



EMPLOYMENT TRIBUNALS

Claimant: Ms Stephanie Whitlock
Respondent: The Order of St John Care Trust
Heard at: Reading **On: 12 August 2019**
Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Miss E Sole (Counsel)
For the Respondent: Not attending and not represented

JUDGMENT ON REMEDY

1. The correct name of the respondent is The Order of St John Care Trust. The title of the proceedings is amended accordingly.
2. The respondent is ordered to pay to the claimant the sum of £58685.74

REASONS

1. The claimant's claim form when first presented on the 27 April 2018 recorded the name of the respondent as The Order of St John Trust Care. This is incorrect, the correct name of the respondent is The Order of St John Care Trust. The claim was served on the correct respondent and the respondent entered a response. There was no confusion as to the correct respondent. The title of the proceedings is amended so that the respondent's name is correctly recorded.
2. The Claimant was employed by the Respondent from 26 July 2016 as an Administrative Assistant. The claimant resigned and her employment ended on 28 October 2018.
3. The claimant is disabled within the meaning of the Equality Act 2010 (EqA). Although initially denied by the respondent, since 4 February 2019 the respondent has accepted that the claimant is and was at the relevant time a disabled person within the meaning of the EqA.
4. The claimant presented claims of discrimination based on the respondent's failure to make reasonable adjustments and victimisation on the grounds of disability.

5. The final hearing was listed for hearing on the 12-14 August 2018 at a preliminary hearing on the 17 October 2018. The respondent although having been served with the notice of the preliminary hearing did not attend. At a preliminary hearing in private conducted by telephone Regional Employment Judge Byrne accepted that there may have been communication between the Employment Tribunal office and Ms Elaine Matthews, the respondent's representative, that resulted in her believing that the preliminary hearing on the 17 October 2018 had been postponed. Regional Employment Judge Byrne made further orders varying the dates for compliance with specified orders made on the 17 October 2018. Regional Employment Judge Byrne directed that: *"All other orders in the orders sent to the parties on 6 November 2018 remain in full force and effect and the claims remain listed for hearing with a time allocation of 3 days before the Employment Tribunal, 30 -31 Friar Street (Entrance in Merchants Place), Reading RG1 1DX starting at 10.00am or as soon thereafter as possible."*
6. The respondent's response denied the claimant's claims however the response was subsequently struck out as a result of the respondent's failure to comply the Employment Tribunal's orders. The respondent was sent confirmation of the dismissal of the response on the 9 March 2019. The respondent was informed that: *"The respondent will be entitled to notice of any hearings and decisions of the Tribunal but will only be entitled to participate in any hearing to the extent permitted by the Employment Judge."*
7. On the 28 July 2019 the employment tribunal office sent the parties a notice confirming that the hearing listed to take place between 12-14 August was now converted to a remedy hearing with a time allocation of 1 day.

Claims

8. The claimant's claims are that the respondent failed to make reasonable adjustments by not allowing part-time work from March 2017 to June 2018 and not allowing more than one break per day.
9. The claim of victimisation relied on five protected acts: the claimant's requests for reduced hours, made on 4 May 2017 and weekly thereafter, which was a request for reasonable adjustments; on receipt of the Occupational Health report the claimant advised of the recommendations for reasonable adjustments; the claimant asking, from 26 June 2017 and thereafter on a weekly basis, when the meeting would take place to discuss the Occupational Health report and reducing her hours; the claimant's formal grievance dated 21 November 2017; presenting her claim to the Employment Tribunal.
10. The detriments of which the claimant complains were: the respondent unfairly suspended the claimant for alleged wrongdoing and failed to properly inform or advise her of the progress of any investigation; rather than agreeing to make reasonable adjustments to the claimant's working hours the respondent offered to terminate the claimant's employment on ill-health grounds on January 2018; the respondent initially ignored the claimant's grievance and, thereafter, failed to address it formally, properly or fairly; the respondent required the claimant to take holiday from around 15 May to 1 June 2018 and thereafter required her to use three days of annual leave each week until around 11 June 2018.

11. The claimant seeks an award of compensation for injury to feelings; pain, suffering and loss of amenity; and aggravated damages. The claimant also seeks an uplift to any award based on the provisions of section 207A Trade Union and Labour Relations (Consolidation) Act 1992 arising from the respondent's failure to address her grievance.

Injury to Feelings

12. The claimant relies on the guidelines as set out in the Presidential Guidance for injury to feelings (5th September 2017 and the addendum) setting out the relevant figures for Vento brackets, applicable to the present claim.

13. The claimant through counsel has submitted that this is a case of multiple forms of prohibited discrimination and separate awards are appropriate on the facts of this particular case.

14. I am reminded that the end of the exercise of assessing injury to feelings, the tribunal must stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate, and that there is no double counting in the calculation. The claimant submitted that the award for failure to make reasonable adjustments and victimisation should both have an award made that falls within the middle bracket of the Vento guidance.

