



EMPLOYMENT TRIBUNALS

Claimant: Olaf Olenski
Respondent: University of Essex Campus Services Ltd
Heard at: East London Hearing Centre
On: 6 and 7 July 2022
Before: Employment Judge Burgher
Members: Mrs G Forrest
Mrs A Berry

Representation

For the Claimant: In person
For the Respondent: Ms R Thomas (Counsel)

REMEDY JUDGMENT

The Respondent is ordered to pay the Claimant the sum of £30,523.17 in respect of his successful claims.

Compensation Calculation table

1. Details

Date of birth of claimant	27/02/1971
Date started employment	27/02/2019
Effective Date of Termination	28/03/2020
Period of continuous service (years)	1
Age at Effective Date of Termination	49
Date new equivalent job started or expected to start	28/03/2021
Remedy hearing date	07/07/2022
Date by which employer should no longer be liable	28/03/2021
Net weekly pay at EDT (20% of £377.50)	75.43
Gross weekly pay at EDT	75.43
Gross annual pay at EDT	3,922.60

2. Loss of earnings

Total compensation (52 x £75.43)	3,922.60
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3. Adjustments to total compensatory award

Plus interest (compensation award) @ 8% for 438 days	376.68
Compensatory award before adjustments	3,922.60
Total adjustments to the compensatory award	376.28
Compensatory award after adjustments	4,299.17

4. Non financial losses

Injury to feelings	22,000.00
Plus interest @ 8% for 876 days	4,224.00
Total non-financial award	26,224.00

5. Summary totals

Compensation award including statutory rights	4,299.17
Non-financial loss	26,224.00
Total	30,523.17

REASONS

Issues

1. The Tribunal upheld two of the Claimant's complaints, namely:
 - 1.1 That the Respondent failed to make reasonable adjustments in relation to the timing of the grievance procedure;
 - 1.2 The Respondent failed to make reasonable adjustments in relation to the probationary termination.
2. Following judgment on liability, the Tribunal was required to consider the following issues for remedy:
 - 2.1 What sum, if any, was appropriate for loss of earnings. This was dependent on an assessment of whether the Claimant would have secured successful redeployment.
 - 2.2 What was the sum for injury to feelings;
 - 2.3 The calculation of interest on relevant sums.

Evidence

3. The Claimant gave evidence in respect of remedy and called Mr Philip Berners to give evidence in support.
4. The Respondent called Ms Karen Braybrooke, University of Essex, Head of Operations, to give evidence on its behalf.
5. The Tribunal was also referred to relevant pages in an agreed remedy hearing bundle consisting of 173 pages.

Findings of fact

6. The Tribunal reminded itself of relevant findings on liability. In particular:
 - 6.1 The Claimant reacted adversely to the working in the April 2019 Easter weekend and felt stressed working in the environment. We find that this undermines the Claimant's assertion that he would have been able to work in a pressured environment going forward;
 - 6.2 The Claimant had difficulty working unsupervised at Buffalo Joes. He was employed as a supervisor and was taking a significant period of time to get up to speed within the working environment.
 - 6.3 Grievances and complaints were made by the Claimant against staff he worked with and complaints were made against him by staff in the short period worked at Buffalo Joes. We find that this supports an implication that the Claimant may have had difficulty sustaining effective working relationships;
 - 6.4 On 31 July 2019, the Claimant felt overwhelmed by events which led him to decide to end his life and he walked into the path of a lorry on the A12. However, contrary to the Claimant's evidence and assertions the Tribunal did not conclude that the Respondent was liable for this state of affairs.
 - 6.5 The Claimant was unable to undertake the physical aspects of the housekeeper role offered to him on 1 November 2019 due to the injuries he had previously sustained.
 - 6.6 It was inappropriate, given the occupational health assessment, in October 2019, to progress the disciplinary issues against the Claimant whilst his grievances remained outstanding.
 - 6.7 Following interview, the Claimant was unable to demonstrate that he satisfied the essential criteria for the Grade 2 Assistant Librarian role. We accepted that Ms Wisher formed genuine reasoned conclusions for deciding this.

- 6.8 The Claimant was aware of, and able to apply, for any roles he was interested in. This was the case for the Wivenhoe House Hotel role.
- 6.9 Pursuing a probationary review for the Claimant's substantive role was artificial, as it was clear from 23 October 2019 that the Claimant could not return to that role.

