THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**
MS S DENGATE
MS M FOSTER-NORMAN

BETWEEN:

Ms K COULTON **Claimant**

AND

BEWBUSH COMMUNITY NURSERY

Respondent

ON: **13 February 2020**
And 4 March 2020 in Chambers

Appearances:

For the Claimant: **Dr Coulton (Claimant's father)**

For the Respondent: **Ms G Crew (Counsel)**

REMEDY JUDGMENT

1. Following the Judgment dated 11 July 2018 the claimant is awarded total damages of £39,906.28 under the following heads of damage/adjustments.

Loss of Earnings (including 25% ACAS uplift)	£10,776.25
Injury to Feelings and Aggravated Damages (including 25% ACAS uplift)	£22,500
Interest	£6,630.53
Total	**£39,906.78**

2. The Claimant's claim for personal injury is not upheld.

REASONS

The Hearing

3. At the hearing on 13 February we were provided with an additional bundle of documents and two witness statements; one for the claimant and one for her mother. Both were present and gave evidence though the Mrs Coulton's evidence was not challenged by the respondent.

4. The respondent witnesses were in attendance but did not give evidence and it was agreed that they would remain in the respondent's waiting room due to the anxiety their presence caused the claimant.

5. As the parties did not finish their submissions until after 4pm on 13 February, the tribunal reconvened in chambers to make its decision.

Background and additional factual findings

6. In our Judgment dated 11 July 2018 we upheld the majority of the claimant's claims and found that the claimant had been subjected to disability related harassment and a failure to make reasonable adjustments.

7. We found that as a result of one of the failures to make reasonable adjustments the claimant received a written warning on her record and resigned as a response to that. Subsequently a role that the claimant had thought she had secured was withdrawn because the written warning was referred to in the reference provided to the future employer.

8. We find that this situation caused the claimant significant loss of earnings. Had that reference been 'clean' and the claimant been allowed to simply move on, we believe it is unlikely that this claim would have been brought at all or that the claimant would have suffered any loss.

9. It was not shown at the original hearing nor as part of the remedy hearing that the respondent could have dismissed the claimant fairly for gross misconduct. Whilst we accept that we found that the investigation was reasonable, it does not necessarily follow that a dismissal would have followed and/or that any such dismissal would have been fair or non-discriminatory. No process had been commenced at the date of termination and the claimant has not been given an opportunity to defend herself against any allegations. We therefore cannot extrapolate from an investigation that dismissal would necessarily have followed nor that the dismissal would have been fair. We conclude that the respondent has not shown that they were more likely than not to have fairly dismissed the claimant after running a fair disciplinary process.

10. Turning to the claimant's attempts to mitigate her losses. It is clear that the claimant did try to mitigate her losses. This occurred in two phases.

11. The first period was immediately after her employment was terminated (March - June 2017). The claimant applied to be on the books for two agencies and separately applied directly for 3 jobs.

12. The first two have been dealt with in our original judgment but for completeness we set out our findings in relation to them here. The first, to Banana Moon would have been successful were it not for the respondent's discrimination which led to the claimant having a written warning on her record about her absence levels. The respondent has said that since giving this reference they have removed the written warning from her record and therefore her references.

13. The second application was made to Daisy Chain. The job offer from them was withdrawn because of the factual only reference provided by the respondent. They provided a factual only reference at the time because they had referred the claimant to the DBS following the escape of a child. We found that the decision to provide this factual only reference was not an act of victimisation as it was caused by the DBS referral as opposed to the claimant's assertion that she might proceed to a tribunal hearing. We therefore do not award any losses that occurred as a result of this because we have not upheld the claimant's claim in this regard.

14. The third direct application was to Rabbit Patch where the claimant was interviewed twice but failed to secure an appointment. No explanation was provided for this but the claimant asserts that the respondent must have given her some form of negative reference.

15. The two agencies whose books she tried to get onto either refused to continue trying to place her because of the references (Tinies) or said that they could not place her. Again, the claimant believes this is because word must have got round about her reference and leaving the respondent. She believes that the respondent is responsible for the situation and will have given oral references about her.

16. We conclude that the claimant did make several attempts to apply for both nurseries and nursery agencies immediately after leaving the respondent. We appreciate that it is for the claimant to prove her losses and her attempts at mitigation. Whilst this may not have been a large number of applications we accept the claimant's evidence that there are only 2 childcare agencies in her immediate vicinity and that she applied for both with no subsequent success at obtaining employment.

