EMPLOYMENT TRIBUNALS

Claimant: Mrs K Rogers

Respondent: Carewatch Care Services Limited (in liquidation)

HELD AT: Liverpool **ON:** 10 December 2019

BEFORE: Employment Judge Shotter
Mr R Tyndall

REPRESENTATION:

Claimant: Written submissions
Respondent: Not in attendance

JUDGMENT

The unanimous judgment of the Tribunal is –

(1) The respondent is ordered to pay to the claimant compensation for unlawful race discrimination in the sum of £5190 loss of earnings plus interest of £1453.20 and injury to feelings in the sum of £6000 plus interest of £2268.00.

(2) The respondent failed to provide the claimant with a statement of terms and conditions of employment in accordance with section 1 of the Employment Rights Act 1996 as amended and the respondent is ordered to pay to the claimant the sum of £900.00.

(3) The claimant's application for a reconsideration dated 4 April 2018 of the reserved judgment and reasons sent to the parties on 12 March 2018 is refused.

REASONS

1. This is a remedy and reconsideration hearing following promulgation of a reserved judgment and reasons sent to the parties on 12 March 2018, whereupon the Tribunal unanimously found that the claimant had been subject to unlawful direct

race discrimination post -employment when untruthful references were provided, and her claim for unlawful direct race discrimination claim numbered 2.6 brought under section 13 of the Equality Act 2010 was well-founded and adjourned to a remedy hearing.

2. The Tribunal has considered all of the evidence produced by the claimant for this remedy hearing, and the claimant's original witness statement provided for the liability hearing in addition to other documents to which it was not taken, in an attempt to give the claimant a fair hearing for which she has ill-prepared, despite case management orders made.

3. The case was originally first listed for a remedy hearing on 18 June 2018 which the claimant failed to attend; she had returned to live in Germany and has since had an operation. The Judgment ordered on 18 June 2018 records the claimant provided no explanation for her non-attendance and case management orders were made including that she provide a copy of the claimant's contract with her new employer, who the Tribunal understood for some reason, was ultimately Evercare. This information has not been forthcoming from the claimant. It was at the first remedy hearing the respondent indicated it had incurred expenses as a result of the claimant's non-attendance, and may need to make a costs application, which was subsequently made and resulted in the claimant's accusations against Ms Mulholland, who had attended the remedy hearing together with the interpreter when the claimant did not. There is a note on file from court staff recording the claimant "was going to doctors at 9 o'clock is coming to Tribunal after." The claimant did not appear and emailed the Tribunal on 25 June 2018 referring to the Tribunal not getting back to her when she requested a German translator, she was "very frightened" and therefore went back to Germany rather than attend the remedy hearing.

4. The remedy hearing has subsequently been re-listed a number of times and the claimant recently confirmed she was prepared to (a) submit her evidence and documents which will be dealt with by the Tribunal without the SKYPE hearing going ahead as arranged, and translator being present, and (b) agreed to having remedy and the reconsideration dealt with in writing. The claimant has previously sought and been granted an adjournment of the remedy hearing on the basis that she wanted to be legally represented; however, this was not an issue raised for this remedy hearing today and it appears the claimant is still not legally represented.

5. Mrs J C Ormshaw, a member who formed part of the original hearing panel at liability stage, cannot take part in this hearing due to ill-health. Rather than delay matters further, the claimant signed a consent form agreeing to the remedy hearing being heard by the judge and one member on 19 October 2019.

Reconsideration

6. The claimant applied for a reconsideration on the 4 April 2018 clarified in an email sent 12 July 2018. There are 4 grounds, which the Tribunal does not intend to repeat, all of which constitute an attempt to re-litigate and re-argue the evidence heard by the Tribunal at the liability hearing.

7. The claimant's reconsideration grounds are still unclear, and she has been invited to provide further information which has not been forthcoming. It appears from the claimant's last email and the documents provided for this hearing including

the statement for remedy, there is an allegation that the solicitor representing the respondent, Ms Mulholland, withheld and mislead evidence at the liability hearing. The claimant does not say what the evidence was and its effect on her case. In the 12 July 2018 email the claimant referred to "evidence I have been providing and law has not been put into consideration in the reserved judgment…and missing documents from the respondent…" the Tribunal is none the wiser as to what information the claimant referred to as this has never been clarified.

