Case No: 2207744/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Ms B Leverton**
Mr J Gautrey

BETWEEN:

Mr C Ishola

Claimant

and

Transport for London

Respondent

ON: **7 January 2021 &**
8 January 2021 in chambers

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr A Allen, Counsel**

REMEDY JUDGMENT

The respondent shall forthwith pay to the claimant the sum of £5,000 in compensation for his injury to feelings plus £2,026.53 interest in respect of that award making a grand total of **£7,026.53**.

REASONS

1. This hearing was dealt with by video due to the current pandemic. In advance of the hearing the claimant had contacted the Tribunal to say that a video hearing would be really challenging for him due to his disability and put him at a substantial disadvantage. He was also concerned about his broadband level. Having logged in to the video platform, however, the claimant confirmed that he was able to participate and was happy to proceed. I was fully satisfied throughout the hearing that the claimant was able to put his case which was very well prepared.

Claims and Issues

2. In this matter the claimant by a Judgment dated 27 November 2017 succeeded in one of his claims of indirect discrimination and two of a breach by the respondent of its duty to make reasonable adjustments. In addition, following a remission to this Tribunal from the Employment Appeal Tribunal he has succeeded in a further claim in respect of the duty to make reasonable adjustments, in respect of which a separate Judgment has been issued.

3. Those successful claims relate to four specific factual allegations:
    a. erratic payment of contractual sick pay (during the period he was off sick on half pay in April and May 2016);
    b. lateness in advising the claimant of a reduction in his sick pay to half pay (he was advised on 2 November 2015 of the reduction to take effect on 4 November 2015 in breach of the respondent's policy that employees should ideally be given at least one month's notice);
    c. lateness in advising the claimant of a reduction in his sick pay to zero (he was advised on 28 April 2016 of the reduction to take effect on 4 May 2016); and
    d. a refusal by the respondent to allow a friend or family member of the claimant to act in the capacity of a workplace companion (23 February 2016).

4. There has been a significant delay between the liability judgment and this remedy hearing due to both the appellate proceedings and, regrettably, difficulties in finding a suitable date within the region.

Evidence and Submissions

5. We had the original liability hearing bundle before us together with supplementary more recent medical documents. The claimant had prepared a detailed remedy witness statement upon which he was cross-examined, and he also had prepared a schedule of loss. That schedule claimed compensation under the following headings:
    a. injury to feelings (£36,000);
    b. personal injury (£15,000);
    c. unspecified financial losses, including pension loss, flowing from the dismissal (which the claimant said was a consequence of the unlawful discrimination);
    d. aggravated damages (£10,000);
    e. uplift due to failure to follow a relevant ACAS Code of Practice; and
    f. interest.

6. The respondent's counter schedule of loss submitted that only an injury to feelings award should be made and that should be limited to £1,000 for each successful claim totalling £3,000.

7. Both parties had also prepared helpful written submissions which were supplemented by oral submissions.

Relevant Law

8. Injury to feelings: An award for injury to feelings is not automatic in every case where unlawful discrimination is established. The onus remains on the claimant to establish the nature and extent of such injury and Tribunals have a broad discretion as to the amount of any such award. In Prison Service and ors v Johnson [1997] ICR 275, the EAT summarised the general principles that underlie awards for injury to feelings:
    a. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;
    b. an award should not be inflated by feelings of indignation at the guilty party's conduct;
    c. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;
    d. awards should be broadly similar to the range of awards in personal injury cases; and
    e. Tribunals should bear in mind the value in everyday life of the sum they are contemplating, and the need for public respect for the level of the awards made.

9. In Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, CA, the Court of Appeal set down three bands of injury to feelings award, indicating the range of award that is appropriate depending on the seriousness of the discrimination in question. The Court also described some of the elements that can be compensated under the head of injury to feelings. According to Lord Justice Mummery, injury to feelings encompasses 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression'. They also emphasised that after making an award for injury to feelings the Tribunal must stand back and have regard to the overall compensation figure to ensure that it is proportionate and not subject to double counting.

10. The three broad bands of compensation for injury to feelings (recognising that there is considerable flexibility within each band allowing Tribunals to fix what is fair, reasonable and just in the particular circumstances of the case) are:
    a. a top band to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed a stated maximum figure;
    b. a middle band for serious cases that do not merit an award in the highest band; and
    c. a lower band appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The Court said that, in general, awards of less than the minimum should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

11. The original Vento bands were revised by the EAT in 2010 and set at: £600-£6,000 (lower), £6,000-£18,000 (middle) and £18,000-£30,000 (top) (Da'Bell v NSPCC (2009) UKEAT/0227/09).

