



THE EMPLOYMENT TRIBUNAL

SITTING: BY CVP VIDEO CONFERENCE

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Ms S Campbell
Mr G Henderson

BETWEEN:

Mr E Reid

Claimant

AND

London Borough of Lewisham (1)
The Governing Body of Horniman School (2)

Respondents

ON: 9 June 2021
In Chambers - 10 December 2021

Appearances:

For the Claimant: Ms S Sleeman, Counsel
For the Respondent: Mr D Panesar, Counsel

RESERVED JUDGMENT ON REMEDY

1. The claimant is awarded the following compensation for unfair dismissal and disability discrimination:
 - a. Basic Award - £11,659.29
 - b. Loss of statutory rights - £125
 - c. Loss of earnings - £5941.82
 - d. Pension loss - £1635.07
 - e. Injury to Feelings - £8800
 - a. Interest - £5600.36

2. The respondents are ordered to pay the claimant the total sum of **£33,761.54**

REASONS

1. This was a hearing to deal with remedy following the Tribunal's judgment on remission from the EAT, sent to the parties on 14 May 2021.
2. In his ET1 the claimant brought a claim of unfair dismissal and disability discrimination – failure to make reasonable adjustments and discrimination arising in consequence of disability. The section 15 claim raised 3 allegations: i) failing to promote reconciliation; ii) beginning capability proceedings without an updated OH report and; iii) dismissal. The unfair dismissal claim succeeded but the Tribunal applied a 75% *Polkey* deduction to any unfair dismissal compensatory award. The failure to make reasonable adjustments' claim was dismissed and the only complaint under section 15 that was upheld was in respect of dismissal.
3. The claimant gave evidence at the hearing on matters relating to remedy, as did his wife on his behalf. The parties presented a remedy bundle which included an updated schedule of loss.

The Issues

4. The issues in the case are as follows:
 - a. Has the Claimant reasonably mitigated his loss
 - b. What financial losses flow from the dismissal
 - c. What award should be made for injury to feelings - Da'Bell v NSPCC [2010] IRLR 19 EAT.
 - d. Should interest be paid on any part of the award and if so;
 - e. At what rate should interest be paid.

The Law

5. Section 123 of the Employment Rights Act 1996 (ERA) provides that the amount of compensation payable for unfair dismissal shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to the action taken by the employer.
6. Under section 124 of the Equality Act 2010, the tribunal, having found discrimination, may make such order - a declaration, award of compensation, a recommendation - as it considers appropriate.
7. Where compensation is ordered, the aim of such compensation is to, as far as possible, put the claimant in the position he would have been, but for the respondent's unlawful discrimination. *Ministry of Defence v Cannock and others 1994 IRLR 509.*
8. The claimant has the burden of proving his loss.
9. An employee is under a duty to mitigate their loss as a reasonable man or woman unaffected by the hope of compensation. This requires them to take all reasonable

steps to mitigate the loss which he or she has sustained as a result of being dismissed. An employee cannot recover compensation for the earnings lost as a result of the dismissal if that loss was avoidable. The onus is on the employer as wrongdoer to show that a claimant has failed in their duty to mitigate. The test is an objective one based on the totality of the evidence. However, the standard of reasonableness to be expected of an employee in these circumstances is not high and the tribunal should not be too stringent in its expectations of the claimant. Fyfe v Scientific Furnishings Ltd [1989] IRLR 331; Wilding v British Telecommunications plc CA 2002 ICR 1079.

Submissions

10. The parties provided written submissions, which they supplemented orally at the hearing. These have been taken into account.

Findings and Conclusions

Mitigation

11. The claimant was dismissed with effect from 31.12.2015. Since then, he has not worked in any capacity. He applied for one job, in 2016, but was unsuccessful. He has not applied for any other jobs since.
12. The claimant told us that since his dismissal, he has been unable to work due to his anxiety and depression, which has been exacerbated by the on-going Tribunal proceedings. Although we have not seen medical evidence covering all of the 5½ year period, we have seen some medical evidence. We accept the evidence of Mrs Reid which supported the claimant's account of his health. We therefore accept the claimant's evidence that he has been unable to work since his dismissal due to ill-health.
13. In those circumstances, we find that the claimant has not failed to take reasonable steps to mitigate his losses as it would have been impracticable for him to take effective proactive steps to search for employment given his mental state.

Loss of Earnings

14. Where remedy includes compensation for financial loss, it will be necessary to identify the sums the claimant would have received had the unlawful conduct not taken place. For a dismissal, this will normally be the salary that would have been earned by the claimant.
15. In Chagger v Abbey National plc and another [2009] EWCA Civ 1202 CA The Court of Appeal confirmed that employment tribunals should ask a Polkey-type question when considering loss of earnings flowing from a discriminatory dismissal. The respondent at para 4(ii) of its submissions submitted that no award should be made for loss of earnings as there was a 100% chance that the claimant would not have returned to work based on his diagnosis of autism on 3 September 2019. The reasons for our 75% unfair dismissal *polkey* deduction, is explained at paragraph 22 of our judgment on remission, and set out more specifically at paragraphs 68 to 70 of our original judgment. The claimant's autism diagnosis does not in our view change the position. The claimant was autistic throughout his employment with the respondent (albeit undiagnosed) and this

had not prevented him from working. Whilst the diagnosis may provide an explanation for the claimant's attitude towards the respondent, it does not mean that there was absolutely no possibility of a resolution of matters through mediation. We therefore apply the same 75% deduction in respect of loss arising from the discrimination.