8. The claimant also alleges that an unknown member of staff employed by the Tribunal passed to Ms Mulholland "personal false information" about the claimant "breaking the Data Protection Act." The alleged information in question appears to be set out in the documents provided by the claimant, namely, concerning the explanation given by the claimant for her non-attendance at the 18 June 2018 remedy hearing and an application of costs made on behalf of the respondent, which went no further. The claimant appears to raise an issue with a member of staff from the Employment Tribunal informing the respondent that the claimant had rang stating she had a doctor's appointment that day, accusing Ms Mulholland of "misleading and corrupt behaviour" (email 13 July 2018 from the claimant to ET). Proof of the phone call and the name of the member of staff was requested.

9. The Tribunal has considered the claimant's file and notes from a vast number of emails sent to the Tribunal by the claimant and written in a similar vein, the following communications:

9.1 17 July 2018 email sent by the claimant requesting a copy of a file note allegedly taken by a ET clerk and the clerk's name.

9.2 27 June 2019 email sent by the claimant to the Tribunal alleging personal information had been sent to the respondent "without my knowledge…as the ET is working hand-in-hand with the respondent…a fair trial is impossible to go ahead without legal representation."

9.3 The ET wrote to the claimant on 8 March 2019 "whilst the claimant's inquiry as to how Ms Mullholland found out she wrote to the Employment Tribunal is not fully understood, it is a basic procedure within the Tribunal that correspondence from one party is sent to the other party -see Rules 30 and 92.

10. Under Rule 70 of the Employment Tribunal Rules a judgement can be reconsidered where it is *necessary in the interests of justice* to do. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation and reconsiderations are a limited exception to the general rule that judgements should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry. In Stevenson v Golden Wonder Ltd [1977] IRLR 474, EAT, Lord McDonald said review provisions that they were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before.'

11. The Tribunal took the view that the claimant, in order to achieve a rehearsal of the evidence already given and dislodge the Tribunal's conclusions that were not favourable to her, the claimant was prepared to make serious allegations including her belief that the Tribunal was working "hand-in-glove" with the respondent, ignoring

the fact that throughout these proceedings the Tribunal as it is required to do, kept the parties informed and copied.

12. Having considered the Tribunal file there is a simple explanation for what transpired on the 18 June 2018 hearing. The claimant did not attend despite informing a Tribunal clerk that she was due to see her doctor and would attend after. The Tribunal was not in breach when it informed the respondent of this fact; it is required to keep both parties appraised and it was not unreasonable for the respondent to be kept so informed. Similarly, had a witness of the respondent been late due to a medical appointment and as a result the proceedings delayed, the claimant would also have been kept informed.

13. It is the Tribunal's view that the claimant is attempting to rehearse the evidence, the basis of her application is unclear and she has not shown it is in the interest of justice to reconsider the Judgement and Reasons promulgated, by rehearing the same evidence and the same arguments put before the Tribunal over a number of days at the liability hearing. Achieving finality in this litigation is part of a fair and just adjudication in a case where the Tribunal has already heard all of the evidence on both sides, made its determination and it is not in the interests of justice or in accordance with the overriding objective to give the claimant a second bite at the cherry which undermines the principle of finality. There is no new evidence available which could not be reasonably have been put forward at the liability hearing and the claimant has not pointed to the Tribunal missing any important evidence. Accordingly, the original decision will not be revoked or varied and the claimant's application is dismissed.

Facts relevant to this remedy hearing

The zero hours contract

1. At the Tribunal found the claimant appeared not to have been issued with a written employment contract or a statement of terms and conditions. The position has not changed.

The reference, loss of earnings and injury to feelings flowing from the discrimination

2. On 25 April 2017 Everycare made the claimant a conditional offer of employment. Following the claimant's resignation on 27 May 2016, when she expected to take up that offer, a reference questionnaire was sent to the respondent by Everycare for the position of health and social care assistant and/or healthcare assistant. As a result of the discriminatory reference the job offer made to the claimant was withdrawn.

