



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs R D'Rozario

AND

Respondent

Aldi Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by CVP) ON 24 September 2021

EMPLOYMENT JUDGE J Bax
MEMBERS Ms J Le Vaillant
Mr C Williams

Representation

For the Claimant: Mrs R D'Rozario (in person)
For the Respondent: Ms F Powell (solicitor)

JUDGMENT ON REMEDY

The judgment of the tribunal is that:

- 1. The Respondent is ordered to pay the Claimant the sum of £5,228.03.**
- 2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case.**

Breakdown of Award

The award is made up the following sums:

(a) Injury to feelings	£4,500
(b) Interest on injury to feelings	£709.15
(c) Loss of Earnings	£17.50
(d) Interest on loss of earnings	<u>£1.38</u>
Total	£5,228.03

REASONS

1. This was the remedy hearing after a final hearing on 26 to 30 April and 1 May 2021, following which a Reserved Judgment was entered for the Claimant that she had suffered a detriment for making a protected disclosure. The detriment suffered was limited to not changing the rota for her shifts on 17 and 31 October 2019.

The issues

2. At the start of the hearing, it was explained that remedy was being assessed on the basis of the effects of the act of detriment and that, as a matter of logic, things occurring before that act could not have been caused by it. The Claimant said that she no longer pursued her August 2019 holiday related claims.
3. The Claimant confirmed that she was seeking the following awards:
 - a. Injury to feelings at £30,000;
 - b. Loss of earnings in respect of the times she could not attend the shifts in the sum of £17.50;
 - c. Personal injury at £60,000;
 - d. The cost of 5 prescriptions at £9.15 per prescription;
 - e. The cost of two letters from her GP at £30;
 - f. Travel expenses to and from the pharmacist and her GP at £50.

The evidence

4. We heard oral evidence from the Claimant and treated her written submissions as an extension of her witness statement. We were also provided with a remedy bundle of 44 pages.

The facts

5. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
6. The parties are referred to the Reserved Judgment dated 6 May 2021. Notable events were that the Claimant attended a formal performance meeting on 8 September 2018. On 9 July 2019 the Claimant attended a formal performance meeting in relation to out of date products. On 20 July 2019, the Claimant was told that she was being recommended for a

disciplinary hearing. These were allegations of detriment which were not proven

7. The Claimant raised a grievance on 21 July 2019.
8. On 1 August 2019, the Claimant went off sick because she was too stressed to work, until she went on holiday on 8 August 2019. The Claimant's text message on 1 August 2019 said that she was really depressed. The self certificate for sickness dated 3 August 2019, said that the absence was due to depression caused by work related stress. The Claimant's written submissions referred to 1 August 2019 being extremely humiliating and insulting and that she was very stressed and depressed and found it very hard to drive home. She saw her GP about the situation. On 1 August 2019, she also raised a grievance.
9. The Claimant was on holiday in India from 8 to 25 August 2019. Whilst on holiday the Claimant saw a GP in India, who diagnosed that she was suffering from acute depression, she was advised to rest and was prescribed Sertraline, an antidepressant. The Claimant felt her holiday was ruined and her parents incurred medical expenses. This featured heavily in her witness statement and written submissions.
10. The Claimant attended a grievance meeting on 4 September 2019.
11. On 11 September 2019, the Claimant was sent the grievance outcome and was told it was rejected.
12. On 12 September 2019, the Claimant was absent from work due to sickness. That day she also appealed against the decision to dismiss her grievance.
13. Shift rotas were prepared 4 weeks in advance and therefore the rotas for 17 and 31 October 2019 would have been prepared in mid and the end of September respectively. Shortly after the preparation of the rota the Claimant spoke to Mr Duffield on a couple of occasions about her start times on 17 and 31 October 2019.
14. On 18 and 19 September 2019, the Claimant was off sick.
15. On 24 September 2019, the Claimant attended the grievance appeal.
16. During September and October 2019, the Claimant on a number of occasions asked questions about not receiving paid sick leave at the beginning of August 2019. On 28 September 2019 the Claimant emailed Mr Haynes about this and was also raising issues about being sick whilst on

holiday and querying her sick pay entitlement. No mention was made about shift start times.