12. This claim was presented on 6 September 2016, a year before the bands were again revised by Presidential Guidance in respect of claims presented on or after 11 September 2017.

13. Aggravated damages: these are available in a discrimination case where the respondent has behaved 'in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination' (Alexander v Home Office [1988] ICR 685 CA). In Commissioner of Police of the Metropolis v Shaw [2012] ICR 464 EAT more guidance was given in identifying three broad categories of appropriate case in which to make an award:
    a. where the manner in which the wrong was committed was particularly upsetting;
    b. where there was a discriminatory motive - i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound; and
    c. where subsequent conduct adds to the injury - for example, where the employer conducts Tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously.

14. Personal injury: it is long established that Tribunals can award compensation for personal injury caused by unlawful discrimination, whether physical or psychiatric (Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170 CA).

15. The burden of proof is on the claimant to demonstrate that the discriminatory acts actually caused the damage in order to establish liability and claim compensation. In Hampshire County Council v Wyatt EAT 0013/16 the EAT confirmed that a Tribunal does not have to see medical evidence in order to make an award for personal injury. Although medical evidence will assist in determining whether the injury was caused by unlawful conduct, an award can be made in the absence of expert medical evidence however it cautioned that it is advisable for claimants to obtain medical evidence - especially in cases involving psychiatric injury, which can give rise to difficult questions of causation and quantification - as a failure to produce such evidence risks a lower award than might otherwise be made, or even no award being made at all.

16. Uplift: section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that if, in relevant proceedings which these are, it appears to the Tribunal that the claim concerns a matter to which a relevant ACAS Code of Practice on resolving disputes applies and the employer has unreasonably failed to comply with that Code the Tribunal may, if it is just and equitable in all the circumstances to do so, increase any

award it makes to the employee by no more than 25%. There is a corresponding provision to reduce the compensation payable if the employee has failed to comply with the Code.

17. Interest on awards:

18. Any award of interest is governed by the Employment Tribunal's (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 2 gives a power to award interest but is permissive; it uses the expression 'may'. However, if the Tribunal decides to award interest and exercises its discretion to do so, the regulations set out how interest should be calculated and at what rate (currently 8%). Regulation 6 provides that interest on injury to feelings awards is calculated from the date of the contravention to the date of calculation (unless there is a risk of serious injustice).

Medical Evidence

19. A significant part of the claimant's submission relies upon his account of his medical position. The medical evidence we have before us comprises:
    a. A report from the claimant's GP dated 16/11/15 which set out the history of his diagnoses, in May and September 2013, in relation to migraines, tension headaches and work-related stress. He was first prescribed medication for stress in October/November 2013 and then again from May 2015 onwards. His prescription in respect of sertraline increased from 50 to 100mg in September 2015 and in November 2015 his prescription for propranolol in respect of his migraines was also increased.
    b. An occupational health report dated 19 January 2016 which confirmed that the claimant felt his then absence was caused by workplace stress, that he was not fit for work, he was on antidepressant medication - the dosage of which had recently increased - and his health was unlikely to improve until the underlying workplace issues had been addressed.
    c. A further shorter report from occupational health dated 26 January 2016 which simply confirmed that he was not fit to work and met the statutory definition of disability.
    d. A report from Dr Rehman dated 11 March 2016 prepared for the previous Tribunal claim on the issue of whether the claimant met the statutory definition of disability. Dr Rehman stated that the claimant's prognosis was dependent on and directly proportional to the level of workplace stress he perceived and also that his condition was not then controlled by medication.
    e. A GP report dated 16 January 2017 recorded a worsening of the claimant's anxiety and depression since his dismissal and an increase in medication in respect of his migraines in December 2016 and depression in January 2017.
    f. A GP report dated 24 August 2017 recorded that the claimant's anxiety and depression had worsened since dismissal and that he felt he had been discriminated against.
    g. A GP report dated 11 January 2019 recorded worsening anxiety and depression since dismissal, that the claimant felt discriminated

against and that the discrimination was still affecting him at night giving him nightmares.

20. We also have before us extracts from the claimant's GP records which show the dates upon which he was prescribed medication and the dosages.

