EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms M Labongo	**v**	**Medicines and Healthcare Products Regulatory Agency**

Heard at:
London Central Tribunal sitting at Fox Court

On: 3 December 2019

Before: Employment Judge Lewis
Ms S Samek
Ms L Jones

Representation

For the Claimant: Mr T Akinsanmi

For the Respondents: Mr S Murray, Counsel

RESERVED JUDGMENT ON REMEDY

1. For the failure to make the reasonable adjustment of increasing the font size in correspondence from November 2017 – January 2018, the tribunal awards £2000 for injury to feelings plus £333.33 interest, making a total of £**2,333,33**.

2. No award is made for financial loss arising out of that failure.

3. The notice pay claim is not upheld.

REASONS

1. The tribunal had decided by a judgment sent out on 10 July 2019 that the respondents failed to make the reasonable adjustment of enlarging the font in their emails and hard copy correspondence in the period November 2017 – January 2018.

2. The claimant's notice pay claim was left to be decided at the remedy hearing. We explain this in the 'Notice pay' section below.

3. The claimant's other claims were not upheld.

4. The claimant was ordered by 1 October 2019 to provide the tribunal and the respondents with a written statement setting out what compensation she would be seeking by way of remedy and how it was calculated. It was explained that this must relate solely to compensation for the fact that font was not enlarged between November 2017 and January 2018. We will call this 'the font claim'. She was also asked to provide a short witness statement relevant to compensation for the font claim.

5. The claimant provided a short witness statement but it did not specifically state how her feelings had been injured by the failure to enlarge the fonts from November 2017 – January 2018. Also, it did not explain why any financial loss would result from that failure.

6. At the start of the remedy hearing, the claimant provided a statement setting out the compensation she claimed, ie £25,000 for injury to feelings and £582,633 for loss of earnings from dismissal until age 65.

Procedure and adjustments

7. The hearing had been moved to Fox Court because Victory House was full. The room at Fox Court had a large table. It was agreed that for ease of communication, the claimant and her representative would sit directly opposite the tribunal panel. The respondents' representative sat at one end of the table.

8. The respondents had provided the claimant in advance with a small remedies bundle in font 20. The claimant brought this with her to the tribunal, but neither she nor her representative felt able to refer to it. The claimant said her eyes were bad that day and her representative would be unable to read such documents in any event because of his own visual impairment. The claimant's mother and other support attended the hearing and were available to help. The respondents had also provided the remedies bundle in advance on a USB stick, but the claimant had not brought this or a computer with her. The tribunal asked whether the claimant felt able to proceed. She did and she wanted to go ahead. There were only a few documents in the remedies bundle which would need to be referred to and passages were read out as necessary.

The law regarding compensation

9. Under s124(3) EqA, a tribunal can make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the claimant. The power to make wider recommendations, ie for the purpose of reducing any adverse effect on anyone else as well as the claimant, does not apply to cases started on or after 1 October 2015 (as is the case here).

10. A tribunal can make an award for injury to feelings. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression etc 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. Nevertheless, employment tribunals have to do the best they can on the available material to make a sensible assessment.

11. The Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102 identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular claimant.

12. For claims presented from September 2017 – 5 April 2018, Presidential Guidance states that - taking account of Simmons v Castle and De Souza v Vinci Construction (UK) Ltd - the lower Vento bands was in the range of £800 to £8,400. The claim in this case was presented on 29 March 2018.

13. Where personal injury or injury to feelings are caused by a number of factors, the award should only be for the injury caused by the unlawful acts of discrimination. However, this assumes it is possible to apportion the hurt. Before considering this question of apportionment, a tribunal should decide whether or not the injury (particularly if it is a psychiatric injury) is divisible at all.

14. A tribunal may award interest on its award and must consider whether to do so. Interest on an award for injury to feelings runs from the date of the discrimination until the date of calculation by the tribunal (inclusive). Interest on any financial loss starts on a date midway between the act of discrimination and the calculation date, and ends on the calculation date. The rate of interest is that fixed by section 17 of the Judgments Act 1838. Since July 2013, that has been 8%. (Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.)

The facts

15. The relevant correspondence which was written in unenlarged font from November 2017 – January 2018 consisted of 7 letters.

16. At the time of this correspondence, the claimant had already been dismissed following Dr Sterland's advice that it was unlikely that she would ever be able to return to the particular employment because she was not physically or psychologically able to do so.

