EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms C Arthur **v** **Hertfordshire Partnership University NHS Foundation Trust**

Heard at: Watford **On**: 13 and 14 April 2021

Before: Employment Judge R Lewis
Members: Mr P MacLean
Mr C Surrey

Appearances
For the Claimant: In person
For the Respondent: Mr A Smith, Counsel

JUDGMENT

1. The respondent is ordered to pay to the claimant as compensation for disability discrimination the total sum of £10,552.99, in accordance with the calculations set out below.

2. The claimant's application for an order for costs is refused.

3. The claimant is ordered to pay to the respondent costs in the sum of £20,000.

4. The sums paid by the claimant as deposits are ordered to be paid to the respondent.

5. The respondent may retain the above remedy award, and the deposit sums, and set them towards the above order for costs.

REASONS

1. The claimant asked for written reasons.

Procedural

2. This tribunal heard this claim between 3 and 16 November 2020. We gave judgment on the final day and listed the present hearing for three days.

3. The tribunal issued two orders, a case management order which was sent to the parties on 21 November 2020 and set out a procedural timetable for this hearing; and Reasons (214 paragraphs, 44 pages) sent to the parties on 22 December 2020.

4. The claimant appealed against both the case management order and the Judgment. By a letter dated 9 February 2021 (UK EAT PA/1005/20) the EAT (HHJ James Tayler) directed that the appeal against the November case management order had no reasonable prospect of success and no further action would be taken. The EAT wrote:

> "Case management orders are designed to prepare for the remedy hearing on normal and entirely reasonable terms … it is not open to the claimant to refuse to "consent" to the order. The claimant should focus her energies on preparing for the remedy hearing and respond to the respondent's application for costs."

5. By letter of 9 April 2021 (UK EAT PA/0056/21 and 0224/21) the EAT (HHJ Auerbach) directed that the appeal against the liability judgment had no reasonable prospect of success and that no further action would be taken on it.

6. We understand the claimant to have applied in both instances for a Rule 3(10) hearing.

7. On 22 February the claimant wrote to this tribunal to ask for a postponement of this hearing and for the proceedings to be stayed pending determination of her appeal. She had by then received the notification of Judge Tayler's decision. Due to office error, her request was not referred to the present judge until 8 April 2021, on which day the judge directed that it be refused.

8. The orderly timetable which had been directed in November in preparation for this hearing was not fully adhered to. We accept that the claimant did not comply with paragraph 5 (witness evidence, documents relied on or information about ability to pay costs) until days before this hearing, if at all.

9. The documents produced for this hearing were usable, thanks to what was evidently a considerable amount of last-minute work by those at Messrs DAC Beachcroft, to whom we repeat thanks already expressed.

10. We had at this hearing a remedy bundle prepared by the respondent; a skeleton and costs bundle prepared by the respondent, which we were asked not to consider until remedy had been determined; a witness statement from the claimant; and written submissions from the claimant in support of a costs application. The tribunal had received no notification that the claimant applied under rule 77 for a costs order, and did not direct that it be listed.

11. We were also referred to the original trial bundle. Where we refer to documents in this judgment, a document identified by T is from the trial bundle and by R is from today's remedy bundle. Where we refer to our own

liability judgment, we refer to it as LJ, so that LJ23 is paragraph 23 from the Judgment of November 2020.

12. The claimant took part in person by CVP. Mr Smith was present by CVP. The claimant was frequently distressed, and we took a number of breaks. We proceeded slowly.

13. At the first stage, the tribunal met the parties to organise how our work would proceed and organise how the paperwork would be used. The judge asked both parties if they were ready to proceed and both confirmed that they were.

14. The tribunal adjourned to read documents which had been provided for this hearing. Mr Smith took instructions during the adjournment and when the hearing resumed at 12 noon, confirmed that the respondent was ready to answer the claimant's application for costs.

15. We heard first the claimant's evidence on remedy in support of her witness statement. In the event, her statement barely touched on the remedy task before us and was supplemented by further questions from the judge. The claimant was cross examined on remedy for about 20 minutes, during which a break was necessary. Mr Smith then made his submissions on remedy.

16. We then heard the claimant's application for costs, although she had little to add to written submissions in which she applied for costs of just under £143,000. Mr Smith replied.

