EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Parsons**

Respondent: **Royal Mail Group Ltd**

Heard at: **Bristol** **On:** **21 - 23 October 2019**

Before: **Employment Judge Oliver**
Dr C Hole
Ms J Cusack

Representation
Claimant: **Mr G Graham, counsel**
Respondent: **Mr Hartley, Solicitor**

JUDGMENT having been sent to the parties on 29 October 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

1. This is a claim for disability discrimination.

2. The claimant's condition of ulcerative colitis was agreed to be a disability. There was a Case Management Preliminary Hearing on 14 May 2019 and a list of issues was agreed. The claims were:

    a. discrimination arising from disability based on the issuing of an attendance warning to the claimant;
    b. indirect discrimination on grounds of disability based on the requirement to regularly attend work; and
    c. a claim for failure to make reasonable adjustments based on two provision, criterion or practices ("PCPs"), the first the requirement to regularly attend work, and the second the requirement to use the provided toilet facilities.

3. At the start of the hearing the respondent conceded liability in relation to all of these claims except the second failure to make reasonable adjustments.

Issues

4. The issues in this claim were:

    a. Did the respondent apply the PCP to the claimant? That was accepted by the respondent.
    b. Did the application of the PCP put the claimant at a substantial disadvantage in that she cannot access toilet facilities when required? The respondent accepts that the claimant has not always been able to access toilet facilities
    c. Did the respondent take such steps as were reasonable to avoid that disadvantage? The adjustment put forward by the claimant is greater and more convenient access to toilet facilities. The respondent's case is that it had no knowledge that the claimant was put at that disadvantage, and once it was aware it took immediate steps to remove that disadvantage.

5. This claim was not actually in the original ET1. It was added at the preliminary hearing on 14 May. It was recorded in the note of the hearing that this was added by the parties by agreement. The representatives at the hearing were not aware of the detail of how this came about.

6. We also heard an application to amend the claim, which was made at the end of the hearing after the respondent had made its submissions. The application was based on concessions made in the respondent's evidence, and was pursued in relation to one amendment. After considering this carefully, the Tribunal did give permission to amend the claim on the basis that we heard further evidence on this point and further submissions.

7. The amendment was to put forward an additional substantial disadvantage, namely access to the claimant's locker containing her personal items inside the disabled toilet. The reasonable adjustment put forward was placing of the locker with the claimant's personal items inside the toilet.

Evidence

8. We had an agreed bundle of documents, and we read the documents in the second half of the bundle. The first half of the bundle contained policies and procedures, so we have not considered those unless referred to during oral evidence. We took witness statements as read. We heard evidence from the claimant, and from Mr John Lewis (Union representative). For the respondent we heard evidence from Ms Sarah Edwards, the Work Area Manager of the night shift at the respondent's Swindon Mail Centre.

Facts

9. The claimant has worked for the respondent since 2003 and at Swindon since 2009. She is an operative postal grade and works the night shift. The

claimant has ulcerative colitis. This is controlled by drugs which supress her immune system and makes her more prone to catch infections which then tend to last longer. Her condition can be exacerbated by stress. She needs easy access to a toilet as she may need to use it urgently, and if she is not able to do so she may have an accident

10. In September 2018 she was given a first stage warning under the respondent's attendance policy called an AR1. The respondent now accepts that this was based on absences related to disability and so an act of discrimination arising from disability, an act of indirect discrimination and a failure to make reasonable adjustments.

11. The attendance policy then proceeds to a second warning if there are a further two absences or a single absence of ten days or more in the next six months, and that may be followed by dismissal being considered if that threshold is met again. The claimant's evidence is that this left her with the stress of a warning hanging over her head and concern that she may be dismissed if she was unwell again. She says it exacerbated her condition and she came into work when she was ill. We also note the Occupational Health report from 30 September 2014 which states that stressed individuals with ulcerative colitis tend to flare up a lot more.

12. Access to the disabled toilets was originally a problem for the claimant as there were no keys used to access them and anyone could use them. This was changed to a system under which disabled employees were given a key. The key was then used to access all four of the disabled toilets in a large building. The claimant explained that in her area there were only two ordinary ladies' toilets and there is always a queue for those.

