Case No: 1306482/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms R Dovkants**

Respondent: **Cathedral Leasing Limited**

Heard at: **Birmingham**

On: **19 April and (in chambers) 7 June 2021**

Before: **Employment Judge Flood**
Mr N Howard
Mr R White

Representation
Claimant: In person
Respondent: Mr Rozycki (Counsel)

JUDGMENT ON REMEDY

1. The respondent is ordered to pay to the claimant the total amount of £6,307.11 which is made up of the following awards:

    a. £731.54 for financial loss suffered by the claimant in respect of the finding of a failure to make a reasonable adjustment;
    b. £54.91 interest on that sum.
    c. £4,800 for injury to feelings in respect of the findings of a failure to make a reasonable adjustment; and
    d. £720.66 interest on that sum.

2. The claimant's application for an Order for Preparation time to be made against the respondent under rule 76 (1)(a) or (b) of the Employment Tribunals Rules of Procedure 2013 is not successful and is dismissed.

REASONS

Introduction

1. The claimants claim was heard on 15, 16 & 19-21 October 2020. The hearing was adjourned and a reserved judgment on liability with reasons was sent to the parties on 16 November 2020.

2. The claimant having succeeded partially on her claims, the cases were listed for a remedy hearing which took place on 19 April 2021.

3. The tribunal had heard evidence from the claimant, Ms D Hyde and Mrs S Rogers on behalf of the claimant and from Mr T Gooder, Ms L Thomas, Mr D Peel, Mr J Smith , Mr M Amillan and Ms T Talboys-Cotton on behalf of the respondents at the liability hearing and had been provided with a number of documents in a Bundle. At the remedy hearing (which was a hybrid hearing held partly in person and partly by CVP video link) the tribunal heard further evidence from the claimant and the claimant's mother, Mrs Dovkants, on issues relevant to remedy in respect of her successful claims. We also heard further from Ms Thomas on behalf of the respondent. We had before us a Bundle of documents relevant to remedy containing a written skeleton argument from Mr Rozycki (and copies of relevant authorities referred to therein); a witness statement from Mrs Thomas and a number of exhibits labelled LT1 and running to 108 pages. Page numbers below are to page numbers in LT1 unless otherwise indicated. The remedy hearing was adjourned at 4.10pm for a reserved decision to be made. The Tribunal were not able to meet together until 7 June 2021 and the parties were informed that this was the case and a decision would be sent out in writing with reasons as soon as practicable after this date.

4. The issues to be determined by the Tribunal on remedy were identified at the preliminary hearing held on 13 May 2020 and contained in the case management order sent to the parties on 3 June 2020. They are as follows:

4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the claimant?

4.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the claimant be compensated?

4.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.9 Did the respondent or the claimant unreasonably fail to comply with it?

4.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

4.11 By what proportion, up to 25%?

4.12 Should interest be awarded? How much?

5 In light of the all the evidence read and heard by the tribunal at both hearings, it made the following findings and came to the following conclusions on remedy.

6 This tribunal found that the respondent failed to comply with a duty to make reasonable adjustments (section 20 & 21 Equality Act 2010 ("EqA")) when it did not allow her to have someone to accompany her during the meeting which led to dismissal on 24 July 2019. The claimant's complaints of direct disability discrimination (section 13 EqA); discrimination arising from disability (section 15 EqA) and disability related harassment (section 26 EqA) failed and were dismissed.

Recommendation

7 We have considered whether a recommendation should be made under section 124 EqA that "*the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant or any other person*" (issue 4.1 above). The claimant did not ask that the Tribunal make such a recommendation and we are not satisfied that in the circumstances of these proceedings a recommendation is appropriate or necessary or would assist the claimant or any other person.