3. Everycare wrote to the claimant on 22 June 2016 withdrawing the conditional offer of employment made on 25 April 2016 "with immediate effect". The letter stated: "As you are aware the offer of employment was conditional upon and subject to the receipt of satisfactory references. Unfortunately, we have received unsatisfactory references. With this in mind you have failed to meet all of the requirements for confirmation of the appointment."

4. In the promulgated judgment the Tribunal fund that the claimant did obtain alternative employment later based on the amended reference. The Tribunal has no information on what alternative employment was obtained, when and the amounts

earned. The claimant's Schedule of Loss appears to suggest she was not well-enough to work and this was attributable to the discriminatory reference. The claimant is making a substantial loss of earnings claim on the basis that the claimant has been out of work for 43-months. There is no evidence attributing the claimant's lack of employment with the discriminatory reference and /or her health. The Tribunal has no persuasive evidence of any exacerbated medical condition, and it is notable in the GP medical records there is no reference to the claimant suffering from depression in August 2016, the period immediately after the discriminatory reference was provided.

5. In the claimant's original witness statement at paragraph 16 she referred to getting the job offer from Everycare and "I thought my life now would get back to normal and start getting over the really bad experience I had with Carewtch." The Tribunal accepts that having been offered a new job only to have it withdrawal because of the discriminatory reference and the discriminatory attempts made by the respondent at changing it, upset the claimant greatly. However, there is no evidence in the GP records that the claimant's depression was exacerbated as the claimant appears to suggest in her schedule of loss. The GP records confirm the claimant "thinks may be stress work stress for months" and in the entry above 8 August 2016 entry "Feeling tired/no motivation. Not depressed…"

6. The claimant is making a claim totalling £52,656.76 including £6000 injury to feelings. Taking into account the unsatisfactory evidence before the Tribunal, the Tribunal concludes the claimant has not been available for work, she returned to live in Germany, underwent an operation and split up from her husband. There is no satisfactory evidence the loss of earnings claimed, other than those from 27 May 2016 when the claimant expected to seamlessly be employed by Everycare following her resignation, causally flowed from the acts of discrimination. The Tribunal took the view that by the 22 June 2016 when the employment offer was withdrawn and thereafter, the loss of earnings would have covered a total period of 6-months on the basis that this would have been the maximum time it would have taken the claimant to obtain alternative work in the care industry. The Tribunal is aware from its own knowledge that an experienced care worker in the UK does not find it difficult to get alternative employment in the industry. The Tribunal has erred on the side of caution with the benefit of very little evidence from the claimant, concluding that the discriminatory reference compounded the difficulties experienced by the claimant in finding work, but there is no evidence to suggest it had a long-term affect. The Tribunal has therefore limited the loss of earnings period to 6-months from the effective date of termination.

7. The Tribunal has considered the wage slips in the liability bundle concluding the claimant received £173.16 gross based on working a 20-hours per week on a zero hours contract, £8.66 per hour gross. The 2016 P.60 reveals 12-months total earnings of £11,189 for the period year ending March 2016. It is on this basis that the claimant's calculation of £900 per month is accepted by the Tribunal. It is notated that the total deductions were £429.00 which equates broad brush to a lawful deduction of £35.00 per month equating to salary of £865.00 per month net, £265.25 net per week.

8. The claimant's loss of earnings claim amounts to £5190 (£865 per month net x 6) plus interest at 8% from 27 May 2016 to 10 December 2019 at the mid-point range (21 months 8% of £865 net) totalling £1453.20.

