



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs N Lawler

**Respondents:** 1. The Co-operative Group Limited  
2. Mr D Collingwood

**Heard at:** Liverpool

**On:** 28 June 2019

**Before:** Employment Judge T Vincent Ryan  
Mrs F Crane  
Mrs J C Ormshaw

## REPRESENTATION:

**Claimant:** Mr M Mensah, Counsel

**Respondents:** Mr P Gorasia, Counsel

**JUDGMENT** having been sent to the parties on 15 July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS ON REMEDY

### 1. Introduction

- 1.1 The claimant was employed by the respondent from 5 March 1995 until her resignation (and claimed constructive unfair dismissal) on 11 September 2017. The claimant had been appointed Regional Manager in 2012. The claimant is a disabled person living with spinal disc damage and psoriatic arthritis which limits her mobility for which she avails of a walking stick and she takes painkillers.
- 1.2 The claimant presented her first claim to the Tribunal on 2 August 2017 alleging disability discrimination; this predated her resignation.
- 1.3 On 4 September 2017 the respondent presented to the Tribunal its ET3 response.

- 1.4 On 3 October 2017 the claimant presented an amended claim, the amendment being the addition of a constructive unfair dismissal claim.
- 1.5 On 16 October 2017 the Tribunal notified the parties that Employment Judge Franey had granted the application to amend the claim by consent of the parties.
- 1.6 On 30 October 2017 in accordance with a Case Management Order and in the light of the amended claim, the respondent presented to the Tribunal an amended ET3 response.
- 1.7 On 1 December 2017 in accordance with a Case Management Order the claimant presented to the Tribunal and served on the respondent further and better particulars of her claims.
- 1.8 The final hearing of the claimant's claims of constructive unfair dismissal and disability discrimination was held at the Liverpool Employment Tribunal between 30 July and 3 August 2018, and the Tribunal met again in chambers on 8 October 2018 for its deliberations and judgment.
- 1.9 On 25 October 2018 I signed a Reserved Judgment on Liability which was sent to the parties on 13 November 2018 ("the Liability Judgment"). In that Judgment the Tribunal found that six harassment claims made by the claimant were well-founded and succeeded, and they were listed at paragraph 4(1) - (6) of the Liability Judgment. The Tribunal dismissed three further claims of harassment, two claims of a failure to make reasonable adjustments and the claim of constructive unfair dismissal. All claims were therefore dismissed save for the six claims of harassment made against the respondents and identified at paragraph 4(1) - (6) of the Liability Judgment.
- 1.10 On 14 November 2018 I signed Case Management Orders for the consideration of the claimant's remedy in respect of her successful claims, and those Case Management Orders were sent to the parties on 22 November 2018.
- 1.11 On 10 May 2019 the claimant made an application to amend her claim to include a claim in respect of personal injury damages, which application was opposed in writing by the respondent such that it was to be made orally and contested at the remedy hearing.
- 1.12 The remedy hearing was listed for 28 June 2019, that is some seven weeks after the amendment application.
- 1.13 The remedy hearing was held at the Employment Tribunal on 28 June 2019 and Judgment was sent to the parties on 15 July 2019 ("the Remedy Judgment"). The Remedy Judgment confirmed refusal of the claimant's application to amend, to include a claim of personal injury, its declaration that the respondent had discriminated against the claimant by way of harassment in relation to the protected characteristic of disability, and confirmed an award of £30,654.56 (inclusive of interest) by way of damages for injury to feelings.

2. **Claimant's application to amend her claim – 10 May 2019 (to include personal injury)**

2.1 The basis of the claimant's application is –

2.1.1 In anticipation of the remedy hearing the parties agreed to obtain a medical report.

2.1.2 On the basis of that medical report the claimant applied to amend her claim to include a claim of personal injury in respect of the six successful harassment claims detailed above and her Schedule of Loss for use at the remedy hearing amounted to £1.6million, with psychiatric injury being assessed in the sum of £40,000.

