THE EMPLOYMENT TRIBUNALS

Claimant: **C**

Respondent: **Department for Work & Pensions**

Heard at: **Teesside Justice Hearing Centre**
On: **Tuesday & Wednesday 6th & 7th April 2021**

Before: **Employment Judge Johnson**

Members: **Ms P Wright**
Ms B Kirby

Representation:

Claimant: **Mr J McHugh of Counsel**
Respondent: **Mr S Redpath of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the employment tribunal is that the claimant's complaint of victimisation contrary to Section 27 of the Equality Act 2010, is well-founded and succeeds. The respondent is ordered to pay to the claimant compensation for injury to feelings in the sum of £6,522.72.

REASONS

1. The claimant was represented by Mr McHugh of Counsel who called the claimant to give evidence. The respondent was represented by Mr Redpath of Counsel who called to give evidence Ms Alison Leslie (Team Leader), Mr David Corrigan (Senior Executive Officer) and Mr Luke Hakin (PC Changes Business Manager). There was an agreed bundle of documents marked R1 comprising an A4 ring-binder containing 352 pages of documents.

2. By a claim form presented on 14th August 2019, the claimant brought a complaint of unlawful disability discrimination, namely victimisation contrary to Section 27 of the Equality Act 2010. The respondent defended the claims. The claimant alleged that she had made complaints to her employer that she was being

subjected to unlawful disability discrimination and that she had subsequently commenced proceedings in the employment tribunal, alleging unlawful disability discrimination, in claim number 2500790/2018. The claimant alleged that she had given evidence to the tribunal at the hearing of those claims between 12th and 14th February 2019 and had subsequently raised a formal grievance about further breaches of the Equality Act 2010, following that hearing. The claimant alleged that those amounted to "protected acts" as defined in Section 27 of the Equality Act 2010. The claimant alleged that she was subsequently subjected to detriment because she had undertaken those protected acts. The detriment was the manner in which her claim for Civil Service Injury Benefit was handled and refused by the respondent.

3. The claimant has been employed by the respondent as an administrative officer since July 2002. The claimant has suffered from stress, anxiety and depression for a number of years. For the purposes of these proceedings, the respondent concedes that the claimant's stress, anxiety and depression amount to a mental impairment which satisfies the definition of disability as set out in Section 6 of the Equality Act 2010.

4. In January 2017 the claimant made an application to change her working pattern because of the difficulties she was encountering as a result of her medical condition. The claimant asked to reduce her hours from 30 hours per week to 18 hours per week with effect from 27th March 2017. That application was successful and the claimant's working pattern was then from 8.45am to 3.00pm each Monday, Tuesday and Friday. Wednesday and Thursdays would be non-working days. The claimant accepts that she was informed that her contract would now contain a notice of change clause which meant that the respondent could change her normal working hours to meet their business needs, either by mutual agreement, or by providing her with reasonable notice.

5. The claimant signed a Working Pattern Template, a copy of which appears at page 72 – 74 in the bundle. The document is dated 27th March 2017. It sets out the working pattern described above. At Section 2 it states, "Please use this section to record annual informal annual discussions and any time-limited agreements including the formal review date and discussion. The light touch, annual reviews are mandatory for all non-standard working patterns." At page 74 the document records the following, "working pattern for the next 12 months – review date;

   The document then records Monday 8.45 – 15:00 and Tuesday 8.45 – 15:00.

6. At page 347 there is a document headed "How to manage working patterns", which is dated 14th December 2018. The relevant extracts to which the tribunal was referred, are as follows:-

   - **Part-time, including partial retirement.**

     19 Agreements to work part-time will normally be permanent in contrast to part-year and compressed hours, which are almost always time limited. Employees with part-time contracts including colleagues who have partially

retired will not be asked to increase the total hours per week they regularly work.

Timelimiting – including all part year and compressed hours.

