



## EMPLOYMENT TRIBUNALS

**Claimant**  
Mr R Uddin

v

**Respondent**  
Embassy of the State of Kuwait

## JUDGMENT

**Heard at:** Central London Employment Tribunal      **On:** 28 February 2020

**Before:** Employment Judge Brown

**Members:** Ms H Craik  
Mr F Benson

### Appearances

**For the Claimant:** Mr Mannon, Counsel  
**For the Respondents:** Did not attend and were not represented

## JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant was a disabled person at all material times.
2. The Respondent subjected the Claimant to disability harassment claim and/or discrimination arising from disability by requiring him to carry out work he could not do and failing to provide him with a hearing before dismissing him.
3. The Respondent did not fail to make reasonable adjustments.
4. The Respondent did not subject the Claimant to discrimination arising from disability by dismissing him.
5. The Respondent shall pay the Claimant £23,353.64 in compensation for injury to feelings, including aggravated damages and interest.

## REASONS

### This Hearing

1. This was a Final Hearing to determine the Claimant's disability discrimination claims against the Embassy of the State of Kuwait.
2. The Claimant had previously also brought claims against United Gulf Management Limited, but these had been settled and a Judgment dismissing them was promulgated on 28 October 2019.
3. The Notice of Hearing for this Final Hearing was sent by the Tribunal to the Embassy of the State of Kuwait.
4. The Claimant confirmed at the outset of the hearing today that he brings complaints of disability harassment, discrimination arising from disability and failure to make reasonable adjustments. The Claimant had sent a List of Issues in these complaints to the Respondent before the Hearing.
5. The disability discrimination issues as stated by the Claimant were:
  - 5.1. Was the Respondent the Claimant's employer?
  - 5.2. Is the Respondent entitled to immunity in respect of the Claimant's claims? And is there any basis in customary international law for the application of state immunity in the employment context?
  - 5.3. Are ss 4(2)(b) & 16(1) of the State Immunity Act 1978 incompatible with article 47 of the EU Charter and with article 6 of the Human Rights Convention?
  - 5.4. Does the Tribunal have jurisdiction to determine the discrimination claim being derived an EU derived claim?
  - 5.5. Did the Claimant have a disability and did the Respondent discriminate against the Claimant by treating him unfavourably because of something arising in consequence of the Claimant's disability?
  - 5.6. Was the Respondent in breach of their duty to make adjustments for the Claimant due to his disability by making him go back to his previous duties and did those acts of the Respondent put the Claimant at a substantial disadvantage?
  - 5.7. After the Claimant suffered from a stroke, his abilities to carry on his job were severely restricted. The stroke affected his speech and the use of his right arm (the Claimant is right handed) and his lower leg. The Claimant was unable to carry out his previous duties due to his disability.
  - 5.8. The Claimant was told to carry out all his previous duties in spite of his inability to carry out said duties which put him at a substantial disadvantage. No reasonable adjustments were made by the Respondent in consequence and the Claimant was treated unfavourably due to his inability to carry out his previous duties.
  - 5.9. The Claimant suffered from burns on numerous occasions which also led to his blood pressure rising and the emergency services had to be

called 3 or 4 times. The cooking duties involved using a knife which the Claimant could no longer do, as he was right handed.

- 5.10. The Respondent discriminated against the Claimant by unlawfully dismissing the Claimant due to his disability and the Claimant's inability to carry out his previous duties due to his disability and reasonable adjustments were not made and/or the Respondent was unwilling to make reasonable adjustments in consequence.
- 5.11. Did the Respondent harass the Claimant by engaging in unwanted conduct due to his disability, which had the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and/or offensive environment for the Claimant?
- 5.12. Is the Claimant entitled to injury to feelings?

6. The Claimant confirmed that he was not pursuing claims in relation to breach of Working Time Regulations 1998 and failure to pay holiday pay.