2.1.3 Mr Mensah for the claimant relied on the authorities of **Selkent** and **Ready Mixed Concrete** on the basis that the interests of justice required an amendment as the Tribunal had jurisdiction to consider the personal injury claim, and any claim of psychiatric injury that the claimant pursued in the County Court or High Court in relation to her employment would be a duplication of proceedings. He relied on the fact that the claimant had always said the alleged discrimination affected her health and all schedules that she had produced in preparation for the final hearing were sizeable albeit none included a claim for personal injury compensation or damages.

2.1.4 Mr Mensah confirmed that he was not advancing any reason for the claimant's omission of such a claim in her initial claim form, amended claim, or further particularised claim as detailed in the introductory paragraph above. Somewhat belatedly during his reply to the respondent's opposition he suggested her omission might have been partly due to the claimant's Post Traumatic Street Disorder.

2.1.5 Principally, however, the claimant's application was based on the respondent's awareness of the possibility at all times that the claimant could have made a personal injury claim, that she was entitled to do so, that the Tribunal had jurisdiction to consider one and that in the light of the medical report advanced it was in the interests of justice to allow this late amendment.

2.2 Respondent's objection –

2.2.1 Mr Gorasia for the respondent submitted that as no personal injury claim had been pleaded it was not prepared to defend the claim at this late stage, almost two years after the initial claim was presented to the Tribunal. He said that the medical report had been obtained in relation to a claim for injury to feelings, or at least that is how it was always viewed by the respondent as the respondent was only defending at this stage the claimant's application for remedy in respect of six successful harassment

claims as detailed in the Liability Judgment. Only seven weeks' notice was given of the application, that is the period between the claimant's application to amend and this remedy hearing, in circumstances when there was no explanation advanced for the claimant's earlier omission throughout lengthy proceedings. Reference was made to the fact that evidence was given and documents adduced during the liability hearing to the effect that the claimant had mentioned that she was feeling symptoms of stress to her GP in 2017. Mr Gorasia submitted that if the amendment was allowed and the nature of the remedy application changed so fundamentally today's hearing would have to be postponed so that further medical evidence could be obtained and the respondent could properly prepare its defence. The claimant had been professionally represented throughout and he categorised, what he considered to be a late application, an "opportunistic ambush" and a tactical step to inflate the claim in the light of the failure of most of the claimant's claims. Mr Gorasia submitted that the personal injury argument was a new basis for a claim as an alternative basis to that which had been argued since the inception of the claimant's claim, and it was a fundamental change which would necessitate additional expert evidence and a multi-day remedy hearing. He prayed in aid the overriding objective of the Tribunal.

- 2.2.2 The respondent also forcefully argued that the available medical evidence described symptoms, a diagnosis and prognosis but did not seek to establish precise causation in circumstances where we were considering remedy in respect of six harassment claims and not all of the circumstances about which the claimant had complained, including constructive unfair dismissal and loss of employment. In any event, considering all the circumstances and the balance of prejudice and hardship of allowing such a late amendment which was not re-labelling but was the introduction of a new claim, was unjust to the respondent particularly in circumstances where the application was considerably out of time (as the claimant had resigned her employment on 11 September 2017, leading to a primary limitation period of 10 January 2018). Mr Mensah accepted that there was potential for a claim in the County Court or High Court and therefore the balance of prejudice in allowing this amendment today was against the respondent.

### 2.3 Decision –

- 2.3.1 The Tribunal considered all the circumstances of the case and the points raised by respective counsel concerning balance of prejudice in allowing or refusing the application to amend.
- 2.3.2 The Tribunal considered the nature of the amendment, concluding that it was not a matter of re-labelling but was the introduction of a new claim, namely that the six instances of harassment in respect of which the claimant's claim succeeded had caused Post

Traumatic Stress Disorder. The pleaded case was that the instances of harassment alone violated her dignity creating an unpleasant environment, embarrassed her causing her to feel uncomfortable (paragraphs 27, 30 and 49 of the claimant's first ET1). In her second claim form at paragraph 4 of her particulars of claim the claimant said that she had a nervous breakdown "due to a cumulation of pressure of treatment received" and orchestrated steps taken by the respondent, steps and actions alleged, which were in relation to all the claimant's claims, very many of which were dismissed at the liability hearing.