13. We have seen a grievance outcome letter from June 2015. This made a number of recommendations. Firstly, the claimant should be moved to a work station near the disabled toilets to give her quick and easy access. Secondly, the claimant was to have her locker moved inside the disabled toilet to enable her to store and access the items she requires. Thirdly, the respondent was to ensure the disabled toilet facility was fit for purpose as the cleaners did not have a key to access them. There was also a recommendation of regular informal reviews to discuss the current adjustments and whether they are still suitable. The claimant's evidence is that these reviews only happened once.

14. The claimant initially moved to the OX area nearer a disabled toilet, and then later moved to the special delivery locker which is close to a different disabled toilet. The claimant says she spoke with various managers about not always being able to access the disabled toilet when she needed to. She said she was finding lots of people using it so it was often occupied and she was not able to access it urgently. The last manager she said she spoke to about this was Chris Luke on 9 February 2018 when they were meeting about issues with attendance. She said she told him she was not able to get into the toilet as it seemed a lot busier and was often locked from the inside. She says he told her that he would look into it and get back to her but nothing was done. We accept this evidence, which was not contradicted by any direct evidence from the respondent.

15. The claimant also says that people told her that they were using the disabled toilet as sleep in and also seemed to be sleeping in there. She said she told her Union representative Mr Lewis, and his evidence is he spoke to a number of managers about the toilet on behalf of the claimant. They didn't get back to him. He was somewhat unclear on dates in his witness statement and oral evidence. We do accept that the claimant had not raised this with her current manager, Sarah Edwards and we accept that Ms Edwards herself was not aware of this issue.

16. On 24 April 2019 the claimant had an accident at work as she was unable to access the disabled toilet when she needed it. She spoke to Mr Lewis and then went home very upset. She sent an email to Tony Hays (another Union representative) which stated that over recent weeks the disabled toilet had increasingly been used by more people until she was unable to access it at all. She was signed off sick and prescribed antidepressants.

17. On 29 April, Phillip Gee sent an email to all managers about disabled toilet keys asking them to brief the team not to share the use of keys and toilets with colleagues and to create a list of key holders. Ms Edwards' evidence is that they have collected lists of people who said they have a key but she doesn't know if that is a complete list.

18. Whilst the claimant was off sick Ms Edwards was contacting her with weekly texts. The respondent's case is that later the sickness absence was due to stress about her impending gallbladder operation. The claimant says this was not right, she was off with stress after what happened at work and was signed off by her GP until 29 June. She didn't get a date for her operation until she went to an appointment on 6 June and the operation took place in July. The claimant's evidence is that there was no point in in her coming back briefly after 29 June to then go off again and get another absence warning.

19. On 20 June 2019, the claimant met with Dan Williams the Swindon Plant Manager to discuss changing the locks on the disabled toilets. He arranged for the lock the toilet used by the claimant to be changed, and only the claimant and night shift manager would be given a key. There was an email from Phillip Gee on 25 June, confirming the lock had been changed. This said there would be an out of service notice on the door. This email also said he had arranged for lockers inside to be placed on the outside of the door as he was not sure who uses these. This email was copied to Ms Edwards, Ms Jennifer Wilson-Lewis and to Dan Williams who are all managers. None of those three individuals asked for the locker to be replaced in the toilet as it is needed by the claimant. We also note there was a letter from the claimant's solicitors to the respondent's solicitors on 11 June which also reiterated that locker was to be placed in the bathroom for ease of access.

20. The claimant returned to work after a gallbladder operation on 22 July. There was a return to work meeting with Ms Edwards. She hadn't used the toilet at that point and she says she wasn't aware of the locker being outside. The claimant said that she didn't tell Ms Edwards about the locker problem, and she gave general evidence that she didn't tell Ms Edwards things as she was busy and would forget about them. The claimant said she did tell Jennifer

Wilson-Lewis the overall manager of the night shift. Ms Wilson-Lewis then came back to the claimant and said the locker could not be moved by the engineers during the day as there was no key to access the disabled toilet. Ms Edwards did say during the hearing that the locker was going to be moved back during the evening of the second day of the hearing.