7. The Tribunal heard evidence from the Claimant. There was a Bundle of Documents.

### **Findings of Fact**

8. The Claimant entered into an employment contract with "The Government of the State of Kuwait, in London represented by the Head of Mission" for employment at the Embassy of Kuwait in London as a cook from 1 June 2008, Bundle, page B1. On 15 May 2008 the Embassy of the State of Kuwait wrote to the Visa Officer at the British High Commission in Dhaka, informing it that the Claimant was employed as a cook in the Embassy of the State of Kuwait in London and asking the British High Commission to issue the Claimant with a visa, Bundle page B4. On 16 June 2008 the Embassy of the State of Kuwait wrote to the Bangladeshi Bureau of Manpower, informing it that the Embassy of the State of Kuwait in London had employed the Claimant as a cook in the Embassy Compound, Bundle page B6. On 28 May 2013 the Embassy of the State of Kuwait certified that the Claimant had been working and living, and continued to work and live, at the Embassy of the State of Kuwait, Bundle page B5.

9. Claimant's oral evidence about his medical history and capabilities at the Hearing on 28 February 2020, was very different from the evidence in his witness statement signed on 13 December 2019, and from the facts set out in his claim form and in his List of Issues. His evidence appeared to contradict the medical evidence he produced for his previous Employment and Support Allowance application, which was in the Tribunal bundle.

10. The Tribunal accepted the Claimant's evidence as set out in his witness statement and did not accept his oral evidence to the Tribunal. The witness statement was consistent with the facts set out in the claim form.

11. In the Claimant's witness statement, he told the Tribunal, and the Tribunal accepted, that he had been employed by the Embassy of the State of Kuwait as a cook from 1 June 2008. This was corroborated by his contract of employment and the correspondence from the Embassy of the State of Kuwait to various governmental agencies from 2008 – 2013.

12. In or around 2013 the Claimant's salary increased to around £1,500 per month.
13. While the Claimant was employed by the Respondent, his family and he lived in accommodation at Fairview House, Burnham Road, Beaconsfield, HP9 2SF ("the property"). The property is in a compound within the Kuwaiti Royal Family's residence.
14. In addition to carrying out his duties as a cook, the Claimant was required to undertake cleaning, washing, gatekeeping and kitchen help duties.
15. On 25 December 2014 the Claimant was working in the kitchen alone, from 7am to 1am, for Sheikh Hamed. He suffered a stroke.
16. The Claimant was off work for 3 months after the stroke. At the date of his witness statement, he continued to have limited movement on the right-hand side of his body. The Claimant had lost most of the feeling in his right hand and found it hard to grip, or do, anything with his right arm and hand. The Claimant continued to have reduced sight and hearing on his right-hand side. He walked with a limp and, after less than half an hour's walking, his foot started shaking. The Claimant found that he was very forgetful. He could not remember people's names, for example, including his wife's name.
17. After his return to work, the Respondent instructed the Claimant to return to light duties, cleaning, gatekeeping and feeding the animals.
18. The Claimant told the Tribunal that he could not cook, as he is right-handed and could not grip a knife. Further, he could not sense heat. Nevertheless, the Respondent put pressure on the Claimant to recommence cooking, which resulted in the Claimant burning himself on numerous occasions.
19. The Claimant further told the Tribunal that, despite having suffered the stroke, no adjustments were made for his disability and he was constantly put under pressure, by repeated telephone calls and texts, to do things which he was unable to do.
20. The Claimant told the Tribunal that he was dismissed in writing, by letters of 16 and 29 March 2016. He said that he was not given the opportunity to go to a meeting and that no procedure was followed. The Claimant said that the Respondent failed to consider reasonable adjustments.
21. The Claimant also told the Tribunal that he was intimidated into leaving the property, which he eventually did on 1 August 2016. He said that the Respondent had not helped him find other accommodation, but that the local authority had rehoused him.
22. The Claimant has been in receipt of full Housing Benefit, Employment Support Allowance and Personal Independence Payments.
23. In the Claimant's witness statement, he told the Tribunal that he has been unable to find another job as he is unemployable as a cook. The Claimant said that to obtain employment in a different occupation would be very difficult as cooking is what he knows best and his memory and concentration have been affected by his stroke.