25 Managers should always consider and where appropriate apply a time limit to authorise an employee contractually to work a non-standard working pattern (e.g part-time, part-year, compressed hours, fixed hours).

b) Optional – up to twelve months for any working pattern request, including part-time working, although agreements to work part-time will normally be permanent.

Annual review and forward look.

26 Employees are responsible for arranging the annual review meeting with their manager. This is because the employee will have full knowledge about their working pattern, as they may change team or manager. Managers must meet employees with none-standard working patterns (e.g part-time, part-year, compressed hours, fixed hours) at least once a year informally to review the arrangement to ensure it continues to work for the employee, their colleagues and the business.

7. The claimant's evidence to the tribunal was that the working pattern template provided that her hours were to be reviewed every twelve months and could be varied subject to the needs of the respondent's business. The claimant's evidence was that, "It was clear to me at the time that the change in my working hours was not a permanent one, that my hours are subject to an annual review and that there could be change either by agreement or unilaterally by the respondent giving me notice."

8. In March 2017 the claimant made an application for Injury Benefit Assessment, on the basis that she had to reduce her working hours from 30 to 18, due to the medical condition described above, which the claimant attributed to an injury at work which happened on 30th June 2015. Such an application could be for a "permanent" award or a "temporary" award. A permanent award requires the claimant to establish a level of impairment of not less than 10% disablement and that the impairment can be sufficiently apportioned to the injury. A temporary award only requires the employee to show that their absence or reduction in hours was wholly or mainly related to an injury at work. The claimant's application in March 2017 was for a temporary award. The claimant's evidence was that, despite her application for a temporary award, she was assessed on the basis of the criteria for a permanent award, which was refused. The claimant challenged that decision, insisting that she met the criteria for a temporary award and should not have been assessed on the basis of an application for a permanent award. The claimant made a Subject Access Request from the organisation which handles such benefit applications, which is known as My CSP. Whilst that time-consuming process continued, the claimant issued a claim in the employment tribunal under claim number 2500790/2018, alleging unlawful disability

discrimination and being subjected to detriment on grounds related to trade union membership or activity.

9. As part of that tribunal claim, the claimant alleged that she had made a protected act when she complained to the respondent that it had breached the Equality Act in respect of a 2015 injury benefit claim and that she had made further allegations of a breach of the Equality Act in an e-mail to the respondent dated 30th January 2018. In its findings in those earlier proceedings the employment tribunal recorded that the claimant's absences were then being managed by Miss Alison Leslie. Following the claimant's application for injury benefit and her appeal against its refusal Miss Leslie attended a management meeting with Mr Moore in early February 2018. The purpose of the meeting was to discuss employees attendance records. During this particular meeting the claimant's attendance was discussed. Following the meeting a "management statement" was prepared which was intended to be sent to a third party assigned with the task of assessing the claimant's injury benefit claim. The statement had not been intended to be seen by the claimant and was only discovered by the claimant following the SAR request. In its judgment in favour of the claimant, the tribunal recorded the following extracts from that management:-

10. "This is the third application submitted by this member of staff and we are now of the belief that it is becoming a vexatious claim.

    We appear to be victims of a widening TU strategy that is following a standard pattern; absence recorded as work-related stress – IB application, the DEA referral sought, seeking gardening leave until the process is resolved. We are taking this matter up with our HR business partner but wish to make you aware."

11. In those tribunal proceedings it was accepted that accusing the claimant of being "vexatious" was a serious allegation which was without foundation. It was further accepted that there was no evidence at the time for alleging that the claimant was involved in the alleged trade union strategy. The tribunal found that Miss Leslie had discussed the claimant's application with her colleague Mr Moore and that the management statement was an inaccurate and disparaging document. The tribunal found that describing the claimant as vexatious was a serious allegation without any evidential basis. The tribunal found that the management statement suggested that there was a wider trade union strategy to encourage unmeritorious claims, misrepresented the claimant and painted her in a poor light. The tribunal concluded that the management statement was generally hostile towards the claimant. The tribunal found that the management statement was a deliberate act on the part of the respondent and upheld the claimant's claim of victimisation. Compensation for injury to feelings was awarded to the claimant. The respondent did not appeal against that decision.