15. In respect of the failure to make reasonable adjustments. I note that the claimant's reasonable request to work part-time was more or less ignored and then refused without a sound basis for a lengthy period (the adjustment arose in March 2017 with an express request in May 2017, and it was rejected until February 2018), during which period the refusal effectively prevented the claimant from working between November 2017 and February 2018. The claimant's request for adjustments was medically supported. Following the agreement to make adjustments in principle, the contractual change only took place in June 2017. The claimant was required to take accrued holiday for a period of time.

16. The impact on the claimant of the failure to make reasonable adjustments is set in emails on 17 August 2017 and November 2017 and in a letter dated 21 November 2017. The claimant set out in her remedy statement that whilst waiting for the OH assessment and report she suffered low mood, did not interact socially and kept very quiet at home. When the claimant's GP gave her a fit note stating she should work part time the claimant was told 'no' by her manager. She raised a grievance: this was ignored, and the claimant became frustrated and annoyed. During the conciliation process the claimant was frustrated that the respondent was not engaging, and she was prevented from working when she was able. The respondent's attitude and responses added to the stress, fatigue and pressure the claimant suffered. She was afraid and anxious about leaving the office to complete tasks, deliver clients mail or use the bathroom. The claimant was forced to ask, on a weekly basis, if Ms Elaine Matthews had contacted the claimant's manager about the OH report. There was a delay of several weeks involving the claimant asking, if Ms Elaine Matthews had received the report and was planning to discuss it with the claimant. The claimant was forced to ask, on a weekly basis, if Ms Elaine Matthews had contacted the claimant's manager about the OH report. There was a delay of several weeks involving the claimant asking, if Ms Elaine Matthews had received the report and was planning to discuss it with the claimant. The respondents lack of action

left the claimant feeling worthless and that she was a hindrance for trying to get the respondent to take note of what the OH report had recommended. The claimant felt excluded from the day to day activities and isolated in her role. The claimant cried in her office because she was feeling low. The claimant's feelings of despair and worthlessness impacted on her health, mentally and physically.

17. The claimant avers that an appropriate award for injury to feelings for failure to make reasonable adjustments would be in the region of £20,000. Having considered the matters set out by the claimant and further having considered the illustrative examples of awards made in other cases and relied on the by the claimant I am of the view that the appropriate level of award for injury to feelings in respect of the respondent's failure to make reasonable adjustments is £18,000.
18. The claimant contends that there is separate and distinct element arising from the victimisation claim that merits a separate award.
19. It is said that the victimisation claim indicates the wholly inappropriate, and on the face of it malicious, reaction of the respondent to the claimant's actions under the EqA. The claimant provides evidence of the injury to feelings resulting from the acts of victimisation. The claimant states that she became *"very dejected after the suspension interview as the main concern was over a simple clerical error, due to my stress and fatigue being raised. I returned after 7 weeks suspension even more nervous and scared I felt sick every day and cried every' day. I began binge eating which caused me to gain more weight and become disgusted with my appearance... When eventually EM engaged in meeting me I felt I was being told to leave on medical grounds rather than them fulfil their legal requirements, I have always feared the loss of independence and my ability to work and provide for my family as a single parent... I spent the days leading up to the [suspension] interview confused and concerned... I attended the investigation interview, physically shaking and feeling sick, not having any idea of the circumstances or the reason I was being suspended..."*
20. The claimant contends that the appropriate award for injury to feelings for victimisation, reflecting the fact that there is of necessity some overlap, would be in the region of £8,000.
21. I am of the view that there is a different element to the victimisation claim that merits a separate award for injury to feelings. In short it arises from the fact that the victimisation claim includes and relates discretely to the claimant's suspension. Bearing in mind the award for injury to feelings arising from the failure to make reasonable adjustments I am of the view that the sum of £5,000 properly compensates this separate element of damage to the claimant.

PSLA

22. The claimant has made reference to the Judicial College Guidelines (14th edition), Chapter 8 addresses "Chronic Pain", in particular (b)(ii) which deals with "Moderate, Other Pain Disorders (not Complex Regional Pain Syndrome)". While accepting that the claimant's relapses and worsening symptoms would not fall within this bracket, it is said that it provides some guidance.

23. The claimant's evidence that she suffered pain and suffering as a result of the discrimination is found in paragraph 18 of her witness statement, regarding pre-June 2017; in paragraph 5 of the impact statement and paragraph 26 of the witness statement relating to the "flare up" August 2017; in paragraph 6 and 7 of the impact statement and paragraph 38 witness statement relating to the fall in October 2017; In paragraph 9 impact statement relating to being signed off in March 2018.
24. Having regard to the claimant's evidence and the Judicial College Guidelines the claimant says that an award of around £5,000 is appropriate for flare ups and worsening symptoms over the course of the period from March 2017 until June 2018. I am of the view that a figure in the sum of £4,000 is more appropriate. I come to this conclusion because I am of the view that there is a degree of overlap or duplication that would not be sufficiently recognised with the award made in the sum of £5,000 and that a sum of £4,000 does so reflect this.

