



EMPLOYMENT TRIBUNALS

Claimant: Mr R Proctor

Respondents: (1) Warwick Estates Property Management Ltd
(2) Verto HR Ltd

Heard at: Remotely, by video **On:** 26 May 2021

Before: Employment Judge S Moore
Mr M Lewis
MS H Mason

Representation

Claimant: Ms Millin, Counsel
Respondents: Ms Cotton, HR Manager

RESERVED JUDGMENT ON REMEDY

1. The respondents are jointly and severally ordered to pay the claimant the following sums:
 - a) £9000.00 (nine thousand pounds) in compensation for injury to feelings;
 - b) £2250.00 (two thousand two hundred and fifty pounds) uplift for failing to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
 - c) £2064.68 (two thousand and sixty four pounds and sixty eight pence) interest.

REASONS

Background and introduction

1. This is the reserved decision of the employment tribunal sitting remotely by video on 26 May 2021. This followed a judgment in favour of the claimant dated 7 December 2020 in respect of his claim for a failure to

make reasonable adjustments contrary to section 20 and 21 of the Equality Act 2010.

2. A case management preliminary hearing took place before Judge Moore on 15 January 2021. At the hearing the Claimant indicated he wished to make a claim for personal injury. This was not understood to be in respect of the hernia at that time. The schedule of loss made no mention of a personal injury claim for the hernia. The reference to personal injury was understood to be in reference to injury to mental health over and above a claim for injury to feelings. Judge Moore indicated that if the claimant wanted to rely on medical evidence it would usually be appropriate to expect the parties to cooperate with a joint instruction. The claimant elected not to adduce medical evidence as he did not want to delay the listing of the remedy hearing to accommodate a joint report.
3. We had before us a remedy bundle and heard evidence from the claimant, and on behalf of the respondent, Ms Cotton and Ms Power. Despite being warned to only call evidence relevant to the issue of remedy at the preliminary hearing above, the respondent called Ms Power whose evidence consisted solely of matters that have been determined at the liability hearing. Therefore in respect of the evidence from Ms Power we attached no weight to her evidence in reaching this decision.

The issues

4. These issues were also set out in the order on the preliminary hearing of 15 January 2021 as follows.

1. Remedy for discrimination or victimisation
 - a) Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
 - b) What financial losses has the discrimination caused the Claimant?
 - c) Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
 - d) If not, for what period of loss should the Claimant be compensated?
 - e) What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
 - f) Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
 - g) Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
 - h) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

- i) Did the Respondent or the Claimant unreasonably fail to comply with it by ?
- j) If so is it just and equitable to increase or decrease any award payable to the Claimant?
- k) By what proportion, up to 25%?
- l) Should interest be awarded? How much?

Issue in respect of personal injury claim

5. The tribunal raised a preliminary issue with the claimant's representative at the outset of the hearing. It seemed apparent from the claimant's witness statement that he was pursuing personal injury claim in respect of the hernia he developed during his employment with the respondent. His witness statement from paragraphs 9 – 58 concerned his pre-hernia diagnosis, ulceration hernia, development of hernia, and hernia diagnosis. The updated schedule of loss sought the sum of £5000 for personal injury compensation in respect of the development of hernia. The claimant's ET1 dated 19 July 2019 stated as follows at paragraph 57:

“The claimant reserves his rights to bring a personal injury claim for his inaugural hernia caused due to his excessive workload and breach of duty of care.”

6. This hearing had been listed as a remedy hearing. It had not been envisaged or discussed at the preliminary hearing that the claimant would be seeking compensation in this regard. Whilst the Tribunal could deal with such matters, the Tribunal considered they were not in a position to make findings in respect of liability for the development of an inaugural hernia without medical expert opinion. After discussion and taking instructions Ms Millin confirmed that the claimant was not pursuing a personal injury claim in respect of the hernia as part of these proceedings. It was agreed therefore that this Tribunal would be determining injury to feelings but would not be making any findings in respect of liability and remedy relating to the hernia.

Findings of fact

7. We make the following findings of fact on the balance of probabilities. These findings should be read in conjunction with the findings of fact made at the remedy hearing. In summary whilst we found the respondent had failed to make reasonable adjustments, the unfair dismissal claim was not successful and we found there was a fair dismissal by reason of redundancy. The effective date of termination was 28 February 2019.

8. Following the claimant's redundancy he obtained a part-time job working two days a week in some local historic gardens as a gardener / groundsman. He commenced this role on 12 March 2019 and is still employed in that role. We accepted the claimant's evidence that he is only able to work two days a week due to his hernia. His new employers have made reasonable adjustments to assist him to carry out tasks that are

strenuous or require more than one person to undertake the task in question.

9. The claimant has also set up his own gardening business which enables him to undertake and pick jobs of lighter duties when his hernia is aching or painful. When he requires tasks involving heavy lifting he calls on a pool of additional labour of three persons which he engages on an ad hoc basis. He generally works 2 days per week in this role.
10. The claimant's statement clearly anticipated the significant award being made in respect of financial loss even though the Tribunal had found that his dismissal was fair and for reasons on redundancy. This appeared to be on the basis of an expectation the Tribunal would find the reason he could only work 4 days per week was because of his hernia and as such the respondent should compensate him for financial loss of work lost for one day per week. Given the claimant's confirmation that this element of his claim was not being pursued before this Tribunal we have not made any findings on financial loss alleged to result from the hernia.