Financial loss

8 The claimant remains out of work following the termination of her employment at the respondent on 24 July 2019. The first question we had to consider was what financial losses, if any, had the unlawful discrimination we found caused the claimant (issue 4.2 above). We entirely accepted the submission of Mr Rozycki that our consideration here was limited to any financial loss that flowed from the failure by the respondent to allow the claimant to be accompanied at the meeting held on 24 July 2019. The claimant made a claim in her updated Schedule of Loss for the sum of £12,162.50 representing 6 months past losses and a further £6,081.25 in respect of an ongoing loss of £2046 per month. In her submissions made to the Tribunal at the remedy hearing, she told us that she was claiming the sum of £5,000 representing the "*loss of a chance of earnings and benefits*". She suggests that this approach is appropriate because there were essentially three outcomes to the meeting at which she was dismissed on 24 July 2019 where the claimant failed to make reasonable

adjustments, had the adjustment been made i.e had the respondent permitted her to have someone to accompany her in the meeting at which she was dismissed. She says that it is possible that (1) even with accompaniment she would have been dismissed anyway; (2) with accompaniment she would have persuaded the respondent to continue her employment for a limited period, but may have been dismissed later; or (3) she would have persuaded the respondent to continue her employment indefinitely (although she acknowledges this was unlikely). She therefore asks the Tribunal to balance any uncertainties and award 10% of her total lost earnings since her dismissal which she suggests is £5,000. Mr Rozycki suggests that the claimant cannot show she has suffered any financial loss as this flows from her dismissal alone and this was not unlawful and suggests that the provision of someone to accompany the claimant would have made no difference to the outcome of the meeting and so no award for financial loss is appropriate. In the alternative he suggests that as the likelihood of dismissal was found by the Tribunal to be high, any financial loss should be restricted to a period of a few days whilst a suitable companion was sought for a rescheduled meeting.

9 The claimant told us that had she been able to bring a companion to the meeting, she would have taken either Ms Hyde or her mother, but could not tell us how long it would have been before such support could have been arranged. We heard from Mrs Dovkants that she would have accompanied the claimant to a meeting if advance notice had been given to her (as she had caring responsibilities to work around). She also suggested she would have liked to have been able to contact another professional, such as someone working within Access to Work, who would have been able to assist. Ms Thomas told us that the respondent would have been able to rearrange the meeting with the claimant to allow her a companion possibly that same afternoon (if Ms Hyde attended) or within a day or two.

10 The claimant also told us that if she had someone in the meeting with her she would have been able to process the information and with the correct support and breaks, she could have prevented her dismissal.

11 The claimant made a request for accompaniment at the hearing on 24 July 2019 which we conclude should have been permitted. Had this been granted and the hearing adjourned, given possible issues with availability of the relevant managers, the claimant and her chosen companion, a hearing could have reasonably been rearranged within 5 working days. We find that a companion would either have been Ms Hyde (as a fellow employee) or Mrs Dovkants (if the respondent had permitted a family member to attend). It is unlikely that even if a request to bring a third party professional had been made, it would have been granted. We therefore conclude that a rescheduled meeting could have taken place on Wednesday 31 July 2019 at the latest. The claimant's employment would therefore have continued for a further period until 31 July 2019 and so she is entitled to be compensated for the wages and benefits she would have been paid until this point. We have calculated this to be £609.62 (representing net weekly salary of £386.07 (based on the figures provided by the respondent of net monthly salary of £1673 with no commission being earned that week as it was unlikely the claimant would have continue to actively work in that period) and company car benefit in kind value of £223.55).

12 We next had to consider whether at the rescheduled meeting, the claimant's employment would have been terminated or whether her employment would have continued beyond this date. We refer to our findings of fact on the liability judgment and in particular paragraphs 13.3 (regarding the high turnover of field sales staff in the early stages of employment); 13.3 (the concerns Mr Amillan had about the claimant's performance); 13.16 and 13.19 Mr Peel's concerns about the claimant's suitability for the role); 13.38 (Mr Gooder's investigations and his conclusion on the tracker information); 13.41 (comparative sales performance); 13.42 (Mr Peels e mail to Ms Rogers about the claimant's performance); 13.43(Ms Rogers' discussions with the claimant about sales performance); 13.46 (discussions between Mr Peel and Ms Thomas about the meeting to be held with the claimant with the "strong likelihood" of dismissal resulting); 13.47 (Ms Thomas making reference to the decision to terminate employment before the meeting); 13.49 (Ms Rogers asking Mr Peel and Mr Thomas whether there was anything she could do to change the outcome for the claimant); and 13.54 (Mr Peel making the decision to dismiss in the meeting albeit that dismissal was likely before the meeting and setting out the basis for his decision to dismiss). All of this suggests to us that dismissal was not just a possibility. As we concluded in the judgment at paragraph 57 "*likelihood of dismissal if not at that meeting but within a relatively short period would have been quite high in any event given the various issues that had already arisen*". We cannot find any persuasive evidence which would suggest that the claimant, had she been accompanied, would have persuaded the respondent to continue with her employment. On the balance of probabilities we conclude that the claimant would have been dismissed at a rescheduled meeting in any event and so her employment would have ended as at 31 July 2019. It is not appropriate for a percentage award to be made on the very small chance that this might not have taken place given the compelling evidence that dismissal was ultimately what would have happened. The claimant's period of financial loss therefore came to an end on this date.

