Case Number: 2201599/2011, 2203497/2011 & 222794/2012

EMPLOYMENT TRIBUNALS

Claimant	AND	Respondent
Mrs E Pereira De Souza		Vinci Construction UK limited

Heard at: London Central **On 14 November 2019**

Before Judge: Mr B T Charlton
Members: Mrs P Woods
Mr R Graham

Representation:
Claimant: Not present or represented
Respondent: Mr T Cordery

JUDGMENT

The unanimous decision of the Tribunal is:

i) The Claimant's further application for an adjournment is refused.

ii) The unreasonable delay on the part of the Respondent breached the ACAS Code of Conduct and the award to the Claimant is increased by £1320.00 to be paid by the Respondent to the Claimant.

iii) No further breaches of the Code occurred.

iii) The Claimant is also awarded the sum of £633.60 by way of interest to be paid by the Respondent to the Claimant.

REASONS

1. This is a case heard by this Tribunal on 2,3,4,5 April and 30, 31 October 2013 when there was a finding that the Respondent had unlawfully discriminated against Ms De Souza on the grounds of disability and awarded compensation in the sum of £14,820.28. Ms De Souza appealed and the Court of Appeal in a judgment dated 23 May 2017 ruled that we had been wrong not to see the issue of non-compliance with the ACAS Code as being covered by the Respondent's concession of liability and remitted the case to the Tribunal in relation to the question of the assessment of a mark up (if any) and interest under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 on the grounds of unreasonable delay and to consider whether those matters set out at Paragraph 38 of the Court of Appeal's judgment also constituted breaches of the ACAS Code and, if so, what the appropriate mark up (if any) and interest should be. The Court considered it arguable at least that some or all of those matters also constituted breaches of the Code although it pointed out that in relation to the mishandling of a grievance procedure or the wrongful rejection of a complaint a breach will not necessarily occur unless the grievance has not been considered in good faith.

2. The Court of Appeal also made it clear that the matters to be considered could be dealt with on the basis of the Tribunal's original findings of fact. The Court expressed the hope that the case could now be dealt with in a manner proportionate to the limited nature of the issue and the amounts at stake and pointed out that in view of the possible maximum award to the Claimant (£3,400 plus interest) it was in both parties' interests to avoid a further hearing. Despite that strong indication, the case has not settled.

3. We have read the Judgment and Reasons of the Tribunal sent to the parties on 26 November 2013, the Judgment of the Court of Appeal resulting from the hearing of 23 May 2017 and the subsequent Order for Directions defining the issues for this hearing . There was a bundle of documents prepared by the Respondent in accordance with the order for directions. We referred only to some correspondence and the Court of Appeal judgment in this bundle. We were addressed by Mr Cordery for the Respondent in the terms of his skeleton argument..

4. The Claimant was not present or represented and there were no written submissions from her. We had before us four e mails from the Claimant dated 14 November and sent early this morning seeking an adjournment of the Hearing today. She had made such an application earlier in the week and it had been refused by the Acting Regional Employment Judge for the reasons set out in the Tribunal's letter of 13 November which was sent to the Claimant by e mail. The application before us was again on the basis of the bad weather (a ground rejected on the last application for an adjournment) and on the basis that the bundle of documents for the hearing had not been received. Mr Cordery informed

us that the Met Office had issued yellow weather warnings for South East England which covered weather likely to cause low level impacts including some disruption to travel. Most people would be able to continue their daily routine. More severe weather was also covered by a yellow warning when there was a much lower chance of it affecting at all. The forecast for Hastings at the time of the hearing was 90% chance of rain and wind. There was no current disruption to trains and the worst of the weather was due to pass by 1 pm.. So far as the bundle of documents was concerned it had been sent by post in December 2017, May 2019, June 2019 and July 2019 as well as this month without any response from the Claimant. There was correspondence in the bundle to this effect.Twice the bundles have been returned. It was also sent by e mail two days ago. In the circumstances we did not grant the request for an adjournment and the hearing proceeded. The weather is not such as to prevent attendance and the documents have been made available to the Claimant. We also respectfully adopt the reasons given on 13 November.