Evidence in respect of injury to feelings

11. In our liability judgment at paragraph 54 we set out evidence in respect of the failure to make reasonable adjustments. The claimant had been assured by a risk assessment that he would be receiving assistance in a number of areas but other than the two occasions in paragraph 54 this did not happen. We also found that the claimant requested the support from his line manager on an almost daily basis (see paragraph 53). We also set out in paragraphs 35 and 36 all the work that the claimant continued to undertake due to the lack of assistance. At paragraph 55 we found that the claimant was made to feel uncomfortable and responsible for pulling work colleagues away from their roles to assist the claimant as this placed them under pressure.
12. We accepted the claimant's unchallenged witness evidence for this hearing as follows. The claimant experienced feelings of embarrassment and was made to feel extremely uncomfortable regarding the respondent's behaviour around introducing contractors that were there to cost the contract for grounds maintenance which ultimately led to the claimant's dismissal by reason of redundancy. However these particular hurt feelings cannot be attributable to the unlawful discrimination as they were quite clearly in relation to the situation with the claimant's impending redundancy and we have found that to be a fair dismissal.
13. By failing to make the reasonable adjustments the respondent put the claimant in a very difficult position as he felt obligated to carry on with his tasks to ensure the grounds were maintained and he experienced feelings of embarrassment of having to ask for assistance that had already been promised but not delivered.
14. We also accepted the claimant's evidence that he had noted a distinct attitude change towards him from the directors. He was told by colleagues they were making negative comments about the claimant which made the claimant feel saddened and disappointed and had a negative effect on his morale at work and lead to stress and anxiety. The claimant did not feel

he been fully supported by the respondent when he raised these concerns.

The Law

15. S124 EQA 2010 provides:

124 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate

16. S124(6) provides that the amount of compensation which may be awarded corresponds to the amount which could be awarded by the County Court under S119.

17. In *Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318*, CA, the Court of Appeal gave specific guidance on how employment tribunals should approach the issue. There are three broad bands when assessing the compensation for injury to feelings and within which band the compensation should fall.

18. As this is a claim presented after 6 April 2019, we have had regard to the Vento bands in the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury dated 25 March 2019. The Vento bands are as follows: a lower band of £900-£8800 (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).

19. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 provide the power to award interest on awards made in discrimination cases. Under Reg 2(1) a tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. The current rate is 8%.

Conclusions

20. Following confirmation from Ms Millin that the Claimant was not pursuing his personal injury claim before the Tribunal, we were left to assess the

compensation that should be awarded for the failure to make reasonable adjustments.

21. In accordance with our findings on liability, the Claimant was fairly dismissed for redundancy. There is no financial loss we can award as the Claimant would have been dismissed regardless of the failure to make the reasonable adjustments. He has elected to not to pursue his claim before the Tribunal that his hernia injury was caused by the failure to make the reasonable adjustment. It is clear therefore that we can only assess non pecuniary loss.
22. We have had regard to the following factors when assessing the injury to feelings:
23. The Claimant was promised reasonable adjustments in a risk assessment but these were not delivered. This failure took place between October 2018 and February 2019 during which the Claimant had to constantly chase his line manager only to be ignored or rebuffed and he struggled to carry on with his work tasks.
24. The Claimant suffered embarrassment and hurt feelings as he was made to feel guilty that he was responsible for pulling work colleagues away from their normal duties in order to assist him.
25. The claimant felt saddened and disappointed and had a negative effect on his morale at work which lead to stress and anxiety.
26. We have determined that the injury to feelings falls within the lower end of the middle band and award compensation in the sum of £9000.

Acas Code of Practice on Disciplinary and Grievance Procedures - uplift

27. Paragraph 65 and 66 of the liability judgment sets out the relevant findings of fact. We find that the email dated 27 February 2019 clearly amounted to a grievance. The respondent failed to address the grievance other than to suggest the claimant should have informed Ms Cotton that there had been a failure to implement the reasonable adjustments. We to date have heard no evidence as to any investigations conducted by the respondent as to why these adjustments were not implemented. We concluded that there were no such investigations or attempts to address the grievance as the claimant was due to leave employment a few days after raising the grievance. The failure to comply with the code of practice was wholesale and the reason for doing so (that the claimant should have told Ms Cotton there had been a failure to apply the risk assessment) was unreasonable. There was no meeting, no decision taken on any action and no appeal provision.
28. In the circumstances we apply a 25% uplift to the compensation award which amounts to £2,250.00.

Interest

29. Interest on injury to feelings is awarded from the date of the act of

discrimination until the date on which the Tribunal calculates the discrimination.

30. In this case there was a failure to do something rather than an act of discrimination. We find that this failure began on the claimant's return to work on 4 October 2018 (see paragraph 53 – 58 of the liability judgment) because although a risk assessment took place on that date it was never implemented.
31. The number of days between 4 October 2018 and 16 August 2021 (the calculation date) is 1047 days inclusive. $1047 \times 0.08 \times \frac{1}{365} \times 9000 = \text{£}2064.68$. This is the interest we award.

Employment Judge S Moore

Date: 16 August 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 23 August 2021
FOR EMPLOYMENT TRIBUNALS Mr N Roche