EMPLOYMENT TRIBUNALS

Claimant: **Mr Y Saleem**

Respondent: **North East London NHS Foundation Trust**

Heard at: **East London Hearing Centre (in public; by video)**

On: **11 June 2021**

Before: **Employment Judge Moor**
Members: **Mrs J Land**
Mr D Ross

Representation
Claimant: in person
Respondent: Mr N Caiden, counsel

JUDGMENT having been sent to the parties on 15 June 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. We refer to our judgment on liability, sent to the parties on 16 March 2021. We decided that the Respondent had failed to make two reasonable adjustments for the Claimant. It failed, between 22 May 2018 and 12 November 2018, to provide a specialist chair; and failed, between 1 March 2019 and 2 May 2019, to provide a desk in the finance office at the CEME centre, closer to the toilet.

2. This hearing was to decide what remedy should be awarded to the Claimant in respect of those two failures.

3. At the outset we double-checked adjustments to the hearing day for the Claimant. We agreed a longer mid-morning break and encouraged the Claimant to get up and walk around if he needed to so, at which point we would also break. He did so on one occasion during the hearing.

4. We read the witness statements of Claimant and Mr Ghadvi and heard their oral evidence. We considered the documents referred to us in that evidence.

Issues

5. We clarified the issues at the outset:

    a. What award for injury to feelings should be made;

    b. Whether an award should be made for aggravated damages and, if so, how much;

    c. Whether the discrimination had caused personal injury and, if so, how much should be awarded;

    d. Whether the discrimination had caused future loss of earnings;

    e. Interest.

Submissions

6. We thanked both parties for the careful way in which they made their submissions. We refer to the Respondent's written submissions which Mr Caiden explained orally.

7. The Claimant referred us to the detail of his witness statement. He reiterated his his view that his manager had discriminated against him in a high-handed way so much so that he had ended up in tears at work and was embarrassed to have to apologise for this. He referred to all the matters he had complained about at the liability hearing. He stated that life at work was 'hell' and he found it difficult to express how significantly his feelings had been injured. He contended the redeployment had affected his career chances because his qualifications were in software development. He contended the delay in supplying the chair had caused his urinary incontinence and referred us to medical websites that described poor posture as one cause. He suggested people with his back condition only developed incontinence in their 70s. He contended that he had to take cocodamol which caused unpleasant side-effects for which he should be compensated. He argued that his urinary incontinence had led him to try not to drink water/tea/coffee at work and when he was not placed near the toilet he had started to wear incontinence pads.

Legal Principles

8. We agree with Mr Caiden's summary of the legal principles so far as injury to feelings are concerned.

9. An award for injury to feelings must be based upon the findings of fact we made as to the impact on the particular Claimant of the discrimination we have found. The Vento bands are a useful guide, but we must take care not to use them as a strait jacket because they are based upon the acts or omissions of discrimination rather than the feelings hurt by those acts/omissions. We acknowledge that the acts of discrimination (their severity and duration) can be a useful indication of the kind of injury to feelings we might expect, but it is how the Claimant experienced the discrimination that matters. The award must compensate the Claimant; we do not take into account by how much it will punish the Respondent.

10. While the Claimant's witness statement referred to most of the acts/omissions he complained about at the liability hearing and other complaints, we made it clear at the outset, and do so here, that we only award remedy in respect of damage caused by the omissions we have found to amount to discrimination. We must therefore disregard or discount for those feelings hurt by acts or failures that we have not found were unlawful.

11. We must consider the value of money and ensure that public respect is maintained for the provisions of the Equality Act by making an award which is neither too low nor too high.

12. In relation to the personal injury claim, the test is whether the discrimination we found caused personal injury. We ask that question on the evidence we have heard applying the test of the balance of probabilities (what is more likely than not). We do not necessarily require medical evidence to make a finding of personal injury, though medical evidence is usually expected and is most persuasive when it comes to causation. The burden is on the Claimant to prove to us that the personal injury was caused by the discrimination.

13. Aggravated damages are a form of injury to feelings. We follow the guidance of higher courts that there would have to be some form of exceptionally bad conduct to warrant an award – like high-handed or malicious conduct. If we were to award aggravated damages we must take care that we do not compensate for the same injury to feelings twice.

14. Under Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 we must consider whether to include interest on sums awarded. Under Reg 6(1) interest on awards for injury to feelings runs from the date of the discrimination to the date of calculation, unless, under regulation 6(3), we decide that a 'serious injustice' would be caused. If we award interest the rate is 8% per year.

Findings of Fact on Injury to Feelings

15. The Claimant has had a chronic and painful back condition since 2016. He was managing to some degree until February 2018 when it became worse. He dates this from the day at work where he had to lie down to relieve his pain. From then he had numbness in his leg. The Claimant was worried about what his worsening back condition might lead to and was understandably miserable about it. He started to take stronger painkillers, Cocodamol, from February 2018.

