EMPLOYMENT TRIBUNALS

Claimant: Ms D McElvaney-Bryson

Respondent: Iceland Foods Limited

Heard at: **London South Employment Tribunal (by CVP)**

On: **8 June 2021**

Before: **Employment Judge Ferguson**

Members: **Ms T Bryant**
Ms S Khawaja

Representation
Claimant: Mr H Aniyam (counsel)
Respondent: Mr R Hignett (counsel)

REMEDY JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The level of uplift under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 is 25%.

2. The Claimant is awarded the following:

    a. In respect of unfair dismissal, a basic award of **£771.46** and a compensatory award of **£4,252.71**.

    b. Damages for wrongful dismissal in the sum of **£879.30**.

    c. In respect of injury to feelings for discrimination, **£14,727.45**.

3. The Claimant's application for costs is refused.

Recoupment
Prescribed period: 6/8/2018 to 08/06/2021
Total award: £20,630.92
Prescribed element: £3,052.17
Balance: £17,578.75

REASONS

1. In our judgment given on 17 March 2021 we found that the Claimant was unfairly dismissed on 6 August 2018 following a disciplinary process in which the Respondent failed to make reasonable adjustments for her disability (dyslexia). It is not in dispute that the Claimant had six years' service and was 45 years old at the date of her dismissal. She was out of work for 43 weeks after her dismissal. Her net weekly pay was £117.24.

2. The Claimant had been unrepresented at the liability hearing, but she instructed counsel to help her prepare for, and to represent her at, the remedy hearing. She provided an updated schedule of loss and a witness statement. The Respondent provided a counter-schedule. There was an agreed bundle of documents. We heard evidence from the Claimant.

3. By the time of closing submissions the only issues in dispute were:

    3.1. The percentage uplift on the compensatory award for unfair dismissal and damages for wrongful dismissal as a result of the Respondent's failure to comply with the ACAS Code of Practice.

    3.2. The level of the award for injury to feelings.

    3.3. Whether any award should be made for aggravated damages.

    3.4. Whether the Tribunal should make a recommendation that the Respondent issue a letter of apology to the Claimant.

<u>Level of uplift</u>

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

> If, in any 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) the 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 per cent.

5. The failings of the disciplinary process are set out at paragraph 81 of our judgment on liability. We consider that these failings were fundamental. The Claimant was not informed of the allegations against her prior to the disciplinary hearing and her disability meant that she could not engage to any meaningful extent in the process. It would of course, as Mr Hignett says, have been

possible for the process to be even worse, but that does not mean we cannot or should not award the highest percentage uplift. We consider it is merited in this case, so we award 25%.

Aggravated damages

6. In Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT, Underhill P identified three broad categories of case in which an award of aggravated damaged may be appropriate, summarised at paragraph 37.93 of the IDS Handbook on Discrimination at Work as follows:

    - Where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in [Alexander v Home Office 1988 ICR 685, CA] meant when referring to acts done in a 'high-handed, malicious, insulting or oppressive manner'

    - 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. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity. However, this will only be the case if the claimant was aware of the motive in question — an unknown motive could not cause aggravation of the injury to feelings, and

    - 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.

7. This is not an appropriate case for aggravated damages. The Claimant relies solely on the impact on her. She does not say there was anything particularly vindictive, high handed, oppressive, or anything of that nature in the way in which the discrimination occurred, or in the Respondent's conduct thereafter. She can be adequately compensated in the normal way by the award of injury to feelings.

Injury to feelings

8. We have found that the Respondent discriminated against the Claimant by failing to make reasonable adjustments relating to the disciplinary process which led to her dismissal. The unfair dismissal was one of the consequences of that discrimination. The Respondent did not argue otherwise, and nor could it reasonably have done so. Given the nature of the adjustments we found should have been made, it is unlikely the Claimant would have been dismissed if the Respondent had made them because she could have prepared properly for the disciplinary hearing and been accompanied. She could have put forward her case more effectively that there was nothing dishonest about her conduct. The Respondent, if it had acted reasonably, would have accepted that and not dismissed her.

9. The Claimant has given evidence of the impact of the dismissal on her. It is not in dispute that she was diagnosed with depression in 2005 and has continued

to suffer from it ever since. She has been taking Sertraline, an anti-depressant, for some time. She says initially this was one tablet (either 50 or 100mg) a day, but at some stage this was increased to 2 x 100mg tablets a day. She said in her oral evidence that her medication was increased in 2017, and it is clear from the medical evidence that she was on the higher dosage from at least March 2018.