He also said that he does not have full movement in the right-hand side of his body, which affects everything he does because he is right handed.

24. The Claimant presented his claim on 28 September 2016.

25. In his claim form, he said that he was unemployable as a cook and that it would be very difficult for him to find alternative employment because of his right-hand side disability.

26. The Claimant's witness statement did not say that the Claimant's symptoms had changed between 2016 and the date he signed his witness statement.

27. The Claimant's GPs prepared medical reports on 17 February 2017, page F77, and 15 May 2017, page F74.

28. On 17 February 2017, Dr R Calver said that the Claimant was unable to transfer objects because of the limited movement in his right hand, his speech impairment made it difficult to convey messages to strangers, he found it difficult to navigate around familiar surroundings without being accompanied and he found it difficult to learn new tasks. She said, "Because of the effects of the CVA .. Mr Uddin would find it very difficult to maintain a job..".

29. On 15 May 2017 Dr Fletcher said that the Claimant's speech was very slow and that the Claimant often dropped things and did not feel safe holding onto things with his right hand. Dr Fletcher said, "I find it very difficult to think of a job that he could reliably and safely do in paid employment."

30. On 18 May 2017 the Social Entitlement Chamber granted the Claimant Employment and Support Allowance "ESA" with the work-related activity component. In doing so, it found that, amongst other things, the Claimant could not pick up an empty cardboard box, page F256.

31. The Claimant has not worked since his dismissal, nor has he looked for work.

## Relevant Law

### Disability

32. One of the protected characteristics under the *Equality Act 2010* is disability, s4 *EqA 2010*.

33. By s6 *Equality Act 2010*, a person (P) has a disability if -

33.1.P has a physical or mental impairment, and

33.2.The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

34. The burden of proof is on the Claimant to show that he or she satisfies this definition.

35. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to

be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

36. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.
37. *Goodwin v Post Office* [1999] ICR 302 established that the words of the s1 DDA 1995, which reflect the words of s6 EqA, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

- 37.1. Did the Claimant have a mental or physical impairment (the impairment condition)?
- 37.2. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)
- 37.3. Was the adverse effect substantial? (the substantial condition)
- 37.4. Was the adverse effect long term? (the long term condition).

#### *Adverse Effect on Normal Day to Day Activities*

38. Section D of the 2011 Guidance gives guidance on adverse effects on normal day to day activities.
39. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food..., travelling by various forms of transport.
40. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.
41. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. In *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

#### *Substantial*

42. A substantial effect is one which is more than minor or trivial, s 212(1) EqA 2010. Section B of the Guidance addresses “substantial” adverse effect.

#### *Long Term*

43. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.
44. “Likely” means, “could well happen”, *Guidance* para C3.

## Discrimination and Harassment

45. By s39(2)(b)(c)&(d) EqA 2010, an employer must not discriminate against an employee in the way the employer affords the employee access, or by not affording the employee access for receiving any benefit, facility or service, or by dismissing him or subjecting him to any other detriment
46. By s40(1)(a) EqA 2010 an employer (A) must not, in relation to employment by A harass a person (B) who is an employee of A's.
47. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

## Harassment

48. s26 Eq A 2010 provides

“(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

49. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT said that, in determining whether any “unwanted conduct” had the proscribed effect, a Tribunal applies both a subjective and an objective test. The Tribunal must first consider if the employee has actually felt, or perceived, his dignity to have been violated or an adverse environment to have been created. If this has been established, the Tribunal should go on to consider if it was reasonable for the employee to have perceived this. In approaching this issue, it is important to have regard to all the relevant circumstances, including the context of the conduct. A relevant question may be whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence: the same remark may have a different

weight if evidently innocently intended, than if evidently intended to hurt (paragraph [15]).

50. The EAT also commented that “Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics), “.. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase”. paragraph [22].

### **Discrimination Arising from Disability**

51. s 15 EqA 2010 provides: “(1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

52. Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

53. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

53.1.1. What was the cause of the treatment complained of (“because of something” – what was the “something”?)

53.1.2. Did that something arise in consequence of the disability?

54. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

### **Reasonable Adjustments**

55. By s39(5) EqA 2010 a duty to make adjustments applies to an employer. By s21 EqA a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

56. s20(3) EqA 2010 provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.