16. The Claimant applied for a specialist chair in March 2018 and we decided that the Respondent should have provided it by 22 May 2018.

17. In June 2018 the Claimant was prescribed pregabalin for mental stress and nerve pain. He was absent from work from 31 July to 6 September 2018 mainly for pain management intervention.

18. The specialist chair would have helped the Claimant by relieving the pressure on his lower back and allowing him to lean back in his seat. It would not have taken his back pain away but would have enabled him to sit more comfortably at work. Not providing it therefore caused Continuing greater discomfort for three and half

months. This made him upset and annoyed. The Claimant discussed obtaining chair with his Freedom to Speak-up adviser, Renata. From this we find that it was important to him. They discussed the delay in provision of the chair and she suggested he chase it up, which he had not done earlier. It was to his manager, Mr Rafiq, that he had made the request and who had to take action upon it.

19. Thus, after the Claimant's return to work in September 2018, he requested the chair on 1 October, after which it was soon prioritised, and ordered on 25 October 2018.

20. At this time the Claimant tells us and we accept he was also annoyed and very upset about the failure of the Respondent to do what he thought his GP had asked. But we find this did not include adjusting the workplace with a chair. We do not accept the Respondent's contention that this evidence means there were minimal upset about the lack of supply of the chair. This would be to look at one snapshot in time. The discussions with Renata and the renewed request for the chair showed it was important to him and we find the Claimant was upset by the delay.

21. On 2 November 2018 (not 2017 as incorrectly stated in our liability judgment) the Claimant experienced his first episode of urinary incontinence. This caused him a great of upset and embarrassment including disruption at home with his wife having to assist him in changing sheets and so on.

22. During this time the Claimant was seeking to work from home. He experienced great deal of upset because this was not allowed. It was what caused his wife to involve the Freedom to Speak-up adviser at the Respondents. (We remind ourselves this decision was not unlawful.)

23. We consider next after the office move, the delay, from 1 March 2019, in placing the Claimant closer to toilet in the finance office. Not being as near to the toilet at work when he had urinary incontinence was upsetting for the Claimant and made him anxious. He sought advice from his GP and started to wear incontinence pads. Once the offer was made to move to the finance desk, on 2 May 2019, the Claimant rejected it because he was wearing pads and was annoyed it had not been originally offered. The Claimant tells us and we accept that such was his anxiety about urination that he would probably have continued to wear pads even if placed at this alternative desk. It was his manager, Mr Rafiq, who made the decision to put the Claimant in his desk position and not offer the finance desk position sooner.

24. We find that the Claimant experienced a great deal of stress and anxiety overall in his relationship with his manager. The Claimant has told us and we accept that he felt his manager did not take his disability seriously and found it hard to have his voice heard. We find that the delay in provision of the chair and the failure to site him nearer to the toilet after the office move were two features of this upset towards his manager, although a greater part of it concerned the failure to allow him to work from home, the alleged harassment and the other complaints for example over altered hours that did not succeed before us. It remains a fact that Mr Rafig overlooked the chair request and was late in offering a desk nearer to the toilet. We do not accept that the Respondent can somehow excise these failures from the

upset over the relationship: they contributed to the Claimant's upset about the way in which he was managed.

Application of facts and legal principles to Issue of Injury to Feeling

Injury to Feeling

25. Our starting point is to decide that the failures are in the lower Vento bracket. While the discriminatory omissions are only an indication of what hurt feelings have been experienced, they help with a starting point. Here we take into account that we are considering only the hurt feelings that arise from two discrete failures each of a relatively short duration. We consider that puts them in the relatively less serious bracket, without resiling from our finding that the failures are discrimination and any breach of the Equality Act is a significant matter.

26. We take into account that the failure to provide the chair when it should have been provided meant that the Claimant had greater back discomfort while sitting at work for about three and a half months, and we note the additional misery that caused. We also take into account our findings that the Claimant was upset and annoyed at the delay.

27. On the other hand the failure was relatively short-lived (3.5 months of time that the Claimant was at work). We consider the Claimant's initial failure to chase up his request for a chair as a neutral factor because we have noted his reluctance to complain and see that he raised his concerns privately with Freedom to Speak-up adviser.

28. We also take into account that the Claimant's back pain existed and had already worsened before the failures for which the Respondent is liable and this was responsible itself for some of his misery and upset.

29. We agree with the Respondent that the much greater injury to feelings described by Claimant in his evidence to us, in the form of what might be regarded as medically recognised anxiety, claustrophobia, crying at work and the great deal of upset within the Claimant's family life, were caused by those allegations that he has not succeed on – the other management decisions and actions of Mr Rafiq: the decision not to allow him to work from home, the refusal to adjust hours as much as he requested, the alleged harassment and the very fact of his disability and its symptoms.

30. Taking all of these factors into account, and the need for public respect in Tribunal discrimination awards, and having regard to the value of money, we consider the injury to feelings caused by the delay in the provision of the chair to warrant an award of £3,250.