The Facts

5. The Court of Appeal indicated that the present issues could be resolved without re-opening the factual findings made on the original hearing. The facts we found in relation to the issue of delay were set out in the original judgment at paragraphs 12 and 16.

6. The grievance dated 7 February 2011 (but received in March that year we found) was acknowledged within five days and a meeting listed for 16 March but was postponed by stages until 27 June 2011 as a result of requests by Ms De Souza or because she wished an alternative manager to chair the hearing. The meeting on 27 June was adjourned to 5 July to consider evidence brought to the meeting of 27 June by Ms De Sousa and the decision given on 2 August. There followed an appeal which was also subject to delay. The appeal was submitted on 22 August 2011 and the employer suggested 15 September for the hearing. It did not take place until 11 October because it was rescheduled at Ms De Souza's request. An alternative of 22 September was suggested by the employer but this was not acceptable to Ms De Souza either (paragraph 16). Under the concession made by the employer this amounts to unreasonable delay in dealing with the grievance and therefore a breach of the code. It is fair to observe however that the greater part of the delay from 16 March to 27 June was not of its making but occurred as a result of Ms De Souza's requests as did the delay on hearing the appeal. It is clear also that an exhaustive process was followed. Nevertheless whilst not of the gravest the delay occasioned by the employer cannot be overlooked.

7. The concession also covers the delay in scheduling occupational health consultations. It was a breach of the Code. As we noted the evidence was not clear as to whether there was any significant delay or why it occurred.

8. As to the grievance lodged on 24 March 2012, the outcome letter was dated 20 June 2012. It was accepted by the Respondent and it is accepted by the

Tribunal that this amounted to an unreasonable delay and as a result of the concession amounts to a breach of the Code. We found however that the delay was the subject of an apology at a subsequent appeal hearing and we noted that the procedure had involved invitations to meetings to discuss the issues where Ms De Souza was accompanied by her husband, a decision and a right of appeal and extensions of time in relation to the appeal. Again, seen in context this is not particularly serious and had a limited effect on the overall fairness of the procedure.

9. We found that Ms De Souza's claim that the delay had affected her health and well being was not supported by her GP records, which recorded in the middle of the process that she was in fact happier at work. We regarded Ms De Souza's evidence as exaggerated and found that there was no extended campaign of discrimination as was claimed but that the handling of the issues by the Respondent and its predecessor had been poor and on the Respondent's admission amounted to discrimination, although we described that discrimination as being at a low level.

10. As well as the issue of delay the Court of Appeal identified at paragraph 38 of its judgment other areas which might be considered as breaches of the ACAS Code and if so would be covered by the Respondent's concession. We list these below together with the relevant facts we found on the original hearing, using the numbering adopted by the Court of Appeal:

11. **December 2011 order**

A3.8 The manner in which the Respondent handled the Claimant's grievance submitted on 7 February 2011.
Our factual findings are at paragraph 11 of the judgment. Ms De Souza complained that the Manager conducting a meeting investigating the grievance had interrupted her at one point. He did do so but he had apologised and the hearing had lasted one and a half hours (and it was not the only meeting), suggesting that Ms De Souza's issues were looked at in depth and not that she was prevented from presenting her case The fact that a letter summarising Ms De Souza's complaint wrongly identified the person she was complaining about was also the subject of an apology. When Ms De Souza complained about the Manager's involvement in the grievance procedure he was removed so that he played no further part in the process. The Respondent accepted what happened as part of its discriminatory conduct however.

A4.1 Unreasonable delay – see above.

A4.10 Dismissal of the Claimant's grievance dated 7 February 2011
Paragraph 14 deals with Ms De Souza's objection to the outcome of the 7 February 2011 grievance. We found that an exhaustive process was undertaken by the employer involving a number of interviews with Ms De Souza and other employees and re-interviews with an appeal following. There is nothing in our findings to suggest that any of this was not conducted in good faith or that the outcome was in any way predetermined. However the Respondent accepted that

this was part of conduct which overall provided the basis for a discrimination claim.