12. The hearing in the previous proceedings took place on 12th, 13th and 14th February 2019. The judgment was promulgated on 6th March 2019. Miss Leslie gave evidence on behalf of the respondent in those proceedings and was also called to give evidence on behalf of the respondent in the current proceedings. Under cross examination by Mr McHugh, Miss Leslie, somewhat reluctantly, conceded

that she had been criticised by the tribunal during the earlier proceedings and that following the hearing but before promulgation she was "under no illusions" as to what would be the likely outcome of those proceedings.

13. Whilst those previous employment tribunal proceedings were continuing, the claimant's application for an Injury Benefit Award continued to be reviewed and processed by My CSP. On 20th February 2019 (after the tribunal hearing but before promulgation of the judgment) My CSP wrote to Miss Leslie in the following terms:-

> "We are currently processing an Injury Benefit application for C and this has been referred to the scheme medical advisor for further medical assessment. The SMA has asked a question concerning the nature of the reduction to C's working hours, as this may determine the type of medical assessment which they are undertaking. Could you please confirm whether the reduction to C's working hours is:-
>
> - A permanent contractual change, or
> - A temporary change as a short-term measure and she may return to full-time hours in due course
>
> The medical assessment is currently on hold until we receive the information above which only C's employee will be able to confirm. I would therefore be grateful for a response to allow the medical assessment to continue. We are aware that the application was made in 2018 and would be grateful for an urgent response in order to progress the matter swiftly. I look forward to hearing from you."

14. By letter dated 22nd February Miss Leslie replied in the following terms:-

> "Apologies for the delay. As I'm no longer Judith's team leader it has taken me a bit of time to locate the relevant documentation. I can now confirm that the reduction in hours is a permanent contractual change."

15. As Miss Leslie states in that response, she was not at that time the claimant's team leader. Under cross examination, Miss Leslie conceded that the matter should have been referred to the claimant's team leader, as that would be normal procedure. Miss Leslie further conceded that when she received the letter from My CSP she did not know the answer to the question about whether the claimant's change in hours was a permanent contractual change or a temporary change. Miss Leslie's evidence was that she spoke to her own manager Miss Joanne Fraser who agreed that Miss Leslie could answer the question but that she would have to access the working pattern template from another colleague, Fiona Rochester, who at that time managed the claimant's own line manager. Miss Leslie accessed the documents and was shown a copy of the working pattern template which appears at page 72 – 74 in the bundle. The claimant's evidence to the tribunal was that, "From experience I knew that this meant that the change is permanent" and that any further changes would require the claimant to make a new application. The claimant's evidence in her statement was that "I knew that the change was permanent by looking at the front of the working pattern

template. I fully believed I was able to give an accurate response to the query. It was a fact that the change is permanent."

16. Under cross examination from Mr McHugh, it was put to Miss Leslie that she had not examined the document properly and had not in fact looked beyond the front page. Miss Leslie's response was, "I cannot remember and cannot say yes or no." When asked what was the basis upon which she concluded that there was no time limit on the change of hours and therefore it amounted to a permanent change, Miss Allison's response was, "That is what I believe". When pressed by Mr McHugh that she should have looked at the form properly and taken management advice before she replied, Miss Leslie conceded that she may have been mistaken about her interpretation of the form and that with the benefit of hindsight she should have taken further advice before replying. When it was put to her that this was a badly completed form and that as a result the answer to the question put to her was far from clear, Miss Leslie accepted that the form was unclear but that, "At the time it looked straightforward to me."

17. It was specifically put to Miss Leslie by Mr McHugh that she remained of the opinion that the claimant was a vexatious claimant whose claim to the employment tribunal had created an extremely difficult and unpleasant experience for Miss Leslie when she had to give evidence to that tribunal. Miss Leslie denied that any of those matters would have influenced the way in which she dealt with the letter from My CSP or the claimant's benefit application form.