31. In respect of the delay in moving the Claimant nearer to the toilet at work, we consider there are similar factors.

32. Not being as near to the toilet at work as he could be when he had urinary incontinence at work did cause upset and anxiety for the Claimant. He was also annoyed at the delay. He was upset that he was not being heard on this issue and

not taken seriously. We take into account this issue is basic to a person's comfort at work.

33. Nevertheless, the failure was for a short duration. Nor did the failure cause the Claimant's incontinence which had started in the previous November and was a symptom of his back condition (see our decision below). We exclude from our assessment the upset he experienced by having this condition. We have also taken care not to double-count in our assessment the hurt feelings for the chair.

34. We consider the upset caused by the delay in providing him with a desk closer to the toilet warrants an injury to feelings award of £3,250.

35. In respect of both awards, we have taken into account that although the failures were short-lived, the feelings about those failures and them having been unlawful continue.

Aggravated damages

36. In our liability judgment we did not find any high-handed or malicious conduct by the Respondent. The Claimant has not persuaded us today of any other form of conduct in connection with the failure to make adjustments we found that would warrant an award for aggravated damages.

Findings of fact in respect of other heads of loss

Personal injury

37. Contrary to the Respondent's submission, there is a diagnosis of urinary problems here in the GP notes recording 'urgency of micturition'. And we accept what the claimant has told us. We have no doubt that he experienced urinary incontinence. This is also supported by the OH reports.

38. We must make an assessment of whether this personal injury was caused by the discrimination on the evidence we have on a balance of probabilities.

39. In our liability judgment (paragraphs 31 and 37) we found that OH reported that the urinary incontinence was likely related to the underlying medical condition i.e. the Claimant's lumbar stenosis. Both OH reports in November 2018 and on 6 March 2019 recorded this.

40. We have considered the information from the medical websites that the Claimant provided. These show that one cause of incontinence can be poor posture. Another cause is lumbar stenosis as the OH opinion recorded.

41. In balancing whether the lack of the chair caused his incontinence, as the Claimant contends, we also take into account there was only a period of 3.5 months when he was at work during which time the Respondent was legally liable for the failure to provide a chair under the Equality Act. And we take into account that during this time he was allowed to and did take as many breaks to walk about as he wished.

42. The one medical website that refers to a single case of a 74 year old man with his condition and incontinence does not prove the general point that it is only older people with the Claimant's condition who experience incontinence

43. In weighing up all of this material we conclude that on balance it was the Claimant's underlying back condition that caused his incontinence and not the failure to provide him with a specialist chair for three and a half months. The evidence pointing to the incontinence being a symptom developed from his back condition is more persuasive it being a medically qualified OH opinion specifically in relation to the Claimant.

44. The Claimant contends that the Cocodamol he took created side-effects for which he should be compensated, including piles. We do not agree. He began taking this medication for his back condition before any discrimination occurred. These side-effects, as unpleasant as they undoubtedly are, were not caused by the discrimination.

45. We have accounted for stress/anxiety in our awards for injured feelings. As we have already explained the greater anxiety of the Claimant was caused by the complaints we have not upheld.

Future loss of earnings

46. The Claimant contends he was redeployed because of the discrimination we have found. We do not accept this. We find it arose because of the ongoing very poor relationship with his manager even after the reasonable adjustments (chair and desk) had been made. The Claimant had continued to complain. Senior managers and the Freedom to Speak-up adviser were involved. The Claimant had previous requested a move in February 2020. When a new position in Mr Gadhvi's digital transformation team came up, it was offered it to the Claimant, who enthusiastically accepted. Since then he has had really successful performance in the role and good relationships with his line management.

47. The Claimant agreed to move to this new role. It has been, on all of the evidence we have heard, a success. The Claimant told us at the liability hearing and we accept that he felt after his move his 'sanity' was coming back, he felt a lot more comfortable working, had been commended for performing beyond expectations (paragraph 85 of his first witness statement). This was an opportunity he gladly took. It was not one foisted on him.

48. In our judgment the move to the new role was not connected to or caused by the earlier failures to provide a chair and appropriate desk. These had been resolved.

49. In any event, we were convinced by Mr Ghadvi that this new role gave the Claimant just as good career prospects as he had in his old role. This was because it gave him new knowledge to add to his previous experience. It made him a nearly unique employee at the Trust in this mix of knowledge and experience. He already has management experience. We conclude that there is no likelihood that he is less able to compete for other jobs whether in the Trust or elsewhere. We reject the Claimant's contentions to the contrary. We do not consider therefore he is likely to have any loss of future earnings.

Interest

50. We decided to award interest on the injury to feelings awards in accordance with the Regulations. We calculate interest on the first award from 22 May 2018 at 8% per year and on the second award from 1 March 2019 at 8% a year to the date of the remedy hearing. The calculation is set out in the Appendix to the remedy judgment.

Employment Judge Moor
Date: 23 June 2021