



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr N McClements

Guy's and St Thomas' NHS
Foundation Trust

Heard at: London South
Employment Tribunal

On: 21 and 22 December 2020

Before: Employment Judge Hyams-Parish
Members: Ms N Christofi and Mr P Adkins

Representation:

For the Claimant: In person

For the Respondent: Mr D O'Dempsey (Counsel)

JUDGMENT

The Respondent is ordered to pay the Claimant **£5000.00** by way of injury to feelings, together with interest on this sum of **£969.86**.

The Respondent is ordered to pay the Claimant compensation of **£1468.38**, together with interest on this sum of **£141.90**.

REASONS

1. The purpose of this remedy hearing was to decide what compensation or remedy should be awarded to the Claimant following a determination in his favour at a liability hearing before the Tribunal on 6, 7 and 8 November 2019.
2. The reserved judgment was originally sent to the parties on 13 March 2019 but unfortunately that judgment contained an error with the Claimant's

name. A certificate of correction and a corrected judgment was sent to the parties on 20 April 2020.

3. The Claimant presented claims to the Tribunal (in a claim form received on 28 September 2018) for:
 - a. Direct age discrimination (s.13 Equality Act 2010 (“EQA”))
 - b. Direct sex discrimination (s.13 EQA)
 - c. Failure to make reasonable adjustments (s.21 EQA)
4. The claims arose out of two unsuccessful job applications made by the Claimant to the Respondent: one on 28 June 2018 for a Band 7 project manager role; the second on 19 July 2018, again for a project manager role, but at Band 8.
5. The direct age and sex discrimination claims were made in respect of the Claimant's failure to secure the first role; the reasonable adjustments claim is made because he was not selected for an interview for the second role.
6. The Claimant was successful in his claims for direct age and sex discrimination but not the disability discrimination claim.
7. A decision on remedy was given orally to the parties at the end of this two day remedy hearing. These written reasons are provided at the request of the Respondent.
8. The Tribunal was provided with a remedy witness statement by the Claimant and a schedule of loss. In the latest schedule of loss supplied by the Claimant, dated 15 December 2020, he invited the Tribunal to make an award of £178,516.08, which would then need to be grossed up. By far the majority of that sum was comprised of pension loss in the sum of £155,698.38.
9. The basis for the pension loss claim was that had he been selected for the post in 2018, and not been subject to discrimination, he would have been admitted to the NHS pension scheme – which is a defined benefit – career average scheme. His claim assumed that he would have remained in the scheme until the retirement age of 68. The Claimant is currently aged 50.
10. The Tribunal had no actuarial report before it to assist with the calculation of pension loss, because the Respondent told us it was too expensive to obtain, without first knowing the Tribunal's determination as to whether a simple or complex calculation of pension loss was appropriate.

Findings of fact

11. Had the Claimant been successful in his application for the band 7 role, his starting salary would have been £39,866.00 gross (27,525.84 net). The

Claimant would have started the role on 13 August 2018. The Tribunal finds that the Claimant's salary would have increased with effect from April 2019 to 44,346.96 gross (30,394.80 net).

12. The comparator received a pay rise to £45,780 gross (31,366.00 net) in April 2020 as part of the national settlement. She would then have received a rise to £47,784 gross (32,580.00 net) when she reached the two year anniversary of joining the NHS in August 2020.
13. Whilst the Band 7 was originally a fixed term role, that was subsequently converted to a permanent role. The Tribunal concluded that had the Claimant been appointed, the post would also have converted to a permanent post.
14. In the summer of 2019, the comparator was successful in securing another role as a result of a competitive exercise involving 48 other candidates. The Tribunal does not find that the Claimant would necessarily have been successful in such an application; indeed it was impossible for the Tribunal to make that prediction.
15. Between 13 August 2018 and 30 September 2018, the Claimant told the Tribunal that he was not in paid employment. However, it appeared from his CV that he provided his services to a polish company called Liatris where he held a position as an interim CEO. The Claimant failed to mention this in his witness statement.
16. The Claimant said the above role was voluntary, for which he was paid expenses. However at some point the Claimant also said that he was paid in Polish zloti for the work he did for the company. The Tribunal was told that the Claimant was required to travel to Poland during his time in this role. The Tribunal concluded that there was a mysterious lack of documents in the bundle relating to this role. There was a contract written in Polish, together with a version translated by google translate. No other documents were available, nothing relating to expenses, not even a letter from the company confirming the Claimant's voluntary status.
17. In relation to this evidence, and other parts of the Claimant's evidence at this hearing, the Tribunal found the Claimant evasive – seemingly not wishing to answer the question he was being asked. The Tribunal concluded that the Claimant knew full well what evidence he needed to bring to the hearing. This was also made very clear by the Tribunal at a previous case management hearing.
18. Accepting a voluntary role inevitably results in a continuing loss of income. The Tribunal commented that accepting voluntary work for a period might not be unreasonable, but here the Tribunal had no supporting evidence that the role was voluntary. Looking at all the evidence, the Tribunal concluded, on balance, that the role was not voluntary and the Claimant was paid something for the work he did for the company. The Tribunal decided that a sum of £2,000 should be added to the sums earned during the period of

loss referred to below at paragraph 28.

