EMPLOYMENT TRIBUNALS

Claimant: **Mr C. Meya**

Respondent: **Ladbrokes Betting and Gaming Limited**

Heard at: **East London Hearing Centre**

On: **12 March 2020**

Before: **Employment Judge Massarella**
Members: **Mrs G. Everett**
Mrs G. Bhatt

Representation
Claimant: In person
Respondent: Mr J. Wallace (Counsel)

French interpreter: Ms Birukova

REMEDY JUDGMENT

The judgment of the Tribunal on remedy is as follows.

1. **The Claimant is awarded £8,000 by way of compensation for injury to feelings in relation to his direct disability discrimination claim.**

2. **The Claimant is awarded £1,350.40 in interest on that sum at a rate of 8% from 2 February 2018 to 12 March 2020.**

3. **The Claimant is awarded £7,000 by way of compensation for injury to feelings in relation to the Respondent's failure to make reasonable adjustments.**

4. **The Claimant is awarded £1,327.20 in interest on that sum at a rate of 8% from 31 October 2017 to 12 March 2020.**

5. The Claimant is awarded £1,411.03 in respect of unauthorised deduction from his wages. This is a gross amount, which the Respondent must pay subject to any appropriate deductions for tax and national insurance.

REASONS

The Tribunal's judgment on liability

1. In a reserved liability judgment, sent to the parties on 2 January 2020, the Tribunal concluded:

    1.1. that it lacked jurisdiction to hear the Claimant's claim of unfair dismissal, which was dismissed;

    1.2. the Claimant's claim of direct disability discrimination succeeded in relation to a single incident of verbal abuse by his former colleague, Ms Camara, on 2 February 2018;

    1.3. the Claimant's claim of failure to make reasonable adjustments succeeded in relation to the Respondent's requirement that he work with old-fashioned slot machines at its City Road branch;

    1.4. the Claimant's claim of unlawful deduction from wages succeeded in relation to the period when the Respondent stopped paying him because he did not attend the second disciplinary investigation meeting;

    1.5. all the Claimant's other claims of disability, race and age discrimination were not well-founded and were dismissed.

2. The issues as to remedy were thus relatively narrow.

    2.1. What was the appropriate level of compensation for injury to feelings in relation to the two acts of discrimination?

    2.2. Did the Claimant suffer any financial loss as a result of those discriminatory acts?

    2.3. What interest on the compensation for discrimination was he entitled to?

    2.4. What was the amount of the unauthorised deduction from his wages?

The Hearing

3. In the last paragraph of the liability judgment, a remedy hearing was listed for 14 January 2020. The Respondent promptly applied for a postponement, because its Counsel at the liability hearing, Mr Rozycki, was unavailable on that date, and it did not wish to incur the additional cost of instructing a barrister unfamiliar with the proceedings. That was a reasonable request, and the matter was adjourned to the first date on which the Tribunal, the Claimant and Mr Rozycki were all available. The Respondent then instructed different Counsel

for the remedy hearing. While the Tribunal was grateful to Mr Wallace for his assistance, we were surprised that the Respondent's position had changed, without explanation, leading to an unnecessary delay.

4. The Claimant was again in person, supported by his wife. He gave evidence on his own behalf and was cross-examined by Mr Wallace. His English is good, but his first language is French, and he had asked for the help of an interpreter. At the liability hearing, the Tribunal had decided (in consultation with him) that it was preferable for all questions and answers to be translated, to ensure that he was able properly to follow the proceedings, and we maintained that approach at the remedies hearing. Although the Tribunal had booked an interpreter for the hearing, because of an administrative error by the agency, no interpreter was present on the morning of the hearing. We were grateful to Ms Birukova, who attended the Tribunal at very short notice. Unfortunately, that meant that there was a late start of the hearing; the Tribunal was able to use that time to read into the documents, and we sat late to deliberate.

5. The parties had prepared a remedy bundle, which ran to some 170 pages. Additional documents were disclosed late on both sides. The Tribunal considered them relevant to the issues and admitted them.

The law

Compensation for discrimination

6. Compensation for discrimination is assessed on tortious principles (ss.119(2) and 124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that he would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

7. In *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102 the Court of Appeal gave guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. 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.**
>
> **ii. 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.**
>
> **iii. 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. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

8. The bands have since been increased several times to reflect inflation, more recently by way of Presidential Guidance. The Claimant's case having been presented on 6 November 2018, the relevant Guidance[1] sets the bands as follows:

   8.1. lower band: £900 to £8600;

   8.2. middle band: £8,600 to 25,700;

   8.3. top band: £25,700 to £42,900.

9. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

10. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

11. A *Polkey*-type deduction should not be applied to an award for injury to feelings (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615). Awards for injury to feelings in relation to pre-termination acts of discrimination are not subject to income tax.