- 2.3.3 It was clear to the Tribunal that the claimant had not pleaded a personal injury claim, a fact accepted by her counsel, who recognised the need to apply to amend the claim.
- 2.3.4 Regarding the applicable statutory time limits the application to amend was significantly out of time. The claimant resigned from her employment on 11 September 2017 leading to a primary limitation period of 10 January 2018 and the application to amend was not made until 10 May 2019, significantly following dismissal of many of the claimant's claims at the liability hearing.
- 2.3.5 When considering the timing and manner of the application in the light of the above the Tribunal considered there was no adequate explanation advanced, that the application post-dated liability and was therefore unfair on the respondent, and it would not be just and equitable to extend time in these circumstances to 10 May 2019.
- 2.3.6 If the application were to be granted today's hearing would have to be postponed for the respondent to prepare with the aid of further medical evidence; a multi-day listing would be required; these essential steps (essential in the interests of justice) would cause significant cost and delay.
- 2.3.7 The balance of prejudice was so heavily against the respondent in all the circumstances that the interests of justice suggested that the application should be refused.
- 2.3.8 The unanimous decision of the Tribunal was that the claimant's application to amend her claim was refused.

### **3. Remedy in respect of the successful harassment claims**

- 3.1 As stated above, the claimant's six successful harassment claims are set out at paragraph 4 of the Liability Judgment and cross reference documents in the trial bundle. The findings of fact in relation to each of the harassment claims are set out at paragraph 2.2.6 of the Liability Judgment.
- 3.2 The Tribunal noted its findings that the claimant was genuinely and conscientiously concerned about the first respondent's management's

attitude to her (including the second respondent), she felt comments made by the second respondent were aimed at her and they made her self-conscious, “upset and worried”. She categorised some of the comments as being “serious and hurtful” and she was upset at them as they drew attention to her disability and use of a walking stick. The Tribunal’s findings repeatedly were that the claimant was upset and embarrassed by comments made to her by the second respondent, and that she suspected an attempt on the part of management to rid itself of her.

- 3.3 The period for this upset, worry and embarrassment spanning the period of harassment was July 2016 to February 2017, a considerable length of time of approximately seven months.
- 3.4 Whilst the Tribunal was made aware that the claimant has been diagnosed with Post Traumatic Stress Disorder, the Tribunal had to consider an appropriate remedy, not in respect of all the matters included in the claimant’s claim but of the six successful harassment claims. As noted above, specific findings were made in respect of those six successful claims regarding upset, embarrassment, feelings of self-consciousness, hurt and general concern.

### 3.5 **The Parties’ Submissions**

#### 3.5.1 The claimant’s submissions on remedy –

3.5.1.1 The claimant contended that the claimant ought to be awarded damages for injury to feelings in the sum of £42,000 and aggravated damages of £20,000. In her written submissions the claimant contended that the respondent failed to match values it espoused in public life and that this aggravated the severity of the discrimination, and that the second respondent’s denial of allegations aggravated the position. The claimant placed emphasis on the respondent’s espoused ethical value.

#### 3.5.2 The respondent’s submissions on remedy –

3.5.2.1 The respondent submitted that an award of £20,000 would be appropriate and reasonable for injury to feelings. Regarding aggravated damages the respondent reminded the Tribunal that it had dismissed many the claimant’s claims, confirming that there was no conspiracy or sinister motive against the claimant, that it was not the respondent’s purpose to discriminate or harass the claimant, there being various findings that the second respondent meant no harm and thought, although obviously misguidedly, that he was being light-hearted. The respondent submitted that the allegations did not

reach the threshold that would justify an award of aggravated damages.

3.6 **The law in respect of injury to feelings –**

3.6.1 The Tribunal is entitled to make not just a declaration of discrimination but also an award in respect of damages for injury to feelings. Section 119(4) Equality Act 2010 provides that an award of damages may include compensation for injury to feelings (whether or not it includes compensation on any other basis).

3.6.2 Such an award is intended to compensate for distress and upset caused by unlawful discriminatory treatment and it is intended to be compensatory. An award of injury to feelings is not to be punitive and ought not to reflect the Tribunal's view of the respondent against whom such an award is made. Emphasis is placed on the effect, that is the damage caused to the claimant.