17. We also accept the claimant's evidence that it was a relatively small community and that once she had applied to these nurseries and agencies, the number of people she could apply to diminished significantly.

18. Further we do not accept the respondent's submissions that she would definitely have had a clean reference once the DBS had lifted all concerns. There was evidence at p474 of the original bundle that they were still referring to the claimant as having a written warning on her record. Whilst this mention of her written warning was on the DBS referral itself, we think it is more likely than not that this warning was referred to in any written or oral references provided about the claimant at that time. The mention is under a box asking about whether there have been any previous disciplinary or other issues warranting disciplinary action. Had the respondent indeed removed the written warning from the claimant's file or record as they said to the claimant after her resignation, we do not believe that it would have been referred to in the DBS referral were that the case.

19. Respondent's counsel said that she had been instructed that they have received no reference requests for the claimant since the Daisy Chain reference. We find that hard to believe on the basis that we accept the claimant's submissions that it is more likely than not that, at the very least, telephone references have been sought because the respondent was put as the claimant's last employer. Given that the claimant was trying to work in childcare where the safeguarding and industry norms require the last employer to provide a reference it is very likely that references would have been sought about the claimant particularly where she has been interviewed.

20. As a whole, this situation therefore then gave rise to the claimant concluding that there was little point in continuing to try to find work in childcare in that area as she was very unlikely to find work. We find that this was a legitimate conclusion to reach. This was further reinforced by the claimant's lack of confidence caused by the discrimination she had suffered. The claimant is an individual with learning difficulties and diagnosed with anxiety and OCD. She was in a position where she felt she had to resign from her role with the respondent because of discriminatory treatment around her sickness absence process and was distressed about this. It is therefore reasonable that her confidence was severely knocked firstly by the discrimination and subsequently by the failure to obtain work in her chosen field of work after 5 attempts. We

also find that it was reasonable for her not to look too much further afield because of her various medical diagnoses.

21. We also find that it is more likely than not that the respondent was being negative about her in oral references subsequent to the dismissal thus contributing to her inability to find work.

22. The second period of time during which the claimant has suffered losses was from June 2017 until June 2018. For that period of time the claimant found casual work in restaurants and pubs on zero hour contracts. We find that the employment she did secure was reasonable for her to accept given her skills and health. We therefore find that is reasonable that the respondent is responsible for her losses until June 2018. She was mitigating her losses to a large extent.

23. During this period she also attempted to retrain so that she could find more stable employment which shows further determination to mitigate her losses. She undertook a dog grooming course which we find, in all the circumstances was a reasonable step to take given her previously unsuccessful attempts to find work in childcare.

24. On concluding that course she decided that she would still prefer to work with children despite her dog grooming qualification. She then attempted to apply for several other childcare jobs in June 2018. None of the applications were successful despite 2 going to interview. As stated above it is not clear what references have been provided by the respondent. However, the fact that in June 2017 the respondent, despite very clear evidence from its witnesses that they had removed it from her record, does refer to the written warning around her sickness absence, we find it likely that any references, whether orally or in writing, from the respondent to date have been in some way negative about the claimant.

25. At around the same time the claimant did however secure the role that she is in now. This is a role as a playworker in a wraparound childcare school club. We find that it was reasonable for her to accept this job even though it is paid less than her salary was with the respondent. The role involves working with children again, it suits her skills and qualifications and, although it is only part time, it is a way for her to get back into working in the industry she has trained for.

26. It is also clear from her evidence to us that it is her choice to remain working for this employer because she feels appreciated and respected and supported. We are pleased that is the case. We find however that it is her choice not to move on and find a more lucrative position and therefore it should not be for the respondent to compensate her on an ongoing basis.

27. We find it reasonable that she would remain in such a role for a short period within her chosen industry to restore her confidence and enable her to be sure that she has a reliable referee before moving on. We therefore consider that it is reasonable to compensate her for the difference between her current earnings and what she would have earned for the respondent for a further period of 6 months, up to the end of 2018.

28. We find that the respondent's behaviour did have an impact on the claimant's health and wellbeing. We have carefully considered the evidence provided by the claimant and her mother as to the impact of the respondent's discriminatory behaviour. Unfortunately, much of their evidence focuses on the impact of the investigation into the child running away and the subsequent referral to DBS – none of which we found to be discriminatory and therefore cannot factor into our decisions about what award should be made to the claimant.

29. However we are satisfied that the decision not to allow her to be accompanied at the disciplinary meeting and then the subsequent decision to provide her with a bad reference which resulted in her job offer being withdrawn did have a significant impact on her health as did the disability-related harassment that we found in our original judgment.

