Case Number: 3334678/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Tyson	v	Cyberfort Limited

Heard at: Aylesbury, via CVP **On**: 7 & 8 January 2021

Before: Employment Judge Hyams **Members:** Ms A Gibson
Mr A Kapur

Appearances:

For the claimant: In person
For the respondent: Ms A Pitt, of counsel

JUDGMENT ON (1) THE CLAIM OF DISABILITY DISCRIMINATION AND (2) REMEDY FOR UNFAIR DISMISSAL

1. The claimant was not disabled within the meaning of the Equality Act 2010 ("EqA 2010") at the time of his dismissal by reason of his Vasovagal Syncope. The claim of disability discrimination is therefore dismissed.

2. The claimant is entitled to a basic award within the meaning of section 119 of the Employment Rights Act 1996 ("ERA 1996") in the sum of £2,448.72.

3. The respondent must pay the claimant as compensation within the meaning of section 123 of the ERA 1996 the sum of £25,446.64.

4. The Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996/2349, apply. The monetary award within the meaning of those regulations is the whole of the award, namely £27,895.36. The prescribed element within the meaning of those regulations is £25,446.64. The dates of the period to which the prescribed element relates are 25 October 2018 to 9 April 2020. The amount by which the monetary award exceeds the prescribed element is £2,448.72.

REASONS

The resumed liability hearing - the question whether the claimant was disabled by reason of Vasovagal Syncope

1 We resumed the liability hearing on 7 January 2021 for the reasons described by us in our previous judgment and written reasons, which were sent to the parties on 8 October 2020. At the start of the resumed hearing (which was held via CVP and was delayed because we had a series of technical issues), we considered further evidence concerning the claimant's fainting, both documentary in the form of a medical report from a jointly-instructed expert, and then, after discussion, orally from the claimant.

2 The medical report was from a Dr W Michael, a consultant neurologist. His report was brief and to the point. It was so far as relevant in these terms:

> "1. I am asked what was the likelihood that the Claimant might suffer a faint on 20 September 2018. I am not sure of the significance of that particular date, and in fact the records I was provided with did not extend beyond 24 August 2018. However I would say that there is probably little difference between those two dates as regards risk. I would point out however that faints or vasovagal syncope are a cardiovascular reaction in which the pulse slows and the blood pressure drops, but they can occur in anyone and are not in themselves any indication of underlying pathology. The cardiologist in 2015 apparently accepted that syncope had been diagnosed, though no details have been provided. The records document episodes of collapse in 1997, 2014, and again in August 2018. Whether those episodes were indeed syncope seems open to doubt given that at least in 2014 and 2018 he was documented at the time of having raised blood pressure, and in 2014 a fast pulse. He suffers from a number of abnormal medical conditions, though none of them in themselves would raise the risk of syncope.
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> 2. As regards the prevention of syncope, the only effective measure is to adopt immediately a recumbent position on any feeling on faintness. This would normally prevent any actual loss of consciousness.
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> 3. Those steps should be effective in preventing loss of consciousness in syncope, but would not apply to collapses from other causes, as seems likely in this case. …
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> 5. Fainting is a transient reaction, and given a few minutes lying down, he should return to normal function.
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> 6. As stated fainting can occur in anyone, though some people are more prone than others, possibly due to having a labile cardiovascular system or low blood pressure. I do not think that his various medical conditions

would be expected to raise the likelihood of fainting, though they might to other forms of collapse. In itself there is no reason why night work or lone working should affect the risk of syncope."

3 The claimant gave evidence about the use by him of compression stockings. He had in 2015 been advised to use those, and he had at the time bought some "off the shelf". He had been advised to wear them at night and if he was sitting down for long periods, but he had in practice not worn them at work because (a) he did not tend to spend long periods of time sitting down at work and (b) they were not effective at preventing him from fainting.

4 The claimant, however, was able to head off a faint by (a) sitting down when he started to feel faint, and (b) doing what he called "leg squeezes".

5 Only after the claimant went to see his GP on 24 August 2018 did the claimant start to use compression stockings during the day regularly. He did so as some were on that day prescribed for him by his GP, and they were custom-made, not off-the-shelf.

6 In those circumstances, were came to the clear conclusion that the claimant was not disabled for the purposes of this claim. That was for the following reasons.

6.1 The evidence of Dr Michael was inconsistent with the proposition that the claimant had an impairment by reason of having Vasovagal Syncope. Both paragraph 1 and paragraph 6 of Dr Michael's report pointed firmly against the conclusion that the claimant was likely to faint at any time: one could not say (applying the decision of the House of Lords in *SCA Packaging Ltd v Boyle* [2009] ICR 1056) that a faint "could well happen", especially if the claimant took the simple step (stated in paragraph 2 of Dr Michael's report) of "adopt[ing] immediately a recumbent position on any feeling o[f] faintness", or (as the claimant himself said) squeezing his legs.