17. On 8 and 9 October 2019, the Claimant was off sick.
18. On 11 October 2019, the Claimant was sent the outcome of the grievance and was told that there would not be disciplinary proceedings.
19. On 17 October 2019, the Claimant was put on the rota to start work at 1430, and on 31 October 2019, the Claimant was put on the rota to start at 1400. The Claimant could not attend until 1500 due to picking her son up from college. The Claimant therefore attended work at 1500 on these days and worked the rest of her shifts. She also worked other shifts after 17 and 31 October. It was agreed that she lost 1.5 hours pay on these days. We found that these rota issues were the only detriments for making a protected disclosure. Mr Duffield could not provide an explanation as to why the rota was not changed and the Respondent failed to discharge its burden of proof. We did not make any finding that this was done in a high handed or offensive manner.
20. The Claimant's son had just started college and was nervous about doing so. The Claimant needed to collect him on Thursdays and therefore could not attend work before 1500 on those days. She previously had been put on the rota from 1500 to enable this. She found the change to the earlier starts very difficult and argued with her son. She was also agitated with her family and was stressed.
21. On 31 October 2019. The Claimant presented her first claim to the Employment Tribunal. It was notable that the Claimant did not refer to the rota on 17 and 31 October 2019 and only did so at the case management hearing in March 2020.
22. On 6 November 2019, the Claimant was sent the outcome of the grievance from August 2019. She gave evidence that the outcome had no effect on her because she accepted that Mr Rowland was stressed and depressed. The Claimant's grievance was rejected in the main. We did not accept that the outcome had no effect on the Claimant, it was part of ongoing complaints by the Claimant about the situation at work. It was likely that she received the grievance outcome on 7 November 2019.
23. On 7 November 2019, the Claimant was signed off sick until 20 November 2019. Her GP diagnosed that she had stress and depression and she was prescribed anti-depressant medication.

24. The Claimant made other allegations of detriment occurring after October 2019, including being sent a list of concerns and moving her to another store.
25. On 9 December 2019, the Claimant wrote to Mr Haynes complaining about unpaid sick pay and about sick pay whilst she was on holiday. She also complained about a breach of the working time regulations. She did not mention any issue about her shifts in October 2019.
26. The only medical evidence provided, which was dated after September 2019, were two letters from the Claimant's GP. The GP letter dated 21 April 2020 said that the Claimant first contacted the surgery on 1 August 2019 regarding work related stress. It detailed that she had since been given a number of med-3 certificates regarding low mood and stress. We noted that the Claimant self certified that she was depressed on 3 August 2019.
27. A further letter was provided by the Claimant's GP dated 14 May 2021, which said, "Since Nov 2019, when Rebecca was first diagnosed with depression, Rebecca has been issued 8 prescriptions, 5 of which contained antidepressant medications for 1 month at a time (total of 5 months medications). Also in this time she has had 9 sick notes issued, initially this was due to stress and depression and later listed for stress, the total duration of these notes amounts to around 8 months from work." We accepted the Claimant's evidence that she had one prescription for Sertraline in November 2019 and her next prescription for anti-depressants was in August 2020.
28. The Respondent's attendance record for the Claimant showed that she had further absences for sickness between 2 and 10 March 2020, 4 and 14 August 2020, 17 August 2020 and 18 to 30 August 2020. The Claimant received her April 2020 grievance appeal outcome on 3 August 2020, the day before a 10 day absence and coincided with restarting anti-depressants.
29. The Claimant gave evidence that sole cause for being signed off work on 7 November 2019 and the onset of depression was the rota for 17 and 31 October 2019. We rejected that evidence. The receipt of the grievance outcome letter on 7 November 2019 had an effect on the Claimant. She had also been previously diagnosed with depression shortly before. Further when the Claimant perceived something untoward had happened to her it was often followed by a period of sickness absence. The Claimant accepted in cross-examination that other adverse work related things were happening during these times. She also accepted that she was able to function at work when she was not off sick, was compiling her photographic evidence of out of date stock, raising grievances and bringing a claim in the Tribunal. On

the balance of probabilities, the other incidents were affecting her mental health and she was suffering from depression from August 2019.

