EMPLOYMENT TRIBUNALS

Claimant: **Mrs S D'Silva**

Respondent: **Croydon Health Services**

Heard at: **London South by CVP** **On:25 January 2021 &**
28 January 2021 (In Chambers)

Before: **Employment Judge Corrigan**
Dr S Chacko
Mr J Turley

Representation
Claimant: Miss E Sole, Counsel
Respondent: Mr D Patel, Counsel

RESERVED REMEDY JUDGMENT

This was a remote hearing which was not objected to by the parties. The form of remote hearing was V – Video (CVP). A face to face hearing was not held because it was not practicable due to the Covid-19 lockdown. We had regard to the parties' witness statements, the agreed remedy bundle and additional documentation provided by the parties including the Claimant's Representative's written submissions on quantum. We also had regard to representations in respect of costs from both parties' representatives.

1. The Claimant is awarded compensation for unfair dismissal of **£6,780.54**. This award consists of:

Basic award	£6258.96 (16 x 1.5 x £260.79)
Compensatory award	£521.58 (Loss of statutory rights)

2. Recoupment does not apply to this award.

3. The Respondent is ordered to pay compensation of **£49,904.19** to the Claimant for contravention of the Equality Act 2010.

   This award consists of:

   Loss of net earnings whilst on sick leave of £4,853.69 and pension loss of £1,164.61 (20.6% of loss of gross earnings);

   Loss of earnings from 2 April 2019 to 31 July 2020 of £16,162.42 and pension loss of £3,723.47;

   Injury to feelings of £24,000.

4. The total sum to be paid by the Respondent to the Claimant is **£56,684.73.**

5. No order was made in respect of costs.

REASONS

Unfair dismissal award

1. The parties agreed that the unfair dismissal award should be limited to the basic award and loss of statutory rights, which we awarded based on two weeks' gross pay at the date of dismissal.

2. The parties agreed that loss of earnings could be addressed either under unfair dismissal or the failure to make reasonable adjustments claim. We decided to deal with loss of earnings all together under the reasonable adjustments claim.

3. The Claimant asked for an uplift due to the Respondent's alleged unreasonable breach of the ACAS Code on Disciplinary and Grievance Procedures because of the failure to provide her with the list of jobs at 473 A-G during the process which led to the dismissal. We have agreed that that was procedurally unfair.

4. S 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992 provides that in unfair dismissal proceedings:

   " if.... 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%".

5. However we had regard to the case of Holmes v Qinetiq [2016] IRLR 664 and the principle that the ACAS Code does not apply to ill health dismissals where there is no suggestion of culpable conduct by the employee. We considered whether there was in this case a suggestion of culpability on the part of the Claimant. Although there is the sense in which the Respondent considered the Claimant was not helping herself to find alternative work in the redeployment process, we do not find that they considered that to be a disciplinary matter. It was not a disciplinary matter. The ACAS Code therefore did not apply, and there is no basis to make an uplift to the award for failure to follow it. We therefore made no uplift.

Discrimination award

6. S 124 Equality Act provides that where a tribunal finds a contravention of a relevant provision of the Equality Act 2010 the tribunal may order the Respondent to pay appropriate compensation. S124 (6) refers back to s 119 and clarifies that compensation can include injury to feelings. We were referred to the case of *Hampshire County Council v Wyatt* UKEAT/0013/16/DA where it was noted that "there is a real risk that failure to produce... medical evidence might lead to a lower award or to no award being made" but the EAT rejected the argument that a personal injury award cannot be made in the absence of expert medical evidence. We also had regard to the examples of awards made provided by the Claimant's representative.

Loss of earnings

7. The parties agreed that the loss of earnings could be addressed under the award for discrimination.

8. The Claimant claimed loss of earnings after dismissal on the basis of a 30 hour week rather than 22.5 hours. We gave consideration to this point but considered that loss of earnings should be awarded on the basis of 22.5 hours a week.

9. The Claimant said she had already asked about increasing her hours to 30 per week and would have made the request again if she had successfully been redeployed into a new position. The Respondent said that although not impossible to find, there are fewer roles at 30 hours as it makes the remaining 7.5 hours harder to fill. It would be decided on a case by case assessment but the Claimant was not entitled to return to 30 hours just because she had done

that in the past. The reasonable adjustment required of the Respondent was to give the Claimant a non face to face patient facing administration role at the level of hours she had been doing just before the redeployment was needed, so 22.5 hours per week.

10. Looking at the list of roles available for redeployment on (pp 473 A-G liability bundle) it is right that there are very few at 0.8 fte (30 hours). We therefore only awarded loss of earnings on the basis of the 22.5 hours a week that the Claimant was actually employed to do.

11. The Claimant claimed loss of earnings whilst she was employed as her absence was prolonged due to the failure to make reasonable adjustments. The Claimant's calculation from May 2018 was accepted by the Respondent subject to the award being made net. We therefore awarded the agreed figure £4,853.69 along with a further 20.6 % of the gross loss of earnings for pension loss.