7. The Claimant gave evidence that the Respondent devastated him and caused severe injury to feelings. He stated he had no self-esteem, he was heavily medicated as a result of events, felt like he had been punished for being depressed, it was like being lynched and he could not trust anyone, including co-workers and Human Resources.

8. The Claimant stated that the Respondent's failure to address his grievance with the seriousness it merited had a profound effect on his mental disability and being dismissed from employment increased his upset.

9. In respect to redeployment, the Claimant was employed at salary band C (spinal column points 7 -10) for the Respondent. This is equivalent to grades 3 and 4 for the University of Essex (spinal column points 6 - 11, exceptionally grade 12).

10. We accept the evidence given by Ms Braybrooke regarding the vacancies for the period January through to end of March 2020. There were 143 positions sent to the recruitment team during this period. However, there were 62 posts which were withdrawn or raised in error.

11. The Claimant accepted that if he did not meet the essential criteria for posts it would not have been appropriate to redeploy him.

12. Ms Braybrooke considered that there were only 12 posts that the Claimant may have had the skillset for. These were:

- 12.1 Assessment Assistant (Grade 4 role) (x2)
- 12.2 Essex Abroad Assistant (Grade 4 role)
- 12.3 Student Administrative Assistant (Grade 4 role)
- 12.4 Student Administrator (Grade 4) (Edge School Hotel) (x2)
- 12.5 Student Administrator (Grade 4) (East 15 Acting School)
- 12.6 Student Administrative Assistant/Receptionist (Grade 3 role)
- 12.7 Kitchen Porter (Grade 2 role)
- 12.8 Early Years Educator (Day nursery) (x3)

13. Ms Braybrooke stated the number of the posts were fixed term and required any employee to hit the ground running. Further due to the pandemic the fixed term posts were not recruited to.

14. In addition to the above vacancies we considered that the Claimant may have been able to demonstrate the skill set for one of the 3 higher grade Band B posts for the Respondent. However, given the Claimant's evident lack of trust of working for

the Respondent's management team, as opposed to the University of Essex, we conclude that these would not have been viable redeployment options.

15. We accept Ms Braybrooke's evidence that the vacancies were readily advertised and that the Claimant would have been able to express an interest in any vacancies if he wished to do so. The Claimant expressed an interest in the Assistant Librarian role and was able to discover a vacancy at Wivenhoe House Hotel.

16. The Tribunal considered the Claimant's CV. Ms Braybrooke had assessed this, alongside the feedback of the Claimant's performance at interview for the Assistant Librarian as well as the Claimant's work for the Respondent. It was her opinion that the Claimant would not have met the essential criteria necessary to be redeployed and/or that the Claimant would not have been able to undertake any of the vacancies.

17. The Claimant observed that Ms Braybrooke's assessment was irrelevant as it was undertaken after the event and no consideration was paid to this at the time. He contended that the Tribunal should disregard her evidence in this regard. There was some strength to the Claimant's contention and we placed limited weight on Ms Braybrooke's opinions. We formed our own assessment on the basis about findings previously made, the Claimant's CV and his evidence before us, when in determining whether or not the Claimant would have demonstrated that he had met the essential criteria necessary to be considered for redeployment for the stated vacancies. Whilst the Claimant did not demonstrate that he met the essential criteria for a lower grade 2 role (the Assistant Librarian role) we considered that this could have been limited to a poor interview on that occasion which he could have addressed for future applications.

18. The Claimant asserted that he would have been able to undertake all of the roles if offered to him. Having considered the evidence and our previous findings we conclude that the Claimant would not have been able to demonstrate the essential criteria for the following roles. In the context of her assessment of whether the Claimant would have being able to meet the essential criteria of the vacancies at the time.