The law

30. S. 49 of the Employment Rights Act 1996 provides:

- (1) Where an employment tribunal finds a complaint [under section 48(1), [(1XA)], (1ZA), (1A), or [(1B) or (1C)]] well-founded, the tribunal—
 - (a) shall make a declaration to that effect, and
 - (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.
- [(1A) ...
- (2) [Subject to subsections [(5ZA)], (5A) and (6)] the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—
 - (a) the infringement to which the complaint relates, and
 - (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.
- (3) The loss shall be taken to include—
 - (a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and
 - (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.
- ...

31. We had to assess the injury to the Claimant's feelings. We considered the original bands of awards set by the case of *Vento-v-Chief Constable of West Yorkshire Police* [2003] IRLR 102 CA, as uplifted by the case of *Da'Bell-v-NSPCC* [2010] IRLR 19 EAT and then the further case of *Simmons-v-Castle* [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation; *Beckford-v-Southwark LBC* [2016] IRLR and *King-v-Sash Window Workshop Ltd* [2015] IRLR 348 and, more recently, *De Souza-v-Vinci Construction (UK) Ltd* EWCA Civ 879). Since then, in the Presidential Guidance issued on 25 March 2019, the following bands to be applied in respect of claims issued on or after 6 April 2019 were; £900 to £8,800 in respect of less serious cases, £8,800 to £26,300 the cases which did not merit in awarding the upper band and £26,300 to £44,000 for the most serious cases, with the most exceptional cases capable of exceeding £44,000.

32. When reaching a figure for injury to feelings, we remained aware that the award that we made had to be compensatory and just to both parties. It should be neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-detriment legislation. We also tried to bear

in mind the value in everyday life of the particular sum that we chose to award, particularly in the context of the Claimant's salary. We had an eye on the range of awards made in personal injury cases. We also took account of the severity of the treatment, its length and the extent to which it affected other aspects of the Claimant's life.

33. The Claimant also sought an award for personal injury. In order to succeed in such a claim, the Claimant must prove that the acts of detriment actually caused the injury (Essa v Laing Ltd [2004] ICR 746). It is not necessary for a Claimant to obtain a medical report before an award for personal injury is made. In Hampshire County Council v Wyatt EAT 0013/16) it was observed that

“28. Medical evidence in particular, is likely to assist in identifying whether (i) all the injury or harm suffered by a claimant can be attributed to the unlawful conduct and (ii) that injury or harm is divisible. It may assist in determining the extent to which any treatment a claimant has undergone has been successful. It may also assist in dealing with questions of prognosis. “

34. Employment tribunals may, but need not, make separate awards for injury to feelings and personal injury. Where separate awards are made, tribunals must be careful to avoid double recovery; the aim of compensatory damages is not to reward the claimant or provide a windfall.

Conclusions

Personal Injury

35. The Claimant sought an award for personal injury in relation to depression and relied upon being signed off sick by her GP in November 2019 and being prescribed anti-depressants. The Claimant had been previously diagnosed with depression by the GP in India in August 2019 and was prescribed anti-depressants then. The Claimant's written submissions for the remedy hearing referred to the extent of the stress and depression she was suffering from before going on holiday and how it ruined that holiday. The Claimant was already suffering from depression before the detriment we found had occurred. The earlier incidents were of a great source of concern stress and worry for the Claimant and led to a diagnosis of depression, which was sufficiently serious to warrant medication.
36. The Claimant did not adduce any medical evidence explaining what the effect of the rota on 17 and 31 October 2019 had on the Claimant, or what effect the other events at work also had. We accepted that the detriment would have had an effect on the Claimant and that she would have suffered a degree of stress, however she attended work at 1500 on both occasions

and completed the rest of her shifts and worked further shifts after 31 October 2019. She did not go off sick for a further week and did so after receiving the grievance outcome on 7 November 2019. She also did not refer to the incident in her Grounds of Claim, nor in her letter to Mr Haynes on 9 December 2019.

