EMPLOYMENT TRIBUNALS

Claimant: Mr M Bradley

Respondent: North Cumbria Integrated Care NHS Foundation Trust

Heard at: Manchester (by CVP) **On:** 20 April 2021

Before: Employment Judge Phil Allen
Mr J King
Mrs C Clover

REPRESENTATION:

Claimant: In person
Respondent: Mr J English, Solicitor

JUDGMENT ON REMEDY

The unanimous judgment of the Employment Tribunal is that:

1. As a result of the respondent's breach of the duty to make reasonable adjustments, the respondent is ordered to pay the claimant compensation for injury to feelings of **£10,000**;

2. The respondent is also ordered to pay the claimant interest on the injury to feelings award of **£1,970.41**;

3. It is not just and equitable to uplift the compensation as a result of the respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;

4. The respondent is not ordered to pay the claimant any further compensation as a result of: loss of statutory rights; aggravated damages; and/or personal injury.

REASONS

Introduction

1. In a liability Judgment sent to the parties on 16 October 2020, the Tribunal found that the respondent breached its duty to make reasonable adjustments as required by sections 21 and 22 of the Equality Act 2010 in the period from 2 November 2018 until 28 February 2019. The Tribunal found that referring the claimant to a Clinical Psychologist not employed by the Trust was a reasonable adjustment for the respondent to make, and that the respondent did breach its duty to make reasonable adjustments for the period from 2 November 2018 until the referral took place on 28 February 2019 (paragraphs 134 and 135 of the liability Judgment).

2. This hearing was arranged to determine the remedy due to the claimant as a result of the Tribunal's liability Judgment.

Issues in dispute

3. The claimant had prepared an updated Schedule of Loss following the previous hearing. In that schedule he claimed the following:

(1) £300 for loss of statutory rights;

(2) £30,000 as an injury to feelings award;

(3) aggravated damages (which was not separately quantified);

(4) £30,000 as damages for personal injury;

(5) An uplift in the compensation of 25% for failure to comply with the ACAS Code (based upon the total figures claimed, he claimed a £15,000 uplift); and

(6) Interest on the amount claimed (£12,215.30 based upon the sums in the schedule).

4. The respondent had prepared a counter Schedule of Loss on 27 November 2020. In that document it disputed all the elements claimed by the claimant, except for injury to feelings. The respondent accepted that the claimant was due an injury to feelings award, but contended that it should be in the lower Vento band.

5. In the skeleton argument on remedy prepared by the respondent's representative for the remedy hearing, it was contended that the injury to feelings award should be in the region of £4,000. In the skeleton argument the respondent accepted that interest was due. In the skeleton argument it also disputed that any other remedy should be awarded.

Procedure

6. The claimant conducted the hearing in person. The respondent was represented by Mr English, solicitor.

7. The hearing was conducted entirely remotely by CVP. That is, both parties attended by remote video technology, as did the Tribunal panel.

8. The Tribunal was provided with an electronic bundle for the remedy hearing containing 445 pages. The documents of importance in that bundle were: the Employment Tribunal's liability Judgment; the claimant's third schedule of loss; the respondent's counter schedule; and a second witness statement prepared by the claimant specifically addressing remedy issues. In reaching its decision, the Tribunal also took into account the content of the medical report of Dr Vincenti of 21 March 2019 from the original bundle of documents for the liability hearing (page 402 of that bundle).

9. During the hearing, the claimant under oath confirmed the accuracy of the second witness statement contained in the remedy bundle. The claimant was cross examined by the respondent's representative. No evidence was called on behalf of the respondent. Each of the parties then made submissions to the Tribunal. The respondent's representative had prepared a skeleton argument which was read by the Tribunal prior to his oral submissions being made. The claimant made submissions orally (only).

10. At the end of the parties' submissions the Tribunal reserved judgment and, accordingly, provides the Judgment and Reasons contained below.

The Law

11. Remedy is governed by section 124 of the Equality Act 2010. The Tribunal may order the respondent to pay compensation to the claimant.

12. Where compensation for discrimination is awarded, it is on the basis that (as stated in **Ministry of Defence v Cannock [1994] IRLR 509**):

> *"As best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]."*

13. The Tribunal took account of the case of **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** and the bands identified in that case. HHJ Eady QC in the Judgment of the Employment Appeal Tribunal in the case of **Base Childrenswear Ltd v Otshudi UKEAT/0267/18** said the following:

> *"When making awards for non-pecuniary losses, it is trite law that an ET must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards not to allow double recovery. The ET should, moreover, not allow its award to be inflated by any feeling of indignation or outrage towards the respondent. On the other hand, awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation…In Vento, the Court of Appeal laid down three levels of award: most serious, middle and lower. Specifically, at*

paragraph 65 of that Judgment, the Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence."