30. We found that although her medication was not increased by the GP, she was referred for counselling. We also considered the aspects that were not challenged by the respondent in her mother's witness statement including that the claimant lost a lot of weight at this time, her eating disorder returned, her confidence was reduced and she asks questions repeatedly and often struggles to sleep well at night with her mother having to sleep with her for reassurance and comfort. Combined these issues amount to a significant impact on her health and well being.

The law

31. S124 Equality Act 2010 states that the claimant is entitled to an award of compensation. The claimant should be put, so far as is reasonable in the position as of the discrimination had not occurred rather than simply what is just and equitable.

32. S119(4) Equality Act 2010 states that the tribunal may include compensation for injured feelings whether or not it includes compensation on any other basis.

33. The case of Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102, set guidelines for the amount of compensation to be given for injured feelings and set out three bands of potential awards:
    (i) The lower band: "appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence".
    (ii) The middle band: "serious cases, which do not merit an award in the highest band".

(iii) The top band: "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 for injury to feelings exceed the top of this band.

The tribunal should focus on the effect the respondent's conduct had on the particular claimant (Base Childrenswear Ltd v Otshudi UKEAT/0267/18).

34. The Vento guidelines and brackets have since been updated by the Court of Appeal in the cases of Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR and in Pereira de Souza v Vinci Construction UK Ltd UKEAT/0328/14. The subsequent Presidential Guidance reflects the updates made by those cases and we have referred to that in reaching our conclusions regarding the level of injury to feelings awarded to the claimant today.

35. The tribunal has the power to award aggravated damages were a respondent has behaved in a high handed, malicious, insulting or oppressive way" as per Commissioner of Police of the Metropolis v Shaw [UKEAT 01215/11/ZT.] and Broome v Cassell & Co Ltd [1972] AC 1027). When considering whether to make an award for aggravated damages the tribunal ought not to focus on the respondent's conduct and motive but on any aggravating effect on the claimant's injury to feelings (Rookes v Barnard [1964] AC 1129).

36. There must also be a causal link between the aggravating act complained of and the injury or loss suffered by the claimant. The tribunal may order aggravated damages even if the aggravating action is not in itself discriminatory.

37. In Zaiwalla & Co and another v Walia UKEAT/451/00 and UKEAT/827/00, the EAT held that there was no reason in law why aggravated damages should not be awarded by reference to conduct in the defence of proceedings in a discrimination claim.

38. This was confirmed in Bungay and another v Saini and others UKEAT/0331/10. There, the EAT noted that the nature of the post-dismissal conduct was sufficiently serious as to to attract an award of aggravated damages and that it had been causally connected to the discriminatory behaviour that formed the basis of the tribunal claim.

39. In Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481, the Court of Appeal confirmed that damages for personal injury can be claimed as part of discriminatory compensation.

40. We have reminded ourselves that Tribunals must be careful when assessing general damages for personal injury to ensure that the claimant is not awarded the same loss twice, with an award for injury to feelings award and a personal injury award.

41. It is normally the case that a tribunal is provided with a medical report addressing causation of the alleged injury though not essential. Hampshire County Council v Wyatt UKEAT/0013/16.

42. S207A TULRC(A) 1992 provides that an award of compensation can be increased or reduced by up to 25% where the respondent has failed to comply with the ACAS Code.

43. Interest in discrimination awards is set down in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803). The tribunal ought to calculate it in accordance with *R*egulation 2(2)*.*

44. For injury to feelings awards, interest runs from the date of the discriminatory act to the date of calculation (Regulation 6(1)(a)). For a discriminatory series of acts, interest will generally run from the date of the first act.

45. For other awards, including past financial losses, the interest runs from the "mid-point" date to the date of calculation *(*regulation 6(1)(b)*)*. The mid-point is calculated as the date halfway between the discriminatory act and ending on the calculation date.

46. Interest accrues from day to day, and is simple rather than compound (Reg 3*).*

47. The tribunal may refuse to award interest, or may apply a different calculation, if it believes that serious injustice would otherwise result.

Conclusions and Calculations

48. The respondent and the claimant agreed on the claimant's weekly wage for the respondent and both used the same figures in their calculations.