3.6.3 Tribunals have a broad discretion and we reminded ourselves of the applicable general principles of way of guidance including the bands identified in **Vento v Chief Constable of West Yorkshire Police** as revised by **De Souza v Vinci Construction (UK) Limited** with specific and reference to the subsequent Presidential Guidance on Tribunal Awards for Injury to Feelings following those cases. The guidance updated the applicable bands and provided a formula for updating claims, there being an addendum to the guidance on 23 March 2018. The claimant's claim was presented to the Tribunal before 11 September 2017.

3.6.4 The general principles are –

- Injury to feelings awards should be compensatory and just to both parties.
- Awards should not be so low or so high as to diminish respect for the policy of the antidiscrimination legislation.
- The award should bear some relation to the range of awards in personal injury cases.
- Awards should in some sense corollate with everyday value of the money being awarded by reference to purchasing power.
- The award is to compensate for various matters encompassing subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.
- It is for the claimant to prove the nature of the injury to feelings and its extent.

- Whereas a Tribunal could make separate awards for each incident of harassment, where the discriminatory acts overlap or arise from the same set of facts the Tribunal ought to be careful to avoid double recovery or an inflated award when the damages being awarded are in respect of a continuing injury to feelings rather than separate and isolated damaging effects.

### 3.7 The law in relation to aggravated damages –

- 3.7.1 Aggravated damages are available in discrimination claims and are an aspect of injury to feelings damages. Whether to make such an award is a consideration where there are aggravating features increasing the impact of the discriminatory treatment such that it aggravates the injury.
- 3.7.2 Aggravated damages are meant to be compensatory not punitive, and the Tribunal must have regard to whether the discriminatory treatment was done in an exceptionally upsetting way motivated by prejudice or animosity or spite or vindictiveness or with an intention to wound such as it would be likely to cause more distress than otherwise.
- 3.7.3 A Tribunal must be wary of the risk of double recovery if an award of injury to feelings is being made.
- 3.7.4 Aggravated damages must be proportionate to the totality of the suffering caused to the claimant.
- 3.7.5 The Tribunal ought to consider whether the conduct of the respondents was high-handed, malicious or oppressive.

### 3.8 Judgment and award –

- 3.8.1 Injury to feelings: In the light of the findings in the Liability Judgment, the evidence heard and received at the remedy hearing, consideration of the respective parties' submissions and the applicable law and guidance, the Tribunal concluded that the award for injury to feelings was on the cusp between the middle and upper bands and assessed damages at £26,300.
- 3.8.2 The Tribunal concluded that this was not a case where it would be appropriate to award aggravated damages in the light of the findings, evidence, submissions and applicable legal principles. The Tribunal did not conclude that the respondents acted in a high-handed, malicious or oppressive manner. The findings in respect of the harassing conduct of the second respondent was that he meant no harm, was not setting out to upset the claimant and however critical one might be of his view, his view was that he was being light-hearted and supportive or on occasion raising valid considerations in the claimant's interests; that said, the



Tribunal criticised the second respondent in its liability judgment for the way he went about things and his wording. It also made findings contrary to his evidence, but nevertheless did not consider that the conduct reached the threshold level for an award of aggravated damages in circumstances where the claimant was properly compensated by its award of damages for injury to feelings above.

- 3.8.3 The claimant is entitled to interest at 8% on the award of damages to injury for feelings, and the interest calculation was checked and approved by counsel for the respective parties. The parties agreed that the appropriate interest was £4,354.56 on the tribunal's award.
- 3.8.4 In the light of all the above the Tribunal awarded the claimant £30,654.56 inclusive of interest by way of an award of damages for injury to feelings; we made no award in respect of the claim for aggravated damages; there was no claim before it for damages for psychiatric injury in the light of the Tribunal's earlier decision to refuse the claimant's application to amend her claim.

Employment Judge T Vincent Ryan

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Date: 02.09.19

REASONS SENT TO THE PARTIES ON

6 September 2019

FOR THE TRIBUNAL OFFICE

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