



EMPLOYMENT TRIBUNALS

Claimant: Mr A Booth
Respondent: Delstar International Limited

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley, Ms Lancaster and Mr Taj
On: 4 December 2020 (by CVP)

Representation
Claimant: Mr S Healy (Counsel)
Respondent: Ms R Mellor (Counsel)

JUDGMENT having been sent to the parties on 4 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

EXTENDED REASONS

Background and evidence

1. The claimant brought complaints of disability discrimination which were considered at the liability hearing of this claim on 5-9 October 2020. The Tribunal's reserved judgment from the liability hearing dated 19 October 2020 was sent to the parties on 26 October 2020 (the "**Liability Judgment**"). The Tribunal stated in the Liability Judgment that:
 - 1.1 the claimant's complaints of (i) discrimination arising from disability and (ii) indirect discrimination made by the claimant in relation to the respondent's delay in applying for income protection benefit under the Unum Scheme on his behalf succeeded (the "**Unum Scheme Complaint**"); and
 - 1.2 all remaining complaints made by the claimant in relation to disability discrimination under the Equality Act 2010 failed and were dismissed.
2. The Tribunal's findings at this remedy stage must be read and viewed alongside its reasons set out in the Liability Judgment.
3. The remedy hearing of this claim took place on 4 December 2020 with the parties and their representatives attending via CVP. We considered the following evidence during the hearing:
 - 3.1 the joint file of documents, additional documents and witness statements from the liability hearing;

- 3.2 a joint file of remedies documents; and
- 3.3 a remedy witness statement and oral evidence from the claimant.
4. We also heard very helpful oral submissions from both parties' representatives during the hearing.

Remedy issues

5. We discussed the claimant's schedule of loss in detail with both parties at the start of the hearing. The parties' representatives confirmed that they had reached agreement on the claimant's financial loss arising out of the Unum Scheme Complaint for the sums of:
 - 5.1 £1327.50 in respect of the claimant's financial losses; and
 - 5.2 £167.30 in respect of interest on the claimant's financial losses.
6. As a result, the sole issue for the Tribunal to determine was the quantum of any non-financial loss suffered by the claimant because of the Unum Scheme Complaint.

Findings of fact

7. These findings of fact are in addition to and should be read alongside the Tribunal's findings of fact set out in the Liability Judgment.
8. The relevant findings in the Liability Judgment can be summarised as follows:
 - 8.1 Ms Davis informed the claimant in late 2017 that the respondent intended to apply to Unum for income protection benefit for him. She said that the claimant would need an occupational health assessment, which was arranged for December 2017;
 - 8.2 Ms Davis received the occupational health assessment in mid-December 2017. She wanted to discuss the contents of the assessment with the claimant once he had chance to consider its contents. At that point, Ms Davis mistakenly believed that the respondent could not apply for income protection benefit on behalf of the claimant unless the claimant was able to return to work at some point in future;
 - 8.3 Ms Davis did not inform the claimant of her mistaken belief at that point in time. She did not tell the claimant that she believed that the respondent could not apply for income protection benefit on his behalf until she met with the claimant on 5 February 2018;
 - 8.4 Starting with the meeting on 5 February 2018, the claimant suffered anxiety and uncertainty regarding his financial situation. The claimant raised a grievance in a document dated 16 April 2018 relating to the Unum Scheme Complaint and many other matters, which resulted in the postponement of the meeting between the respondent and the claimant arranged for 18 April 2018. The claimant received a letter Ms Davis dated 9th May 2018 which attached an Unum application form for the claimant to complete;
 - 8.5 Ms Davis had realised her mistake following discussions with the claimant's union representative and the respondent's legal advisers in March 2018. However, she did not tell the claimant directly that she had made a mistake because communications had deteriorated between Ms Davis and the claimant after their meeting on 12 March 2018; and

8.6 There were further delays in processing the claimant's application from 9 May 2018 onwards which were not within the respondent's control. These included the completion of Unum's application form, the provision of medical records to Unum and Unum's review of the application. These delays may have happened regardless of the date on which the respondent applied for income protection benefit on behalf of the claimant.

9. We note that the claimant had suffered from serious ill health since late 2016, as set out in the Liability Judgment. The respondent's occupational health report dated 7 December 2017 provided details of the claimant's condition including:

"Mr Booth appeared quite frustrated during the assessment. He has been upset by some of the comments made by his GP and other doctors; particularly by the lack of a clear prognosis and statements that he will not work again.

...

In my opinion, Mr Booth is unfit for work and he will not be fit in the foreseeable future.

There appears to be no information available regarding the prognosis for Mr Booth's kidney condition. He has long term impairment of his vision and short term memory. These have not improved to date...I expect that his visual and short term memory impairments will not fully resolve, although they could possibly improve to some degree over the longer term..."

10. We also accept that the claimant's state of health was particularly poor as at February 2018. The claimant's GP's letter dated 27 February 2018 provided details of the claimant's condition including:

"Mr Booth has had a number of difficulties over the past year...His memory is very poor. He gets short term memory problems and can't remember where he is...He has a certificate of visual impairment...His anxiety is bad, he worries a lot and can't shake things off easily..."

11. Any individual in the claimant's situation would have been concerned regarding their financial circumstances and their ability to support their family. However, we accept that the claimant was also concerned about the impact of his additional anxiety and uncertainty regarding the Unum Scheme Complaint on his ongoing recovery from his stroke.