6.2 We could not see that the advice to the claimant to sit down and squeeze his legs was a "measure" within the meaning of paragraph 5(1)(a) of Schedule 1 to the EqA 2010. Rather, in our view, taking into account paragraph C9 of the Secretary of State's guidance on the meaning of disability, which we set out in paragraph 13 of our reasons for our judgment sent to the parties on 8 October 2020, it was a step which a person could reasonably be expected to take to prevent a recurrence.

7 The claim of disability discrimination therefore does not succeed.

Remedy

8 That conclusion meant that only the claim of unfair dismissal had succeeded, and that we had to conclude what remedy the claimant should receive for that dismissal.

9 The claimant did not want to be reinstated, he said. Accordingly, we were obliged to consider only what financial remedy he should receive.

The basic award

10 There was no reason at all for reducing the basic award within the meaning of section 119 of the ERA 1996. The claimant was employed by the respondent for five full years before his dismissal. He was below the age of 41 for all of those years. Accordingly, he was entitled to a basic award of five times his gross weekly pay, which was £489.74 (according to the respondent's figure at page 12 of the bundle; the claimant's figure was slightly higher, at page 5 of the bundle; both were within the then-current cap in section 227 of the ERA 1996), giving a figure of £2,448.72. The claimant claimed £2448.70 in his schedule of loss at page 158, but plainly he was entitled to the extra two pence.

The compensatory award: general considerations and applicable law

11 The initial issues arising for us in determining the compensatory award under section 123 of the Employment Rights Act 1996 ("ERA 1996") were stated most clearly in paragraphs DI[2542]-[2560] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"), although some parts of that section were not as relevant as others. We took into account in particular the following passage from paragraph 54 of the judgment of the Employment Appeal Tribunal ("EAT") presided over by Elias J (as then was) in *Software 2000 Ltd v Andrews* [2007] ICR 825:

> "(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)
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> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

12 We also took into account the effect of the decision of the EAT presided over by HHJ Richardson in *Wood v Mitchell SA Limited* (UKEAT/0018/10/CEA; 12 March 2010), to which reference is made in paragraph DI[2558] of *Harvey*. We saw that the summary of that unreported case, set out at the start of the transcript of the judgment, was in these terms:

"The Tribunal awarded compensation to the Claimant up to the date when he became unfit for work (at least for a time) due to a supervening illness. It treated any loss after this date as not attributable to the Respondent's action in dismissing the Claimant. This was an error of law; the Tribunal ought to have considered for how long thereafter the Claimant might have been employed by the Respondent, whether he might again have become fit for work during that period, and what sick pay or other benefits he would have received during that period. "

13 In fact, that ruling concerned a decision of an employment tribunal which had rejected the claimant's evidence that his sickness, which took the form of mental ill-health, had been caused by his dismissal. That is evident from paragraphs 18-23 of the judgment in that case.

14 We were also obliged to apply the law relating to the mitigation of losses. As for the law on mitigation, we took into account and applied the clear and helpful summary of the law stated by HH Eady QC (as she then was) in paragraph 19 of her judgment in *Singh v Glass Express Midlands Limited* (UKEAT/0071/18/DM; 15 June 2018). There, she said this:

In reviewing the case law relevant to this question, the EAT in *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15 laid down the following guidance at paragraph 16 (I summarise):

(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove they have mitigated their loss.

(2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; the Claimant does not have to show that what they did was reasonable.

(4) There is a difference between acting reasonably and not acting unreasonably.

(5) What is reasonable or unreasonable is a matter of fact.

(6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.

(7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate."

15 Ms Pitt submitted that the claimant was under a duty to mitigate his losses, but we noted that the above analysis of HHJ Eady QC contains no statement of such a duty and in any event we were bound by it. We noted incidentally the following paragraph of the current (21st) edition of McGregor on Damages (9-018):

> 'Lord Haldane [in the leading case of *British Westinghouse Co v Underground Railway* [1912] A.C. 673 at 689] spoke of the claimant as having a duty to mitigate, and this is the common and convenient way of stating the rule. The expression is, however, a somewhat loose one since there is no "duty" which is actionable or which is owed to anyone by the claimant. He cannot owe a duty to himself; the position is similar to that of a claimant whose damages are reduced because of his contributory negligence. Pearson LJ in *Darbishire v Warran*,[[1963] 1 W.L.R. 1067] gave the proper analysis when he said:
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> > "It is important to appreciate the true nature of the so-called 'duty to mitigate the loss' or 'duty to minimise the damage'. The claimant is not under any contractual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the claimant is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant." [[1963] 1 W.L.R. 1067 CA at 1075. See similarly *Wallems Rederij v Muller* [1927] 2 K.B. 99 at 104–105, per Mackinnon J.]