13 Given the conclusions at paragraphs 11 and 12 above, it is not necessary to go on to consider whether the claimant took reasonable steps to replace lost earnings, for example by looking for another job, as the financial loss covered just one week in total.

Non Financial Loss

Injury to feelings

14 The claimant contended that the respondent, by failing to allow her to be accompanied at the meeting on 24 July 2019, adversely impacted her mental health considerably. The claimant acknowledged that even before the meeting itself her anxiety level was extremely high. She told us that she felt extremely upset and distraught from the moment she walked into the venue and was shaking. She said her anxiety was raised when she saw Ms Davies (as she realised the meeting would be more formal than she had been led to believe) and when she realised the meeting would be taking place in a public setting. The claimant explained that had she had someone with her, her anxiety level would have been lowered and made her fell less vulnerable and bullied. She told us that she was extremely upset when she was told of being dismissed and felt bullied. She felt that her dismissal must have been due to her mental health

disclosure as her two colleagues were not being dismissed as she was despite the claimant feeling she was a better performer than they were.

15 The claimant also gave evidence about the deterioration in her mental health since her employment terminated. She has had various referrals to mental health services and has been diagnosed with body dysmorphia and has self-harmed. She has been prescribed antidepressants which she has been taking since 9 October 2019. She has undertaken a series of counselling appointments with Northamptonshire Mental Health service. She also told us that she struggled to go into public places and some days felt unable to leave her home. She referred to referrals being made to child services in respect of her three children as a result of her health difficulties. She has been deemed to have limited capability for work and not required to search for work as of 4 October 2020 as a result of a work capability assessment for Universal Credit by the Department of Work and Pensions.

16 The claimant submits that although the respondent's failure was a one off event relating to the meeting, the consequences on her were devastating causing severe distress and sparking a major deterioration in mental health. She says that the law requires the respondent "*to take their victim as they find him or her*" and if the impact of the wrong on her has been substantial then the respondent must still be responsible for that. She invites the Tribunal to award a sum for injury to feelings in the upper Vento band, suggesting a figure of £30,000 being appropriate.

17 The respondent submits that the Tribunal must take care to identify the particular suffering caused by the wrong in question (BAE Systems v Konczak [2017] IRLR 893) and that the wrong in question here is the single act of not allowing the claimant to be accompanied. He asked us to take care not to compensate the claimant for other matters that may have caused the claimant's injury to feelings (in particular the dismissal itself) which were not found to be acts of discrimination. We were reminded of the substantial disadvantage said to have been suffered by the claimant as a result of the application of the particular provision, criteria or practice (PCP) here. That was that " *as a person with the claimant's disability, this caused additional anxiety and left her feeling vulnerable*". The respondent submits that the evidence of the claimant about the deterioration in her health since she left employment is not relevant as it does not bear any connection to and was not caused by the failure to allow the claimant to be accompanied. It is submitted that the case has all the flavours of one where an award in the lower Vento band (and to the lower end of that band) would be appropriate as a one off failure being what happened at the meeting itself and the additional anxiety and vulnerability caused by the lack of a companion. The respondent suggests a figure of between £900-1000.

18 We entirely accept that since the claimant left her employment with the respondent her health has suffered immensely and she has our utmost sympathy for that. This Tribunal must take care to compensate the injury to feelings that was caused by the unlawful action of the respondent namely the failure to allow the claimant to be accompanied at the dismissal meeting on 24 July. There were various other matters that the claimant complained about during her employment that we did not find to be acts of discrimination (12 allegations of direct discrimination, 3 allegations of discrimination arising from

disability, 3 other allegations of failure to make reasonable adjustments and 23 allegations of disability related harassment). The claimant has a significant history of mental ill health although she was managing this well in recent times and obtained a role she enjoyed and was intending to continue in. Losing this job was undoubtedly a huge blow to the claimant and everything that took place may have contributed to the way she was feeling and her decline in mental health. However we have no evidence that shows that the one discriminatory act we are looking at (i.e the failure to allow her to be accompanied) caused the significant impact on the claimant's health and wellbeing or were the effective cause of all the distress and suffering she described.