Interest

12. The Tribunal must consider whether to award interest on awards in discrimination claims, without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[2]

13. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[3] The interest rate now to be applied is 8%.

14. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

Unauthorised deduction from wages

[1] 'First Addendum to Presidential Guidance Originally Issued on 5 September 2017'
[2] SI 1006/2803
[3] SI 1996/2803

15. An award by a Tribunal that an employer pay unlawfully deducted wages will be calculated gross, and the employer will pay the sum (and deduct tax and national insurance on it) as he does wages under s.62 ITEPA 2003, or as a taxable benefit under Part 3, Chapters 2 to 11 ITEPA 2003. The EAT confirmed that this is the correct approach in *Walters t/a Rosewood v Barik*, UKEAT/0053/16/BA at [7-9] *per* HHJ Shanks:

> 'We are dealing here with non-payment of salary, which is taxable, perhaps, in different ways at different times, and the right Order is indeed a gross sum with a continuing obligation to deduct tax and account for it in accordance with whatever PAYE Regulations applied to the payment in question.'

Findings of fact and conclusions

The Claimant's claim for loss of earnings flowing from the unlawful discrimination

16. In the document the Claimant prepared for the remedy hearing, the Claimant claimed past and future loss of earnings.

17. In order to recover such losses, the Claimant must show that they were caused by the two specific acts of discrimination to which the Tribunal has found he was subjected: Ms Camara's treatment of him in January 2018; and the Respondent's failure to make reasonable adjustments to his work with the old-fashioned slot machines. The Claimant primarily seeks to make that causal link by reference to the incident with Ms Camara, and we will deal with his points in context below. The Respondent's position was that no financial loss flowed from either discriminatory act, and that compensation should be confined to a modest award for injury to feelings.

Direct disability discrimination: [on 2 February] 2018 Fatou Camara said to the Claimant that he was "dumb, useless and a sick man" and that she did not know why the company was employing the Claimant and saying, "look at you, you are a sick man.

Loss of earnings

18. Dealing first with the Claimant's claim that he suffered financial loss as a result of this incident, his evidence was that Ms Camara's verbal abuse on 2 February 2018 so profoundly affected his self-esteem that it caused him to perform badly at job interviews; it had effectively prevented him from finding alternative work. He further stated that, as a result of this incident, he had suffered from depression, which also affected his confidence in applying for other work.

19. At the very beginning of cross examination, Mr Wallace put to the Claimant that his own written evidence for the hearing suggested that he believed it was his dismissal (which he believed to be unfair) that had had the greatest impact on him and had caused the anxiety and depression which he described. The Claimant readily agreed with that.

20. The Tribunal found the Claimant's evidence about depression to be inconsistent. In his written statement, he said that he had been taking anti-depressants and undergoing talking therapy; in his oral evidence he said that

he was not prescribed anti-depressants and, although he made some reference to having been referred by his GP for counselling sessions in 2019, his evidence was confused as to what form it took, whether it was health-related or more practically focussed, for example on managing finances. The only concrete evidence of counselling sessions was a document from February 2020 confirming that a place had been booked for him for two sessions in February and March 2020 with Oxley's NHS Greenwich Time to Talk. That, of course, was after the Claimant received the liability judgment, and long after the end of his employment by the Respondent. The GP notes which we saw contained numerous references to 'stress', but none to depression. In his statement, he referred to experiencing suicidal thoughts; the notes record him saying that he had no such thoughts.

21. Finally, we had regard to a report on the Claimant's health when he applied for ESA. He was examined on 7 June 2018 and the notes of the interview for that application record the following:

> 'Depression: states that he had depression a few years ago. States not a current problem. He has not had any treatment for this recently or any input. Never had any related thoughts of suicide or self-harm.'

22. In the light of this evidence, we find that the Claimant was not prescribed antidepressants and did not attend counselling sessions for depression. We were not satisfied that there was evidence to show that any depression or anxiety he did experience was caused or contributed to by Ms Camara's treatment of him. Nor do we accept his evidence that it was Ms Camara's treatment of him which so badly damaged his confidence that he was unable to find work thereafter. If he did experience those symptoms and consequences, we think it more likely that they were caused by his dismissal, rather than by the pre-termination discrimination. The Tribunal cannot compensate the Claimant for losses flowing from his dismissal, because it lacked jurisdiction to hear that claim.

23. Consequently, we accept Mr Wallace's submission that the Claimant is entitled to be compensated solely for injury to feelings.

Injury to feelings

24. The parties took very different views as to what the appropriate award for injury to feelings for this incident should be: the Claimant submitted that this incident merited an award of £35,000 for injury to feelings, in other words towards the top of the upper *Vento* band; Mr Wallace submitted that this was a fleeting, one-off act and that the award should not exceed £1000. He reminded us that, although the Claimant said that there had been previous occasions when she had been rude and hostile towards him, this was the only occasion on which the Tribunal has found that her behaviour was discriminatory.