### **Reasonableness of Adjustments**

57. The test of 'reasonableness', imports an objective standard. Per Maurice Kay LJ in *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] ICR 524, *Collins v Royal National Theatre Board Ltd* 2004 EWCA Civ 144, 2004 IRLR 395 per Sedley LJ para 20.
58. The *Equality Act 2010* does not specify any particular factors which are to be taken into account in deciding whether an adjustment is reasonable. The *Code of Practice on Employment 2011* provides examples of some of the factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;
- 58.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;
  - 58.2. The practicability of the step;
  - 58.3. The financial and other costs of the step and the extent of any disruption caused;
  - 58.4. The extent of the employer's financial and other resources;
  - 58.5. The availability to the employer of financial and other assistance;
  - 58.6. The type and size of the employer.

### **Burden of Proof – Reasonable Adjustments**

59. In *Project Management Institute v Latif* [2007] IRLR 579, the EAT decided that, to shift the burden of proof to the Respondent in a reasonable adjustments claim, the Claimant must therefore show evidence from which it could be concluded that there was an arrangement causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the Claimant does this, the burden shifts.
60. Once the burden has shifted, the Claimant's claim will succeed unless the Respondent shows that it did not breach the duty.

### **Injury to Feelings**

61. The Tribunal is guided by principles set out in *Prison Service v Johnson* [1997] IRLR 162 in relation to assessing injury to feeling awards. Awards for injury to feelings are compensatory, they should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that if it seen to be wrong.
62. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power. It is helpful to consider the band into which the injury falls, see *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. In *Vento* the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race

or sex. The middle band should be use for serious cases which do not merit an award in the highest band the lower band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

63. In *Vento* the Court of Appeal identified 3 bands for compensation for injury to feelings, “ 1. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.2. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band. 3. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.”
64. The EAT increased the *Vento* bands for injury to feelings to allow for inflation in *Da’Bell v NSPCC* [2010] IRLR 19. *Da’Bell* was heard at the end of 2009. From then, the lower band was £500 to £6,000 the middle band was £6,000 to £18,000 and the upper band was £18,000 to £30,000.
65. In *Simmons v Castle* [2012] EWCA Civ 1039 *Simmons v Castle* [2012] EWCA Civ 1288, the Court of Appeal ruled as follows; “Accordingly, we take this opportunity to declare that, with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress, or (vi) loss of society of relatives, will be 10% higher than previously, unless the claimant falls within section 44(6) of LASPO. Injury to feelings awards were also to be increased in accordance with the +10% principle.
66. *Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following Da Vinci Construction (UK) Limited* [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the *Vento* Bands and said that, when awards are made by Tribunals, the *Vento* bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of *Simmons v Castle* [2012] EWCA Civ 1039 *Simmons v Castle* [2012] EWCA Civ 1288.
67. The *Joint Presidential Guidance* concluded as follows, “...as at 4 September 2017, that produces a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,000 (cases that did not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000. ... the Employment Tribunal retains its discretion as to which band applies and where in the band the appropriate award should fall.

## Discussion and Decision

68. The Tribunal found that the Respondent was the Claimant’s employer. This was evidenced by the contractual documents and the correspondence from the Respondent to various government agencies.

69. The Respondent is an emanation of a State and might have the benefit of state immunity under the *State Immunity Act 1978*. However, following *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2018] IRLR 123, [2017] ICR 1327, Tribunals have jurisdiction to hear complaints against foreign states based EU law, if the employment relationship is of a purely private law character. Tribunals do not have jurisdiction to hear complaints based on UK national law only.
70. The Tribunal therefore has jurisdiction to hear the Claimant's discrimination/harassment claims.

