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EMPLOYMENT TRIBUNALS

Claimant: Mrs K Grace
Respondent: Maldon Lodge Care Home Limited
Heard at: East London Hearing Centre
On: 26 July 2019
Before: Employment Judge WA Allen
Members: Miss S Campbell
Mrs S Jeary

Representation

Claimant: Ms D Carter (Lay Representative)
Respondent: Mrs S Potter and Ms L Aitken

REMEDY JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent is to pay the Claimant a total sum for unlawful deduction from wages of £2,550.19 comprising £2,428.75 plus a 5% ACAS uplift of £121.44.
2. The Respondent is to pay the Claimant a total injury to feelings award of £4,675.65 comprising £4,000 plus £453 interest to which in total a 5% ACAS uplift of £222.65 is added.
3. The Respondent is to pay the Claimant Costs of £500 reflecting the costs of the dyslexia report obtained for the purpose of the Tribunal hearing.
4. This makes a grand total of £7,725.84.

REASONS

1 The Tribunal was presented with bundles of documents by both parties; and the Tribunal read the relevant pages to which they were directed by the parties during the hearing and in submissions. The Tribunal had the benefit of a Witness Emotional Statement and an Injury to Feelings statement – both from the Claimant. The Tribunal heard the Claimant in sworn oral evidence adopt these statements; and the Claimant was cross-examined by the Respondent.

Unlawful deduction from wages

2 The Tribunal were concerned not with what the Claimant might have received had she been at work between 28 February 2018 and her return to work on 24 October 2018 but with what she had a contractual entitlement to and was not paid during that period. Helpfully, the parties were able to agree that this was a total sum of £2,381.13 loss wages plus 2% employer contribution at £47.62 totalling £2,428.75.

Injury to feelings

3 The Claimant's witness statement set out for the Tribunal the impact on her of the Respondent's discriminatory actions. She told the Tribunal of her being made to feel stupid and incompetent and its impact on her confidence. She has also set out the impact of taking her employer to the Tribunal and, given her history with dyslexia, the context in which her injury to feelings claim is based. The Claimant has recounted difficulty in sleeping, worrying about her situation, feelings of misery and anger and the impact on her family life. This evidence was not challenged by the Respondent. The Tribunal also took into account matters put forward by the Respondent stating that the Claimant was able to attend training events in the workplace and a work place social event during the relevant period of time in 2018. However, the Claimant did state in her oral evidence that her presentation to others at these events hid her internal unhappiness.

4 The Claimant, in her evidence, particularly her written evidence before the Tribunal, did also address matters that are outside of the matters upheld by the Tribunal against the Respondent and in assessing the appropriate sum for injury to feelings, the Tribunal discounted the impact that was referred to in relation to those matters.

5 The Tribunal considered the *Vento* guidelines as updated by *Dabell* and *Simmons & Castle* and the Presidential Guidance. The Tribunal took into account the matters related above in determining that the impact on the Claimant of the matters relating to the injury to feelings caused by the specific acts of discrimination found by the tribunal fell within the lower *Vento* band. The Tribunal took into account that the Claimant is still working for the Respondent and that she was able to attend workplace events, albeit and accepting the Claimant's evidence as to her unhappiness on those occasions. The Tribunal took into account the level of financial compensation paid to the Claimant for over seven months of loss of earnings and the proportionality of an award for injury to feelings. The Tribunal, primarily placed emphasis on the impact on the Claimant, particularly noting the impact of the inevitable gossip in a small work place and the impact of the lack of empathy and understanding shown at times by the Respondent and the understandable

worry that the Claimant would have had about her income, about threats to her future prospects at the Respondent and the impact on her home life.

6 The Tribunal had no reason to doubt the Claimant's evidence as to the impact of discriminatory treatment by the Respondent on her and the Tribunal concluded that the appropriate sum to compensate the Claimant for injury to feelings was towards the middle of the lower band at £4,000.

7 The Claimant is entitled to an award of interest on the injury to feelings award and calculating that from the date of 28 February 2018, the interest awarded at a rate of 8% is £453.