49. Given our factual conclusions above as to the claimant's attempts to mitigate her losses and the fact that we find the losses until December 2018 were caused by the respondent's discrimination, we award the claimant her entire loss of earnings for the period from the termination of her employment until 31 December 2018. We do not find it is appropriate to compensate her beyond this date as we do not believe that she has demonstrated that any losses beyond this date are attributable to the respondent. We find that she is choosing to remain in a lower paid role because she enjoys her job not because it would be difficult to obtain alternative, higher paid work in her chosen field of childcare.

50. At the hearing respondent's counsel agreed with the claimant's calculations as set out in her Schedule of Loss but did not agree that the respondent had caused them. We have therefore used the claimant's schedule of loss this amounts to £8,112 for loss of earnings to 31 December 2018.

51. We also find that it is reasonable to compensate the claimant for the costs she incurred on the dog grooming course which was £509 as we concluded that it

was reasonable for her to attempt to explore an alternative career in a situation where she could not find work in her chosen career at that time.

52. Both parties agreed that the appropriate bracket for the injury to feelings award was the middle Vento bracket. Taking into account the Presidential Guidance and the increased brackets for the relevant period (2017) this bracket was between £8,400 – £25,200. The claimant submitted that she was entitled to £20,000, the respondent submitted that although they accepted the middle bracket was the correct bracket, it should be towards the lower end of the bracket.

53. We conclude that the impact that the discrimination had on the claimant was considerable as per the evidence she and her mother gave to the tribunal. We have been very careful not to attribute the injury she suffered as a result of the DBS referral or the investigation to the respondent given our findings. Nevertheless, we find that the discrimination we have found did have a significant negative impact on the claimant resulting in her confidence being severely affected, her sleeping and eating being affected and the impact overall being serious. However, she did manage to continue working in alternative fields (which she should be applauded for), and her medication was not increased by her GP as a result of the situation. We therefore award the figure of £16,000 in injury to feelings as we consider that this reflects the level of harm caused by the respondent's discriminatory behaviour without attributing to them any injury to feelings caused by the DBS referral.

54. We make a further award of £2,000 as aggravated damages. This award reflects the following two issues which have come to light during the course of this litigation which we find to be capable of high handed and/or insulting as set out in Commissioner of Police of the Metropolis v Shaw [UKEAT 01215/11/ZT.].

    (i) It appears, from the evidence we have been provided with, that the respondent has not removed the written warning from the claimant's record and continued to put it on the referral to the DBS despite writing to the claimant and stating that it was being removed from her record. It is not clear, because of this, whether it has been or is still being referred to if references are sought about the claimant. It certainly shows that the respondent has not done what it said it would do which casts significant doubt on what they are doing now and what they have told the tribunal about the references provided (or not) since the claimant's resignation. Whilst the inclusion of the written warning on the DBS referral occurred before the tribunal had found that the respondent had discriminated against the claimant, it nonetheless occurred after they realised that they had not followed their own internal procedures in giving the claimant a written warning in the first place and had written to the claimant saying that it had been removed. We believe that this demonstrates them being high-handed and shows that they did not take the claimant's concerns about the written warning seriously and that they failed to correct action which we have subsequently found to be discriminatory and is directly

linked to the claimant's original claim regarding a failure to make reasonable adjustments.

(ii) The failure to disclose the document from the claimant's personnel file (that was the basis for the claimant's review application in March 2019) was a significant issue in respect of the very important question around whether the respondent knew about the claimant's disability. In our Review Judgment we did not find that the failure to disclose the document was deliberate. However we did find that two of the respondent's witnesses' evidence to the tribunal about their knowledge regarding the claimant's health had been at best misleading by omission once we knew about the existence of this document. Their insistence before the tribunal, despite the existence of this document, that they did not know about the claimant's health was upsetting to the claimant who maintained throughout that she had told Ms Worsfold about her conditions does appear to be high handed of the type that can justify aggravated damages.

55. We are careful however not to duplicate the claimant's award for injury to feelings and are aware that this is not a punitive award. We find that this behaviour by the respondent in continuing to assert that they knew nothing about the claimant's health despite evidence directly to the contrary and continued to refer to a written warning that they knew was incorrectly on her record, have no doubt exacerbated the injury to the claimant's health particularly given her existing conditions of anxiety and OCD. There is a causal link between these issues and her injury to feelings.

Personal Injury

56. We have not awarded the claimant any damages in respect of a personal injury claim. We conclude that the claimant has not provided evidence that her injury goes beyond that which we have awarded for her injury to feelings award above. We consider that the claimant was obliged to something additional to the injury already compensated for above to warrant a further award for personal injury. However the claimant provided no medical evidence about any such injury. The only evidence provided was by her and her mother and her GP note around the time of her resignation . Whilst this is compelling in respect of the injury to feelings award, personal injury claims do normally require additional evidence and preferably medical evidence to deal with exactly what injury has been suffered and the causation of that injury.