### **Disability**

71. The Claimant suffered a stroke on 25 December 2014. Since then, he has had restricted movement on the right hand side of his body. He has lost the feeling in his right hand and arm and finds it hard to grip anything with his right, dominant hand. He walks with a limp. The Claimant has difficulty concentrating and retaining information; he finds that he is forgetful and forgets names, including his wife's name.
72. It appears that these adverse effects are permanent.
73. There is no doubt that the Claimant has had physical and mental impairments since 25 December 2014 and that these have had "more than minor" adverse effects on his ability to carry out normal day to day activities, such as lifting and gripping anything with his right hand. The effects on his memory and concentration, which include forgetting familiar matters such as the Claimant's wife's name, are clearly substantial. The effects had lasted more than a year by the time of the Claimant's dismissal.
74. The Claimant returned to work about 3 months after his stroke. There was no indication that the condition was expected to improve significantly after his return to work.
75. The Tribunal concluded that the Claimant was a disabled person when he returned to work after his stroke. He already had impairments which had substantial adverse effects on his ability to carry out normal day to day activities and it was likely, in the sense that it "could well happen" that these would continue for more than 12 months.
76. The Claimant was disabled throughout the relevant period.

### **Disability Harassment/Discrimination Arising from Disability: Pre-dismissal actions**

77. The Tribunal accepted the Claimant's evidence that the Respondent repeatedly required him to undertake activities which he was not capable of doing, despite being aware of his disability and his limitations in this regard.

78. The Tribunal accepted that the Claimant was required to cook when he could not and that this led him to burning himself repeatedly. He felt under pressure by the constant request to do things he could not do.

79. It decided that the requirement to undertake cooking duties and other duties the Claimant was not capable of was unwanted conduct and that the conduct was related to the Claimant's disability in that the Respondent instructed the Claimant to resume activities which he had been unable to perform because of disability. The Respondent was clearly aware of the disability and its effects – the Claimant had been off work for 3 months because of the stroke and initially returned to light duties because of his resulting impairments. Nevertheless, the Respondent instructed the Claimant to undertake duties which it must have known were difficult, or impossible, for the Claimant; the emergency services were called on a number of occasions due to the Claimant repeatedly injuring himself.

80. The Respondent also dismissed the Claimant without any hearing. This was unwanted by the Claimant and related to his disability. Failing to have a hearing treated the Claimant with disrespect and added to the humiliating environment.

81. The conduct in requiring the Claimant to undertake duties lasted for about a year. It resulted in the Claimant burning himself repeatedly. This plainly created a degrading environment for the Claimant. The Respondent harassed the Claimant during this period.

82. Alternatively, the Respondent's conduct in requiring the Claimant to carry out duties he was incapable of performing and in dismissing him without a hearing was unfavourable treatment because of something arising in consequence of disability. The "something arising in consequence" of disability was the Claimant's inability to carry out his tasks. There was no justification for requiring him to carry out tasks which exposed him to a risk of injury and for failing to allow the Claimant the courtesy of a meeting before dismissing him.

### **Failure to Make Reasonable Adjustments and Dismissal**

83. It was clear from the facts that the Respondent dismissed the Claimant because of something arising from his disability – the fact that he could no longer undertake the duties for which he had been employed.

84. It appears that the Respondent had offered the Claimant some alternative duties when he first returned to work.

85. The Claimant contended that the Respondent failed to make reasonable adjustments for him. Nevertheless, on the Claimant's own evidence, he was unable to undertake cooking duties and it was, at all times, very difficult for him to undertake any alternative employment.

86. The Tribunal rejected the evidence the Claimant gave the Tribunal at the Hearing that he was fit to undertake other work like feeding animals, gatekeeping and kitchen work, whether with assistance or not.

87. The ET found that, at the date of dismissal, the Claimant could not undertake his chef duties, nor could he undertake other work. The Claimant said in his witness statement, his claim form and his list of issues, that he could not do his previous duties and that it was extremely difficult for him to do any other work. His previous duties had included work around the estate, outside his kitchen duties. The Claimant's GPs prepared medical reports in 2017, one stating that it would be very difficult for the Claimant to maintain a job; the other saying that he could not think of a job which the Claimant could reliably and safely do in paid employment.