16. Ordinarily, it might be argued that the claimant's continuing loss of earnings was due to his ill health and not attributable to the dismissal. However, the Tribunal must consider the extent to which the claimant's ill health, and therefore his inability to work, was caused by the discriminatory dismissal.
17. In determining this issue, we bear in mind that the claimant has produced no medical evidence to show that the anxiety and depression was caused or exacerbated by the unlawful act. In the absence of such medical evidence, we have done the best we can with the information before us.
18. The claimant was predisposed to anxiety and depression; he had it in the 14 months immediately prior to the dismissal and had not been signed as fit for work at the point of dismissal. Between 2018 and 2020 the claimant suffered a number of bereavements, which included his twin sister and his mother. Since dismissal, he has also been diagnosed with prostate cancer. All of these matters are unrelated to the discriminatory acts found and will have significantly contributed to the claimant's continuing anxiety and depression and therefore his inability to work. That said, we accept the claimant's evidence that the way he was treated at the end of his employment and the manner in which he was dismissed caused his mental health to deteriorate. In all the circumstances, we find that there were different causes for the claimant's ill health but that the respondent's discriminatory act contributed to this by 30%. Loss of earnings will be reduced to reflect the respondent's level of contribution.

Compensation for Financial Loss

19. The claimant's gross weekly pay was £395.23 and his net weekly pay, £353.68. His effective date of termination was 31 December 2015. The claimant would have retired on 14 April 2020. The figures are taken from the claimant's schedule of loss and are adjusted to take into account the 75% Polkey deduction and the respondents' 30% contribution to the financial loss.

Loss of earnings

1.1.16 - 14.4.20 – 224 weeks @ £353.68 x 25% (*Polkey*) x 30% (causation) = **£5941.82**

Pension Loss

1.1.16 – 14.4.20 @ £6540.3 x 25% (*Polkey*) = **1635.07**

Total Financial Loss – **£7576.89**

Injury to Feelings

20. 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, para 27:
- i. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;
 - ii. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;
 - iii. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
 - iv. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
 - v. Tribunals should bear in mind the need for public respect for the level of awards made.
21. The claimant was devastated by his dismissal. He had been a music teacher with the respondent for over 20 years and it was a job that he loved. His panic attacks increased, he had disturbed sleep, felt worthless and confused, and battled with the darkest of thoughts. As already mentioned, the claimant had a history of anxiety and depression and we are satisfied that the dismissal exacerbated his condition. He was offered medication by his GP, which he declined.
22. We observe that the claimant has conflated his hurt feelings relating to the dismissal with other elements of his claim in relation to which no discrimination was found. At paragraph 17 of his Remedy statement, he refers to his anxiety and depression levels being affected by the events from 2014-2016. The only event that the Tribunal has found to amount to discrimination is the dismissal and it is only the injury relating to that unlawful act which we are concerned with.
23. The claimant also refers to disclosures made and evidence given by the respondent during the course of the litigation as causing him more injury. Litigation is difficult and there will often be things said or disclosed that are upsetting to claimants. However, in the case before us, we do not consider them relevant to the injury to feelings award.
24. The relevant Vento guidelines (as amended by *Da'Bell v NSPCC, UKEAT/0227/09, [2010] IRLR 19*) for claims presented on 23.5.16 were:
- Lower – 600 – 6000
Middle – 6000 – 18000
Upper – 18000 - 30000

25. Taking all the above matters into account, we consider that this matter falls within the lower end of the middle Vento band and we award £8000 injury to feelings. We add to this a *Simmons v Castle* uplift of 10% (£800) making the total injury to feelings award £8800.
26. We make no award for personal injury or aggravated damages as there is no evidence to support such awards.

Interest

27. The tribunal awards interest at 8% on the loss of earnings and injury to feelings award as follows:

Date of discrimination (X)	1.1.16		
Date of ET Calculation (Y)	10.12.21		
Number of day bw X & Y	2171		
Mid-point	1085		
Injury to feelings	£8800	$\frac{8800 \times 2171 \times 0.08}{365}$	4187.35
Loss of earnings	£5941.82	$\frac{5941.82 \times 1085 \times 0.08}{365}$	1413.01
Total Interest			5600.36

Basic Award for Unfair Dismissal

28. The claimant had 20 years continuous service, He was born on 14.4.55 and was aged 60 at the effective date of termination.
29. Basic award – $1 \times 1 @ 395.23 = 395.23$
 $1.5 \times 395.23 = \underline{11,264.06}$
11,659.29

Loss of statutory rights

30. £500 less 75% Polkey = £125

Conclusion on Remedy

31. The unanimous judgment of the Tribunal is that the claimant be awarded the following:
- Basic Award - £11,659.29
 - Loss of statutory rights - £125
 - Loss of earnings - £5941.82
 - Pension loss - £1635.07
 - Injury to Feelings - £8800
 - Interest - £5600.36

32. The claimant is awarded the total sum of **£33,761.54**

Employment Judge Balogun
Date: 10 January 2022