12. However, it is clear from the claimant's witness statement and his oral evidence at the remedy hearing that the claimant's evidence of his upset and distress goes beyond matters relating to the Unum Scheme Complaint. The claimant remains aggrieved about other matters, including issues regarding the handling of his grievance in 2018/2019 and his ongoing dispute regarding his pension contributions. For example:

12.1 the claimant said in his oral evidence that he thought Ms Davis did understand the income protection policy and that she had deliberately not applied to Unum on his behalf, despite the Tribunal's findings on this issue;

12.2 the claimant referred to his grievance in his witness statement and stated during oral evidence that his grievance had not been dealt with properly.

Applicable law

13. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts.
14. The purpose of an award for injury to feelings is to compensate the Claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with *Ministry of Defence v Cannock* [1994] ICR 918, the aim is to award a sum that, in so far as money can do so, puts the Claimant in the position he or she would have been had the discrimination not taken place. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that he would have been in had the discrimination not occurred – essentially a “but for” test in causation when assessing damages flowing from discriminatory acts.
15. The EAT held in *Corus Hotels Plc v Woodward* [2006] UK EAT/0536/05 that an Employment Tribunal should not allow its feelings of indignation at the employer’s conduct to inflate the award made in favour of the Claimant. The EAT reiterated in *Komeng v Creative Support Ltd* that the Tribunal needs to consider the impact of the discriminatory behaviour on the individual affected, rather than the seriousness of the conduct of the respondent.
16. The Tribunal was referred to the *Vento* guidelines (derived from *Vento v Chief Constable of West Yorkshire* [2003] ICR 318) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band should be used for serious cases which did not merit an award in the highest band. Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The decisive factor is the effect of the unlawful discrimination on the Claimant.
17. The bands originally set out in *Vento* have increased in their value due to inflation and, a further uplift of 10% given to general damages pursuant to the case of *Simmons v Castle* [2012] EWCA Civ 1039. The Presidential Guidance stated that the lower and middle band for claims brought between 6 April 2019 and 5 April 2020 were as follows:
 - 17.1 Lower band: £900 - £8,000;
 - 17.2 Middle band: £8,800 - £26,300; and
 - 17.3 Higher band: £26,300-£44,000.
18. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 sets out the Tribunal’s power to award interest for injury to feelings awards. Regulation 3(1) states that interest is to be calculated as simple interest which accrues from day to day. The current rate of interest is 8% and is to be calculated from the date of the act of discrimination complained of until the date on which the award is made (Regulation 6).

Conclusions

19. The Tribunal applied the law to its findings of fact and reached the conclusions set out below.

20. Whilst the *Vento* guidelines are of help in characterising the severity of the acts of discrimination, the Tribunal must assess the level of upset and distress caused to the claimant by the discrimination found. Assessing the level of appropriate compensation is a matter of careful judgment and estimation. The claimant was understandably distressed due to the serious ill health that he had suffered and continued to suffer from late 2016 onwards. He was also distressed because of several aspects of his treatment by the respondent, including treatment that the Tribunal found to be non-discriminatory.
21. The claimant's Counsel submitted that the claimant was seeking an injury to feelings award in the lower end of the middle band of *Vento* (in the region of £12,500). The respondent's Counsel submitted that an appropriate award would be in the lower end of the lower band of *Vento* (in the region of £2000-£3000).
22. On balance the Tribunal considers that any award ought to be assessed in the lower *Vento* band but at the lower end of that band. The key reasons for our conclusion include:
- 22.1 We recognise that the claimant was upset and distressed but that the reasons for his distress were not solely related to the Unum Scheme Complaint. The causes of his distress included:
- 22.1.1 the claimant's serious ill health issues which had been ongoing since late 2016 and which understandably caused him significant ongoing concerns; and
- 22.1.2 other matters relating to his employment with the respondent that formed part of his disability discrimination claim, but which were not upheld by the Tribunal as acts of unlawful discrimination.
- 22.2 We have seen the medical evidence of the claimant's condition referred to in our findings of fact. However, the medical evidence does not specifically refer to any exacerbation of the claimant's existing medical conditions resulting from the Unum Scheme Complaint. The claimant's doctor's letter of 27 February 2018 refers to his difficulties 'over the past year' and largely mirrors the symptoms reported in the occupational health report of 7 December 2017.
- 22.3 We found that the Unum Scheme Complaint related to a one-off act by the respondent, albeit one that had consequences that continued for around 3 months. We also found that the act resulted from Ms Davis' mistaken belief regarding the claimant's eligibility for income protection benefit under the Unum Scheme, rather than any deliberate action on the part of Ms Davis to prevent the respondent from applying for income benefit on behalf of the claimant.
23. The Tribunal considers an award of £4,000 (inclusive of interest) to be a fair assessment of an amount which is aimed at compensating the Claimant rather than punishing the Respondent. This award reflects the significant degree of upset suffered by the claimant and also the Tribunal's finding as to the actual act of discrimination which caused or contributed to it.
24. The claimant's Counsel asked the Tribunal to provide a breakdown of the calculation of the interest element of the injury to feelings award. The Tribunal's interest calculation was as follows:

Injury to feelings award: £3250

Calculation dates: 5th February 2018 (i.e. the date on which the act of discrimination started) – 4th December 2020 (i.e. the date of the Remedies Hearing)

Number of days: 1033 days

Interest rate: 8%

Interest calculation: $£3250 \times 0.08 \times 1033/365 = (£3985.84 - £3250) = £735.84$

25. However, as stated above, the amount of interest was included in the £4,000 injury to feelings award made to the claimant.

Employment Judge **Deeley**

Date: 7 January 2021