19 We remind ourselves of our findings and conclusions on this matter in the main decision where we accepted at paragraph 13.55 that the lack of support during the meeting meant that the claimant felt victimised and vulnerable and at 13.56 that she was upset after the meeting. We conclude at paragraph 57 that had accompaniment been permitted would have reduced anxiety and vulnerability.

20 We have considered the Vento bands and we remind ourselves of the principles of awarding damages for injury to feelings as set out in Prison Service v Johnson [1997] IRLR 162 that injury to feelings should be compensatory in nature and just to both parties; should not be too low as to diminish respect for the policy of anti discrimination legislation but awards should be restrained and not excessive. We remind ourselves that we should take into account the value in everyday life of the sum awarded and the need for public respect for the level of awards made. The three broad Vento bands are firstly the top level (which for the time of the claimant's complaint encompasses a range of between £26,300 and £44,000) which should be awarded in the most serious of cases where there has been a lengthy campaign of discriminatory harassment; the middle band between £8,800 and £26,300 which is for serious cases which do not merit an award in the highest band and the lower band £900 to £8,800 which deals with less serious cases such as one off or isolated acts. We also take note of the Presidential Guidance - Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 and note that the bands as adjusted at this point (and in the first addendum to this guidance issued on 23 March 2018) takes account of the decision of Simmons v Castle and De Souza and the uplift of 10% is already taken account of within those bands.

21 We conclude that the award should sit within the lower band of Vento, not because we do not take seriously the failure of the respondent in not allowing the claimant to be accompanied, but because this was essentially a one off failure relating to one meeting which took place on 24 July 2019. We do not believe it warrants being placed in with the most serious elements of discrimination and harassment which in many cases may include physical assaults and a sustained campaign of deliberate harassment. However we conclude that the award should be made towards the middle of the lower Vento Band, given the particular sensitivity of this claimant and our findings and conclusions above. We have determined that the claimant should be awarded the sum of £4,000 in respect of her injury to feelings.

Adjustments

22 The next issue to be determined was whether the ACAS Code applied. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") applies to claims brought under the provisions of sections 120 and 127 of the EqA (discrimination in employment) so clearly applies to the claim before the Tribunal. Section (2) of section 207A provides that if the claim to which proceedings relate concerns a matter to which a relevant code of practice applies and the employer has unreasonably failed to comply with that Code in relation to that matter, a Tribunal may increase or decrease any award it makes by no more than 25% if it considers it is just and equitable in all the circumstances to do so. In this particular claim, we made determinations in relation to the meeting held on 24 July 2019 at which the claimant was dismissed. This meeting had been called by the respondent to discuss issues of performance and conduct and where it was likely that the claimant would be dismissed. The ACAS Code expressly deals with how to handle "*disciplinary and grievance situations*". At paragraph 1 it states that disciplinary situations "*include misconduct and/or poor performance"*. We are satisfied therefore that the ACAS Code applied to the meeting held with the claimant on 24 July 2019.

23 We then went on to consider whether either the respondent or the claimant unreasonably fail to comply with it. There was no suggestion that the claimant failed to comply with the ACAS Code. With respect to the respondent, we refer to our findings of fact in the judgment on this claim at paragraph 13.47. The respondent had decided it was going to apply its abbreviated procedure to the meeting held with the claimant and so did not notify the claimant in writing of the meeting or of the nature of the complaint and did not offer her the right to be accompanied by a colleague or trade union representative. This amounts to a failure to comply with the provisions of paragraphs 9, 10, 11, 13-17 of the ACAS Code. We were of course particularly concerned in relation to this claim with the failure of the respondent to allow the claimant to be accompanied during the meeting at which her dismissal took place. The respondent acknowledges that there is a statutory right to be accompanied but suggests it was not engaged in this particular case because the claimant only raised the matter of having someone accompany her at the meeting itself and so suggests this was not a "*reasonable request*". We do not accept this contention. As the claimant had not been informed in advance of the nature of the meeting and in fact was not even aware of the meeting itself until the morning of that meeting (see paragraph 13.48 of the judgment), it was really not practicable for her to have made a request for accompaniment at any earlier point than at the meeting itself. Therefore we conclude this was a reasonable request that had been made and the respondent refused it. This was an unreasonable refusal in the circumstances (for similar reasons to those we set out at paragraphs 54-55 and 57 of our judgment).