14. The Employment Tribunal also took into account the Presidential Guidance on Vento bands. The Tribunal identified that it was the second addendum to the Presidential Guidance which applied to this case (as the claim was presented on 22 July 2019 and the second addendum applied to claims presented on or after 6 April 2019). That meant that the Vento bands were as follows: lower band - £900 to £8,800; middle band - £8,800 to £26,300; and upper band - £26,300 to £44,000. When this was explained to the claimant, he accepted that they were the relevant bands which applied to his claim.

15. The claimant placed reliance upon the summary of a case included in the remedy bundle, regarding **Austin v The Leeds Teaching Hospitals NHS Trust ET/1801339/2017**. That was a case in which the claimant was awarded £32,629.10 based on the top Vento band, as a result of the discrimination which she suffered. The respondent's representative in submissions said that he had been unable to identify any particular case with comparable circumstances which would be an example of the level of award the Tribunal should make. It is always, of course, the case that in any discrimination claim the Tribunal must reach its own assessment of the appropriate injury to feelings award based upon the injury to the particular claimant's feelings, the discrimination found, and the context of the discrimination. The fact-specific nature of such awards for disability discrimination will also apply as a claimant will always have their own unique disability.

16. In terms of aggravated damages, the respondent contended that, in order to justify an award, the respondent would have needed to have acted in a *"high-handed malicious, insulting or oppressive manner"* (**Broome v Cassell & Co Ltd [1972] AC 1027**). The Tribunal also took into account the fact that aggravated damages are really an aspect of injury to feelings, and the Tribunal should have regard to the total award made when considering aggravated damages (**Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291**). The Tribunal is not required to make one global award, but it did need to be careful about the risk of double recovery.

17. To the extent that a psychiatric and/or physical injury can be attributed to the unlawful act, the Tribunal has jurisdiction to award personal injury compensation. The respondent relied upon what was said by LJ Stuart-Smith in the key case of **Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170** in which he said: *"In my judgment that language is clear. The principle must be that the claimant is entitled to be compensated for the loss and damage actually sustained as a result of the statutory tort".* The claimant must prove that the discrimination found had a causal link to any personal injury suffered. The respondent also relied upon the case of **Osei-Adjei v RM Education Ltd UKEAT/0461/12** with regard to the chain of causation.

18. Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
>
> *(c) that failure was unreasonable,*
>
> *the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

19. It is not necessary for the Employment Tribunal to reproduce the ACAS Code of Practice on Disciplinary and Grievance Procedures in this Judgment, save to highlight that in relation to grievances it provides that matters should be addressed, and a formal meeting held, *"without unreasonable delay".*

20. Interest is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In particular, regulation 6(1)(a) provides that, in the case of any sum for injury to feelings, interest shall be calculated for the period beginning on the date of the contravention or act of discrimination complained of and ending on the date of calculation. The applicable rate is 8% per annum.

Remedy Facts and Findings

Injury to feelings

21. It was not in dispute that the Tribunal should require the respondent to pay compensation to the claimant for injury to feelings. The first question upon which the Tribunal focussed was which of the Vento bands would be appropriate for such an award.

22. Whilst the claimant contended that the award should fall in the highest band, the Tribunal found that this was not a case in which the award should fall within the top band. What had been found was not what could be described as the most serious case, nor was it a lengthy campaign of discriminatory harassment.

23. The Tribunal considered carefully whether the appropriate award for what had been found fell within the lower or middle Vento band. The respondent emphasised a number of factors, including:

a. the decision to make the adjustment was delayed, but eventually the adjustment the claimant sought was made;

b. the decision was unusual;

c. the complaint related to what the respondent's representative described as a "managerial process" conducted largely by email; and

d. the respondent's representative contended that there was no evidence that the delay caused or contributed to the claimant's ill health.

24. These are relevant factors and factor (a) was an important one. The Tribunal was particularly mindful of the fact that an injury to feelings award must be compensatory and not punitive and therefore the relevance of those factors (or at least the first three factors) was limited by the requirement that the main focus for an injury to feelings award (unlike an aggravated damages award) was not the fault ascribed to the respondent.