57. In a complicated situation such as this, where the claimant has existing conditions and medical needs, and has ascribed her deterioration in health to several factors (including ones that we have found to be non-discriminatory behaviour by the respondent), we are not in a position to be able to assess and award separate, additional damages under this separate and additional head of claim. We consider that the award made for injury to feelings and aggravated damages adequately compensates the claimant for the impact that the discrimination had on her as evidenced before us at the remedy hearing.

58. Even if we are wrong in that conclusion we note that the claimant had not until today, sought to advance a claim for personal injury. At all previous hearings the claimant had not mentioned or evidenced personal injury as an additional head of claim. Therefore to bring such a claim the claimant is in effect applying to amend her claim at this late stage.

59. No application to amend was sought by the claimant's representative. We have born in mind that the claimant is represented by her father, a lay representative, and he explained that they had included this head of damage after receiving expert advice from a barrister on their schedule of loss. We have therefore treated the late inclusion of this head of damage as an application to amend.

60. However the amendment was not applied for until the hearing today over 2.5 years after the claim was first presented and a year after the first remedy hearing was listed (it subsequently became a review hearing). In considering an application to amend we must consider whether it is in the interests of justice to allow it and weigh the relevant prejudices to the parties. We believe that to allow such an amendment at this late stage is prejudicial to the respondent who was not in a position to be able to defend this claim at this late stage beyond addressing the Dr Coulton's submissions as they were given. They were not, for example, in a position to request or provide any medical evidence to counter any evidence provided by the claimant and her mother in respect of any injuries suffered.

61. In the event, as per our conclusions in paragraphs 46 and 47 above, insufficient evidence was provided in any event to allow us to make such a determination. However that does not change the fact that the respondent was not in a position to properly defend any such claim because of the lateness of its inclusion by the claimant. For those reasons we refuse what we have deemed to be an application to amend the claimant's claim to include a claim for personal injury.

ACAS Uplift

62. We found that the respondent failed to follow the ACAS process in respect of two meetings which ultimately led to the claimant resigning. This failure occurred despite the respondent having in place procedures which did comply with the ACAS process that they chose not to follow. The failure was complete in that the claimant was not written to to be invited to the meeting, she was not told of the purpose of the meeting, she was not entitled to be accompanied at the meeting and she was not given the right to appeal. She did appeal and they repeated the same pattern for the appeal hearing. We therefore consider that the uplift should be the maximum of 25%.

63. We have uplifted both parts of the award separately because the interest awarded on these figures must be dealt with separately.
    The uplift to the injury to feelings and aggravated damages = £18000 +25% = £22,500.
    The uplift to the loss of earnings = £8,621 + 25% = £10,776.25.

Interest

64. The earliest date of discrimination that we found to have occurred is 16 March 2017. This was the date of the first meeting with the claimant on her return from a period of sickness absence where a written warning was given to her. We calculate interest at 8% on the amount of injury to feelings and aggravated damages that we apply the 8% from 16 March 2017 which is when the first incident of discrimination that we upheld occurred.

65. We have considered whether interest ought to be awarded in respect of a shorter period of time than that set out in Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The period of time for which interest is awarded can be changed if the normal approach would cause serious injustice. We do not consider that this threshold is satisfied here. We have considered the fact that this matter has been ongoing for a considerable period of time. The delays in the case have often not been of either parties' making and to a large extent due to administrative issues. Delay has been caused by the claimant exercising her right of appeal against the various decisions reached by the tribunal but we do not consider that this represents serious injustice to the respondent or that this is an exceptional situation. We reach this conclusion not least because the review that occurred in 2019 was in part caused by their failure to disclose a document at the relevant time. We have therefore not reduced the period for which interest is to be awarded.

66. The number of days from the discrimination to today's date is 1085 or 2.97 years.
    2.97 x .8% x £22,500 = £5,346

67. The interest on the loss of earnings is calculated from the midpoint between the date of discrimination and the date this judgment was decided. That midpoint is 7 September 2018.

    543 days or 1.49 years.
    1.49 x 8% x 10,776.25 = £1,284.53

68. Total Award

Loss of Earnings	£10,776.25
Injury to Feelings	£22,500
Interest	£6,630.53
Total	**£39,906.78**

Employment Judge Webster

Date: 7 March 2020