A4.11 Dismissal of the Claimant's grievance of 27 June 2011. This refers to an appeal by Ms De Souza in June 2011 in respect of a grievance dismissed in 2008 which the employer did not address. We again noted that the employer accepted that what happened overall formed the basis of a claim for discrimination ie. it was conceded. This also forms part of the claim of unreasonable delay insofar as it was never dealt with and this amounts to a delay. It is more properly seen as an allegation of failure to deal.

12. **8 October 2012 order**

2) Outcome of my grievance 2012. We found (paragraph 15) that the employer had partly upheld Ms De Souza's complaint and apologised for the delay in discussing an occupational health report. It did not accept a complaint about where Ms De Souza was required to work and this point was the subject of an unsuccessful appeal.

3) Unreasonable delays with my grievance 2012 – see above.

4) Grievance 2012. We understood this to refer to the way in which that grievance was handled and not the outcome. We found there had been a series of meetings discuss the issues, Ms De Souza had been accompanied by her husband, there had been decision and appeal with time extended for the lodging of the appeal. There were further meetings and decision on the appeal.

10) The Respondent's handling of my appeal (2011), the procedure itself, what was done, what was not considered and the findings and outcome of the appeal. See above.

11) The Respondent's refusal to allow adjustments to the appeal hearing 2011. Our findings (paragraph 16) were that Ms De Souza had made three requests in relation to venue, being accompanied by her husband and regular breaks and all those requests had been acceded to.

12) The Respondent's delays in dealing with my appeal hearing 2011. See above

14) The Respondent's scheduling of an appeal hearing on 15 September 2011. We found that the employer rescheduled this meeting at Ms De Souza's request.

15) The Respondent's scheduling of an appeal hearing on 22 September 2011. This meeting was rescheduled at Ms de Souza's request.

16) The Respondent's interference with witnesses that I sought to call upon at my appeal hearing of 11 October 2011. Our findings were that Ms De Souza had asked if she could call witnesses to the hearing and was informed that this was her responsibility but that any such witnesses would be allowed time off to attend. We found that witnesses did not agree to attend on her behalf and that

Ms De Souza and her husband did not ask for witnesses to attend when the hearing took place or complain that they were prevented from calling any witnesses.

17) Circumstances surrounding the appeal hearing of 11 October 2011. This was an all encompassing complaint which covered the circumstances we have addressed above.

20) Respondent's dismissal of my grievance dated 7 February 2011
This appears to repeat the point dealt with at A4.10 above.

21) Respondent's dismissal of my grievance appeal dated 27 June 2011
This appears to repeat the point dealt with at A4.11 above.

13. We found that the employers did not subject Ms De Souza to an extended campaign of discrimination but the handling of the issues which she faced in her employment was poor and on the employer's own admission amounted to discrimination. We made no finding of bad faith on the part of the employer. On the contrary we did not find proved any of the Claimant's assertions which might have led us in that direction. We made it clear that exhaustive processes had usually been followed; that Ms De Souza's requests were acceded to in relation to adjustments, adjournments and the identity of the manager conducting the process; and that apologies were made when mistakes had occurred. We recorded that this was not a case where there had been high handed, malicious, insulting or oppressive behaviour. We specifically found there was no prejudice, animosity, spite or vindictiveness and proceedings were not conducted in and unnecessary offensive manner.

The Law

14. In claims such as this where s.207A of the 1992 Act applies if it appears to a Tribunal that there is a relevant Code of Practice applicable and an employer has unreasonably failed to comply with the Code then if it considers it just and equitable in all the circumstances to do so the Tribunal has a discretion to increase any award made by no more than 25%

15. The relevant ACAS Code of Practice here is the 2009 Code on Disciplinary and Grievance procedures which requires the employee to make known to the employer the nature of the grievance and then the employer is required to hold a meeting with the employee to discuss the grievance. The employee must be allowed to be accompanied at the meeting after which the employer must decide on what action to take if any. The employee must be allowed to take the grievance further if the matter is not resolved to his or her satisfaction and this normally involves an appeal procedure. Each stage must be carried out without unreasonable delay.