Compliance with the ACAS Code of Practice

8 Both parties contended under section 207A Trade Union and Labour Relations (Consolidation) Act 1992, for an adjustment (either up or down) to the compensation awarded for the unlawful deduction from wages and injury to feelings because of failure to comply on each side with paragraph 32 and 33 of the ACAS Code of Practice.

Section 207A states:

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

9 The ACAS Code of Practice is a relevant Code of Practice and it states at paragraph 32 and 33:

Let the employer know the nature of the grievance

32. If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

Hold a meeting with the employee to discuss the grievance

33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

10 The Code then continues by setting out the basic elements of the process which an employer must follow.

11 The Claimant did raise an internal complaint on 19 February 2018 about the refusal to permit her extra time for e-Learning. It was accepted, on behalf of the Claimant in submissions, that this was not a 'formal grievance' but the Tribunal considered that the Claimant had clearly raised a complaint and the Respondent was therefore required to do something. The Respondent on 3 March 2018 requested a meeting with the Claimant to discuss e-Learning; but also a number of other matters, policies and procedures, contract and supervision to which the Claimant responded on 6 March 2018: 'I do not require another meeting with you to discuss matters that have already been discussed'. There were subsequent documented meetings on 5 April 2018 and 4 July 2018, which sadly failed to achieve a resolution.

12 The Tribunal in its Judgment and Reasons sent to the parties on 21 March 2019 was critical of both parties and there was more correspondence in the same vein on both sides as set out in detail in that previous Judgment.

13 In her complaint of 19 February 2018 and in other correspondence the Claimant was clearly asking for her concerns to be addressed in the context of the Equality Act and disability discrimination in relation to her dyslexia and contractual matters related to pay. The Respondent, in submissions, stated that the parties should have dealt with the matter internally. The Tribunal agree and given the Tribunal's criticism aimed at both sides the Tribunal did consider that the ultimate ACAS uplift of 5% was appropriate given that the Respondent had the primary responsibility to deal with matters internally and it could have sought external advice much sooner. The tone and content of both parties' correspondence was unhelpful, in particular the Tribunal noted the 5 March 2018 correspondence from the Claimant and the 15 March 2018 correspondence from the Respondent as set out in more detail in our previous Reasons. We did take into account the Claimant's refusal to attend some meetings requested by the Respondent but we did note that this was in the context of requests to discuss matters that went beyond the bands of her complaints and included, in particular, matters related to the signing of a new contract.

Costs

14 The Claimant applied for the costs of her having to obtain an expert report in the sum of £500. The application was made under Rule 76(1)(a) of the 2013 Employment Tribunal rules on the basis of unreasonable behaviour in the conduct of proceedings by the Respondent. The Claimant had emphasised dyslexia in her internal correspondence and the Respondent was aware of dyslexia and its stated effect on the Claimant since the commencement of her employment. Mrs Potter for the Respondent freely today accepted in answer to a question from the Tribunal that she was aware from the commencement of litigation that the Claimant's dyslexia caused her long term substantial adverse effects on her day-to-day activities. That is the definition of disability in the Equality Act. The Respondent, which was at times represented, accepted that the Claimant had dyslexia in its ET3 Response Form. However in both the ET3 and at the Preliminary Hearing on 23 July 2018, the Respondent denied that this amounted to a disability.

15 Following guidance from the Employment Judge at the Preliminary Hearing, the Claimant obtained an expert report on dyslexia. The Respondent had this report in advance of the hearing in February 2019 but did not admit disability until the morning of the first day of the hearing. The Tribunal found that the Respondent's position was unreasonable. The Respondent should not have denied disability, given its awareness of the impact of the Claimant dyslexia upon her and therefore the Tribunal award costs in the sum of £500 to cover the costs of the report.

16 In conclusion:

16.1 for the Claimant's unlawful deduction from wages claim, the Tribunal award £2,428.75 plus a 5% ACAS uplift of £121.44 totalling £2,550.19.

16.2 for the compensation for injury to feelings, the Tribunal award £4,000 plus £453 interest with a 5% ACAS uplift of £222.65 totalling £4,675.65.

16.3 on the matter of costs the Tribunal award £500.

17 The total award is therefore £7,725.84.

Employment Judge WA Allen

Dated: 18 October 2019