19. In late September 2018, the Claimant started to provide his services to the Addison's Disease Self-Help Group (ADSHG - a small, rare disease charity) via the Claimant's service company, called Indifi Limited. In the period between October to December 2018 the Claimant invoiced the ADSHG a total of £9,600 plus VAT.
20. With effect from 1 January 2019, the Claimant became employed by ADSHG, earning a gross salary of £20,000 a year. That was a full-time role until 1 April 2019.
21. On 30 May 2019, the Claimant commenced employment as CEO at Haemochromatosis UK ("HUK"). He initially worked part-time whilst working out his notice part time at ADSHG.
22. At the date of this hearing, the Claimant was still employed by HUK. His salary was 56,000.00 (gross). His current net monthly salary was 3,383.80.

Analysis, conclusions and associated findings of fact

23. After the conclusion of the evidence, the Tribunal heard submissions from the parties which it listened to carefully and took into account when reaching its decision.
24. In relation to the period of loss, there were two issues the Tribunal needed to determine:
 - a. Did the Claimant mitigate his loss?
 - b. How long would the Claimant have remained in the above position had he been offered it?
25. On the mitigation issue, the Tribunal was helpfully reminded by Mr O'Dempsey of the principles that it should apply. The Tribunal was told that the Claimant does not bear the burden of proving that he has mitigated his loss. Secondly, in reaching its decision on this issue, the question for the Tribunal is whether the Claimant acted *unreasonably* - as opposed to asking whether the Claimant acted *reasonably*. The Tribunal agreed with Mr O'Dempsey when he said it was a subtle but important distinction. The Tribunal was very mindful of these legal principles when reaching its decision on mitigation.
26. As has already been said, the Claimant claims a significant amount from the Respondent in terms of pension loss. He falls under a duty to mitigate his loss. The Tribunal is satisfied that the Claimant was fully aware of his duty to mitigate.
27. During this case the Tribunal was shown, and the Claimant was questioned about, a very significant number of Band 7 roles in the NHS performing a

project manager role. The Tribunal was mindful that the NHS is a very large organisation, and the Claimant – due to his residence – had a number of locations which he had the benefit or advantage of choosing from.

28. The Tribunal concluded that the Claimant did not even look into applying for roles. An NHS role would have fully extinguished any loss as he would have been provided with equivalent terms to his comparator and an equivalent pension. The Tribunal concluded that the Claimant acted unreasonably in not pursuing any of the opportunities in the NHS. The Tribunal considered carefully the Claimant's feelings about the NHS in light of his experience of discrimination, but in the circumstances, given that he had not been dismissed, given the findings made on liability, and the size of the organisation, the Tribunal considered it wholly unreasonable for the Claimant to have dismissed the prospect of working for the NHS generally. The Tribunal concluded that had the Claimant looked at and applied for positions, he would have secured a position within 6 months, given his experience and credentials. This means he would have secured a position by 12 January 2019. The Tribunal therefore assessed the Claimant's period of loss to be the six months from 13 August 2018 to 12 January 2019.
29. Even had the Tribunal not reached the above conclusion, the Tribunal concluded that the Claimant's role, had he been successful, would have come to an end in any event by the end of May 2019. This is because, given the Claimant's long standing interest and passion for the charity sector, particularly his personal and long standing interest in the condition Haemochromatosis, the Tribunal considers that the Claimant would have left his position to take up the role at HUK in any event. It came as no surprise to the Tribunal that the Claimant ended up in this role. It is a perfect role for him. He would have known that the role was coming up, given his activities and then involvement with the charity. It is a position which the Tribunal concluded the Claimant would have preferred over his NHS role.
30. Given the period of loss determined by the Tribunal, it concluded that a simple method of pension calculation was appropriate. Anyone leaving the NHS within 2 years has their pension contributions returned. The Tribunal added pension contributions to the loss when calculating what should be awarded to the Claimant. The calculations are as follows:

Description	Amount (£)
Salary and pension the Claimant would have received (13762.92 salary + 1483.00 pension)	15,245.92
LESS what the Claimant actually earned (including £2,000 for Liatrix)	14,211.84
Net loss	<u>1034.08</u>
Plus loss of benefits	434.30

AWARD

1468.38

Interest

141.90

31. On injury to feelings, the Tribunal considered that the circumstances of this case merited an award falling within the lower ventis range. The Tribunal accepted that the Claimant would have felt aggrieved at the way he was treated by the Respondent and that he had injured feelings. However, there is no evidence – aside from what the Claimant said – of the effect on him, physically and mentally, which he said warranted a much higher award. Without such evidence, the Tribunal did not feel able to accept at face value what the Claimant said about the effect of the discrimination on his health. In deciding an appropriate award, the Tribunal thought it important not to settle on a figure that could be considered derisory and which did not reflect that the Claimant did not get the job he wanted due to discrimination. That said, the Tribunal did not consider it was a deliberate or malicious act of discrimination. It was much more a case of poor processes, mistakes and a lack of experience and training which led the Respondent into making a decision that was discriminatory. In the circumstances an award of £5,000 for injury to feelings was appropriate. Interest is awarded in the sum of £969.86.
32. The Tribunal did not consider it had the power to make a recommendation in this case; neither did it think one was necessary. It was comforting to hear that the Respondent had taken the decision seriously and implemented training on the back of it.
33. The Tribunal concluded that this was not a case where aggravated damages was appropriate. Neither was an ACAS uplift appropriate. The ACAS code was not applicable and therefore there was no breach of it.
34. The Tribunal concluded that there were no valid grounds to make a preparation order.

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Employment Judge Hyams-Parish
21 January 2021

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