17. We adjourned at the end of the first day for deliberation on these points. On the second morning, we gave judgment on remedy and on the claimant's costs application. We adjourned to enable Mr Smith to take instructions on how the respondent wished to pursue its costs application in light of the remedy judgment.

18. We then heard Mr Smith's submissions on costs. The tribunal took a break after he had finished, after which the claimant replied. The tribunal gave judgment on costs in the early afternoon of the second day. Paragraph 5 of this Judgment is made in accordance with our powers under rule 29, and of the tribunal's own proposal, with which Mr Smith agreed.

General observations

19. We preface our discussion by repeating the general observations set out at paragraphs 35 to 39 of LJ. We add a further concern. It was clear that the claimant's understanding of our earlier judgment was very limited. We had endeavoured at paragraphs 207 to 213 in particular, and in the November case management order, to enable both sides to prepare for this hearing.

20. It was not clear that the claimant had understood what had been said in those paragraphs in particular. The claimant referred a number of times to live proceedings in the EAT. It is of course her right to pursue matters further as she wishes. We were however concerned that when she referred to those proceedings, she appeared to do so without a realistic

understanding of what they involve, or what the issues would be on appeal. We intend no discourtesy in noting that the claimant appeared not to have attached much weight to the observations of Judge Tayler or Judge Auerbach, or indeed to the observations with which Judge Manley and Judge Eady QC had explained their deposit orders.

Financial loss

21. The first matter for us to consider was loss of income. We repeat paragraphs LJ190-205. As Mr Smith rightly pointed out, the claim for reasonable adjustment (failure to extend time to appeal) could not give rise to compensation for loss of income, because the claimant had already been dismissed and her income had ended.

22. We therefore turned to loss of income caused by the section 15 claim, ie the failure to postpone the dismissal hearing from 19 June. The first point was as to how long it would have taken to rearrange a postponed hearing in a non-discriminatory manner. We had set out our approach at LJ208. It was not clear that the claimant understood LJ208, and she said little about it. Mr Smith in reply drew to our attention that the claimant had first instructed solicitors by late July 2017, and their first letter on her behalf had been sent on 25 July. He submitted that that was an indication that the claimant was by that date well enough to engage with the issue of her employment. When cross examined, the claimant said that she had very little memory of the events, and it was possible that her husband had undertaken all communication with the solicitors. Mr Smith went on to caution the tribunal against assuming that the claimant's disciplinary could not have been rearranged during August; the respondent had produced (R119) an availability table for members of the disciplinary panel, showing dates in August and September 2017 when they would have been available for an adjourned hearing.

23. We find that had matters proceeded in a non-discriminatory way, the panel on 19 June 2017 would have adjourned. It would have followed the advice of Dr Yew and arranged a review of the claimant's health to take place at the earliest on 12 July. That would have given rise to another report.

24. There was scant evidence of what it would have said, ie of the claimant's state of health in the period after mid July 2017. Although we had a number of medical reports, it was striking that there was no direct medical evidence about the claimant for much of the period between June and October 2017. Dr Lockhart reported in 2019 that on 10 August 2017 the claimant's CBT therapist had reported "persistent and uncontrollable worry" and that the claimant had been assessed on the GAD7 scale, and had achieved the maximum score (T1407, para 2.26). At that time (summer 2017) the claimant was pregnant, and was therefore trying to avoid medication in favour of CBT.

25. We find that it would have taken to late July to obtain and receive a further report, which may well have advised that there was not a recovery time within which the claimant would be able to participate in a disciplinary

hearing. In those circumstances, we find that the respondent would have proceeded on the footing that a disciplinary hearing would take place at an adjourned date, with all reasonable arrangements to enable the claimant to participate by Zoom and/or in writing and/or vicariously, and with absolute clarity that the claimant's inability to attend on the second occasion would not prevent the matter from proceeding.

26. We find, having regard to R119, that that meeting would have taken place at the latest in the week of 18 September. We repeat our conclusion as to what would have happened.

27. We therefore set the period for loss of earnings as 12 weeks. We accept that that would have been payable at SSP level, and we accept Mr Smith's net weekly figure of £102.20, a total therefore of £1,226.40. The interest calculation on the basis set out below is £187.39. The total for that element therefore is £1,413.79.

