THE EMPLOYMENT TRIBUNALS

Claimant: **Miss Rachel Brook**

Respondent: **Tyneside Cinema Ltd**

Heard at: **North Shields Hearing Centre** **On:** **8 January 2020**

Before: **Employment Judge Arullendran**

Members: **Ms D Winship**
Mr G Gallagher

Representation:

Claimant: **In person**
Respondent: **Ms C Millns (counsel)**

RESERVED JUDGMENT ON REMEDY

The unanimous Judgment of the Employment Tribunal is as follows:

1. The respondent is ordered to pay to the claimant the net sum of £244.02 for loss of earnings plus interest in the sum of £14.07.

2. The respondent is ordered to pay to the claimant the sum of £6,000.00 for injury to feelings plus interest in the sum of £768.97.

3. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

REASONS

1. The issues to be determined by the Employment Tribunal were set out in the case management summary dated 11 November 2019 as being:

1.1 what was the period of time the redundancy consultation should have been delayed by in order to amount to a reasonable adjustment?

1.2 How much compensation should be awarded for injury to feelings?

2. We were provided with a joint bundle of documents consisting of 151 pages. The respondent referred to 2 documents from the original trial bundle from the merits hearing and they were renumbered and added to the remedy bundle at pages 152 to 153. The claimant requested that a copy of a letter from her psychotherapist be admitted into evidence, which the respondent agreed to, and this was added to the remedy bundle at pages 154 to 155.

3. We heard witness evidence from the claimant and Holli Keeble, chief executive officer of the respondent.

4. Both sides made closing submissions with reference to written skeleton arguments, the full contents of which are not reproduced in this judgement but have been considered in their entirety along with the oral submissions made by the claimant and Ms Millns.

5. Ms Millns told the Tribunal that she was familiar with the information available on the Advocates Gateway and she has refreshed her memory in respect of Toolkit 2 in advance of today's hearing as suggested by the Tribunal in their letter dated 7 December 2019.

The facts

6. It is common ground that the claimant was employed as a personal assistant and had no previous experience of human resources (HR). The claimant was asked to undertake some HR functions as part of her role in or around October 2017 when the claimant's previous line manager, Ms Coul, resigned. It is common ground that Ms Coul was responsible for HR within the respondent organisation and the claimant was asked to take over some of these duties when Holli Keeble became her line manager.

7. The claimant started to experience stress at work as a result of having to undertake additional HR duties as part of her role. It is common ground that the claimant made it clear to the respondent that she had reservations about the breadth of her role and these concerns were discussed between the claimant and her line manager.

8. It is common ground that the claimant was receiving treatment for her mental health, emanating from childhood trauma, throughout her employment with the respondent and was regularly attending appointments every two weeks on Monday mornings. The claimant attended an appointment with a clinical psychologist on 29 January 2018 where it was agreed that she would take a break from therapy because she was experiencing work related stress which was having a detrimental effect on her ability to take part in the therapy. The claimant's psychologist

wrote to her on 9 February 2018 confirming that she had been discharged and could seek a referral via her GP at a later date to the NTW Specialist Psychotherapy Centre.

9. In her position as PA to the chief executive, the claimant was aware of plans to restructure the respondent organisation and she knew that this would lead to some redundancies. The claimant learned of the potential effect on her own role on 28 March 2018 and became distressed and upset as a result. The claimant accepted in cross examination that she was always going to be placed under stress because she knew from the meeting in March that there was a potential her job was at risk of being made redundant and that she experienced distress from not knowing what was happening to her job, among other things. The claimant experienced work related stress after receiving her appraisal documents on 4 April 2018 which resulted in her taking 2 ½ days off sick leave. The respondent organised a referral to occupational health and the claimant and the respondent agreed 17 actions arising from the occupational health report which were all implemented, with the exception of two.

10. The claimant raised a local resolution request with the respondent on 9 April 2018 and it is common ground that this had not been finalised when the claimant was notified on 13 June 2018 of the at-risk redundancy meeting which was scheduled to take place on 15 June 2018. However, the parties did not use the meeting of 15 June for the redundancy consultation, as it was used to discuss the outcome of the occupational health report and to finalise the local resolution. The first consultation meeting for the redundancy process took place on 20 June 2018.

11. Ms Keeble was absent on annual leave from 16 July 2018 for a period of two weeks and she return to work on 30 July 2018. It is common ground that the claimant was absent from work on sick leave with work related stress whilst Ms Keeble was on holiday. The claimant returned to work on 8 August 2018 but was absent from 9 August 2018 with stress and anxiety due to the consultation process. At this point the respondent gave the claimant two weeks compassionate leave on full pay in order to help reduce her levels of stress and anxiety. At around this time the respondent employed a temporary HR manager to undertake the claimant's duties. At this time the claimant asked the respondent to correspond with ACAS about the redundancy process and not to contact her directly and she made it clear that she did not want to enter into any further consultation and what she really needed was a decision about the redundancy, implying that it was the uncertainty which was causing the stress and anxiety.

