EMPLOYMENT TRIBUNALS

Claimant: Mr J Aslam

Respondent: London General Transport Services t/a Go Ahead London

Heard at: **London South Employment Tribunal**

On: **21-23 June 2022**

Before: **Employment Judge Ferguson**

Members: **Ms D Mitchell**
Mr S Khan

Representation
Claimant: In person
Respondent: Mr I Maccabe (counsel)

REMEDY JUDGMENT having been sent to the parties on ***1/7/22*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. By a judgment given on 14 January 2022, the written judgment with reasons having been sent to the parties on 28 January 2022, we found that the Respondent's rejection of Claimant's job application on 29 March 2019 amounted to direct disability discrimination and victimisation.

2. The issues to be determined in respect of remedy were agreed as follows:

   2.1. But for the discrimination, would C have been offered the iBus controller post (at either LG01 or LG03 level)?

   2.2. R does not dispute that if C had been offered the post he would have commenced employment with R.

2.3. What would C have received by way of salary and benefits if he had been appointed?

2.4. What income (including from benefits) has C received since 29 March 2019?

2.5. Has C taken reasonable steps to mitigate his losses?

2.6. Were there any new intervening acts that caused C losses for which R should not be liable (e.g. discrimination by another prospective employer or the Covid-19 pandemic)?

2.7. Has any loss, whether pecuniary and/or non-pecuniary, been caused by a combination of factors which are not unlawful discrimination by R such that any compensation falls to be discounted by such percentage as reflects the apportionment of that responsibility?

2.8. Has C established psychiatric injury caused by the discrimination?

2.9. What level of award is appropriate for personal injury and/or injury to feelings?

2.10. Is an award for aggravated damages appropriate and if so in what amount?

2.11. What award should be made for interest?

3. We heard evidence from the Claimant and from Sajid Chaudry on behalf of the Respondent.

FACTUAL FINDINGS

4. The findings in our liability judgment stand as to what happened in the Claimant's interview for the position, and in particular what was said about the GDPR issue.

5. We remind ourselves that the relevant undisputed facts are:

5.1. The Claimant said he was in a toxic relationship with a female driver.

5.2. The Claimant said he had been disciplined for breach of the GDPR relating to him accessing CCTV footage.

5.3. The Claimant said he was demoted to driver, that he appealed and was regraded to controller, i.e. still a demotion from his substantive post.

5.4. The Claimant said he believed he had been treated unfairly.

6. We found at paragraph 12.2 of the liability judgment that:

> "Mr Chaudry and Mr Kiani formed the impression, given the eventual outcome of the disciplinary proceedings, which still involved a demotion,

> and having heard the Claimant's description of the background, that there was likely to have been a serious breach of procedures relating to data protection."

7. Having heard further evidence from the Claimant and Mr Chaudry on this issue we can make the following additional findings.

8. The Claimant takes issue with the notes of the interview recording that he said he reported the driver for using a phone, and that he said she raised a grievance against him. He does accept, however, that she did in fact raise a grievance against him, and that that led to the disciplinary proceedings. He has also never disputed that the GDPR issue was in some way connected to the relationship.

9. We accept that even if the Claimant did not expressly say that he reported the driver for using a phone, or that she raised a grievance against him, he gave the impression in his description of the background that the essence of the charge against him, which was upheld to the extent that he remained demoted at the end of the process, was improper accessing of CCTV footage for personal reasons. We accept Mr Chaudry's evidence, given in the remedy hearing, that his understanding during the interview was that the Claimant had accessed the CCTV and reported the driver for personal reasons, which was a serious breach of the GDPR. We also accept his evidence that he was particularly concerned that the Claimant did not appear to accept any wrongdoing or to have learnt from the experience.

10. We also heard evidence and make findings about the other candidates and the process for selection.

11. The Claimant was one of 42 candidates invited to interview of whom 35 attended. There were five vacancies for an iBus controller at LG01 level, with scope to appoint others at LG03 level if deemed suitable for later appointment.

12. There was a written assessment marked by Sarah Hillier against a model answer document. The Claimant scored 26 out of 73.

13. Five candidates were offered the LG01 post. Their scores in the written assessment were between 26 and 34. The candidate who scored 26 was not ultimately appointed because he declined the offer. Mr Chaudry's evidence was that that candidate had performed well in interview. He also said that none of the other candidates interviewed had any disciplinary issues that he was aware of. He gave evidence about one candidate who scored 28 on the written assessment but was not offered the job. The records of the recruitment process state "average interview did not score high enough".

14. Mr Chaudry's oral evidence was that the written assessment was a secondary consideration to the interview. He said that in this type of exercise they would take the top ten or so candidates based on their scores in the written assessment and then decide who to appoint based on their interviews. Although the template interview notes document has space for a score for each answer he said in practice they did not gives scores for the interviews at all. That is supported by the interview notes produced in the bundle.