25. In his evidence to the Tribunal, the claimant emphasised why he believed that the delay in assessment was very important to his health and ability to return to work and full duties. He relied upon a number of sources in support of his contention that the quicker that assessment can be undertaken the better, and the less likely it is that the relevant person will cease to be able to work altogether. The Tribunal accepted that evidence and agreed that it accorded with the current view of good practice for those commencing absence which may be longer term. The claimant's statement also described how it was hard to sum up in words the emotional impact of the delays in the process undertaken and the fact that he had felt unsupported and undervalued in his job role.

26. In reaching its decision the Tribunal has also considered the liability judgment. In that Judgment, at paragraph 35, the Tribunal recorded what was said in a document entitled "Rapid Access to Treatment and Rehabilitation for NHS Staff" published by NHS Employers in March 2018. At paragraph 133 of the Judgment the Tribunal recorded that the significance of the delay for the claimant was demonstrated by the NHS Employers' document referred to, and the Tribunal found that the delay in the claimant seeing Dr Vincenti was a substantial disadvantage. Paragraph 37 of the Judgment supported point (b) of the respondent's representative's points listed above, as the Tribunal recorded that it was exceptional to refer someone outside of the NHS to a private consultant (although not unheard of).

27. Having considered the Vento bands and what is recorded in this Judgment both regarding the law and these findings, the Tribunal concluded that the injury to feelings award in this case should appropriately be made in the middle band. This was not what should accurately be called a less serious case. For the claimant, the delay in the adjustment being made was significant and adversely impacted upon him as he evidenced.

28. Having concluded that the injury to feelings award should fall in the mid-band, the Tribunal has however determined that the amount awarded should be at the lower end of the middle band. The band began at £8,800. The Tribunal has concluded that the appropriate award is **£10,000** for injury to feelings, being near to the bottom of that band but not quite at the lowest level. That was an award in the middle band, but at the lower end of the middle band.

29. In making this award, the Tribunal particularly took into account the impact upon the claimant of the delay/breach of the duty to make reasonable adjustments,

both in terms of: the impact of the delay in assessment as evidenced by the claimant and recorded in the documents to which he referred; and in terms of the claimant's perception of his treatment by the respondent as a result of the delay, something that was particularly important for the claimant with his impairment/disability.

Aggravated damages

30. With regard to aggravated damages, the Tribunal did not find that anything about the way in which the claimant was treated by the respondent was high-handed, malicious, insulting or oppressive. The respondent did not set out to cause harm to the claimant. The respondent did not make the decision as it should (taking account of the duty to make reasonable adjustments) and the grievance process was protracted. However, the respondent apologised for the delay in the assessment as part of the grievance process. As recorded in the liability decision, the respondent breached its duty to make reasonable adjustments, but ultimately, approximately three months after it did so, it rectified the breach by making the adjustment. The Tribunal found that there was nothing about the way in which the claimant was treated by the respondent which would give rise to aggravated damages. This was not a case in which the Tribunal found that aggravated damages should be awarded.

Personal injury

31. In terms of personal injury damages, the Tribunal was not provided with any medical evidence which substantiated that the delay in being referred for assessment had caused personal injury. When considering the personal injury claim, the Tribunal reminded itself of the report of Dr Vincenti and what was said in that report. That very full and thorough report contained no indication that the delay in obtaining assessment had a significant adverse impact on the claimant's condition or had in some way caused the claimant's condition (or a notable exacerbation of it). Rather, that report recorded in detail the history of the claimant's employment (including work prior to being employed by the respondent) which led to his PTSD. It addressed the future prognosis for the claimant and his ability to return to work in a comparable role. It did not attribute anything significant to the delay in Dr Vincenti assessing the claimant.

32. The Tribunal understood that the claimant himself attributed greater significance to the delay and contended that it had a significant adverse impact on his health. As explained above, the Tribunal has already taken that evidence into account in determining the appropriate level of injury to feelings award. However, in the absence of any genuine evidence that proved that the matters which the Tribunal had found amounted to unlawful discrimination had a direct causal link either to the claimant's PTSD, or a significant exacerbation of it, the Tribunal did not find that personal injury damages should be awarded. In any event, the impact of the delay in the claimant being assessed by a consultant, had already been taken into account in the injury to feelings awarded.