24 Given that we have concluded that the respondent unreasonably failed to comply with the ACAS Code, we have gone to consider whether it is it just and equitable to increase any award payable to the claimant and by what proportion, up to 25%. We conclude that this failure to allow the claimant to be accompanied at such a key meeting (which we have also found to amount to a breach of the respondent's duty to make reasonable adjustments) was a serious and significant matter. Whilst the ACAS Code is not binding law, it does

offer a sensible guide for employers to assist them with dealing with discipline in the workplace. This was a substantial employer with over 250 staff and has a HR function to assist it on employment matters and clearly has significant experience dealing with dismissal of employees from what we heard at the Tribunal (see paragraph 13.3 of our judgment). The respondent operated a detailed disciplinary procedure which was contained in its standard contract of employment. This broadly followed the guidance of the ACAS Code and was clear and comprehensive running to 2 full pages. It also contained a provision that during the first 24 months of employment, the respondent may use an "abbreviated form" of that procedure but did not go on to state what form that abbreviation might take. We accepted Ms Thomas's evidence that the respondent took that to mean that during the first 24 months of employment, the respondent did not apply its disciplinary procedure at all and this would include any right to be accompanied. Our conclusion is that this was a concerning step to have taken, particularly in this case and it was certainly possible and advisable for a respondent of this size to have offered the basic protections of its disciplinary procedure, particularly to a vulnerable employee like the claimant. We therefore conclude that this failure means that it is just and equitable to increase the award made to the claimant by 20%. The claimant's award for financial loss is increased by £121.92 to become £731.54 and the claimant's award for injury to feelings is increased by £800 to become £4800.

Interest

25 The next issue is whether interest should be awarded, and if so, how much. Section 139 EqA, the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 2013 (SI 1996/2803) and the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 (SI 1669/2013), provide that for claims presented to the tribunal on or after 29 July 2013, that interest of 8% may be awarded on any awards made for discrimination. The respondent does not challenge the Tribunal making an award for interest and (even in the current financial climate) does not contend that there is any good reason why interest at the fixed rate should not be awarded. On that basis we have gone on to award such interest at the fixed rate. Regulation 6 (1) (a) of the first such regulations provides that for an award for injury to feelings interest should be awarded from the date of the act of discrimination complained of until the date of calculation of the compensation. For other awards (e.g financial loss), Regulation 6 (1) (b) provides that interest should be calculated from mid point of the day of the act of discrimination and the date of calculation (half way between the two dates). Here the act of discrimination took place on 24 July 2019 and the date of calculation is 7 June 2021 (which is a total of 685 days). The sum of £54.91 is awarded by way of interest on the financial loss award. The calculation was: 685/2 (because of the mid point rule) = 342.5 days x 1/365 x 8% x £731.54 = £54.91. This brings the total financial loss award to £786.45. The sum of £720.66 is awarded by way of interest on the injury to feelings award. The calculation was: 685 days x 1/365 x 8% x £4800 = £720.66. This brings the total injury to feelings award to £5520.66.

Application for a preparation time order

26 The claimant also made an application for a preparation time order to be made against the respondent, in the sum of £3,280 representing 80 hours spent at an hourly rate of £41. She did not explain the basis upon which she believes the Tribunal should make such an award. Rule 76 (1) of the Employment Tribunals Rules of Procedure 2013 which gives the Tribunal the power to award a costs or preparation time order where it considers that:

> *"(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success."*

27 We do not find any basis for suggesting that the respondent or its representative has behaved in a way that could be considered vexatious, abusive, disruptive or unreasonable in the way they have conducted the proceedings. The respondent is entitled to vigorously defend claims made against it. Indeed in our judgment we gave credit to the respondent's representative for the way he conducted the hearing (paragraph 9). Given that the respondent was successful in defending most of the allegations made against it, the second ground at (b) above is not made out. There are no grounds for making a preparation time order against the respondent so the claimant's application in this regard is dismissed.

Signed by: Employment Judge Flood
Signed on: 14 June 2021