12. The remaining issue was the question of how long to award loss of earnings. The Claimant claimed loss of earnings from the date of termination until 1 year after this hearing. The Respondent argued the Claimant ought to have been able to reasonably mitigate her loss and obtained work at the same rate by 6 months after the dismissal on 2 April 2019.

13. We accept that the Claimant did not reasonably mitigate her loss. The Claimant only applied for band 4 roles again. There were band 2 roles in those trusts that she said she could travel to, more if Guy's and St Thomas' is included, which the Claimant did make an application to. There was also the option of Bank work which the Claimant had been keen on before but did not look into at all once she had left the Respondent.

14. The Claimant made one application for work in December 2019 and then began applying more seriously from June 2020. We consider that she limited herself in respect of not applying for band 2 roles, not considering Bank work and limiting herself to a few hospitals that are reachable by public transport without any change (eg change of bus or train). She also had not looked outside of the NHS for administrative roles.

15. We decided to award loss of earnings up to the end of July 2020 with pension loss for the same period. We find that it was not unreasonable for the Claimant to need six months to recover after the appeal outcome of 24 June 2019 and that it would be likely to then take a further six months to obtain another position, especially as the Claimant had not worked for so long. The Claimant had taken positive steps and undertaken a course and voluntary work in this period to aid her return to work. We took into account the Claimant's GP records including the entry on 10 October 2019 that the "stress factors are better now" (p414) but also that she had other health issues affecting her job search, for example the Claimant said she did not want to apply for work just as she had a spinal injection. She did start looking seriously by June 2020 but limited her search as set out above. We decided to award losses up to the end of the following month.

16. We also consider that loss of earnings up to the end of July 2020 is the extent of what it is just and equitable to require the Respondent to pay because there are also other factors contributing to the Claimant's situation and her job search which are not a result of the discrimination. Not all of the Claimant's upset was due to discrimination. In her remedy statement she was still focused on the upset due to the back office role not having been offered permanently. The Claimant's issues with the NHS also extend back to before the incidents in this case.

Injury to feelings

17. The Presidential Guidance on the relevant bands for injury to feelings awards at the time the claim was presented were: a lower band of £900-£8,800 (less serious cases); a middle band of £8,800 - £26,300 (cases that do not merit an award in the upper band) and an upper band of £26,300 -£44,000 (the most serious cases). These bands are based on the case of Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, where guidance was set out that the upper band should be limited to the most serious cases such as lengthy campaigns of harassment, whereas the lower band would be for less serious cases where the discrimination is isolated or one-off.

18. The Respondent's representative accepted this case was a middle band case and we agree. The Respondent's witnesses demonstrated a lack of understanding of the duty to make adjustments and were careless and insensitive to the Claimant's disability. This attitude pervaded the process. None of the witnesses had any idea of the Respondent's responsibilities in this case (placing the onus on finding a non face to face patient facing position on the Claimant). After the involvement of HR the Respondent's treatment of the Claimant was high handed and unsympathetic. There was institutional denial of the Respondent's responsibility and the Respondent pushed the responsibility back on the Claimant. We refer back to the comments made by Ms Quiller recorded at paragraphs 74, 81 and 92 of the Reserved Judgment on liability and our view expressed at paragraph 147 that her attitude (that the Claimant did not want to do her existing role and had not made a single application during the redeployment period) pervaded the witness evidence.

19. The consequence to the Claimant was also serious in that she lost her job, having worked for the Respondent for a long time and we accept she expected to work for the Respondent until retirement.

20. This is a serious case, but it is not one of the most serious cases, it is not a campaign of harassment extending over a prolonged period.

21. We accept the failure to make reasonable adjustments caused upset and distress. However the case is complicated by the fact her upset and distress was not just due to the failure to make reasonable adjustments by the Respondent not redeploying her into a suitable role. We found the Respondent reasonable to insist that the Claimant could not stay in the band 2 chest clinic

role and not see patients face to face as it is a reception role. This is what led to the Claimant's absence initially. The Claimant refused to accept this position because she believed she had been offered a permanent back office role. The Claimant has hung on to trying to go back to the temporary back office role even when it became obvious that it was a face to face reception role. As mentioned above, she remains very upset that she could not stay in this role. We have not found that decision to be discriminatory.

22. The Claimant has also had ongoing unhappiness with the fact she was put in a band 2 role and lodged a grievance about this. She had had a previous Tribunal claim which led to mistrust of the Trust and HR. THE CBT record notes that her work situation is the central factor to her low mood "over the years" she had had input from the service, and her scores had "never reduced" (entry dated 23 July 2018) (p459). The discrimination did not arise until the failure to redeploy promptly in 2018.

23. Our starting point taking into account the above, and the cases cited by the Claimant's representative in her submission entited quantum material, was that the award should be well within the middle band, for example around £20,000. This takes account that there are complex factors contributing to the injury to feelings and not just the discrimination. The Respondent did not do nothing at all and had the Claimant been more ready to give up the back office role the steps taken by the Respondent might have led to successful redeployment. The start of the Claimant's absence was not due to the discrimination, but the length of the absence which led to the dismissal was due to the discrimination and failure to find the Claimant a suitable alternative role. The Claimant would have returned to work much sooner if she had been successfully redeployed. The need to have some time to recover and rebuild confidence to apply for jobs was because of the discrimination.