- 18.1 Assessment Assistant (Grade 4 role) (x2)
- 18.2 Essex Abroad Assistant (Grade 4 role)
- 18.3 Student Administrative Assistant (Grade 4 role)
- 18.4 Student Administrator (Grade 4) (Edge School Hotel) (x2)
- 18.5 Student Administrator (Grade 4) (East 15 Acting School)

19. In respect of the grade 4 roles we are prepared to accept from the Claimant's CV and his evidence before us that he would have been able to show that he had proven experience in Microsoft Office and competency in Word Excel and Outlook; that he had experience working independently within a team; and that he had relevant administrative experience. However having considered the job descriptions and job person specifications for these grade 4 roles, and given our previous findings we are unable to accept that the Claimant would have demonstrated that he met the essential criteria in respect of the following:

Ability to work independently with minimal supervision, prioritising workload to manage a range of varied tasks and dealing effectively with multiple priorities and deadlines.

*Ability to work under pressure, maintaining a calm and friendly manner
Excellent communication skills both written and oral, and ability to express yourself clearly in person and in writing; High level of written English
The ability to work accurately with attention to detail what's dealing with competing areas of work .*

Proven ability to work independently as well as part of a team facilitating the smooth running of an office.

Ability to work effectively to tight deadlines - Ability to manage and prioritise tasks, meet deadlines and manage workloads.

20. These matters formed part of the essential criteria, to varying extents, for the different grade 4 roles. We therefore do not consider the Claimant would have been able to be meet the criteria to be redeployed to them.

21. We take a different view, inferring from the Claimant's CV, that he may have met the essential criteria for the grade 3 position Student Administrative Assistant/Receptionist to be invited to interviewed for the post. This role had a gross annual salary of £19,613.00. The required interpersonal communication skills administrative organisational and IT skills and qualified to draft of correspondence and documentation.

22. Assuming that the Claimant should have been invited to interview for this role we considered what would have been likely to happen. We conclude that given the Claimant's lack of reflection about his performance at interview for the Assistant Librarian role (he still believes that he excelled at interview but the Tribunal concluded otherwise) we do not consider it likely that he would have been able to change his approach to demonstrate that had excellent interpersonal and communication skills and excellent administrative and organisational skills. We cannot conclude that he would not have done and conclude that there was a 20% chance of doing so. We use this percentage in assessing the Claimant's compensation for loss of earnings.

23. When considering the kitchen porter role, the Claimant gave evidence that even as at May 2022 he was unable to undertake physically demanding roles. He made it clear to us that even lifting his bag would have caused severe pain in his arm and we conclude that sustained manual duties would have adversely affected his ability to sleep and his underlying mental health. Therefore, we do not conclude that the manual nature of the kitchen porter role, even adjusted, would have been an appropriate role for the Claimant to be redeployed to.

24. Finally, we do not consider that any of the available Early years educators roles would have been appropriate for the Claimant to be redeployed to, he had neither the qualifications nor experience of working with children to be properly considered for them.

25. When considering mitigation and future loss of earnings the Claimant referred the Tribunal to his Universal Credit reports as evidence of the steps he was taking to secure alternative employment. He did not provide any details of job applications or rejections, nor any evidence of earnings during the interim period whether by way of pay slips or bank statements. The Claimant asserting that he was fit to work with adjustments following his dismissal and his stated that he would not have been able to receive Universal Credit if he was not actively seeking alternative work.

26. In response to questions, the Claimant was able to remember three or four occasions where he earned sums of £700, £480 and £130 (x2). He has also applied to undertake a security officer course. He applied to undertake a university course but has apparently now deferred enrolment.

27. The Claimant accepted that there were a large number of hospitality jobs vacancies in the prevailing employment market. We agree. In these circumstances we conclude that the Claimant ought to have reasonably secured alternative employment within 12 months of his dismissal and we limit his compensation this period of time.

Law and Submissions

28. Section 124 Equality Act 2010 states:

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

29. The Tribunal has the power to award to compensation to an employee for injury to feelings resulting from an act of discrimination by virtue of sections 124(5) and 119(4) of the Equality Act 2010.

Injury to feelings

30. The purpose of the injury to feelings award is to compensate the complainant for the injury, anger, upset and humiliation caused by the discrimination. It is compensatory not punitive.

31. In determining the amount of the award, we followed the Vento v Chief Constable of West Yorkshire No2 [2003] ICR 318 guidelines (uplifted pursuant to Simmons v Castle [2012] EWCA Civ 1288) in respect of the level of awards in place at the time the claim was presented. The Vento guidelines as at April 2020 (following the updated Presidential Guidance) were:

- a top band of between £27,000 to £45,000 to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £42,900.
- a middle band of between £9,000 to £27,000: for serious cases that do not merit an award in the highest band, and
- a lower band of between £900 to £9,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

32. When assessing the level of injury to feelings the guidance HM Prison Service v Johnson [1997] IRLR 162 Smith J held: -

(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(2) 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, to use Lord Bingham's phrase, be seen as the way to untaxed riches.