15. Mr Chaudry's evidence was that regardless of the Claimant's health issues and any risk of him making complaints of discrimination, the Claimant would not have been offered the post because of what he revealed in the interview about being disciplined and demoted for a breach of the GDPR, together with the fact that he did not appear to have acknowledged any mistake or learnt lessons from it. He said that even if the Claimant had scored higher in the written assessment he still would not have been offered the job because of those concerns.

16. Mr Chaudry accepted that the iBus controllers do not have authority to request CCTV unless they are the subject of the footage, so a similar issue was unlikely to arise if the Claimant took up the post, but he said that compliance with GDPR was still an important part of the role because controllers handled personal data regularly.

17. It has never been in dispute that the Claimant was well qualified for the position with 17 years' experience in a similar role at Metroline. The Claimant says that at the start of the interview Mr Chaudry said words to the effect of "we know you could do the job with your eyes closed/ standing on your head". Mr Chaudry could not recall saying this. We are prepared to accept that he did. It is not inconsistent with his evidence that his view changed completely after the Claimant's revelations and in his words he was "gobsmacked" by what the Claimant said.

18. The Claimant's evidence was primarily about the effect of the discrimination on him and his medical history. There is no real dispute about the history.

19. The Claimant says his mental health problems started in around 2012 when a group of drivers at his previous workplace accused him of racism. The investigation took about two years and the allegations were ultimately not upheld. He said he then was in a toxic relationship from around 2013 until 2017. After that ended there was the disciplinary investigation and the Claimant's dismissal on medical grounds from Metroline in around January 2019. The Claimant suffered insomnia in March/April 2018. He also said he saw Occupational Health about his depression before being moved to a different garage in 2018. He had at least two courses of counselling, one in around 2012 and one in 2018.

20. By early 2019 the Claimant was experiencing problems with his property. He had to sell a house because he could not pay the mortgage and he said the estate agents sold it significantly under value. He then had to pay much of what he received from the sale to a former partner so he was left with very little.

21. The Claimant's GP records note that in January 2019 he was experiencing ongoing stress partly due to grievances at work. In February 2019 he told his GP he had been dismissed and there was an ongoing tribunal. He was prescribed sleeping tablets on this occasion. The first entry after the Claimant was rejected for the job with Respondent was on 1 April 2019. It reads:

> "Situation has gotten worse- estate agents in London […] causing harrassment- police not assisting - Luton estate agents […] trying to sell

> property under market valye and trying to scam pt by not evicting tenant who has not paid rent for 8/12 - unable to pay credit card bills but getting repeated reminders/letters as unemployed and not making any money - causing stress to pt - eldest child age 17yrs has left home to live with his mother - belittled at job interview for GoAhead - due to being discriminated against disabilty of stress/anxiety - likely to have work/noise related hearing loss in right ear – being referred to ENT for that - no sucidal thoughts - req med3 for ISA"

22. The GP records from this point onwards show that the Claimant was attending regularly, on average about once a month, to discuss his personal situation. They reveal, and he accepted in his evidence, he had a very large number of disputes with people in almost every aspect of his life. From disputes with the Council about his housing, to complaints against the police, to altercations with shopkeepers, to problems with his family. He applied for numerous other jobs in 2019 and early 2020, but says that as soon as he mentioned his health issues and needing adjustments he was always rejected. He explained he has two ongoing civil claims against shops and two other Tribunal proceedings, one against Metroline and another against Abellio who also rejected a job application in around June 2020. The Claimant became homeless in March/ April 2020 and says he was too unwell to work or apply for jobs from then onwards.

23. The Claimant says his health has deteriorated since the interview with the Respondent. He says in his witness statement:

> "The claimant's depression symptoms have become so severe that daily headaches are regular, eye pressure, tightness of the body in all areas especially neck and body aches is daily part of life now, irritability, difficulty breathing, irregular heart palpitations, increased fatigue, lack of motivation, increased sadness, lipping, difficulty finding words, hands shaking, weakness in the arms at times and the continuation of all ongoing symptoms of depression. The claimant's anxiety has been made worse to the point he does not feel he can any longer apply for further jobs, the coercive abuse attacks by previous and all future employers including the respondent, government departments, and public servants has placed the claimant in an uncertain state of mind. The claimant is aware all the individuals involved may have mental health issues of there own hence their conscious choice for use of coercive abuse tactics, for which the claimant is very sympathetic however, it is unfair for these individuals to abuse their power to make the claimants genuine medical conditions worse due to their own deep inner issues. At no point during the interview was the claimant explained that the interview panel will adopt to manipulation after the interview, nor was he pre-warned that the interview panel will use harassment and abuse tactics which is not normal behaviour for professionals conducting a intreview. Due to the above issues, state of mind, personal injury the claimant must now rely upon further aides to manage his daily needs. These aids consist of a shower stool, kitchen stool, back support belt, regular body massage therapy, massage gun, hearing aid, reminder alarms and high strength prescribed medicine which pre – 2019 were never required."