24. We then considered whether and by how much the starting figure should be increased to reflect the injury to the Claimant's health. We did not consider a separate award for personal injury to be appropriate. In the absence of a medical report dealing with the contribution caused by each issue that upset the Claimant it is hard to both determine the damage to the Claimant's health caused by the failure to redeploy promptly and to quantify that in any sensible way.

25. The Claimant had a stress and anxiety disability and had come back off longterm absence prior to the discrimination.

26. We had regard to the CBT session records (pp 452-461) and the GP records in which other matters were raised (for example back pain continuing throughout the relevant period), and the Claimant's own statement for the remedy hearing where she was still going back over the impact of other matters including the discussions that the back office role was temporary and that if the Claimant could not do reception work she would need to be redeployed. However, we accept the discrimination did cause both injury to feelings and affected her health. In these circumstances we consider a global figure for

injury to feelings to include injury to health, is preferable to avoid double recovery or overcompensation given the impact of non discriminatory causes.

27. We had regard to the Claimant's questionnaire scores at pages 363, 462-464. Her depression and anxiety scores had mostly been in the 20s in the period October 2016 to February 2017 when the Claimant began the back office role. There was then some improvement through to May 2017 when those scores ceased as her treatment completed. Scores resumed on 24 November 2017 and in 2018. They mostly remained moderately severe through 2018 with a spike in July 2018. The scores were down in May 2017 when the Claimant was performing the back office role and then went back up, though mostly not as high as they had been, when the Claimant was absent and needing redeployment.

28. The GP records show that at the start of the Claimant's reporting of stress at work again (up to February 2018), it was because of the disagreement over the back office role and whether her role involved patient facing work on the front desk, and the decision to redeploy (p427).

29. By April 2018 she was recorded in the GP records as saying she was thinking of applying for an admin job that did not involve patient facing care (p425). The entry for 27 June 2018 recorded she was still upset and trying to apply for non patient facing jobs (p423). The entry for 30 August 2018 recorded that the Claimant was "very stressed now, pains everywhere, she [did] not think work problems [would] be resolved [and did] not think they want[ed] her any more..." It records she was struggling on half pay (p422).

30. By 1 November 2018 it was recorded that "work still saying there are no jobs available that would suit her, very stressed [and] upset.... pain everywhere. Seen pain clinic who have told her she won't improve until the work situation is sorted one way or another (p421). The entry dated 31 January 2019 recorded that her contract was terminated. Anxiety was recorded. The Amitriptyline prescribed increased between April and November 2018.

31. From the above records we accept the Claimant's health condition was exacerbated and/or her recovery delayed by the failure to redeploy. As a result we considered it appropriate to make an award nearer to the top end of the middle band and decided the appropriate award is £24,000.

32. We were asked by the Claimant's representative to make a separate award for aggravated damages but decided not to do so. We consider that the impact of the Respondent's conduct on the Claimant is adequately addressed by the injury to feelings award. We did not consider it appropriate to make an award due to the way the Respondent conducted the hearings before us. We consider, in particular, it was valid to make points about the Claimant's attachment (which still persists) to the back office role; her attachment to a band 4 role (which also still persists) and to take points about mitigation, and why the Claimant had not applied for the roles available.

Polkey reduction

33. We were asked by the Respondent's representative to consider a reduction to reflect the possibility that the Claimant's employment would have ended at some stage in any event. In particular the Respondent suggested that had the Claimant been redeployed it would have been to a band 2 role and that the Claimant would not have been happy with this and would have resigned, as the Claimant prefers a band 4 role.

34. We accept that there might have been further or ongoing upset if the Claimant was not redeployed to a band 4 role, and this might have led to a further period of sick leave. However we find that there is sufficient evidence to counter this in respect of the Claimant's commitment to the NHS, her intention to work for the Respondent until she retired and her persistent commitment to the band 2 back office role despite her disagreement with the banding. As a result we do not find that the employment was likely to end fairly within the time period we have compensated for. We do no consider a deduction appropriate to reflect a chance that the employment would have ended in any event.

Costs

35. The Claimant's representative applied for an order for costs as set out in the email dated 27 January 2021. We decided not to make an order for costs. Whilst it is right that some aspects of the Respondent's case were weaker than others, the same applies to the Claimant's case. We found in favour of the Respondent in respect of the harassment and victimisation claims. We have also found in the Respondent's favour in respect of the back office role. We have found it was valid to ask questions in the hearing about the Claimant's attachment to the back office role and to band 4 roles and the impact on redeployment. It was also appropriate to take points about mitigation. We noted that it was only during the evidence that it became apparent that the Claimant's evidence was that she had not seen the roles at 473A-G of the liability bundle during the redeployment process and that she agreed that a number of them would have been suitable. We did not consider this an appropriate case to award costs in all the circumstances.

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Employment Judge Corrigan
11 June 2021

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