Injury to feelings

28. When we come to injury to feelings, we are in much more difficult territory. Mr Smith rightly cautioned us that the appropriate principle is a compensatory figure, which is proportionate. He stressed that our power was limited to compensating the claimant for unlawful conduct. Although that proposition sounds obvious, we were concerned that the claimant had not understood it. We indicated at LJ 207 and LJ 210 to 212, that our task would be limited to two types of award (loss of earnings and injury to feelings) for two things only (failure to adjourn on 19 June 2017 and failure to extend time for appeal 25 July 2017) and no more. The claimant's remedy statement nevertheless set out a painful history of how events since October 2016 have impacted on her mental health. It was not disputed that the claimant suffered PTSD in response to management decisions in October 2016. However, it was not open to us to compensate the claimant for any event other than the two acts of discrimination in June and July 2017.

29. We find that at the material time the claimant's health was as described by Dr Yew in his report of 30 May 2017, which was a snapshot of her mental health at the time in question. Our task was to decide what injury to feelings she suffered on and after 19 June and 25 July 2017.

30. The claimant's written witness statement said nothing which described injury to feelings with reference to the events in June and July 2017. She wrote at length, and in distressing detail, about the impact on her of the totality of these events. When she gave evidence, the judge asked her to describe the injury to her feelings, specifically in relation to the events before the tribunal. So far as we know, her oral evidence to this tribunal was the first occasion on which she did so. She spoke of her sense of isolation, and that being excluded from a meeting deepened that sense. She had felt shut out and excluded. She had been unable to get witnesses. She had not been able to achieve the vindication of clearing her name. She had suffered the stigma of being involved in a disciplinary and subsequently a tribunal claim.

She wanted the opportunity to come to a meeting and see and achieve justice.

31. When the judge asked her how she would describe the injury to feelings in money terms, her answer was, "I have lost my career." That answer, no matter how deeply felt and sincere, unfortunately was an indication of the lack of realism or understanding or analysis with which the claimant approached this hearing.

32. Mr Smith had had no notice of the claimant's oral evidence on injury to feelings. He pointed out that the claimant's sense of isolation was not attributable to the meeting of 19 June 2017, but went back to the original trigger event of October 2016, when she had been removed from the workplace.

33. We have mentioned above the medical evidence from the claimant's CBT therapist of August 2017. We noted two portions of psychiatric reports prepared for these proceedings. In a report on behalf of the claimant in May 2019, Dr Winbow wrote (R77-78):

> "The claimant had already had PTSD in June 2017 and she was unable to work for that reason from 23 June 2017. Taking into account the challenging life events effecting the claimant before and after her dismissal without being permitted to attend the disciplinary hearing, and therefore consider on the balance of probabilities that it was a dismissal without being permitted to attend the disciplinary hearing, which has mainly caused and very significantly contributed to the claimant being unable to work up until today. Taking into account these directly contributing factors and other events in her life, I estimate that 90 per cent of the reason the claimant has been unable to work since 23 June 2017 is the dismissal without being able to attend the disciplinary hearing. The appeal not being heard because it had been received 10 days after the date of dismissal exacerbated her symptoms of PTSD as well as anxiety and depression."

34. In a report on behalf of the respondent from Dr Latcham of December 2019, we read the following (R111-112):

> "She considers that the disciplinary hearing and the appeal might have presented opportunities for her to make corrections and to restore both her reputation and her employment. The decision to hold the disciplinary hearing in her absence might be considered to have perpetuated her psychiatric condition as might be the decision not to allow her to appeal the decision to dismiss her. It is my opinion however that unless either the outcome of the hearing at which she had been present or had been meaningfully represented, or the outcome of any appeal had been different, she would not have felt vindicated and her condition would have been the same as it is."

35. Although Dr Latcham's language is troubling on paper, it seems to us that the disagreement between the two specialists is about the long-term consequence on the claimant's employment and ability to work of the June and July 2017 events. That is not a matter for us, in light of our other remedy findings.

36. We need go no further in resolving the disagreement, nor are we qualified to do so, save to add this observation. Dr Latcham's comment is more in accordance with our experience and common sense, which tell us that the opportunity of a day in court presupposes that the day in court will achieve the outcome which is hoped for. To put it more plainly: our finding is that if there had been a disciplinary hearing which the claimant attended, she would not have found the procedure to her liking, and she would in any event have been dismissed. While that may have met her sense of exclusion, it would not have met her sense of injustice.