88. The Claimant has not shown that there were reasonable adjustments which the Respondent could have made to remove the disadvantage of being required to carry out his chef duties when he could not undertake them. The burden of proof does not shift to the Respondent to show that it did not fail to make reasonable adjustments.

89. Furthermore, on those facts, it was an inescapable conclusion that it was a proportionate means of achieving a legitimate aim for the Respondent to dismiss the Claimant when he was unable to work in his own job and there was no alternative work which he could carry out. As the Respondent was entitled to dismiss the Claimant, the Claimant did not have the right to continue to live in the Embassy compound and the Respondent did not subject the Claimant to unlawful treatment by ending his tenancy after dismissal.

90. The Claimant therefore succeeded in his disability harassment claim/discrimination arising from disability claims, in relation to the requirement to carry out work he could not do and the failure to provide him with a hearing before dismissing him. He did not succeed in his claims for failure to make reasonable adjustments and discrimination arising from disability in relation to the dismissal itself.

## Remedy

91. The pre-dismissal harassment/discrimination lasted for about a year. The Tribunal concluded that the harassment was serious in that it involved repeatedly requiring the Claimant to undertake tasks which were impossible for him, which was inevitably humiliating and distressing, and it involved exposing the Claimant to physical injury. The Tribunal accepted the Claimant's evidence that he felt stressed and depressed by the constant pressure to undertake tasks which he was unable to undertake. The Tribunal accepted that the Claimant being dismissed without a hearing added to the Claimant's feelings of indignation and injury.

92. The Tribunal considered that the relevant injury to feelings award came within the middle band of *Vento*. The harassment/discrimination was serious and sustained. The Respondent's acts in this case occurred in 2015-2016, after *Simmons v Castle*. The Tribunal awarded the Claimant £15,000 for injury to feelings, in the upper part of the middle band of *Vento*.

## Aggravated Damages

93. Aggravated damages are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT).

94. The award must still be compensatory and not punitive in nature, *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT. In that case, a whistleblowing case, compensation was assessed on the same basis as awards in discrimination cases). The EAT said that the circumstances attracting an award of aggravated damages fall into three categories: (a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase “high-handed, malicious, insulting or oppressive” is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress (b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a). (c) Subsequent conduct.

95. In *HM Land Registry v McGlue* UKEAT/0435/11, [2013] EqLR 701, EAT. The EAT said that aggravated damages 'have a proper place and role to fill', but that a tribunal should also 'be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”’. Such damages are not intended to be punitive in nature.

96. The Tribunal decided that an award of aggravated damages was also warranted in this case. The Claimant burned himself on a number of occasions, resulting in the emergency services being called. On the evidence, however, he was still required to carry out these tasks. The Respondent's conduct was highhanded and oppressive. The Tribunal is mindful that it should not award aggravated damages in respect of the conduct for which it has already compensated the Claimant. It makes an additional award of aggravated damages of £3,000, to reflect the fact that the Respondent persisted in requiring the Claimant to do tasks which presented a serious risk to his health, when it must have known that he could injure himself.

97. The Tribunal therefore awarded the Claimant £18,000 for injury to feelings, including aggravated damages.

98. It also awarded the Claimant interest at 8% from 10 June 2016. There were 1357 days between 10 June 2016 and 28 February 2020. The calculation of interest was  $£18,000 \times 1357/365 \times 0.08 = £5,353.64$ .

99. The Tribunal ordered the Respondent to pay the Claimant £23,353.64 in compensation for injury to feelings.

100. The Tribunal did not make a separate personal injury award for depression and anxiety. There was no medical evidence justifying a separate award for depression or anxiety.

101. There was no economic loss pre-dismissal, so no award for economic loss was appropriate.

**Costs**

102. The Claimant made an application for costs. He had not put the Respondent on notice that he would seek costs. The Tribunal said that the application should be made in writing, copied to the Respondent.

Employment Judge Brown

Dated:3<sup>rd</sup> March 2020

Judgment and Reasons sent to the parties on:

06/03/2020

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For the Tribunal Office