Discussion & Conclusion

21. We consider first whether the unlawful acts of discrimination damaged or exacerbated the claimant's ill health and if so, whether:
    a. they amounted to a personal injury; or
    b. lengthened his absence and therefore caused, to any extent, his dismissal and consequent financial losses.

22. The claimant's evidence at the liability hearing, repeated at the remedy hearing, was that all the matters about which he complained contributed to his ill health and he relies on the medical evidence described above. At the liability hearing he also specifically said that the GP's report of 16 November 2015 was evidence of the exacerbation on his ill health by the actions of Mr Ndochi. In his evidence at this remedy hearing he said that that report supported his claim that the four unlawful acts of discrimination had exacerbated his condition. In fact, at the time of this report the lateness in advising him of the reduction in his sick pay to zero and the refusal to allow a friend or family member of the claimant to act in the capacity of a workplace companion had not yet happened. In any event - taken together with his earlier evidence - it is clear that many other factors were also, in his view, exacerbating his ill health.

23. The respondent says that the vast majority of the claimant's complaints were not found to be unlawful discrimination and therefore that - whilst a crude measure - is a strong indication that the claimant's undoubted ill health was not a product of the four allegations with which we are concerned but of the wider picture. Further, the respondent says that the medical evidence is very general in that whilst it acknowledges that it was the claimant's perception of events at work that caused his work-related stress, no medical report identifies any specific work event as causing or contributing to that stress.

24. To that, the claimant says that as the reports refer to his feeling discriminated against and the Tribunal has found that he was in fact discriminated against, all the statements within the medical reports are relevant to our assessment of compensation. We do not agree with the claimant's analysis in this respect. It is not appropriate to correlate his very limited successful claims with the references in the medical reports to the claimant feeling discriminated against as he clearly felt discriminated against on a much wider basis.

25. Having cross-referenced the GP records to the dates relevant to the successful allegations, we note that there is no apparent correlation between any of those unlawful acts and any notable change in the claimant's medication. Indeed, on 30 October 2015 the claimant's dosage of propranolol was increased and although the claimant expressly connected

this increase to the late notification to him of the reduction to half sick pay, that notification was sent three days after this medication was increased.

26. Taking all these matters into account we find that there is an absence of medical evidence supporting the claimant's allegation that he has suffered a personal injury as a result of the discriminatory acts. We have also considered if there is any non-medical evidence that supports that allegation but conclude there is not. Indeed we agree with Mr Allen's submission that the tone of the claimant's own correspondence at the time of the unlawful acts – compared to his tone in relation to earlier events – suggests that those earlier events had more of an impact on him than the unlawful ones.

27. We conclude therefore that the claimant has not proved that he suffered a personal injury as a consequence of the discrimination he suffered and will receive no compensation in that respect.

28. As to whether that discrimination lengthened his absence and therefore contributed to his dismissal for capability we conclude - having considered the dismissal letter and the reasons set out therein – that it did not. Although clearly the length of the claimant's absence was a very relevant factor, it is also clear that his failure to engage with the absence review process, his failure to attend occupational health appointments and to release their reports taken together with no prospect of a return to work were also very compelling reasons. Therefore even if the discriminatory acts did lengthen the claimant's absence to some extent - and there is no specific evidence to support that statement - we do not find that that increased the chance of him being dismissed. Therefore he will receive no compensation in that respect.

29. We have also specifically considered whether the respondent's failure to reasonably adjust its policy in relation to companions, with the result that the claimant did not attend the sickness absence review meetings, also made it more likely that he was dismissed or, if the companion had attended, whether that would that have delayed his dismissal. We conclude however that there is no evidence to support either argument. The respondent had of course agreed that the claimant's wife could attend as a companion only. There is no evidence to support a finding that that limit on her role made dismissal the more likely outcome. Again, the reasons for the dismissal were very carefully set out in the dismissal letter and it seems unlikely that even if the claimant had attended with his wife as a representative rather than companion that position would have changed. Indeed, given the tone of the correspondence between the claimant, his wife and the respondent, it seems all the more unlikely.