25. In support of his submission that the award should be at the very bottom of the range, Mr Wallace argued that that there was a history of conflict between the Claimant and Ms Camara and that her abuse arose in the context of a heated argument in which both participated: that must, he argued, reduce the level of hurt the Claimant would have felt. The Tribunal does not accept that part of his analysis. Although it was a two-way argument, it was only Ms Camara who

resorted to offensive and discriminatory language. In the Tribunal's view there was no equivalence between their behaviour on 2 February 2018.

26. The Tribunal concludes that the Claimant found Ms Camara's words and actions deeply offensive and insulting. In his oral evidence, he said that he found it difficult to speak about the way she had treated him, but he felt that she was not treating him as a human being, and that she saw only his disability. He had rarely encountered overt discrimination of this kind. He was not a man who complained lightly about matters - see our finding below as to his failure to complain about the old-fashioned machines - yet he was sufficiently aggrieved about this incident to approach his manager and make a formal complaint. The Tribunal regards this as a strong indicator of the extent of his hurt feelings.

27. We conclude that the award in respect of this incident properly comes within the low band because it was a one-off incident, which did not have the long-term consequences the Claimant described; on the other hand, it had a very substantial impact on the Claimant at the time: it was humiliating in a deeply personal way, by reference to his disability and his professional capabilities. Balancing the one-off nature of the incident against that substantial impact, we concluded that the award should be towards the top end of the lower band. We conclude that an award of **£8,000** is appropriate in all the circumstances.

<u>Failure to make reasonable adjustments in relation to the old-fashioned machines of the City Road.</u>

28. Again, the parties were far apart as to the appropriate level of compensation for injury to feelings for the failure to make reasonable adjustments: the Claimant argued for £40,000, Mr Wallace for £900.

29. The Tribunal has already made findings in its judgment on liability, which are relevant in this context:

> 'One of the Claimant's daily duties was to empty old-fashioned slot machines, which required him to kneel and reach down to the bottom of the machine and unlock it at the side. Bending down to floor level is difficult for him: he must first remove his leg calliper and then lower himself with care. He demonstrated this manoeuvre in the course of the hearing and we have no doubt that it was uncomfortable for him, as Ms Javang accepted in the course of her oral evidence […]
>
> …
>
> We […] conclude that the old-fashioned machines, which required the Claimant to remove his calliper and lower himself to floor level, caused him significant discomfort and inconvenience. Again, we conclude that the Respondent had actual knowledge that assign these duties to the Claimant cause the disadvantage in that his colleagues must have observed this manoeuvre.'

30. The Claimant's evidence was that the use of the slot machines caused him chronic backache and required him to have regular physiotherapy. The Claimant referred us to a Physiotherapy Discharge Document, dated 7 February 2018, which records that he visited the A&E physiotherapy clinic:

> 'with acute onset of radicular nerve pain after bending and twisting at work. After following exercises and advice, he reports a 75% improvement in his pain, which is only exacerbated on repeating the task that started his pain. He has been advised to speak to his managers about reducing this task.'

31. We note that the discharge document does not identify what the relevant 'task' was which caused this injury. In cross-examination at the remedy hearing, the Claimant specifically linked this treatment to putting up the marketing material. He said that he fell, and experienced so much pain that he had to attend A&E. That of course is a separate matter, and one which the Tribunal found did not amount to discrimination. On balance, the Tribunal does not consider that there is sufficient evidence from which we could conclude that the Claimant suffered a painful injury to his back as a result of the failure to make reasonable adjustments to the slot machines.

32. There was a dispute as to whether the Claimant complained about the machines at the time. In cross-examination at the remedy hearing, the Claimant that he had done so, orally, to his managers. We do not accept that evidence: there was no evidence of a complaint, other than his bare assertion. We think it more likely that he simply put up with it.

33. Mr Wallace argued that, by not complaining, the Claimant did not give the Respondent the opportunity to remedy the problem and so did not 'mitigate his loss'. We reject that submission. We have already found in our judgment on liability that the Respondent knew, or ought to have known, about the disadvantage; it ought to have rectified it immediately, so obvious was the discomfort the Claimant experienced in working with the machines. On the other hand, we can see that it might be argued that the fact that the Claimant did not complain about it might suggest that he did not suffer serious injury to feelings.

34. We restate our conclusion, made at the liability stage, that every time the Claimant was required to empty one of these machines, it was awkward for him and caused him discomfort. This was a task which he was required to perform frequently. He could tolerate the discomfort, but he should not have had to do so. Moreover, this occurred on an almost daily basis over a period of several months. We find that this in turn had an impact on the Claimant's feelings. His oral evidence was that he felt that it was:

> 'unfair for a big company like Ladbrokes not to take into consideration that they were working with a person with a disability, I felt I was weak and that I was neglected; if they took into account my disability, they would not put me in that position.'