18. It was put to Miss Leslie by Mr McHugh that she should not have involved herself at all in dealing with the enquiry from My CSP. That was so because she was not the claimant's line manager at the time, she did not know the answer to the question which had been asked, had recently given evidence against the claimant in employment tribunal proceedings and had previously accused the claimant of being a vexatious claimant for benefit. Miss Leslie accepted each of those points but insisted that she had only dealt with the enquiry because it was her normal practice to deal with such matters as expeditiously as possible.

19. Mr McHugh then challenged the basis upon which Miss Leslie had concluded that the change to the claimant's hours was a permanent change rather than a temporary change. Miss Leslie accepted the document at page 347 in the bundle "How to Manage Working Patterns", was to be interpreted so that a working pattern plan could be changed, depending upon the needs of the employer or the employee and that both could ask for a change at any time. Miss Allison accepts that the claimant was entitled to ask for a change after 12 months, but when asked that this must mean that any change was temporary and not permanent, Miss Allison insisted that "This depends upon how you read the rules". Miss Leslie accepted that she may have mis-read the document, but that she still believed the claimant's change of hours amounted to a permanent change and not a temporary change.

20. Under re-examination from Mr Redpath Miss Allison accepted that she was not particularly familiar with the injury benefit rules, that she did not know the qualifying conditions and had never been required to have any understanding of those rules prior to the claimant's application. Miss Allison accepted that a

change in an employee's working pattern which was found to be unworkable would require 3 months notice to be given to change the working pattern after which a new document would be prepared.

21. The tribunal noted from pages 350 and 351 in the bundle that managers should always consider, and where appropriate apply, a time limit to authorise an employee contractually to work a non-standard working pattern. There is an option for any working pattern request, including part-time working, to last for up to twelve months, although agreements to work part-time would normally be permanent. At paragraph 26 on page 351 it clearly states that employees are responsible for arranging the annual review meeting with their manager to discuss their working pattern. The paragraph clearly states, "managers must meet employees with non-standard working patterns (eg part-time, part-year, compressed hours, fixed hours) at least once a year informally to review the arrangement to ensure it continues to work for the employee, their colleagues and the business. Annual reviews should encompass both a review of the employee's formerly agreed contractual hours and the actual times they routinely attend under local flexi-time arrangements (these two frequently differ).

22. Having heard the evidence of the claimant, that of Miss Allison and having examined the paperwork, the tribunal found that the change to the claimant's working pattern was temporary, and not permanent. The tribunal found that Miss Allison's examination of the contract and her consideration of the claimant's application form was not undertaken with an appropriate level of care and diligence. Miss Allison's explanation as to manner in which she dealt with the claimant's application was wholly unsatisfactory. The tribunal found that there was no good reason why Miss Allison should have involved herself at all in dealing with the questions raised by My CSP. Miss Allison was not the claimant's line manager at the time. Miss Allison was unable to answer the questions raised by My CSP. Miss Allison did not seek the appropriate level of advice about how to answer the question raised. Miss Allison had recently described the claimant as a vexatious applicant. Miss Allison was by then expecting to be criticised by the employment tribunal to which she had given evidence against the claimant. The tribunal found that any fair-minded and informed observer was likely to conclude that there was more of a real possibility that Miss Allison was biased against the claimant's application.

23. The claimant raised a formal grievance about the manner in which her application had been handled. A copy of that grievance appears at page 248 in the bundle and states as follows:-

> "I wish to make a complaint against Alison Leslie as she had been involved in my injury benefit claim without a business reason and when it wasn`t her area of expertise. Alison Leslie was not my manager at the point I reduced my hours, nor my manager at the point questions were being asked from HML. It is widely known and especially by managers that matters involving contracts, pay and terms and conditions are a Shared Services query. However Alison Leslie stated that she decided with senior management support to make that decision. I have now

received information from Shared Services that it is their query and not a DWP action and she had no reason other than to frustrate my claim."