17. The 7 letters from the respondents were as follows:

    a. A letter from Mr Foy to the claimant dated 8 November 2017 which confirmed the outcome of the Stage 4 absence hearing held on 5 September 2017. The letter confirmed that as the claimant had not provided a consent form to apply for ill-health retirement, she was being given 8 weeks' notice of dismissal. The letter offered a right of appeal.

    b. A letter from Ms Vigurs to the claimant dated 10 November 2017 which followed up on the claimant's letter to Mr Foy dated 7 November 2017 raising queries about ill-health retirement. Ms Vigurs finished by saying that she noticed the letter had been written by Waterloo Legal Advice Service ('WLAS') and Blind Aid and she said she was happy for the claimant's adviser from either service to telephone her to talk through its contents.

    c. A letter from Dr Raine dated 21 November 2017 inviting the claimant to

attend an appeal hearing following the claimant's letter of appeal dated 15 November 2017. Dr Raine said that if the claimant felt there was any additional support or assistance the organisation could give, she should contact Mr McGuigan in HR.

d. A letter from Dr Raine to the claimant dated 23 November 2017 refixing the date of the appeal hearing.

e. A letter from Dr Raine to the claimant dated 28 November 2017 in response to the claimant's letter of 24 November 2017 in which the claimant had raised various points including asking a delay of the hearing until 7 days after the claimant's GP appointment on 5 December. The claimant's letter also referred to new evidence, ie a report from her specialist and her GP, and said that Dr Sterland's report should not have been relied on because he had never met the claimant.

f. An further letter from Dr Raine to the claimant dated 5 December 2017, almost identical to Dr Raine's 28 November 2017 letter.

g. A letter from Dr Raine to the claimant dated 21 December 2017 rejecting the appeal and explaining why. It said the decision was taken on two grounds (1) no procedural errors and (2) the further evidence provided by the claimant's eye specialist did not outweigh the occupational health report provided by Dr Sterland on 18 August 2017.

18. All the letters except the last one stated at the top that they had been sent by email, recorded delivery and standard (or 1st class) post. We do not think the omission of those words from the final letter was significant. There was no suggestion that the final letter had not in fact been sent the same way or that the claimant did not receive it.

19. The claimant did not always have access to her email, which would enable her to electronically enlarge documents. She needed the help of her mother or aunt or advice agencies to read the documents. Indeed, on 24 November 2017, when sending in her more detailed grounds of appeal, the claimant asked for hard copies of the documents which the respondents

were going to use at the appeal as she had minimal access to email.

20. Primarily, the claimant was able to access and engage with the contents of the letters by seeking advice. The claimant showed the letters to the Waterloo Legal Advice Service who were helping her and they wrote her letters in reply. In this way, the claimant was able to ask questions and to make points. She was able to ask about the possibility of early retirement. She was able to submit an appeal and make her appeal points. She also attended the appeal hearing in person.

21. There was sometimes a delay because the claimant would show the letters to her support team. Her support team were all blind and they had to take the letters away to get them read.

22. In none of the claimant's replies to the respondents did she complain about the small font or ask it to be enlarged. However, the respondents should have known. The 30 October 2014 the Access to Work report said that due to her blurred and tunnel vision, the claimant preferred to read 14 – 16 point, and even then, that her reading

time was reduced. Moreover, although a computer is not the same as paper, the respondents were aware that that also required magnification. The claimant sent Dr Raine her appeal letter in very large font and her more detailed appeal reasons in smaller but still enlarged font.

23. In April 2017, a welfare officer at Blindaid (Ms Collie) wrote to Ms Vaughan regarding the claimant's inability to attend a meeting that had been fixed for 10 April and referring to the claimant's recent eye operation. Ms Vaughan passed the letter on to Ms Vigurs. Ms Vigurs emailed Ms Collie in return on 13 April 2017 regarding the attendance issue. She concluded: 'I am not familiar with the support that Blindaid provide but I am more than happy to give you a call if there is any support that you can provide to either the Agency or Margaret in facilitating her return to work on Tuesday 18 April.' Neither ADD nor the claimant ever replied.

24. As we said in our decision on liability, it would not have been difficult for the respondents from November 2017 – January 2018, when writing such important letters about the termination of the claimant's employment, to ensure

that emails and hard copies were typed in at least font 16, or larger. Although in practice, the claimant was able to process the information and respond to the letters and fully participate in the appeal, it would have been harder work for her to do so.