30. Consequently no recoverable financial losses flowed from the impact of the discriminatory acts on the dismissal.

31. Turning to consideration of an award for injury to feelings.

32. In respect of the unlawful discrimination arising from the late notifications to the claimant of his reduction to half pay and then to zero, we take into

account the fact that this was not a deliberate failure on the part of the respondent. However the claimant was vulnerable and we accept his evidence that it meant that he could not plan his finances in the way he would want and it therefore had a not insignificant impact on him. We note that the claimant in correspondence, after he had reduced to half pay but before he reduced to zero, referred to having read the sickness absence policy. We conclude therefore that it is more likely than not that by the time his pay reduced to zero it would have been less likely that this took him by surprise. However, he was entitled to a month's notice which he did not receive and the very fact that the respondent's policy provides for that is a recognition that people need to know this information in order to plan. Taking all matters into account we assess the appropriate level of award for injury to feelings to be £1,000.

33. In respect of the erratic payment of sick pay in April and May 2016, we regard this more seriously although still conclude it falls within the lower band. There were three occasions upon which it was not clear to the claimant why he was being paid what he was - 2nd April, 30 April and 28 May 2016. He telephoned payroll on 27 April and although this appears to be because he had not received a pay slip it can perhaps be inferred that if he was confused by his level of pay he would particularly want a pay slip. In any event the claimant raised a grievance in this respect but not until 13 August 2016. In that grievance he not unreasonably referred to this erratic payment causing him a lot of hardship, that he had been unable to plan his finances, that he had had to take the initiative to call the respondent and the deductions were still not explained to him. This grievance was investigated and an outcome sent to the claimant on 11 October 2016.

34. At this stage the claimant was given an explanation, it was acknowledged that the situation would be disappointing to him and it was identified that there were systemic errors. Ultimately the claimant was paid what he was due to be paid but undoubtedly the respondent's unlawful discrimination was as a result of their own inefficiency. Accordingly whilst this discrimination was not deliberate it was avoidable and took place at a time when the claimant's income had already been significantly reduced and, by the time he raised his grievance, had reduced completely. We assess the appropriate level of award for injury to feelings in respect of this allegation as £2,500.

35. In respect of the refusal to allow the claimant's wife to attend as a representative, this founded successful claims of both indirect discrimination and a breach of the duty to make reasonable adjustments. The complaint is essentially the same, however, and there is very significant overlap between those two claims. It was in one sense a one-off act but the refusal was implicitly maintained and was at least part of the reason why the claimant did not attend the sickness absence review meeting. We accept the claimant's evidence that this caused him additional hurt and distress and, even if only in his own mind, would lead him to believe that he was being put at a disadvantage. In his email to Mr Walters on 24 February the claimant referred to Mr Walters' behaviour as being insulting and arrogant.

Taking all these matters into account we assess compensation payable to the claimant for injury to feelings on this allegation as £1,500.

36. This therefore makes a total payment due to the claimant for injury to feelings of £5,000. In assessing that sum we have taken into account any issues of overlap between the separate unlawful acts. We also award interest on that sum calculated as follows:
    a. 8% on £1,000 = daily rate of £0.22 x 1,757 days (1.4.16-date) = £386.54
    b. 8% on £2,500 = daily rate of £0.55 x 1,906 days (2.11.15-date) = £1,048.30
    c. 8% on £1,500 = daily rate of £0.33 x 1,793 days (23.2.16-date) = £591.69

    Total Interest = £2,026.53

37. Turning to the claimants claim for aggravated damages, we are quite clear that the behaviour of the respondent in this matter did not amount to the sort of behaviour that would warrant an award of aggravated damages. None of the categories identified in the Shaw case above apply.

38. Finally as far as the claimant's claim for an ACAS uplift is concerned, he was unable to identify for the Tribunal any specific breach of a relevant Code that he was relying upon and asked the Tribunal to consider this on his behalf although he referred to the handling of his grievance and the failure to allow him representation. The respondent in accordance with its own policy did not hold a meeting to deal with that grievance but conducted it by correspondence as the claimant had by then left their employment. This is not provided for by the Code which recommends that a meeting should be held. In all the circumstances, however, we do not find that this was an unreasonable breach. In any event, in relation to that grievance the claimant was offered the opportunity to appeal which he chose not to do which would amount to a breach of the process of the Code by him.

39. We have also considered whether the failure to allow the claimant's wife to represent him at his sickness absence review meeting amounted to a breach. The only possibly relevant part of the code is in relation to disciplinary meetings, which arguably does not apply in this instance as this was a capability dismissal, however in any event there was no breach as the Code only requires that employers comply with the statutory right to representation i.e. by a trade union representative or a work colleague. Accordingly it is not appropriate for the award of compensation to be subject to any uplift.

Employment Judge K Andrews
Date: 22 January 2021