12. The claimant was informed of her redundancy on 24 August 2018, after nine weeks of consultation, and she was not required to work during her notice but was paid in lieu of her notice which expired on 24 September 2018.

13. The respondent's uncontested evidence is that they required a HR manager with CIPD qualifications because there were a number of HR projects and issues which were overdue and required attention. During the claimant's redundancy consultation and absence, there were a number of urgent HR matters which needed immediate attention and the respondent appointed a temporary HR officer in order to "hold the fort" until it could recruit a long-term HR manager. The temporary HR officer found a number of deficiencies which required urgent attention as some of them had statutory implications, such as right to work checks, DBS checks, GDPR staff consent forms, absence tracking and holiday tracking. Holli Keeble says that the respondent business could have delayed the claimant's consultation for four weeks without it having a detrimental impact on the HR duties which needed to be undertaken within the business, but a longer delay would have had an impact on the business and would have meant compliance issues deteriorating much further for the organisation.

14. The claimant was upset at being made redundant on 24 August 2018 and this had an impact on her well-being as she had found the process intense and hard to deal with and she felt defeated. The claimant's evidence to this Tribunal was that the loss of a job would have a significant impact on any employee.

15. The claimant had started a mental health awareness course in October 2017, as set out at page 102 of the bundle, for which she was awarded a certificate on 18 February 2019 the claimant says this was approximately a 40-hour course and she completed the course after her redundancy had taken effect. The claimant says that this was not a self-help course but she was educating herself as it looked at different types of mental health in the UK and that it was not the same as undertaking therapy.

16. The claimant says that if the redundancy consultation had been delayed, she would have been able to re-enter therapy, however the claimant would not have returned to her previous therapist as it was recommended that she should seek a referral through her GP to the NTW Specialist Psychotherapy Centre. The claimant's evidence is that she has waited approximately 3 ½ months for a referral to specialist services in the past, however sometimes the wait can be as little as a couple of months. The claimant says that she wanted to go back into therapy around July 2018, but this was not possible because of the redundancy consultation, however the claimant did not ask her GP for a referral around July 2018 or before that date. The claimant says that she was not in a fit mental state to have requested such a referral at that time.

17. The claimant secured temporary employment with Fenwick's during the Christmas period from around October 2018 to December 2018. The claimant also obtained employment with Northern Creative Solutions form around September 2018 onwards. The claimant also told us that she had been in that paid employment up until last week.

Submissions

18. The respondent submits that the reasonable adjustment to the delay in starting the claimant's redundancy consultation needs to be determined on the basis of how much time the claimant would have needed in order to have better mental health to deal with the consultation process, given that this Tribunal found that it should have been for a "short period". The respondent relies on section 124(6) of the Equality Act 2010 and submits that the aim of compensation is to award a sum of money that would put the claimant into the position she would have been had the wrong not taken place. The test as to whether a proposed adjustment is reasonable is an objective test and the respondent submits that there is no duty to take measures that would impose a "disproportionate burden on the employer" and that the practicability of an adjustment is directly relevant to its reasonableness.

19. The respondent submits that it would have been impractical and therefore unreasonable for the consultation process to be delayed any longer than one month to a maximum period of six weeks and that the claimant's assertion that it should have commenced on 2 December 2018 (a delay of five months and 12 days) is unreasonable. The respondent submits that allowing a delay of six weeks to start the consultation would take the start date of the consultation to 1 August 2018, following Holli Keeble's return from holiday and that the overall consultation process would have been concluded within four weeks because the delay in starting the process would have mitigated the need for the claimant to take sick leave during the consultation process and the need for the respondent to give compassionate leave during this period; the employment would have ended on 28 September 2018.

20. The respondent submits that, although the claimant was successful under two statutory provisions of the Equality Act 2010, the successful claim arose as of a common finding of fact by the Tribunal that the start of the redundancy consultation process ought to have been delayed for a short period on account of the claimant's disability. The claimant's feeling of upset cannot be compensated twice simply because two findings of discrimination have been made. The respondent submits that the claimant's feelings of distress extend substantially beyond the findings of discrimination in the Tribunal's decision, particularly in respect of her perception of being overworked and that the Tribunal is not to compensate the claimant for those other matters. The respondent submits that the claimant would not have found any consultation process easy and there is no doubt that it would have caused her stress and anxiety and it is inevitable that she would be made redundant and would have become distressed. The respondent submits that the injury to feelings award should fall in the region of £900 for a one-off act of discrimination.

