrence.

d. In general, awards of less than £500 are to be avoided altogether.

19. The amounts in the Vento bands have increased over time due to inflation. Further, the Court of Appeal in *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 held that the 10% uplift in *Simmonds v Castle* [2012] EWCA Civ 1288 should apply towards for injury to feelings.

20. The Tribunal explained to the parties that it intended to comply with the Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury. The Presidential Guidance provided a formula by which Tribunals should update the original Vento bands for claims (such as this) presented before 11 September 2017. The Tribunal after having considered the evidence and submissions, would identify in which Vento band the award should fall and whereabouts in that band. It would then uprate the award according to the Guidance. There was no objection by either party.

<u>The Award - Equality Act</u>

21. the Tribunal reminded itself that it might only award compensation for the unlawful discrimination found in the liability judgement. Accordingly, compensation could not relate to the entire circumstances of dismissal. The liability judgement found that the failure to recognise to treat the Claimant as a disabled person and the failure to make good faith reasonable efforts to find an alternative job for the Claimant amounted to unlawful discrimination. Further, the Claimant would have been dismissed within a further 4 weeks or perhaps a month as there was no alternative employment available.

22. The Tribunal heard evidence from the Claimant, which the Tribunal accepted and noted was corroborated by medical documents in the bundle, that she suffered from mental stress and anxiety leading up to and following her termination. She suffered the loss of her job, loss of amenity and pain from her knee, fibromyalgia, then a very unpleasant marriage breakup and then considerable mental difficulties. The Tribunal was unable to determine the level of seriousness of the effect upon the Claimant's mental well-being because she chose not to disclose documents relating to her psychiatric treatment and therapy as these included intimate matters. However, based on the evidence before it, the Tribunal accepted that she had suffered an adverse impact upon her mental well-being.

23. The Tribunal went on to consider how much of this adverse impact was attributable to the unlawful conduct of the Respondent as found in the liability judgement. The Claimant gave evidence which the Tribunal accepted that the Respondent's conduct in failing to seek alternative work and to treat her as a disabled person did cause her considerable distress in and of itself. The Claimant gave what the Tribunal found to be convincing and vivid evidence that she found the Respondent's treatment of her extremely difficult. The Claimant

explained that she felt that after six years of service (and the Tribunal noted that the liability judgement referred to her in glowing terms as an employee) that she was "worth nothing". She said she felt that she had no one to talk to and that the Respondent was dismissive of her. She felt isolated and that no one cared.

24. Whilst bearing in mind that it is extremely difficult to disentangle each cause from each effect, the Tribunal found that the Respondent was responsible for at least some of the mental damage and suffering which followed the dismissal.

25. The Tribunal also directed itself in line with the decision of the Employment Appeal Tribunal in *Voith Turbo v Stowe 228 IRLR 2005* (a race determination case) that a dismissal should not be characterised as a one-off incident and should be at least in the middle band. The Tribunal considered if it should depart from this authority because much of the unlawfulness of the dismissal was procedural. According to the liability judgement, had the Respondent complied with the law Claimant would have been dismissed in any event a short period later. The Tribunal concluded that it should not depart from the authority of *Voith Turbo* because the award reflected the injury to the Claimant's feelings caused by the discriminatory dismissal and it could not be offset by the fact that a lawful and non-discriminatory dismissal could have been carried out later in any event.

26. In view of the Tribunal, the unlawful conduct of the Respondent does not take this case outside of the middle band. However, the relatively limited nature of the Respondent unlawful conduct, taken in the context of the Claimant's losing her job which she would have done in any event, meant that the award should be at the lower end of the middle band. Applying the Presidential Guidance, the Tribunal, bearing in mind that the original Vento middle band, was £5000-£15,000, decided to award £5500.

27. This unadjusted award was then uprated in line with the Presidential Guidance. According to the Presidential Guidance, in respect of claims presented before 11 September 2017, an Employment Tribunal may upgrade the Vento bands for inflation by applying the formula X divided by Y (178.5) multiplied by Z, where Z is the relevant boundary of the relevant band in the original Vento decision and Z is the approximate value from the RPI all items index for the month and year closest to the date of the presentation of the claim, and, where the claim for the consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift.

28. The Tribunal calculated as follows:

    5500/178.5 = 30.81
    The ONS relevant value at March 2015 was 256.7, making a total of £7,908.93. This was adjusted by 10%, making a total of £8,699.82

29. For the avoidance of doubt, the Tribunal made no award for aggravated damages. There was no submission to this, and it was not set out as a head of

loss at the beginning of the hearing. The Tribunal found no grounds for the making of such an award.