ACAS code of practice

33. With regard to the ACAS Code of Practice on disciplinary and grievance procedures, the respondent’s representative in his skeleton argument contended that the Tribunal should not take this into account, as it had made no finding in relation to a breach of the ACAS Code. It is correct that the claimant had not previously

identified that breach of the ACAS Code was an issue to be determined, and it was not determined as part of the liability Judgment (as is often in practice the case). However, as the issue of an uplift for not following the ACAS code is an issue of remedy, it was appropriate for it to be raised by the claimant at the remedy hearing and, having done so, the respondent had been given the opportunity to respond to it.

34. The liability Judgment contained detailed findings in relation to the conduct of the grievance raised by the claimant, at paragraphs 59-63. The Tribunal found that there was a significant and undue delay in the claimant's grievance being addressed and in a meeting being arranged. Indeed, after the grievance was raised on 20 January 2019, a meeting was not held until 6 December 2019. That was a breach of what is required by the Code – that a meeting should be held without unreasonable delay

35. The Tribunal carefully considered the connection between the grievance and the matter which the Tribunal found amounted to discrimination. The discrimination found occurred between 2 November 2018 and 28 February 2019. The claimant first raised a grievance on 20 January 2019. The claimant raised a further complaint on 19 February 2019. By the latter date, and therefore within one month of the grievance being raised, the respondent had already decided that the claimant should be referred to an external private consultant (albeit not actioned, nor was the claimant informed). They did make the referral on 28 February 2019, many months before the grievance meeting took place, but only a little over a month after the grievance had been raised.

36. In considering the words of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 recorded above, the Tribunal has found that this is a case to which the section applied. The claim to which the finding in the proceedings related did concern a matter to which a relevant Code of Practice applied. The employer had failed to comply with that Code, by not dealing with the grievance without undue delay. That was in relation to that matter, as the issue of the assessment was part of the grievance raised. The failure was unreasonable.

37. The Tribunal did, however, conclude that it would not be just and equitable in the circumstances to uplift any award. The unreasonable delay in addressing the grievance did not delay the respondent making the adjustment which the claimant sought, and which the Tribunal determined the respondent breached its duty by not making. The adjustment was made on 28 February 2019 (that is a little over one month after the grievance was raised). Therefore, whilst a grievance meeting did not take place for approximately another ten months, that delay in the grievance being addressed and resolved did not stop the claimant from having the adjustment made, that is being referred to Dr Vincenti. The failings in the grievance process and the respondent’s delay in addressing the grievance and holding a meeting, did not stop (or further delay) the respondent making the adjustment sought.

38. Had the Tribunal not reached this conclusion in respect of whether it was just and equitable to uplift the award, any uplift applied would, in any event, have been nominal for the reasons explained in relation to the just and equitable decision.

Loss of statutory rights

39. In his Schedule of Loss, the claimant sought an award for loss of statutory rights. The claim, and what was found by the Employment Tribunal, did not relate to the claimant losing his employment. The claimant resigned his employment on 14 February 2020, that is approximately a year after the adjustment was made. The claimant's claim to the Tribunal was not about the loss of his job. An award for loss of statutory rights recompenses an individual for ceasing to be employed in a job with long service and moving to one without such length of service. That did not apply to, or arise from, the breach of duty found by the Tribunal. The Tribunal found that such an award should not be made to the claimant on the facts of this case.

Interest

40. With regard to interest, the respondent accepted in its skeleton argument that the interest ran from 2 November 2018 (the date of the act of discrimination) to 20 April 2021 (the calculation date). The respondent's representative was asked to confirm the number of days which he believed applied, and helpfully he said that it was 899 days. The claimant agreed with that number of days (or at least did not argue a different number). On that basis, the Tribunal found that the claimant was entitled to interest on his injury to feelings award for 899 days at 8% per annum.

41. Accordingly, the Tribunal calculated the appropriate figure for the interest to be awarded to be £1,970.41. That was calculated on the following basis:

899/365 x 0.08 = 0.197041

0.197041 x £10,000 = £1,970.41

Conclusion

42. The Tribunal found that the injury to feelings award to which the claimant was entitled was one in the middle Vento band, that is it was neither a less serious case nor the most serious case, but rather one in the middle. The injury to feelings award made was £10,000. The interest awarded was £1,970.41. The total amount which the claimant should receive from the respondent is £11,970.41.

Employment Judge Phil Allen
21 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
23 April 2021

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number:
2410258/19
Mr M Bradley v North Cumbria Integrated Care NHS Foundation Trust

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 23 April 2021

"the calculation day" is: 24 April 2021

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.