21. The claimant said she was told not to tell anyone about having the key and two other employees have interrogated about her having a key. The disabled toilet used by the claimant is in a vestibule area, and the locker is right next to it and outside the toilet itself. The claimant's evidence is that it is important the locker is inside the toilet so she can access it privately. Although it is a vestibule, the door opens out into the main warehouse area. She keeps sanitary products and spare clothing there, and often there is only just time to get to the toilet and unlock it. She is not able to open the locker as well, and it is then embarrassing to come out into a public area to collect items she needs from her locker such as a change of clothes. She says this has happened to her.

22. We heard evidence about the overall effect of these events on the claimant. With the absence warning, we have already noted the stress of a warning hanging over the claimant and her fear that would result in dismissal. She has anxiety about being disciplined and that makes it slower for her to recover from illnesses. She refers to humiliation and lack of dignity if she has an accident due to being unable to access the toilet and she feels humiliated by having to ask for help. She says she has constant anxiety about being able to access the toilet and her personal items in time if needed, and feels embarrassed if she is not able to do so and fears having an accident. This has been exacerbated by questioning and comments by other employees. The constant stress of the situation caused her to be signed off for over two months in April 2019. She remains on antidepressants which were started after the incident in April. She is tearful and has lost confidence, and as already noted her medical condition is made worse by its stress.

Applicable law

23. The claims for disability discrimination are made under the Equality Act 2010 ("EA"). A claim for a failure to make reasonable adjustments is made under Section 23. The duty arises where a PCP applied by an employer places a disabled person at a substantial disadvantage in comparison with persons who are not disabled. "Substantial" for these purposes means "more than minor or trivial", as defined in Section 212.

24. Under Schedule 8 paragraph 20 EA, the respondent is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know both that the claimant has a disability and that the claimant is likely to be placed at the relevant substantial disadvantage. The duty only arises if the respondent has or could reasonably be expected to have knowledge of both of these elements.

25. Compensation for loss suffered as a result of discrimination is calculated in accordance with Section 124 EA. This includes injury to feelings under

Section 119. There are three "Vento" bands which set different levels of award for injury to feelings. These have been uprated over time, and the latest figures are contained in Presidential Guidance. The claim was presented after 6 April 2018 and before 6 April 2019, so the guidance for this period should be used. The lower band is £900 - £8,600, and the middle band £8,600 - £25,700. The lower band is for the least serious cases such as a one-off incident or an isolated event. The middle band is for more serious cases which don't merit the top band. The top band is generally for the most serious cases such as a lengthy campaign of harassment which causes significant injury. The award is to be based on the extent of the injury to the claimant, and is not punitive against the respondent.

26. In relation to interest on awards to the date of the hearing, under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 the Tribunal is bound to consider interest. The current rate is 8% simple annual interest. Under regulations 6(1)(a), interest on injury to feelings is calculated from the date of the discriminatory act to the date of calculation. Under Regulation 6(1)(b), interest on loss of earnings is calculated from the midpoint from the date of the discrimination to the date of calculation.

27. A costs award may be made against a party under Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations. The Tribunal may make a costs order, and shall consider whether to do so where it considers a party has acted unreasonably in the way that proceedings or part of them have been conducted. Under Rule 78 the Tribunal can order the paying party to pay the receiving party a specified amount not exceeding £20,000. The Tribunal has a wide discretion in this area. However, we must consider making a costs order where we do consider a party has acted unreasonably.

Conclusions

Liability

28. ***Did the respondent apply the PCP to the claimant, namely the requirement to use the provided toilet facilities?*** This is accepted by the respondent.

29. ***Did the application of this PCP put the claimant at a substantial disadvantage in that she cannot access the toilet facilities when required and was not provided with access to the claimant's locker containing her personal items inside the disabled toilet?*** The respondent accepts that the claimant was not always able to access toilet facilities. In relation to the second item, the respondent disputes that not being provided with access to a locker with personal items created a substantial disadvantage. However, we find that this does put the claimant at a substantial disadvantage. The test of substantial is more than minor or trivial. The claimant gave us clear evidence about the effect on her of having personal items outside the toilet, including her inability at times to collect what she needs before she goes into the toilet, and the embarrassment of then

coming out to collect items from the locker in a public area if she has had an accident.