37. When we consider other factors, we note that we are concerned with two separate events, a few weeks apart. The events carried the authority of senior members of the respondent. Both were matters of process not outcome, and although comment may be made that a specialist Mental Health Trust, though senior managers acting on with HR advice, discriminated against one of its own employees on grounds related to mental health, we must bear in mind that the function of injury to feelings awards is compensatory only.

38. We find that the claimant was hurt to be denied personal access to an individual with whom to discuss her feelings and concerns. We agree that she felt that she was denied a voice, although we add another caution. The claimant had unrealistic expectations and understanding of the disciplinary process. She had no right to expect that the complainants against her (A to F in LJ) would be present or available for questioning. She is to be compensated for being denied access to a hearing on the terms on which the respondent would have conducted the hearing.

39. We accept that the claimant's sense of injustice has been exacerbated by being unable to attend a hearing; we accept the caution that her sense of injustice would not have been assuaged if she had attended a hearing and had achieved the outcome (dismissal) which we have found was a 100% probability.

40. Drawing all of these matters together, it seems to us that the appropriate award is at the top of the bottom band, and the award is £7,000.00.

Interest

41. The interest calculation takes the date of discrimination to be 19 June 2017. The date of calculation was 14 April 2021. We take that to be 3.82 years. Mr Smith invited us not to award interest for the entire period, allowing for the delay caused by the appeal to the EAT. We do not agree. The rule enables us to depart from the standard award of interest if the award might cause "serious injustice." We do not consider that that high test is met in this case.

42. The appropriate calculation is therefore as follows: the period is 3.82 years, calculated at 8% of £7,000.00 for the injury to feelings award, which we calculate as £2,139.20, and a total injury to feelings award of £9,139.20.

43. Interest on the loss of earnings award is calculated on the same basis and then halved, as set out above.

Claimant's costs

44. It was not clear if the claimant's application for costs was seriously advanced. The first indication that the claimant wished to make the application was a day or two before this hearing.

45. The claimant submitted that the respondent had conducted the proceedings unreasonably by defending points on which it failed (eg s.6 disability), and by intimidatory tactics in the litigation; and that in consequence, she had had to incur considerable costs, including the substantial costs of counsel and experts. Her claim was not supported by any receipts or invoices, and the totality of the narrative on solicitors' costs was a few words to the effect that 398 hours work had been done at a rate which appeared to be around £250.00 per hour.

46. We do not find that it has been shown that the respondent conducted itself unreasonably in defence of these proceedings. We see no evidence of intimidatory conduct. We remind the claimant that a respondent has no choice: It has been drawn into proceedings by the exercise of choice by its opponent. We find that it is furthermore not in the interests of justice to make an award of costs against a respondent party which has been successful on the great majority of claims; nor to make an award based on an unsupported one-line narrative, which simply states an hourly rate and a huge number of hours. (Expressed in real time, the claim for costs equated to one person working all day, every day, on the claimant's case for nearly eleven weeks). The application was refused.

Respondent's costs

47. The final matter was the respondent's application for costs. Mr Smith's submission was that in the relevant period (ie since August 2019) the respondent's costs had been in excess of £255,000; of which it attributed 60% to the whistleblowing claims; of which it applied for a fixed award of £20,000.00. Whatever the precise calculations and percentages, we accept that in this application the respondent applied for a fraction of the actual costs incurred in defending this claim. We wholly reject the claimant's criticism of the respondent for defending itself through solicitors rather than by use of its HR team: it had the right to the representative of its choice.

48. The primary basis of the application was that on 7 December 2018 Judge Manley had struck out all the claimant's claims of public interest disclosure and stated that in the alternative she would have ordered deposit orders.

49. On 13 August 2019, the EAT, (HHJ Eady QC) set aside the strike out orders and reinstated the deposit orders (C26-27). The claimant had been ordered to pay two deposits of £250.00 each in relation to public interest disclosure claims and had done so.

50. Two sentences used by Judge Manley are repeated here, and should be read in conjunction with our findings in LJ:

> "My finding is that the claimant has no reasonable prospect of success in showing the public interest disclosure led to any detriments or her dismissal ..
>
> As indicated I can see no causal connection at all between PID 2 and any of the detriments. There is only a very limited connection between PIDs 3 and 4…My view is that she has no reasonable prospect of showing that any PIDs, if the were any, were causally connected, that is that they were the principal reason for the dismissal."