35. Thus, the effect on the Claimant's feelings were significant but not of the most severe kind; on the other hand it was experienced over an extended period of time. Balancing those factors, we concluded that the appropriate award falls into the lower band, but at the top end of that band. We consider that an award of **£7,000** is appropriate.

<u>Double-recovery</u>

36. We then stood back from the two awards and considered whether there was any risk of overlap between them. We concluded that there was not. These were two entirely separate matters, of quite different character: one was an act of verbal abuse; the other the consequence of inadequate practical arrangements. The impact on the Claimant was quite different, and it is appropriate for him to be compensated by way of two distinct awards. The total of the two awards falls into the middle of the middle band and is, in our judgment, proportionate: it is certainly 'serious' that an employer should subject a disabled employee to two acts of discrimination within a relatively short period of time and enough to take the overall award out of the bottom band; but it plainly does not fall into the category of the 'most serious' type of case, meriting an award in the top band.

Interest on the awards for injury to feelings

37. We consider it appropriate to award interest on both awards for injury to feelings. We do not accept Mr Wallace's submission that interest should not be awarded, or should be reduced, because the claims were presented out of time. The majority of the delay was caused by the length of time it took for the case to come on for trial, which was outside the Claimant's control. Some of it was caused by the adjournment of the remedy hearing, which the Respondent requested.

38. As for the incident with Ms Camara, we award interest from the date of the incident (2 February 2018) up to the calculation date (12 March 2020), which is 2.11 years. Simple interest on £8,000 at 8% per annum over 2.11 years is **£1350.40**.

39. As for the failure to make reasonable adjustments, we award interest from the date on which we found in our liability judgment that the discrimination crystallised (31 October 2017) up to 12 March 2020, which is 2.37 years. Simple interest on £7,000 at 8% per annum over 2.37 years is **£1327.20**.

The Respondent made unauthorised deductions from the Claimant's wages when it stopped paying his salary after he failed to attend a disciplinary meeting.

40. The Tribunal found that the Respondent unlawfully withheld pay from the point at which it suspended the Claimant up to the termination of his employment. The relevant period is 27 February, when the Claimant was due to attend the second disciplinary investigation meeting, to 24 March 2018, the effective date of termination of the Claimant's employment.

41. In correspondence before the hearing, the Respondent had offered to pay the Claimant the amount of £1,192.80. The Claimant did not accept, as he did not understand how this sum had been calculated. However, he had not himself done the calculation of what he was owed. Since neither party had provided a clear exposition of the sums due, the Tribunal directed the Respondent to lodge written submissions, setting out its position in detail; the Claimant was then given an opportunity to respond in writing should he dispute the Respondent's calculation.

42. Mr Wallace duly lodged detailed submissions, for which the Tribunal was grateful. He, and those instructing him, had plainly gone to some lengths to

ensure that the position had been carefully explored, because the Respondent revised its original calculation upward. Its final calculation of the gross figures, which were not disputed by the Claimant in his written response and which the Tribunal accepts, was as follows:

42.1. basic pay of £1041.60;

42.2. London Allowance of £222.37; and

42.3. London Additional Allowance of £147.06.

43. This produces a total of **£1,411.03** gross. While the Claimant in his response accepted that gross figure, he questioned whether the net figures, which Mr Wallace also set out, were correct.

44. With regard to the net figures for London allowance (£151.21) and London additional allowance (£100), these tally with the Claimant's own schedule of loss. As for the net figure for basic pay basic pay (£708.29), the Respondent has deducted 20% income tax (£208.32) and 12% national insurance (£124.99) from the gross figure (£1,041.60) to produce a net figure of £708.29. The total net figure, as calculated by the Respondent, is £959.50. The Claimant argued in his response for deductions of only £266, but did not explain how he has arrived at that figure.

45. There appears to me to be a sound basis for the Respondent's calculation, but in the end, the calculation of deductions is not a matter for the Tribunal. The authorities are clear that the correct approach is for the Tribunal to name the gross figure and for the Respondent then to deduct PAYE and national insurance, according to the applicable rules. If the Claimant wishes to challenge the Respondent's calculation, he should either take it up directly with the Respondent's payroll department, or with HMRC by way of an application for a refund.

46. Finally, the Claimant asked for the figure to be increased by 20% to reflect the 'stress' which the unauthorised deduction had occasioned him. The Tribunal does not have the power to award compensation for non-financial loss, such as injury to feelings and stress, in relation to unauthorised deductions from wages.

Employment Judge Massarella
Date: 29 May 2020