(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

33. When more than one event contributes to the injury suffered by a claimant then, save where the injury in question can be said to be 'indivisible,' the extent of the Respondent's liability is limited to the contribution to the injury made by its

discriminatory conduct, Olayemi v Athena Medical Centre [2016] ICR 1074. Following Olayemi, the approach we are guided to take in a case where there is more than one material cause for the injury is as follows:-

- a. Consider if the injury is truly indivisible. (Can a rational apportionment be made or not?)
- b. If it is indivisible, the wrongdoer is responsible for all of it even if there are other causative acts contributing to the injury.
- c. If it is divisible, the wrongdoer is responsible only for so much of it as can be apportioned on a rational basis.
- d. If the other material cause simply creates a vulnerability to the injury, but does not actually cause an injury, the wrongdoer will be responsible for all of it whether it is divisible or indivisible but, the tribunal should then consider the chance that the injury would have been suffered in any event, even if the wrongdoer's act had not happened.

34. The Claimant contended that his injury to feelings band was in the exceptional bracket, above the top Vento band. He relied heavily on his belief that the Respondent's actions contributed to his serious illness in July 2019 where he tried to end his life. However, we have not concluded that the Respondent was liable for any events at that time.

35. We remind ourselves of the matters for which the Respondent was found to be liable and at the same time note that the Respondent must take the employee as they find them in this case the Claimant with significant pre existing mental issues

36. The Tribunal concluded that it was inappropriate, given the occupational health assessment, to progress the disciplinary issues against the Claimant whilst his grievances remained outstanding. The Claimant has an underlying medical condition of anxiety and depression and it was stated to be imperative that his grievances be resolved in a timely fashion to reduce the likelihood of further exacerbation of symptoms of depression.

37. Against this the Claimant was able to seek alternative work from November 2019 and engage with the disciplinary and grievance processes that were determined in February 2020. The Claimant was then dismissed for failing to successfully complete his probation and this created further upset to him as it believed that it created a negative and unfair blot on his working history.

38. The Respondent accepts that an injury to feelings award is due and contends that the evidence points this falling at the low end of the middle band at £9000.

39. When discounting matters relied on by the Claimant for injury to feelings that the Respondent was not liable for and reminding ourselves that the award is compensatory, not punitive, we considered that the appropriate award for injury to feelings falls in the middle to upper range of the middle band. The Claimant's pre-existing upset was exacerbated and continued by the timing of the grievance and

subsequently losing his job for what he considered to be unfair reasons. He lost self-esteem and trust for others and this further affected his mental health.

40. In these circumstances we assess the appropriate award for injury to feelings at £22,000. Interest is added to this sum. We conclude that the injury to feelings commenced on 13 February 2020 when the disciplinary process against the Claimant concluded before his grievance. The Claimant is entitled to interest at 8%pa on this sum.

Loss of earnings

41. The Tribunal then assessed what amount, if any, is appropriate for loss of earnings. There was no prospect of the Claimant returning to his substantive role. Having assessed available roles we have concluded that there was a 20% chance of the Claimant being able to successfully secure the grade 3 position Student Administrative Assistant/Receptionist role at an annual salary of £19,613.00. This equates to an annual loss of £3,922.60. All other vacancies were not appropriate.

42. We have also concluded that the Claimant ought to have secured a similar, or higher annual salary within 12 months of his dismissal give the numerous job vacancies in the hospitality sector. We therefore limit his loss of earnings to this period.

43. The calculation of the Claimant's compensation is therefore set out in the table below.

1. Details

Date of birth of claimant	27/02/1971
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3. Adjustments to total compensatory award

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4. Non financial losses

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Total non-financial award	26,224.00

5. Summary totals

Compensation award including statutory rights	4,299.17
Non-financial loss	26,224.00
Total	30,523.17

44. The Respondent is ordered to pay the Claimant the sum of £30,523.17 in respect of his successful claims.

Employment Judge Burgher
Date: 14 July 2022