This has been re-emphasised by Sir John Donaldson MR, delivering the judgment of the court in *The Solholt*, [[1983] 1 Lloyd's Rep. 605 CA.] where he said:

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty." [[1983] 1 Lloyd's Rep. 605 CA at 608, col.1.]

The point was again reiterated by Lord Toulson (with whom Lord Neuberger, Lord Mance and Lord Clarke agreed) in *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 at [81].] saying that "the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so."'

16 We also noted the discussion in paragraph 9-020 of *McGregor* where the author refers to the decision of the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 in the following manner:

> "There, the Supreme Court held that although the legal onus is borne by the defendants, the claimants, who are the people in possession of the information about how the loss would or should have been avoided, will have a heavy evidential onus. In discharging their legal onus in light of the broad axe approach to assessment of non-pecuniary compensation and the principle of proportionality, even in cases of pecuniary loss said to have been avoided or capable of being avoided the law does not require unreasonable precision." [[2020] UKSC 24, at [225].]

The evidence which was before us relating to the issue of what financial remedy the claimant should receive

17 The claimant had, by the time of the hearing before us in August 2020, worked only for a period of approximately 12 weeks since his dismissal, which was by then nearly two years earlier. That work (which consisted in the provision of care services) was done between 20 October 2019 and February 2020, when the claimant and his new employer agreed to the ending of his employment for the reason he stated in his witness statement concerning remedy, dated 24 September 2020, which was this:

> "During my time in this employment I had many bouts of an upset stomach, due to the type of people I was caring for this was deemed to be unsafe as we did not know the cause. I mutually ended my employment in February 2020 whilst seeking medical advice as to the cause."

18 The witness statement continued (and concluded):

> "After having blood tests as well as others including a colonoscopy under the care of gastroenterology, they determined I had crohn's colitis. I am currently signed off whilst my consultant tries to bring this under control via medication. I am supporting myself through universal credit, industrial injuries disablement benefit and my wife who is working part time."

19 By the time of the resumption of the hearing before us, on 7 January 2021, the claimant had not worked again. The care work which he had done was as a domestic care worker, working not in a care home but going to service users' homes. The claimant had (he told us, and we accepted) been well-regarded by his employer in that work (whose trading name was Surecare), and he had given it up only because he had by the time of doing that work developed Crohn's disease, which had developed from irritable bowel syndrome.

20 The claimant's evidence as to why he had not worked since February 2020 was that he had been too unwell mentally to apply for new work. He accepted that there was work that he could have done, even after the lockdown imposed in March 2020 by reason of the country's response to the Covid-19 pandemic.

21 The claimant's mental health was therefore a critical consideration for us. The evidence before us about it was put before us by the claimant, and it included the letter at page 161 of the bundle, which was dated 27 February 2019, was written by a Dr Tarek Zghoul, a psychiatrist, and was in these terms:

> "This letter is in support of Mr Nicholas Tyson. Mr Tyson has been under the care of the Crisis Resolution and Home Treatment Team (CRHTT) since 13th February, 2019. Mr Tyson has been diagnosed with Depression and underlying cluster C traits with complex psychosocial stressors for which he is receiving intensive medical treatment and support from our team. In his current state, he is unable to work and, further, unable to engage in normal activities of daily living."

22 In addition, the claimant put before us a letter headed "Common point of entry (CPE) Assessment/Discharge" and dated 19 September 2019. At the top of page 2, that had this passage:

> "WORKING DIAGNOSIS: From assessment by Dr Levy Feb 2019 – significant trauma throughout childhood and youth which may have led to significant anxiety, depression, PTSD evident within todays assessment."

20. Lower down on that page, there was this sentence:

> "Nick linked his low mood to the loss of his mother in June 18 and losing his job in September 18, the Employment Tribunal related to this is still ongoing."

23 On page 4 of the document, there was this passage:

> “PAST PSYCHIATRIC HISTORY:
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> - Jan 2019_ referred by GP: Mr Tyson has been feeling low for at least one year following the passing of his mother. He felt he would be able to deal with this himself, however evidently he has not. He has not sought too much help not in the form of counselling. He was put on 100mg of Sertraline. He lost his job in September and this led to his mood taking a turn for the worse.”

24 The claimant’s oral evidence on this was entirely consistent with those passages. In part for that reason, but in any event, we accepted that evidence. The claimant said that he had not gone to see his GP before January 2019 to seek help because “when spiralling into a deep dark pit it takes a while for you to realise it” and that that had happened to him after he lost his job and before he went to see his GP in January 2019. As for what occurred subsequently, he said this:

> “I did everything I could to try and sort out my health and go back to work. My medication changed and that was how I was able to go and get a job. But leaving the job broke me again; which is why the mental health [i.e. his current mental ill-health condition] is still ongoing and I am on stronger medication.”

