



EMPLOYMENT TRIBUNALS

Claimant: Mrs Helen Potgieter
Respondent: Lloyds Pharmacy Limited
Heard at: Bristol Employment Tribunal
On: 25 November 2021
Before: Employment Judge Millard

Representation

Claimant: In Person
Respondent: Mr Crow, Counsel

JUDGMENT having been reserved on 25 November 2021, the following reasons are provided:

REASONS ON REMEDY

Introduction

1. These written reasons should be read in conjunction with the reserved judgment of 25 November 2021.

Hearing

2. The hearing was held at Bristol Employment Tribunal on Thursday 25 November 2021 with all parties attending.
3. The claimant gave evidence. The respondent called the following witness, Anna Snopkowska who gave evidence by video link.
4. I had sight of a bundle of documents totalling 323 pages which was produced by the respondent.

Claim

5. The claimant presented a claim by way of a claim form dated 12 May 2020 that she was subject to a detriment by the respondent on the grounds that she had made a protected disclosure.

6. On the 21 October 2021 the respondent wrote to the Employment Tribunal and accepted that the claimant had made protected disclosures to them in her letter of 11 July 2018 and that as a result of these disclosures the respondent had removed her from a list of approved pharmacists used by the respondent to select pharmacists for locum shifts and had thereby subjected the respondent to detriment from 1 January 2020
7. Accordingly, the final hearing was converted to a remedy hearing.
8. The respondent also accepted that the claimant did not cause or contribute to the detrimental treatment by her own actions and that the protected disclosure was made in good faith.
9. The claimant produced a schedule of loss dated 27 May 2021 (pp.61-63), claiming the following from 2 January 2020 to 27 May 2021. The claimant also sought additional weeks to the date of the remedy hearing. The claimant's claim was based on her working 2 shifts per week at £250 per shift.

Loss of earnings, 73 weeks at £500 per week	£36,500
Loss of reputation (Defamation)	£85,000
Claimant's costs	<u>£1,000</u>
Total:	£122,500

List of Issues

10. The agreed list of issues for the remedy hearing were therefore as follows,
 - a. What financial losses has the detrimental treatment caused the claimant?
 - b. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?
 - c. If not, for what period of loss should the claimant be compensated?
 - d. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

The Law

11. Where a claimant has suffered a detriment for making a protected disclosure, the tribunal may award financial compensation.
12. The tribunal must award such an amount as it considers is just and equitable having regard to the infringement to which the complaint relates and any loss which is attributable to the act or failure to act.
13. The burden of proving her financial losses is on the claimant.
14. The tribunal may reduce the amount awarded if it considers that the claimant has failed to mitigate her loss. Section 49(4) Employment Rights Act 1996

imposes a duty on a party to mitigate their losses. The burden of proof for this is on the respondent.

15. A detriment award may also include compensation for injury to feelings.

Background

16. The claimant worked as a locum pharmacist for the respondent.

17. On 11 July 2018 the claimant made protected disclosures to the respondent. These protected disclosures are set out at pages 20-23 of the remedy bundle.

18. On 2 January 2020 the claimant was informed that she was no longer on the approved list of pharmacists for the respondent. The respondent accepts that this was because of the protected disclosures.

Findings on the List of Issues

Financial Losses

19. I am unable to assess the losses that the claimant has suffered, as she has presented no evidence to me as to exactly what work she has done in the period from 2 January 2020, nor what income she has received from this work.

20. The claimant had previously worked for the respondent between January to August 2019 at a rate of 0.875 shifts per week at a gross rate of £250 per shift. This equates to gross income of £218.75 per week as opposed to the £500 per week claimed by the claimant from 2 January 2020. This actual amount worked, whilst significant, is a relatively low amount for the claimant to have to replace.

21. The claimant told me that she had been offered work as a pharmacist after the 2 January 2020 and that she had undertaken this work. However, she did not provide any evidence as to how often she undertook that work and what she was paid for it. When she was asked in cross examination to provide this, she stated that she did not have to provide any evidence.

22. I asked the claimant what other work she had undertaken after 2 January 2020 and she informed me that she had spent her time managing both her investment and property portfolios. When I asked her what additional income, she had derived from these as a result of the additional time she had spent on them, she declined to tell me and declined to provide any documentary evidence.

23. The only conclusion I can draw from this refusal by the claimant to provide me with the information about the locum work she undertook after the 2 January 2020 and the additional income from her property and investment portfolios, is that she received such an increase in her income so as to replace her lost income from the respondent. Why otherwise would she have failed to provide me with this information.

24. The claimant was asked in cross examination about applying to other agencies for work as a locum pharmacist. The claimant stated that she had not applied

to any other agencies as she didn't have to do so. I can well imagine that in registering with an agency, they may require a locum to disclose whether they have been refused work by any pharmacies and that having to disclose that she had been removed from the respondents register of approved pharmacists, may have adversely impacted her ability to register with other agencies. However, the claimant did not seek to register with any other locum agencies and she has presented me with no evidence to prove the difficulties that she would have had, had she have chosen to do so. In answering this question, her attitude was that she did not have to do so, as the respondent should pay her for removing her from their approved locum list.