21. The claimant made submissions with reference to a written closing statement to which she had appended a further page consisting of evidence which she had not referred to in her evidence in chief. The

respondent objected to the Tribunal taking into account the second page, as it should have formed part of her witness statement, and the claimant agreed that the Tribunal should not read the second page of the submission.

22. The claimant submits that the discrimination she was subjected to in June 2018 because of her mental health has had a significant effect on her ability to enter back into full-time employment and she has only been able to work 17.5 hours per week which has had an effect on her self-esteem and has set her back emotionally. The claimant submits that the failure to make reasonable adjustments is still affecting her now and has had a detrimental effect on her professional self-confidence and self-esteem. The claimant submits that it would have been appropriate for the respondent to allow her a four-month period of readjustment after concluding the local resolution which would have meant that her consultation process would have ended at the end of December 2018, at which point she would have been given one months' notice which would have expired on 31 January 2019. The claimant refers to her schedule of loss which can be seen at pages 55 to 58 of the bundle and claim a partial financial loss of earnings to 31 January 2019 in the sum of £1698.18, injury to feelings for the failure to make reasonable adjustments in the sum of £5500 and injury to feelings for discrimination arising in consequence of the disability in the sum of £12,000.

The Law

23. The onus is on the claimant to establish the nature and extent of any injury to feelings and this must be proved: Ministry of Defence v Cannock and ors [1994] ICR 918. However, the claimant does not have to produce medical evidence of injury to feelings.

24. We are referred to the leading case Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 in which the Court of Appeal held that "*the assessment of compensation for an injury or loss, which is neither physical nor financial, present special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upsets, 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 nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in calculation of financial loss or compensation for bodily injury*."

25. In respect to claims presented on or after 6 April 2018, the Vento band are as follows:
    - lower band of £900-£8600 (less serious cases)
    - middle band of £8600-£25,700 (cases that do not merit an award in the upper band)
    - upper band of £25,700-£42,900 (the most serious cases), with the most exceptional case is capable of exceeding £42,900.

26. In Vento, Mummery LJ identified the lowest of the three bands being appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. However, this does not translate to a rule that all one-off occurrences must fall within the lower band and some occurrences will be sufficiently serious to warrant an award in one of the upper 2 bands.

27. An award for injury to feelings is intended to compensate for the hurt and humiliation suffered by the claimant. This means that, in theory, the award depends not on the seriousness of the discrimination but on the nature of the claimant's reaction to that discrimination. Therefore, the Tribunal's main task is to determine the effect the discrimination has had on the life of the claimant and the key factors will be whether the discrimination has led to any medical condition, such as depression, panic attacks or any stress-related illness; whether the claimant has suffered a loss of confidence; how the discrimination has affected the claimant's personal relationships; and whether the claimant continues to suffer as a result of the discrimination.

Conclusions

28. Applying the law to the facts we find that, although the claimant was successful with her claim of discrimination under sections 15 and 21 of the Equality Act 2010, the discrimination was a one-off act of failing to delay the start of the redundancy consultation process. There were not two separate acts of discrimination for which the claimant should be compensated for separately and, therefore, the claimant's approach to calculating two separate awards for injury to feelings in her schedule of loss is incorrect and will not be followed by this Tribunal.

29. The respondent did delay the first consultation meeting from 15 June to 20 June 2018 and the local resolution was concluded at the meeting on 15 June. The email asking the claimant to attend the consultation meeting was sent on 13 June 2018. Looking at all the evidence in the round and applying our mind to what is more likely to have happened had the respondent made a reasonable adjustment and delayed the start of the consultation process, we find that it is more probable than not that Ms Keeble would have arranged for the first consultation meeting to take place after her return from holiday (31 July 2018) and that this is likely to have taken place on 1 August 2018, as opposed to 20 June when it actually took place. This would have given the claimant a period of 6 weeks after the conclusion of the local resolution and discussions about

the occupational health report findings to do her normal day to day job, which is what the claimant has said she needed in order to help her mental health to improve sufficiently to be better able to handle the consultation process. There is no medical evidence in front of us that the claimant required a delay of four months before the consultation period could commence, as suggested by the claimant in her closing submissions.

30. We agree with the respondent's submission that, had the first consultation meeting taken place on 1 August 2018, the likelihood is that the claimant would have been better able to deal with the consultation process and would not have needed to take sick leave and there would have been no need for the respondent to give the claimant 2 weeks compassionate leave. Therefore, instead of taking 9 weeks (7 weeks of consultation plus 2 weeks of compassionate leave), the consultation process would have been completed in 4 weeks, as originally set out it the respondent's business reorganisation proposal. This would have meant that the claimant would have been given notice of redundancy on 1 September 2018 and her employment would have ended on 1 October 2018. In reality, this means that as the claimant was dismissed on 24 September 2018, she has suffered a loss of earnings from 25 September to 1 October 2018, which is 1 week's wages.

