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EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Wild**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **Wednesday 7 August 2019**

Before: **Employment Judge Barrowclough**

Members: **Mrs G Bhatt**
Mr P Pendle

Representation

Claimant: Mr Gavin (Union representative)
Respondent: Mr Ross (Counsel)

JUDGMENT having been sent to the parties on 12 September 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. This is a remedy hearing, arising from the Tribunal's determination, sent to the parties on 18 May following the full merits hearing before us on 19-22 March 2019, that the Respondent had discriminated against the Claimant arising from a disability (s.15 Equality Act 2010) and failed to make adjustments (s.20). In relation to remedy, we heard further evidence from the Claimant, and submissions from Mr Gavin on her behalf and from Mr Ross on behalf of the Respondent. The Claimant seeks (a) an award for injury to feelings; (b) loss of earnings and pension contributions; and (c) interest on the late payment of her

2. First of all and for the avoidance of doubt, we note that whilst the figure of £1,776 for legal fees incurred in seeking payment of the outstanding redundancy payment and notice pay has been included in the Claimant's schedule of loss, that sum was in fact ordered to be paid in, and formed part of, our liability judgment. Staying with this issue, we determine that interest is payable on both the Claimant's redundancy payment and her notice pay for the period of approximately nine months from the time they should have been paid (31 January 2018) until actual payment by the Respondent

on 23 October that year at the rate of 1.5%. Having invited the parties to see if they could reach agreement on the actual figure payable, we order the Respondent to pay the Claimant the agreed sum of £20 representing interest on those items.

3. Turning to consideration of an appropriate injury to feelings award, we remind ourselves that such awards are compensatory rather than punitive, and that they should be by reference to the upset, anguish, worry and other negative feelings attributable to or resulting from the discrimination involved in the particular case. In the Claimant's case, it is agreed and accepted that there was no malice, ill-will or ill-feeling involved in the Respondent's discrimination against her. Secondly, it was agreed and indeed we found that Mr Gibbs, who was the Respondent's manager at fault, was doing his best to assist the Claimant in the invidious position in which she found herself whilst signed off on long term sick leave; and the discrimination we found proved arose from his oversight or forgetfulness in failing to refer the Claimant to the Respondent's Employee Assistance Programme, or alerting her to the possibility of medical redeployment. Thirdly, and as Mr Ross points out on behalf of the Respondent, no statement or evidence of injury to her feelings was contained in the Claimant's witness statement, or led separately. Finally, it was clear to us from the evidence and we find that the Claimant would not have commenced these proceedings, and would not have brought any claim against the Respondent, had the Respondent promptly paid her the notice and redundancy monies, to which she was indubitably entitled; and it was the unexplained and unreasonable delay in payment which caused the Claimant understandable and justified worry and anxiety, rather than anything else which the Respondent did or did not do.

4. As a result of Mr Gibbs' failure or oversight, the Claimant applied for and was made redundant under the Respondent's Voluntary Release Scheme on 31 January 2018; so that, in our judgment, the Respondent's delay in payment of the Claimant's redundancy and notice monies can therefore be linked to the discrimination, although it was not suggested that discrimination was causative of that delay. However, that failure or oversight on Mr Gibbs' part was unintentional and isolated, and in fact may not have resulted in any prejudice to the Claimant, as we address hereafter. Overall, we consider that the Respondent's discrimination falls into the lower *Vento* band, and towards the lower end of that band. Bearing in mind the 18 month period between the Claimant's dismissal and this remedy hearing, we think an injury to feelings award of £3,500 is appropriate. We do not think that interest should be added to that sum, which takes into account that delay.

5. The Claimant's claim for loss of earnings and pension contributions claim is complicated, since it essentially involves evaluating the 'loss of a chance', and a number of different possibilities were canvassed during the representatives' closing submissions. Having considered possible alternatives, we return to the approach which we set out in paragraphs 28 and 29 of our original judgment.

6. The Claimant, whose evidence we have already accepted, made clear in October 2017, in the very email where she volunteered for redundancy, that her pain consultant Dr McCartney had recently advised her that, whilst she should not return to her existing role, there was at least a possibility of her being able to do some form of work that involved a mix of sitting, walking and standing at some unspecified point in the future. Assuming that the Claimant's understanding of that advice was correct, and

absent Mr Gibbs' unintentional discrimination, that should have triggered a further OH referral and/or consideration by the Respondent of the possibility of medical redeployment of the Claimant, whether by way of a stage 3 meeting under their sickness absence policy, or via some other route. We consider that, had that happened, it is reasonable and likely that the Respondent would have adopted a 'wait and see' approach: to allow a further period of time before assessing whether the Claimant would in fact be able to undertake any potential alternative role in the foreseeable future. It is obviously difficult to say how long such a postponement or deferral should have been; but a period of 6 months from Dr McCartney's advice in October 2017 does not strike us as being unreasonable. However, by April 2018 the Claimant would have been signed off sick continuously for a period of two years; and from the evidence we heard and accepted at the liability hearing, the Claimant was still then unable not only to undertake work of any sort, but even to say when she might be able to do so. In fact the Claimant's health and medical condition did not improve significantly until October 2018, after she had had a steroid spinal injection.

7. Bearing in mind the provisions of the Respondent's sickness absence policy, and that Mr Gibbs had been under pressure from other managers within his department to hold a stage 3 meeting with the Claimant (which might well have resulted in her dismissal on grounds of ill health) as far back as April 2017, we consider it highly likely if not inevitable that the Claimant would in fact have been dismissed, presumably without any redundancy payment, on grounds of ill health at some time in the spring or early summer of 2018, since the possibility of her undertaking any alternative work or medical redeployment in the foreseeable future would then have seemed to be illusory or non-existent. Whilst it is possible that what turned out to be, at least to some extent, effective treatment of the Claimant's continuing back and neck problems might have been accelerated, it seems to us that that is too uncertain and speculative a basis on which to award compensation.

8. Accordingly and for these reasons, we are driven to the conclusion that on the balance of probabilities the Respondent's discrimination did not give rise to any loss of earnings or pension contributions by the Claimant. The compensation payable to the Claimant in these proceedings is limited to £3,500 in relation to injury to feelings, the agreed sum of £20 by way of interest on the Claimant's delayed redundancy payment and notice monies, together with £1,776 as ordered at the liability hearing.

Employment Judge Barrowclough

Dated: 6 November 2019