30. ***Did the respondent take such steps as were reasonable to avoid the disadvantage?*** The adjustment put forward by the claimant is greater and more convenient access to toilet facilities and the placing of the locker containing her personal items inside the toilet.

31. In relation to access to the toilet facilities, the respondent's case is that it did not have knowledge that the claimant was put at that disadvantage, and once it was aware it took immediate steps to remove that disadvantage. Based on our findings of fact, we find that the respondent did know about this issue. In particular, we find that the claimant told the manager Chris Luke about her difficulties in accessing the toilet in February 2018, and nothing was done about this.

32. We have also considered whether the respondent could reasonably have been expected to know that the claimant was put at that disadvantage, and we find that the respondent could reasonably have been expected to know in any event. The respondent was aware of the claimant's need to access the facilities urgently. This was shown by the adjustments that had already been made, such as the key system, moving her to work nearer the disabled toilets, and the various recommendations made in the grievance outcome in 2015. The respondent then implemented a key system without keeping a list or checking how keys were being used, and they failed to implement the recommendation of regular informal reviews to discuss adjustments and whether they were still suitable. In these circumstances we feel it was incumbent on the respondent to check the claimant did have ability to access the disabled toilet urgently if required, and they should have been aware the system was not working if they had no control over the key system.

33. We have noted the claimant's submissions that knowledge of this nature isn't required anyway. If the respondent was aware of a general substantial disadvantage from the outcome of the grievance, this created an ongoing obligation to provide reasonable adjustments whether or not matters were then raised by the claimant. We do not agree this always applies. We think there may be cases where an employer has made an adjustment requested by an employee and is entirely unaware that is not working, where it would be appropriate to find the employer had no knowledge of an ongoing substantial disadvantage. Obviously, that is not the case here in light of our earlier findings about both actual knowledge and reasonably being expected to know about the issues.

34. In relation to the locker issue, the respondent accepts the claimant's locker with personal items is currently outside the disabled toilet. It appears that Mr Gee made a genuine mistake and he moved the lockers outside because he wasn't sure who they belonged to. But this mistake was not corrected - despite his email about having moved the lockers being sent to three managers, and the solicitor's letter reminding the respondent of this requirement. We have also found on the facts the claimant told Ms Wilson-Lewis about this, and she failed to act on the basis that the engineers in the

day had no access to a key. We find that the respondent was clearly aware of this disadvantage to the claimant.

35. We also find that it would have been a reasonable step for the respondent to move the locker back into the disabled toilet used by the claimant. Even if the general staff at night shouldn't be moving lockers around (which Ms Edwards in evidence suggested they could), it would be a relatively simple step to provide one of the copies of the key to the engineers in the day so that they could move it. The respondent therefore failed to take reasonable steps to avoid this disadvantage to the claimant, which left her being unable to access personal items in the locker inside the disabled toilet.

36. These findings mean that the further claims of failure to make reasonable adjustments succeed, in addition to the claims relating to the attendance warning which were admitted by the respondent.

Compensation

37. Starting with the loss of earnings figure, this was helpfully agreed by the parties to be the sum of £1318,76 net loss. This represents loss of overtime pay and night shift allowance, which was caused by the April 2019 incident which resulted in the claimant being signed off sick with stress for a period of time.

38. For injury to feelings, having considered this carefully we award the sum of £15,000.

39. We have considered the Vento bands. The respondent has accepted liability on the attendance warning issue, and we have also found further acts of discrimination by failure to make two other reasonable adjustments. This is not a one-off act - it is a series of acts. We have heard evidence from the claimant about the effect on her, including the ongoing effects. We find it is appropriate for this case to fall within the middle band, in that it is serious but not so serious that an upper band would be appropriate.

40. We have also looked at the fact this is a case where there have been a number of acts of disability discrimination. Although they are not all based on exactly the same facts, we find they are sufficiently linked that it is appropriate to make one award of injury to feelings rather than separate awards.