24. In terms of the injury to feelings caused by the discrimination he says:

> "The claimant considers the claim to meet the highest Vento bands because the discrimination caused severe distress to the claimant. The respondent was fully aware of the claimant's medical conditions, but like vultures decided to consciously attack him through there abuse of power. This was clearly demonstrated and established at the full merits hearing where discrimination and victimisation was unanimously found in the favour of the claimant.
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> The claimant was referred to as a troublemaker during the interview which caused the claimant a serious amount of distress and considering he was already under a great deal of stress, which the respondents were aware off from the outset of the interview. This demonstrated the heartless, lack of empathy, unprofessionalism, vultures Ness & cannibalism approach, tactic adapted by the interview panel. From the outcome of this case, it is fair to say the respondents were trying to project their behaviour onto the claimant. Therefore, I would consider this as an example of coercive abuse attack on the claimant rather than trying to employ the claimant which is completely contrary to the respondent's company polices.
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> …
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> Having now established formally the reason why the respondents refused the job it causes the claimant even more sadness to learn how this multi-billion-pound company and their peers have operated. Therefore, causing the claimant a great deal of concern and increased anxiety to learn are we safe under the current directorship, management, and leadership, who demonstrate hypocrisy rather than the expected care and compassion. whilst we are medically aware that the use of coercive abuse tactics can lead to serious mental health issues, physical injuries, and death. Having now established this has happened in the claimants case, therefore, if the claimant was to die from the injuries sustained now and or the effects of these injuries was to worsen over time which may result in early death or life changing injuries, and based on the evidence present for the sustained personal injuries the claimant believes it is likely there could be likeliness to explore a possible coercive murder attempt on the claimant."

25. The Claimant has recently seen a psychiatrist but has had no formal diagnosis and he has not produced any records of any psychiatric assessment or treatment.

26. The Claimant accepts that his mental health problems have not been caused solely by the Respondent's conduct, but says it was a factor.

THE LAW

27. The purpose of an award of compensation for discrimination is to put the claimant in the position he or she would have been but for the discrimination

(Ministry of Defence v Cannock and ors 1994 ICR 918, EAT). The Tribunal must therefore determine the hypothetical question of what would have happened if the discrimination had not occurred. In cases involving failure to recruit the authorities are not entirely clear as to whether that question should be determined on the balance of probabilities or whether the Tribunal should assess the percentage chance of the claimant being successful absent the discrimination. The IDS Handbook states that tribunals "have a wide discretion in this area" (Volume 4 – Discrimination at Word, paragraph 37.21). Our reading of the authorities (Abbey National plc and anor v Chagger 2009 ICR 624, EAT, Allied Maples Group Ltd v Simmons and Simmons (a firm) 1995 1 WLR 1602, CA) is that where the Tribunal is concerned with hypothetical events in the past, if what would have happened depends on the actions of a third party, i.e. not a party to the proceedings, then a "loss of a chance" approach is appropriate. If, however, the Tribunal is concerned with what the parties to the proceedings would have done, it can hear evidence on the issue and determine the matter on the balance of probabilities.

CONCLUSIONS

28. Given that we are concerned with what the Respondent would have done, and we have the benefit of evidence from the actual decision-maker Mr Chaudry, we consider this is an appropriate case for us to make a finding on the balance of probabilities as to what would have happened if the Respondent had not discriminated against the Claimant.

29. We note that much of the Claimant's submissions was focused on what the Respondent *should* have done. He argued that they should have asked more questions about the GDPR issue, that they should have given credit for his honesty, that they should have given him a second chance, and that ultimately they should have offered him the job. He considered it was unfair that, as he saw it, the only way for him to get this job would have been for him to accept wrongdoing about the GDPR matter, when he did not believe he had done anything wrong.

30. None of those matters are relevant. The question for us is whether the Respondent *would have* offered the Claimant the job but for the discrimination. We must, when considering this hypothetical question, assume that everything apart from the discrimination happened as it did, i.e. the Claimant achieved a score of 26 in the written and assessment and Claimant gave the answer that he did in interview, which we have found was accurately recorded in the notes, but Mr Kiani and Mr Chaudry did not take any account of his health issues or any risk that he might make complaints of discrimination against the Respondent in the future. Leaving aside those discriminatory factors, what would have happened?