24. The grievance hearing was conducted by Mr Luke Hakin, PC Changes Business Manager. Mr Hakin gave evidence to the tribunal. Mr Hakin considered that there were four points to be considered as part of the grievance, namely:-

    (i) Alison Leslie had responded to the HML enquiry stating that the change in working was a permanent change;

    (ii) that Alison Leslie should have referred the enquiry to Shared Services;

    (iii) that the claimant was concerned about how Lesley Allison attained access to the information she had used;

    (iv) that the claimant believed Lesley Allison had no reason to respond to the request other than to frustrate the claimant's injury benefit claim.

25. Mr Hakin's conclusions were as follows:-

    (i) that Lesley Allison had responded to the enquiry from HML;

    (ii) that there was no requirement for the enquiry to have been referred to Shared Services;

    (iii) that Miss Allison had not obtained access to the claimant's information;

    (iv) there was insufficient evidence that Miss Allison had sought to frustrate the injury claim.

26. The claimant appealed against that decision. The appeal was heard by David Corrigan, Senior Executive Officer. Mr Corrigan's findings in dismissing the appeal were as follows:-

    (i) there is no evidence that Alison Leslie breached the respondent's standards of behaviour policy;

    (ii) there is no evidence of any inappropriate access by Alison Leslie to the claimant's HR record;

    (iii) that a reasonable person would have concluded that the information is sourced from the claimant's personal file via Fiona Rochester;

    (iv) there was no evidence of any collusion or any instruction between Alison Leslie and HR;

    (v) there was no evidence that Alison Leslie sought to frustrate the outcome of the claimant's injury claim.

27. The tribunal found both Mr Hakin and Mr Corrigan to be less than helpful witnesses. Neither had properly addressed their minds to the main thrust of the claimant's complaint namely that Alison Leslie should not have involved herself anyway in consideration of the claimant's application for injury benefit. Both Mr Hakin and Mr Corrigan accepted that they were more concerned about whether there had been a technical breach of the respondent's standards of behaviour policy. Mr Hakin accepted that only one question had been put to Alison Leslie throughout his investigation. Mr Corrigan insisted that it was not his role to reinvestigate the allegation of collusion of against Alison Leslie and stated, "I could not understand why Alison Leslie would try and frustrate an award". He did not know that Miss Leslie had described the claimant as a vexatious applicant. Mr Corrigan accepted that his conduct of the appeal was based upon whether there was a sound business reason for Miss Leslie to have accessed the claimant's personal data and not whether her interpretation of the change of hours was accurate or inaccurate.

The law

28. The claimant's complaint of victimisation engages Section 27 of the Equality At 2010.

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act--
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

29. It is for the claimant to establish the following matters:-

    (i) that she has done a protected act;

    (ii) that she has been subjected to a detriment;

    (iii) that she was subjected to that detriment because she had done a protected act.

30. Mr Redpath quite properly conceded that the claimant had done a protected act when she complained to the respondent about disability discrimination and in particular when she issued proceedings in the employment tribunal and gave evidence to the employment tribunal at the previous hearing. Accordingly, the claimant has established that she had done a protected act.

31. When considering whether someone has been subjected to a detriment, the EHR code states as follows:-

> "Generally, a detriment is anything which the individual concerned might reasonably consider change their position for the worst or put them at a disadvantage. This could include rejection for promotion, being denied an opportunity to represent the organisation at external events, being excluded from opportunities to train, or being overlooked in the allocation of discretionary bonuses or performance related awards. A detriment might also include a threat made to the complainant, which they take seriously and which it is reasonable for them to take seriously. There is no need to demonstrate physical or economic consequences. However an unjustified sense of grievance alone would not be enough to establish detriment."

32. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003 ICR337]** the House of Lords considered the meaning of "detriment" and established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The situation must be looked at from the claimant's point of view, but that perception must be reasonable in all the circumstances.

33. In accordance with **Section 136 of the Equality Act 2010**, the claimant must prove facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent has contravened a provision of the Equality Act. Once the claimant has established that prime officiary case, the burden of proof passes or shifts to the respondent to prove that the act of discrimination did not occur. If the respondent is unable to do so, the tribunal must uphold complaints.