31. The claimant's net salary with the respondent was £258.02 per week. The claimant earned £140 net on 25 September 2018 with Northern Creative solutions, as set out in the payslip at page 59 of the bundle. This gives the claimant a net loss in the sum of £244.02 and the respondent is ordered to pay this sum to the claimant in respect of her claim for loss of earnings arising from the act of discrimination.

32. The claimant is entitled to receive from the respondent interest on the sum of £244.02 at the rate of 8% per annum in accordance with Regulation 6(1)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The mid-point date is 2 April 2019, as this is the mid-point between 13 June 2018 and the date of this Judgment (21 January 2020). The interest is calculated at 8% per annum, which gives a daily rate of £0.05 on the sum of £244.02. There are 294 days from 2 April 2019 to 21 January 2020, which gives the total amount of interest on this award in the sum of £14.70.

33. The claimant is a vulnerable individual who was already receiving medical intervention and help with her mental health prior to the redundancy consultation. We bear in mind that the claimant's health is more likely to have made her more sensitive in her emotional response to the redundancy consultation and the loss of her employment. The claimant has said that she started feeling stressed when her job role changed to include HR functions in October 2017. The claimant's evidence indicates that she felt upset and stressed in relation to matters outside the specific act of discrimination identified by this Tribunal, i.e. the failure to delay the redundancy consultation. The claimant's evidence was that she was distressed when she took minutes at the consultation meeting on 28

March 2018, which we did not find to be an act of discrimination. The claimant was also very upset and distressed when she received her appraisal in April 2018 and, furthermore, as a result of going through the local resolution which she raised on 9 April 2018 and concluded on 15 June 2018. We did not find that any of these issues were acts of discrimination, nor were they related to the commencement of the redundancy consultation. The claimant has also given an account of being upset at the loss of her job, however this Tribunal did not find that the redundancy dismissal was an act of discrimination. In all the circumstances, we direct ourselves to disregard the hurt, humiliation and upset the claimant has experienced as a result of any or all of these situations as they are not connected to the respondent's failure to delay the start of the redundancy consultation in any way.

34. We accept that the claimant was upset by the respondent starting the redundancy consultation by sending her an email on 13 June 2018 inviting her to the first consultation meeting at a time when the claimant did not feel well enough to deal with the process, however we note that the claimant did not make any complaints to the respondent at the time that the first consultation meeting should not have taken place on 20 June 2018 and we also note that the failure to delay the start of the consultation process was not pleaded by the claimant in her ET1 form as being an act of discrimination. Starting the consultation in June 2018 led to the claimant taking periods of sick leave and the respondent providing the claimant with two weeks of compassionate leave because the claimant was feeling upset and extremely unwell. However, we do not accept that the single act of failing to delay the start of the redundancy consultation period has had the profound and ongoing effect claimed by the claimant, effectively preventing the claimant from entering into full-time employment as at the date of this hearing or from seeking a referral to specialist mental health services through her GP. We find that it is more probable than not that the claimant's existing mental health has been exacerbated by her feeling out of her depth in undertaking HR duties which she did not feel confident about when her job role changed in October 2017, receiving negative comments on her appraisal in April 2018 and by the act of being made redundant in September 2018, which were not acts of discrimination.

35. In all the circumstances, we find that the respondent's failure to delay the start of the redundancy consultation in June 2018 was a one-off act of discrimination, particularly viewed in light of the fact that we found the respondent had adequately supported the claimant during the rest of the consultation process, carrying out risk assessments, making appropriate referrals to occupational health and agreeing with the claimant and implementing reasonable adjustments, as necessary. Although not all one-off acts of discrimination automatically fall in the lower Vento band, we find that there is sufficient evidence in this case that the specific injury to feelings suffered by this claimant in respect of the failure to delay the consultation process, even given her particular vulnerability and existing mental health issues, falls within the middle to upper end of the lower

Vento band. In this case we assess the compensation for injury to feelings to be in the sum of £6000.00.

36. The respondent is ordered to pay to the claimant compensation for injury to feelings in the sum of £6000.00 plus interest at the rate of 8% per annum in accordance with Regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Interest is awarded from 13 June 2018 to 21 January 2020 at the rate of 8% per annum which gives a daily rate of £1.31. There are 587 days in the period of calculation which gives a total amount of interest on this award in the sum of £768.97.

37. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....21 January 2020….....