31. We accept Mr Chaudry's evidence that the Respondent would not have offered the Claimant the position due to the concerns arising from what the Claimant revealed regarding the GDPR breach. We accept that the Respondent placed significant weight on candidates' performance in interview in the application process and that regardless of the Claimant's score in the written assessment the GDPR issue would have precluded the Claimant from being offered the job. We accept Mr Chaudry's evidence that compliance with the GDPR is an

important element of the iBus controller role. His understanding from what the Claimant said was that the Claimant had accessed CCTV for personal reasons, which was a serious breach of data protection rules, and the Claimant had not accepted his mistake or learnt from it. That, in his view, made the Claimant unsuitable for the position. It is not relevant whether it was fair or reasonable for the Claimant's application to be rejected on that basis. We simply accept that that is what would have happened.

32. Even if we were considering this issue on the basis of loss of a chance, we consider that the prospects of the Claimant being offered the post, absent the discrimination, were negligible so we would not award any financial loss.

33. The consequence is that the Claimant is not entitled to compensation for any financial losses claimed.

34. The Claimant also claims compensation for non-pecuniary losses, including for personal injury. We do not have anywhere near enough evidence to find that the discrimination we have found caused or exacerbated psychiatric injury. We do not even have medical evidence of any identified psychiatric injury at all, let alone of any exacerbation after the interview or rejection, or of causation of any such exacerbation or injury. This is not a case, therefore, in which it is appropriate to make an award for personal injury. We can, however, take account of such evidence we have about the Claimant's mental health when determining compensation for injury to feelings.

35. We accept, based on the Claimant's own evidence and the GP records, that he has suffered from symptoms of depression over a long period. He has also been prescribed medication for depression and/or anxiety and been referred for other types of treatment including talking therapy.

36. The Respondent says that the Claimant's account of the effect of the Respondent's conduct on his health is hugely exaggerated. They point to the fact that the Claimant was still able to apply for other jobs until early 2020 as well as instructing solicitors and bringing legal proceedings as a litigant in person.

37. It is undoubtedly the case that the Claimant's life has been extremely difficult over the last few years, and in particular since early 2019. We found him to be an honest witness. We accept that he has suffered in the ways he has described in his statement. We are not medically qualified to assess the Claimant's mental health issues, but we would not assume that the fact the Claimant was able to pursue challenges or legal proceedings with other people, and apply for jobs, meant that he was not suffering from mental health problems. Indeed it seems possible to us that the Claimant's response to conflict and feelings of injustice are a feature of his condition(s).

38. The question for us is what award for injury to feelings is appropriate bearing in mind the nature and severity of the discrimination and its effect on the Claimant in the context we have described.

39. We agree with the Respondent that the lower band of Vento is appropriate. The lower band applicable to claims brought between April 2019 and April 2020 is £900 to £8,000.

40. This was a one-off act of discrimination. Mr Chaudry and Mr Kiani unlawfully took into account the Claimant's disability and their perceived risk of him making complaints of discrimination in the future when deciding to refuse his application for the job. That is not a minor or insignificant act of discrimination. Mr Chaudry also made the comment in the interview that the Claimant sounded like a troublemaker. But nor was it at the higher end of the spectrum of one-off acts of discrimination. No particularly offensive or abusive language was used, and the discriminatory factors were not the only reason for the decision.

41. In terms of the impact on the Claimant, we have already found that the Claimant would not have been offered the job in any event. That does not mean we cannot or should not make an award for injury to feelings. The Claimant said to the GP very shortly after hearing his application was not successful that he believed it was disability discrimination. He also described feeling belittled in the interview. It is true that the Claimant's evidence in his witness statement seems somewhat out of proportion to the discriminatory act, but we note that he was already struggling with life beforehand and has continued to do so ever since, so events such as this can take on greater significance than they would to a person in more stable circumstances. Clearly this was one of many things that happened to the Claimant around this time that he considered unfair or discriminatory but that does not mean he did not suffer injury to his feelings because of it. We accept he felt belittled and recognised straight away, correctly as it turns out, that there was discrimination involved. We do not consider it necessary to apportion by percentage any injury to the Claimant's feelings according to the different stressors in his life.

42. Taking into account the nature of the discriminatory act and the fact that it caused some upset that is likely to have contributed to the Claimant's existing mental health problems, we make an award in the lower half of the lower band, namely £3,500.

43. The Claimant claims aggravated damages but we do not accept there were any aggravating features that would justify an additional award in this case.

44. We calculate interest, with agreement of both parties, on the basis of 3.75 years at 8%. This gives a figure of £910.

45. The total sum awarded is therefore £4,410.

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Employment Judge Ferguson

Date:11 July 2022