34. The tribunal found that the respondent's refusal to grant the claimant's application for injury benefit amounted to a detriment. Being refused a financial award which could have amounted to several thousand pounds was something which the claimant considered to be to her disadvantage. The claimant's perception in that regard was reasonable in all circumstances.

35. The tribunal found the following facts proven on a balance of probabilities:-

    (i) the claimant's application for injury benefit was a genuine application;

    (ii) that application should have been fairly and reasonably considered by the respondent in accordance with its written policies;

    (iii) the application should have been dealt with by the claimant's line manager;

    (iv) the questions raised by My CSP should not have been dealt with by Alison Leslie;

    (iv) Alison Leslie had previously formed an adverse view of the claimant's applications for benefit;

    (v) Alison Leslie had given evidence against the claimant only a few days prior to considering the claimant's most recent application;

    (vii) Alison Leslie's consideration of the claimant's most recent application was adversely affected by those matters to such an extent that she either failed to fairly and reasonably consider the application or deliberately ensure that it would not be granted.

36. The respondent was unable to provide a meaningful explanation as to manner in which the claimant's application had been dealt with. Both Mr Hakin and Mr Corrigan had failed to address their minds to that particular point. Alison Leslie's evidence was wholly unreliable.

37. The tribunal was satisfied that the claimant had done a protected act. The tribunal was satisfied that the claimant had been subjected to a detriment. The tribunal was satisfied that the claimant had been subjected to that detriment because she had done the protected act. Accordingly the claimant's complaint of victimisation contrary to Section 27 of the Equality Act 2010 is well-founded and succeeds.

38. The claimant does not bring a claim for compensation relating to the benefit claim itself. The claimant limits her claim to one of damages for to injury to feelings. That claim is made pursuant to **Section 119 (4) of the Equality Act 2010. Prison Service & Others v Johnson [1997 ICR275]** is a well-known authority in the Employment Appeal Tribunal which sets out the following guidance in respect of claims for compensation for injury to feelings:-

    (a) awards for injuries to feelings are designed to compensate the injured party and not to punish the guilty party;

    (b) the award should not be inflated by feelings of indignation at the conduct of the guilty party;

    (c) awards of compensation should not be so low as to diminish respect for the policy of the discrimination legislation, but should not be so excessive that they might be regarded as a windfall or untaxed riches;

(d) awards should be broadly like the range of awards in personal injury cases;

(e) the tribunal should always bear in mind the value in everyday life of the sum they are contemplating and the need for public respect for the level of the awards made.

39. The Court of Appeal set out guidelines for injury to feelings awards in the well-known case of **Vento v Chief Constable of West Yorkshire Police** (2) [2003 ICR318]. There are now three bands of injury to feelings awards, namely:- a lower band of £900.00 to £9,100.00 for the less serious cases, a middle band of £9,100.00 to £27,400.00 for cases which do not merit an award in the upper and and finally an upper band of £27,400.00 to £45,600.00 for the most serious cases.

40. Both Mr McHugh and Mr Redpath agreed that any compensation to be awarded to the claimant in this case would fall within the lower of those three bands. Having considered the claimant's evidence and in particular the impact upon her of what was a further act of victimisation which thwarted a genuine application for financial relief, the tribunal found that an appropriate figure for compensation for injury to feelings is the sum of £6,000.00.

41. **Section 124 (2) (b) of the Equality Act 2010** permits the tribunal to award interest on such awards of compensation. The applicable rate of interest is 8% and is to be awarded from the date of the act of discrimination complained of until the date when the tribunal calculates the level of compensation. Interest is to be calculated at the "midpoint" between those dates. The midpoint in this case is the 25th March 2020. The award of interest is therefore £522.72.

42. The respondent is ordered to pay to the claimant compensation for victimisation in the total sum of £6,522.72.

Authorised by EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 18 June 2021