37. For the Claimant to succeed in a personal injury claim she must prove that the detriment in relation to the rota caused the injury. There were many incidents that had the potential to cause an injury and she was diagnosed with depression necessitating medication in August. This diagnosis predated the detriment, and the depression was continuing at the time the detriment occurred. The Claimant also had other sickness absences between August and 17 October 2019. We were not satisfied on the balance of probabilities that the cause of the Claimant's depression was the detriment.
38. The Claimant can only be compensated for damage caused by the detriment. There was no medical evidence as to how the detriment aggravated or exacerbated her depression, if at all. There was no evidence as to how long any aggravation or exacerbation would have been attributable to the detriment, or whether the Claimant would have been signed off sick, irrespective of it occurring. The medical evidence provided by the Claimant's GP confirmed a diagnosis of depression, but did not identify the cause or provide any information as to the effect of rotas on the Claimant. Without medical evidence to explain how severe the depression was in August and what the effect of the detriment was, the Claimant did not establish on the balance of probabilities that the detriment caused her to suffer from depression or that the depression was aggravated or exacerbated by the detriment and if so to what extent. The Claimant tried to suggest that the other incidents had no effect, we considered this highly unlikely given the diagnosis in August and that when perceived untoward events occurred they were often followed by a period of sickness absence. The Claimant, in her written submissions considered that the effects in August were significant, and we were not satisfied that the Claimant had proved, on the balance of probabilities, that there had been an aggravation or exacerbation of depression due to the detriment, particularly due to the timing of the grievance outcome. Even if there was an exacerbation or aggravation there was no evidence, including detailed medical evidence, on which we could make a finding as to how long that exacerbation or aggravation lasted or its severity. The Claimant had not proved a loss and accordingly, no award for personal injury was made.

Injury to feelings

39. The Claimant was subjected to essentially a single act of detriment that took effect on two days. It was not an incident which was high handed. The

- Claimant was in a vulnerable position having been diagnosed with depression in August 2019. She had an obligation to pick up her son from college and was unable to attend work until 1500. The Claimant was not so badly affected that she could not attend work on those days, and she worked the rest of her shifts, this was notwithstanding that she had raised the issue in September 2019. There was no suggestion of any punishment for the Claimant, other than she was only paid for the time she actually worked.
40. The Claimant submitted that an award for injury to feelings should be £30,000, i.e. in the band for the most serious cases. This is a band for cases in which there had been a lengthy campaign of detriment and we rejected that submission.
41. The Respondent submitted the award should be in the order of £100, we rejected that submission as such an award would not recognise injury to feelings.
42. We concluded, taking into account that this was effectively a single act of detriment taking effect on two occasions, that the appropriate band was the lower band. The Claimant was already vulnerable and suffering from depression. An award below the bottom of the band does not properly recognise injury to feelings. We considered that the feelings of stress and pressure by needing to pick up her son were more than minor and were of concern to her. At this time, she was agitated and argued with her family, in particular with her son about collecting him, which would have been distressing and unpleasant. We were not satisfied that the detriment caused the Claimant to have depression and there was no medical evidence as to the degree, if any, of any exacerbation or aggravation of her depression. The rota issue upset the Claimant and a week after 31 October 2019 she went off sick for two weeks, albeit after receiving the grievance outcome. Doing the best we could with the evidence provided, we considered that an appropriate award, recognising the agitation, upset and distress caused to the Claimant, and that some time was taken off work shortly after these events, an appropriate award for injury to feelings was £4,500.

Loss of earnings on 17 and 31 October 2019

43. It was agreed that the Claimant suffered a loss of earnings on 17 and 31 October 2019 in the sum of £17.50 and an award was made in that amount.

Other Losses

44. The Claimant originally sought to claim for the cost of her flights and medical expenses whilst on holiday, however because they occurred before the detriment they were no longer pursued.

45. The prescription costs, travel expenses and GP letters were claimed as a consequential losses of depression. The Claimant was unable to establish that her depression was caused or aggravated/exacerbated by the detriment and was unable to prove her loss. Therefore, no award was made in these respects.

Interest

46. The appropriate rate of interest injury to feelings was 8%, which on £4,500 equated to £709.15. The interest on the wages is calculated from the mid point between the date of loss and date of assessment and was £1.38. Therefore, the total interest awarded was £710.53.
47. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") did not apply in this case.

Employment Judge J Bax
Dated: 24 September 2021

Judgment sent to parties: 12 October 2021

FOR THE TRIBUNAL OFFICE