25. As part of the correspondence between the parties and of which I have been provided with copies of, the respondent's solicitor wrote to the claimant on 16 August 2021 and requested disclosure from the claimant of any employment she undertook from 1 January 2020 and her income from these (pp.210-211). The respondent also informed the claimant of her duty to mitigate her losses, discussed in more detail in the section of mitigation below.
26. The claimant responded by way of an email 20 August 2021 at 13:06hrs (P. 214). The claimant did not provide any disclosure of her employment and income since 1 January 2020. The claimant wrote in response that, '*HP [claimant] also disputes that she must mitigate losses...LP's solicitors are insisting that HP, mitigates her losses, but this is negated in case law.*' The claimant sent a further email to the respondent's solicitors the same day at 13:31hrs (P.216), adding, '*HP has sent an email today to Rachel Rigg (RR) firmly disputing the need to mitigate losses and has previously quoted case law that will be relied on. Under the present circumstances, HP has no obligation to mitigate loss, **thus no disclosure is required**, or will be provided.'*

[Emphasis added]

27. It is important to separate out the issue of what losses the claimant has suffered from any failure to mitigate those losses. However, what is clear from the correspondence quoted above is that the claimant did not see the need to provide any disclosure with regard to her financial losses. This was as confirmed by her to me in the hearing.
28. This failure by the claimant to provide me with any evidence has left me in a position where I am unable to calculate what losses she has actually suffered. The only inference I can draw from her failure to provide information of the income she earned from the locum shifts she worked after 2 January 2020 and the income from her property and investment portfolios is that this income replaced the income she lost from the respondent. Therefore the claimant has failed to discharge her duty to prove her losses.

Duty to Mitigate

29. In addition to the failure of the claimant to prove her losses, the respondent has satisfied me that the claimant has failed to mitigate her losses.
30. Section 49(4) Employment Rights Act 1996 imposes a duty on a party to mitigate their losses. The claimant has been made aware of this duty. In the

Case Management Order of 13 April 2021, Employment Judge Matthews sets out under remedy at para 4.1 (P.45), that the tribunal would consider whether the claimant has taken reasonable steps to replace her lost earnings, by for example looking for another job.

31. The claimant accepted in evidence that she had been made aware in the Case Management Order that the tribunal would consider at the remedy stage whether she had taken reasonable steps to replace her earnings. However, whilst she accepted that she had been made aware of this, she told me that she did not think it was relevant to disclose any material with regard to mitigating her losses.
32. Additionally, in evidence to me, the claimant told me that she was not under a duty to mitigate her losses. When I explained to her that she was, she informed me that she was not under any duty to mitigate her losses as she was the victim. She is wrong about this. Whilst her feelings of victimization are understandable, they have unfortunately led her to the incorrect position that she does not have to mitigate her losses. When I informed the claimant of this, she informed me that she would appeal my decision, this being prior to even receiving my judgment in this case. The claimant of course has a right of appeal, but this does not change the duty that she has to mitigate her losses.
33. This denial of her duty to mitigate her losses was the same position that the claimant adopted in correspondence with the respondent as stated by her in her emails of 20 August 2021, ***‘HP also disputes that she must mitigate losses...LP’s solicitors are insisting that HP, mitigates her losses, but this is negated in case law.’*** (P.216) and ***‘HP has sent an email today to Rachel Rigg (RR) firmly disputing the need to mitigate losses and has previously quoted case law that will be relied on. Under the present circumstances, HP has no obligation to mitigate loss, thus no disclosure is required, or will be provided.’***

[Emphasis added]

34. The claimant has both said in written correspondence to the respondent and in evidence to me that she is not under a duty to mitigate her losses. The only logical inference from her written and oral statements is that she has not in fact mitigated her losses. As such, even if I were able to calculate the financial loss that the claimant had suffered, it would be appropriate to reduce this to zero for her complete failure to mitigate her losses.

Injury to Feelings

35. The claimant’s schedule of loss, includes an award for defamation. I have no power to make an award for defamation.
36. However, I must consider what injury to feelings the detrimental treatment caused the claimant and how much compensation should be awarded for that.
37. The general principles that apply to assessing an appropriate injury to feelings award have been set out by the EAT in *Prison Service v Johnson* [1997] IRLR 162:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the respondent. Feelings of indignation at the respondent's conduct should not be allowed to inflate the award;
- Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation. Similarly, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;
- Awards should bear some broad general similarity to the range of awards in personal injury cases;
- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or earnings;
- Tribunals should bear in mind the need for public respect for the level of awards made.

38. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

39. In my judgment this case merits an award in the middle Vento band. This is not one of the most serious cases, justifying an award in the top band, but the claimant is a pharmacist, who having made protected disclosures to the respondent found that as a consequence of these protected disclosures, she was removed from their list of approved locum pharmacists, such that she was no longer able to obtain locum shifts from them. Accordingly, I assess this case as falling towards the bottom of the middle band, such that an award of **£12,000** for injury to feelings is appropriate.

Conclusions

40. The claimant has failed to provide evidence of her financial losses as a result of the detrimental treatment.

41. The claimant has failed to mitigate her losses.

42. The respondent must pay the claimant £12,000 for injury to feelings.

Employment Judge Millard
Date: 3 January 2022

Reasons sent to parties: 17 January 2022

FOR THE TRIBUNAL OFFICE