The respondent’s submissions

25 Ms Pitt accepted that the first issue for us on the question of compensation was whether or not the respondent could lawfully, i.e. within the range of reasonable responses of a reasonable employer, have dismissed the claimant when, or at least soon after, it did in fact dismiss him. Pitt’s first submission was that it was open to us to conclude that the respondent could reasonably have dismissed the claimant if it had, before dismissing him, obtained a report such as the expert report of Dr Michael which we have set out in paragraph 2 above. That was because the report of Dr Michael showed, said Ms Pitt, that the claimant was at risk of falling when fainting and in the course of falling hurting himself seriously, so that it would have been within the range of reasonable responses of a reasonable employer to dismiss him to avoid that risk. She made that submission even though the claimant was saying (and had said before he was dismissed) that he was not at risk of falling as he would be able to anticipate that risk and, by sitting down, avoid it, after which he would, as he said, be able to avoid the risk of fainting by squeezing his legs.

26 Otherwise, it was Ms Pitt’s submission that we should limit the claimant’s compensation by reference to the illnesses which he had suffered and which had precluded him from working since his dismissal. Given our conclusions on the facts, we do not state those submissions in detail here.

Our conclusions

27 We saw the whole of Dr Michael's report as being relevant to our determination of the question whether it would have been within the range of reasonable responses of a reasonable employer to dismiss the claimant because of his Vasovagal Syncope, but we noted in particular that he said (in the report's final sentence):

> "In itself there is no reason why night work or lone working should affect the risk of syncope".

28 In the circumstances, we concluded that it would have been outside the range of reasonable responses of a reasonable employer to dismiss the claimant because of the risk of him fainting.

29 Turning, then to the application of the questions posed in the *Software 2000* case, we came to the following conclusions.

29.1 If the claimant had not been dismissed in September 2018 because of Vasovagal Syncope, then he would today still have been employed by the respondent. In coming to that conclusion, we took into account fully all of the medical evidence before us, and that of the claimant, about his health conditions. We concluded that he was tipped by his dismissal into the mental state from which he has yet to emerge. We add that we believe that this judgment is likely to aid his recovery, but that is not directly relevant, given the effect of section 124A of the ERA 1996, to which we return below.

29.2 If the claimant had not been dismissed then, we concluded, he would not have been prevented either by mental ill-health or the condition of his digestive system from continuing to work for the respondent.

29.3 That claimant has to date not acted unreasonably as far as the mitigation of his losses is concerned. That is because his mental ill-health has prevented him from working.

30 The claimant's losses are to date therefore the net income that he would have received if he had continued to be employed by the respondent (in whose employment he had, we noted, relatively good sick pay rights), minus the pay in lieu of notice that he was paid and the ex gratia payment that he was made, and minus the net sums earned by him in his employment with Surecare.

31 Taking the net figure for the claimant's weekly pay as £397.71 as at the date of his dismissal, as stated in his schedule of loss, the claimant has lost to date over two years' pay. Two years' net pay is £41,361.84. The claimant also had, by the time of the hearing before us in August 2020, lost £820.40 by way of lost pension contributions. He received £1,893.62 net in total as a payment in lieu of notice and an ex gratia payment, and he earned (we calculated from the pay statements that were before us) gross income of £2,197.22 from his employment with Surecare.

Assuming that the latter was not taxed, but deducting from it national insurance contributions (shown on the pay statements before us) of £25.64, the claimant’s losses to 20 September 2020 were £38,117.04.

32 Given that the claimant’s gross annual pay was (as stated in his schedule of loss and agreed by the respondent) £25,466.64, by reason of section 124A of the ERA 1996, that sum of £25,466.64 was the maximum awardable to the claimant under section 123 of that Act. In the circumstances, we did not need to go any further in this regard, and concluded that that maximum should be paid by the respondent to the claimant by way of compensation within the meaning of section 123.

Recoupment

33 The claimant has been receiving state benefits. Thus, the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996/2349, apply. The monetary award within the meaning of those regulations is the whole of the award, namely £25,446.64 + £2,448.72, which is £27,895.36. The prescribed element within the meaning of those regulations is the compensatory award, which is £25,446.64. The dates of the period to which the prescribed element relates are 25 October 2018 to 9 April 2020. The amount by which the monetary award exceeds the prescribed element is £2,448.72.

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Employment Judge Hyams
Date: 11 January 2021

JUDGMENT SENT TO THE PARTIES ON

.................1 February 2021

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FOR THE TRIBUNAL OFFICE