51. The claimant was represented by counsel both before Judge Manley and at the EAT.

52. Rule 39(5) states as follows:

> "If the tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order
>
> (a) The paying party should be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of Rule 76, unless the contrary is shown."

53. At the first stage, the tribunal dealing with the costs application must decide whether the claimant has behaved unreasonably in her conduct of the claim. We find that the claims of public interest disclosure failed for substantially (if not identically) the same reason as the deposit orders were made. It therefore follows, applying rule 39(5), that the test of unreasonable conduct of the claim is met.

54. We also find an alternative ground of unreasonable conduct, which was that we were briefly referred to negotiations. We do not have a complete evidential trail, as it appeared that some negotiation had been conducted orally through Acas. The claimant however readily accepted that she or her husband had at various times put through Acas settlement figures between £2 million and £5 million. Those figures were advanced on the basis that the claimant's experience was "career ending".

55. At the time of the negotiations, the claimant was in her late thirties. She has written that she would like to continue working until the age of 67. At the time in question, payslips indicate a take home pay (not including pension and other matters) of about £2,500 per month. Although the precise figures are not material, the claimant's proposed settlement sums equated to loss of earnings for more than 100 years. Making every allowance for the claimant's legal inexperience, she is also a university graduate and a qualified HR professional: such figures were fanciful and were not a realistic settlement basis. They were not reasonably put.

56. For avoidance of doubt, we confirm that in relation to each of the above matters separately, the test of unreasonable conduct has in our view been met.

57. We must then consider the interests of justice. We take pride in the tribunal as a jurisdiction to which there is open access, without need of representation, to secure workplace justice. We must balance that with our obligation to safeguard employers from unmeritorious claims; our duty to ensure that the finite resource of the tribunal is well used; and bearing in mind that we are not subject to the same rules as the civil courts. Costs do not routinely follow the event but are exceptionally awarded.

58. In finding that it is in the interests of justice to make a costs award in this case, we rely most heavily on the deposit order events. The claimant was advised by solicitor and counsel before both Judge Manley and Judge Eady QC. We must take it therefore that the meaning and effect of deposit orders were explained to her, along with the risk carried by Rule 39(5). The claimant had had the view of two experienced specialist employment judges, which was that this part of her claim had no reasonable prospect of success. She had the opportunity not to pursue it. It has failed on grounds substantially similar if not identical to those predicted by Judge Manley: the inability of the tribunal to find any causal connection whatsoever between any protected disclosure and the detriments complained of.

59. The public interest disclosure claim was hugely demanding of resource: It required analysis of a number of disclosures, and of some 30 detriments. It opened the door to the excessively long and paper heavy claim which followed. Mr Smith suggested that if the disability discrimination claim alone had proceeded it would have been a two-day case; we think probably a three-day case, but even so, it would have been a much less resource heavy exercise.

60. The interest of justice in this case seems to us in favour of a costs award.

61. The claimant placed before the tribunal no information about ability to pay. When offered the opportunity to do so in her oral evidence, she simply said that she had no ability. While that is a troubling assertion, we cannot accept the logical consequence, which is that an impecunious claimant may conduct her claim unreasonably without financial risk. Despite the order of this tribunal of November, and the reiteration in the EAT letter of 9 February 2021, she had done nothing to produce information or evidence about ability to pay. We had therefore no material upon which to make a decision save to say that we do not accept in principle that a person of the claimant's energy, ability and education ceased to have an earning capacity (as she said) at the age of 39. In setting the award at the maximum level open to us for a fixed sum, we note the effect of the remedy award in the claimant's favour; and we accept the possibility of a future period for payment. We note that the sum awarded represents less than 10% of the respondent's actual costs of this litigation.

Set off

62. The tribunal raised the issue of, in effect, set off. We wanted to avoid the possibility of the respondent paying the remedy sum to the claimant, with no guarantee that she would apply any of it to payment of the costs order. We could not see any interest of justice in that happening. We did not think that Rule 66 could be used to set sequential dates for payment. Our order is made in the exercise of our general case management powers under Rule 29 and in accordance with the interests of justice.

_____
Employment Judge R Lewis 10/5/2021

Date: ……..

Sent to the parties on: .....

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For the Tribunal Office