Aggravated Damages

25. My initial view was that an award of aggravated damages was not necessary in this case because it was properly reflected in the distinct awards for two types of injury to feelings and for PSLA. However having heard the claimant I am persuaded that in this case an additional amount of compensation to include an element of aggravated damages is justified because there has been an increased impact on the claimant of the discriminatory conduct and thus her injury to feelings. As the claimant contends this arises from the manner in which the discriminatory act was committed was insulting and oppressive; the respondent's subsequent conduct has caused further distress by plainly showing that it does not take the claimant's complaint of discrimination seriously.
26. I consider that an award of £2000 for aggravated damages is merited.

ACAS

27. The claimant presented a grievance about disability discrimination on 21 November 2017 this was not addressed as a grievance in accordance with the ACAS Code of Practice, or in line with the respondent's own policy. An informal meeting took place over two months after the grievance and only once ACAS had become involved. The grievance, according to the claimant, was never brought to a conclusion. The respondent has failed to deal with the claimant's grievance which went to the heart of the matters about which this case is concerned.
28. In the absence of a response from the Respondent it is averred that the breach of the ACAS procedure (for example failing to hold a meeting without unreasonable delay as per paragraph 33 of the Code) was unreasonable and that a 25% increase would be just and equitable pursuant to section 207A Trade Union Labour Relations (Consolidation) Act 1992.
29. I am satisfied that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, and that the respondent employer has failed to comply with that Code in relation to that matter, and that the failure was unreasonable. Having regard to the background circumstances of this case

consider that it is just and equitable in all the circumstances to increase any award to the claimant by 25%.

Interest

30. The Claimant is entitled to an award of interest on the sum of £36,250 compensation made in respect of injury to feelings. The award of interest is made pursuant to the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (as amended by the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013). The award of interest is made in respect of the period from the 1 August 2017 until the 12 August 2019. The rate of interest during the relevant period is 8%¹. The interest awarded is therefore £5481.37.²

Costs

31. I am satisfied that the respondent's conduct of the proceedings has been unreasonable. The respondent began by denying that the claimant was disabled when there was no sensible basis for doing so. The respondent did not attend the first preliminary hearing but was aware of the orders made by the Tribunal on that occasion and failed to comply. Following the second preliminary hearing (conducted by telephone) the respondent has failed to engage in the proceedings save to belatedly accept that the claimant is a disabled person. The respondent has not attended the hearing today despite the respondent being aware for many months that today was the hearing date for the full merits hearing and latterly for a remedy hearing. The employment tribunal has attempted to contact the respondent using the email address and postal address confirmed by the respondent's representative as correct. I am satisfied that not only was there no reasonable basis for defending the claim against the respondent but the respondent had no intention of presenting a reasonably competent defence to the claim. That conduct in my view is unreasonable.

32. The claimant makes an application for costs. The respondent has been put on notice of the claimant's application for costs. There has been no response to the application for costs.

33. A tribunal may make a costs order, and shall consider whether to do so, where it considers that a party (or that party's representative) has acted unreasonably in the way that the proceedings (or part) have been conducted or any claim or response had no reasonable prospect of success.

34. As a consequence of the agreement made between the claimant and the claimant's representative the claimant is to pay her representative costs at 35% of the sums recovered plus a further 35% of any costs recovered. I am satisfied that while it is reasonable to make an order that the claimant recover her costs I am not satisfied that it is reasonable to award costs based on 35% of the sums recovered plus a

¹ Regulation 3 (2) provides that "Subject to paragraph (3) , the rate of interest to be applied shall be, in England and Wales, the rate fixed, for the time being, by section 17 of the Judgments Act 1838 ...".

² The award of interest is made on £28,750 (i.e. injury to feelings award) from the 1 August 2017 and in respect of £5,000 (PSLA and 25% increase) from the midpoint.

further 35% of any costs recovered. I do however make an order for costs based on 35% of the sums recovered in compensation.

35. The respondent is ordered to pay to the claimant the sum of £14,605.97 solicitor's costs, a further £2,280 representing disbursement for counsel and expenses incurred in travel to Tribunal hearings in the sum of £68.40

36. The respondent is ordered to pay to the claimant the sum of £58,685.74 comprising of

- a. Injury to feelings
£25,000
- b. Pain and suffering loss of amenity
£4,000
- c. Acas increase in award
£7250
- d. Interest
£5075.34 (injury to feelings)
£406.03 (Pain, suffering and loss of amenity)
- e. Costs
£14,605.97 (Solicitors costs)
£2280 (Disbursement for counsel fees)
£68.40 (Travel to employment tribunal)

Employment Judge Gumbiti-Zimuto

Date: 13 August 2019

Sent to the parties on:28.08.19....

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For the Tribunals Office

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