The Court of Appeal points out in its judgment that the mere fact that a grievance has been procedurally mishandled or wrongly rejected does not constitute a

breach of the Code, there may be such a breach if the conduct or decision in question shows a grievance to have been conducted in bad faith.

We note that the Court of Appeal at paragraph 51 of its judgment indicates that it is open to the Tribunal in exercise of its discretion to conclude that although there had been non-compliance with the Code the breaches in question were not very serious and accordingly only an uplift at the lower end of the available range was appropriate or indeed no award at all

13. The Employment Tribunal (interest on Awards in Discrimination Case) Regulations 1996 apply to awards in discrimination cases. The rate applicable is 8% and as a non pecuniary award any amount should be calculated from the date of the act complained of to date.

Conclusion

14. Unreasonable delay is a breach of the Code. In relation to the 2011 grievance and the appeal it is accepted there were delays in dealing with it although we note that the lengthier delay was due to Ms De Souza's requests to adjourn. There was a delay in scheduling occupational health consultations which is unexplained and a further delay in relation to the 2012 grievances in respect of which the employer issued an apology at the appeal hearing. In the context of the overall procedure - what we have described on more than one occasion as an exhaustive process - and in the context of the delays which were at the Claimant's request we do not regard the employer's delays as having a major impact on what happened in this case. However we are not prepared to ignore them altogether. Mr Cordery in addressing us conceded a 5% mark up would be appropriate. Whilst we do not regard a 25% increase in the award as reflecting our views we see Mr Cordery's suggestion as somewhat on the low side and our conclusion is that 10% would properly reflect the nature and gravity in this particular case. 10% of £13200 (the part of the award to which the mark up applies) is a figure of £1320.00

We regard the appeals against the 2008 grievance as a matter which is not properly a question of delay, but either way it was not a matter in respect of which we levelled any criticism at the employer. If it is a matter of delay we see no reason to adjust the above figure in the light of that in all the circumstances.

15. Other than delay we do not find any breaches of the Code. Our findings were that the procedure overall had been poorly handled and that this was what founded the claim for discrimination. We did not find bad faith. Indeed our findings contradict any suggestion that bad faith was involved in this unfortunate chain of events. Quite the contrary. Steps were taken to safeguard Ms De Souza's interests. Her requests for adjournments were granted. Apologies were offered for mistakes made by a manager and a manager was removed part way through a procedure at Ms De Souza's request. If we are wrong in this and these matters are covered by the Respondent's concession, it will be clear that we regard any breaches as trivial. In those circumstances our judgment would be

that no adjustment is required to the percentage we have awarded under paragraph 14 above.

16. So far as interest is concerned Mr Cordery has argued that interest under the 1996 Regulations is not appropriate. The award we are making is under the Trade Union and Labour Relations Act (Consolidation Act) 1992 and is therefore not covered by the Regulations. Our view is that we are marking up an award made under the Equality Act 2010 and it would be wrong to regard the basic sum as covered by the Regulations and any increase in that sum as not so covered. However Mr Cordery has drawn our attention to Regulation 6(3) which provides that where a tribunal considers serious injustice would occur if interest were to be awarded for the full period a different period may be used. The period from the 2 August 2011 when the first delay may be said to have occurred to date is some 8 years and 105 days. This is a quite extraordinary length of time for a case to go up to the Court of Appeal and come down again on remission. It is clear says Mr Cordery that some of this delay has been as a result of repeated requests to delay matters made by the Claimant herself and in the circumstances it would be wrong to award interest for the full period. It would amount to a serious injustice to have the Respondent pay interest for a period of time when the delay was created by the Claimant. We agree and will base interest on a period of 6 years at 8% on £1320 a sum of £633.60. To avoid any doubt the due date for interest under The Employment Tribunals (Interest) Order 1990 will be the date on which these written reasons are sent to the parties.

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Employment Judge Charlton

15 November 2019_____
Date

REASONS SENT TO THE PARTIES ON

....19 November 2019.....

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FOR EMPLOYMENT TRIBUNALS