10. In her witness statement she said the following about the effect of the dismissal on her:

> "7. I felt so ashamed at being branded a thief and everyone in the store knew I was dismissed following allegation of theft. I am still suffering from the shame of being branded a thief.
>
> 8. I felt so depressed and suffered from sleepless nights, panic attacks and at times I felt suicidal because I felt worthless that I just wanted to end it all. I live for my daughter who has supported me throughout this traumatic experience in my life.
>
> 9. I also suffered the breakdown of my personal relationship with my partner of 14 years as a direct consequence of this horrendous incident with Iceland. He started calling me stupid, idiot and a fool for what happened to me in Iceland and this ultimately destroyed my self-esteem and l was so broken.
>
> …
>
> 12. To this day, despite winning my claim against Iceland I still panic whenever I see an Iceland store. Therefore, I always avoid going near any Iceland store if I can, but sometimes it is unavoidable.
>
> 13.To this day, every time the thought comes to my mind about the incident in Iceland store I still breakdown in tears.
>
> 14.The pain and the hurt I felt continue to this day, that no financial amount could ever compensate the pain and suffering I have been through as a direct consequence of the treatment I received from my former employer."

11. She said she is now taking a number of other types of medication including for anxiety, but the medical evidence about this is not clear. There was nothing in the bundle to support the Claimant's assertion that she has been prescribed medication for panic attacks and sleep problems. Nor is there any medical evidence of any exacerbation in her symptoms after her dismissal.

12. The Claimant accepts that she was searching for employment from straight after her dismissal. She also said in her oral evidence that she was doing some voluntary work from February 2019 at the latest. We infer from this that her condition was not so severe that she could not function.

13. We accept that there was some adverse impact on the Claimant's mental health as a result of the dismissal, but we are not in a position to make any specific

findings about exacerbation of symptoms, and we do not accept that her medication had to be increased as a result. We do not have sufficient evidence to find that the breakdown of her relationship was caused by the dismissal.

14. We remind ourselves that the purpose of an award of injury to feelings is to compensate the Claimant, not to punish the Respondent. We have of course referred ourselves to the updated Vento bands:

    14.1. A lower band of £900 to £8,600 (less serious cases);

    14.2. A middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and

    14.3. An upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900.

15. The Claimant says this is an exceptional case meriting an award higher than the upper band of Vento. The Respondent puts the case at the top of the lower band or bottom of the middle band.

16. The discrimination we have found was serious in that it resulted in the Claimant's dismissal and had a major impact on her life. It caused her shame in that she had been found guilty of theft, wrongly, and the Respondent does not dispute that it had some adverse impact on her pre-existing depression. In those circumstances the lower band is not appropriate. We consider the level of award should be towards the bottom end, but not right at the bottom, of the middle band. We award £12,000 plus interest.

Recommendation

17. A recommendation can only be for the Respondent to "take specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate" (section 124(3) of the Equality Act 2010).

18. We do not consider it appropriate to order the Respondent to apologise to the Claimant in circumstances where they defended the proceedings and the Claimant has succeeded, albeit with a finding of contributory fault. It is not clear what a letter of apology would add to the findings we made in our judgment. It is a matter for the Respondent, not the Tribunal, to decide whether they wish to apologise.

Calculation of awards

19. There was no dispute as to the calculation of the awards based on our conclusions set out above.

20. Basic award: £1,102.08 less 30% = £771.46

21. Damages for wrongful dismissal (6 weeks' notice): £703.44 plus 25% = £879.30

22. Compensatory award:

22.1. Loss of earnings: 37 weeks x £117.24 = £4,337.88

22.2. Loss of statutory rights: £500

22.3. Loss of pension contributions: £22.36

22.4. Subtotal £4,860.24, plus 25% (£1,215.06), less 30% (1,822.59) = £4,252.71

23. Injury to feelings: £12,000 plus interest at 8% for 1,037 days (£2,727.45) = £14,727.45

Claimant's application for costs

24. The Claimant applied for costs under Rule 76(1)(a) on the basis that the Respondent's conduct of the proceedings had been unreasonable. Mr Aniyam relied on the fact that the Claimant had succeeded in her claim. He argued that the Respondent should have settled the case, and should not have continued to defend the case after the evidence had been heard.

25. We refused the application. The Claimant has not put forward any alleged unreasonable conduct of the proceedings by the Respondent, but relies solely on the merits of the claim and the fact that she succeeded. Even if the application were pursued on the basis of Rule 76(1)(b), this was not a case in which it was so obvious the Claimant would succeed that it could be said the response had no reasonable prospect of success. The suggestion that the Respondent should have conceded the case after the oral evidence is not realistic or reasonable. There was nothing in the oral evidence that substantially altered the merits of either party's case such that the Respondent would not entitled to pursue its defence.

Employment Judge Ferguson
Date: 8 June 2021