41. In relation to the level of the award within the middle band, we have taken account of the following.

    a. The personal characteristics of the claimant, and in particular the fact that she suffers from an illness which is exacerbated by stress. Stress can be and was caused by her discriminatory treatment. We have not had any medical evidence on the current position, but we do accept the claimant's general evidence that her underlying illness and her ability to recover for any infections is affected by stress.

b. The claimant was clearly caused stress by the attendance warning issue. We accept her evidence this was hanging over her and she was worried this might result in dismissal, and this caused her to feel she had to come into work when she was ill. The April incident then caused particular additional stress. That was serious enough for her to be signed off with stress for over two months and she started a course of antidepressants. The locker issue has caused further stress from anxiety about the embarrassment and not being able to access personal items. Overall, the issue of unsatisfactory toilet access caused worry to the claimant about the humiliation involved in having an accident.

c. The claimant was off with stress for two months. She is now back at work and able to function in the workplace. This is not a more serious case where the effect on the claimant has been so severe that she has been unable to return to the workplace at all. The respondent makes the point that the claimant continued at work with the same people. We are mindful we are awarding injury to feelings in relation to the actual injury caused to the claimant, it is not a punitive award against the respondent. However, we do also accept the claimant's evidence that she remains tearful and lacks confidence, attending work is not easy for her, and she has been unable to come off antidepressants at the moment.

d. As already noted, this was not a one-off act but a series of acts of discrimination. The impact on the claimant has been lengthy. As at the time of the Tribunal hearing, although it appears the attendance warning has now been removed, all of the issues are still not resolved. In particular, the locker issue has not been resolved and that has been having an ongoing impact on the claimant.

42. Taking all of these matters into account, we find it is appropriate to make an award towards the middle of the middle band, and award the sum of £15.000.

43. In relation to interest, we discussed our calculations with the parties and agreed the following total interest figure of £1396.96:

a. For loss of earnings, the calculation is 8% from the midpoint between the act of discrimination and the date of calculation

The total period is from 26 April to 23 October, which is 180 days. So the midpoint gives 90 days of interest @ 8%.

90/365 = 0.247
0.247 x 0.08 = 0.0197
1318.76 x 0.0197 = £26

b. For injury to feelings, the calculation is 8% from the act of discrimination to the date of the hearing. As this was a series acts with global award injury feelings, we find it is appropriate to calculate from the date of the first act.

The start point is 1 September 2018, which was when the claimant was first given the AR1 warning. This gives a period of 417 days

417/365 = 1.142
1.142 x 0.08 = 0.091
15,000 x 0.091 = £1,370.96

Costs Application

44. The claimant made an application for costs. This was based on the respondent acting unreasonably in the way they defended the claim and/or that their defence had no reasonable prospect of success.

45. The AR1 warning issue was the main claim in this case. The claimant says it was obvious the defence to this claim would not succeed, and the respondent only admitted liability formally on day one of the hearing. We have seen a letter from the claimant's solicitors of 11 June 2019 which sets out clear failures by the respondent in relation to the attendance warning and why this was disability discrimination, based on evidence from the documents. There was a £5,000 offer to settle from the claimant at that point £500 was offered by the respondent on 22 August. We have seen further without prejudice correspondence going into October, resulting in the claimant offering £15,000 in total and the respondent £5,000 in total. The amount we have awarded at the end of the hearing is in excess of £15,000.

46. The claimant says that the attempts to defend the AR1 issue were highly unreasonable, if not from the start then from the 11 June letter when the claimant's position and evidence was clear. This exacerbated the claimant's injury by putting her through the stressful process of bringing all of her claims to the final hearing.

47. The respondent's position is that this claim was defensible. The claims involved issues of justification, and the attendance procedure in the bundle indicates that there can be circumstances where disability related absence could be counted. The other parts of the claimant's claim about access to the toilet were defensible and needing litigating at Tribunal, and it was not unreasonable to do so. One element of the claim was actually only added during the hearing. In addition, the concession on the AR1 issue actually saved some time at the hearing.

48. We have seen a schedule of costs from the claimant. Full costs were given at £21,858.80. We did an amended calculation with the parties from 11 June 2019, giving the sum of £16,027.55. This factored in the hearing being reduced to two days, on the basis of the locker issue which was added at the hearing.

