EMPLOYMENT TRIBUNALS

Claimant: Mrs A Roberts

Respondent: Tesco Stores Ltd

Heard at: Cardiff **On:** 7 August 2020 and 17 August 2020 (in Chambers)

Before: Employment Judge Brace
Mrs M Walters
Ms C Williams

Appearances: Ms K Annand of Counsel
Ms R Barrett of Counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is that the claimant is awarded the following amounts in respect of remedy:

1. £6,000 in respect of injury to feelings

2. Interest on the award for injury to feelings from 1 June 2016 to the date of calculation [17 August 2020] a total of 1,538 days at the rate of 8% being the sum of £2,022.5

3. The total award including interest is £8,022.58.

RESERVED REASONS

1. The full hearing on liability had taken place over the course of 5 days in January 2020 and a unanimous and reserved Judgment had been sent out the parties on 11 February 2020 after the Employment tribunal had completed its deliberations on 4 February 2020 ("Liability Judgment").

2. A further agreed bundle of documents (the "Bundle",) running to 466 pages, was provided for the remedy hearing, as well as an agreed List of Issues, a Schedule of Loss from the claimant and a counter Schedule of Loss from the respondent.

3. Having heard the claimant's evidence, further evidence from Jessica Fear, People Partner at the respondent organisation, and the respective submissions of the parties in respect of remedy, there was insufficient time for the tribunal to complete

its deliberation and deliver its decision on remedy at the hearing on 7 August 2020. The Tribunal reserved its decision and reconvened in Chambers on 17 August 2020 and reached the following decision.

Financial Losses

4. Whilst we had found that the claimant had reduced her hours from 16.5 hours to 10 hours on 17 April 2017 (para 52 Liability Judgment,) we had also found that this had again been discussed again, in the September of that year, when it had been agreed that the claimant would continue to take unpaid leave on the Wednesday of each week (para 75).

5. Against that background, whilst we had concluded (at para 159 Liability Judgment) that there had been a failure to place some form of orthopaedic non-trip matting or alternative softer floor covering, and that this failure at arisen by the beginning of June 2016, we were not persuaded on balance of probabilities, that had this adjustment been put in place, the claimant would not have reduced her hours in April 2017, on the following basis:

    a. This was not the only adjustment that the claimant was seeking at this time;
    b. From as early as February 2017, the claimant had been complaining, not just about the issues that the hard floor was causing, but also about standing (as opposed to sitting) as well as the impact of the cold weather; and
    c. She had, just prior to the reduction in hours, also been off work for 49 days with pleurisy.

6. We concluded that it could not said that the claimant would not have reduced her hours in April 2017 had the discrimination not occurred.

7. We were also not persuaded, on balance of probabilities, that had both the flooring and sit stand stools been provided by 26 June 2017 (see para 142 Liability Judgment,) that the claimant would have increased her hours back up to 16.5 hours on the following basis:

    a. Again, these were not the only adjustments that the claimant was seeking at this time;
    b. In June 2017, the claimant was still complaining about the cold and this was repeated later the summer, during the claimant's absence from vertigo (para 72 Liability Judgment), where she was expressing concern that cold played a major part in her condition and with Autumn/Winter approaching, under current conditions, she would be unable to work.

8. Whilst we accepted that the claimant had raised in November 2017 that she might be able to increase her hours after the Christmas, for the reasons given we concluded that on balance of probabilities, this would not have happened.

9. We finally turned to what, on balance of probabilities, would have happened if the claimant had been offered the Wages role in May 2018.

10. Whilst we did conclude that in April/May 2018 the claimant had not been prepared to consider an administrative role in the office on a Wednesday, this had been a general administrative role and not the Wages role which had been the subject of our findings within the Liability Judgment. That said, it was persuasive in determining whether or not on balance of probabilities the claimant would have returned to longer hours on any basis at that time i.e. even if she had been offered the Wages role. We were not persuaded that she would have done. We concluded that at that time, the claimant was still wanting to work on the customer services desk and that this would have been her frame of mind even if the Wages role had been offered.

11. We were not persuaded by the fact that because the claimant has in fact increased her hours from 10 to 16.5 hours since September 2019, that it follows that she would have been able to work such increased hours from May 2018 in the Wages role.

12. We did not consider therefore, that the claimant would have increased her hours to 16.5 hours had she been offered the Wages role.

13. We returned to our Liability Judgment and our conclusions in relation to the s.15 EqA 20190 claim. We were not persuaded that the claimant, from September 2018, when she again presented as unfit for work, was well enough to work in any capacity. The FIT notes, from September 2018 through to May 2019 [242,246,251-253, 279, 307 and 329,] indicate that the claimant was not fit to return to work in any capacity. They do not indicate that she was fit to return with adjustments.

14. From September 2018 the claimant was therefore not in work at all, and despite that complete rest from work period, was still not fit for work in any capacity for the period from September 2017 through to August 2019 [329] on the basis of the medical evidence that has been provided.

15. We were therefore not persuaded that had the claimant been offered the Wages role in May 2018 that she would have increased her hours in May 2018, or indeed at any point up to and including the date that she did in fact return to work in 2019.

16. The claim for financial losses in respect of the failure to make reasonable adjustments therefore does not succeed.

Injury to Feelings

17. We accept the Claimant's evidence, set out in her witness statement and given orally at the hearing, that the claimant had felt upset, stressed and frustrated as a result of the respondent's failure and delay in implementing reasonable adjustments. We also accepted that the claimant may very well have had some sleepless nights as a result.

18. Whilst we also accepted that there is no need for a claimant to adduce medical evidence of injury to support a claim for injury to feelings, we concluded that we

would have expected to see some evidence, whether by way of GP notes or otherwise, to suggest that if the claimant's panic attacks and headaches had been of sufficient concern to her that she had sought assistance or help in managing such attacks, whether by way of counselling or otherwise. This was particularly the case where, on consideration of the documentation provided to us, particularly of the meetings that the claimant had held with the respondent's managers, there had been little or no contemporaneous evidence that she had raised such issues.

19. Whilst we noted that it had been over two years, from June 2016 (when we considered that the respondent had failed to make the adjustment in respect of the flooring,) to December 2018 (when the claimant issued these proceedings,) the respondent had throughout this time been attempting to resolve the claimant's concerns which included not just the adjustments which this Tribunal concluded were reasonable adjustments, but also implementing other measures to assist the claimant. This was not a case whereby the respondent had done nothing to assist the claimant.

20. This, together with the limited evidence from the claimant on the effect on her of the discrimination, caused us to conclude that an award for injury to feelings was appropriate towards the top of the bottom Vento band, as opposed to the middle band.

21. We are satisfied that it is just and equitable to award the sum of £6,000 for injury to feelings.

22. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 apply and the Claimant is entitled to interest on that award and we calculate that from the 1 June 2016 which is the date (and agreed by the parties to be the date) of the earliest failure to make the reasonable adjustments, i.e. the adjustments to the flooring. The number of days from 1 June 2016 to the date of calculation of the award is 1,538 days and the amount of the interest on the injury to feelings awarded is £2,022.58.

23. The total award payable by the Respondents to the Claimant forthwith is £8,022.58 calculated as follows:

    a. Injury to feelings in the sum of £6,000
    b. Interest on the award for injury to feelings from 1 June 2016 to the date of calculation of 17 August a total of 1,538 days at the rate of 8% (£1.32 per day) being the sum of £2,022.58.

Employment Judge Brace

17 August 2020

Judgment sent to the parties on: 21 August 2020

For the Tribunal