Interest

30. Interest was due on the award for injury to feelings from the date of the act of discrimination complained of until the date on which the Tribunal calculated the compensation, see section 124(2) (d) Equality Act 2010 and regulation 6 (1) (a) IT (IADC) Regulations 1996.

31. The Tribunal considered regulation 6(3) IT(IADC) Regulations 1996 according to which, where a Tribunal considers that serious injustice would be caused if interest were to be calculated according to the default approach, it may calculate interest on such different periods as it considers appropriate.

32. The Respondent contended that the Tribunal should not include the period from May 2018 to May 2019 pursuant to regulation 6(3) on the basis that this would cause it serious injustice. During this period there was a serious delay in sending the reconsideration decision to the parties and the remedy hearing (which had previously been listed) was postponed as a consequence. The Respondent placed particular reliance on the period from February to May 2019 in that a relisted remedy hearing for 27 February 2019 was postponed the day before because the Claimant's representative said he had not been informed of the hearing and was not available.

33. The Claimant contended that the Tribunal should calculate interest according to the default position.

34. "Serious injustice" is a high bar. The Tribunal noted that the Claimant had been kept out of compensation for a considerable period, for a number of reasons. The Tribunal accepted her evidence that her financial difficulties had materially exacerbated the sufferings which have been set out in this judgement. The first part of the delay was caused by the workload of the Tribunal. This was unfortunate and the Tribunal accepted the Respondent's contention that it had been made liable for further interest through no fault of its own.

35. The Tribunal considered the Claimant's February 2019 postponement request. The Claimant made a request to postpone on the basis that her representative was not aware of a notice of hearing sent by email and by post several months earlier. Before this tribunal the Claimant's representative admitted that he did not "keep an eye" on his email and as a result had not been made aware of this hearing until 4:30 PM the previous evening. In the circumstances the Tribunal found the Claimant's grounds for the February 2019 postponement request to be questionable. However, the Respondent did not object to the February 2019 postponement request.

36. The Tribunal accepted that there had been some injustice to the Respondent. However, this was not sufficient to overcome the high bar "serious injustice". Further, there was no suggestion that any fault lay with Claimant rather than with her representative.

37. The parties were unable to agree the amount of interest and accordingly the Tribunal made the interest calculation whilst checking that the parties agreed at each step of the way.

38. From 29 November 2014 to 14 March 2019 was 1628 days. The interest rate is 8%. The calculation was

    1628 x 0.08 x 1/365 x £8699.82 = £3104.29

Section 13-Unauthorised Deduction from Wages

39. The issue as agreed was whether the Respondent paid the Claimant during her employment either 8 weeks full + 8 weeks half sick pay or 9 weeks full + 9 weeks half sick pay.

40. The difficulty for the Tribunal was the lack of contemporary evidence going to this. The Tribunal had sight of a spreadsheet put together by the Claimant's representative. The Claimant was unable to give authoritative evidence about the spreadsheet. The best she could say that that she did not disagree with it and thought it was probably based on her payslips. The Tribunal was unable to place any reliance on this spreadsheet.

41. The Tribunal, as set out above, did not draw an adverse inference against the Respondent for its failure to provide any contemporaneous evidence as it did not expect to meet this claim at this hearing. However, the Claimant was aware of her section 13 claim yet provided no contemporary document.

42. The Tribunal heard oral evidence. With the Claimant the Tribunal calculated how much pay had been received. It was clear from the face of the liability judgement that the Claimant said she was entitled to 18 weeks full sick pay and 18 weeks half pay. According to the schedule of loss prepared at the hearing, Claimant was entitled to £384.25 x 18 as a week's full pay and £193.13 x 18 as a week's half pay. Accordingly, the total amount due was £10,374.84.

43. It was the Claimant's case before the Tribunal that she had received £6413.68 by way of sick pay during her employment. This was consistent with her documents. Accordingly, she was therefore owed £3961. At this hearing she accepted that she had been paid on 11 December 2017 the sum of £5187.42 in respect of unauthorised deduction from wages under section 13.

44. Accordingly, the Tribunal found that even if the payment of £5187.42 was paid net as opposed to gross (and the parties were unable to assist the Tribunal with this), on the basis of these calculations nothing could be outstanding. The payment of £5187.42 was expressed by the Respondent to be sick pay only and there was no contention that any other sums were due under the liability judgement in this regard.

45. Accordingly, the Tribunal made no award under section 13 Employment Rights Act 1996.

Employment Judge Nash
5 July 2019