49. We have considered this very carefully. Starting with the claims about reasonable adjustments relating access to the disabled toilet and the locker, we do not find that the respondent acted unreasonably in defending these claims. We agree with the respondent's position they had an arguable case.

The outcome went against the respondent on the reasonable adjustments in relation to the toilet access, but this turned on evidence in the Tribunal and in particular the claimant's evidence about the information she and her union representative had provided verbally to management. The issue about access to the locker was only added during the hearing and so needed to be argued at the hearing. The claimant succeeded with this claim as well, but there is no criticism of the respondent fighting this point at the hearing because it was not known in advance that this was going to be an issue. We are also mindful that costs are only to be awarded if a party has acted unreasonably, not simply because they have lost a case.

50. On the AR1 issue, we do find that the respondent had acted unreasonably by defending this claim and only conceding liability formally on the morning of the first day of the hearing. We agree with the respondent that there were potentially arguable issues about justification at the time of the original claim and at the Case Management Preliminary Hearing. We have seen there is not a blanket ban under the respondent's attendance policy of not counting any disability related to absence. However, we have looked carefully at the letter from the claimant's solicitors of 11 June 2019, and this made the position very clear based on evidence about what had happened. We find the respondent could and should have been aware of the facts which led to the concession of liability from this date. The concession at the hearing was made on the basis there had been a mistake and disability related absence should not have been counted. We have heard nothing to indicate that something suddenly changed shortly before the hearing to mean it was appropriate to make this concession at this late stage rather than earlier.

51. We find that by failing to concede on this issue earlier the respondent did put the claimant through the additional stress of preparing this issue for the hearing, and also caused her to incur the costs involved in doing so. We consider the respondent did unreasonably conduct part of the proceedings in relation to the AR1 issue. We have considered whether to make a costs order and decided that we should do so.

52. In terms of calculating the award, the claimant's schedule of costs did not split out the sums incurred in preparation for arguing the AR1 issue as opposed to the other reasonable adjustment claims and remedy. We have a wide discretion to award the amount we regard as fair and appropriate in the circumstances.

53. Starting with the costs of preparing for the hearing, in exercising our discretion here we have looked at the volume of documents in the bundle and also the evidence in the claimant's witness statements. It appears to us that around a third of the bundle relates to general pleadings issues about the toilet and locker access, and related issues that are relevant to the assessment of injury to feelings and compensation. These were all things we would have to consider at irrespective of the AR1 liability issue.

54. The claimant's main witness statement had limited information on toilet access, but there is also her statement of feelings which is relevant to assessing the actual award for all claims. Similarly, Mr Lewis' statement had

some information on the toilet and locker issues but the majority was on the AR1. This is quite unusual because one of the claims that we have adjudicated on was the locker issue which was not added until during the hearing, so neither party had done much in preparation for that.

55. We think it is fair to assess that two thirds of the preparation time was spent on the AR1 issue, which was the main claim at the time the hearing was being prepared for, the remainder was on the toilet access and remedy which was going to be required irrespective of the concession on the AR1 issue.

56. Moving on to the costs of the actual hearing, we have found it was reasonable for the respondent to litigate on the other reasonable adjustment issues. However, if the AR1 issue had been conceded earlier, we find the matter of both liability and remedy could have been concluded within two days. The Tribunal could have given Judgment at the end of day two, particularly if it was known before the hearing that the issue was limited in this way. The case would have been timetabled accordingly, and the extra time we have taken on day three would not have been necessary.

57. We have taken the figures from the claimant and rounded it to the nearest pound. We make a total costs award of £8,768:

    a. For preparation, we are looking at preparation of the case from 11 June 2019. The total sum is £10,674. We are then discounting one third of that as preparation which would have been required anyway, which gives a sum of £7,116.00.

    b. For the hearing, one day hearing would have been saved. For Counsel there is a refresher fee of £950 which could have been avoided. There is also solicitor attendance of £702 for one day of the hearing. That gives a total sum of £1,652.

Employment Judge Oliver

Date: 1 December 2019

Reasons sent to parties: 11 December 2019

FOR THE TRIBUNAL OFFICE