Injury to feelings

9. The Presidents of the Employment Tribunals in England and Wales and Scotland issued updated joint presidential guidance in relation to the "Vento bands" for compensation for injury to feelings in discrimination claims brought under the Equality Act 2010. The Vento bands were uprated for claims presented to employment tribunals in England or Wales on or after 6 April 2018 (after the claimant had presented her claim) and are: a lower band of £900 to £8,600 (less serious cases). a middle band of £8,600 to £25,700 (those cases that do not merit an award in the upper band).an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900. The 5 September 2017 joint presidential guidance dealt with claims presented on or after 11 September 2017 where the lower band was £800 to £8,400 (less serious cases), and it is these figures the Tribunal has taken into account of as they reflect an inflation upgrade and take into account Simmons v Castle and De Souza v Vinci Construction (UK) Limited.

10. In Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, CA, the Court of Appeal gave specific guidance on how employment tribunals should approach the issue. Lord Justice Mummery identified three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury. These comprised:

- a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000

- a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and

- a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The Court said that, in general, awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

11. No medical evidence of injury to feelings is necessary. As Lord Justice Mummery held in Vento, injury to feelings is not a medical term: 'It is self-evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise… Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms." The Tribunal accepted from its recollection of the evidence given by the claimant at the liability hearing that she was understandably very upset at the terms in which the reference was couched; she believed she was a good employee who enjoyed working with the residents, and felt extremely upset at how she was described repeatedly in the reference, even after she instructed lawyers to get involved, who tried to put the right the wrong committed against her.

12. The employment tribunal has a discretion as to which band applies, and where in the band the appropriate award should fall; the claimant is claiming £6000 which falls in the middle of the lower band, and this sum is accepted by the Tribunal as properly reflecting the injury to feelings she has suffered because of the discriminatory reference, differentiating all the other upset she felt at the respondent's behaviour found by the Tribunal not to have been discriminatory. When arriving at the quantification of £6000 the Tribunal had in focus the need to compensate the claimant rather than punish to the respondent, and its assessment has been made difficult by the lack of evidence. To counter-balance the claimant's poorly prepared remedy evidence, the Tribunal has spent time re-visiting the file, reading the handwritten notes taken of the claimant's oral evidence, her original witness statement and impact statement, the medical records and the correspondence file. It has not been an easy matter to unravel from the evidence heard a long time ago the hurt, distress and humiliation caused to the claimant when she lost the job offer she had expected to take up on resignation, to discover thereafter the reason for the withdrawal and full extent of the discriminatory reference having made a subject access request.

13. The claimant is entitled to 8% interest on injury of feelings of £480.00 per annum (£54.00 per month x 43) which equates to £2268.00 from 27 May 2017 to today's date.

Claim for expenses: the ferry crossing

14. The Tribunal does not accept the claimant's claim for her ferry crossing incurred as a result of the remedy hearing held on 18 June 2018; it is notable that she did not attend the remedy hearing in any event and it is a matter for the claimant whether she moved back to live in Germany.

Claim for pension loss

15. The Tribunal does not accept the claimant's claim for pension loss; the wage slips in the liability bundle do not mention pension and there is no evidence before the Tribunal the claimant paid into a pension scheme and the respondent contributed by £20 per month. It is noted that pension loss was not referred to in the original schedules of loss, for example, the schedule of loss at 3 February 2017.

Failure to provide a statement of main terms and conditions of employment under section 1 of the Employment Rights Act 1996.

16. The Tribunal had found the claimant was not provided with a statement of terms and conditions of employment and the respondent is ordered to pay to the claimant £900 (4 weeks @ £225.00 per week gross).

17. In conclusion, the respondent is ordered to pay to the claimant compensation for unlawful race discrimination in the sum of £5190 loss of earnings plus interest of £1453.20 and injury to feelings in the sum of £6000 plus interest of £2268.00.

18. The respondent failed to provide the claimant with a statement of terms and conditions of employment in accordance with section 1 of the Employment Rights Act 1996 as amended and the respondent is ordered to pay to the claimant the sum of £900.00.

19. The claimant's application for a reconsideration dated 4 April 2018 of the reserved judgment and reasons sent to the parties on 12 March 2018 is refused.

_____
10.12.19
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

9 December 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2404338/2016**

Name of case: **Mrs K Rogers** v **Carewatch Care Services Limited (In Liquidation)**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **9 January 2020**

"the calculation day" is: **10 January 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office