Conclusions

Injury to feelings

25. The claimant has been evidently very hurt and distressed by the way she feels the respondents have treated her as well as by having to cope with her worsening sight. But as we explained at the hearing, we can only award compensation for the actions which we have found to be unlawful, ie the non-enlarged fonts from November 2017 – January 2018.

26. We first considered whether it is possible to look specifically at the hurt caused by the font issue. We believe that it was. When focussed on the relevant question, the claimant was able to specifically describe how she felt about the unenlarged font in the relevant period.

27. We accept the claimant's evidence that receiving the letters in unenlarged font injured her feelings. It was another experience of lack of control and independence. She had to go to others to read the correspondence for her and she was reliant on their availability and time-scales. She felt it yet again demonstrated that the respondents did not take her disability seriously.

28. Having said that, we do not think the font issue caused a great deal of injury to feelings. We say this because the letters written on behalf of the claimant did not complain about the small font or ask for a larger font. We feel that if the claimant had been expressing concern and upset about the font size to those who helped her write letters, they would have mentioned this to the respondents. We also had this sense at the remedy hearing. Although able to talk separately about how she felt on the font issue, the claimant's main sense of outrage was directed at the respondents' failure to make reasonable adjustments in the workplace up to her dismissal.

29. For these reason, we think it appropriate to make an award for injury to feelings at the lower end of Vento. The range applicable is £800 - £8,400. The award we make is therefore £2000.

30. We award interest on this sum at the rate of 8% from the beginning of the period in November 2017 to date. 25 months at the rate of 8% is £333.33

Financial loss

31. The claimant believes the effect of her dismissal is that she will find it very hard to get a new job and that she will incur loss of earnings until the age of 65 when she would have retired. We certainly hope that is not the case.

32. However, as we explained, that is not the legal question for us. We did not find that the dismissal was unfair or discriminatory. The only action which we found was discriminatory was failing to enlarge the font size of correspondence from November 2017 – January 2018.

33. We asked several times how the unenlarged font size caused the claimant to

lose earnings or lose her job. The claimant was unable to answer this. She kept referring back to the fact that she would have kept her job if the respondents had put in a number of reasonable adjustments long before this one.

34. We do not believe that it would have made any difference to whether and when the claimant's job ended if the font had been larger. She had already been dismissed. The reason she was dismissed was essentially Dr Sterland's advice that she would never be able to return. Her appeal was turned down for the same reason.

35. There is no evidence that the claimant was unable to argue her case fully at the appeal because of the font size (and she does not suggest this anyway). She had had help in reading and answering the correspondence and she was able to attend the appeal hearing in person and discuss the matter.

36. Nor is there any evidence that the claimant could not respond properly to the other letters in the period or that that would have prevented the dismissal.

37. We therefore find that no financial loss was caused by the respondents' failure to enlarge the font size from November 2017 – January 2019.

38. Finally we refer back to our finding in paragraph 199 of the original decision:

'In practice, the claimant was able to process the information and respond to the letters and fully participate in the appeal. However, it would have been harder work for her to do so.'

Recommendations

39. The claimant did not suggest any recommendations, although invited to do so. She did not indicate that she had any particular interest in recommendations to be made. Given that the claimant has now left the job and that we were given no evidence that any recommendations would help alleviate or reduce the claimant's hurt, we did not make any recommendations.

Notice pay

40. The respondents did not pay notice because the claimant was off sick through the notice period and her sick pay had run out. As a matter of contract, the respondents were entitled not to pay wages during the notice period for this reason.

41. The tribunal raised with the respondents whether the claimant should nevertheless be paid for the notice period as a result of s87(1) and s88(1)(b) of the Employment Rights Act 1996.

42. Mr Murray drew the tribunal's attention to s191(2)(d) which sets out which parts of the Employment Rights Act 1996 apply to Crown Employment. In relation to Part IX, it only sets out sections 92 and 93. Crown employment is defined in s191(3) as 'employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision'.

43. The parties agreed that the respondent was an agent of the Department of Health. We find that the respondents were an executive agency of the Department and the claimant's employment was therefore 'for the purposes of a government department'

and she was therefore in Crown employment. As a result, the sections under the Employment Rights Act 1996 do not apply to the claimant.

44. For these reasons, the claim for notice pay fails.

Employment Judge Lewis

Dated: 10 Dec 2019

Judgment and Reasons sent to the parties on:

12.12.2019

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For the Tribunal Office